

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CR No. 21-28
	)	Washington, D.C.
vs.	)	September 8, 2021
	)	2:00 p.m.
THOMAS E. CALDWELL, ET AL.,	)	
	)	
Defendants.	)	
_____	)	

TRANSCRIPT OF MOTION HEARING PROCEEDINGS  
BEFORE THE HONORABLE AMIT P. MEHTA  
UNITED STATES DISTRICT JUDGE

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1 P R O C E E D I N G S

2 THE COURT: Good afternoon, everyone. Please be  
3 seated.

4 DEPUTY CLERK: Your Honor, this is Criminal Case  
5 No. 21-28, United States of America versus Defendant No. 1,  
6 Thomas Edward Caldwell; Defendant No. 2, Donovan Ray Crawl;  
7 Defendant No. 3, Jessica Marie Watkins; Defendant No. 4,  
8 Sandra Ruth Parker; Defendant No. 5, Bennie Alvin Parker;  
9 Defendant 7, Laura Steele; Defendant 8, Kelly Meggs;  
10 Defendant 9, Connie Meggs; Defendant 10, Kenneth Harrelson;  
11 Defendant 11, Roberto Minuta; Defendant 12, Joshua James;  
12 Defendant 13, Jonathan Walden; Defendant 14, Joseph Hackett;  
13 Defendant 15, Jason Dolan; Defendant 16, William Isaacs; and  
14 Defendant 17, David Moerschel; Defendant 18, Brian Ulrich.

15 Jeffrey Nestler and Kathryn Rakoczy on behalf of  
16 the government.

17 David Fischer on behalf of Mr. Caldwell;  
18 Carmen Hernandez on behalf of Mr. Crawl, Shelli Peterson on  
19 behalf of Ms. Watkins; John Machado on behalf of Ms. Parker;  
20 Stephen Brennwald for Mr. Parker; Peter Cooper for  
21 Ms. Steele; David Wilson for Mr. Meggs; Juli Haller and  
22 Stanley Woodward for Defendant Connie Meggs, Bradford Geyer  
23 and John Moseley for Defendant Harrelson; Jenifer Wicks for  
24 Defendant Minuta; Joni Robin and Chris Leibig for Defendant  
25 James; Thomas Spina and Ed MacMahon for Defendant Walden,



1 Angie Halim for Defendant Hackett; Michael Van Der Veen for  
2 Defendant Dolan; Eugene Rossi for Defendant Isaacs; Scott  
3 Weinberg for Defendant Moerschel; and Attilio Joseph Balbo  
4 for Defendant Ulrich.

5 Defendants Jessica Watkins, Kelly Meggs,  
6 Kenneth Harrelson, Roberto Minuta, and Joshua James are  
7 appearing in person for this matter.

8 Defendant Moerschel's presence has been waived by  
9 counsel for this hearing.

10 And all other defendants are appearing remotely.

11 THE COURT: Okay, Counsel, good afternoon.

12 To all of the defense, good afternoon.

13 To all of those who are here physically, welcome  
14 to the courtroom.

15 For those of you who are here remotely, welcome.

16 Just a couple of housekeeping matters before we  
17 get started:

18 For those of you who are here, it looks like  
19 everybody is already on board, but please keep your masks on  
20 unless you're addressing the Court, in which case if you're  
21 comfortable, you can remove your mask while you're at the  
22 lectern, that's fine by me. But otherwise, you should keep  
23 your mask on at all times.

24 Secondly, the -- we have at least three  
25 defendants, Mr. Meggs, Mr. Harrelson, and Ms. Watkins, they

1 are, I believe, in the courthouse, but they are in a  
2 separate overflow room and able to watch the hearing.  
3 I just want to make sure their lawyers were all aware of  
4 that; that that's how we've accommodated those three  
5 defendants, because we were unable to link them up with the  
6 Department of Corrections, okay?

7 Thirdly, Mr. Harrelson, is Mr. Geyer either  
8 present or --

9 MR. GEYER: Yes, Your Honor. Present.

10 THE COURT: How are you doing, Mr. Geyer?

11 MR. GEYER: Good afternoon.

12 THE COURT: Why don't you just come on up here  
13 quickly so we can just address your client's situation.

14 So just so the record reflects what's going on  
15 with Mr. Harrelson, he originally had two counsel, which,  
16 I believe, he had retained, he removed those counsel and  
17 hired Mr. Pierce, John Pierce. Mr. Pierce has been  
18 unavailable at least the last couple weeks, I don't know  
19 what his current health situation is, but Mr. Harrelson, we  
20 got word, I think it was late last week, that he intended to  
21 replace Mr. Pierce, and you've entered your appearance.

22 Mr. Harrelson's first set of counsel did file a  
23 fairly substantive motion in this case, and, in fact, there  
24 are a couple of pending motions as well.

25 So I don't know where you find yourself in terms

1 of your ability to present argument today or if you intend  
2 to present argument or you wish to at least consider the  
3 possibility of delaying it to another date with respect to  
4 those arguments that are raised in Mr. Harrelson's brief.

5 MR. GEYER: So I spoke with the defendant's wife,  
6 who is the -- has power of attorney, on, I believe, Friday.  
7 I came on to the case technically sometime Friday night.  
8 Since that time, I've kind of reoriented my activities  
9 around this case.

10 I came here today to ask for an additional  
11 30 days. I briefly discussed that with Mr. Nestler.  
12 I agree with your characterization, sir, of the motion to  
13 dismiss that was prepared by the initial law firm, but,  
14 again, that's on a first glance. I'd really like to dig  
15 into it and make sure that it's -- everything is  
16 comprehensively presented as it should be.

17 I've noticed in some of the responses by the  
18 government, the brevity of them makes me wonder if maybe  
19 there was some information or evidence that was left on the  
20 table and didn't make it into a motion.

21 I've never met Mr. Pierce.

22 Thank you, by the way, to Mr. Nestler who reached  
23 out to me while I was meeting my client for the first time  
24 for one minute, Mr. Harrelson, and he told me about  
25 Mr. Pierce. I'm very relieved that his health has improved.

1           I have no way of -- I've never spoken to him, I've  
2 never spoken to any of his people who work with him, I have  
3 no way to evaluate that situation.

4           I briefly called -- I spoke to the client.  
5 He said muddle forward as best you can. And I called the --  
6 his wife, and she said, we'd like you to stay on. And I  
7 said, well, it's like an impossible situation for me here.

8           THE COURT: If I can just interrupt, Mr. Geyer.

9           I mean, look, I think the bottom line here is --  
10 what I'm hearing you say is that you're not prepared to --

11          MR. GEYER: Yes.

12          THE COURT: -- make argument today, and that's  
13 completely understandable.

14          In terms of a 30-day continuance, I think what  
15 I'll do is as follows: Let's just see where we are at the  
16 end of today. I mean, I've read -- I've spent a lot of time  
17 with these motions and the government's opposition and  
18 planned to sort of go through the waterfront of all of the  
19 arguments regardless of which particular counsel and  
20 defendant raise them. And so at the end of the day, I may  
21 not need a Harrelson-specific argument; I mean, the motion  
22 is fairly comprehensive.

23          But why don't we just see where we are at the end  
24 of the day and then we can figure out whether we need to  
25 schedule another hearing just on Mr. Harrelson's motion or

1 not, if that's acceptable to you.

2 MR. GEYER: Yes, that is.

3 I'll mention real quick that I did speak with some  
4 of the other counsel about the possibility of them at least  
5 being supportive of some additional time.

6 There's been no coordination among defense  
7 counsel. Something that we lost and are rescheduling now  
8 might be regained with better coordination among the group.  
9 I'll just tender that for your consideration, sir.

10 THE COURT: All right.

11 Well, you know, with a case involving, I think  
12 we're up to 16 defendants, there's a lot of moving parts --

13 MR. GEYER: Yes, I understand.

14 THE COURT: -- and we're just trying to corral  
15 everybody here and keep everybody moving in the right  
16 direction, so...

17 MR. GEYER: All right.

18 THE COURT: All right.

19 Terrific.

20 MR. GEYER: Thank you, sir.

21 THE COURT: Thank you, Mr. Geyer, I appreciate  
22 that.

23 In terms of -- just so that the record is clear,  
24 the motions that we're going to deal with today are as  
25 follows: There is the motion to dismiss that Mr. Caldwell

1 filed at ECF 240. That motion has been joined, I think, by  
2 all defendants.

3 Mr. James has a couple of motions filed at ECF 269  
4 and 270. Those motions have been joined by some defendants.

5 Mr. Harrelson's motion, which I just mentioned at  
6 ECF 278, and then there's Mr. Crowl's motion at 288.

7 There's also a motion to transfer venue at 273.  
8 That motion has been joined, I think, by nearly everybody,  
9 maybe with the exception of one or two defendants.

10 There are a number of other outstanding motions  
11 that were filed more recently, and let me just be clear on  
12 what those are: There's a motion to sever and a motion to  
13 suppress identification testimony. Those were filed by  
14 Mr. Meggs at ECF 1 -- excuse me, 315, 316.

15 Mr. Harrelson has a motion to sever at 342, as  
16 well as a bond review motion.

17 Mr. Meggs also has a bond review motion.

18 Mr. Crowl filed a motion to dismiss Counts 1 and 2  
19 and a request for Grand Jury minutes at 382, also a motion  
20 to dismiss Count 3 at 384.

21 Ms. Meggs, Connie Meggs, has recently filed a  
22 motion to dismiss Count 1 through 4 at 386.

23 And Mr. Minuta also filed a motion that seemingly  
24 is particular to him at 389 to dismiss the case.

25 None of those motions are before me today, they're

1 not ripe or at least -- I shouldn't say they're not all  
2 ripe, but certainly the more recent motions that go to the  
3 indictment are not ripe, and so those aren't going to be  
4 argued today. If they need argument, we'll schedule  
5 something. But for now, we're going to focus on the motions  
6 that are before me and that I've just identified.

7 In terms how we're going to proceed today, what I  
8 would propose is as follows, is that we would simply just do  
9 this by count. Counts 1 and 2 are the counts that are  
10 most -- as to which the arguments -- the most substantive  
11 arguments have been directed; that is, the conspiracy count  
12 and the obstruction count, the substantive standalone  
13 obstruction count.

14 There are additional arguments concerning Count 4,  
15 that's the entry into a restricted area count, we can turn  
16 to that next.

17 And then Mr. James has some arguments, as well as  
18 a motion for bill of particulars with respect to Count 8,  
19 and, I believe, one other count that relates to him.

20 One of the arguments is essentially now moot by  
21 virtue of the fifth superseding indictment. An argument was  
22 made, I think, by multiple counsel, about either sort of  
23 duplicity concerns about -- I can't remember which count it  
24 was, but there were duplicity concerns with a particular  
25 count that -- I think it was the destruction of evidence

1 counts, the tampering with documents or proceedings, those  
2 counts that involved certain defendants and the destruction  
3 of Facebook postings or other material.

