UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Case No. 1:21-cr-138
AARON MOSTOFSKY,	)	**Judge James E. Boasberg**
Defendant.	)	

DEFENDANT MOSTOFSKY'S REPLY IN SUPPORT OF MOTION FOR A BILL OF PARTICULARS

The superseding indictment charges Mostofsky with two interference-with-law-enforcement felonies (18 U.S.C. § 231(a)(3) and § 111(a)(1)), and with obstruction of an official proceeding (18 U.S.C. § 1512(c)(2)), without alleging a single fact beyond its recitation of the statutory elements. Superseding Indictment, Counts 1-3. There is virtually no case law interpreting Section 231(a)(3); before January 6, Section 1512(c)(2) had never been charged outside the context of a quasi-judicial proceeding; Section 111(a)(1) is inartfully drafted and ambiguous. Yet the government argues that it should not be required to explain the factual basis for these charges beyond allowing that Mostofsky's alleged "conduct on January 6 *includes* his pushing against a line of officers who were trying to adjust a barrier between themselves and rioters." Gov't Opp., p. 2 (emphasis added). The government says that, in preparing for trial on the three felonies, Mostofsky is entitled to no more charging information. That is wrong.

A. The Section 111(a)(1) count (Count 3)

Mostofsky showed that every circuit to address the issue has held that there is "no room for a conviction [under § 111(a)(1)] that does not involve at least some form of assault." *United States v. Chapman*, 528 F.3d 1215, 1219 (9th Cir. 2008) (holding that, under every circuit's

approach, "while a defendant could be charged with resisting, opposing, impeding, intimidating, or interfering [under § 111(a)(1)], he could not be convicted unless his conduct *also* amounted to an assault") (emphasis original); see also *United States v. Chestaro*, 197 F.3d 600, 608 (2d Cir. 1999); *United States v. Hathaway*, 318 F.3d 1001, 1007 (10th Cir. 2003); *United States v. McCulligan*, 256 F.3d 97, 102 (3d Cir. 2001). As Section 111(a)(1) does not define assault, courts turn to the generic federal definition: "To constitute an assault, an action must be either a willful attempt to inflict injury upon the person of another or a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." *Chapman*, 528 F.3d at 1219 (cleaned up).

Yet the government is unwilling to provide notice whether it is charging that Mostofsky somehow committed an assault under § 111(a)(1) when police officers picked up a barricade and ran it into him and other people in the crowd. Gov't Opp., pp. 6-9. Mostofsky needs to know. If he decides to file a motion to dismiss for failure to state a claim, he must do so before trial. Fed. R. Crim. P. 12(b)(3). By refusing even to disclose *whether* it is charging an assault underlying all the § 111(a)(1) actus reus verbs, the government is wasting the parties' and the Court's time on discovery, motion practice, trial preparation and trial which may all be unnecessary. In addition, a trial in which Mostofsky must defend himself against the charge that he "willfully attempted to inflict injury" upon a law enforcement officer—i.e., committed assault—is materially different from one in which he must defend himself against the charge that he merely "forcibly . . . resist[ed], oppose[d], imped[ed], intimidate[d], or interfere[d] with" a law enforcement officer, short of assault. § 111(a)(1); see also *Chapman*, 528 F.3d at 1219 (reversing conviction where defendant did not do the former but did do the latter).

He is entitled to know the legal nature of the charge he is defending himself against, and if the government does not clarify whether Count 3 charges an assault, a general verdict could contain an improper basis for conviction under § 111(a)(1) (just as in *Chapman*). *United States v. Trie*, 21 F. Supp. 2d 7, 21 (D.D.C. 1998) ("A defendant faced with false statement charges should not have to waste precious pre-trial preparation time guessing which statements he has to defend against . . . when the government knows precisely the statements on which it intends to rely and can easily provide the information); *Street v. New York*, 394 U.S. 576, 578 (1969) (reversal of general verdict required where charge encompasses both criminal activity and protected political protest).

There is more information Mostofsky needs to know about Count Three. That count's § 111(a)(1) charge is a felony because the government alleges that Mostofsky committed the law enforcement interference offense with "the intent to commit *another* felony." Superseding Indictment, Count 3 (emphasis added). The government is unwilling to provide notice of what the "other" felony *is*. Yet even the government allows that it is constitutionally required to "apprise the defendant of the essential elements of the offense . . ." Gov't Opp., p. 5. With respect to the "other felony" Mostofsky allegedly intended to commit during the charged § 111(a)(1) offense, the government not only provides no notice of the essential elements, it will not even say what kind of offense it is.

