ON THE UPCOMING SENTENCING FOR THE FIRST JANUARY 6 FELONY DEFENDANT, PAUL HODGKINS

On Monday, Paul Hodgkins will become the first felony defendant to be sentenced for his role in the January 6 riot.

Before I explain what the parties have said about that sentencing, some background is in order. The government has used obstruction, 18 USC §1512(c)(2), to charge virtually every January 6 defendant who in one way or another (often on social media before and after the riot), expressed the intent to prevent the certification of the vote, as distinct from simply wandering into the Capitol to express some support for Trump. Such an approach has a lot of upsides: it (thus far) avoids the inflammatory step of charging defendants with seditious conspiracy or insurrection (though that remains a possibility, particularly for militia defendants), while accessing the same kind of steep sentences for the most serious defendants. Because of sentencing enhancements built into obstruction, including "substantial interference," "extensive scope or planning," and "threatening injury or violence," using it allows DOJ to make clear distinctions even among the defendants found guilty of obstruction. Just as an example, while Hodgkins' sentencing range treated his occupation of the Senate Chamber as substantial interference (which resulted in a sentencing range of 15-21 months), he did not get dinged with enhancements that Graydon Young did for all his pre-planning, the Oath Keepers' threats of violence, and Young's attempt to destroy his Facebook account (which resulted in a sentencing range, for obstruction and conspiracy, of 63-78 months).

That said, it is an unprecedented application of the obstruction statute (of course, the January 6 insurrection was an unprecedented event). And a number of defendants have active, non-frivolous challenges to that application, some of which I explained here. Hodgkins pled guilty before all that litigation plays out, giving DOJ a significant first endorsement of this charging approach (which may be why Deputy Attorney General Lisa Monaco sat in on Hodgkins' guilty plea).

But Monday will be overdetermined because Hodgkins' sentence, whatever it is, will be taken as setting some kind of standard that over a hundred defendants may be able to point to when it comes to their own sentencing (if DOJ's application of 1512 is upheld through what is sure to be a number of decisions and appeals). Just as three hypotheticals, Judge Randolph Moss might explain that he finds Hodgkins' behavior to be a grave threat to democracy and say that with any other similarly situated defendant, he would sentence him to the maximum sentence in his guideline, 21 months, but because Hodgkins went first, Moss will give him a significant downward variance; that would allow him and all other DC judges to sentence hold-outs more severely than Hodgkins. Alternately, Moss might decide that the "significant interference" enhancement shouldn't apply to Hodgkins and on that basis sentence Hodgkins using a lower guideline (it would give Hodgkins a sentencing range of 8 to 14 months), a judgment that would likely be invoked by a wide range of similar defendants and so would be more binding to other judges and Moss himself in the future. Finally, Moss might rule that what Hodgkins did is barely distinguishable from what he is seeing in some of the trespass cases before him, and so sentence Hodgkins to what would be the max range for one of those trespass charges, six months; such a decision might or might not extend to other obstruction defendants based on factors like whether they told the truth about their actions. Again, those are all just hypotheticals intended to illustrate that *why* Moss sentences

Hodgkins to a particular sentence will be as important going forward as *what* he sentences him to.

The possibility that Moss might be thinking about what distinguishes Hodgkins from misdemeanor trespass defendants or other defendants charged with obstruction would not be surprising. Because all DC judges have a bunch of January 6 cases, they often express a comparative understanding of them in hearings. So, as Moss prepares to sentence Hodgkins, he might be comparing Hodgkins' conduct with what has been charged against other defendants over whose cases he is presiding. Moss has a wide range of defendants before him (the Klein brothers, who have ties to the Proud Boys, are his only militia defendants), but the most useful comparisons with other defendants charged with obstruction include:

- Brady Knowlton and Patrick Montgomery, who were also in the Senate Chamber and who are among the defendants challenging the application of 1512; Montgomery was charged with resisting a police officer after having claimed on Facebook not to have stormed the Capitol violently
- Bruno Cua, who was charged with assault and civil disorder on top of obstruction and sat in Pence's chair in the Senate Chamber even as others there told him not to
- Ryan Suleski, who is also charged with stealing some

papers from a member of Congress, who hinted at more to come in an interview after the riot, and who may not have been entirely forthright when interviewed by the FBI

- Melody Steele-Smith, who boasted of entering Nancy Pelosi's office and storming the Capitol on Facebook before she deleted those posts

In other words, Judge Moss' sentencing decision may be as influenced by what he thinks of Knowlton's similar conduct and fully-briefed challenge to 1512 as it will be by the memoranda before him. It may be influenced by a belief that Hodgkins didn't do what other defendants did — including misrepresenting their own behaviors either to the FBI or in his own courtroom — while getting charged for the same crime.

