**UNITED STATES DISTRICT**
**FOR THE DISTRICT OF COLUMBIA**

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| **UNITED STATES OF AMERICA** | ) | |
| | ) | |
| **v.** | ) | Case No. 21-cr-00088-DLF |
| | ) | |
| **RONALD SANDLIN, ET AL,** | ) | |
| | ) | |
| Defendants. | ) | |

**DEFENDANT DEGRAVE'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANT SANDLIN'S MOTION TO DISMISS**

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**INTRODUCTION**

A ceremonial meeting of the two Houses of Congress where they serve no constitutional function other than as witnesses is not an "official proceeding". That is the only legitimate constitutional role of the Congress with regard to the counting of electoral votes.

Every other action by Senators and Representatives beyond serving as witness is a usurpation of authority not granted to them by the United States Constitution and the Amendments thereto. Because the presence of Congress on January 6 was a ceremonial function, it falls outside the scope of an "official proceeding" as used by Congress in drafting Section 1512(c) – whatever that term may mean.

If "corruptly obstructing an official proceeding" is prohibited by Section 1512(c), then "non-corruptly obstructing an official proceeding" must be lawful. The exception – acting "corruptly" – establishes the rule, i.e., obstruction of an official proceeding is otherwise not a crime.

A system of laws cannot function on the government's proffered mechanism for distinguishing lawful from unlawful obstruction in this circumstance -- "The jury will figure it out." It is legal sophistry to claim that the defects in the statute raised by this motion can be fixed through this Court's fashioning of instructions for a lay jury to distinguish "corrupt" obstruction from "non-corrupt" obstruction.

But that is the secondary consideration, not the primary one. The more important problem exposed by this motion is that the language employed by Congress in writing Section 1512(c) does not provide clear and fair warning to the governed about where the line is drawn between those two types of "obstruction". The drafting of Section 1512(c) came only after the appellate court in this Circuit put Congress on notice that the use of the term "corruptly" in Section 1505 did not meaningfully describe illegal conduct in a constitutionally sufficient manner.

> "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Connally v. General Construction Company, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). In particular, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct it prohibits, and do so in a manner that does not invite arbitrary and discriminatory enforcement by which "policemen, prosecutors, and juries ... pursue their personal predilections." Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).

United States v. Poindexter, 951 F.2d 369, 378 (D.C. Cir. 1981)

Hence the dilemma of the defendants in this case – in advance of their approach to the Capitol on January 6, how did the language of the penal statute Section 1512(c) provide to them the "sufficient definiteness" required such that they knew where lawful "non-corrupt" obstruction on their part ended and unlawful "corrupt" obstruction on their part is alleged to have begun?

## I. The Meeting of Congress on January 6 was not an "Official Proceeding".

If the meeting of Congress on January 6 was not an "official proceeding", then Counts One and Two of the Superseding Indictment fail as a matter of law, as Section 1512(c) only applies to "official proceedings."

The language of the statute is not helpful in any respect.

As the government notes in its opposition, § 1515(a)(1)(B) defines an "official proceeding" as including "a proceeding before the Congress."

By that language, an "unofficial" proceeding before Congress would not be "a proceeding before the Congress" as contemplated by the statute.

Is there such a thing as an "unofficial" proceeding before Congress?

Are "Special Orders" – speeches given by House Members on the floor of an empty House chamber, except for a few staff members present, and CSPAN cameras rolling – "official" or "unofficial" proceedings before Congress?

> Special order speeches (commonly called "special orders") usually take place at the end of the day after the House of Representatives has completed all legislative business. During the special order period, individual Representatives can deliver speeches on topics of their choice for up to 60 minutes. Special order speeches give Members a chance to speak outside the time restrictions that govern legislative debate in the House and the Committee of the Whole. These speeches also provide one of the few opportunities for non-legislative debate in the House, where debate is almost always confined to pending legislative business.

*Id.* at p. 1.

Would interfering with the television signal in order to prevent the broadcast of Special Order speeches be obstructing an "official proceeding" under Section 1512(c)? If so, why? If not, why not?