4 The fourth superseding indictment originally had  
5 identified the official proceeding as the FBI investigation  
6 or a Grand Jury investigation, at least two of the  
7 defendants noted that there's case law to the effect that  
8 the law enforcement investigation such as that alleged in  
9 this indictment is not an official proceeding for purposes  
10 of 1512(c) (1).

11 And then the fifth superseding indictment which  
12 followed those contentions dropped the FBI from those  
13 tampering counts, and so that it's only the Grand Jury  
14 investigation that is the official proceeding that is the  
15 subject of those counts. And so I think that argument is  
16 now moot for our present purposes. If anybody disagrees  
17 with me, you'll let me know when you stand up.

18 So with that, why don't we go ahead and turn to  
19 Count 1 and Count 2. And we'll start with Mr. Caldwell's  
20 counsel, Mr. Fischer. And then we've got Ms. Hernandez, who  
21 also has made a motion with respect to Count 1 and Count 2.

22 MR. MACHADO: Your Honor, prior to that --  
23 I apologize, this is Mr. Machado, on behalf of actually  
24 Bennie and Sandra Parker.

25 My clients have an issue with regard to a family



1 member, their daughter, and they are wondering if they could  
2 be excused from this hearing, with the understanding that  
3 we will provide them with the next court date, and they have  
4 no problems waiving any -- tolling any time, wondering if  
5 they might be able to be excused and I'll inform them of the  
6 results of this hearing.

7 THE COURT: I mean, if they do not wish to be  
8 present, they don't have to be present.

9 And so if they want to be excused from the  
10 hearing, they are certainly free to not be present remotely.

11 MR. FISCHER: Thank you very much, Your Honor.  
12 I apologize for interrupting.

13 THE COURT: No problem.

14 Mr. Fischer.

15 MR. FISCHER: Thank you, Your Honor.

16 If the Court would please.

17 Your Honor, as to Counts 1 and 2, there are two  
18 issues that the Court needs to deal with as far as the  
19 motions -- the motion that I filed.

20 Number one is the definition of "official  
21 proceeding," and number two is the reach of the residual  
22 clause, 1512(c)(2), which is what Mr. Caldwell is charged  
23 under, as well as a number of other defendants as well.

24 Our position is that the term "official  
25 proceeding" applies to congressional hearings, or it could

1 apply to impeachment, but it applies to a hearing context, a  
2 judicial or quasi-judicial type proceeding.

3 As to 1512(c)(2), there are two issues; number one  
4 is -- our position is that the residual clause applies to  
5 conduct that is aimed exclusively at Congress's legislative  
6 power of inquiry and not other things, but aimed exclusively  
7 at the legislative power of inquiry.

8 And, third, as to 1512(c)(2), our position is that  
9 that statute applies to conduct that's intended to thwart  
10 justice or to cause a miscarriage of justice.

11 In short, Your Honor, we believe that the statute  
12 that Mr. Caldwell is charged under prosecutes -- its intent  
13 to prosecute obstruction of justice, and that's not  
14 something ordinarily one would consider, interrupting an  
15 Electoral College certification.

16 Your Honor, the legislative history that I cited  
17 in detail that I discovered and I put in my reply brief is,  
18 I believe, is pretty compelling. On three different  
19 occasions, Congress attempted to pass the residual clause:  
20 1979, which appears to be the first time Congress tried to  
21 pass what is now 1512, 1981, and also 1982. And the three  
22 times that they -- Congress put these bills forward, the  
23 language specifically laid out that the conduct in question  
24 only applied to Congress's power of legislative inquiry; in  
25 other words, it was clear Congress was --

1           THE COURT: Doesn't the fact that the current  
2 statute doesn't reflect -- that limitation suggests that  
3 Congress didn't intend for the residual clause to be so  
4 limited?

5           MR. FISCHER: Not at all, because I think,  
6 Your Honor, what happened, Congress, when they put 1515  
7 forward, 18 U.S.C. 1515 forward, and they spelled out the  
8 various types of proceedings that are considered official  
9 proceedings, they were simply restating everything that they  
10 had stated in those prior proposed statutes.

11           THE COURT: I mean, 1515 defines "official  
12 proceeding" to be simply a proceeding before Congress,  
13 right?

14           I mean, Congress didn't include any qualification  
15 as to the type of proceeding before Congress, and so why  
16 would there need to be some judicial gloss that limits the  
17 type of proceeding before Congress that has to be the object  
18 of the conduct?

19           MR. FISCHER: Because the word "proceeding,"  
20 Your Honor, means a court-like activity, a hearing. That's  
21 what "proceeding" means.

22           So when the Congress passed the statute --

23           THE COURT: So what else -- I mean, what other  
24 proceeding before Congress other than impeachment would fall  
25 within that definition of yours?

1 MR. FISCHER: Congressional hearings.

2 THE COURT: But that's not a judicial-like or  
3 quasi-judicial -- I mean, an ordinary congressional hearing  
4 in which witnesses appear to testify about consideration of  
5 legislation, that's not quasi-judicial in any sense.  
6 They're not taking evidence. They're not -- nobody's --  
7 I mean, there's a chairman, but there's no presiding  
8 officer. They're not dealing with objections, for example.  
9 I mean, I'm not sure how anything other than impeachment  
10 would qualify under your narrow definition.

11 MR. FISCHER: Well, Your Honor, apparently,  
12 Congress at one point intended my definition in the 1979,  
13 1981, and 1982 proposals that were put forward.

14 And I suspect it's much easier -- it would seem  
15 much more logical that Congress simply tightened the  
16 language when it constructed 1515 than it would be to think  
17 that Congress radically changed its intent, because it  
18 clearly intended, under these statutes, the 1979, '81, and  
19 '82 legislation, it clearly limited --

20 THE COURT: So then how do I deal with the fact  
21 that Congress used very different language, in terms of  
22 defining the type of proceeding before Congress, just a few  
23 sections earlier in 1505, right?

24 1505 speaks to obstruction with respect to any --  
25 the very -- what you suggested: The power of inquiry under

1 which any inquiry or investigation is being had by either  
2 house.

3 So, I mean, you know, one could sort of conclude  
4 that if Congress intends to limit the type of proceeding  
5 before it, it knows very well how to do that and did that in  
6 a neighboring provision but chose to leave it relatively  
7 broad here.

8 MR. FISCHER: Well, Your Honor, I believe, first  
9 of all, the other parts of 1515 regarding court hearings,  
10 administrative hearings, they would be covered by the exact  
11 same language that were used in these proposed bills.

12 Your Honor, the reality is, what Congress was  
13 getting at was when they use the term "before Congress,"  
14 "before" is a term that implies it's before a hearing, it's  
15 before a congressional committee.

16 And, Your Honor, a committee, they take testimony  
17 under oath.

18 And logically, this is an obstruction-of-justice  
19 statute.

20 THE COURT: I guess I don't understand that.

21 It seems odd to me that your argument is that a  
22 committee hearing would qualify as an official proceeding,  
23 but when both houses of Congress convene to carry out its  
24 constitutional and statutory duty in a fairly regimented --  
25 when I mean regimented, I mean sort of a statutorily laid

1 out process, that that would not qualify. It seems backward  
2 to me, if anything.

3 MR. FISCHER: Your Honor, if you look at it from  
4 the point of view is of which is a more serious undertaking,  
5 obviously, Electoral College certification is a  
6 once-every-four-year event, and it's a very important event  
7 for our country. And legislative hearings are things that  
8 happen every other day in Congress.

9 But the difference is, at a legislative hearing,  
10 those hearings require -- they need truthful testimony; they  
11 need to be able to take -- to have witnesses come to  
12 hearings and not be intimidated out of testifying. They  
13 can't have a situation where Congress is trying to obtain  
14 documents for very important legislation or investigatory  
15 hearings and somebody is destroying the documents.

16 So it all comes back to this is an  
17 obstruction-of-justice statute, and there's absolutely  
18 nothing about an Electoral College certification that  
19 says -- that the average person would believe is justice  
20 related. There was no testimony being taken, there were no  
21 witnesses being called, there were no documents to produce.

22 So, Your Honor, if you look at it from the point  
23 of view which is a more serious type of event, obviously,  
24 I mean, it would just be like if somebody interrupted  
25 Congress voting on a declaration of war. That's a very

1 serious event, but it's not obstruction of justice.

2           So, Your Honor, if I can move along now, I'd also  
3 point out that in the -- I cited also legislative history,  
4 extensive legislative history, which pointed out that  
5 section -- that these proposed statutes were designed to  
6 incorporate the residual clauses in 1503 and 1505. And  
7 I did point out, the government, the DOJ's prosecution  
8 manual, did state -- and it's still out there, it's been out  
9 there for many, many years, and it states that the purpose  
10 of the term "proceeding" is the same proceeding that is  
11 under 1503 and 1505.

12           I mean, the reality is, Congress should engage in  
13 legislative tightening and did not intend to expand the  
14 reach of the statute beyond that.

15           THE COURT: But I mean -- I'm sorry, but -- well,  
16 I mean, 1515 is pretty clear that the definition of  
17 "official proceeding" that's set forth in 1515 is as it's  
18 used in 1512 and 1513. So it's not the same meaning of  
19 "proceeding" that Congress intended, perhaps, in 1503 or  
20 1505. In fact, it's quite explicitly limited to two other  
21 sections, right?

22           MR. FISCHER: Well, Your Honor, it's impossible to  
23 say with 100 percent Congress's intent on anything.

24           THE COURT: I try to figure that out every day.

25           MR. FISCHER: What we do know is there was an

1 obvious intent -- I'll just put it this way: The  
2 government's position in the DOJ manual was that the purpose  
3 of this statute was to basically incorporate 1503 and 1505,  
4 the word "proceedings," and to eliminate the pending  
5 proceeding requirement. That's how the government  
6 interpreted the statute.

7 Your Honor, there's also the issue of what conduct  
8 does -- assuming that the contact reaches something outside  
9 of legislative inquiry matters, what conduct then  
10 constitutes a violation of the statute.

11 Now, I cited *Yates*, I know Ms. Hernandez cited the  
12 *Yates* case as well. At least in the *Yates* case, one could  
13 see that throwing fish overboard, contraband fish overboard,  
14 would be obstruction of justice, one could envision that  
15 being obstruction of justice. It's much more difficult to  
16 envision interrupting an Electoral College proceeding as  
17 obstruction of justice.

18 The statute, I think, should be read in light of  
19 1512(c)(1), which is -- which deals with documents. This  
20 whole statute was under the -- or this provision was put  
21 into place by -- with the Sarbanes-Oxley legislation. And  
22 so the purpose of this statute would seem to be limited to  
23 obstructive acts that deal with document shredding or  
24 something of similar behavior. So it should be limited in  
25 that respect as well.



1           So, Your Honor, unless the Court has any other  
2 questions, those were the points.

3           THE COURT: Okay.

4           Thank you, Counsel. I'll give you an opportunity  
5 if you'd like some rebuttal after I hear from the  
6 government.