That comparative approach may be Hodgkins' best argument for a lenient sentence. Hodgkins' sentencing memo makes a sustained and not very convincing pitch for the effort to forgive sedition after the Civil War and throws in some bullshit language about "cancel" culture, then asks for probation (as most defense attorneys do for obstruction). But it then argues that, given how little separates Hodgkins from defendants charged with misdemeanor trespass (significantly, that he entered the Senate Chamber itself), he should benefit from a minimal participation variance.

> We contend that when one's role is similar to the several hundred Defendant's found inside the same building as Mr. HODGKINS who are being offered misdemeanors, and whose conduct

> is the same as the totality of the misconduct that is alleged in the instant case, as noted in the PSR paragraphs 10-19, that Mr. HODGKINS' role was only minimal and deserving of a variance. Because Mr. HODGKINS is accepting a felony, giving him the minimal role variance creates a just result for sentencing purposes. Importantly, this argument is about sentencing. The Defendant has pled to a felony offense because of his presence on the Senate floor. Those being offered misdemeanors offense for being inside the Capitol could also arguably have been compelled to plead to the same felony count as Mr. HODGKINS, but for the distinction of their location within the building. While for findings purposes, Mr. HODGKINS presence inside the Senate chambers vice the Rotunda is an important consideration, for purposes of sentencing there is zero space between Mr. HODGKINS conduct and that of the several hundred others who entered the United States Capitol who are being sentenced for a misdemeanor offense. Mr. HODGKINS should be treated likewise. One surmises that had Mr. HODGKINS simply stopped at the Senate door, he also would be facing a misdemeanor charge rather than this felony offense.

This is a fairly convincing argument, not least because of the defendants who were in the Senate Chamber (notably including Cua), Hodgkins engaged in far less obstructive behavior while there.

The government, meanwhile, seems to have taken an approach that hopes to leave itself maximal flexibility after this first January 6 obstruction sentencing, one that really doesn't credit Hodgkins all that much for being the first to plead guilty.

> The defendant, Paul Hodgkins, participated in the January 6, 2021, attack on the United States Capitol—a violent attack that forced an interruption of the certification of the 2020 Electoral College vote count, threatened the peaceful transfer of power after the 2020 Presidential election, injured more than one hundred law enforcement officers, and resulted in more than a million dollars' worth of property damage. Hodgkins entered the Capitol wearing a backpack containing protective eye goggles, rope, and white latex gloves, among other items. He made his way to the heart of the proceeding that he has pleaded guilty to obstructing — the Senate chamber — where he took "selfie-style" photographs and saluted others who were shouting and cheering from a nearby raised platform in the well of the chamber. The government nonetheless recognizes that Hodgkins did not personally engage in or espouse violence or property destruction, he accepted responsibility early and in a fulsome manner, and he has taken significant steps toward his rehabilitation. Accordingly, the government recommends that the Court sentence Hodgkins to 18 months in custody, which is the mid-point of the Sentencing Guidelines as calculated by the U.S. Probation Office and as contemplated in the parties' plea agreement. An 18-month, within Guidelines sentence is also supported by the U.S. Probation Office's conclusion that neither a downward departure nor a downward variance is warranted in this case.
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> [snip]
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> The government recognizes that Hodgkins did not personally destroy property or engage in any violence against law

> enforcement officers. But he was surrounded by others who were doing both, and he entered the Capitol as others had paved the way with destruction and violence. Time and time again, rather than turn around and retreat, Hodgkins pressed forward until he walked all the way down to the well of the Senate chamber. Hodgkins came to D.C. preparing to encounter violence around him. He was a rioter, not a protester, and his conduct shows that he was determined to interfere with the vote count and the peaceful transition of power in the 2020 Presidential election. Hodgkins entered the Senate chamber, where he joined the chanting and ranting at the dais. This was precisely where, only 40 minutes earlier, the Vice President had been sitting at the desk on the elevated platform, surrounded by Senators who were considering a procedural issue related to the certification of the Electoral College vote.
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> In the end, Hodgkins, like each rioter, contributed to the collective threat to democracy, physical safety, emotional well-being, and property on January 6, 2021.

Keep in mind, the same way defense attorneys always ask for probation, prosecutors always ask for harsh sentences, knowing the judge will usually find some happy medium, and in doing so here, they're not starting at the top of the sentencing range. But ultimately, by asking Judge Moss to apply a medium range sentence to a defendant facing a range that a large number of defendants might likewise face, they're trying to set a standard sentence and have it start reasonably high. They're really not fully accounting for what it took Hodgkins to decide to be the first to plead guilty; they seem to be thinking as much about the over a hundred

defendants coming down the pike and so trying to frame how they're conceiving of this obstruction crime generally as they're thinking about Hodgkins himself.

