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# When a Legislator Threatens Retaliation: Obstruction?

By [Joel Cohen](#)

**Whether or not the conduct of McCarthy and Taylor Green should be criminally prosecuted or is even prosecutable as a practical matter, the Congress itself, as an institution, needs to address this conduct, both for now and the future, by publicly censuring those engaged.**

January 6th seems almost decades ago. Drastic new crises have emerged. COVID-19 resurgence. Hurricane Ida. Chaos in Afghanistan.

Those who believed in real time that President Trump actually bore no responsibility for the Capitol riot will continue to believe that. Those who see him as having been the assault's prime mover will continue to, any evidence to the contrary notwithstanding. We all "know" what happened, and saw it with our own eyes (however one might understand that day). Still, we simply choose to view it differently, largely dependent on our idiosyncratic *political* perspectives.

So, what's the value of the hearings, and why the dispute over it? Even though I myself believe that Trump, indeed, instigated it, or at the very least singularly could have stopped it dead in its tracks had he wanted to, it's largely all political now as regards Trump—the rioters themselves already being prosecuted or on the way. Simply, the Democrat Majority in the House wants to keep Trump's conduct front and center. An extremely wide swath of the Republican Minority wants it under the rug. Understandably so, in both cases. Elections will occur soon. Democrats will be all over January 6. Republicans who didn't denounce Trump on January 6, before he left office or even since, will try to contain it.

And most prominently among them, House Minority Leader Kevin McCarthy. He apparently, privately, chastised Trump by phone while the riot was underway, but chose instead to kiss the ring at Mar-a-Lago after the dust subsided and he refocused singularly on becoming elected Speaker after the 2022 election. And he knew that if he didn't successfully undermine the hearing he would be reduced to, at best, being "speaker" in the house where he resides with his family. If even that.

So, what has McCarthy actually done? He can't threaten his Democrat colleagues to withdraw subpoenas duces tecum. They likely have the needed votes to enforce the subpoenas, and could care less what he says. So, instead, McCarthy threatens those who are being subpoenaed—such as the phone companies whose records the Majority wants—[declaring](#) that if they don't resist compliance with records' preservation demands, when the Republicans gain the majority they will retaliate, passing legislation that will cost these companies "their ability to operate in the United States." Marjorie Taylor Greene, never at a loss for incendiary [words](#), jumped in adding this: "These telecommunications companies, if they go along with this, they will be shut down, and that's a promise." Maybe she should become the Leader! She's got a louder, more raucous, bullhorn.

Make no mistake, there's virtually no chance that the Biden Justice Department will initiate a criminal prosecution regarding these intimidation efforts by McCarthy, Taylor Greene or any other Republicans who try to derail the congressional investigation using this tactic. Attorney General Garland has scrupulously opposed taking sides in ticklish interparty skirmishes, particularly over Trump-related issues. He has made a priority of cleansing his Department of the rank politicization that branded his predecessors' tenure. Beyond that, he hardly wants to participate in an institutional skirmish going on within another branch of government, which participation by the executive branch might arguably violate separation of powers. Also, rightly so on his part.

It would be one thing if Leader McCarthy—far more likely, though, Congresswoman Taylor Greene—walked into the phone company, *gun in hand*, to demand non-compliance with a Democrat Majority's congressional subpoena, at penalty of the obvious. Here, though, they use "words" of retaliation. Yes, "words" are the gravamen of potential obstruction charges, and most criminal obstruction indictments are predicated largely on words that were uttered by a defendant. Words, though, even if recorded, unambiguous and unqualifiedly extortive, certainly aren't considered in nearly the same way as weapons of death—even to the mind of an obdurately nonpolitical attorney general as is General Garland.

Still, the unlikelihood of these members being criminally prosecuted aside, what about the obstructionist quality of the uttered words, given the very real risk that the Republicans will become the majority, McCarthy leading the pack after the midterm elections? And, assume, of course, that McCarthy will indeed be able to pass legislation inimical to the interests of these telecommunication entities? Remember, success in carrying through the threat of putting these companies out of business wouldn't be the sine qua non to having committed the crime.

