

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA : Case No. 21 Cr. 73-1 (BAH)
v. :
NICHOLAS DECARLO :
Defendant. :

**DEFENDANT’S REPLY MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS COUNTS ONE AND TWO**

INTRODUCTION

The Government opposes the defendant’s Motion To Dismiss, arguing that: (1) Congress’ certification of the Electoral College vote was an “official proceeding” within the meaning of 18 United States Code Section 1512(c)(2); and (2) the obstruction charges against him are not void for vagueness.

With respect to the first argument, while other judges in this jurisdiction have denied motions to dismiss the obstruction count, neither the Government’s Opposition, nor the decisions it relies upon, appear to address the precise issue raised in this case: whether the “vote counting” component of the January 6, 2021 Joint Session was an “official proceeding.” The Government has treated the Joint Session as a monolithic whole, when by statute (as noted in the defendant’s Motion To Dismiss) it comprises two separate and distinct components.

The Government’s arguments with respect to vagueness should also be rejected by this Court. While the Government now argues that the defendant “participated in the riot,” it previously stated in writing that the defendant conspired only with his co-defendant Nicholas Ochs. No reasonable person would have been on notice that the defendant’s actual conduct inside the Capitol – including the misdemeanor theft of one pair of flex handcuffs and writing on

a door with a magic marker – would subject him to punishment for “corruptly” obstructing a Congressional proceeding. As discussed in greater detail herein, the lack of notice is reflected in the Government’s inconsistent and in many ways irreconcilable charging decisions in the Capitol Hill cases: some defendants who engaged in actual violence inside the building are not charged with obstruction, while others who engaged in what the Government claims was “civil disorder. . . and disorderly and disruptive conduct” are so charged. If the professional prosecutors assigned to these cases (with the benefit of hindsight and thousands of hours of videotape) cannot make sense out of what conduct violates the statute, how could the lay defendant be expected to do so.

LEGAL ANALYSIS

1. The Counting of Electoral Ballots Is Not An Official Proceeding

The Defendant’s Motion To Dismiss (filed prior to any decisions regarding whether or not the vote certification was an official proceeding) noted that the Joint Session of Congress convened on January 6, 2021 had two components under the controlling statute: (1) the counting of the previously awarded state electoral votes; and possibly (2) a challenge to the certification. The defense argued then – and affirms now – that the Indictment in this case charges him with attempting to obstruct the first phase of the process, not the latter. That interpretation is supported by the plain language of the Indictment, as well as by reference to other criminal cases in this jurisdiction against defendants charged in connection with the events of January 6, 2021.

The Indictment in this case specifically charges the defendant with obstruction of “Congress’ **certification** of the Electoral College Vote” (emphasis added). In contrast, the Government has charged other defendants (including ones charged before this Court) more broadly with attempting to corruptly obstruct:

an official proceeding, that is, a proceeding before Congress, specifically Congress' certification of the Electoral College vote, as set out in the Twelfth Amendment of the Constitution of the United States and 3 U.S.C. Sections 15-18.

See *United States v. Bender*, 21 Cr. 508 at DE 7 (BAH). Accord *United States v. Montano Alvarado*, 21 Cr. 154 (RJL) at DE 30; *United States v. Galetto*, 21 Cr. 517 (CKK) at DE 40; *United States v. Jackman, et al.*, 21 Cr. 378 (TJK) at DE 23; *United States v. Griswold*, 21 Cr. 459 (CRC) at DE 23.

In the defense view, the Government expanded the formulation of the alleged obstruction because it recognized that it had too narrowly defined the object of the conspiracy.¹ In that regard, it is this within this Court's authority to determine the scope of the conspiracy alleged in the Indictment.

Whether an indictment successfully charges a federal offense is a question of law. The grand jury's draftsman is typically a prosecutor, not a member of the grand jury. To require judges to presume that indictments allege all elements of the crimes that they charge would require judges to defer to prosecutors on questions of law regarding defendants' rights under the Constitution.

United States v. Edwards, 111 F. Supp. 2d 1057, 1061 (E.D. Wis. 2000). To the extent that there is some perceived ambiguity as to the object of the alleged obstruction, the defense believes that it should be construed in favor of the accused, as would be a criminal statute, see United States v. Bass, 404 U.S. 336, 347 (1971) and against the Government, as would an ambiguous plea agreement drafted by the prosecution. United States v. Moreno-Membache, 995 F.3d 249, 254 (D.C. Cir. 2021).