7           MR. FISCHER: Thank you, Your Honor.

8           THE COURT: All right.

9           Ms. Hernandez.

10          MS. HERNANDEZ: Good afternoon, Your Honor.

11          THE COURT: Good afternoon.

12          MS. HERNANDEZ: Your Honor, initially I just want  
13 to say, in case we don't cover any points, I think whatever  
14 was stated in the briefs and the motions and in the reply  
15 memo, including Mr. Harrelson's original motion, I would ask  
16 if we don't mention it at the hearing or if I don't mention  
17 it at the hearing, I don't mean to waive any statements  
18 made, which are probably more articulate than anything  
19 I will say to the Court today.

20          So, Your Honor, I think I would submit to the  
21 Court that it's fairly clear that this statute, in two  
22 respects, fails the due-process clause, because it's  
23 overly -- at least as applied by the government to the facts  
24 of this case, it is unconstitutionally vague.

25          And, of course, the Court is not ruling -- it's

1 not being asked to rule on a clean slate. You've got the  
2 *Poindexter* opinion out of the D.C. Circuit, which has not  
3 been overruled, which has been applied by the Circuit and by  
4 other judges in this district.

5 And you've got the *Yates* opinion out of the  
6 Supreme Court, which interpreted a separate obstruction  
7 provision, but an obstruction provision that was enacted  
8 under Sarbanes-Oxley, so at the same time, and had a similar  
9 "otherwise" term.

10 And the Court there, I think, Justice Ginsburg,  
11 was clear that she said, you have to interpret that term,  
12 whatever comes after "otherwise," with reference to what the  
13 statute is about. I believe what the Court -- the term that  
14 the Justice Ginsberg used was the term "spoliation of  
15 evidence," which really goes to the notion that -- and goes  
16 hand in hand with obstruction statutes; it goes hand in hand  
17 with the notion that the action, the actus reus involved  
18 some attempt to falsify -- to attack the integrity of the  
19 evidence. People lie, suborn perjury, destroy documents.

20 THE COURT: Can I interrupt you, Ms. Hernandez.

21 I want to unpack the arguments that, I think, are  
22 in your brief and make sure I understand them.

23 I understand you to be making three arguments, and  
24 you tell me if I'm wrong. The first is the statute on its  
25 face -- let me do it in sort of reverse order, if you will.

1           The first is that the terms of the statute, in  
2 particular the word "corruptly," is facially vague.

3           MS. HERNANDEZ: Correct.

4           THE COURT: That is, it's vague in all of its  
5 applications, in any application.

6           The second argument you seem to make, that it is  
7 vague as applied to your client and the other defendants in  
8 this case.

9           The third argument you seem to make is that the  
10 statute itself does not reach the conduct, okay?

11          MS. HERNANDEZ: Okay.

12          THE COURT: And those are three different  
13 arguments, they're informed by different cases in different  
14 sets of analytical frameworks.

15          The first argument about facially invalid seems  
16 problematic to me, because even in *Poindexter* the Court said  
17 that there is some core activity that is corrupt, right?  
18 So -- in bribes, et cetera. And so facially invalid, at  
19 least as I understand it, means that a statute or a word in  
20 a statute is so vague that no one in any circumstance could  
21 understand what it means.

22          MS. HERNANDEZ: Correct.

23          And I don't -- I mean, I think the statute in this  
24 case relying on *Poindexter*, an argument could be made that  
25 it's facially unconstitutional, the term "corruptly," and

1 the Court, the *Poindexter* court says several times corruptly  
2 is --

3 THE COURT: Well, that wasn't what the Court held  
4 in *Poindexter*.

5 MS. HERNANDEZ: Well -- right. But --

6 THE COURT: In fact, the holding is inconsistent  
7 with that.

8 MS. HERNANDEZ: It's facially unconstitutional so  
9 we're going to see if we can find some way that it's not --  
10 as applied, that it's constitutional.

11 But the bottom line is, whether it's facially or  
12 as applied, I'm happy to live with as applied.

13 THE COURT: Oh, I know, but I want to make sure  
14 that we're talking about the arguments you're actually  
15 making.

16 So the second argument about facial- -- excuse me,  
17 vague as applied, tell me whether you think *Arthur Andersen*  
18 affects -- the Supreme Court decision in *Arthur Andersen*  
19 affects the consideration of that argument. And  
20 specifically, as you know, the Court in *Arthur Andersen*  
21 found there to be a definition or held that there was a  
22 definition of knowingly corruptly in, I think, it's  
23 1512(b) --

24 MS. HERNANDEZ: Right.

25 THE COURT: That was -- was not problematic.

1 MS. HERNANDEZ: That would be dicta, because the  
2 Court -- first of all, the Court never uses the term  
3 "vagueness" anyplace in the statute.

4 And it overturns the conviction because the  
5 instruction, which was --

6 THE COURT: Right.

7 I mean, but you're relying on dicta in *Poindexter*,  
8 so it's kind of --

9 MS. HERNANDEZ: Well, I don't think I'm relying on  
10 dicta.

11 But the point is that I think it's hard to argue  
12 that if found, that there's some definition that is  
13 constitutional; and if found, that the definition that was  
14 given to the jury in *Arthur Andersen* was deficient, and,  
15 therefore, I think -- I mean, I think it --

16 THE COURT: But the deficiency in *Arthur Andersen*  
17 had nothing to do with -- it had everything to do with  
18 corruptly, in the sense that the jury instruction didn't  
19 require two things; one, it didn't require a guilty mind;  
20 that is, the jury was actually instructed that an innocent  
21 mind could still result in a conviction; and two, the jury  
22 instruction did not require that there be a nexus between  
23 the conduct and the proceeding --

24 MS. HERNANDEZ: I don't --

25 THE COURT: -- right?

1 MS. HERNANDEZ: No.

2 THE COURT: I mean, those were the two flaws with  
3 the jury instructions in *Arthur Andersen*.

4 MS. HERNANDEZ: Well, Your Honor, I don't want to  
5 concede that in this sense.

6 THE COURT: Okay.

7 MS. HERNANDEZ: When the Court says that the Court  
8 found that the jury was allowed to find that non- -- or  
9 legal conduct would be -- would violate the statute, that's  
10 not exactly, I don't think, what the *Arthur Andersen* court  
11 says, because the *Arthur Andersen* court talks about the  
12 problem with -- one of the big problems with the instruction  
13 is that the government persuaded the District Court to take  
14 out the word "dishonest" and instead just used "impede."

15 THE COURT: Right.

16 MS. HERNANDEZ: And so -- which is exactly what  
17 the government is doing here, because our statute, our  
18 statute, 1512(c)(2), one of the ways you can violate it is  
19 by impeding. So the Court --

20 THE COURT: Right, but the government is not  
21 asking to drop "corruptly" from any --

22 MS. HERNANDEZ: Yeah, but they're asking -- the  
23 key in *Arthur Andersen* was that dropping the "dishonest" --

24 THE COURT: Let me just read --

25 MS. HERNANDEZ: -- definition.

1           THE COURT:  -- what the Court said in  
2     *Arthur Andersen*.

3           They were referring to 1512, I think it's (b)(1):  
4     You know, "The parties have not pointed us to any  
5     interpretation of 'knowingly ... corruptly' to guide us  
6     here.  In any event, the natural meaning of these terms  
7     provides a clear answer.  'Knowledge' and 'knowingly' are  
8     normally associated with awareness, understanding, or  
9     consciousness.  'Corrupt' and 'corruptly' are normally  
10    associated with wrongful, immoral, depraved, or evil.  
11    Joining these meanings together here makes sense both  
12    linguistically and in the statutory scheme.  Only persons  
13    conscious of wrongdoing can be said to 'knowingly ...  
14    corruptly persuade.'  And limiting criminality to persuaders  
15    conscious of their wrongdoing sensibly allows 1512(b) to  
16    reach only those with the level of 'culpability ... we  
17    usually require in order to impose criminal liability.'"

18           MS. HERNANDEZ:  So I'll --

19           THE COURT:  Now, I'll admit to you that the  
20    current -- you know, 1512(c) doesn't have the word  
21    "knowingly" in it, but --

22           MS. HERNANDEZ:  I don't want to.

23           THE COURT:  -- let me assure you that if there's a  
24    jury trial in this case, they will be instructed that the  
25    actions have to be knowing, including the state of mind.

1 MS. HERNANDEZ: So I would argue to the Court that  
2 that passage is dicta, because it is some broad statement  
3 that is not what they held and was not the instruction that  
4 was produced -- that was submitted to the jury, so that was  
5 not the instruction that was before the Court.

6 And, frankly, the *Poindexter* court says very  
7 clearly that moral, depraved, evil -- and it's not just  
8 *Poindexter*, there's other Circuits who have said moral,  
9 deprived people are unconstitutionally vague.

10 And interesting, one of the cases the government  
11 cites, the Seventh Circuit case where Justice Posner --  
12 I mean, Judge Posner, for some reason, draws some value from  
13 the fact that the Supreme Court failed to imply something.  
14 But in that case, the District Court said, nobody knows what  
15 "corruptly" means.

16 But I would say to the Court --

17 THE COURT: So would you -- is it your position  
18 then that all of the -- I mean, if I accepted your position,  
19 which is that "corruptly" is vague --

20 MS. HERNANDEZ: It's vague as applied.

21 THE COURT: -- as applied. Okay.

22 MS. HERNANDEZ: It's absolutely vague as applied.

23 There are -- Justice Scalia --

24 THE COURT: So why is it vague as applied in this  
25 case?



1 MS. HERNANDEZ: Because --

2 THE COURT: In -- hang on.

3 In other words --

4 MS. HERNANDEZ: Because my client didn't bribe  
5 anybody, he didn't pay off anybody, he didn't seek to gain  
6 any personal --

7 THE COURT: No, but he's alleged to have -- to  
8 cross barriers, rush past police officers --

9 MS. HERNANDEZ: That's not accurate.

10 THE COURT: -- entered the Capitol with the intent  
11 to obstruct an official proceeding.

12 MS. HERNANDEZ: Okay. So --

13 THE COURT: No. Hang on. You've got to let me  
14 finish.

15 MS. HERNANDEZ: But that's not accurate.

16 THE COURT: I don't interrupt you, Ms. Hernandez.

17 MS. HERNANDEZ: Excuse me, Your Honor?

18 THE COURT: I said, I don't interrupt you. So let  
19 me just finish.

20 MS. HERNANDEZ: Sorry, Your Honor.

21 THE COURT: You know --

22 MS. HERNANDEZ: I'm not sure that's true, though.

23 But, nonetheless, Your Honor, the Court has its --  
24 the Court deserves all my respect, and I'll just keep my  
25 mouth shut.

1           THE COURT: In any event, it just seems to me that  
2 if you were to ask anybody, the average person, whether that  
3 kind of activity -- and I'm not saying they're guilty of  
4 anything, but that's what's alleged -- that that would meet  
5 the definition of "corrupt."