The government provides notice that Mostofsky's alleged "conduct on January 6 *includes* his pushing against a line of officers who were trying to adjust a barrier between themselves and rioters," as seen in a 30-second clip of body camera footage. Gov't Opp., p. 2 (emphasis added). But it does not say whether that "conduct" is the sole basis of the § 111(a)(1) charge. It does not say whether it alleges other interactions between law enforcement and Mostofsky that are

encompassed by Count 3.[1] "In order for an accusation of a crime . . . to be proper under the codification of common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime." *Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000). "Thus, it is critical to know *which facts* are elements." *Id*. (emphasis added). The government should be required to identify in a bill of particulars "which facts are elements" of its § 111(a)(1) charge, whether it is charging an assault underlying the § 111(a)(1) actus reus verbs (*see Chapman*), and what the "other felony" is that Mostofsky allegedly intended to commit during the alleged § 111(a)(1) offense.

B. The Section 231(a)(3) count (Count One)

Although Section 231(a)(3) criminalizes "*any* act" that "obstruct[s], impede[s], or interfere[s] with any fireman or law enforcement officer," § 231(a)(3), the government claims that an indictment that merely traces the statutory language provides "fair notice" to Mostofsky of which of his "acts" on January 6 were felonies and which were not crimes at all. Not only does the government not identify Mostofsky's criminal "acts," it will not even provide notice whether those acts encompass nonviolent demonstration and speech. Gov't Opp., p. 3 ("The defendant knowingly committed *an act* with the intended purpose of obstructing, impeding, or interfering with one or more law enforcement officers.") (emphasis added).

Mostofsky must know what the charged "acts" are to determine if they reach nonviolent political expression. If so, Mostofsky will need to file a motion to dismiss with an as-applied First Amendment challenge. *See City of Houston v. Hill*, 482 U.S. 451 (1987) (striking down as unconstitutionally overbroad an ordinance that made it "unlawful for any person to . . . in any

[1] The government says that it has "provided the names of two law enforcement officers referenced in" the § 111(a)(1) count. Gov't Opp., p. 4. The government does not say if these are the only law enforcement officers involved in the § 111(a)(1) count or if there are others.

manner oppose, molest, abuse or interrupt any policeman in the execution of his duty"); *McCoy v. City of Columbia*, 929 F. Supp. 2d 541, 550 (D.S.C. 2013) (finding law unconstitutionally vague under *City of Houston* because it criminalized "interfering with or molesting" law enforcement). He must also know what the "acts" are to prepare for and to defend himself at trial. If the "acts" constitute nonviolent expression or speech, his defense at trial will be quite different from one where he is defending against an "act" that includes violence. *United States v. Palfrey*, 499 F. Supp. 2d 34, 51-52 (D.D.C. 2007) (requiring government to identify proceeds allegedly used in support of criminal enterprise so defendant does not "waste precious pre-trial preparation guessing what data . . . will be relevant to [the] defense"); *United States v. Brown*, 2007 U.S. Dist. LEXIS 49169, *45 (D.D.C. July 9, 2007) (ordering government to identify in bill of particulars "specific alleged actions and specifically worded false statements on which the government shall rely in proving its case"); *United States v. Siddiqi*, 2007 U.S. Dist. LEXIS 15410, *8 (S.D.N.Y. Feb. 21, 2007) (bill of particulars must specify the dates and amounts of bribes defendant allegedly paid).

Finally, the government refuses to provide notice as to the "department, agency or instrumentality of the United States" on which its § 231(a)(3) charge depends. As Mostofsky showed, charges brought under § 231(a)(3) must prove, as an element of the offense, that a "civil disorder . . . in any way or degree obstructs, delays or adversely affects" either (a) "commerce or the movement of any article or commodity in commerce" or (b) "the conduct or performance of any federally protected function." § 231(a)(3). The superseding indictment alleges it is only relying on the "federally protected function" option. Superseding Indictment, Count One.

Section 231(a)(3)'s definition of "federally protected function" requires the government to establish that the "function" at issue was by a "department, agency, or instrumentality of the United States." 18 U.S.C. § 232(3).

