ENRIQUE TARRIO GETS HIS CHANCE TO FIT IN OR FUCK OFF

Enrique Tarrio has finally be included in the Proud Boy conspiracy indictment.

JUDGE CARL NICHOLS UPENDS DOJ'S JANUARY 6 PROSECUTION STRATEGY

On Friday, I argued that both the January 6 Committee and TV lawyers wailing about DOJ's slow pace of prosecution needed to look more closely at the litigation surrounding DOJ's use of 18 USC 1512(c)(2) to prosecute January 6 defendants.

> [U]ltimately all 22 judges are likely to weigh in on this obstruction application (and there are only two or three judges remaining who might conceivably rule differently than their colleagues), there are just a handful of judges who might face this obstruction application *with Trump* or a close associate like Roger Stone or Rudy Giuliani. Judge Mehta (by dint of presiding over the Oath Keeper cases) or Judge Kelly (by dint of ruling over the most important Proud Boy cases) might see charges against Roger Stone, Rudy Giuliani, or Alex Jones. Chief Judge Howell might take a higher profile case herself. Or she might give it to either Mehta (who is already presiding over closely related cases, including the January 6

> lawsuits of Trump) or one of the two judges who has dealt with issues of Presidential accountability, either former OLC head Moss or Carl Nichols. Notably, Judge Nichols, who might also get related cases based on presiding over the Steve Bannon case, has not yet (as far as I'm aware) issued a ruling upholding 1512(c)(2); I imagine he *would* uphold it, but don't know how his opinion might differ from his colleagues.
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> The application of 18 USC 1512(c)(2) to January 6 is not, as the TV lawyers only now discovering it, an abstract concept. It is something that has been heavily litigated already. There are eight substantive opinions out there, with some nuances between them. The universe of judges who might preside over a Trump case is likewise finite and with the notable exception of Judge Nichols, the two groups largely overlap.
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> So if TV lawyers with time on their hands want to understand how obstruction would apply to Trump, it'd do well — and it is long overdue — to look at what the judges have actually said and how those opinions differ from the theory of liability being thrown around on TV.

Judge Carl Nichols — the Trump-appointed judge presiding over the Steve Bannon case and as such one of the most likely judges to preside over any Trump prosecution — will undoubtedly finally generate needed attention to what judges are doing.

That's because he just rejected DOJ's application in the case of Garret Miller. In places, the decision is reasonable; in others, it is far too clever. Nichols acknowledges only the Randolph Moss opinion in on this topic, thereby ignoring some language addressing issues he raises in his opinion.

Nichols disagrees with Miller's contention that the vote certification was not an official proceeding.

> [I]t makes little if any sense, in the context here, to read "a proceeding before Congress" as invoking only the judicial sense of the word "proceeding." After all, the only proceedings of even a quasijudicial nature before Congress are impeachment proceedings, and Miller has offered no reason to think Congress intended such a narrow definition here.

But he argued that the word "otherwise" in the statute necessarily connects the charged clause to the one prior to it, and should be read as a limitation of it. From that, he reads the statute to pertain only to evidence tampering, not witness tampering.

He then cites Justice Kavanaugh to argue that under the rule of lenity, such ambiguity here must be judged in favor of the defendant.

> "Under the rule of lenity, courts construe penal laws strictly and resolve ambiguities in favor of the defendant," id., so long as doing so would not "conflict with the implied or expressed intent of Congress," Liparota v. United States, 471 U.S. 419, 427 (1985). Under current doctrine, the rule of lenity applies to instances of "grievous" ambiguity, see Shular v. United States, 140 S. Ct. 779, 788 (2020) (Kavanaugh, J., concurring) (collecting citations), a construction that is arguably in tension with the rule's historical origins, see 1 William Blackstone, Commentaries *88 ("Penal statutes must be construed strictly."). See also Wooden v. United States, ___ U.S. ___, ___ (2022) (Gorsuch, J., concurring in judgment) (slip op. at 9–12); but see id. (Kavanaugh, J., concurring) (slip op. at 1–4).

Via a variety of means, Nichols judges that 1512(c)(2) must relate to the destruction of evidence, which Miller is not accused of doing.

> The Court therefore concludes that § 1512(c)(2) must be interpreted as limited by subsection (c)(1), and thus requires that the defendant have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding.

This argument has holes in it—holes that were addressed by some of the opinions he ignores.

Nichols simply dismisses the argument that Congress could have provided the kind of limiting language he thinks should be inferred.

> Another court has sought to allay this overlap concern by pointing to the language Congress could have used:
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> > [I]t would have been easy for Congress to craft language to achieve the goal that Defendants now hypothesize. Congress, for example, could have substituted Section 1512(c)(2) with the following: "engages in conduct that otherwise impairs the integrity or availability of evidence or testimony for use in an official proceeding." The fact that Congress, instead, enacted language that more generally—and without the limitations that Defendants now ask the Court to adopt—criminalized efforts corruptly to obstruct official proceedings speaks volume.
>
> Montgomery, 2021 WL 6134591, at *12. That is certainly true, and in fact is why the Court does not believe that there is a single obvious interpretation of the statute. But it is also the case that reading § 1512(c)(1) as limiting

> the scope of § 1512(c)(2) avoids many of these structural or contextual issues altogether

He also ignores some differences between clause c and other clauses of 1512, arguments made and dismissed by some of the opinions he ignores.