6           MS. HERNANDEZ: That's abs- -- first -- I think  
7 the average person -- and it's -- the D.C. Circuit several  
8 times in *Poindexter*, in *North*, Judge Silberman in *North*,  
9 Scalia several times, said all --

10          THE COURT: Yeah, but --

11          MS. HERNANDEZ: -- I'm sorry -- they all cite  
12 dictionary definitions of "corrupt," which would bring in  
13 this notion of paying off, bribing, trying to get something  
14 for yourself that's not -- you know, I think the average  
15 person, that's their notion. A corrupt -- a corrupt  
16 politician. What does a corrupt politician do? He's taking  
17 money under the table to do something.

18               "Corruption" for most people is doing something --  
19 paying off somebody, doing something that gives yourself  
20 person gain. And all the cases, including some of the cases  
21 that the government cites is, oh, look this case upheld this  
22 and this case -- they all -- this notion of dishonesty, this  
23 notion of putting money in our pocket that doesn't belong to  
24 you, no case -- and two things, Your Honor, about going back  
25 to *Arthur Andersen*. I don't think *Arthur Andersen*, whatever

1 it said about the jury instruction in that case that the  
2 Court read, that's dicta, that's not what was before the  
3 Court; two, it is -- and the D.C. Circuit is very clear on  
4 that and other Circuits are very clear on that -- it is  
5 different to say if you try to impede a witness from  
6 testifying in a court hearing or if you try to impede or  
7 prevent some document from being presented at a court  
8 hearing, most people would say that's wrong, that's corrupt.  
9 Influencing Congress, going to Congress and shouting and  
10 making a fool of yourself? That's what we Americans do.  
11 And we do -- that is done every day.

12 THE COURT: Well, that may be.

13 MS. HERNANDEZ: And it's done every day.

14 THE COURT: Hang on.

15 MS. HERNANDEZ: Let me finish this thought,  
16 please.

17 And the Circuit is very clear that when you're  
18 dealing with attempts to "obstruct Congress," you've got a  
19 different analysis, because there's a lot of innocent  
20 conduct that falls within this notion of "attempt" -- it is  
21 impossible -- I think the Court says it's an absurd reading  
22 of 1505 and *Poindexter* to think that Congress intended to  
23 make illegal attempts to influence it. That's the  
24 First Amendment. So I don't think the cases that uphold --  
25 and, again --

1 THE COURT: All right.

2 MS. HERNANDEZ: -- *Arthur Andersen* involved --

3 THE COURT: I'm going to interrupt you now because  
4 I haven't done so in a while.

5 But, look, you're right, people do stand up in  
6 Congress all the time, and this is a question I have for the  
7 government, but that's not what your clients -- or your  
8 defendant is accused of doing, okay? It's a different kind  
9 of action than -- and we can have a discussion about the  
10 last of your arguments in a moment, but you cannot compare  
11 standing up necessarily in a committee room with what these  
12 defendants are being accused of, at least in terms of state  
13 of mind.

14 MS. HERNANDEZ: Absolutely not, Your Honor.

15 Those defendants, including the defendants in the  
16 case that went to the Supreme Court where they got up and  
17 interfered -- you know, interrupted the -- a Supreme Court  
18 hearing time and time again. One would get pulled out and  
19 the next one. Those defendants had the specific intent to  
20 interrupt that hearing.

21 My client, there is -- the government -- the  
22 indictment is --

23 THE COURT: They weren't charged with obstruction.

24 MS. HERNANDEZ: Again, that's because of the  
25 ability to arbitrarily apply the statute.

1           They absolutely could have been charged under  
2 1512(c)(2). They had the specific purpose to interfere,  
3 impede that hearing, and that was an official proceeding,  
4 and they were charged with misdemeanors.

5           THE COURT: So let's talk about that argument.

6           MS. HERNANDEZ: But, Your Honor, I mean --

7           THE COURT: Hang on.

8           MS. HERNANDEZ: -- I dispute the way you --

9           THE COURT: You know, Ms. Hernandez, it's better  
10 not to interrupt me, okay?

11          MS. HERNANDEZ: Excuse me?

12          THE COURT: It's better not to interrupt me when I  
13 want to move on to something else, okay?

14          MS. HERNANDEZ: Yes, sir.

15          THE COURT: Let's talk about the argument that,  
16 I think, actually has given me a great deal of pause and is  
17 one I want to spend a fair amount of time with when the  
18 government gets up, and that is this *Yates* argument and  
19 whether the statute actually reaches the conduct that's  
20 alleged in this case, okay?

21               Tell me why, in your view and in your estimate,  
22 the plain text of this statute doesn't reach this conduct.  
23 The conduct that is outlawed by 1512 is as follows: Someone  
24 who corruptly "otherwise obstructs, influences, or impedes  
25 any official proceeding, or attempts to do so."

1           Why doesn't --

2           MS. HERNANDEZ: If I --

3           THE COURT: Hang on.

4           Why doesn't someone, with the intent, as they've  
5       been alleged to have done in this case, to interfere with,  
6       to halt, to stop, hinder, those are the words used in the  
7       conspiracy count, why doesn't that meet the definition of  
8       "obstructs, influences, or impedes" corruptly?

9           MS. HERNANDEZ: First of all, that may be what's  
10      in the count, but what the statute says is "obstruct,  
11      impede, and influence."

12           If you add "otherwise" and you add "evade,  
13      corrupt," you've got nothing. Anybody could -- and not only  
14      that, every person who goes before Congress -- I mean, a  
15      couple of years ago, about two years ago, there were some  
16      handicapped persons who went before Congress, Congress was  
17      hearing a Medicaid bill, and they were there and they tried  
18      to -- they were in the hallway, it was a ghastly scene  
19      because they were dragged -- unceremoniously dragged out of  
20      the halls of Congress.

21           During the confirmation of Justice Kavanaugh, that  
22      would be --

23           THE COURT: Ms. Hernandez, you're not answering my  
24      question.

25           MS. HERNANDEZ: Okay. So I'm sorry.

1           THE COURT: My question is: Why doesn't this  
2 conduct fall within the plain terms that Congress used in  
3 this statute?

4           MS. HERNANDEZ: So --

5           THE COURT: Otherwise -- hang on -- otherwise  
6 obstructs, influences, or impedes any official proceeding.

7           You're making arguments about arbitrary  
8 enforcement, selective enforcement. That may be part of  
9 this, but I've asked you --

10          MS. HERNANDEZ: For the reasons --

11          THE COURT: Why doesn't the conduct that's alleged  
12 satisfy the statute on its face?

13          MS. HERNANDEZ: For the reasons -- it doesn't  
14 satisfy the statute on its face, because the term  
15 "otherwise" cannot be read as broadly as the government  
16 wants it. And *Yates* makes that very clear. Justice  
17 Ginsburg said, we may want there to be some general  
18 spoliation statute, but that's not how we -- it's not our  
19 job, by that, meaning the Court's job, to broaden what  
20 Congress did.

21           It is impossible to believe that the term  
22 "otherwise" -- it has never been applied to a demonstration  
23 in the manner that -- there's not one case in 20 years that  
24 has charged that kind of conduct. It doesn't reach that.

25          THE COURT: You're making a different argument,

1 I understand that.

2 MS. HERNANDEZ: Well, the answer is --

3 THE COURT: You're making a different argument,  
4 but that's okay.

5 MS. HERNANDEZ: Okay, the answer is what  
6 Justice Ginsburg said. You have to look at the --

7 THE COURT: So otherwise -- so, *Yates*, the statute  
8 at issue, involved a single sentence, document, something --  
9 I can't remember -- document, record, or tangible object, it  
10 was in a serial -- series of terms.

11 This section, this "otherwise" is separated in a  
12 separate subsection in 15(c) -- 1512(c). There's  
13 1512(c)(1), which talks about document destruction, and then  
14 otherwise.

15 Why is that not better read as a catch-all  
16 provision that is divorced from the preceding section, which  
17 is (c)(1), and focuses strictly on document destruction?

18 MS. HERNANDEZ: As the D.C. Circuit said -- I know  
19 that's the argument the government makes, that the  
20 concept -- the principle *eiusdem generis* doesn't apply.

21 But the D.C. Circuit, in *TransUnion*, used, again,  
22 a nearly identical statute. The case is *TransUnion*  
23 *Corporation versus FTC*, cited at page 26 of my reply,  
24 81 F.3d 228 at 234, D.C. Circuit 1996, it is a statute  
25 almost identical. It has several subsections, full



1 sentence -- or full phrases, with a semicolon separating the  
2 two, sort of like our (c)(1) and (c)(2).

3 And the government -- the D.C. Circuit in that  
4 case applied the Latin term, which is when a general term  
5 follows the specific one, the general term should be  
6 understood as a reference to subjects akin to the one with  
7 specific enumeration.

8 The D.C. Circuit said it applies in this case.  
9 There's no difference between that formulation, that is, a  
10 phrase, semicolon, another phrase. That's exactly what  
11 (c)(2) does. It has a (c)(1), semicolon, and a (c)(2).

12 You can't just -- it is a statute that was enacted  
13 to attack corporate fraud. I cite the legislative history.  
14 It is a statute that was to attack corporate fraud. It has  
15 never been used to prosecute demonstrators. It is  
16 impossible to believe that this passes due process  
17 constitutional fair notice to my client, that if he enters  
18 the Capitol, he will be -- he will expose himself to  
19 20 years in prison.

20 There are -- we have thousands of criminal  
21 statutes in the United States Code. The government is free  
22 to prosecute each defendant in this case with whatever  
23 statute they feel applies to the facts, but they're not  
24 allowed to twist these words into a fashion that just  
25 eliminates any meaning that Congress intended or that these

1 words mean.

2 If the term "otherwise" is as broad as the  
3 government proposes, then that's the only statute you would  
4 need -- obstruction would have to be otherwise, and that  
5 covers everything. Whereas, that's not it; that -- if  
6 (c)(2) is read as the government wants it to, you don't need  
7 anything else in 1512, because it covers everything.

8 And, again, as I say, particularly in a case where  
9 you're talking about a congressional hearing with all the  
10 legitimate and First Amendment protected rights that  
11 Americans have to shout at and impede and try to influence  
12 and do all these things to get their legislators to do what  
13 they want, it just -- it boggles the mind that this statute  
14 would be applied to these defendants or to my client.  
15 I mean, if it falls over to others, fine, but my client is  
16 not alleged to have beaten anybody up. And if he had --

17 THE COURT: Okay.

18 MS. HERNANDEZ: -- 1512(a) would cover it --  
19 I mean, it wouldn't even cover it.

20 THE COURT: All right.

21 Anything further, Ms. Hernandez? I want to move  
22 to the government.

23 MS. HERNANDEZ: I'm sorry?

24 THE COURT: I said, anything further? I want to  
25 move to the government now, unless you have anything

1 additional to add.

2 MS. HERNANDEZ: With the Court's indulgence.

3 Every case that the government cites is  
4 distinguishable or doesn't even say what the government  
5 claims it says.

6 I mean, it throws out these cases because it  
7 upheld prosecutions under 1512. And when you look at the  
8 instruction that was given to the jury, the instruction that  
9 was given to the jury includes the term "dishonest." And  
10 all the cases involve this notion of spoliation of evidence,  
11 and that's it.