Curiously, Judge Moss (possibly with the input of other DC District judges) afforded himself an extra range of flexibility by inviting the Sentencing Commission to review average sentences for the sentencing guidelines that Hodgkins faces. Significantly, the Sentencing Commission found that of those facing the same guidelines sentence as Hodgkins, almost a quarter — 22.6% — got a probation sentence, though it appears all but one of those probation sentences involved a defendant who provided prosecutors "substantial assistance," and a goodly number got closer to six months after variances below range.

> MINUTE ORDER as to PAUL ALLARD HODGKINS (1): In connection with the sentencing of Defendant, the Court has requested and obtained, via email, from the U.S. Sentencing Commission the following information regarding the sentencing of offenders with similar records who have been found guilty of similar conduct to Defendant in this case. The Sentencing Commission reports as follows:
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> "In the case before you the defendant pled guilty to obstruction of an official proceeding in violation of 18 U.S.C. § 1512(c)(2). The guideline that applies is USSG 2J1.2. Your Probation Office has calculated the guideline range as follows: BOL 14, a 3-level increase for substantial interference with the administration of justice, and a 3-level adjustment for acceptance of responsibility, resulting in a final offense level (FOL) of 14. The offender is assigned to Criminal History Category I. The applicable guideline range is 15-21 months.
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> "We examined our records from fiscal

> year 2014 through 2020, and found 31 cases that match this guideline calculation. None of these cases were reported from the District of Columbia. In only nine cases was 18 U.S.C. § 1512(c)(2) a statute of conviction.
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> "For the 31 cases matching the guideline calculation under USSG § 2J1.2, in 16 cases (51.6%) the offender received a prison only sentence, in six cases (19.4%) the offender received prison with an alternative, in two cases (6.4 %) the sentences was probation with some condition of confinement, and in seven cases (22.6%) the sentence was probation only.
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> "Of the 31 cases, in seven (22.6%) the sentence was within the guideline range. The average sentence in those cases was 19 months (median = 21 months). Two cases (6.5%) were above range: one upward departure to 36 months and one upward variance to 48 months. The remaining 21 cases (71.0%) were below range. Thirteen cases were below range variances. The average sentence in those cases was seven months (median = six months). One case was downward departure to 14 months, another was a government departure to probation, and the remaining case was a government variance to six months. The remaining six cases were substantial assistance cases.
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> "In order to provide a more narrowly-tailored analysis, we then limited our analysis to the nine cases in which section 1512(c)(2) was one of the statutes (or the only statute) of conviction. Of those nine cases, in two the sentence was within the guideline range. The sentences were 15 and 21 months. There was one upward departure to 36 months. Three cases were below range variances. The average sentence in

> those cases was 10 months (median = 12 months). One case was a downward departure to 14 months. The remaining two cases were substantial assistance cases." Signed by Judge Randolph D. Moss on 07/13/2021. (lcrdm3)

While this table is a rough estimation of what this language says, basically it says a group of people were sentenced to a guidelines sentence, another bigger group were sentenced to around six months, and a third group were sentenced to probation — but never without government agreement (either for a departure or for cooperation).

Above Guidelines	2 of 31	6.5%	1 of 36 months, 1 of 48 months
Guidelines	7 of 31	22.6%	Mean 19, median 21
Below Guidelines Departures	2 of 31	6.5%	1 of 14 months, 1 of 6 months
Below Guidelines Variances	13 of 31	41.9%	Mean 7, median 6
Probation, Govt Departure	1 of 31	3.2%	0
Probation, Substantial Assistance	6 of 31	19.4%	0

What Moss has done by obtaining this information and publishing it was, first, to go into Monday's sentencing hearing with proof that whatever he does will be fair as compared to what has happened to others. Obtaining the guidelines also gives Moss some flexibility. He could, to recognize Hodgkins' first guilty plea, give him a significant downward variance (and/or sentence him to some alternative to prison, such as weekend confinement), pointing out that the largest group of defendants similarly situated to him got around six months. Alternately, he could explain why he wasn't giving Hodgkins the probation he requested by pointing out that almost everyone who got a probation sentence in recent history cooperated with prosecutors against others.

Whatever Judge Moss decides (I would be unsurprised by a four to six month sentence, possibly with the opportunity to serve it on weekends or something similar), Hodgkins went first because he has a legitimate argument to make that, aside from his presence on the Senate floor, his behavior really was less culpable

than many of the defendants charged with the same crime. Which means — again assuming this novel application of obstruction is upheld going forward — this is just the beginning of a long series of similar horse trading over sentences going forward.

Update: Josh Gerstein reminded me that Judge Moss used a similar approach to George Papadopoulos' sentencing and — believing that Papadopoulos felt remorse — sentenced him to fourteen days rather than the thirty days he had been considering. Papadopoulos' guidelines were 0 to 6 months.