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UNITED STATES DISTRICT AND BANKRUPTCY COURTS
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Criminal No. 21-CR-00234
v. Washington, D.C.
JOSEPH W. FISCHER, February 28, 2022
Defendant. 1:00 p.m.

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TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE CARL J. NICHOLS
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE COURTROOM DEPUTY: Good afternoon, Your Honor. This is Criminal Case Year 2021-234, United States of America versus Joseph W. Fischer. Counsel, please come forward and introduce yourselves for the record, beginning with the government.

THE COURT: Let me just note that as it pertains to masks in the courtroom, my view is that whoever is at the podium should feel free to take his or her mask off. I would ask everyone else in the courtroom to stay masked. Otherwise but if you're at the podium, I found that it helps me hear, it helps the court reporter hear, it helps opposing counsel hear if you take off your mask.

MS. LOEB: Good afternoon, Your Honor. Alexis Loeb for the United States. With me is my colleague, James Pearce.

THE COURT: Counsel.

MS. ULRICH: Good afternoon, Your Honor. Lori Ulrich for Joe Fischer, along with my co-counsel, Eugene Ohm.

THE COURT: Counsel.

So we're here principally on Mr. Fischer's motion to dismiss Counts One, Three, Four and Five of the superseding indictment. I think we need to arraign Mr. Fischer first on the superseding indictment. Correct? Why don't we do that first and then we'll proceed to the motion?

THE COURTROOM DEPUTY: Ms. Ulrich, please come

1 forward. May the record reflect that defendant, Joseph W.
2 Fischer, and counsel have received a copy of the superseding
3 indictment. Do you wish to waive the formal reading of the
4 seven-count superseding indictment and enter a plea?

5 MS. ULRICH: Yes.

6 THE COURTROOM DEPUTY: And how do you all wish to
7 plead?

8 MS. ULRICH: Not guilty.

9 THE COURT: Thank you, counsel. You might as well
10 stay at the podium. It's your motion. I'd like to treat this
11 as a, what would be your typical oral argument. Hear from
12 defense counsel on the motion, hear from the government and
13 then I'll give the defense time for a brief rebuttal at the
14 end.

15 So I'm happy to hear from you on all the issues.
16 I'll have questions -- I think -- let me just say a few
17 things. The two issues that are most interesting or I think
18 difficult for me are, one, whether it can be said that Vice
19 President Pence was temporarily visiting the Capitol or
20 whatever location we are describing here because I think
21 that's -- we need to define what the location is that he's
22 temporarily visiting, but whether he could be said to be
23 temporarily visiting in light of his status as president of
24 the Senate and the fact that his role at the time at least in
25 part was as president in the Senate. So that's one issue.

1 And the second issue is as to 1512(C)(2) isn't
2 really whether -- I mean I'll hear you on this question, but
3 is not really whether the proceedings in Congress were an
4 official proceeding. Obviously, all of my colleagues to
5 address that issue have found that they were. But is really
6 trying to figure out what work (C)(1) and (C)(2) are doing
7 together, how they can be read correctly together. And in
8 your view, what if anything (C)(2) covers that is not covered
9 by (C)(1) on your reading. So again I'm happy to hear from
10 you on all issues, but those are the two things in particular
11 that I will want to focus on at some point.

12 MS. ULRICH: Okay. I was kind of focusing on them
13 myself, more so the official proceeding even though I know
14 there are now ten opinions rejecting my argument. So I will
15 start -- I'll start with our position on Counts I think it's
16 Four and Five and whether or not the vice president could be
17 temporarily visiting the Capitol. So if the Court's okay,
18 I'll start with that.

19 I think it's -- the reading of the statute is plain.
20 It's our understanding the vice president has an office at the
21 White House. He has an office at the Capitol. He was
22 presiding over the Senate and the count that day in the House.
23 And therefore, our position is he could not be temporarily
24 visiting his office --

25 THE COURT: He doesn't -- I don't think it's really

1 disputed or at least the facts could show that he did not
2 regularly visit that office or work out of that office and in
3 any event, that office is on as I understand it the Senate
4 side and at least for part of the certification, he was
5 supposed to be on the House side. Correct?

6 MS. ULRICH: Yes. The certification was in the
7 House. But the Capitol is -- I wouldn't break down like this
8 courthouse into separate offices or separate floors. I mean
9 it is one building. And when you come to the federal
10 building, you're coming to your office. And I don't believe
11 when I go to my office even though there's a lot of different
12 agencies there, I'm not temporarily visiting and even if I go
13 in on a Saturday, am I temporarily visiting my office? I
14 think temporarily visiting is clear. It's plain. And it is
15 our position that the vice president does not temporarily
16 visit the Capitol and we're looking at it as one building, the
17 Capitol, where he had an office and he presides over the
18 Senate.

19 THE COURT: What about Vice President Pence's family
20 members who are with him?

21 MS. ULRICH: Well, that would be a harder argument.
22 That's not in the indictment and I know in some of my other
23 cases, the government threw that in there. But it's not --

24 THE COURT: The government notes that in the briefs
25 here. But if hypothetically speaking, I thought that the vice

1 president could not temporarily visit the Capitol on
2 January 6th in the context that we're talking about and if I
3 thought that his family members could, is there enough in the
4 record before me to deny your motion as to that count or those
5 counts?

6 MS. ULRICH: No. Because I certainly -- it's
7 certainly not a fact that the government -- it's nothing that
8 the government established factually or have alleged. I'm
9 fairly certain that's not in the indictment. And it's
10 certainly not anything they've established factually. But our
11 position is really based on the --

12 THE COURT: well, they wouldn't have to establish it
13 factually now. That would be for trial just as Vice President
14 Pence's presence would be an issue that they would have to
15 prove, assuming it wasn't stipulated to. But for purposes of
16 a motion to dismiss the indictment, do they have to have in
17 the indictment each name of each person who was temporarily
18 visiting in the sense used by the statute?

19 MS. ULRICH: It's our position that the answer to
20 that question is yes I mean because we're here defending
21 whether the vice president could temporarily be visiting. He
22 had an office there. I mean I don't disagree it is a harder
23 argument for us if they allege that his family was there.
24 That would be a harder argument under the statute --

25 THE COURT: would you make that argument?

1 MS. ULRICH: That's a good question. Would I make
2 it? I don't know that I would make that argument.

3 THE COURT: I know you have other arguments about
4 what the statute covers. I'm just talking about the specific
5 question of the vice president's temporary visit and if we're
6 talking about someone who isn't the president of the Senate,
7 who doesn't have a statutory and constitutional role in the
8 proceedings that are going on, for example, his wife or a
9 child, it seems to me that those arguments about the vice
10 president would not apply and you'd basically agree with that?

11 MS. ULRICH: Yes. I do.

12 THE COURT: Yeah. All right. Do you want to
13 address the other arguments about that statute and whether,
14 for example, the Secret Service is the entity that has to
15 create the perimeter and the like?

16 MS. ULRICH: No. We're actually -- I'm glad you
17 brought that up. We're not -- we are withdrawing that. We're
18 not pursuing that argument that the Secret Service has to be
19 the one doing the cordoning off.

20 THE COURT: So is the only argument about those two
21 counts then about Vice President Pence's status that day?

22 MS. ULRICH: Yes.

23 THE COURT: Got it. Okay. And then so if we are
24 talking about somebody other than Vice President Pence, that
25 motion would be very likely withdrawn or not filed?