12 If these defendants had gone in there and stolen  
13 the votes or done something to prevent -- somebody from  
14 test- -- that would be one thing. But the notion that this  
15 statute applies, it just -- and, again, I think the Court is  
16 not writing on a clean slate. *Poindexter* controls and so  
17 does *Yates*, I would argue to the Court.

18 Thank you, Your Honor.

19 THE COURT: Thank you, Ms. Hernandez.

20 Okay. On behalf of -- before I do that, I ought  
21 to at least -- does anybody else, on behalf of the  
22 defendants, wish to add anything at this point? None of you  
23 have written anything, but if there's anybody that wants to  
24 add anything orally, I'll open the floor for a minute to do  
25 that.

1           Okay. Hearing no takers, we'll hear from the  
2 government.

3           Oh. Yes.

4           MS. HALLER: Your Honor, we filed our motion on  
5 September 2nd, so it's not ripe yet. I represent Connie  
6 Meggs, who still has argument. We do have argument on this  
7 and we do have another point to raise on this issue.  
8 I would respectfully request that I can --

9           THE COURT: Well, I guess -- the only issue with  
10 Ms. Meggs's more recent motion as that it's not ripe and I  
11 sort of said at the beginning --

12          MS. HALLER: That's true.

13          THE COURT: -- that we wouldn't be dealing with  
14 it. The government hasn't had an opportunity to respond to  
15 it so --

16          MS. HALLER: Thank you, Your Honor.

17          THE COURT: Okay?

18          MR. FISCHER: Thank you, Your Honor.

19          THE COURT: All right.

20          Mr. Nestler.

21          MR. NESTLER: Yes, Your Honor.

22                 So Mr. Fischer started with legislative history,  
23 which we believe to be very telling. The Supreme Court has  
24 counseled time and again that the Court should not look to  
25 legislative history, should not try to discern Congress's

1 intent, which Mr. Fischer acknowledged we can never know  
2 with 100 percent certainty, when the text of the statute is  
3 unambiguous. And here, the text of the statute is  
4 unambiguous.

5 And so the government's position, Your Honor, is  
6 that 1512(c)(2) is unambiguous, 1515(a)(1)(B) is  
7 unambiguous, and that ends the inquiry, there's no need to  
8 resort to looking at legislative history.

9 THE COURT: So I wish it were that simple. And if  
10 it were, I would agree with you and this would be a very  
11 short hearing.

12 But the Supreme Court has said something very  
13 different in *Yates*, and that's the case I want to focus on.  
14 And what the Court has said quite clearly is that "the  
15 dictionary definitions of terms in a criminal statute may  
16 not necessarily be the end-all in terms of determining what  
17 the meaning of the statute is." And the Court in that case  
18 goes through a number of different factors, looks at the  
19 title, looks at the placement of the provision, it looks at  
20 statutory canons of construction, and comes up with a  
21 definition of "tangible object" that is narrower than  
22 tangible object is ordinarily understood, okay?

23 It seems to me -- and I don't want to -- it seems  
24 to me -- and I say this after having thought about this a  
25 fair amount -- that this statute potentially suffers from

1 the same problems, at least as applied to this case, and I  
2 want to get your reaction as to why that's not so.

3 We have a statute here that was borne out of  
4 Sarbanes-Oxley that was focused on corporate crime and the  
5 destruction of property -- excuse me, destruction of  
6 evidence coming out of Enron. So context provides us one  
7 clue.

8 Secondly, it's put in a statutory provision that  
9 concerns interference of evidence and the destruction of  
10 evidence or the presentation of evidence. That's 1512  
11 generally, tampering with witnesses, et cetera.

12 Thirdly, the statutory provision you're beginning  
13 with starts with "otherwise," a term that arguably links it  
14 to, in some way, the preceding section, which is limited to  
15 document shredding. It seems to me a fairly far leap to go  
16 from document shredding to the conduct that is at issue  
17 here.

18 And fourth, in *Yates* when it was all said and  
19 done, the Court relied on the Rule of Lenity to say, we're  
20 going to give this a more narrow interpretation.

21 So I could follow the *Yates* analysis here and  
22 follow that path and get to the position Ms. Hernandez has  
23 tried to articulate and it wouldn't be that hard. So tell  
24 me why that's wrong.

25 MR. NESTLER: Yes, Your Honor, several reasons.

1           We'll start with the fact that *Yates* is a  
2     plurality decision. And so the decision that Your Honor is  
3     citing is the plurality. Justice Alito provided the fifth  
4     vote in a concurrence. And he didn't just concur in the  
5     judgment, that he concurred and wrote separately. And so we  
6     want to start with recognizing that limitation of *Yates*.

7           Secondly, 1519 and 1512 are different  
8     structurally. 1519, which *Yates* considered, is one long  
9     paragraph. And the Court resorted to the statutory  
10    construction canon of ejusdem generis because the phrase  
11    "tangible object" there was in the end of a sentence or a  
12    clause of a sentence following several other words, like  
13    "record" and "document," which is why the Court looked at  
14    the phrase there.

15           1512(c) is structured far differently. And so  
16    Congress -- the government submits that ejusdem generis is  
17    not an applicable canon when interpreting 1512(c) because of  
18    the structure.

19           And we'll go to -- I'll start, Your Honor, with  
20    the *Aguilar* decision where Justice Scalia --

21           THE COURT: Well, before you go to *Aguilar* --

22           MR. NESTLER: Yes.

23           THE COURT: So in *Begay* -- you're familiar with  
24    *U.S. versus Begay*, right?

25           MR. NESTLER: Yes, Your Honor.

1           THE COURT: It's another case that involved the  
2 word "otherwise." And it was the armed career criminal  
3 offender provision.

4           And I will concede to you from the get-go that  
5 that provision is structured differently in two important  
6 respects; one, it sort of provides examples and then says  
7 "otherwise." And, two, like you've suggested, it's sort of  
8 in a string of words, as opposed to here, we've got two  
9 separate sections.

10           I'll agree with you that it's structurally a  
11 different statute. But at a minimum, what the Court does at  
12 least recognize and seems to recognize and Circuits have  
13 said this, actually, in some of the cases that you've cited,  
14 that that "otherwise" word actually means, at a minimum,  
15 that the conduct is -- and I'm just sort of reading what the  
16 Court said in *Begay*, "these considerations taken together  
17 convince us that to give effect to every word and clause of  
18 this statute, we should read the examples as limiting the  
19 crimes that clause covers to the crimes that are roughly  
20 similar in kind, as well as the degree of risk posed to the  
21 examples themselves."

22           The Court suggested that otherwise while it can be  
23 a different type of conduct, at least it ought to have some  
24 connectivity with the conduct that precedes it. And in this  
25 case, the conduct that precedes it is the shredding of



1 documents.

2 This resembles nothing like the shredding of  
3 documents.

4 MR. NESTLER: That's correct.

5 So in some statutes, the word "otherwise" is  
6 tethered to a list that precedes it. And in 1519, the word  
7 "otherwise" wasn't used, but it's similar, which is -- and  
8 that's where we go back to the canon of ejusdem generis,  
9 which is, when the word "otherwise" is following a list,  
10 then the Court -- the Supreme Court has said we ought to  
11 look to what precedes the words after "otherwise" to help  
12 limit or give construction or definition to what comes after  
13 "otherwise."

14 There are other statutes.

15 THE COURT: So do you think I should just ignore  
16 what (c)(1) prohibits --

17 MR. NESTLER: In this situation?

18 THE COURT: -- and that "otherwise" is essentially  
19 a catch-all that covers every other conceivable form of  
20 obstructive conduct?

21 MR. NESTLER: Yes, Your Honor.

22 THE COURT: So there's no limitation on the  
23 conduct that (c)(2) can capture?

24 MR. NESTLER: That's not what I said --

25 THE COURT: Okay.

1 MR. NESTLER: -- but that is correct that we do  
2 not believe that (c)(2) needs to be read in conjunction with  
3 (c)(1).

4 THE COURT: Okay.

5 MR. NESTLER: They share a prefatory clause, which  
6 is "whoever," and they share a penalty; otherwise, they  
7 don't share any common attributes.

8 In fact, (c)(1) has an additional and separate  
9 mens rea requirement --

10 THE COURT: Right.

11 MR. NESTLER: -- which is an intent to impair the  
12 availability of a document for the proceeding.

13 (c)(2) does not have that separate mens rea  
14 requirement.

15 THE COURT: So what's -- I mean, this is, I think,  
16 the million-dollar question in many respects: What's the  
17 limiting principle of how the government -- the Department  
18 of Justice, United States, applies (c)(2)? What does the  
19 work -- because I think even you would concede, or at least  
20 I hope you would concede, that (c)(2) on its face clearly  
21 brings in innocent conduct, somebody intends to influence  
22 Congress, that -- there's nothing inherently unlawful about  
23 that.

24 MR. NESTLER: So --

25 THE COURT: I'm sorry?

1 MR. NESTLER: I'm sorry, I didn't realize  
2 Your Honor wasn't done.

3 THE COURT: No, no, I just want -- I take it you  
4 agree with that?

5 MR. NESTLER: Correct.

6 THE COURT: Right.

7 So what is it about (c)(1) then -- or, excuse me,  
8 1215 -- 1512(c) that provides the limiting principle that  
9 distinguishes between unlawful conduct and lawful conduct?  
10 Is it "corruptly"?

11 MR. NESTLER: There are two limiting principles.  
12 The first is "corruptly."

13 THE COURT: Okay.

14 MR. NESTLER: The word "corruptly" does provide a  
15 limiting principle.

16 So calling one's legislator and asking them to  
17 vote or not vote on a bill is not corrupt. And so the  
18 government submits that "corruptly" does a lot of the work  
19 in terms of limiting (c)(2).

20 The other limiting principle comes from *Aguilar*  
21 and *Arthur Andersen*. *Aguilar*, looking at 1503, and *Arthur*  
22 *Andersen* looking at 1512(b), which is the nexus requirement.

23 And so both of those things, the government  
24 submits, and when it comes time to talk about jury  
25 instructions, Your Honor, we're prepared to talk about that,

1 there are limiting principles there tied to the nexus  
2 requirement that the Supreme Court has said are appropriate.  
3 We agree.

4 THE COURT: So how much work does that really do,  
5 in the following sense?

6 I mean, take the hypothetical that that is the  
7 obvious one. Somebody stands up at a Senate confirmation  
8 hearing for a Supreme Court justices and yells, "stop these  
9 proceedings." Is that a 20-year felony?

10 MR. NESTLER: Likely not.

11 And there are a couple of reasons: Well, we have  
12 to look at the person's intent. What were they -- was their  
13 intent corrupt and what did they intend to actually  
14 accomplish? Did they intend to have their voice heard by  
15 Congress and have their position known and to have a  
16 momentary second or minutes?

17 THE COURT: So what if the person stands up and  
18 says, "Stop these proceedings now," "These proceedings have  
19 to come to a stop now," because that's what you've alleged  
20 the object of the conspiracy here is, was to halt these  
21 proceedings, right? Would that be a 20-year felony?