Title 18 defines "department" and "agency" for every reference to those terms throughout the title. Section 6 provides,

> The term "department" means one of the executive departments enumerated in section 1 of Title 5,[2] unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
>
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

18 U.S.C. § 6.

The Supreme Court has held that Section 6's definition of "department" to mean "one of the executive departments enumerated in section 1 of Title 5" presumptively controls any Title 18 statute's use of that term unless the government makes a "fairly powerful" "showing" that Congress intended, in the statute at issue, that "department" refers to the "legislative, or judicial branches of government," which the Court held was the "unusual sense" of the term. *Hubbard v. United States*, 514 U.S. 695, 700 (1995). In *Hubbard*, a man was convicted under a now-superseded version of § 1001 that punished "'[w]hoever, in any matter within the jurisdiction of *any department or agency of the United States* knowingly and willfully . . . makes any false,

[2] The Executive Departments enumerated in section 1 of Title 5 are: The Department of State; The Department of Treasury; The Department of Defense; The Department of Justice; The Department of the Interior; The Department of Agriculture; The Department of Commerce; The Department of Labor; The Department of Health and Human Services; The Department of Housing and Urban Development; The Department of Transportation; The Department of Energy; The Department of Education; The Department of Veterans Affairs; and The Department of Homeland Security. 5 U.S.C. § 101.

fictitious or fraudulent statements. . .'" 514 U.S. at 698 (quoting § 1001) (emphasis added). The man had filed false records in a bankruptcy court. The lower courts upheld his conviction on the basis that such a court was a "department . . .of the United States," in the sense that the executive, legislative and judicial branches of government were sometimes referred to as "departments" in the 18th century. *Id.* Not only did the Supreme Court reverse his conviction on the ground that this interpretation of "department" was inconsistent with § 6, it overruled prior contrary precedent notwithstanding the gauntlet of *stare decisis.* 514 U.S. at 701.

Following *Hubbard*, courts have held that Congress is neither a "department" nor an "agency" under Section 6, as it is not an executive department. 18 U.S.C. § 6. *See*, *e.g.*, *Trump v. Deutsche Bank AG*, 943 F.3d 627, 645 (2d Cir. 2019) (applying *Hubbard* and § 6 and holding that the Right to Financial Privacy Act's reference to a "department or agency" does not apply to Congress) *rev'd and remanded on other grounds sub. nom. Trump v. Mazars USA LLP*, 140 S. Ct. 2019 (2020); *United States v. Oakar*, 111 F.3d 146, 155 (D.C. Cir. 1997) (After *Hubbard*, a statute's reference to "department" does not refer to Congress); *United States v. Perraud*, 672 F. Supp. 2d 1328, 1344 n. 4 (S.D. Fla. 2009) (Congress neither a "department" nor an "agency").

Accordingly, Mostofsky needs notice as to the "department, agency or instrumentality of the United States" on which the § 231(a)(3) count depends. If the government contends that Congress satisfies that element, Mostofsky will need to move to dismiss before trial. Rather than identify "which fact [satisfies this] element," *Apprendi*, 530 U.S. at 500, the government would prefer to risk wasting the parties' and Court's time and resources litigating a claim that may not satisfy an essential element of the crime.

C. The Section 1512(c)(2) count (Count Two)

The government fails to provide any notice of which alleged facts satisfy the elements of its felony charge that Mostofsky corruptly obstructed an official proceeding under § 1512(c)(2). That notice deficiency is exacerbated by the novel application of several elements essential to the government's obstruction theory here, emboldened below:

> Whoever **[1] corruptly**—
>
> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; **or**
>
> (2) **[2] otherwise** obstructs, influences, or impedes any **[3] official proceeding**, or attempts to do so . . . shall be fined . . . or imprisoned. . .

§ 1512(c) (emboldening added).