1 MS. ULRICH: Yes. Yes.

2 THE COURT: Okay.

3 MS. ULRICH: Okay.

4 THE COURT: All right. So I'm going to go on to the
5 other arguments then.

6 MS. ULRICH: So on the official proceeding and I
7 didn't bring the (C)(1) statute. I can't phone a friend.

8 THE COURT: I know it pretty well at this point.

9 MS. ULRICH: So I mean obviously, we're here under
10 (C)(2) --

11 THE COURT: It looks like you may have a friend.

12 MS. ULRICH: What's that? Oh, that would be
13 awesome.

14 THE COURT: So I understand the arguments here quite
15 well. I have before me in another matter, the United States
16 versus Miller, similar arguments presented slightly
17 differently. So I understand the arguments pretty well.

18 What I'm trying to understand is in your -- the way
19 you interpret the statute, what if anything would 1512(C)(2)
20 cover that isn't covered by (C)(1)?

21 MS. ULRICH: I do believe like the January 6
22 Commission right now would be covered by (C)(2). That you
23 said that -- wait. Did you say that would be covered by
24 (C)(1) and not (C)(2)?

25 THE COURT: That would be covered by (C)(2), but not

1 (C)(1). So it seems to me that (C)(2) should in a correct
2 interpretation of the statute apply to some conduct that is
3 not covered by (C)(1). I mean we can talk about how much
4 more, but there really shouldn't be a debate in my view about
5 that question. And so my question is in your view, what would
6 (C)(2) cover that is not covered by (C)(1)?

7 MS. ULRICH: Okay. So for instance, in this
8 January 6 Commission, I think that could conceivably be an
9 official proceeding because the commission is they are
10 subpoenaing records, they are subpoenaing individuals. If
11 those individuals go in there and they lie, I think that the
12 government would have a good argument under (C)(2) that that
13 is in fact an official proceeding because now you've got
14 adverse parties that are being directed to appear that
15 presumably they are going to be under oath and presumably if
16 they present or give them false documents, even (C)(1) would
17 apply in that instance and that would be an official
18 proceeding. So and our position, that's what we think would
19 cover on January 6 Commission.

20 THE COURT: So assume the January 6 Commission is an
21 official proceeding. If a defendant or if somebody stormed in
22 and did something, maybe called in a bomb threat to prevent
23 the day from happening, the committee hearing day or stormed
24 in with the intent of disrupting or stopping it, would that be
25 sufficient in your view?

1 MS. ULRICH: well, I don't -- I can't say even that
2 under those facts. when I look at this statute, this statute
3 is to protect witnesses, it's to protect informants, the
4 integrity of proceedings. So when I look at this, I look at
5 it more as like somebody that was going to go in front of
6 Congress and lie or they're going to present some false
7 documents because (C)(2) was enacted -- that was really under
8 the Sarbanes Oxley Act of 2002 and it was really meant to
9 address corporate fraud and so I don't know. I'd have to
10 think that one through. But someone storming the Capitol, I
11 think there's other offenses that apply there.

12 THE COURT: But that's true also of lying under
13 oath.

14 MS. ULRICH: well, I do think this would -- but
15 lying under oath is captured here because that would be
16 obstructing in a January 6 Commission example. Lying under
17 oath is certainly I think something that -- you know, and then
18 you have to look at the word "corruptly." That would
19 obstruct, influence, impede official proceeding or give them a
20 false document. when I think of 1512, that's how I think of
21 it in that context. That it's really not like storming into
22 some place to stop something from happening. It's more like
23 we had the Poindexter case where he lied to Congress or, you
24 know, people that have presented false documents. That's kind
25 of what I think 1512, witnesses, victims, informants, jurors,

1 grand jurors. When I look at 1512, I feel that is what --
2 that's the purpose of 1512 and I think that was the idea when
3 it was enacted in 1982. And then in 2002, they added this
4 section which is what we're here for and that was really for
5 the corporate fraud issues.

6 THE COURT: Right. But what I'm struggling with
7 even with respect to your position is that there are already
8 statutes that govern perjury and lying to official bodies,
9 whether it's Congress or in a court proceeding or can't make
10 false statements to the government.

11 MS. ULRICH: That's right.

12 THE COURT: Why would we think that Congress added
13 1512(C)(2) to do that here?

14 MS. ULRICH: Well, when I look at that, the thing is
15 is and I know that we have the 1505 that was certainly the
16 statute in Poindexter and after that, they amended the
17 definition of corruptly to include, you know, if you
18 personally lie or you get someone else to lie. But when
19 they -- the thing is when they added that -- the definition of
20 official proceeding, that was there I think from the get-go in
21 1982. So when they added 1512 (C)(2), they didn't go back and
22 re-look at what an official proceeding is a proceeding before
23 Congress. They were looking at corporate fraud and
24 corporations that are presenting false documents. So the
25 definition of official proceeding was already there and it

1 included a proceeding before Congress.

2 But when I look at the cases and not the ten against
3 me that have rejected it here, but there's a few other cases
4 that like kind of go around the edges. One is United States
5 versus Guertin and that's a D.C. case by Judge McFadden here,
6 but it's not a rioter case. It was a case in which they went
7 in under the other prong of official proceeding and it was the
8 federal regulatory agency. And Judge McFadden noted that in
9 this case a gentleman had filled out his security clearance
10 falsely and the government prosecuted him under 1512 and they
11 said that can't be an official proceeding. And they look at a
12 formal tribunal or adjudicative body before which persons are
13 compelled to appear. Again it's not directly on point. But
14 it goes back to the purpose of 1512 and that is, you know,
15 we're here to protect the integrity of the proceedings. We
16 don't want people lying before Congress. We don't want people
17 lying before a court or a tribunal. We don't want them giving
18 us false documents. That was the purpose of 1512.

19 And then we have I think it was the Ramos case that
20 we cited in our brief again. It's a Fifth Circuit case.
21 Obviously, this court is not bound. But they noted the
22 statute was to protect the necessary role of crime victims and
23 witnesses in the criminal justice process.

24 And then the one opinion that I was struck by the
25 ten that reject my argument was Judge Bates in the McHugh

1 opinion here in D.C. and he went one step further and said
2 that okay, but it has to involve -- we agree it has to be
3 formal and but and we agree it has to be multiple entities and
4 then Judge Bates said the multiple entity is the electors even
5 though the electors weren't there on January 6th. So while,
6 you know, he went that one step further than the other
7 opinions, he also recognized that it has to be a little bit
8 more formal and there has to be two parties.

9 And our position, of course, is the January 6th
10 certification of the electoral college was really nothing more
11 than ceremonial or ministerial, if you will. It is our
12 position that there was nothing Congress could do to overturn
13 that election. The state had litigated all of the issues. It
14 was over and all they could do was certify. And even in the
15 indictment itself, it says the certification of the electoral
16 college and certification implies that that's all it is. They
17 are attesting to something. It's just a certification. So I
18 hope I answered the Court's questions on this. So for those
19 reasons, it is our position that the certification --

20 THE COURT: Do you have a view of what corruptly
21 means in this context or is your view more that it is
22 sufficiently vague or overbroad or I mean I guess it's the
23 whole statute is sufficiently infirm that it's not -- you
24 don't have to define it. You just have to know that it's
25 difficult to define.

1 MS. ULRICH: It is difficult to define and that's
2 what Poindexter found and I know all the other opinions have
3 said Poindexter is in and of itself it doesn't apply here,
4 it's been limited. But when I looked -- I re-looked at
5 Poindexter again, like the whole first part of the argument
6 was the word "corrupt" is vague. End of story. But then they
7 went into the legislative history and then they came up with
8 this whole other aspect that, well, he didn't personally lie
9 to Congress so it's unclear to us what corrupt is. So we're
10 going to reverse the conviction. And then they amended the
11 definition for 1505, but not for anything else in 1512. So it
12 is our position that even though the courts here have all
13 rejected is that, you know, corrupt is a vague word in the
14 criminal context. It's vague.