22 MR. NESTLER: No.

23 But the object here was not just to halt the  
24 proceedings, the object here was to scare Congress into  
25 halting the proceedings.

1           And so if a person stands up in a congressional  
2 proceeding and says, "There is a bomb under all of your  
3 chairs, stop the proceeding now," their actions might be  
4 corrupt.

5           THE COURT: I mean, that's not what --

6           MR. NESTLER: If they just say, "I want you to  
7 stop" --

8           THE COURT: Where do I look in the indictment for  
9 that?

10           I mean, now you've suggested that this bordered on  
11 threatening conduct. You didn't use the word "threatening  
12 conduct," but, I mean -- you know, the purpose of the  
13 conspiracy was to stop, delay, and hinder the certification  
14 of the Electoral College vote.

15           MR. NESTLER: Correct.

16           THE COURT: That was the purpose of the  
17 conspiracy.

18           MR. NESTLER: That was the purpose of the  
19 conspiracy.

20           THE COURT: Right.

21           MR. NESTLER: But one of the means by which the  
22 defendants evidenced their intent to act corruptly in doing  
23 so was by their show of force; their numbers, their weapons  
24 that they had stashed in Virginia, in this particular case;  
25 mostly their numbers here and their use of force with the

1 police officers.

2           The other important limiting factor, Your Honor,  
3 for the congressional proceeding hypothetical or the  
4 confirmation proceeding, is that those individuals were  
5 lawfully present at the time they made those statements.  
6 So a person who attends a judge's confirmation hearing  
7 before the Senate Judiciary Committee, has a ticket,  
8 is there, is seated, is peaceful, and causes some sort of  
9 outburst or disruption. And so there are other statutes,  
10 obviously, that the government has used in the past in order  
11 to prosecute that conduct.

12           Here's, there's no allegation that any of the  
13 defendants here were lawfully present at the Capitol  
14 Grounds.

15           THE COURT: I mean, doesn't the concern that's  
16 raised in Supreme Court cases about -- I mean, essentially  
17 what you've said is, trust us, we know the difference  
18 between obstruction under (c)(2) -- we know what's  
19 obstructive under (c)(2) when we see it.

20           I mean, it has that feel to it. And that is a  
21 real problem when it comes to criminal statutes, to suggest  
22 that we know it when we see it and we'll pick and choose  
23 when we think it's an appropriate exercise of prosecutorial  
24 discretion.

25           MR. NESTLER: That is not what we are saying,

1 Your Honor.

2 We are saying when the defendants -- the putative  
3 defendants' actions evidence their corrupt intent, and we  
4 understand the -- whether something is corrupt is ultimately  
5 a jury question and ought not to be decided on a Rule 12  
6 motion, whether the defendants' actions here were corrupt.  
7 I understood Ms. Hernandez to be arguing that her client was  
8 not corrupt, he didn't have the correct mens rea. And the  
9 government submits that's a jury question, ultimately the  
10 jury should decide that based on the instructions the  
11 parties and the Court formulate.

12 But it's not a trust-us situation. It's a -- if  
13 the defendants' conduct could fall within this statute that  
14 they were acting corruptly and that their conduct had a  
15 nexus in order to -- related to the official proceeding.

16 THE COURT: So if you're right that Congress  
17 intended 1512(c)(2) to reach as broadly as you've suggested,  
18 what then is left of the other obstruction statutes? Why do  
19 we need them? Why do we need 1505? Why do we need 1503?  
20 I mean, doesn't the very broad construction that you've  
21 suggested essentially swallow those other provisions?

22 MR. NESTLER: No.

23 And that's because this is how Congress typically  
24 does legislate. They give specific examples and specific  
25 statutes, and then sometimes Congress sees fit to include a

1 residual or a catch-all, either a statute or a subsection or  
2 a part of a subsection, and Congress includes catch-alls.

3 And so we have several examples we cite in our  
4 briefs, and I can provide with the Court with others, where  
5 Congress provides a catch-all that, under the line of  
6 thinking Your Honor just said, might encompass and swallow  
7 up everything else that Congress brought before. But  
8 Congress wants to give examples and give specificity, and  
9 sometimes then will provide a catch-all provision.

10 THE COURT: But what evidence is there -- what do  
11 you think the best evidence is that Congress intended for  
12 this catch-all -- and I'll concede to you it has a catch-all  
13 quality to it -- was intended to reach as far as you  
14 suggest; that is, to be completely unmoored from the other  
15 aspects of 1512, right?

16 1512 addresses witness tampering, destruction of  
17 documents. This is conduct that is arguably different in  
18 kind and, in a sense, different in its object. Those other  
19 portions -- those other portions of the statute has an  
20 object, a witness, a piece of evidence, and the destruction  
21 or influencing of testimony.

22 This is not that. This is an effort to stop a  
23 proceeding, whether temporarily or permanently.

24 MR. NESTLER: A couple of answers to that,  
25 Your Honor.



1           First, we submit that it's not appropriate to look  
2   at Congress's intent, because Congress's intent is diffuse.  
3   Congress is a large, multi-hundred-person body. And so the  
4   intent of Congress is hard to discern, as we just talked  
5   about, by looking at legislative history.

6           THE COURT: When I use that term, I mean through  
7   the statutory text and other clues of meaning. I don't mean  
8   what was in the head of particular Congressmen and women.

9           MR. NESTLER: Right.

10          And so the clearest example of that is the  
11   language that Congress settled on and negotiated and  
12   compromised on, and this is -- we believe that is clear.

13          Secondly, Your Honor, court after court has looked  
14   at this exact question about whether (c)(2) is tethered or  
15   moored to (c)(1) and found that it's not, both before and  
16   after *Yates*.

17          And so we can point the Court to *Volpendesto*,  
18   which was divided before *Yates* by the Seventh Circuit, but  
19   also the *Petruk* case, P-e-t-r-u-k, decided after *Yates* was  
20   decided.

21          There is also a District Court decision in Texas  
22   from last year, *De Bruhl-Daniels*, it's at 491 F.Supp.3d 237,  
23   and it rejected this exact argument that otherwise limits  
24   (c)(2) to being tethered to (c)(1).

25          THE COURT: I mean, what's interesting to me, is

1 that, for example, the Seventh Circuit in *Burge*, which is  
2 sort of a series of these cases that you've cited, agreed  
3 with you, but not so far as what you've suggested.

4 I mean, they say Sections 1512(c)(1) and (2) are  
5 linked with the word "otherwise," so we can safely infer  
6 that Congress intended to target the same type of pretrial  
7 misconduct that might otherwise obstruct a proceeding beyond  
8 simple document destruction.

9 So, you know, at least the Seventh Circuit, for  
10 lack of a better term, seems to at least suggest there has  
11 to be some similarity in the type of conduct that is at  
12 issue and being charged under (c)(2), as made unlawful under  
13 (c)(1).

14 MR. NESTLER: Well, the type of conduct is...

15 The type of conduct is the corrupt conduct. So  
16 the type of conduct is the person committing the corrupt act  
17 in order to obstruct the proceeding, whether it involves a  
18 document or not a document, "otherwise."

19 THE COURT: But the conduct here is being done  
20 corruptly. That's the state of mind.

21 But the conduct is unlawfully entering the Capitol  
22 building and Capitol Grounds, pushing through police  
23 officers, moving into the Rotunda, and, you know, at a  
24 minimum, scaring the daylights out of everybody who was in  
25 either the House or the Senate when people entered the

1 Rotunda.

2 That, it seems to me, is conduct that's very  
3 different than destroying a document, intimidating a  
4 witness, convincing somebody not to testify.

5 MR. NESTLER: In this situation, it's intimidating  
6 Congress. That is what the government intends to prove at  
7 trial; that the defendants here were corrupt because they  
8 intended to intimidate Congress, obstruct Congress,  
9 interfere with Congress. And they were corrupt because they  
10 were intending to intimidate Congress into stopping what  
11 Congress was doing.

12 One person standing outside of the Capitol  
13 building yelling "don't certify the Electoral College vote"  
14 is not going to accomplish their ends. So what they did was  
15 they broke through the doors and made Congress literally  
16 flee from their seats so they couldn't do what they were  
17 doing. The government's position is that's what evidences  
18 their corrupt state of mind.

19 THE COURT: And so to take a hypothetical, if  
20 somebody were to bust through the front doors, say a group  
21 of people bust through the front doors of C Street with the  
22 intent to halt these proceedings, that, in your view, would  
23 be a violation of 1512(c)(2) potentially?

24 MR. NESTLER: Potentially a violation of  
25 1512(c)(2), yes.

1           And if a person came into the courtroom in order  
2   to convince Your Honor to leave the bench, to not rule on  
3   this motion, that could be a violation of 1512(c)(2),  
4   depending on what's inside of that person's mind, whether we  
5   would -- the government submits that they were acting  
6   corruptly.

7           THE COURT: And how, in your view, would the  
8   ordinary person have notice that (c)(2) reaches that  
9   conduct? I mean, it's a different argument than whether the  
10  statute actually reaches it; the question of notice is a  
11  separate question.

12           And so what's your position on what it is about  
13  the statute that -- and anything else? And it would  
14  include, for example, prior prosecutions, legislative  
15  history. I mean, what could the ordinary person look to, in  
16  your view, beyond the words of the statute, if there's  
17  anything else?

18           Let me put the question differently, which is:  
19  What is the government relying upon to support the position  
20  that a person of ordinary understanding would know that this  
21  statute reaches the conduct that's alleged in this  
22  indictment?

23           MR. NESTLER: Two things, Your Honor.

24           One is the plain meaning -- I'm sorry, the plain  
25  text of the statute. A person of ordinary intelligence who

1 were to read this statute would or should know that it would  
2 criminalize or proscribe actually corruptly breaking into  
3 the Senate chamber to stop the Senate from meeting.

4 Second is, court decisions. As I just indicated,  
5 *Petruk* and, we believe, the *Volpendesto* decision. But even  
6 the *De Bruhl-Daniels* decision says, when it's interpreting  
7 the same statute, the Court there said that (c)(2) is an  
8 unlimited prohibition on obstructive behavior that extends  
9 beyond merely tampering with tangible items.

10 THE COURT: I'm sorry, which case is that?

11 MR. NESTLER: That's *De Bruhl-Daniels*,  
12 D-e B-r-u-h-l-Daniels. And that's the case from the  
13 Southern District of Texas last year.

14 THE COURT: But do any of those cases involve  
15 conduct like -- that's at issue here?

16 I mean, a lot of those cases involve false  
17 statements in civil proceedings, they involve -- there's a  
18 recent decision, I think somebody cited, about the burning  
19 of bodies following a murder.

20 I mean, any case that you're aware of that has  
21 comparable facts; that is, a crowd of people or even a  
22 single person attempting to halt a legislative or judicial  
23 proceeding that's been prosecuted under (c)(2)?

24 MR. NESTLER: No.

25 And there's an easy answer for that: It's because

1 it doesn't frequently come up.