What about non-legislative proclamations and commissions issued and/or paid for by congressional funding or appropriations?

> Since its inception, Congress has used commemoratives to express public gratitude for distinguished contributions; dramatize the virtues of individuals, groups, and causes; and perpetuate the remembrance of significant events. The first commemoratives were primarily in the form of individually struck medals. During the 19th century, Congress gradually broadened the scope of commemoratives by recommending special days for national observance; funding monuments and memorials; creating federal holidays; authorizing the minting of commemorative coins; and establishing commissions to celebrate important anniversaries. In the 20th century, it became increasingly commonplace for Congress to use commemorative legislation to name buildings and other public works, scholarships, endowments, fellowships, and historic sites.

*Id.* at p. 1.

Could interference with such commemoratives or commissions created to celebrate important people, places, or things be deemed obstructing an "official" proceeding before the Congress?

If yes, is there any limiting principle with respect to what are "official" – as contrasted with "unofficial" -- proceedings before the Congress?

The government fails to address the question. Instead, it retreats to defend on the ground that no matter what the contours of "official" and "unofficial" proceedings might be, the meeting of Congress on January 6 clearly falls within any definition of an "official proceeding" that one might conjure up. This is because of the "solemn" and "formal" nature of the proceedings set to transpire on that day. Opp. Memo. at p. 7.

But the solemn and formal proceedings relied upon by the government are on their face unconstitutional and following through with those proceedings was an unlawful act.

The Twelfth Amendment to the United States Constitution provides the sole legitimate process for receiving and counting the votes of the Electoral College. It does not require or suggest a "Joint Session" of Congress as repeatedly claimed by the government in its opposition. The Amendment provides, in pertinent part:

> ….The President of the Senate shall, <u>in the presence</u> of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; [Emphasis added.]

The only reference to Congress is that the opening of "certificates" received from the individual states shall be done "in the presence of" Congress. The members of Congress are witnesses, not participants, of the procedure set forth in the Twelfth Amendment. If a person receives a majority of the whole of all votes cast by Electors that person is President without any participation --- or "***<u>certification</u>***" – by the Congress in determining that fact.

A contrary process that might be imagined – and not in compliance with the Twelfth Amendment – could involve the certificates being opened and electoral votes counted in the White House or Naval Observatory -- beyond the ability of the States' federal elected representatives to

observe. The Electoral Votes are, after all, the votes of Electors from each of the States, giving the elected representatives an interest in being able to observe the votes as they are being counted, which is what the Twelfth Amendment affords.

Another contrary practice that might be imagined – also not in compliance with the Twelfth Amendment – could involve members of Congress "objecting" to certificates, and then voting amongst themselves to not allow some Electoral votes reflected on the certificats to be included in the final count.

Such a process would find as much support in the Twelfth Amendment as would the process of having the certificates opened and counted in the White House or Naval Observatory – meaning none at all.

Yet it is just this "solemn" and "formal" – and unconstitutional – process which the government relies upon to claim that the meeting of Congress on January 6 was an "official proceeding".

This process for counting the votes of the Electoral College was adopted by constitutional amendment pursuant to Article V of the Constitution.

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution… [which] shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof….

The Twelfth Amendment was ratified by the required number of States in 1804. The Twelfth Amendment itself has never been amended through the same process under Article V since 1804.

In 3 U.S.C. § 15 Congress created statutory processes and procedures for involving itself in the counting of Electoral College votes that are contrary to and in conflict with the Twelfth Amendment. Congress created for itself a procedure which includes the authority to invalidate

Electoral Votes received from the States, and engage in a process for selecting the President and Vice-President not in accord with the provisions of the Twelfth Amendment.

The express provisions of § 15 which conflict read as follows:

> 1. "Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any."

The Twelfth Amendment gives no power to the President of the Senate to call for objections to votes as received. He is directed by the Constitution only to open the certificates received.

> 2. "Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received."