15 THE COURT: Okay. Let's talk about your first --
16 well, I guess one of your arguments, the Count One argument.

17 MS. ULRICH: Yes. Count One, the civil disorder.
18 So I don't have a lot to say about that. I was really more
19 just relying on my briefs. If you have specific questions on
20 that?

21 THE COURT: I mean why is it unclear that this was a
22 civil disorder? It seems pretty clear to me.

23 MS. ULRICH: Well, you know, I just think it's --

24 THE COURT: Specifically, where is the mishmash or a
25 lack of clarity as between the statute and what happened on

1 January 6th?

2 MS. ULRICH: I think that the language that and it's
3 not all that different than corrupt, it's any act to obstruct,
4 impede or interfere. That I think is to me the most troubling
5 language. Again, it kind of ranks up there with corrupt. I
6 know it's an act. And so I know the government's position is
7 that it's not speech. But we do think that it is vague, any
8 act to obstruct because people and again not really going to
9 the facts because we're not, you know, making --

10 THE COURT: But this is much more specific. It's an
11 act to obstruct, impede or interfere with any fireman or law
12 enforcement officer. It's very specific about the person.
13 That it's prohibiting the interference, obstruction or
14 impeding as it relates to. And then lawfully engaged in the
15 lawful performance of his official duties. So you have to
16 have a fireman or a law enforcement officer acting in the
17 scope of his or her official duties incident to and during the
18 commission of a civil disorder. So you have to also have a
19 civil disorder. Is it your view that this was not a civil
20 disorder?

21 MS. ULRICH: well, I think the point is what if I'm
22 there on January 6th and the sheer numbers are an obstruction?
23 I think there's like thousands of people there and that is
24 certainly obstructing the law enforcement and firemen were
25 there. But what if -- when I look at that, am I -- it doesn't

1 say I'm acting with an intent to obstruct --

2 THE COURT: So there may be some applications of
3 this statute in context of January 6th that might be at the
4 periphery of whether we are certain or not that it's within
5 the statute. But why isn't what's alleged to have happened
6 here sufficient?

7 MS. ULRICH: Because it says any act to obstruct,
8 impede or interfere and that's pretty much as far as it goes
9 in Count One. I could be there committing, you know,
10 committing what could be perceived as an act to obstruct
11 because I'm present with a thousand people that, you know,
12 half of which are there to interfere with this vote. And me,
13 that's not my purpose. I don't have an intent to obstruct.
14 But my mere presence there, my being in this crowd is
15 obstruction. It's obstructing. And this statute does not
16 charge -- is not charging -- the statute itself doesn't say
17 with the intent to obstruct.

18 THE COURT: Right. So let me put it a little
19 differently. The indictment here in your view I take it on
20 its face does not distinguish Mr. Fischer's conduct from
21 others who might have merely been milling about or something
22 like that, even though we know or at least the government has
23 put forward some information to suggest that he's more than
24 that. But the indictment at least on its face doesn't
25 distinguish between and among people who acted differently.

1 MS. ULRICH: It does not. But our challenge, of
2 course, is to the vagueness of the statute itself and we're
3 not --

4 THE COURT: But if Mr. Fischer's conduct was plainly
5 at the core of what everyone would understand the statute to
6 apply to, you can't bring a vagueness challenge then.

7 MS. ULRICH: Well, we're not making a vagueness as
8 applied. We're saying the statute is vague because it doesn't
9 have this intent element. So it really it doesn't -- you
10 know, I'm not really getting into his actions. I do think
11 that's something we would certainly argue if Your Honor goes
12 against us. We would be arguing to the jury during trial.
13 His actions then are certainly relevant. But for the legal
14 argument today, that's our position.

15 THE COURT: Thank you, counsel. Why don't I hear
16 from the government? As I said, unless there is anything
17 you'd like to say now, I will give you time for rebuttal.

18 MS. ULRICH: No, Your Honor. Thank you.

19 THE COURT: Thank you.

20 Ms. Loeb, I'm happy to hear from you in any order
21 that you'd like to take things. Obviously, I have some
22 questions about specific things I'm thinking about. But I
23 don't want to preempt your doing the argument in any order
24 you'd like.

25 MS. LOEB: Thank you, Your Honor. I thought I would

1 focus on responding to the points you discussed with defense
2 counsel. So starting with the issue of temporarily
3 visiting --

4 THE COURT: Yes.

5 MS. LOEB: -- I think Your Honor was correct to zone
6 in on the issue with the vice president's family members. And
7 one point I want to add which we did make in our brief is that
8 it would be pretty absurd for the statute to leave the public
9 official himself unprotected while protecting the family
10 members and --

11 THE COURT: I saw that point. It's not that he
12 would be unprotected. It would be that this one particular
13 criminal statute might not apply because of the unique nature
14 of the vice president in our constitutional structure, he may
15 have actually not been temporarily visiting this one
16 particular location. It could be a very sui, sui, sui generis
17 situation. It wouldn't distinguish between the vice president
18 and his family anywhere else in the world. It would be only
19 one place in Congress where he has this very, very unique
20 role.

21 MS. LOEB: Yes. But the point of the statute is to
22 deter people from entering these areas around the public
23 officials. And so even if, yes, the Secret Service, of
24 course, could still protect him, it would be strange to -- it
25 would be strange for there to be a hole in the statute that

1 it's designed to deter people from approaching the area where
2 he is.

3 THE COURT: Is it your view that if Vice President
4 Pence or Vice President Harris now went up to the Senate,
5 worked in his or now her office, awaiting a vote that he or
6 she might have had to break the tie of, that Vice President
7 Harris, for example, now would be temporarily visiting the
8 Senate?

9 MS. LOEB: The Senate chamber. Yes.

10 THE COURT: Or her office in the Senate.

11 MS. LOEB: Yes. Yes. Our position --

12 THE COURT: And that's just because she -- the facts
13 would show don't go there -- she doesn't go there very often?

14 MS. LOEB: It's because the definition of
15 temporarily visiting means visiting a place for a limited time
16 for a particular purpose essentially. So our position is that
17 one can temporarily visit the office.

18 Of course, here as you noted and as Judge Bates
19 found, this isn't the vice president's regular office. And on
20 January 6th, he was, for example, in the house chamber and in
21 many other locations that --

22 THE COURT: Was I temporarily visiting my chambers
23 if I was coming in irregularly during COVID?

24 MS. LOEB: Yes.

25 THE COURT: I was temporarily visiting my own

1 chambers?

2 MS. LOEB: Your own chambers? Yes. During the --
3 yes. You were visiting --

4 THE COURT: And when did my visits start to become
5 not temporary visits? When I came in every week?

6 MS. LOEB: Our view is that you're always
7 temporarily visiting your chambers because you're going
8 there -- each time you're going there, you're going there for
9 a limited time for a limited purpose --

10 THE COURT: So the vice president is temporarily
11 visiting the white House every day?

12 MS. LOEB: No. Your Honor, the white House is
13 carved out --

14 THE COURT: I know. But that's -- I'm just trying
15 to understand what temporary visit means. The vice president
16 lives at the vice presidential residence. Goes to work at
17 least some days at the white House. I understand it's carved
18 out in the sense that it's covered otherwise. I'm trying to
19 understand what temporary visit means in your view. Your view
20 is even if the vice president went to work in the west wing
21 every single day or wherever the vice president's office is
22 there, I don't even know, that would be a temporary visit?

