

THE TESTIMONY JACK SMITH GETS THIS WEEK BUILDS ON WORK FROM OVER A YEAR AGO

Starting on Tuesday, Jack Smith's prosecutors started getting return grand jury appearances for a set of key Trump aides who had invoked Executive Privilege in earlier appearances. In the days ahead, that same January 6 grand jury will get the testimony of Dan Scavino, Stephen Miller, Mark Meadows and – unless Trump succeeds with some kind of last minute challenge – Mike Pence.

Starting tomorrow, Secret Service agents will testify in the stolen documents case. That comes after (according to CNN), witnesses who gave voluntary testimony last summer have made subsequent appearances before the grand jury and Evan Corcoran provided crime-fraud excepted documents and testimony to the same grand jury. Multiple other lawyers already testified before the grand jury.

While there are a few outstanding items, such as the exploitation of Scott Perry's phone, the DC Circuit decision on the application of 18 USC 1512(c)(2) to January 6, finding a way to obtain any remaining classified documents Trump has been hoarding, a verdict in the Proud Boys trial (which may dictate charging decisions for others) – all of which efforts have been pending for over six months, before Smith was appointed – the twin investigations headed by Jack Smith appear to be headed to imminent resolutions.

In recent weeks, the same TV lawyers who were wailing last summer about the January 6 investigation into Trump (the stolen documents investigation, while already laying the groundwork for charging a former President under the Espionage Act, still remained entirely unknown), have suggested that Alvin Bragg's

indictment of Trump might, "might light a fire under other prosecutors and advance the proposition that even ex-presidents must follow the law."

It's an obscene suggestion, that Jack Smith or his AUSAs or Merrick Garland needed some push to pursue the investigation into Donald Trump, when instead the TV lawyers simply needed a push to review what steps the investigation was actually pursuing. That's because all of the recent developments in the Jack Smith case – the crime-fraud ruling, the Executive Privilege waiver, the testimony of Mike Pence – very obviously build on work done last year, well before Garland appointed Jack Smith. Some of those steps were even public at the time last summer when the very same TV lawyers were wailing. All of the climactic steps occurring in recent weeks were easily foreseeable by August.

Prosecutors have been building to this moment for a long time.

As I noted here, investigations in the era of cloud computing usually follow a clear logic:

- Use subpoenas to obtain metadata to identify key subjects
- Use metadata to obtain cloud warrants of subjects
- Use cloud warrants to obtain warrants for phones (a necessary step if encrypted apps were used in furtherance of a crime, as was the case in the lead-up to January 6)
- Use overt subpoenas for other witnesses to obtain evidence
- Obtain grand jury testimony

from witnesses

By the time the first overt subpoenas and warrants go out – which in the January 6 case was May 2022, though in the case of Sidney Powell was September 2021 – DOJ will already have obtained metadata and cloud content from key subjects of the investigation. Only after DOJ works through that covertly obtained evidence does it start doing the things that alert subjects to the scope of the investigation by subpoenaing other witnesses or seizing phones.

Even in a garden variety investigation, it can take six months from the date of seizure of a subject's phone until an arrest. This was true even in the militia conspiracy cases, where arrests were an attempt to stave off further violence, in part because FBI was exploiting so many phones.

In the case of sensitive witnesses like lawyers, presidential advisors, and members of Congress, it takes a number of extra steps to get grand jury testimony or access content.

In Rudy Giuliani's case, a privilege review of his phone content took nine months (though that review incorporated content relating to January 6, so it has been done since January 2022). In Enrique Tarrío's case (largely due the security he used on his phone), it took over a year to access the content on his phone. In Scott Perry's case, prosecutors are still working on it seven months later. In James O'Keefe's unrelated case, Project Veritas still has one more chance to prevent prosecutors from getting evidence the FBI seized in November 2021, almost 17 months ago. You can't skip privilege reviews, because if you do, key evidence will get thrown out during prosecution, rendering any downstream evidence useless as well.

In cases of privilege, DOJ first gets grand jury testimony where the witness invokes privilege, and then afterwards makes a case that the needs of the investigation overcome any privilege

claim. DOJ first started pursuing privileged testimony regarding events involving Mike Pence with grand jury testimony from Pence aides Greg Jacob and Marc Short last July, then with testimony from the two Pats, Cipollone and Philbin, in August. It got privilege-waived testimony from Pence's aides in October and from the two Pats on December 2. That process undoubtedly laid the groundwork for this week's DC Circuit ruling that people like Mark Meadows and Dan Scavino must likewise testify to the grand jury.

By the time DOJ first overtly subpoenaed material in the fake electors plot last May, it had done the work to obtain cloud content from John Eastman and Jeffrey Clark. If DOJ had obtained warrants for the already seized phone content from Rudy – which is likely given the prominence of Victoria Toensing from the start of the fake elector subpoenas – then it would have built on content it obtained a year earlier in another investigation.

Some of this undoubtedly benefitted from the January 6 Committee's work. I would be shocked, for example, if DOJ didn't piggyback on Judge David Carter's March 28, 2022 decision ruling some of John Eastman's communications to be crime-fraud excepted. As NYT reported in August, in May 2022, DOJ similarly piggybacked on J6C's earlier subpoenas to the National Archives (and in so doing avoided any need to alert Joe Biden to the criminal, as opposed to congressional, investigation); this is consistent with some of what Mueller did in the Russian investigation. Cassidy Hutchinson's testimony, obtained via trust earned by Liz Cheney, has undoubtedly been critical. But the January 6 Committee also likely created recent delays in the January 6 and Georgia investigation, thanks to the delayed release of transcripts showing potentially exculpatory testimony.