The Twelfth Amendment gives no authority to Members of the House or Senate to object to Electoral Vote Certificates received.

> 3. ***When all objections so made*** to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and ***such objections shall be submitted to the Senate for its decision***; and ***the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision***; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but ***the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified***. [Emphasis added.]

There is no provision of the Constitution, in the Twelfth Amendment or elsewhere, that confers upon Congress the authority to reject the casting or counting of Electoral Votes cast through the Electoral College.

Section 15 continues in similar fashion for several more sentences, all equally unconstitutional as the passages highlighted above.

All these procedures are facially unconstitutional as they arrogate to Congress, via statute, authority on matters that are expressly governed by the Constitution, with such authority conferring upon Congress an illegitimate ability to alter the outcome of the Electoral Votes cast through the Electoral College.

Whatever the process might have been on January 6, it was not a legitimate "official proceeding" as is necessary for the the government to sustain the prosecution in this matter. The presence of Congress was required in a fashion that made them witnesses to a ministerial act by the President of the Senate – nothing more. The votes had already been cast and the certificates had already been delivered.

No "proceeding" was obstructed as the outcome of the ministerial act by the Vice President was preordained, always certain, and not subject to lawful alteration by Congress due to the exhortations of the crowd.

## II. If the Government Cannot Describe in Plain and Unambiguous Language the Difference Between "Corrupt Obstruction" and "Non-Corrupt Obstruction" Then It Should Not Be Allowed To Seek to Imprison Defendants For Not Understanding that Distinction as Reflected in their Actions.

> We must acknowledge that, on its face, the word "corruptly" is vague; that is, in the absence of some narrowing gloss, people must "guess at its meaning and differ as to its application."
>
> U.S. v. Poindexter, 951 F.2d at 378.

The importance of "people" in this quote is not the "people" on a petite jury. Rather, the importance of "people" is in its reference to individuals who the government accuses of acting in a criminally corrupt fashion.

The issue here is not whether Congress could have written 1512(c) with greater precision and clarity. Rose v. Locke, 423 U.S. 48, 49 (1975) (per curiam). The issue is simply whether it is

reasonable to hold Mr. DeGrave to a standard of knowing from the language that Congress did use where the boundary was between "corrupt" and "non-corrupt" obstruction in his conduct.

The government cites United States v. Williams, 553 U.S. 285, 306 (2008) for the proposition that a statute is not "void for vagueness" simply because the language of the statute makes it difficult to determine when an incriminating fact exists.

But Williams does not help the government, it reveals the flaw in the government's defense of the statute. Williams makes clear that "state of mind" requirements in a statute are subject to "yes" or "no" determinations, and those answers can be based on objective facts from which inferences can be drawn.

> Whether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment such as whether conduct is "annoying" or "indecent"… To be sure, it may be difficult in some cases to determine whether these clear requirements have been met. "But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred."
>
> What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.

*Id*. at 306-07.

Clearly, the government believes it can prove "corruptly" through use of the words and conduct of the defendants. But which words? And what conduct? How is it about these specific words and acts establish that the defendants acted "corruptly"? How is "corruptly" meaningfully different from "annoyingly" or "indecently" which the Supreme Court has held to be too subjective and indeterminate for criminal liability to be attached to them as the Court noted in Williams?

**CONCLUSION**

Having been joined in this case by the government through a superseding indictment after pending on the docket of another District Judge a lone defendant for approximately eight months, and with the motion by Defendant Sandlin already having been filed, Defendant DeGrave has had only a minimal amount of time to fully review and research the extensive briefing done by Defendant Sandlin and the Government with regard to the complex legal issues raised here. Defendant DeGrave joins in all the arguments made by Defendant Sandlin, but reserves the right to file additional briefing on these issues on his own behalf according to the trial schedule for motions set by this Honorable Court.

Date: October 16, 2021

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, John M. Pierce, hereby certify that on this day, October 15, 2021, I caused a copy of the foregoing document to be served on all counsel through the Court's CM/ECF case filing system.

/s/ John M. Pierce
John M. Pierce