"Official proceeding." Before January 6, the government had never charged obstruction of a congressional proceeding under § 1512(c)(2), which was added to Chapter 73 of title 18 in the Sarbanes-Oxley financial and accounting records reforms. It had never charged any obstruction-of-Congress offense that did not involve a legislative inquiry or investigation. After all, Section 1505, the obstruction-of-Congress statute, explicitly cabins the offense to inquiries or investigations of Congress, as opposed to ceremonial proceedings. § 1505. Every time that the government attempted to charge an offense alleging obstruction of a proceeding lacking the defining characteristics of a legal proceeding— a tribunal that hears evidence and makes findings—it lost. *United States v. Ermoian*, 752 F.3d 1165, 1169 (9th Cir. 2013) (FBI investigation not an "official proceeding"); *United States v. Ramos*, 537 F.3d 439 (5th Cir. 2008) (same regarding internal agency investigation). But even when obstruction convictions were not reversed, the circuits made clear that the "proceedings" at issue therefore possessed the attributes of a legal proceeding, i.e., issuing subpoenas, hearing testimony, determining facts, making

findings. *United States v. Perez*, 575 F.3d 164 (2d Cir. 2009) (BOP's investigation qualified as an "official proceeding" because "the review panel must '*determine*' if there has been a violation of BOP policy, must make '*findings*,' and may '*decide*' to refer the matter to senior departmental authorities . . ."') (emphasis added); *United States v. Kelley*, 36 F.3d 1118 (D.C. Cir. 1994) (inspector general's use of subpoenas was determinative of the "proceeding" *vel non* question); *United States v. Sutton*, 732 F.2d 1483, 1490 (10th Cir. 1984) (Department of Energy investigation including issuance of administrative subpoena was proceeding under § 1505); *United States v. Vixie*, 532 F.2d 1277, 1278 (9th Cir. 1976) (IRS investigation including issuance of subpoena was a proceeding under § 1505); *United States v. Batten*, 226 F. Supp. 492, 493 (D.D.C. 1964) (SEC investigation with authority to issue subpoenas and administer oaths was "proceeding" under § 1505). Indeed, the DOJ's handbook for prosecutors adopts the position that the meaning of "official proceeding" in Section 1512 is the same as the meaning given to "proceeding" by courts construing Section 1505—which is explicitly limited to congressional hearings in exercise of the legislature's investigatory power.[3] DOJ Resource Manual, § 1730 ("This definition [of 'proceeding' in § 1512] is in large part a restatement of the judicial interpretation of the word 'proceeding' in § 1503 and 1505."), available at: https://www.justice.gov/archives/jm/criminal-resource-manual-1730-protection-government-processes-official-proceeding-requirement. And as recently as three years ago, the government argued in federal courts that the meaning of "official proceeding" in § 1512(c) is "limited to quasi-adjudicative investigations or inquiries that involve the making of findings of fact and the issuance of rulings or recommendations for government action." *United States v. O'Connell*,

[3] *United States v. Poindexter*, 951 F.2d 369, 380-81 (D.C. Cir. 1991) ("Proceeding" in § 1505 means a hearing held pursuant to Congress's power of investigation).

2017 U.S. Dist. LEXIS 172491, *14 (E.D. Wisc. Sept. 5, 2017) (summarizing DOJ's interpretation of § 1512(c)).

"Corruptly." In *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), the D.C. Circuit held that an interpretation of § 1505's adverb "corruptly" to mean acting with any "improper purpose" was unconstitutionally vague. "Words like 'depraved,' 'evil,' 'immoral,' 'wicked,' and 'improper' are no more specific—indeed they may be less specific—than 'corrupt.'" *Id.* at 379. It also held that the adverb should therefore be read "transitively," i.e., to require that the defendant "corrupt" another into committing the obstructive acts against that person's legal duty. *Id.* *Poindexter* is still good law. The D.C. Circuit applied the *Poindexter* analysis to Section 1512 in *United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir. 1996) (upholding § 1512 conviction because the defendant had committed "transitive" corruption in the *Poindexter* sense by persuading a witness to violate their legal duty to testify truthfully in court). In response to *Poindexter*, Congress amended Section 1515 to define "corruptly," but only with respect to § 1505. In Section 1505, "corruptly" means,

> acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

§ 1515(b).