¹ Indeed, in *United States v. Gossjankowski*, 21 Cr. 123 (PLF), the original Indictment charged the obstruction of an "official proceeding," DE 10, but the Superseding Indictment added the language expanding its scope to define the proceeding in conformity with the constitution and the electoral vote statute. DE 41. The defense has not attached copies of these pleadings as Exhibits to this reply in the interest of efficiency. If the Court would prefer, the defense can submit the materials as Exhibits on the ECF docket of this case.

Under this formulation, the cases relied upon by the Government are largely inapposite, as none of them differentiated between the vote count aspect of the Joint Session on January 6, 2021 and the second component of the Joint Session – the resolution of any objections made to the vote tabulation.

In United States v. Sandlin, 2021 WL 5865006, for example, Judge Friedrich first noted that not every event that takes place before Congress is an official proceeding. This is consistent with the defense position in this case. The court concluded that:

an “official proceeding” under § 1512(c)(2) does not include any and all series of actions before Congress; rather, the proceeding must be akin to a formal hearing.

Sandlin, at p.3. The Court then analyzed whether the January 6, 2021 Joint Session was such an official proceeding by considering the totality of the possible outcomes during the electoral college vote certification. The court noted as follows:

The Joint Session thus has the trappings of a formal hearing before an official body. There is a presiding officer, a process by which objections can be heard, debated, and ruled upon, and a decision—the certification of the results—that must be reached before the session can be adjourned.

Sandlin, at p. 4. The reasoning of *Sandlin* thus ought not be controlling in this case, as the defendants in that case did not attempt to parse out the different aspects of the January 6, 2021 Joint Session.

In United States v. Caldwell, 21 Cr. 28 (APM), Judge Meta did not directly address the issue as to whether every event before Congress constituted an official proceeding, but concluded that even if some proceedings were not official, the formality of the January 6, 2021 vote certification was sufficient under the statute:

neither of those cases [relied upon by the defense] touched on the question of whether “a proceeding before Congress” should be construed narrowly to encompass only a subspecies of congressional proceeding. But even by their logic, the Certification of the

Electoral College vote exudes “formality” and involves a “formal convocation” of Congress.

Caldwell, DE 558 at p. 11.

The *Caldwell* court was likewise not presented with the issue raised in this case – whether an “official proceeding” includes Congress assembling for the limited purpose of tallying the state electoral college votes, particularly when it is not a legislative function, but a responsibility imposed by the Constitution under the Executive power defined by Article II? With all due consideration of the decisions rendered by judges in this jurisdiction, the defense continues to believe that the answer to this question is no.²

Finally, although the Government attempted to minimize the importance of comments made by various Senators concerning the role of Congress in the vote certification, the following

² The Government submitted notice of two additional decisions from this jurisdiction after filing its Opposition: *United States v. Nordean*, 21 Cr. 175 (TJK) at DE 264 and *United States v. Montgomery*, 21 Cr. 46 (RDM) at DE 87. The *Nordean* court agreed with *Sandlin*, holding that not every legislative proceeding satisfied the requirement of an official proceeding under 18 U.S.C. Section 1512(c)(2), but that it required “some formal convocation” of the Legislative Branch. *Nordean* at p. 10. The court discussed the procedures for the Joint Session, noting that:

the Joint Session must follow specific steps: the President of the Senate (the Vice President) must open the votes, hand them to two tellers from each House, ensure the votes are properly counted, and then call for written objections, which must be signed “by at least one Senator and one Member of the House of Representatives.” 3 U.S.C. § 15. Once any objections are “received and read,” they must be “submitted” to both the Senate and the House of Representatives for their decision.

Nordean, at p.10. The decision thus did not address the core argument advanced in this case.

Likewise, in *Montgomery*, the Court concluded that not every event before Congress would satisfy the “official proceeding” requirement of the criminal statute. Judge Kelly reasoned that:

The Court, accordingly, concludes that “a proceeding before the Congress” requires more than “an action or series of actions” and that not every event occurring within the walls of Congress constitutes an “official proceeding.” The “proceeding” must involve a formal assembly or meeting of Congress for the purpose of conducting official business.