23 MS. LOEB: Yes. Because he's going there again for
24 a particular purpose for a limited amount of time and I think
25 that --

1 THE COURT: So you are temporarily visiting your
2 office at D.O.J. every day?

3 MS. LOEB: As many hours as I may spend there right
4 now, yes.

5 THE COURT: Yes. I know it probably seems like a
6 lot. So what that means is that I am a temporary visitor to
7 my chambers here.

8 MS. LOEB: That you temporarily visit it. Yes.

9 THE COURT: Every day?

10 MS. LOEB: Yes. And, Your Honor, I think that if
11 you were to create -- if there were a different definition of
12 temporarily visiting, it would create very difficult line
13 drawing --

14 THE COURT: Am I a temporary visitor to my house?

15 MS. LOEB: No.

16 THE COURT: why? I spend almost as much time in
17 chambers as my home when I'm working regular hours.

18 MS. LOEB: Because that is your permanent residence.
19 That's the place you live.

20 THE COURT: So other than a permanent residence, I'm
21 temporarily visiting every single other place in the world, no
22 matter how frequent and no matter for how long. If I work 365
23 days a year in this courthouse, would I be temporarily
24 visiting every time I came?

25 MS. LOEB: Yes. Yes, Your Honor. You would be. I

1 think there could be as I think Judge Bates noted, there could
2 be a -- there could be at some point an upper balance, a
3 temporal limit if you go --

4 THE COURT: But that means just --

5 MS. LOEB: If you go there somewhere for several
6 years, for example. At some point you're not temporarily
7 visiting it --

8 THE COURT: That means that just to use a different
9 example that is about January 6th or I guess about Congress
10 generally, that means that every single day of the year that
11 they go there, Nancy Pelosi and Leader McConnell, Senator
12 McConnell are temporarily visiting the Capitol --

13 MS. LOEB: Yes.

14 THE COURT: -- as is every other member of Congress.

15 MS. LOEB: Yes. They're going there for a limited
16 purpose for a limited duration. They're not living there.

17 THE COURT: So let's go back just to the Pence
18 family for a second. So I think we just heard the defense
19 counsel essentially say that -- I'm not going to put any words
20 in her mouth -- but very much weaker or different argument if
21 we're talking about somebody who is not the vice president.
22 The vice president's family clearly has no constitutional role
23 as it relates to the Senate and the like. Is there enough in
24 the government's view before me to deny the motion on the
25 ground that even if I thought the vice president wasn't

1 temporarily visiting the Capitol that day, his family members
2 clearly were?

3 MS. LOEB: Yes, Your Honor. That's because the
4 indictment is a notice pleading. We don't need to specify
5 every single Secret Service protectee who is there inside the
6 Capitol. That's the type of information, although it's
7 available in the discovery, but that's the type of information
8 that could be sought through a bill of particulars, for
9 example, if the defendant wanted specificity. But we're not
10 required as a matter of law to allege the name of every Secret
11 Service protectee in the indictment.

12 THE COURT: You did hear mentioned one. Does
13 that -- so in other words, my recollection is the indictment
14 says Vice President Pence. It doesn't say just protectees.
15 Is that relevant here in the sense that it's notice pleading,
16 but the notice suggests we're talking about Vice President
17 Pence and only Vice President Pence?

18 MS. LOEB: I don't think so because it doesn't say
19 only Vice President Pence. I think it does give some
20 additional notice as to Vice President Pence. But I don't
21 think it forecloses the government from relying on other
22 Secret Service protectees.

23 THE COURT: Imagine hypothetically I thought that
24 the vice president couldn't temporarily visit at least on that
25 day the Capitol, that his family members clearly could, but

1 that the indictment needed to say something different. Well,
2 a couple of things. One is can I rely on non-indictment facts
3 for purposes of a motion to dismiss the indictment like the
4 complaint or the facts around detention questions?

5 MS. LOEB: Your Honor, I know that some other courts
6 in this district have. I believe the D.C. Circuit's decision
7 in the Yakou case suggests that the Court is limited to the
8 indictment and if there's a set of undisputed facts of which I
9 don't believe we have before the Court. So I do think the
10 better course is to be limited to that, to the indictment
11 here.

12 THE COURT: Right. These are true hypotheticals.
13 If I believed all those things, would the government then have
14 to go back to the grand jury and get another superseding
15 indictment?

16 MS. LOEB: I don't believe so, Your Honor. I think
17 at trial, we just would not rely on the vice president's
18 presence as --

19 THE COURT: No. I'm saying in my view if I say the
20 indictment is lacking or either because it needs to name
21 someone else or it needs to not name the person who I think
22 doesn't qualify. It needs to either include additional names
23 or it needs to not specify the person who I think raises this
24 potential issue. In other words, to amend the indictment in
25 any way, you have to go back to the grand jury. Correct?

1 MS. LOEB: I believe in this case, we would need to.
2 I know there are certain circumstances where we can file a
3 motion to strike. But and it would depend on what were the
4 facts that were introduced before the grand jury. So I mean I
5 would need to go back and look to --

6 THE COURT: Fair enough. I understand.

7 MS. LOEB: -- give Your Honor a better answer.

8 I would also push back against the idea that because
9 the vice president had an office somewhere in the Capitol,
10 that anywhere on the Capitol grounds or maybe in the House
11 office building or the Senate building, none of that can be
12 restricted just because there's an office somewhere in that
13 area even if the vice president didn't even go in that office
14 on a particular day.

15 And I also just want to emphasize again that the
16 statute is drafted broadly and is supposed to provide broad
17 coverage for the Secret Service protectees. So again I don't
18 think it would make sense here to read this kind of office
19 carve-out which would create difficult line drawing in terms
20 of when -- at what point someone has temporarily visited and
21 also create these distinctions between the family and the
22 public official for which there is not a good reason.

23 THE COURT: To be clear, I understand that. I don't
24 think that this creates like a massive distinction between the
25 public official and the family or between the vice president

1 and his public official and family. It would be one and one
2 location only where the vice president it is argued by the
3 defendant has a particular office and a particular
4 constitutional role.

5 I get that your view is office is irrelevant because
6 every person in the world is essentially temporarily visiting
7 his or her office. But again assuming that I don't agree with
8 that, then it's just a question of whether the vice
9 president's office there is enough. And I get that for all
10 the reasons you've discussed, you don't agree with that. But
11 it's not as if such a holding would all of a sudden say that
12 the Secret Service is sort of disabled from protecting the
13 vice president vis-a-vis his or her children. Generally,
14 that's no. It's only in Congress and it's not even about
15 protection. It's just whether this criminal prohibition would
16 necessarily kick in. And only when there's a perimeter or the
17 kind of steps that have been taken that are -- that trigger
18 the protection of the statute.

19 MS. LOEB: I would resist the idea that it would
20 create just this one narrow exception because the vice
21 president has other offices, too. You mentioned the vice
22 president's office in the white House which I know we have
23 another part of the statute. There are other offices in Camp
24 David. The vice president may have an office in California.
25 There may be many offices or work spaces set aside for public

1 officials and --

2 THE COURT: Right. But there, the -- I would be --
3 to the extent that I was saying that the person is maybe not
4 temporarily visiting, that's -- I guess your point is that --
5 I understand the point. If, for example, Vice President
6 Harris' husband went with her to Camp David and I were to say
7 hypothetically, she is not temporarily visiting Camp David
8 because she has an office there, but her husband would be and
9 it would be anomalous in your view to have a distinction
10 between them when they are at a place that the vice president
11 has an office and that would be true equally of the president.

