

Brief-Writing Lessons From the January 6 Committee Hearings

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The first three public hearings of the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol provide some helpful lessons for clarity and persuasion in presenting a complicated story.

Overall Organization

Each of the first three hearings has had a clear theme and purpose. The prime time hearing on the evening of June 9 represented the equivalent of an opening statement at trial or an introduction to a complex brief. It provided an overview of the committee's findings, as to both the actual events of the January 6 assault and the statements and actions of former President Trump and his associates which set the stage for those events. The introductory hearing was also emotionally compelling. It presented the live testimony of a Capitol Police officer injured in the assault and of an investigative journalist who had been embedded with a group of Proud Boys who came to Washington and descended on the Capitol, apparently in response to the former President's "Stop the steal!" exhortations.

The second and third hearings (June 14 & 16) each served a distinct purpose. The June 14 hearing presented evidence that *there was no factual basis* for the assertions that the 2020 election results were tainted by fraud or any other errors or misconduct in the tabulation of votes. The June 16 hearing built upon that factual foundation by establishing that *there was no legal basis* for the theory that the Vice President had the authority to reject any state's electoral count or to send the matter back to the state legislature.

Chronological and Topical Organization, Rather Than Witness-by-Witness

Although each hearing featured a few live witnesses, much of the evidence presented at the televised hearings has consisted of videos of various other witnesses' depositions before the committee. And, due to flexibility of evidentiary and procedural rules during the committee hearing, the committee members were able to present portions of those deposition recordings during the course of the live witnesses' testimony. Most

significantly, the lead presenters in the respective hearings played portions of the recorded depositions, as relevant to the specific subjects being covered during each portion of the hearing. For example, the committee did not present all of former Attorney General Barr's deposition in a single block, but interspersed brief excerpts throughout the hearing.

Trial attorneys generally have no choice but to present their cases witness by witness. However, like the January 6 committee, appellate attorneys face no such constraints. As anyone who reads a lot of briefs can attest, a witness-by-witness, order-of-trial statement of facts tries the readers' attention and patience and leaves them without a firm grasp of which important facts were essentially settled and where various witnesses' accounts diverged. It is far more effective for a brief to present a chronological narrative of the overall story – including where the witnesses' accounts conflict – rather than in the order in which they appeared at trial. Similarly, for areas of testimony that do not easily fit into a chronology – e.g., forensic evidence, expert testimony – it's far preferable to organize the presentation by sub-topics rather than in order of trial appearance.

Pitch Arguments to Persuadable Skeptics, Not Just Those Already on “Your Side”

Throughout the hearings, the January 6 committee is relying heavily on Republicans, both committee members and witnesses, to carry its message. The vice-chairwoman, Rep. Liz Cheney, has taken a leading role throughout the hearings in presenting the committee's overall narrative of the events and summarizing its most crucial (and damning) findings. Similarly, most of the witnesses to date have been Republicans, including White House staff and other administration officials, Trump campaign officials, and other Republicans in touch with the Trump team during the period between the election and January 6. The committee presented former Fourth Circuit Judge J. Michael Luttig, a widely-respected conservative legal scholar, as the principal witness debunking the theory that the Twelfth Amendment could allow the Vice President to reject a state's electoral votes or send them back to the state legislature for reconsideration.

Similarly, in brief-writing – especially on behalf of appellants in criminal and juvenile cases – it is not enough to “preach to the choir.” Criminal appellate defenders cannot assume an audience composed mostly of jurists deeply skeptical of the fairness of the justice system. They must always strive to

persuade the many justices who feel that the system *generally* gets it right, but who recognize that abuses and errors do occur. When appellate counsel *is* making an argument regarding systemic inequities – e.g., *Batson* error, stop-and-frisk – it is vital to lay out the factual basis for that indictment, including through statistical evidence, studies, and other judicially noticeable sources. Backing any such systemic arguments with statistics or similar evidence, rather than rhetorical generalizations, is essential because many jurists may not be familiar with those inequities through their own personal experiences.

Much as the January 6 committee has done, appellate defenders should always highlight situations in which groups or individuals *not* commonly associated with criminal defense support a defense position on a particular issue. Those unexpected allies may have reached that position through an entirely different reasoning route than most defense attorneys. A number of conservative figures and groups, such as the Koch brothers, have turned against the “war on crime” based on concerns such as waste of taxpayers’ money and the overreach of “big government.” Similarly, it is worth identifying the opinion author where a conservative jurist has taken a leading role in the development and enforcement of a core defense right – e.g., Justice Scalia’s landmark opinion in *Crawford*.

Clarity and Engagement Above All

The January 6 hearings demonstrate the importance of telling a good story. Whenever possible, an appellate brief-writer should present a chronological narrative or some other easy-to-follow topical organization. And the attorney should always consider ways to draw in readers who may not share a defense worldview but who are potentially receptive to arguments that demonstrate how a specific trial or sentence offended their own values.