> At a minimum, conduct made unlawful by at least eleven subsections— §§ 1512(a)(1)(A), 1512(a)(1)(B), 1512(a)(2)(A), 1512(a)(2)(B)(i), 1512(a)(2)(B)(iii),1512(a)(2)(B)(iv), 1512(b)(1), 1512(b)(2)(A), 1512(b)(2)(C), 1512(b)(2)(D), and 1512(d)(1)— would also run afoul of § 1512(c)(2).

He also makes a comparison between clause b and c, ignoring that c(2) — and the behavior Miller is accused of — is equivalent to b(2)(D).

DOJ will have a ready response to this on appeal. They may count themselves lucky that this particular opinion is not a particularly strong argument against their application. Nichols basically argues that intimidating Congress by assaulting the building is not obstruction of what he concedes is an official proceeding.

But this will cause a number of prosecutions, including of some defendants who were about to provide key cooperation, to grind to a halt until this is appealed.

Update: In other news, Guy Reffitt was just found guilty on all five charges against him. That includes the obstruction charge. So the DC Circuit will soon be getting two appeals of the obstruction application.

Update, 4/1/22: DOJ asked Nichols to reconsider, making two legal and one common sense arguments:

- You can't really argue there's some grievous

uncertainty implicating the rule of lenity if 13 of your colleagues don't see it.

- Your ruling that 1512(c)(2) requires document destruction is an evidentiary question, not a motion to dismiss one, and if we have to we'll argue that Miller's actions posed a risk to the actual ballots.
- Your logic would suggest that, per the Reffitt scenario, attempting to drag lawmakers out of Congress to prevent them from certifying the vote would not be obstruction.

Other opinions upholding obstruction application:

1. Dabney Friedrich, December 10, 2021, Sandlin*
2. Amit Mehta, December 20, 2021, Caldwell*
3. James Boasberg, December 21, 2021, Mostofsky
4. Tim Kelly, December 28, 2021, Nordean; May 9, 2022, Hughes (by minute order), rejecting Miller
5. Randolph Moss, December 28, 2021, Montgomery
6. Beryl Howell, January 21, 2022, DeCarlo

7. John Bates, February 1, 2022, McHugh; May 2, 2022 [on reconsideration]
8. Colleen Kollar-Kotelly, February 9, 2022, Grider
9. Richard Leon (by minute order), February 24, 2022, Costianes
10. Christopher Cooper, February 25, 2022, Robertson
11. Rudolph Contreras, announced March 8, released March 14, Andries
12. Paul Friedman, March 19, Puma
13. Thomas Hogan, March 30, Sargent (opinion forthcoming)
14. Trevor McFadden, May 6, Hale-Cusanelli

"THE WHOLE IDEA WAS TO INTIMIDATE CONGRESS:" BILL BARR CONTINUES TO MINIMIZE WITNESS TAMPERING

In a supine interview with Lester Holt, Bill Barr minimized the danger of witness tampering on January 6 just like he minimized Proud Boy associated threats against Amy Berman Jackson and Randy Credico.

THE ERROR THAT BETRAYS INSUFFICIENT ATTENTION TO THE OBSTRUCTION STANDARD IN THE JANUARY 6 EASTMAN FILING

The January 6 Committee — and the TV lawyers commenting on the John Eastman filing — need to look more closely at what the (at least) ten DC district rulings upholding the use of 18 USC 1512(c)(2) with January 6.

"THANKS TO YOUR BULLSHIT WE'RE NOW UNDER SIEGE"

Emails between John Eastman and Mike Pence's counsel suggest that Eastman figured that by forcing the Congress to adjourn, they would effectively force Pence into breaking the ECA, which Eastman shamelessly used to demand Pence further violate the law.

WHAT SEDITION LOOKS LIKE: LOTS OF STEWART RHODES, BUT KEY UNCHARGED OTHERS

Joshua James' statement of offense lays out a lot more evidence of Stewart Rhodes' plans for insurrection. But the silences may be just as interesting.

IT'S OFFICIAL: JANUARY 6 WAS SEDITION

For those of you who've been wondering what Merrick Garland's DOJ has been doing for the last year, it's this: January 6 was officially, for at least one participant, sedition.

PUTIN'S PLAYMATES TRUMP AND TUCKER REMIND TRUMPSTERS THEY'VE BEEN TRAINED TO LOVE PUTIN

If Putin has his way, his Ukraine war will split the United States in two. He plans to do that by keeping Trump supporters trained to love Putin more than they like their own country.

THE HALF OF TRUMP'S CONSPIRACY TO OBSTRUCT JUSTSECURITY LEFT OUT: INCITING AN INSURRECTION

To prove that Trump violated 18 USC 1512(c)(2) in attempting to prevent the vote certification, you need to prove he acted corruptly. The easiest way to do that is to show that he conspired with the rioters already charged with breaking other laws.

JUDGE MEHTA OBSERVES THAT ROGER STONE'S ROLE ON JANUARY 6 "MAY PROVE SIGNIFICANT IN DISCOVERY"

Judge Amit Mehta is probably the person most familiar with what DOJ has learned of Roger Stone's interactions with the Oath Keepers on January 6. And in rejecting Trump's motion to dismiss a lawsuit for his role in inciting the riot, Mehta suggested that, Discovery might prove [Roger Stone's ties to the militias] to be an important one."