12 MS. LOEB: And even if the Secret Service could
13 still protect them, one of the tools to protect them are
14 criminal prohibitions against trespassing such as this one.
15 And it would be removing that tool.

16 THE COURT: Right. I understand. Okay. Thank you.

17 MS. LOEB: I think if Your Honor has no further
18 questions about 1752, we'll move on to 1512.

19 THE COURT: Yes, please.

20 MS. LOEB: So starting with the official proceeding
21 point, I think defense counsel is arguing that there needs to
22 be an adjudicative purpose of a proceeding for it to qualify
23 as an official proceeding. As several of Your Honor's
24 colleagues have found, that is drawn from cases that are not
25 talking about needing of a proceeding before Congress. And it

1 really makes very little sense to impose this adjudicative
2 requirement on congressional proceedings because that is very
3 little of what Congress does. Aside from an impeachment
4 proceeding, there may be one other example of that. And
5 that's certainly true of the Ramos case which defense counsel
6 cited again, but it's not talking about a proceeding before
7 the Congress.

8 The plain text of official proceeding, I mean I
9 think it means what it says. There's nothing in there about
10 an adjudicative requirement. As Judge Mehta noted, had
11 Congress wanted to limit this proceeding to investigations or
12 inquiries, Congress had ready-made models there at least in
13 Section 1505.

14 And there's just no basis in the text to provide --
15 even though to limit it to an adjudicative proceeding even
16 if -- even the legal definition of the term proceeding refers
17 to the business conducted by an official body. It doesn't
18 have any kind of adjudicative limitation. And I think even
19 defense counsel's hypothetical about the January 6th
20 Commission wouldn't necessarily even qualify as adjudicative
21 because the people who are subpoenaed to appear are not
22 parties to a dispute the way that a party -- you would have
23 parties to an agency proceeding. So I think it would be kind
24 of a bizarre narrow carve-out that's without basis in the
25 text.

1 Defense counsel also mentioned Judge McFadden's
2 opinion in Guertin which Judge Kollar-Kotelly distinguished in
3 the Grider case and is another example of what a proceeding
4 might be in a different context that is not a proceeding
5 before the Congress.

6 Defense counsel also dismissed the certification as
7 ministerial or ceremonial. That's another argument that has
8 been rejected because there are objections made and Congress
9 needs to -- when there are objections, Congress breaks into
10 their separate houses to deliberate and they are not adjourned
11 until then. They make a decision about those objections and
12 certify the proceedings. So it's not purely ministerial or
13 ceremonial. Although our view is not that objections are
14 required to make something an official proceeding, of course.

15 THE COURT: So let's assume it's an official
16 proceeding. Do you agree with Judge Friedrich that corruptly
17 requires an otherwise unlawful act, which is how I read her
18 opinion?

19 MS. LOEB: Yes. I think corruptly -- and this is
20 from I believe Judge Silverman in North that it can be an
21 unlawful --

22 THE COURT: It could be unlawful --

23 MS. LOEB: It could be unlawful --

24 THE COURT: It could be corrupt purpose or corrupt
25 means or both, something like that.

1 MS. LOEB: Yes. Although in the Reffitt case, I
2 believe we have also defined it to include improper means.
3 Let me just confirm that.

4 THE COURT: I read Judge Friedrich to have said --
5 now, you know, I realize that this also can come up at jury
6 instruction time -- but that to make sure there aren't
7 constitutional concerns about the statute that corruptly
8 should be defined to require an otherwise unlawful act, an act
9 that is independently unlawful. Does the government agree
10 with that view?

11 MS. LOEB: well, I think -- I just don't want to
12 foreclose the improper -- I think we believe you need unlawful
13 means or an improper purpose or both. Although for this case,
14 the indictment alone alleges independently unlawful acts.

15 THE COURT: Yeah. The reason I ask is because as
16 I've parsed this, I don't understand how a requirement of
17 unlawful means would work with (C)(1). You know, it seemed to
18 me that (C)(1) is designed to create illegality by its terms
19 and it would be weird to me to say whoever acting through
20 otherwise unlawful acts or means alters, destroys, mutilates
21 or conceals a record. It's designed to create an illegality
22 for the conduct covered by (C)(1).

23 MS. LOEB: well, I think corruptly does do some
24 additional work there in that, for example, you could conceal
25 a document because it's covered by attorney/client privilege

1 and I don't think that should qualify as corrupt.

2 THE COURT: But that's a bad purpose. Right? That
3 would say that's not an improper purpose --

4 MS. LOEB: Right. Right.

5 THE COURT: -- if you withhold a document because
6 it's covered by privilege. I'm talking about an
7 interpretation of corruptly that requires, not permits, but
8 requires you to act corruptly through otherwise unlawful
9 act --

10 MS. LOEB: Right.

11 THE COURT: -- which is how I read her opinion.

12 MS. LOEB: Right. So although -- I mean she is also
13 the judge in the Reffitt case and so has approved -- well, I'm
14 not sure if those instructions -- the jury hasn't been
15 instructed, but the --

16 THE COURT: It's going on right now.

17 MS. LOEB: Right. Right. The jury selection. So
18 but I think that's a reason why we need not just unlawful
19 means but the improper purpose because there may not always be
20 kind of an independently unlawful act that is part of the
21 obstruction. But as the Supreme Court defined corruptly in
22 Arthur Andersen to require this consciousness of wrong doing,
23 it didn't limit the definition there to illegality. So I
24 think wrongfulness is slightly broader than purely as an
25 independently unlawful means. Although that's certainly the

1 core conduct and that is -- I think that that clearly
2 establishes that 1512 is not vague as applied to this
3 defendant. And if it's not vague as applied to him, then he
4 can't bring -- he can't challenge the statute as vague.

5 THE COURT: Right. So I think my -- and I've --
6 this came up in the Miller case. Why isn't at least a reading
7 of (C)(1) and (2) -- that (C)(2) is essentially a residual
8 clause for (1)? Why isn't that a -- as good a reading as
9 suggesting that it basically creates this untethered to (C)(1)
10 criminal prohibition?

11 MS. LOEB: I think (C)(2) is -- I think that is a
12 good reading of (C)(2). That it is a residual or a catch-all
13 clause that covers acts that obstruct an official proceeding
14 that are not covered by (C)(1).

15 THE COURT: Well, but that's not really residual
16 unless it has some -- unless you find its residual nature in
17 (1). I mean I know Judge Moss said the link is -- Judge Moss
18 says there has to be a link because otherwise serves to
19 link -- the word "otherwise" serves to link (1) and (2). The
20 link is it has to be about an official proceeding.

21 But in a residual clause, at least my sort of basic
22 thinking about it is that it's designed to say we're talking
23 about conduct that is like the first clause. We're just
24 making sure that by talking about just, for example, here,
25 altering, destroying, mutilating or concealing a record, that

1 we haven't missed something that's like that. And so we're
2 going to have a residual clause that ensures we haven't missed
3 something through our use of specific terms. Why isn't that a
4 reasonable way of thinking about (2)?

5 MS. LOEB: I don't see why a residual clause or a
6 catch-all clause isn't broader than (C)(1) which is a form
7 of -- which you might also think about as sort of an example
8 of conduct that might violate the prohibition in (C)(2) and
9 Congress is just making it exceptionally clear that the act
10 described in (C)(1) is illegal is the crime of obstruction.

