

THE “DILIGENT” PROUD BOYS JURY: “CAN WE ALSO GET A STAPLER, PLEASE?”

Yesterday, there were several interesting notes in the Proud Boys jury, including one – identifying a seeming discrepancy in their instructions – which led Judge Tim Kelly to note how diligent they were.

My favorite note, as I wrote at the time, asked for a stapler (I used to take off a point when students turned in papers using paperclips or dogeared pages rather than a staple).

I’d like to explain a different note, which may suggest where this jury is heading (and heading, it seems, in the reasonably near future). It asks:

1. For counts 1 + 4, the conspiracy charges that have more than one goal listed, can one agreed upon objective of the conspiracy simultaneously satisfy both goals?
2. We did not receive instructions on what to do if the jury does not reach unanimity on a charge. How should we proceed in this scenario?

The two counts in question were the seditious conspiracy charge, which the jury instructions describe this way:

Count One of the indictment charges that from in and around December 19, 2020, through in and around January 2021, the

defendants participated in a conspiracy to do at least one of two things: (1) to oppose by force the authority of the Government of the United States, or (2) to prevent, hinder, or delay the execution of any law of the United States by force.

And the instructions describe the fourth, interfering with a government agent, this way:

Count Four of the indictment charges that from in and around December 19, 2020, through in and around January 2021, the defendants participated in a conspiracy to prevent Members of Congress and law enforcement officers from discharging their duties, which is a violation of the law.

[snip]

First, that the defendant agreed with at least one other person to, by force, intimidation, or threat, (a) prevent a Member of Congress or a federal law enforcement officer from discharging a duty, or (b) induce a Member of Congress or federal law enforcement officer to leave the place where that person's duties are required to be performed.

One scenario where the jury might pose this question is if they believed some or all of the Proud Boys had agreed to and succeeded in obstructing the certification of the vote (the 1512 conspiracy), which is pretty close to Count One(2) and Count Four(b), but didn't believe some or all had taken up force against the government (which was a stretch in this case since the violence exercised here was via "tools" who attacked the cops).

The inclusion of the question about not reaching unanimity suggests the possibility of a hung count on these or another charge. That happened, for example, in the lesser Oath Keepers case,

but the hung count could just pertain to one of the defendants (perhaps Zach Rehl, who said the least inflammatory things in advance of the attack, or Dominic Pezzola, who only joined the conspiracy at a late moment, or Henry Tarrio, who wasn't present).

One way or another they were down to the nitty gritty questions when they sent this note at 10:47AM yesterday. The response could make or break the sedition charge, too. So the lawyers discussed it for hours.

While they were waiting for their answer to that, they asked the "diligent" question, what to do about a charge invoking Charles Donohoe's role in throwing a water bottle, given that a different instruction told them not to make any inferences about why people weren't charged (Donohoe pled guilty last summer). At 3:19PM on Monday, they had asked for the exhibit numbers pertaining to that charge, so they seem to be a bit perplexed by Count Eight, which charges aid and abet liability in an assault for throwing a water bottle.

Per Roger Parloff, it took the lawyers and Judge Kelly more than three hours before they sent back a response to the 10:47 AM note. So they likely got significantly further in their deliberations before they got those two answers.

Here are the jury notes and responses:

1. Please provide exhibit numbers for Rehl's phone crossing the barricade and Biggs suggesting they pull their masks up. Response
2. Please provide the following exhibits: police shield, megaphone, org chart. Response
3. Please provide a stapler (and exhibit 490A). Response

4. Upcoming appointments (in response to a question from the Courtroom Deputy)
5. Please provide exhibit numbers for the Donohoe water bottle throwing examples. Response
6. Clarification on multi-purpose conspiracies and non-unanimity on a charge. Response
7. Clarification on persons not present. Response

Update: Now the "diligent" jury is asking the Court to fix the typo in their verdict form.