

DC CIRCUIT UPHOLDS 18 USC 1512(C)(2), SORT OF

This passage from Judge Justin Walker's concurring opinion in the DC Circuit's ruling upholding the application of 18 USC 1512(c)(2) to three defendants accused of assaulting cops on January 6 may be the most important language, until further litigation sorts out the rest.

5 The dissenting opinion says a defendant can act "corruptly" only if the benefit he intends to procure is a "financial, professional, or exculpatory advantage." Dissenting Op. 35. I am not so sure. Cf. *United States v. Townsend*, 630 F.3d 1003, 1010-11 (11th Cir. 2011); *United States v. Girard*, 601 F.2d 69, 70 (2d Cir. 1979); *Trushin v. State*, 425 So.2d 1126, 1130-32 (Fla. 1982). Besides, this case may involve a professional benefit. The Defendants' conduct may have been an attempt to help Donald Trump unlawfully secure a professional advantage – the presidency. Like the clerkship that Samuel Vaughan corruptly sought hundreds of years ago, the presidency is a coveted professional position. See *Vaughan* (1769) 98 Eng. Rep. at 308-10; but see Telegram from William T. Sherman to Republican National Convention (1884) ("I will not accept if nominated, and will not serve if elected.").

True, the Defendants were allegedly trying to secure the presidency for Donald Trump, not for themselves or their close associates. But the beneficiary of an unlawful benefit need not be the defendant or his friends. Few would doubt that a defendant could be convicted of corruptly bribing a presidential elector if he paid the

elector to cast a vote in favor of a preferred candidate – even if the defendant had never met the candidate and was not associated with him. See Oral Arg. Tr. 18-19, Chiafalo v. Washington, 140 S. Ct. 2316 (2020) (discussing the fear that electoral college voters might one day be bribed).

[snip]

[I]t might be enough for the Government to prove that a defendant used illegal means (like assaulting police officers) with the intent to procure a benefit (the presidency) for another person (Donald Trump). * *

I most recently wrote about this appeal here (which links to my past coverage). DOJ has charged over 300 people with obstructing the vote certification on January 6. All but one judge – former Clarence Thomas clerk Carl Nichols – upheld the application. Judge Nichols said that the application of 1512 to these defendants, who allegedly engaged in significant assaults as part of their actions on January 6, had to involve a documentary component, like destroying a document.

Walker joined Florence Pan's majority opinion upholding the obstruction statute with Garret Miller, Joseph Fischer, and Jake Lang. The decision before the court was primarily whether obstruction required a documentary aspect, and Pan and Walker agreed it did not, though at the hearing, Walker and Greg Katsas made it clear they were interested in limiting the "corrupt purpose" requirement of the statute.

That's where Walker disagreed with Pan: whether the "corrupt purpose" part of 1512 must involve some kind of personal corruption or may be broader. He argues here – in a part of the opinion that Greg Katsas did not join – that it must.

But he interpreted his own definition requiring

some personal corruption to extend to those, like the appellees, who committed crimes in service of keeping Trump in office.

I'm not sure his adoption of personal corruption to assault in the service of election theft is so obvious (his opinion makes it sound like he's not sure either).

But as written, his language would extend to virtually all the people already charged with obstruction.

This will be further litigated. But given that this is the starting place, unless SCOTUS does something remarkable, it likely means obstruction will be upheld for all those currently charged *and could be used* with Trump and all his aides who were more clearly working for a corrupt purpose.

[Fixed appellee appellant – because I forgot the defendants won before Nichols]

Update: Earlier this week, I did a podcast with Joshua Holland. I said there were a number of things that Jack Smith might wait on before charging Trump. One of those was this appeal.

Update: Added a bit more description the Nichols' holding that was overturned.

Update: Both Nick Smith (for Ethan Nordean and the guy who argued before the DC Circuit) and Carmen Hernandez (for Zach Rehl) are using the opinion to disrupt the Proud Boy trial, with Hernandez making a much more expansive ask.

They argue that because Walker would not have joined Pan's majority opinion *on the documents issue* without a more narrow reading of "corruptly" than she adopted, Tim Kelly has to apply Walker's standard in the Proud Boy case. That's why I noted that Walker had little problem applying his "corruptly" standard to the defendants before him: if it can apply to guys who weren't called out by the President in advance of playing a key role in an assault on the Capitol, then it surely could apply to guys

accused of doing just that.

In her majority, Pan noted that Thomas Robertson's appeal includes a challenge to the "corruptly" language used to convict him on obstruction, but this bid by the Proud Boys may hasten DOJ's request for some other resolution.