11 THE COURT: In the government's view, what work, if
12 any, does the word "otherwise" do?

13 MS. LOEB: Otherwise is --

14 THE COURT: Is it necessary at all to your view of
15 the statute?

16 MS. LOEB: I mean I think it means in another manner
17 or differently from (C)(1). So I think it makes clear that
18 the conduct that violates (C)(2) may be broader and different
19 than that violates (C)(1). But if the statute simply said
20 "or," I'm just thinking about whether --

21 THE COURT: It seems to me that the argument about
22 what the statute means or covers isn't really dependent on
23 "otherwise." In other words, the government's view about
24 what's covered by (C)(2) would be the same if we deleted the
25 word "otherwise."

1 MS. LOEB: Your Honor, I think that --

2 THE COURT: That's not to say that the government's
3 interpretation is not consistent with the included of
4 "otherwise."

5 MS. LOEB: Yeah.

6 THE COURT: It's not clear to me that it is doing
7 any work there.

8 MS. LOEB: I agree. I mean I'm hesitant to say
9 there may be something I'm just not thinking of. But I don't
10 think that otherwise is a very significant term. I mean it
11 means as I said in another manner or differently. But I do --

12 THE COURT: well, why couldn't that be in another
13 manner or differently? Just figure out a way that someone
14 else could, for example, do something with respect to records,
15 documents or objects that just happens to not be alteration,
16 destruction, mutilation or concealment. Falsification or -- I
17 don't know. Pick another verb that isn't covered by those
18 four terms and then you say, okay, whoever otherwise in
19 another manner basically is trying to obstruct, influence or
20 impede an official proceeding, but is doing it in a way that's
21 different than in (C)(1), but it relates to a document, a
22 record or other object.

23 MS. LOEB: Um-hum.

24 THE COURT: why isn't that at least consistent with
25 the way the government views "otherwise"?

1 MS. LOEB: I'm sorry. Could you run --

2 THE COURT: So it seems to me that (C)(1) is pretty
3 clear. If you have a record, document or other object --

4 MS. LOEB: Um-hum.

5 THE COURT: -- and you alter it, you destroy it, you
6 mutilate it or you conceal it and obviously, of course, you
7 have to act with a particular intent and corruptly and all
8 that stuff, that you're guilty of (C)(1). And (C)(2) says
9 whoever in another manner, right, that's otherwise, obstructs,
10 influences or impedes any official proceeding.

11 what if in another manner is just whoever -- I'll
12 put it this way. By doing something that is not captured by
13 those four verbs, but it still has something to do with a
14 record, a document or another object or other record. So
15 falsifying or -- I don't know. I could imagine a number of
16 ways in which, one, a person could act with respect to
17 tangible information and evidence that wouldn't fit within the
18 four verbs used in (C)(1) and so (C)(2) is saying, hey, we're
19 going to make sure that we're covering people who do similar
20 stuff with documents, falsifying them or whatever. But that's
21 what we're talking about here. (C) is about whether you are
22 acting on documents.

23 MS. LOEB: well, I think the verbs in (C)(2) don't
24 really make sense regarding documents except perhaps
25 influences. Obstruct a document, impede a document.

1 THE COURT: No, no. No. It would say, look,
2 (C)(1), we are worried about people obstructing, influencing
3 or impeding a proceeding through alteration, destruction,
4 mutilation or concealment of a record. Then (C)(2) says
5 whoever otherwise obstructs because those things in (C)(1) are
6 obstructing, influencing or impeding an official proceeding
7 and (C)(2) says whoever otherwise does that is also guilty.
8 But the otherwise is saying as it relates to operation on a
9 record, document or other object.

10 MS. LOEB: Well, that would be inconsistent with the
11 many Courts of Appeals that have upheld convictions under
12 1512(C)(2) for conduct that doesn't have anything to do with
13 documents.

14 THE COURT: Agreed.

15 MS. LOEB: And then I think also at that point we
16 may also run into an issue with overlap with 1519. And it
17 just would create and have a gaping loophole especially
18 relating to things like false statements which again has been
19 the basis for many 1512(C)(2) prosecutions.

20 THE COURT: Why would there be a overlap at all with
21 1519? I mean 1519 doesn't require an official proceeding.

22 MS. LOEB: That is correct, Your Honor. But it does
23 relate to evidence spoliation.

24 THE COURT: Yes.

25 MS. LOEB: Right. So and I think it's just another

1 indication that when Congress --

2 THE COURT: Well, wait. I mean this is actually a
3 pretty good example for one view of maybe of 1512(C). So 1519
4 says whoever alters, destroys, mutilates or conceals. Right?
5 That's the same verbs as in (C)(1) of 1512. Then it says
6 covers up, falsifies or makes a false entry in. Those verbs
7 are not in 1512(C)(1). Why isn't it at least a reasonable
8 interpretation of (C)(2) to say that's what Congress was
9 worried about, was making sure that when it picked four verbs
10 in (C)(1), it wasn't sort of failing to cover the waterfront
11 of ways in which people can act on documents. We have some
12 examples in 1519.

13 MS. LOEB: Those examples show that Congress knows
14 exactly how to draft a statute that relates to those kinds of
15 impairments. And it chose not to do that here. And it's
16 especially true when you consider that I believe 1519 was one
17 of the original core provisions of Sarbanes Oxley. 1512(C)(2)
18 was added shortly thereafter. So I mean if Congress just
19 wanted to copy over those list of terms for 1519, Congress
20 could have done that and it didn't.

21 And there is -- I don't think the Court needs to or
22 should resort to legislative history here and the legislative
23 history of 1512(C)(2) is very limited. But the little bit we
24 do have doesn't indicate that what Your Honor suggested is the
25 purpose of 1512(C)(2) --

1 THE COURT: But is there any suggestion in the
2 legislative history that Congress was intending to create a
3 20-year criminal statute for just general obstruction,
4 influence or impeding the official proceedings without any
5 worry about the core of Sarbanes Oxley issues which was
6 document destruction?

7 MS. LOEB: I mean I don't think the legislative
8 history goes to that level of detail. But I believe
9 1512(C)(2) was originally proposed with -- at the time that
10 the penalty was ten years. I know that one of Your Honor's
11 colleague's opinions has gone through the penalties. I can't
12 recall if it was Judge Mehta or perhaps Judge Moss.

13 THE COURT: Or maybe both.

14 MS. LOEB: But I know they have addressed that --

15 THE COURT: But is there anything -- so everyone
16 agrees that the core of this provision was to deal with one or
17 two related problems. One is document destruction and the
18 other is as I understand it was the concern that the earlier
19 versions of the statute prohibited the influencing of someone
20 else as it related to document destruction, but not sort of
21 primary liability on the document destructor, him or herself.

22 Is there anything in the legislative history to
23 suggest that while those were the core concerns, we need to
24 worry about document destruction and we need to have a
25 prohibition that applies to the document destructor, not the

1 influencing of a third party, that there is also a concern
2 that, hey, we don't have nearly enough criminal prohibitions
3 on just a general instruction like somebody who wants to
4 prevent a court proceeding from going on altogether or someone
5 who wants to stop a proceeding in Congress from happening
6 rather than document destruction?

7 MS. LOEB: Your Honor, I'm not aware of a statement
8 that is that in the legislative history --

9 THE COURT: Is there anything directionally that
10 way?

11 MS. LOEB: I mean Senator Hatch explained that the
12 amendment strengthens the existing federal offense that is
13 often used to prosecute document shredding and other forms of
14 obstruction of justice. So he's saying forms of obstruction
15 of justice. But again we have --

16 THE COURT: It seems like he's thinking of these
17 other forms as things like document shredding.

18 MS. LOEB: We just don't have a lot of legislative
19 history here and we have the plain text that is not limited in
20 that way and there's really no reason to resort to the
21 legislative history.