Now, clearly, Title 18, U.S. Code §1505(b) prohibits one who "corruptly ... by any threatening ... communication ... endeavors to influence, obstruct, or impede ... the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House ..." Indeed, "corruptly" has been [defined](#) to include an action that is done in part with an "evil or wicked purpose" for an "improper motive."

So, at day's end, did McCarthy's threat manifest an "evil or wicked purpose" conducted with "improper motive"? Sure enough, in my own view. Here, too, though, "purpose" or "motive" typically lie in eye of the beholder, unlike the kind of mafia tactics employed in the pistol scenario which would definitely be the ballgame for McCarthy or Taylor Greene. Still, how a jury might view McCarthy's purpose or motive would be the pivotal issue that would face a Justice Department attorney seeking to indict.

So, therefore, even if the Department authorized a prosecution, how might jurors react to McCarthy's "threat"? Would they see it as protecting the privacy interests of those parties or individuals whose telephone records are subpoenaed, as he articulates what he has done? Or might they be seen as desperate political acts—even dirty tricks (evil and wicked)—designed only to protect the political hides of McCarthy and his colleagues in arms? Try to indict that case in Mississippi! And, arguably, that should be the test.

The real issues here, though, are much broader than McCarthy's own facially hideous conduct. First, President Trump tried to defeat candidate Biden in 2020 by basically trying to force the Ukrainian regime to investigate Hunter Biden. In the impeachment proceedings that resulted, Trump somehow persuaded a large segment of America that it is almost an "affirmative defense" to unlawful conduct that he (and his sidekick Giuliani) cavalierly did it in public (paraphrasing, e.g., "I wasn't hiding it at all. Therefore, there was nothing improper"). A variation of sorts on Trump's earlier claim to be able to shoot someone on Fifth Avenue and get away with it. Despite what he said about that, I maintain that he is indisputably wrong both times around. Moreover, the mere concept offensive.

Second, some legislators, probably on both sides of the aisle, argue that they simply engage in horse trading or “politics as usual” when they threaten one another saying, for example, that “if you push that bill, I will persuade my caucus to vote down *any bill* you ever try to pass in the Congress. Take that!” It’s absolutely a threat and, indeed, politics as usual. A crime, though? Maybe in an extreme case, but no prosecutor would typically try to bring such a case.

What McCarthy and Taylor Greene have done here, though, is dramatically different, and rancid in its intent. They’re intimidating the far more vulnerable *recipients* of congressional process, not their fellow legislators. The businesspeople—even big business—affected know that if a McCarthy retakes the Speaker’s podium either with Trump or a Trump-sympathizer in the White House, McCarthy may actually be able to realize his threats. Then—neither horse trading, nor simply business as usual. A congressional majority—especially with a leader at its helm who boldly proclaims that he will be vindictive—does indeed possess the legislative capacity to destroy a business or, at the very least, cause it grievous financial harm. Chief executive officers of big businesses are *required* to protect the bottom line of their companies. McCarthy’s threats, therefore, simply can’t be ignored, and that’s a reality. And that’s why the threat is very real, even if coming from a minority leader with his eye on the prize.

So, whether or not the conduct of McCarthy and Taylor Green should be *criminally* prosecuted or is even prosecutable as a practical matter, the Congress itself, as an institution, needs to address this conduct, both for now and the future, by publicly censuring those engaged. While McCarthy might see a censure as a badge of honor, Republicans running for their individual congressional seats might see their putative leader being censured as a possible roadblock to their individual candidacies in their own districts.

At any event, if the Congress is to do something about this “obstructionist” conduct, even if it is not criminally prosecutable, it needs to do it promptly—now, when the Democrats hold the gavel, and the votes. Oddly enough, big business, this time around, needs the Democrats to stand up for it.

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