



“Without any Doubt, Beyond a Reasonable Doubt, Beyond any Doubt”: Tribe Declares Trump Committed Attempted Murder

Description



USA: In past columns, we have discussed how Harvard Law

professor Laurence Tribe seems intent upon running through the entire criminal code in declaring clear evidence of every federal crime by former President Donald Trump and/or his family. Just for the purposes of keeping score, Tribe declared evidence supporting criminal charges of witness tampering, obstruction of justice, criminal election violations, Logan Act violations, extortion, espionage, and treason by Trump or his family. He has now added attempted murder in an interview on CNN's "Erin Burnett OutFront." In addition to declaring former President Donald Trump clearly guilty of the attempt to murder Vice President Mike Pence on January 6, 2021, Tribe is again assuring viewers that "without any doubt, beyond a reasonable doubt, beyond any doubt, and the crimes are obvious." I guess there is no doubt. There is also no compelling legal basis for the claim. Nevertheless, Tribe is promising more if needed: "There are other crimes that have been proven. Those are plenty to start with."

In light of Tribe's prior declarations of the long litany of criminal acts by Trump, the opening question of Burnett seemed almost rhetorical bordering on the comical: "From everything you have seen so far, including the hearing today that focused so much on Trump causing violence against Pence, do you believe the committee has proven that Trump himself knowingly committed crimes?"

Tribe responded:

“Without any doubt, beyond a reasonable doubt, beyond any doubt, and the crimes are obvious. The most obvious was that he was ordering his vice-president to do what everyone in the room knew would be illegal, namely, exercise power to pick the next president. It would be very convenient if Al Gore could have picked himself as the next president in 2000, very convenient if Richard Nixon could have done it in 1960.

“Ordering your vice-president to violate the law in order to stay in power is a very serious federal crime, but there are other crimes as well. One that occurred to several people today is attempted murder. You know, under the criminal code of the United States, the attempted murder of the vice-president is punishable by life imprisonment. What we saw with the president egging the crowd on, telling them that, basically, his own vice-president was a traitor while he knew that the mob had gallows waiting for him, that’s pretty serious stuff. You don’t have to go to law school to know that there’s something seriously criminal about that. There are other crimes that have been proven. Those are plenty to start with.”

It is a curious thing that these crimes “have been proven” but Trump has not been charged with them. After the riot, District of Columbia Attorney General Karl Racine announced that he was considering arresting Trump, Donald Trump Jr., Rudy Giuliani and U.S. Rep. Mo Brooks and charging them with incitement. So what happened to that prosecution? The failure of Racine to charge Trump was not due to any affection or loyalty to the former president. It was due to the paucity of direct evidence of a crime that would hold up in court.

Tribe notably cuts directly to the punishment for attempted murder rather than the elements. The elements of attempted murder require specific intent to kill and the commission of some direct but ineffectual act toward accomplishing the intended killing.

Many of us criticized Trump for his insistence that Pence could effectively block certification of the election. I publicly condemned Trump’s speech while it was being given and said that Pence was a profile of courage in resisting such calls. However, calling for protests to pressure Pence to reject the votes is no evidence of specific intent. The Select Committee has maintained that Trump also said that, when made aware of the rioters’ chants to ‘hang Mike Pence,’ the president responded that maybe they have the right idea since he “deserves it.” That statement after the start of the riot would again fall wildly short of any claim of specific intent.

Tribe could argue that a claim could be made under a “natural and probable consequences” argument, which has been curtailed in states like California. See *People v. Gillespie*, 2022 Cal. App. LEXIS 3055 *, 2022 WL 1564200. Indeed, in *People v. Vallejo*, 2021 Cal. App. LEXIS 1033 *, 2021 WL 633384, the court noted:

Attempted murder requires a finding of specific intent to kill such that implied malice is insufficient to support a conviction for that offense. (See [People v. Swain \(1996\) 12 Cal.4th 593, 605, 49 Cal. Rptr. 2d 390, 909 P.2d 994](#) [“Specific intent to kill is a necessary element of attempted murder. It must be proved, and it cannot be inferred merely from the commission of another dangerous crime.” [Citation.]’ [Citations.]”.) In other words, the natural and probable consequences doctrine may apply to felony murder, but it is not properly applied to attempted murder.

There are cases in other states that apply the natural and probable consequences doctrine but it still requires substantial acts and intent on the part of the defendant. This is usually found in such acts like firing a weapon and missing.

Even then, it can be difficult since attempted murder requires proof that the defendant “must have taken a substantial step towards that crime, and must also have had the requisite mens rea.” *Braxton v. United States*, 500 U.S. 344 (1991). In *Braxton*, the defendant was charged with attempted murder of a federal marshal after he fired two shots through his front door where marshals with an arrest warrant were standing. The Court wrote that “[s]ince the statute does not specify the elements of “attempt to kill,” they are those required for an “attempt” at common law, ... which include a specific intent to commit the unlawful act. ‘Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill.’”

I know of no case where a speech of this kind was treated as sufficient to establish attempted murder. Indeed, such a claim would contradict controlling Supreme Court precedent.

In *Brandenburg v. Ohio*, the Supreme Court ruled in 1969 that even calling for violence is protected under the First Amendment unless there is a threat of “imminent lawless action and is likely to incite or produce such action.”

It is common for political leaders to call for protests at the federal or state capitols when controversial legislation or actions are being taken. Indeed, in past elections, Democratic members also protested elections and challenged electoral votes in Congress.

The problem for prosecutors is that Trump never actually called for violence or a riot. Rather, he urged his supporters to march on the Capitol to express opposition to the certification of electoral votes and to support the challenges being made by some members of Congress. He expressly told his followers “to peacefully and patriotically make your voices heard.”

Trump also stated: “Now it is up to Congress to confront this egregious assault on our democracy...And after this, we’re going to walk down – and I’ll be there with you – we’re going to walk down ... to the Capitol and we’re going to cheer on our brave senators and congressmen and women.”

Yet, Tribe declared “What we saw with the president egging the crowd on, telling them that, basically, his own vice-president was a traitor while he knew that the mob had gallows waiting for him, that’s pretty serious stuff. You don’t have to go to law school to know that there’s something seriously criminal about that.”

As a factual matter, it has not been suggested by the Committee that Trump knew that protesters

brought that gallows to the scene. Most of us found about about the gallows and chant after the start of the riot.

Tribe further predicted that Attorney General Merrick Garland would criminally charge Donald Trump.

If so, Garland may want to consult with other experts before including this particular charge. Tribe's suggestion that Trump could be prosecuted for attempted murder on this evidence is utter nonsense.

The Select Committee has not made such a claim but has promised that a criminal conspiracy will be established by the hearings. That evidence may still be forthcoming, but that case has not been made in my view in the last three hearings. There have been new videotapes and testimony supporting what we already knew: that Trump was told that the election fraud claims were unsupported and that he continued to assert a theory about Pence's authority that most of us rejected as unfounded. The testimony has been powerful and gut-wrenching. Yet, there has to be more direct and substantial links to the violence to offer a compelling basis for prosecution.

Tribe has of course never lacked confidence that his lengthening list of crimes have been "without any doubt, beyond a reasonable doubt, beyond any doubt." Yet, if he is going to add attempted murder, he should have more than the repetition of conclusory statements to offer. "You don't have to go to law school to know" that the law is based on evidence and elements. Indeed, students go to law school to learn the element of crimes, not just their punishment. Indeed, few of us would allow students to start a discussion of a possible crime by simply declaring the crime and stating the possible sentence. If Professor Tribe believes that a case for attempted murder is clearly established, he may want to start with the elements.

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