Following the amendment, however, courts in this district have noted that, even if Congress "fixed" *Poindexter*'s "transitive corruption" rule with respect to Section 1505, Section 1515(b)'s definition of "corruptly" as meaning "acting with an improper purpose" is still unconstitutionally vague under *Poindexter*. *United States v. Kanchanalak*, 37 F. Supp. 2d 1, 4 (D.D.C. 1999) (Friedman, J.). The *Poindexter* court gave an example showing a circumstance in which some purposes motivating the obstruction of Congress could not be deemed "corrupt"

without unconstitutional vagueness. *Poindexter*, 951 F.2d at 386 (citing a hypothetical person who obstructs Congress "to protect the historical reputation of some historical figure that has been dead for 20 years and [the defendant obstructs to avoid] mar[ring] that person's reputation"). This is in accord with decisions from this circuit and others which require that a "corrupt" purpose entail an intent to secure an unlawful advantage or benefit either for oneself or for another. *United States v. North*, 910 F.2d 843, 882, 285 U.S. App. D.C. 343 (D.C. Cir. 1990), *opinion withdrawn and superseded in other part on reh'g*, 920 F.2d 940, 287 U.S. App. D.C. 146 (D.C. Cir. 1990) (holding that a "corrupt" intent means "the intent to obtain an improper advantage for oneself or someone else. . ."); *United States v. Kelly*, 147 F.3d 172, 176 (2d Cir. 1998) ("[A] well-accepted definition of corruptly" is "to act with the intent to secure an unlawful advantage or benefit either for one's self or for another"); *United States v. Dorri*, 15 F.3d 888, 895 (9th Cir. 1994) (holding that "corruptly" element was satisfied by evidence that defendant acted "with a hope or expectation of [a] benefit to one's self"); *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991) ("Corruptly" means "done with the intent to secure an unlawful benefit either for oneself or another"); *United States v. Reeves*, 752 F2d 995, 1001 (5th Cir. 1985) ("To interpret 'corruptly' [in obstruction statute] as meaning 'with an improper motive or bad or evil purpose' would raise the potential of overbreadth' in this statute because of the chilling effect on protected activities. . . Where 'corruptly' is taken to require an intent to secure an unlawful advantage or benefit, the statute does not infringe on first amendment guarantees and is not 'overbroad.'"); CORRUPTLY, Black's Law Dictionary 345 (6th ed. 1990) (acting with "a wrongful design to acquire some pecuniary or other advantage"); CORRUPTLY, Ballentine's Law Dictionary 276 (3d ed. 1969) (acting with the "intent to obtain

an improper advantage for oneself or someone else, inconsistent with official duty and the rights of others").

"Or otherwise obstructs. . ." As seen above, Section 1512(c)(2) is a "residual clause" because it penalizes whoever "*otherwise* obstructs, influences, or impedes any official proceeding," i.e., in a manner different from the "alter[ing], destroy[ing], mutilate[ing], or conceal[ing] a record, document, or other object" in Section 1512(c)(1). But "*[e]jusdem generis* counsels: Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the proceeding specific words." *Yates v. United States*, 574 U.S. 528, 545 (2015) (cleaned up).

In *Yates*, a fisherman caught an undersized red grouper in the Gulf of Mexico, contrary to federal law. To prevent federal authorities from finding out, he ordered a crew member to toss the catch into the sea. He was charged with an obstruction offense under § 1519, which penalizes "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, *or tangible object* with the intent to impede, obstruct, or influence the investigation . . ." 574 U.S. at 532 (quoting § 1519) (emphasis added). The Supreme Court reversed Yates' conviction as the term "tangible object" did not encompass the grouper. Like Section 1512(c), Section 1519 was enacted as part of the Sarbanes-Oxley Act of 2002. 574 U.S. at 532. To apply Section 1519 to sea creatures, the Court held,

> would cut § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with an obstructive intent. *Mindful that in Sarbanes-Oxley, Congress trained its attention on corporate and accounting deception and cover ups, we conclude that a matching construction of § 1519 is in order*: A tangible object captured by § 1519, we hold, must be one used to record or preserve information.

574 U.S. at 532 (emphasis added).

Nearly every aspect of *Yates'* limitation of the phrase "tangible object" in Section 1519 applies to the phrase "or otherwise obstructs, influences, or impedes" in Section 1512(c)(2). As in *Yates*, the government implies here that § 1512(c)(2) "extends beyond the principal evil motivating its passage." 574 U.S. at 536. But *Yates* held that Section 1519, a companion to § 1512(c)(2) in Sarbanes-Oxley, could not be properly read outside the context of the Sarbanes-Oxley financial and audit reforms. *Id.* at 541. The Court also held that "the words immediately surrounding 'tangible object' in § 1519—'falsifies, or makes a false entry in any record [or] document]'—also cabin the contextual meaning of that term." *Id.* at 542. The *noscitur a sociis* canon thus operated to limit "tangible object" to "the subset of tangible objects involving records or documents, i.e., objects used to record or preserve information." *Id.* at 544. And under the related *ejusdem generis* canon—"[W]here general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the proceeding specific words"—"tangible object" could not be read "to capture physical objects as dissimilar as documents and fish." *Id.* at 546.