22 THE COURT: I agree.

23 MS. LOEB: The legislative history are floor
24 statements which are of exceptionally little value and then we
25 also have the court statement from Oncale that statutes can go

1 beyond the principal evil that animated them.

2 If Your Honor has no further questions about 1512, I
3 would like to move on to Section 231.

4 THE COURT: I just want to -- my apologies. I had
5 one last question I wanted to ask, but I've now forgotten it.
6 But I think principally because we covered it which is just --
7 and I think it's already been briefed. It goes to the extent
8 to which all of the various interpretations of (C)(1) that
9 have been either advocated for, adopted or mused about in this
10 argument do create a surplusage issue I think no matter where
11 one comes out.

12 I obviously asked you some questions about whether
13 it would be reasonable to so interpret. Do you have a view of
14 how ambiguous a statute needs to be for lenity to kick in?

15 MS. LOEB: Grievously and beyond the terms on their
16 face to determine whether or not there's vagueness, the Court
17 can also look at whether courts have construed them and here
18 we have case law construing the term "corruptly." So it is
19 the combination of both the terms that do have an ordinary
20 meaning, but is readily comprehensible combined with courts
21 from around the country constructing the term that gives
22 sufficient notice and does not trigger the rule of lenity
23 here.

24 THE COURT: Thank you. So let's do the Count One.

25 MS. LOEB: I wanted to point out that counsel

1 asserted that she's making a facial challenge I believe here
2 to Section 231 and she mentioned the scenario of someone who
3 is just standing there. To the extent that she is making a
4 facial vagueness challenge, I don't think that is an issue
5 because the statute requires any act. So just standing around
6 wouldn't qualify as any act. And certainly, this defendant is
7 accused of committing an assault. So he's not been charged
8 simply for standing around.

9 In addition, of course, the mens rea which Judge
10 Bates noted --

11 THE COURT: Can we just pause there for a second?

12 MS. LOEB: Yes.

13 THE COURT: Going back to our earlier conversation
14 about facts in or not in the indictment, does the
15 indictment -- and this may be clear that it does -- I'm sorry.
16 I'm just not seeing it. Does the indictment allege that he
17 assaulted someone?

18 MS. LOEB: That's Count Two of the indictment is
19 assault.

20 THE COURT: Oh, I'm sorry. Yes. Of course. Thank
21 you.

22 MS. LOEB: But --

23 THE COURT: I'm sorry. I was looking at the rest of
24 it. Right. So it's assault, resist, oppose, impede,
25 intimidate and interfere with. So any of those in your view

1 is sufficient for --

2 MS. LOEB: Yes. But I also think the terms of the
3 statute are sufficiently clear and we don't have a vagueness
4 problem here.

5 To just respond, I also believe the mens rea point
6 came up. And as Judge Bates found, there is a mens rea in the
7 statute to specific intent is required and even if there
8 weren't, under the *Elonis* case, the Court would read the
9 statute to include a mens rea requirement.

10 I believe those were all the points on Section 231
11 that I wanted to respond to. If Your Honor has questions
12 about it, otherwise I would rely on our briefs.

13 THE COURT: No. Thank you.

14 MS. LOEB: Thank you, Your Honor.

15 THE COURT: Thank you, counsel. Ms. Ulrich?

16 MS. ULRICH: Your Honor, I don't have any specific
17 rebuttal unless you have some followup questions. I did want
18 to talk to you about the issue of venue. But first --

19 THE COURT: So let me just tell you where I am on
20 the motion which is that I am going to take it under
21 advisement. As the government knows, I've been -- I've had in
22 front of me a motion in another case that presents just the
23 1512 question which I'm still working through as you can
24 imagine from the argument today. So that is clearly important
25 to me and relevant here. But there are two issues that I have

1 not confronted. So I am going to take that motion under
2 advisement. I will definitely be writing an opinion. It may
3 be that that follows the Miller case. But no promises about
4 when that's going to be. So in terms of the ark of this case,
5 I'm not going to decide the motion orally today or know for
6 sure when I will. So that then gets us to the case more
7 generally.

8 The venue motion which has been sort of suspended
9 for the present time. So why don't we talk about that?

10 MS. ULRICH: Thank you. So the federal public
11 defenders here in D.C. had done a survey I think of potential
12 jurors in this area and so that I think that would be data
13 that the Court might be interested in in looking at the change
14 of venue. And so what I propose, I proposed this in my other
15 case, that we supplement our argument and that we file a brief
16 on March 23rd with that data and then I talked to Ms. Loeb
17 about their response being April 25th and I believe she's in
18 agreement and able to do that. And so that's what I would
19 propose if the Court would be okay with that.

20 THE COURT: That seems preliminarily just fine to
21 me. Obviously, the pendency of the motion is very relevant
22 here. Assuming we do that, then I would be taking up the
23 venue question sometime in early May, depending on whether you
24 want to file a reply brief.

25 What are your thoughts more generally about where

1 the case stands? Obviously, if for whatever reason, venue
2 were to be transferred, then it would no longer be here and
3 we'd be worrying about someone else's trial schedule
4 altogether. But assume not for present purposes or just more
5 generally, all the things that have to happen wherever this
6 thing gets tried, where are we?

7 MS. ULRICH: In terms of?

8 THE COURT: Discovery, discussions, thoughts about
9 trial prep.

10 MS. ULRICH: Right now, our plea negotiations have
11 kind of stalled. So I don't know if we're going to resurrect
12 them or not. I guess right now, we're on track for trial.
13 But Mr. Fischer is out. So we're -- you know, I'm not looking
14 to have a trial anytime soon. So I don't know what the
15 Court's schedule is. If we can't resolve this with a plea, I
16 have no idea. I know that this court is inundated with these
17 cases.

18 THE COURT: Yeah.

19 MS. ULRICH: So we're --

20 THE COURT: There are obviously these motions that
21 are pending to be supplemented and the like. Other than that,
22 are there significant amounts of discovery or other facts
23 development that needs to happen or is that where it needs to
24 be or getting close to where it needs to be?

25 MS. ULRICH: And that's a good question. From our

1 standpoint, I mean I know the government intends. We keep
2 getting these big briefs saying that there's even more
3 voluminous discovery coming and I know they are working very
4 well -- I mean I know they are working very hard to get that
5 for us.

6 From our standpoint, we are kind of at like -- like
7 we -- given the facts that we know, he was, you know, there in
8 a very small area for less than five minutes, I don't know
9 what else the government could give us to change, you know,
10 what the facts are that we already know. But I know they are
11 claiming that there's more and more and more coming. So I
12 guess I'm not sure about that, what their timetable is on the
13 rest of this discovery. But again from our standpoint, you
14 know, we're not talking hours in the Capitol. We're talking
15 less than five minutes in one small area. That's what we are
16 dealing with.

17 THE COURT: Let me just hear from the government and
18 then we can talk about that motion's practice. Thank you.

19 Ms. Loeb? Can you start with that question, just
20 where are things generally in this case discovery-wise?

21 MS. LOEB: We've completed most of the case specific
22 discovery. There will always be additional items. I mean
23 there will not always be. We have some small number likely of
24 additional reports we would turn over. But it's pretty much
25 completed.

