

PROUD BOY CLOSURE OR JOHN ROBERTS' GET OUT OF JAIL FREE CARD?

There have been some developments in the Proud Boy prosecutions I want to note.


First, according to a status update filed on October 23, Jeremy Bertino – the most important cooperating Proud Boy witness – is done cooperating. That follows a four month continuance obtained in June. He will be sentenced in February.

Then, in the case of the Ron Loerkhe and Jimmy Haffner, on October 24, DOJ asked for and got an awkwardly timed 35-day motion to continue, until December 3, between the election and inauguration. AUSA Jason McCullough – who took over the case from Erik Kenerson a year ago, had previously asked for and gotten a 75-day continuance in July, which would have expired Tuesday. This case has done nothing but continue like this since they were first charged in December 2021. As I described then, Loehrke especially, who is a former Marine, was pretty instrumental in moving the crowd around on January 6, and would have been involved in any charges tied to the effort to open a second front of attack on the East doors of the Capitol.

Finally, on October 25, Alexis Loeb dropped off some or all of her cases. For years, the AUSA has shepherded a fairly breathtaking number of Proud Boy and Proud Boy adjacent cases – often those where the defendants couldn't be tied to the Proud Boy leaders. In that role, she has had to manage a number of the cases that SCOTUS' *Fischer* decision most complicated, in some cases shifting obstruction charges into civil disorder ones or arguing that defendants get the same sentence on the latter charge after the government gave up on the former. Ockham's razor would suggest she's dropping off because she has

already put years into an investigation that for most others was a six month assignment. All the more so given she has finished up some recent business. On October 8, she got a plea with Jerry Braun; on October 18, Tim Kelly denied his bid to stay out of prison pending sentencing. On October 25, Colleen Kollar-Kotelly denied a bid by George Tenney to reduce his sentence. And on October 23, Kollar-Kotelly held a stipulated trial for Nicholas Kennedy's obstruction charge (he already pled to his other charges, including Civil Disorder) under the new Fischer rules.

But not only is Fischer himself still pending, with trial scheduled in February, but Kennedy is not done. Immediately after the stipulated trial, Kollar-Kotelly ordered more briefing, scheduled out through November.

MINUTE ORDER as to NICHOLAS KENNEDY (1):
Yesterday, October 23, 2024, the Court held a stipulated trial on Count Two of the 63  Second Superseding Indictment (Obstruction of an Official Proceeding and Aiding and Abetting, in violation of 18 U.S.C. §§ 1512(c)(2) and 2). After reviewing the stipulated facts with Defendant, the Court discussed with the parties the 82 Proposed Jury Instructions. During that discussion, it became clear that the parties agreed on the elements of a Section 1512(c)(2) offense but disagreed about the application of those elements to Defendant's stipulated conduct. The Court has not yet reached a verdict. The Court ORDERS the Government to file proposed findings of fact and conclusions of law on or before NOVEMBER 1, 2024. Defendant shall respond on or before NOVEMBER 15, 2024. And the Government shall reply, if necessary, on or before NOVEMBER 25, 2024. Signed by Judge Colleen Kollar-Kotelly on 10/24/2024. (lcckk3) (Entered: 10/24/2024)

This briefing will go to the core of DOJ's theory via which they think they can hold people accountable for trying to disrupt the counting of actual vote certifications.

Still, the most likely explanation is that Loeb has earned a break.

What I'm wondering, given the silence about the Proud Boys in Jack Smith's immunity briefing, is what these movements mean for any implication of the militia into a case for Trump or his closest allies (the cases Loeb has overseen treated both Alex Jones and Roger Stone as unindicted co-conspirators).

I speculated earlier this month that we might see something implicating the Proud Boys after the election.

Back in December, in the last filing Jack Smith submitted before Trump's lawyers got Judge Chutkan to prohibit such things, Smith said he wanted to introduce Trump's encouragement of the Proud Boys as 404(b) evidence.