2 THE COURT: Right.

3 MR. NESTLER: Firstly, the act of trying to  
4 obstruct a proceeding by halting it is oftentimes  
5 criminalized by other specific provisions without the need  
6 to resort to a catch-all. So trying to prevent a juror from  
7 showing up in the courtroom, or, more often, trying to  
8 prevent a witness from showing up, there's a specific  
9 statutory provision on that, so the government can more  
10 easily and more acutely rely on those specific statutes.

11 It's rare that the government is forced to rely on  
12 the catch-all, but the catch-alls exist for a reason. And  
13 the Supreme Court has said this time and again: There's a  
14 catch-all there, because we don't -- and Congress doesn't  
15 always -- know what it is that some inventive criminal mind  
16 is going to come up with.

17 And that is actually -- we cited that, and so did  
18 Mr. Fischer, from the Senate Report from the early '80s when  
19 1512 was initially passed, before it included 1512(c)(2);  
20 that Congress, the Senate specifically, was concerned with  
21 "the inventive criminal mind." Congress at that point was  
22 considering a residual or a catch-all and wanted to make  
23 sure that it could capture whatever some future criminal  
24 came up with.

25 THE COURT: Right.

1           But we have no comparable legislative history with  
2       respect to this provision.

3           MR. NESTLER: That's correct.

4           And when we talk about the catch-alls, though, the  
5       government will point the Court to the *Iraq versus Beaty*  
6       case, the 2009 Supreme Court case, it's at 556 US 848.

7           And there, the Supreme Court said that the whole  
8       value of a generally phrased residual clause is that it  
9       serves as a catch-all for matters not specifically  
10      contemplated, what are known as known unknowns, and it cites  
11      Donald Rumsfeld's statement about known unknowns.

12           The Supreme Court in the *Beaty* case actually  
13      overruled the D.C. Circuit in that decision. And the  
14      Supreme Court talked about how it was not appropriate to  
15      look at Congress's intent in passing this provision of the  
16      Foreign Sovereign Immunities Act, because one could not  
17      ultimately know what Congress was intending. And so the  
18      Supreme Court said, let's look at what the language Congress  
19      used. Congress used a broad residual clause or a broad  
20      catch-all. And so courts should be wary about overriding  
21      clear, statutory texts with speculation about a law's true  
22      purpose.

23           That's the government's position here, Your Honor,  
24      that we should all be wary about overruling what Congress  
25      said by trying to interpret what it meant.

1 Congress means what it says, and it said here very  
2 clearly, the phrase in 1512(c)(2), corruptly obstructs,  
3 interferes with an official proceeding. And it also defined  
4 official proceeding very clearly as any proceeding before  
5 the Congress.

6 THE COURT: So what's your position on -- I mean,  
7 there's a lot riding on my understanding of "corruptly" in  
8 *Poindexter*. What's the government's response to whether  
9 "corruptly" in this case is a word that has sufficiently  
10 definite meaning that it can be understood and employed in a  
11 criminal statute?

12 MR. NESTLER: It does.

13 So as Your Honor indicated, *Poindexter* was an  
14 as-applied challenge case, not a facial challenge to the  
15 word "corruptly."

16 The D.C. Circuit, after *Poindexter*, has upheld  
17 convictions and talked about the word "corruptly." The  
18 *Morrison* case from 1996 was a challenge to the word  
19 "corruptly" in 1512(b), and the D.C. Circuit in that case  
20 said that the word --

21 THE COURT: But that was a case that involved sort  
22 of core corrupt conduct.

23 MR. NESTLER: Correct.

24 But the D.C. Circuit said that the word  
25 "corruptly" was not itself vague and could be given a



1 definition.

2 As Your Honor already indicated, the Supreme Court  
3 in *Arthur Andersen* provided some definition of the word  
4 "corruptly."

5 THE COURT: Would the government agree -- and  
6 maybe I'm asking something earlier than I need to. Would  
7 the government agree that "corruptly," as an element in this  
8 case, under 1512(c)(2), also has a knowing component to it,  
9 such that someone has to act knowingly corruptly?

10 MR. NESTLER: I think Your Honor's preface to that  
11 question is correct. I'm not prepared to answer whether, at  
12 the time we talk about jury instructions, we ought to  
13 include the word "knowing."

14 If we look at the footnote in *Arthur Andersen* that  
15 Your Honor was talking about a quote to Ms. Hernandez, the  
16 Supreme Court actually indicated that the word "knowing" was  
17 before the word "corruptly" in a couple of those statutes,  
18 but not in 1512.

19 THE COURT: Right.

20 1512(c). It's not in 1512(c).

21 MR. NESTLER: Not in 1512(c).

22 THE COURT: Right.

23 MR. NESTLER: The word "knowingly" is in some  
24 other provisions of 1512.

25 And so the government would have to consider

1 whether we would agree that the word "knowingly" would need  
2 to be present.

3 THE COURT: I mean, I'll say this, that, you know,  
4 if you agree it includes the word "knowingly," then you're  
5 sort of all on -- you're sort of on -- at least you're more  
6 in line with *Arthur Andersen* and the Supreme Court's  
7 position that "knowingly corruptly" actually is a  
8 definite -- has sort of a definite meaning that can be used  
9 to prosecute and a phrase that has common understanding.

10 MR. NESTLER: The government believes that the  
11 word "corruptly" itself has a phrase that has knowing  
12 understandings -- or has -- not to use the word "knowing"  
13 twice in the same sentence differently, but has a common  
14 understanding that the Seventh Circuit actually has a jury  
15 instruction for 1512(c) on the word "corruptly." The word  
16 "corruptly" is defined elsewhere in the U.S. Code, including  
17 in 1515, not with reference to 1512, with reference to other  
18 statutes.

19 And court case after court case, including  
20 *Arthur Andersen*, have provided definitions of the word  
21 "corruptly." The government submits that it's not a word  
22 that is not susceptible to some sort of concrete definition  
23 that jurors would be able to look at the word "corruptly"  
24 and look at the definition the Court ultimately provides  
25 them with the jury instructions and render a decision about

1 whether these defendants' actions were done with the  
2 appropriate mens rea.

3 THE COURT: So let me ask you, Mr. Nestler.  
4 I mean, in all candor, your opposition brief didn't really  
5 address this argument, but we spent a lot of time doing it  
6 orally, and my intention here at the start was to suggest  
7 that maybe it ought to be briefed and addressed. And I  
8 mean, I think you and I have spent a fair amount of time,  
9 and I wonder whether you still think something like that  
10 would be useful.

11 I mean, the extent to which the government  
12 addressed *Yates* in its opposition only had to do with sort  
13 of the ambiguity argument in connection with the word  
14 "otherwise." It didn't address this question of, does the  
15 statute reach the conduct that's alleged in the sense that  
16 *Yates* looked at the question.

17 MR. NESTLER: The government submits, Your Honor,  
18 that the -- every court to have looked at this question that  
19 I've cited back to Your Honor about the breadth of (c) (2)  
20 has said that (c) (2) was not tethered to (c) (1) and so the  
21 government believes that that would be appropriate.

22 If the Court believes that additional briefing on  
23 this topic would be helpful for the Court's consideration,  
24 the government would be happy to put some of its thoughts in  
25 writing in order to drill down on the specific point about

1 the word "otherwise" and the concept of ejusdem generis and  
2 why it does not apply in this particular context because we  
3 are not here dealing with a list.

4 THE COURT: Okay.

5 I mean, I've seen -- I know there was a -- I think  
6 it may have been a surreply brief filed in one of  
7 Judge Kelly's cases that addressed some of these issues.

8 But, all right, why don't we put a pin on that for  
9 a moment and then we'll figure out how we'll proceed at the  
10 end of all this.

11 MR. NESTLER: Yes, Judge.

12 THE COURT: Okay.

13 I'll give defense counsel a brief opportunity for  
14 rebuttal, if you'd like it.

15 MR. FISCHER: Your Honor, if the Court would  
16 please, I just wanted to make one point based on  
17 Mr. Nestler's comments regarding -- about legislative  
18 history regarding the 1512.

19 There was the -- in the government's reply -- and  
20 I've cited this in my filing -- the government cited a  
21 Senate Judiciary Committee Report regarding Section 1512  
22 from 1982. And what it said, the government said, and I  
23 quote, "But the Senate Judiciary Committee Report that  
24 supported Section 1512 justified the inclusion of a 'broad  
25 residual clause' by noting that the 'purpose of preventing

1 an obstruction or miscarriage of justice cannot be fully  
2 carried out by a simple enumeration of the commonly  
3 prosecuted obstruction offenses. There must be protection  
4 against the rare type of conduct that is the product of the  
5 inventive criminal mind and which also thwarts justice."

6 So, Your Honor, I would point out right there,  
7 that lays out in a nutshell how the Court should interpret  
8 or put the brakes on 15(c)(2). It has to be conduct that's  
9 intended to thwart justice. Not only that, it has to also  
10 involve documents as well, we would argue, but it has to be  
11 something that's aimed --

12 THE COURT: If I could interrupt you, Mr. Fischer.

13 I mean, look, there's a lot to think about here.  
14 I will say the following: That legislative history from  
15 1982 regarding a statute that was then actually promulgated  
16 some decade -- two-plus decades later and whether it's cited  
17 by you or cited by the government, I don't know how terribly  
18 helpful that is in terms of divining the meaning of the  
19 statute that's before me.

20 But I take your point that there's an argument to  
21 be made here that the statute, as it's written even, and it  
22 was adopted, requires some linkage between, you know,  
23 15(c)(1) and the conduct that's actually unlawful under  
24 17(c)(2).

25 MR. FISCHER: Understood, Your Honor.

1           Your Honor, there's also the point of the novel  
2 construction principle, I wanted to raise that as well. The  
3 Court is aware, this would be the ultimate novel  
4 construction, because the government has never prosecuted  
5 anyone for this type of conduct under this statute.

6           With that said, Your Honor, thank you.

7           THE COURT: Thank you, Mr. Fischer.

8           Ms. Hernandez.

9           MS. HERNANDEZ: Thank you, Your Honor.

10           Some of the questions that the Court asked about  
11 if someone came in here and tried to force their way in and  
12 interrupt, there is actually an obstruction statute, 1507,  
13 that applies to judicial proceedings. Again, going back to  
14 the difference between congressional and judicial  
15 proceedings, Congress enacted a statute that says if you  
16 picket, if you interrupt, if you do this, that's a  
17 violation. It could have added, Congress, it could have  
18 added "official proceedings." No, it specifically said  
19 "judicial proceedings."

20           With respect to the government's citation of  
21 *Morrison, Morrison*, as the Court said, is core corrupt. The  
22 person offered to buy a witness's furniture in return for  
23 her lying and providing an alibi. Yes, as applied in  
24 *Morrison*, "corruptly" has a definition. As applied in  
25 *Arthur Andersen*, which involved shredding documents, the

1 Supreme Court could come up with a definition of "corrupt."

2 But every day -- but there's nothing -- and the  
3 government's adding terms -- as the Court pointed out,  
4 adding terms that are not in the indictment, what they claim  
5 they're going to say. And what they claim, you know, the  
6 reason these facts or these allegations fall within 1512.