1 The global discovery is ongoing as Ms. Ulrich said.
2 It seems like there could be things in there that could end up
3 being relevant to the defendant. For example, if there was
4 some other defendant in the area who videotapes the encounter
5 on his device, that's not available yet. And I know the
6 defendant has made -- has suggested that there may be officers
7 who were not resisting or allowing him to enter. So they
8 would want -- they may want the relativity database populated
9 so that they can search for that officer and find all the
10 information related to him. So I do think there are some
11 things in the global discovery that could be relevant. And
12 the status report really is the best information I have there.

13 Aside from the venue motion, I would think we would
14 want a date for motions in limine and 404(b) disclosure. So
15 we need some time for that. And we can talk about our various
16 trial schedules, too, if that makes sense.

17 THE COURT: It seems a little premature to do that
18 because there is at least the hypothetical possibility, I
19 don't know how likely it is, that I would grant the venue
20 motion. And if what I was hearing was we are done, a hundred
21 percent and we're ready to go to trial, then I might want to
22 just set a trial date and then deal with it if the trial is
23 not going to be here.

24 But it seems to me what I'm hearing is we agree
25 there is a venue motion that should get litigated and we are

1 suggesting essentially a two-month briefing schedule. I
2 obviously have the pending motion to dismiss that I need to
3 work through. There is additional fact development production
4 and review that needs to happen. And so if we don't set a
5 trial date today and I think I heard the pretty clear
6 implication from Ms. Ulrich that she wasn't pushing for one.
7 You may be pushing for one. But it seems to me that we can
8 wait a little while to set a trial date.

9 MS. LOEB: I think that's fine, Your Honor,
10 particularly in light of the ongoing discovery.

11 THE COURT: And really that's where I wanted to
12 land -- that general view is where I wanted to be before we --
13 before I just agree that the venue briefing schedule was
14 appropriate. But it seems appropriate to me in light of this
15 conversation which is there is still some more stuff to do.
16 Obviously, I have the motions still in front of me. And so if
17 we allow two more months to pass before I take up the venue
18 motion because that's what we're really talking about. It's
19 not going to be briefed until the end of April. That's not
20 going to substantially delay where the case would otherwise
21 be.

22 MS. LOEB: Yes. And I may be jumping the gun here,
23 but in terms of speedy trial, I think we have another 30 days
24 from the hearing where the clock would be tolled based on the
25 motion to dismiss, but the venue motion would be filed within

1 30 days. So then we would -- that would toll the clock. That
2 would stop the clock.

3 THE COURT: In other words, we are currently
4 tolling.

5 MS. LOEB: Yes.

6 THE COURT: And we will do so through almost the end
7 of March and then we'll have another motion?

8 MS. LOEB: Yes.

9 THE COURT: Although I guess that motion is -- it's
10 stayed. So maybe it's not tolling. But why don't we do this
11 then? Okay. I agree with the parties' proposal on the venue
12 motion, which means March 23rd, it will be supplemented to
13 include the survey that FPD is doing. Government's opposition
14 due April 25th.

15 MS. LOEB: Yes.

16 THE COURT: I'm not going to toll the Speedy Trial
17 Act today because I think it is being tolled as you said by
18 operation of the pending motion. Do you believe, Ms. Loeb,
19 that when the venue motion is supplemented, it would then have
20 the -- if I've already decided the motion to dismiss, that it
21 would then have the effect of re-tolling the statute?

22 MS. LOEB: If it's treated as a renewed motion, the
23 filing of a pretrial motion --

24 THE COURT: Yes. It should.

25 MS. LOEB: -- but given that we've talked about the

1 ongoing voluminous discovery and the preparation of pretrial
2 motions, I would also suggest that we can make a finding that
3 time should be excluded --

4 THE COURT: I would agree. Ms. Ulrich, do you
5 object to that?

6 MS. ULRICH: No, Your Honor.

7 THE COURT: So let me ask one more question. Let me
8 just wrap all this up together. Do the parties believe it
9 would be helpful or appropriate to set a status in this matter
10 for sometime within the next 60 days to take up any other
11 issues that may arise between now and then recognizing that
12 that venue motion will only just have been fully briefed
13 within that 60-day period?

14 MS. LOEB: Your Honor, I would suggest we set the
15 status that might also serve as a hearing on the venue motion.

16 THE COURT: Let me just look at my calendar now. So
17 what I am thinking is then so renewed venue motion,
18 March 23rd, response April 25 and then because I have a trial
19 starting May 9th, then I would want to do the status/argument
20 in this case the week before. So May 3rd or May 4. Are the
21 parties available? Do you have windows within those periods?
22 And I would just propose a 2 p.m. May 3rd status
23 conference/argument on the venue motion as appropriate.

24 MS. LOEB: Your Honor, I have a 4 p.m. sentencing
25 before Judge Sullivan that day. But by 2 p.m., we should be

1 able to get it done by then.

2 THE COURT: How about 1:30 to be safe?

3 MS. LOEB: Sure.

4 THE COURT: It shouldn't go two and a half hours.

5 Ms. Ulrich, does that work for you?

6 MS. ULRICH: Yes, Your Honor.

7 MS. LOEB: would that be --

8 THE COURT: I thought it was important to have this
9 hearing in person because I had obviously substantive
10 questions. That's not to say I won't on the venue question.
11 My preference would be in person. But, Ms. Ulrich, I know
12 that might be a little burdensome.

13 MS. ULRICH: Actually, no. I like in person. It's
14 probably more burdensome for Ms. Loeb. She's from California.

15 THE COURT: Ms. Loeb.

16 MS. ULRICH: Yes. I'm from Pennsylvania.

17 THE COURT: I knew that. I had forgotten that you
18 were in California. So would you give me another argument?

19 MS. LOEB: Yes. Yes. Your Honor, I can come back
20 in person. And if Your Honor does not see the need for a
21 hearing on the motion, I would appreciate if the Court would
22 let me know.

23 THE COURT: Absolutely. why don't we do this?
24 Let's do 1:30 p.m. May 3rd in person, status and argument on
25 the venue motion. If I decide I don't need argument on the

1 venue motion, then my goal would be to decide that very
2 quickly after the 25th and to inform the parties and to
3 convert it to a virtual status.

4 MS. LOEB: Should we set a deadline for a reply
5 brief on the venue motion?

6 THE COURT: Do you want a reply brief, Ms. Ulrich?

7 MS. ULRICH: No. I doubt it. I don't think I need
8 a reply brief deadline.

9 MS. LOEB: Okay.

10 THE COURT: Okay. So that's the schedule for the
11 next two and a half months or so. Not quite two and a half
12 months. And I conclude that for the various reasons discussed
13 today to include the current resolution of current motions,
14 the receipt to the report from FPD and the renewed venue
15 motion, the continued production of discovery and review
16 thereof by defendant that is appropriate to toll time under
17 the Speedy Trial Act between today's date and May 3rd. Are
18 there any other things we should discuss today?

19 MS. LOEB: Nothing from the government, Your Honor.
20 Thank you.

21 THE COURT: Thank you, Ms. Loeb.

22 MS. ULRICH: Nothing from the defense. Thank you.

23 THE COURT: Thank you, counsel.

24 (Proceedings concluded.)
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CERTIFICATE OF REPORTER

I, Lisa K. Bankins, an Official Court Reporter for the United States District and Bankruptcy Courts for the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the oral argument in the case of the United States of America versus Joseph Fischer, Criminal Number 21-cr-00234, in said court on the 28th day of February, 2022.

I further certify that the foregoing 51 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 20th day of March, 2022.

Lisa K. Bankins
Lisa K. Bankins
Official Court Reporter

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