The Government plans to introduce evidence from the period in advance of the charged conspiracies that demonstrates the defendant's encouragement of violence. For instance, in response to a question during the September 29, 2020, presidential debate asking him to denounce the extremist group the Proud Boys, the defendant instead spoke publicly to them and told them to "stand back and stand by." Members of the group embraced the defendant's words as an endorsement and printed merchandise with them as a rallying cry. As discussed below, after the Proud Boys and other extremist groups participated in obstructing the

congressional certification on January 6, the defendant made clear that they were acting consistent with his intent and direction in doing so.

[snip]

Of particular note are the specific January 6 offenders whom the defendant has supported— namely, individuals convicted of some of the most serious crimes charged in relation to January 6, such as seditious conspiracy and violent assaults on police officers. During **a September 17, 2023, appearance on Meet the Press**, for instance, the defendant said regarding Proud Boys leader Enrique Tarrio—who was convicted of seditious conspiracy—“I want to tell you, he and other people have been treated horribly.” The defendant then criticized the kinds of lengthy sentences received only by defendants who, like Tarrio, committed the most serious crimes on January 6. [my emphasis]

But the Proud Boys don’t appear, at all, in the immunity filing. You can go search for them **using this OCR version**. Nothing. Jack Smith said he wanted them to be part of the trial, but they’re not in this filing laying out that Smith might mention them at trial.

To be sure, there is **a section** of the immunity filing that addresses Trump’s fondness for convicted Jan6ers.

In the years after January 6, the defendant has reiterated his support for and allegiance to

39478 39479 rioters who broke into the Capitol, calling them “patriots⁴⁷⁸ and “hostages,⁴⁷⁹ providing them financial assistance,⁴⁸⁰ and reminiscing about January 6 as “a beautiful day.”⁴⁸¹ At a rally in Waco, Texas, on March 25, 2023, the defendant started a tradition he has repeated several times—opening the event with a song called “Justice for All,” recorded by a group of charged—and in many cases, convicted—January 6 offenders known as the “January 6 Choir” and who, because of their dangerousness, are held at the District of Columbia jail.⁴⁸² At the Waco Rally, of the January 6 Choir, the defendant said, “our people love those people, they love those people.”⁴⁸³ The defendant has also stated that if re-elected, he will pardon individuals convicted of crimes on January 6.⁴⁸⁴

But not only doesn’t it mention the Proud Boys directly (one of them was part of the Jan6 Choir, though not any of the seditionists), it doesn’t include the September 2023 interview in which Trump addressed Enrique Tarrio by name (bolded above).

478 GA 1973 at 16:52 (Video of Waco Rally 03/25/2023); GA 1962 at 48:29 (Video of Trump at Faith and Freedom Coalition 06/17/2022); GA 1971 (Video of Trump Interview 02/01/2022).

479 GA 1935 at 35:50, 01:16:16 (Video of Greensboro Rally 03/02/2024).

480 GA 1966 at 09:30 (Video of Trump Interview 09/01/2022).

481 GA 1967 at 45:18 (Video of Trump Interview 08/23/2023); GA 1692 (Transcript of CNN Town Hall 05/10/2023).

482 GA 1973 at 03:00 (Video of Waco Rally 03/25/2023). See, e.g., United States v. Jordan Robert Mink, 21-cr-25 (D.D.C. 2023); United States v. Ronald Sandlin, 21-cr-88 (D.D.C. 2022); United States v. Barton Shively, 21-cr-151 (D.D.C. 2022); United States v. Julian Khater, 21-cr-222 (D.D.C. 2022); United States v. James McGrew, 21-cr-398 (D.D.C. 2022).

483 GA 1973 at 06:02 (Video of Waco Rally 03/25/2023).

484 GA 1971 at 15:51 (Video of Trump Interview with Schmitt 02/01/2022).

If you're going to impress SCOTUS with Trump's outrageous support for convicted rioters, you would include the Proud Boys.

Maybe that's right.

Or maybe, with Fischer, John Roberts effectively wrote people like Jones and Stone a Get out of jail free card. For years, I've been laying out how Alex Jones and Roger Stone are right there in a networked conspiracy between the Proud Boys and Oath Keepers and Donald Trump.

