

Jan. 6 Prosecutor's Tall Task: Getting Inside Trump's Mind

By **Phillip Bantz**

Law360 (July 18, 2023, 7:40 PM EDT) -- A possible criminal indictment of Donald Trump over his efforts to overturn the 2020 election will likely include obstruction and sedition charges, according to experts who also say special prosecutor Jack Smith faces serious hurdles in proving the ex-president intended to commit those crimes.



Special prosecutor Jack Smith sent a letter to former President Donald Trump on Sunday informing him he is a target of the criminal investigation into the Jan. 6, 2021, attempt to thwart the certification of President Joe Biden's election, according to Trump's social media posts on Tuesday. (AP Photo/Charles Dharapak)

Trump said Tuesday on his social media site Truth Social that his attorneys received a letter from Smith on Sunday night notifying him that **he is the target** of a criminal investigation into the Jan. 6, 2021, attack on the U.S. Capitol building as part of an alleged attempt to foil the certification of President Joe Biden's election victory.

"Deranged Jack Smith, the prosecutor with Joe Biden's DOJ, sent a letter (again, it was Sunday night!) stating that I am a **TARGET** of the January 6th Grand Jury investigation, and giving me a very short 4 days to report to the Grand Jury, which almost always means an Arrest and Indictment," Trump wrote.

A spokesperson for Trump's attorneys told Law360 in an email that they would "let the Truth Social post speak for itself." Smith's spokesperson declined to comment.

Former federal prosecutor William "Widge" Devaney, a white collar partner at Baker McKenzie, predicted that if an indictment is handed up against Trump it will include a charge of obstructing congressional administrative proceedings in connection with Trump's alleged attempt to keep Congress from confirming Biden's election.

"In order to link Trump to that, you have to demonstrate that his intent was that the Jan. 6 rioters were going to obstruct a congressional proceeding," Devaney said. "And once [prosecutors] have done that, they're nine-tenths of the way to seditious conspiracy charges."

"The most likely charge would be a conspiracy to obstruct Congress," Devaney added. "But I think you'll also see sedition charges against Trump."

The bipartisan House committee that investigated the Jan. 6 riots referred Trump to the U.S. Department of Justice for prosecution under four statutes: obstruction of an official proceeding, conspiracy to defraud the U.S., conspiracy to make a false statement, and inciting, assisting, aiding or comforting an insurrection.

In its report, the lawmakers cited evidence that Trump tried to convince Vice President Mike Pence to block certification of Biden's win. The report also alleged an elaborate effort to advance a slate of fake electors to keep Trump in power based on false claims of election fraud.

The committee argued that Trump was "directly responsible" for summoning his supporters to Washington, D.C., calling on them to march to the Capitol and encouraging them via tweets that "exacerbated that violence."

In his Jan. 6 speech to supporters, Trump falsely claimed that he won the election by a "landslide," according to a transcript. Referring to Biden's win, Trump said, "We're just not going to let that happen." He also said, "We fight like hell. And if you don't fight like hell, you're not going to have a country anymore."

But connecting Trump's statements to the Jan. 6 riots could be challenging for the government, according to Kevin O'Brien, a white collar partner at Ford O'Brien Landy LLP and ex-federal prosecutor.

"There may be ways of linking Trump to the violence on that day by showing that he egged it on and, by inference, wanted it to happen," O'Brien said. "But you don't have a lot of directive from Trump. He's very crafty. He does things by indirection. He makes suggestions."

O'Brien and other experts also expect that Trump will argue that his false statements about election fraud leading up to Jan. 6 are protected under the First Amendment. Another potential defense is that Trump was simply being Trump.

Trump could argue that "he says inflammatory and incendiary things all the time, every day, and he didn't intend for there to be a violent assault on the Capitol," said Devaney of Baker McKenzie. "Trying to link someone's statements to someone else's actions can be very difficult because the defendant can always say, 'That's not what I meant.'"

That's why potential testimony from members of Trump's inner circle, such as his former lawyer Rudy Giuliani and ex-chief of staff Mark Meadows, could be critical to the government's case in combination with "surrounding circumstances," including the alleged effort to get Pence to block Biden's certification and the alleged fake electors scheme, Devaney said.

Marc Scholl of Lewis Baach Kaufmann Middlemiss PLLC also predicted that Trump would argue that he lacked criminal intent because he believed he won the election when he was making incendiary statements before and during Jan. 6.

"Presumably, the government will parry that with evidence that Trump knew that he lost the vote and, in the alternative, that it was clear to any reasonable person that he lost the election and Trump 'consciously avoided' recognizing the truth," Scholl said in an email.

"Although the doctrine of 'conscious avoidance' or 'willful blindness' is used in federal criminal prosecutions where the actual proof of knowledge or willfulness can be questioned, there could be legal arguments trying to restrict the use of that doctrine," Scholl added.

Trump's potential argument that he thought the election was stolen likely won't get much traction with a jury, according to O'Brien or Ford O'Brien.

"Jurors aren't going to credit an assertion that is just so bonkers and conflicts with reality," he said. "It's not a defense."

The target letter in the Jan. 6 investigation adds to Trump's already significant legal woes and raises questions about whether his defense attorneys and Smith's team of prosecutors are going to be stretched too thin.

The special counsel also is prosecuting Trump in Florida for allegedly scheming with his personal aide, Walt Nauta, to **hide classified national defense documents** from the government. Trump and Nauta have pled not guilty in that case.

"I don't know how Jack Smith keeps his fingers in all those pots," O'Brien said.

But Devaney dismissed the notion that Smith and his team are in danger of being overextended with a double-barrel prosecution.

"I don't see this as a problem for them," he said. "You need to look at the special prosecutor's office like a small U.S. attorney's office. They should have the bandwidth to have two different teams with Smith in the executive role."

In a separate case, Trump is facing felony charges in New York for allegedly mischaracterizing **hush money payments** to a porn star to keep her from publicly alleging just before the 2016 presidential election that she had an affair with the married Trump. Trump has pled not guilty.

"The bigger question is: Can Trump's lawyers handle all of this? They're going to have to divide and conquer," Devaney said. "We've already seen Trump's team trying to **delay the Florida case** until after the election, and I would expect to see more of that."

--Additional reporting by Frank G. Runyeon. Editing by Jill Coffey and Kelly Duncan.