ACCUSED TERRORIST* LEADER ETHAN NORDEAN COMPLAINS HE GOT CHARGED WITH TRESPASSING

The biggest advantages that Ethan Nordean and the other men charged in the Proud Boys Leadership conspiracy have are a judge, Tim Kelly, who is very sympathetic to the fact that they're being held in jail as the government fleshes out the case against them, and the 450 other January 6 defendants who have been charged with one or another of the same charges the Proud Boys were charged with. The biggest disadvantages are that, as time passes, the government's case gets stronger and stronger and the fact that seditious conspiracy or insurrection charges not only remain a real possibility, but are arguably are a better fit than what they got charged with.

That's why it baffles me that, minutes after Judge Kelly noted that every time Nordean files a new motion, Nordean himself tolls the Speedy Trial clock, Nordean's lawyer, Nick Smith, filed a motion to dismiss the entirety of the indictment against Nordean.

Don't get me wrong; I think Smith is a good lawyer and I'm grateful for the January 6 defense attorneys who are making aggressive challenges to the charges against their clients; it's an important check on the First Amendment risks of this prosecution. And I imagine the filing was all ready to go before yesterday's status hearing, where Kelly kept repeating that he is sympathetic to the plight of the defendants, but noted that the last motion Smith filed — a motion for a Bill of Particulars, a kind of motion that, in general, rarely succeeds — probably tolls the Speedy Trial clock whether or not Kelly were prepared to rule against

prosecutors' request for more time.

But tactically, trying to throw out every single crime, up to and including his trespassing charge, charged against one of the key leaders of a terrorist attack that put our very system of government at risk trades away the two biggest advantages Nordean has on legal challenges that won't eliminate the prosecution against Nordean.

The 66-page motion goes one by one, arguing that every charge against Nordean is vague or wrongly applied. Obstruction — 1512 — only applies for Congress when it is engaged in an investigative function, not what Nordean claims (notwithstanding the questions that sympathetic members of Congress raised about the vote count) was just a formal technicality. Leading an insurrection also doesn't have the requisite corrupt nature, because threatening the Vice President and the Speaker of the House with assassination would not have the effect of influencing members of Congress to do what the mob wanted. Civil disorder — 231 — was designed to jail civil rights leaders and so (it suggests) shouldn't be used against a guy trying to invalidate the votes of 81 million Americans. A riot affecting a vote count that affects every state and shut down much of DC did not affect interstate commerce. There were other police, in addition to the Secret Service at the Capitol, and so the specific terms of 1752 — the trespassing charge — don't apply here. Plus, poor Ethan Nordean had no way of knowing that barriers that were clearly in place when he started the approach to the Capitol were barriers meant to keep him out. And, finally (though this comes off as half-hearted), Nordean has no idea what property his conspiracy depredated even though it has been discussed ad nauseum in past hearings.

Along the way, Smith shades the case in ways that prosecutors will easily rebut, as when he suggests Nordean, whom the indictment cites invoking revolution as early as November 27 (and

so even before the states certified their votes), was motivated out of a sincere belief that the election was stolen because of voter fraud.

> Nordean did so, the government alleges, in the misguided belief that the legislature should refuse to certify the vote upon a review of evidence that he mistakenly contended showed voter fraud.
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> Instead, it contends he allegedly obstructed the session in support of the sincerely held political belief that the 2020 presidential election was not fairly decided.

He lays out the legislative history for many of these laws. He provides the entire history of the Executive Mansion. He falsely represents that the only people who are being charged with 1512 are gang members like Nordean. More ridiculous still is the claim that hundreds or thousands of other people aren't being charged with 1752 and so Nordean's charge must solely stem from his gang membership, when in fact, virtually every person who is being charged, is being charged with 1752.

Some of these arguments have merit. For example, I've repeatedly raised concerns about the way the government has hung all its felony counts on a fairly novel reading of obstruction (basically, the argument that the insurrectionists were obstructing the official proceeding of certifying the vote). But other defendants — albeit mostly Proud Boys — are already bringing these challenges (and more are likely to now that Paul Hodgkins' plea has made it clear that the government will insist defendants plead to that count). The DC Circuit is far more likely to assess those arguments on their legal merits if someone like business owner Jenny Cudd, who actually attended Trump's rally before heading to the Capitol, and who

didn’t preassemble a mob of 100 gang members to attack the Capitol even before Trump’s speech (that said, Cudd’s challenges thus far have been motions to change venue and to sever).

I would like the 231 challenge to succeed, but similar challenges have thus far failed when launched by people in actual states rather than the nation’s capital that by its geographic nature can carry out little commerce without transit through Maryland and/or Virginia, and in protests that would have been prosecuted solely by state cops if Billy Barr didn’t bigfoot on the events

Even Smith’s challenge to the trespassing charge was genuinely interesting when he made the same argument for another of his clients, Couy Griffin, who attended Trump’s rally and is not alleged to have entered the Capitol itself. But it works very differently for a guy who, rather than attending Trump’s rally, instead spent the morning of January 6 preparing a mob to march on an event that was important precisely *because* Mike Pence, along with his Secret Service detail, would be there conducting official business.

That’s the thing about being charged along with 450 other people: Where a claim has legal merit, other defendants are going to make such challenges. Those other defendants will be taken more seriously by the DC Circuit (the detention case for Chris Worrell has already shown that the DC Circuit sees the Proud Boys’ role in this as distinct from the unaffiliated defendants). And most of those defendants, if they succeed, won’t be promptly charged with insurrection or seditious conspiracy to sustain the prosecution.

And if any of these challenges brought by others succeed, then *at that point*, Nordean could point to the appellate decision and get his charges dropped along with hundreds of other people. But launching the challenge now, and in an omnibus motion claiming that poor Ethan didn’t know he was trespassing, is apt to get the whole package treated with less seriousness. Meanwhile,

Nordean will be extending his own pre-trial detention. The government will be given more time to try to flip other members of a famously back-stabbing group, possibly up to and including Nordean's co-conspirators (whose pre-trial detention Nordean will also be extending). And Judge Kelly will be left wondering why Nordean keeps undermining Kelly's stated intent to limit how much the government can draw this out.

The worst thing about this motion, though, is that both the substance of it and *that* it was filed by one of the key terrorist leaders of this attack serves as the single best argument I've seen for passing a domestic terrorism statute. I don't want January 6 to lead to passage of a domestic terrorism statute so the government has a way to criminalize membership in the Proud Boys. But claiming that Ethan Nordean shouldn't even be held accountable for trespassing is a good way to ensure that one is passed.

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*I believe it is legally accurate to use the term "terrorist" with Nordean because the government has charged him with a crime that can carry a terrorist enhancement — and in fact the government laid that out explicitly in the superseding Front Door indictment. I also believe the January 6 attack was a classical case of terrorism: the use of political violence to achieve a political goal.