The *Montgomery* Court concluded that the January 6, 2021 Joint Session satisfied this test, but again, did so by referencing both components of the vote certification process. These decisions are not binding on this court, although they are considered persuasive authority. *Committee On Oversight And Government Reform, U.S. House of Representative v. Sessions*, 344 F.Supp.3d 1, 14 (D.D.C. 2018).

account of the proceedings from January 6, 2021 confirms the extraordinarily limited and ministerial nature of Congress' responsibility to count the vote totals. After the Senate and the House convened in the Joint Session, a representative made a "parliamentary inquiry" concerning the procedure for making a future inquiry or objection, since House members were relegated to the gallery because of COVID protocols. The following is the colloquy between the Congressman and Vice President Pence:

Mr. GRIFFITH. Mr. Vice President, parliamentary inquiry.

The VICE PRESIDENT. The gentleman from Virginia will state his parliamentary inquiry.

Mr. GRIFFITH. Mr. Vice President, in order to follow the Speaker's instructions that only a limited number of people be on the floor, may I ask how one would make an objection or make a parliamentary inquiry in the future if you are not on the floor but in the gallery.

The VICE PRESIDENT. Under section 18 of title 3, United States Code, debate is not permitted in the joint session.

Mr. GRIFFITH. Further parliamentary inquiry.

Mr. Vice President, I am not attempting to debate. I am trying to find out how a parliamentary inquiry or a parliamentary point of order would be made in following with the Speaker's request that most of us not be on the floor. How do you make one of those points of order when you don't know what is going to happen later?

The VICE PRESIDENT. **Respectfully, the gentleman's parliamentary inquiry constitutes debate, which is not permitted in the joint session under section 18 of title 3, United States Code.**

Congressional Record, Volume 167, House of Representative January 6, 2021 (Counting Electoral Votes) at p. H76 (emphasis added).

In the final analysis, legislators were not even allowed to make parliamentary inquiries during the Joint Session. Notwithstanding its formality and importance, the Joint Session that convened on January 6, 2021 to receive the previously cast state electoral college votes and count them was not an "official proceeding" within the meaning of 18 United States Code Section 1512(c)(2) and the charges in Counts One and Two against defendant DeCarlo should be dismissed as a matter of law.

2. The Statute Is Void For Vagueness As Applied To Defendant DeCarlo

The Indictment in this case concludes that the defendant “corruptly attempted to and did corruptly obstruct, influence, and impede” an official proceeding. The factual allegations contained in the Indictment, however, would not have given Mr. DeCarlo – or any other reasonable person – notice that his conduct would run afoul of this criminal provision.

The first eleven paragraphs of the Indictment simply recite general factual allegations about the 2020 Presidential Election and the events of January 6, 2021. They are not specific to defendant DeCarlo, but rather constitute “boilerplate” allegations made in many of the other Capitol Hill cases. Paragraph twelve is a denunciation of the “Proud Boys,” but the Indictment does not anywhere else allege that Mr. DeCarlo (and/or his co-defendant Nicholas Ochs) traveled to the Capitol on January 6, 2021 as a member of that organization.³ As noted in the defendant’s motion to dismiss, the operative factual paragraphs concerning his conduct are very limited and allege that he: (1) entered the Capitol building after it was breached by others; (2) traveled through the building; (3) took photographs and videos and posted them to social media; (4) wrote the words “MURDER THE MEDIA” on an exterior door in washable magic marker; and (5) stole a pair of flex handcuffs. DE 17 at paras. 24-28 (Indictment). Under these circumstances and with the caveat that defendant DeCarlo is alleged by the Government to have conspired only with his co-defendant, as a matter of law these allegations fail to apprise the defendant that his conduct would subject him to criminal liability for “corruptly” attempting to obstruct the vote certification.⁴

³ In this inquiry the Court is limited to the four corners of the Indictment, but the defense does not believe that the Government can allege that the defendant traveled to the Capitol as part of a “Proud Boy” group.

