THE EFFORT BY ACCUSED MOBSTERS TO END RUN THE DC CIRCUIT ON "CORRUPTLY"

Now that Trump has been charged with it, legal commentators have finally discovered that DOJ has been applying obstruction — 18 USC 1512(c)(2) — to January 6.

For example, in a post yesterday, Jay Kuo noted that over the two and a half years that DOJ has been charging January 6 defendants with obstruction, its application to January 6 as an official proceeding has been affirmed and the meaning of "corruptly" is getting closer to definition.

> Seen from a broad perspective, the over 1,000 January 6 cases filed by the Justice Department against the rioters, insurrectionists and seditious conspirators have now yielded important precedents that can be applied to the charges and the case against Donald J. Trump. Without this important groundwork, there would be considerably more legal risks in the application of two of the primary counts in the indictment: obstruction or attempted obstruction of an official proceeding, and conspiracy to obstruct an official proceeding.
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> Those legal risks would have certainly been targeted and appealed by Trump's attorneys, putting a very big question mark over the finality of any conviction. As things stand, there remains some legal uncertainty—such as which jury instruction for "corruptly" to apply here—but they likely will be

> resolved, perhaps even by the Supreme Court, long before the jury meets to deliberate Trump's guilt.
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> And for all that legwork by Garland and his Department of Justice, forging a clear legal path to prosecute Trump under the obstruction statute, I am both grateful and impressed.

Kuo correctly notes that *the most likely* place we'll get such a definition is in Thomas Robertson's appeal, which was heard on May 11. Given the hearing, it seems likely that the DC Circuit will adopt a standard on "corruptly" that would include, at least, either the "otherwise illegal" standard that Dabney Friedrich has adopted or the corrupt benefit that Justin Walker addressed in Fischer. Under either standard, obstruction *should* apply to Trump more neatly than it does many of the other January 6 defendants who've been charged under the statute.

But as Roger Parloff has noted, there is one other possibility.

Shortly after the other DC Circuit decision — captioned after Joseph Fischer, but including appeals from Jake Lang and Garret Miller, all of whom had had their obstruction charge rejected by Carl Nichols — Norm Pattis (who also represents Joe Biggs and Owen Shroyer and, if he ever gets charged, Alex Jones) and Steven Metcalf (who also represents Dominic Pezzola) filed an appeal for Lang. That appeal was not closely focused or in my NAL opinion, all that well crafted. It did not focus on the definition of "corruptly."

Then, on August 1 — *hours before Trump was charged with obstruction* — Nick Smith (who largely crafted these challenges to 1512 and also represents Ethan Nordean) filed a cert petition for Miller.

Even though "corruptly" wasn't the central holding in the Fischer decision, Smith included

it as one of the questions presented here.

> Whether § 1512(c)'s "corruptly" element requires proof that the defendant acted with the intent to obtain an unlawful benefit, or whether it merely requires proof that the defendant acted with an improper or wrongful purpose or through unlawful means.

And he cited NYT's coverage of the use of obstruction as part of his explanation for the import of this appeal.

> Elevating the national political salience of the issues raised here, it appears that the former president of the United States, and candidate in the 2024 presidential election, will be charged under the same Section 1512(c) (2) theory of liability that the government has filed against Petitioner and hundreds of others. Obstruction Law Cited by Prosecutors in Trump Case Has Drawn Challenges, N.Y.Times, July 20, 2023, available at: https:// www.nytimes.com/2023/07/20/us/politics/trump-jan-6- obstruction-charge.html.

He made no mention of the pending Robertson decision.

His justification for why Miller's appeal provides little reason to consider the definition of "corruptly" when it is not ripe below — to say nothing of why a third defendant before Carl Nichols also accused of assault makes a sound vehicle for testing a statute that is more troubling with defendants who did not engage in violence on the day of the attack. Instead, Smith suggests that Miller's guilty plea on the assault charges brackets that issue.

> Miller's case presents a clean vehicle to address the questions presented. Miller's case is usefully contrasted with that of Petitioner Edward Lang (No.

> 23-32).
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> The government alleges that Lang entered the Capitol's Lower West Terrace tunnel where, according to the government, "some of the most violent attacks on police officers occurred." Dkt. 1958170 at 24. The government further alleges: "Until approximately 5 p.m., Lang pushed, kicked, and punched officers, at times using a bar or a stolen riot shield." Id. In an interview on January 7, 2021, Lang described how he "had a gas mask on for the first two, three hours" as he was "fighting them face to face" as part of "a mission to have the Capitol building" and "stop this presidential election from being stolen." Id. According to Lang: "It was war. This was no protest." Id.
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> While Miller's conduct in entering the Capitol and pushing on police lines was wrong, he has accepted responsibility for his actions by pleading guilty to every valid offense with which he was charged—except the charge under Section 1512(c)(2). The charges to which Milled pled guilty already perfectly encompass all his misconduct that day. Thus, Miller's case captures the essential point that the novel obstruction charge does not penalize any unique criminal conduct or intent.

Ultimately, both these appeals are misleading, because they suggest *these appeals* are about protesting. None of the three can claim to be only protesting; all three are charged with — and Miller pled guilty to — assault (though Lang, who has not yet been found guilty, claims he was engaged in self defense).

But that doesn't rule out that a SCOTUS dominated by right wingers like Clarence Thomas, for whom Nichols, the lone DC District holdout on this application of obstruction, once

clerked, may choose to weigh in now rather than waiting for the DC Circuit’s decision to ripen the issue.

This is the kind of thing that legal commentators could be productively focused on, because it is designed to affect the case against Trump.

Update: Mistakenly referred to Lang as Alam.