In reaching that interpretation of § 1519, *Yates* relied on *Begay v. United States*, 553 U.S. 137, 142-43 (2008). *Yates*, 574 U.S. at 545. In *Begay*, the Court used *ejusdem generis* to determine what crimes were covered by the statutory phrase "any crime . . . that . . . is burglary, arson, or extortion, involves use of explosives, or *otherwise involves* conduct that presents a serious potential risk of physical injury to another." 553 U.S. at 142 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)) (emphasis added). *Begay* held that the "otherwise involves" provision covered "only similar crimes, rather than every crime that 'presents a serious potential risk of physical injury to another.'" *Id*. Had Congress intended the latter "all encompassing meaning," "it is hard to see why it would have needed to include the [preceding statutory] examples at all." *Id.*

Yates and *Begay* mean that § 1512(c)(2)'s reference to acts that "*otherwise* obstruct[], influence[], or impede[] any official proceeding," covers "only similar crimes" to those enumerated in § 1512(c)(1), i.e., "alter[ing], destroy[ing], mutilate[ing], or conceal[ing] a record, document, or other object . . . with the intent to impair the object's integrity or availability for use in an official proceeding." Had Congress intended the "or otherwise obstructs. . ." language to create an unlimited obstruction catch-call crime, "it is hard to see why it would have needed to include the examples [in § 1512(c)(1)] at all." *Yates*, 553 U.S. at 142. Indeed, or why it would have any need for the rest of the obstruction crimes in Chapter 73.

Taken together, then, the government's § 1512(c)(2) charge against Mostofsky is attempting to bend the statute in three unusual directions to attach felony liability to political protest. Although "Chapter 73 of Title 18 of the United States Code"—including Section 1512 and all other obstruction statutes—"provides criminal sanctions for those who *obstruct justice*," *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (emphasis added), the government lifts "official proceeding" out of that standard "legal" context. *Ermoian*, 752 F.3d at 1169. Although corrupt intent traditionally meant an intent to obtain an improper advantage for oneself or an associate, the government appears to allege here that it is satisfied by sincere but misguided political views. And although Section 1512(c)(2) was passed in the Sarbanes-Oxley reforms to "close [] [the] loophole" created by the available obstruction statutes and hold criminally liable a person who, acting alone, destroys documents, 148 Cong. Rec. S6542 (daily ed. July 10, 2002) (statement of Senator Orin Hatch), the government attempts to apply it for the first time to political protest at Congress.

In light of these novel constructions and ambiguities, it cannot be the case that an indictment alleging the bare elements of Section 1512(c)(2) alone and no facts provides

sufficient notice to Mostofsky. *Trie*, 21 F. Supp. 2d at 21. The superseding indictment raises questions whose answers could dramatically shape preparation for and the course of trial:

- Whom did Mostofsky obstruct?
- Did Mostofsky obstruct a proceeding of Congress by virtue of his presence inside the Capitol Building? Presence alone or was there some obstructive act inside?
- Or was the obstruction offense committed before he entered the building?
- Was the proceeding obstructed because it was delayed or for some other reason?
- Does the government allege "corruptly" in the "transitive" *Poindexter* sense, i.e., that Mostofsky corrupted another person to obstruct Congress in violation of their legal duty? If so, whom did Mostofsky corrupt?
- Or does it allege "corruptly" in the sense of acting with an "improper purpose"?
- If the government alleges that Mostofsky obstructed Congress with an "improper purpose" what was that purpose?

Trial preparation aside, Mostofsky needs answers to the questions because if the superseding indictment charges a Section 1512(c)(2) crime inconsistent with the case law cited above, he will need to move to dismiss the charge before trial.

Conclusion

For the foregoing reasons, the Court should order the government to file a bill of particulars that specifically details the information requested by this motion.

Dated: July 13, 2021

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 13th day of July, 2021, I filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following CM/ECF user(s):

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