⁴ So the record before the Court, is clear, prior to filing the Motion To Dismiss, undersigned wrote to the Government, inquiring as to whether the defendant was alleged to have conspired with anyone else other than his co-defendant. In the interest of transparency, undersigned advised that the information was to be used in connection

In response, the Government has been forced to rely upon information outside the parameters of the Indictment. In particular, the prosecution makes the circular argument that even if the defendants did not conspire with other member of the crowd, they entered the Capitol as “part of a mob.” Gov. Opp. at p. 27. The Government continues with the following:

The riot relied on numbers to overwhelm law enforcement. As any reasonable person would understand, a mob can (and did) threaten and disrupt Congress in a way that one individual likely cannot. DeCarlo notes that he was not on the Senate Floor, but the Senate was evacuated before *any* rioters entered; at that moment, the certification had surely been obstructed, though no Senator may have been aware of any particular individual’s presence, nor had any person breached the gallery or the Senate Floor. Staffers hiding under their desks were likely not aware of any specific rioter’s presence, but the threat of a mob that had overrun the barriers outside was enough.

The problems posed by this argument are twofold. First, the Government is actually asking that this Court consider the conduct of others in determining the reasonableness of the charges against this defendant. But more importantly, none of the Government’s observations demonstrate how a reasonable person would have known that entering the Capitol, traversing the building – and committing two misdemeanors inside – would subject you to criminal punishment for obstruction of an official proceeding, when you were nowhere near the proceeding (and indeed, it had already been suspended before you entered the Capitol). That point is exemplified by the way in which the Government has chosen to charge the Capitol Hill cases. Even allowing for prosecutorial discretion in the nature and number of charges, the inconsistency in charging reflects the insurmountable problem in identifying what conduct constitutes obstruction of an “official proceeding.”

In each of the following representative cases, the defendants are charged with committing violent acts inside of the Capitol building and complex, some while armed with dangerous or

with a motion to dismiss. The Government responded that Mr. DeCarlo was alleged to have conspired only with his co-defendant Mr. Ochs, subject to any additional investigation. *See* Gov. Opp. at fn.9 (DE 58). The defense is not aware that any additional investigation has occurred since the parties communicated about this issue.

deadly weapons – yet none of them were charged with a violation of 18 United States Code Section 1512(c)(2):

United States v. Alberts, 21 Cr. 26 (CRC), the defendants are charged in a nine count Indictment with, *inter alia*, entering the Capitol with a deadly or dangerous weapons and assaulting members of the Capitol police, but are not charged with obstruction of an official proceeding.

United States v. Bauero, 21 Cr. 702 (JEB) the defendants are charged with entering the restricted area within the United States Capitol and assaulting a member of the Metropolitan Police Department, but not a violation of 18 United States Code Section 1512(c)(2) .

United States v. Westbury, 21 Cr. 605 (RL), the defendants are charged with assaulting a police officer with a dangerous weapon and committing physical violence inside the Capitol, but not the obstruction conspiracy charge.

United States v. Jenkins, 21 Cr. 245 (APM), the defendants are charged with assaulting police officers with a dangerous weapon as well as engaging in disruptive and physical violence inside of the Capitol. The Government did not indict them for obstruction of an official proceeding.

The *United States Attorney's Manual* is emphatically clear that once a decision to charge a defendant has been made:

the attorney for the government should charge and pursue the most serious, readily provable offenses. By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.

USAM at 9.27.300. When measured against this admonition, it is impossible to see a principled basis to distinguish why charges were brought against some defendants for felony obstruction of an official proceeding and not against other, seemingly more culpable, defendants. The use of violence and/or a dangerous weapons does not appear to be the distinguishing factor. As the Court knows, hundreds of defendants who were present inside of the Capitol on January 6, 2021 and whose behavior was consistent with Mr. DeCarlo's conduct were charged with only misdemeanors. The inconsistency in charging decisions reflects the almost insurmountable problem in identifying what conduct falls within the obstruction statute and what conduct does

not. For that reason alone, this Court should dismiss Counts One and Two against Mr. DeCarlo as being void for vagueness and failure under the due process clause to give fair notice.

CONCLUSION

For all of the foregoing reasons the defendant respectfully requests that this Court dismiss Counts One and Two of the Indictment. As previously noted, the defendant does not ask for this relief lightly but as a matter of law, the defense should prevail upon its legal theories.

Respectfully submitted,

Robert Feitel

Robert Feitel, Esquire
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
D.C. Bar No. 366673
202-255-6637 (cellular)
202-450-6133 (office)
RF@RFeitelLaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via ECF to Assistant United States Attorney (detainee) Alexis Loeb, 555 4th Street, N.W. Washington, D.C. this 10th day of January, 2022 and to counsel for co-defendant Nicholas Ochs.

Robert Feitel

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