

JUDGE TIM KELLY RELEASES OPINION ON OBSTRUCTION AFFECTING AS MANY AS TWO DOZEN PROUD BOYS

Judge Tim Kelly released his order denying Ethan Nordean's motion to dismiss the Proud Boys' conspiracy indictment, a challenge largely focused on DOJ's application of the obstruction statute to January 6 (here's my Twitter thread on the opinion). The opinion cites Dabney Friedrich's opinion in Sandlin seven times, Amit Mehta's opinion in Caldwell three times, and Trevor McFadden's opinion in Couy Griffin (on one of the trespassing charges) ten times, suggesting that DC District judges (three of them Trump appointees) are coming to a consensus approving the way DOJ has charged these January 6 cases.

Perhaps the most notable language in the opinion rejects a comparison Nordean tried to make with the Brett Kavanaugh Supreme Court protests.

Arguing that the statute invites discriminatory enforcement, Defendants repeatedly point to charging decisions and plea deals related to other January 6 defendants, see ECF No. 226 at 12–13, and the uncharged protestors on the Capitol steps during Justice Kavanaugh's confirmation hearings, see ECF No. 113 at 13–16. But neither provides evidence of vagueness. Both merely show “the Executive's exercise of discretion over charging determinations.” *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016). And “Supreme Court precedent teaches that the presence of enforcement discretion alone does not

render a statutory scheme unconstitutionally vague.” Kincaid v. Gov’t of D.C., 854 F.3d 721, 729 (D.C. Cir. 2017); see also United States v. Griffin, – F. Supp. 3d -- , 2021 WL 2778557, at *7 (D.D.C. July 2, 2021) (rejecting argument that defendant’s prosecution was discriminatory given large numbers of similarly situated, uncharged individuals from January 6 and uncharged protestors at Justice Kavanaugh’s confirmation hearings). “As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible.” Grayned v. City of Rockford, 408 U.S. 104, 114 (1972).

That’s because eventually Kavanaugh will get to weigh in on this issue, and because DOJ’s response to Nordean’s comparison was weaker than it should have been.

In a feat of procedural wizardry, Nordean already appealed today’s decision, yesterday, by sticking it onto an appeal of Kelly’s refusal to reopen bail.

Offense: 18 USC 1512(c)(2); 18 USC 1361

Concise statement of judgment or order, giving date, and any sentence:

12/14/21 Order denying motion to reopen bail proceedings; and related 12/14/21 oral Order denying motion to dismiss charges.

The denial of his motion to dismiss normally would not be appealable until after trial (at which point Kavanaugh can have his say).

One reason Nordean may have done that is to attempt to stave off a flood of Proud Boys rushing to join Matthew Greene in pleading out. That’s because Judge Kelly’s decision will also apply to the following groups of Proud Boys and Proud Boy adjacent defendants whose cases he is also presiding over, as well as a number of others who might get added in if – as I expect – DOJ consolidates its Proud Boy conspiracy cases

in the weeks ahead:

- Nordean (4 defendants)
- Pezzola (2 remaining defendants after Greene's change of plea)
- Chrestman (6 defendants)
- Jackman (5 defendants charged individually with obstruction, but not with conspiracy)
- Hughes (2 defendants)
- Pruitt
- Samsel (2 defendants)*

All defendants charged with obstruction have been waiting for these opinions. But as it happens, almost two dozen people currently or potentially charged with obstruction will be covered by this opinion. And if the attorneys are seeing the same signs of an imminent superseding Proud Boy indictment, if they don't think there'll be any fresh uncertainty from another judge, they may rush for the exits before that happens.

Thus far, with assistance from Enrique Tarrío, the Proud Boys have prevented the kinds of (visible) defections we've seen from the Oath Keepers. But this decision – coming at the same time as Greene's plea deal – may change that.

*DOJ has been talking about consolidating Samsel's case with that of Paul Johnson and Stephen Chase Randolph, along with another not-yet arrested defendant. If they do that, it would normally be kept under Judge Paul Friedman since he had the case first.

Update: Corrected McFadden's first name.

Update: Judge Randolph Moss has also issued his opinion, similarly upholding the application of obstruction. Here's my thread on it.