

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF THE DISTRICT OF COLUMBIA

UNITED STATES,)	
)	
v.)	Crim. No. 21cr268
)	Hon. Carl J. Nichols
JEFFREY McKELLOP,)	
Defendant.)	

**DEFENDANT’S REPLY TO GOVERNMENT’S OPPOSITION TO
MOTION TO DISMISS**

Comes now Defendant Jeffrey McKellop, by counsel, and replies to the government’s Opposition (Doc 116) to Defendant’s Motion to Dismiss (Doc 114).

The government cites to venue decisions adverse to defendant movants—all of which entailed adverse pre-trial **media** coverage. By contrast, the audience of the broadcast subject of the motion at bar, and those with whom those audience members spoke, were exhorted to hate the January 6th defendants not by a journalist, but by the highest authority in the land: the President of the United States. Certainly, a President’s screed poisons a jury pool of citizens no less than a command preference inferred among soldiers. The government elects utterly to ignore this essential point—the impermissible preclusion **by the state** of “a forum where impartiality is not impaired,” as decried in *United States v. Thomas*, 22 M.J. 388, 393 (1986).

The leader of the Executive Branch has committed prosecutorial misconduct of the highest order. The President’s conduct is inarguably no less significant than that of a federal prosecutor, his Executive Branch agent. A prosecutor’s poisoning of a jury pool stands among the most egregious examples of prosecutorial misconduct.

“[Having done so] breached all standards of prosecutorial ethics, gave the government a surreptitious advantage in influencing public opinion, the venire panel, and the trial itself.

United States v. Bowen, 799 F. 3d 336, 353 (5th Cir. 2015).

Such conduct by a prosecutor falls within:

“the category of errors capable of infecting the integrity of the prosecution to a degree warranting a new trial irrespective of prejudice.

Id.

In fact, the President has arguably violated the very statute which the government has invoked - and which this Court has pointedly refused to apply - against many Capitol rioters: 18 U.S.C. Sec. 1512. *United States v. Miller*, DDC 1:21-CR-119, Doc 72; *United States v. Fischer*, DDC 1:21-CR-234, Doc. 64; *United States v. Lang*, DDC 1:21-CR-53, Minute Order June 7, 2022; and *United States v. Haya*, DDC 1:21-CR-565, Doc 28. A federal felony prosecution unquestionably qualifies as an “official proceeding,” and the President’s poisoning of the jury pool has obstructed the conduct of an impartial trial.

President Biden’s extreme misconduct compels an admittedly extreme remedy: dismissal.

“Under its supervisory powers, the court may dismiss an indictment with prejudice as a sanction for prosecutorial misconduct... [T]he court may exercise this authority only in extreme circumstances.

United States v. Slough, 679 F.Supp.2d 55, 60–61 (D.D.C. 2010).

The President’s speech has clearly prejudiced Defendant. However, the gravity of the President’s misconduct obviates the need to demonstrate prejudice.

“[S]erious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused.

United States v. McCord, 509 F.2d 334, 349 (D.C. Cir. 1974).

The President’s disparagement of January 6th defendants has so polluted this prosecution.

The charges against Defendant should be dismissed.

Respectfully submitted,

JEFFREY McKELLOP
By Counsel

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Certificate of Electronic Service

I hereby certify that on September 26, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, with consequent service on all parties

/s/
John C. Kiyonaga