But much of it preceded the January 6 Committee. I've shown, for example, that DOJ had a focus on Epshteyn before J6C first publicly mentioned his

role in the fake electors plot. Toensing's involvement came entirely via the DOJ track.

The path that brought us here went from the covert steps in advance of the May 2022 Clark and Eastman warrants (possibly including Rudy Giuliani warrants), to testimony from Trump's aides, to testimony from White House Counsels, to Meadows and Pence and the rest of them.

There's not a shred of evidence that DOJ's prosecutors or Garland were afraid of taking these steps (FBI might be another issue). Instead, there's a clear timeline of public steps DOJ has taken to get us to this point, which necessarily built on non-public things DOJ did to get to the point of obtaining warrants for the email accounts of several lawyers (and whatever covert steps it took with non-lawyers that won't be public for years).

A timeline of the stolen document investigation is here.

Some key dates in the January 6 investigation are:

January 4, 2021: DC authorities seize Enrique Tarrío's phone

January 25, 2021: Stop the Steal VIP Brandon Straka arrested; DOJ IG opens probe into Jeff Clark and others

February 17, 2021: First allegedly cooperative interview with Straka

March 17, 2021: DOJ makes first tie between Oath Keepers investigation and Roger Stone

March 25, 2021: Second allegedly cooperative interview with Straka

April 21, 2021 (Lisa Monaco's first day on the job): DOJ obtains warrant targeting Rudy Giuliani's cell phones in Ukraine investigation

June 23, 2021: First Oath Keeper who interacted with Stone enters into cooperation agreement

August 19, 2021: Alex Jones sidekick Owen

Shroyer, who participated in Friends of Stone list and served as a communication hub between Proud Boys and others, arrested

September 2021: DOJ subpoenas records from Sidney Powell gift

September 3, 2021: SDNY makes an ultimately successful bid to review all content on Rudy's devices for privilege (making such content available if and when DOJ obtains January 6 warrant targeting Rudy)

Fall 2021: Thomas Windom appointed to form fake elector team

October 28, 2021: Merrick Garland tells Sheldon Whitehouse DOJ is following the money of January 6

November 2, 2021: Special Master Barbara Jones releases first tranche of materials from Rudy's phones, including content through seizure

November 22, 2021: Trump appointee Carl Nichols asks James Pearce whether 18 USC 1512(c)(2) might be applied to someone like Trump (he would go on to issue an outlier opinion rejecting the application)

By December 2021: JP Cooney starts long-invisible investigation into financial side of January 6

December 2021: NARA and Mark Meadows begin process of completing his record of PRA-covered communications

December 10, 2021: Judge Dabney Friedrich (a Trump appointee) upholds application of 18 USC 1512(c)(2) to January 6

January 5, 2022: Merrick Garland reiterates that DOJ is investigating the financial side of January 6

Mid-January 2022: DOJ finally obtains contents of Tarrío's phone

January 19, 2022: Jones releases remaining content from Rudy's phones; SCOTUS declines to

review DC Circuit rejection of Trump's Executive Privilege claims with respect to January 6 subpoenas

January 5, 2022: Lisa Monaco confirms DOJ is investigating fake electors plot

February 18, 2022: In civil cases, Judge Amit Mehta rules it plausible that Trump and militias conspired to obstruct vote certification, as well that he aided and abetted assaults

March 2, 2022: Oath Keeper in charge of Stone security on January 6, Joshua James, enters into cooperation agreement

March 28, 2022: Judge David Carter issues crime-fraud ruling covering John Eastman's communications with and on behalf of Trump

May 2022: DOJ subpoenas all NARA records provided to J6C

May 26, 2022: Subpoenas for fake electors plot including Rudy, John Eastman, Boris Epshteyn, Bernie Kerik, and Jenna Ellis, among others; warrants for email accounts of Jeffrey Clark, John Eastman, Ken Klukowski, and one non-lawyer

June 6, 2022: DOJ charges Proud Boy leaders with seditious conspiracy

June 21, 2022: Second set of fake electors subpoenas, adding Mike Roman and others, warrants for NV GOP officials and GA official

June 22, 2022: DOJ searches Jeffrey Clark's home and seizes his phone

June 28, 2022: DOJ seizes John Eastman's phone

June 23, 2022: DOJ completes exploitation (but not scoping) of Shroyer's phone

June 24, 2022: Ali Alexander grand jury appearance

June 27, 2022: Then Chief Judge Beryl Howell permits prosecutors to obtain emails between Scott Perry and Clark and Eastman

July 22, 2022: Marc Short appears before grand

jury

August 9, 2022: Scott Perry's phone seized

August 2022: Mark Meadows provides previously withheld PRA covered materials to NARA

Early September, 2022: Pre-election legal process includes seizure of Boris Epshteyn and Mike Roman's phones, subpoenas to key aides including Dan Scavino, Bernie Kerik, Stephen Miller, Mark Meadows, subpoenas pertaining to Trump's PAC spending,

October 13, 2022: Marc Short and Greg Jacob make second, privilege-waived grand jury appearance

November 18, 2022: Merrick Garland appoints Jack Smith

December 2, 2022: Pats Cipollone and Philbin make second, privilege-waived grand jury appearance

December 2022: Rudy Giuliani subpoena asks for information on his payment

February 9, 2023: Mike Pence subpoenaed

February 23, 2023: DC Circuit hears Scott Perry's challenge to order providing access to his phone content

March 9, 2023: Judge Kollar-Kotelly orders Peter Navarro to turn over PRA-covered contents from Proton Mail account

March 28, 2023: Chief Judge Jeb Boasberg rules Mike Pence must testify (though protects some areas on Speech and Debate grounds)

April 4, 2023: DC Circuit declines to stay Beryl Howell ruling ordering testimony from Mark Meadows and others