Donald Trump	Alex Jones Ali Alexander Roger Stone	Proud Boy Leadership (5 + 3)	Oath Keeper (10 + 6)	Disorganized (2+1)	PA (2)
		Ethan Nordean Joe Biggs Zachary Rehl Enrique Tarrio Dominic Pezzola	Roberto Minuta Joseph Hackett David Moerschel Edward Vallejo		
			Kelly Meggs Jessica Watkins Thomas Caldwell Kenneth Harrelson Stewart Rhodes		
		Jeremy Bertino James Stewart Charles Donohoe Matthew Greene Isaiah Giddings	Jon Schaffer Graydon Young Mark Grods Caleb Berry Jason Dolan Joshua James Brian Ulrich Todd Wilson	Ronnie Sandlin Josiah Colt Nate DeGrave	Brad Smith Marshall Neefe
18 USC 371		18 USC 2384, 18 USC 372	18 USC 2384, 18 USC 372		
18 USC 1512(k) conspiracy to obstruct, influence, and impede the Certification of the Electoral College vote	18 USC 1512(k) conspiracy to obstruct, influence, and impede the Certification of the Electoral College vote	18 USC 1512(k) conspiracy to obstruct, influence, and impede the Certification of the Electoral College vote	18 USC 1512(k) conspiracy to obstruct, influence, and impede the Certification of the Electoral College vote	18 USC 1512(k) conspiracy to obstruct, influence, and impede the Certification of the Electoral College vote	18 USC 1512(k) conspiracy to obstruct, influence, and impede the Certification of the Electoral College vote
September 29 comment, December 19 tweet, advertise speech	Encourage attendance (Stop the Steal, WildProtest)	Encourage attendance (a)	Encourage attendance (a)	Encourage attendance (18)	Encourage attendance (19)
Vote fraud advertisements	Raised \$3 million	Advertise to raise funds (b)	Advertise to raise funds and recruit (c)	Advertise to raise funds (18)	
Request for Meadows to contact Stone		Bring paramilitary gear (c)	Bring paramilitary gear (f)	Bring paramilitary gear (22)	
Call to DC	Travel to DC	Travel to DC (e)	Travel to DC (e)(g)	Travel to DC (22)	
Inclusion of Pence language in speech		Coordinate before Jan 6 (f)	Coordinate before Jan 6 (b) (d)	Coordinate before Jan 6	
Tact knowledge of arms	Speeches on January 5	Use comms on Jan 6 (g)	Use comms on Jan 6 (k)	Follow WildProtest, Trump's instructions	Bring batons (21)
Call on march to Capitol	Lead mob to Capitol	Dismantle barricades (h)		Storm past barricades (28)	
187 minutes of inaction	Lead mob to East steps	Storm past barricades (i)	Storm past barricades (j)	Assault law enforcement (30)	Assault law enforcement (29)

But that was envisioned – I believe DOJ envisioned it, starting years ago – as a conspiracy built around obstruction charges, 18 USC 1512(k).

Given Fischer's new evidentiary component, I'm not sure whether you could sustain charges for obstruction against Jones and Stone.

There's at least one clue that DOJ doubts it can sustain such charges against people further from the action. In the SoCal Conspiracy, in which some anti-vaxers and Three Percenters joined up to plan their travel to January 6, DOJ just filed an information for Morton Irvine Smith, for *just* trespassing.

Smith funded much of the conspiring. He appeared to be involved in earlier plotting, going back to the MAGA March in December 2020. And DOJ imaged his computer years ago, back in June 2021.

To be sure, since he was charged via information, it's clear that Smith has negotiated these charges. But particularly as the obstruction charges against the guys he funded, notably Alan Hostetter, have been put at risk with Fischer, I wonder whether DOJ has simply given up trying to hold Smith to any more serious charges.

It may be we'll see some new Proud Boy developments after the election. But it's just as likely that John Roberts' revision of 18 USC 1512(c)(2) made it difficult if not impossible to hold key players between the crime scene and the Willard accountable.