7 "Otherwise" has to refer back to something. You  
8 have to -- it has to refer back to something. What does it  
9 refer back -- if you didn't need to refer back, if it was an  
10 open statement, then all you had to -- take the word  
11 "otherwise" out and just say "corruptly" this, this, that.  
12 But you put "otherwise" in there, it has to refer to  
13 something. What is it? It's in thin air, it's in the  
14 government's mind. That's just not the way the due process  
15 law works.

16 And bottom line, Your Honor, the due process  
17 clause requires statutes to give a fair meaning so that a  
18 defendant can say, I'm not going to do that because that's a  
19 20-year violation.

20 How many lawyers are in this room? I would say  
21 we're at least of normal intelligence. Some of us more  
22 intelligent than others. But bottom line is, I don't think  
23 we've come up with a single definition of what the term  
24 "corruptly" is.

25 The judge in the *Edwards* case, the District Court

1 Judge in the *Edwards* case out of the Seventh Circuit, which  
2 the government cited, said on the record "nobody knows what  
3 the term 'corruptly' means." The D.C. Circuit said "this  
4 word is vague." And as applied here, it's still vague.

5 THE COURT: But it's a term that finds itself, it  
6 appears, in countless criminal statutes --

7 MR. NESTLER: As applied.

8 THE COURT: -- countless.

9 MS. HERNANDEZ: As applied.

10 No question.

11 Of course, I agree, if you give a bribe to  
12 somebody, that's corrupt.

13 If you vote in one way in order to help your --

14 THE COURT: So if you rush into a courthouse with  
15 the intention of --

16 MS. HERNANDEZ: 1507 covers that, Your Honor.

17 THE COURT: Well, it doesn't only have to be  
18 covered by one statute.

19 You rush into a courthouse intending to cause the  
20 judge and the jury to scamper and run for cover, that's not  
21 corrupt?

22 MS. HERNANDEZ: As the D.C. Circuit, the  
23 Supreme Court, multiple courts have said, there is no way  
24 that one could look at conduct of that nature that  
25 interrupts the judicial proceeding and not see it as



1 corrupt; however --

2 THE COURT: So why would it violate the other --

3 MS. HERNANDEZ: Because --

4 THE COURT: Hang on.

5 Why would it violate the other statute, which  
6 I think is actually 1505 --

7 MS. HERNANDEZ: Because --

8 THE COURT: -- let me finish -- which also uses  
9 "corruptly"?

10 MS. HERNANDEZ: Because all those statutes have  
11 been upheld as applied.

12 Every case that the government has cited -- as  
13 applied -- yes, I will admit to the Court that the "as  
14 applied" term is not unconstitutionally vague in every case  
15 that the government has cited, because every case that the  
16 government has cited involved attempts to mess up -- mess  
17 with the evidence, with the integrity of evidence in a  
18 judicial proceeding; to get somebody to lie; to suborn  
19 perjury; to destroy -- to false alibi.

20 So, yes, in those as applied --

21 THE COURT: So I guess I don't understand your  
22 argument.

23 MS. HERNANDEZ: As applied --

24 THE COURT: Which is -- hang on.

25 You've conceded that the conduct that I just

1 described, which is bum rushing into a courthouse -- hang  
2 on -- entering a courthouse with the intention of disrupting  
3 a court proceeding, causing a judge to leave the bench, the  
4 marshals to come in, the jurors to scamper, that would be a  
5 violation of 1503?

6 MS. HERNANDEZ: The Court has said that; the  
7 D.C. Circuit has said that.

8 THE COURT: Okay. Hang on.

9 That same statute uses the term "corruptly," okay?

10 So how is "corruptly" ambiguous when applied to  
11 1503 for the same conduct when the same word appears in  
12 1512(c)(2)?

13 MS. HERNANDEZ: As applied, multiple courts,  
14 including the *Poindexter* court, and, I believe, the *North*  
15 court --

16 THE COURT: You're missing my point.

17 MS. HERNANDEZ: I'm going to answer you.

18 THE COURT: You're not answering my question --

19 MS. HERNANDEZ: I am, because --

20 THE COURT: -- which is: I don't understand how  
21 the word can be --

22 MS. HERNANDEZ: -- because --

23 THE COURT: -- differently as applied across  
24 different statutes when you've conceded to me that the very  
25 same conduct that uses the term "corruptly" can violate

1 another statute that uses the word "corruptly."

2 MS. HERNANDEZ: The language that the D.C. Circuit  
3 has used, and that other courts have used, including,  
4 I believe, some justices have used, is that, as applied,  
5 conduct that seeks to interrupt a proceeding that is based  
6 on facts and logic and that type of thing, that could be  
7 viewed as corrupt. There's no way not to view it.

8 But conduct that seeks to interrupt the political  
9 wing of the government, it cannot be viewed -- by its  
10 nature, that's what the First Amendment protects explicitly,  
11 for us to go and seek to influence Congress, that's what the  
12 First Amendment protects.

13 THE COURT: So you think --

14 MS. HERNANDEZ: But those statutes --

15 THE COURT: You think these defendants were  
16 exercising their First Amendment rights?

17 MS. HERNANDEZ: Yes.

18 I am saying the following, Your Honor: These  
19 defendants --

20 THE COURT: By rushing past police, rushing past  
21 barriers?

22 MS. HERNANDEZ: So my client -- you're asking me a  
23 question?

24 THE COURT: I'm just asking. Yeah.

25 MS. HERNANDEZ: Okay.

1 THE COURT: That's protected by the  
2 First Amendment?

3 MS. HERNANDEZ: Their conduct implicated the  
4 First Amendment.

5 It may violate time, place, and manner, I'm not  
6 suggesting that it may not.

7 But was the First Amendment implicated? Yes.  
8 My client did not attack any police officer and there's no  
9 allegation -- I'm not making a factual argument. There's no  
10 allegation in the indictment that he attacked anyone.  
11 He entered a door that was opened by others.

12 THE COURT: I didn't say -- I never said he  
13 attacked anybody.

14 MS. HERNANDEZ: Well, he didn't rush by. He  
15 didn't -- there's no -- there's nothing in the indictment  
16 that says he moved over barricades or anything.

17 But the bottom line is, there is a distinction  
18 that the Courts have drawn --

19 THE COURT: Let's --

20 MS. HERNANDEZ: -- I agree with it --

21 THE COURT: -- not pretend that this was --

22 MS. HERNANDEZ: Excuse me?

23 THE COURT: Let's not pretend that this was simple  
24 parading or picketting.

25 MS. HERNANDEZ: It's --

1           THE COURT: Let's at least acknowledge that the  
2 nature of the conduct was different.

3           MS. HERNANDEZ: Your Honor, here's the thing,  
4 Your Honor: There were people at the Congress that day who  
5 acted clearly illegally.

6           And I'm not saying that there may not be  
7 statutes --

8           THE COURT: So ultimately, isn't this a jury  
9 question?

10          MS. HERNANDEZ: Well, no.

11          I'm not saying that there may not be statutes that  
12 reach the conduct that is alleged against my client.  
13 I'm just saying this statute is unconstitutionally vague.

14          And, again, I just want to go back to the  
15 question. What is the key question in a vagueness argument?  
16 Does a person of ordinary intelligence know? I still don't  
17 know what the definition of "corruptly," as applied in this  
18 case, means, because there's not a single statement, there's  
19 not a single case that they have cited that would reach --  
20 that would explain this.

21          And in -- I want to say, in *Poindexter*, which  
22 involved Poindexter lying, the Court found "corruptly" to be  
23 unconstitutionally vague. They upheld the 1001 charge. It  
24 wasn't that they were protecting Poindexter from all his  
25 conduct. The false statement charge was not vague. The

1 15 -- the 1503 -- 1505 charge was unconstitutionally vague.

2 But, again, a person of ordinary intelligence,  
3 corrupt, maybe they were jerks, maybe some people were  
4 violent, and that's illegal for some other reason. But the  
5 nature of the inquiry is, does a person -- the Court  
6 asked -- and the government's response is insufficient.

7 THE COURT: All right.

8 MS. HERNANDEZ: I'm sorry, Your Honor, just one --

9 THE COURT: Ms. Hernandez, I've got to move on  
10 here.

11 MS. HERNANDEZ: And just one last thing here.

12 Again, the ejusdem -- you're supposed to review,  
13 you're supposed to decide -- there's a D.C. Circuit case --

14 THE COURT: I know. I'll take a look at it.

15 MS. HERNANDEZ: Explicitly covers this.

16 THE COURT: I'll take a look at it.

17 All right.

18 Why don't we, in the time we have remaining, why  
19 don't we move to Count 4. This is the count that concerns  
20 entering a restricted area and remaining in a restricted  
21 area, and I'll hear if there's additional argument that  
22 you'd like to make on that count.

23 And, I guess, Mr. Fischer, before you even begin,  
24 let me just ask why you think Judge McFadden is wrong.

25 I mean, look, he's done the work. And tell me what is

1     flawed about his reasoning and his conclusion?

2             MR. FISCHER: Well, Your Honor, his reasoning  
3     basically lays the door open for chaos when it comes to how  
4     law enforcement protects Secret Service protectees. Under  
5     Judge McFadden's ruling, anybody could do the restricting of  
6     the grounds. That would be -- that would lead to a  
7     situation where local --

8             THE COURT: But why do I need to be worried about  
9     that in this case?

10            I mean, unless -- I mean, I know part of your  
11     argument is that the statute requires the Secret Service to  
12     cordon it off. But this isn't a case that involves, for  
13     example, whether a local law enforcement -- this was a  
14     federally protected area. There's no question -- even under  
15     the Fourth Circuit case, there's not a question raised about  
16     whether there's a federally -- whether federal agents can  
17     cordon off an area.

18            MR. FISCHER: Well, Your Honor, certainly, it's  
19     illegal to trespass on the grounds of the Capitol, our  
20     Capitol buildings, at any time. You can't trespass, but  
21     that's a separate statute.

22            In order to violate this statute, the grounds, we  
23     would argue, have to specifically be restricted for the  
24     purpose of the visit by the Secret Service protectee; in  
25     this case, the Vice President or the Vice President-elect.

1           So, Your Honor, I think --

2           THE COURT: If I can interrupt you.

3           Why isn't that a jury question ultimately?

4 I mean, why isn't -- for example, won't it be incumbent upon  
5 the government to prove that the area was cordoned off  
6 because the Vice President and the Vice President-elect were  
7 going to be there that day? I mean, that seems to me a jury  
8 question. It certainly isn't alleged in the indictment.

9           MR. FISCHER: Well, Your Honor, I think it could  
10 become a question of law if the government would answer  
11 whether they have knowledge if the Secret Service did.

12          THE COURT: But that's a different question --

13          MR. FISCHER: Sure.

14          THE COURT: -- as to whether the Secret Service is  
15 to be the agency that cordons the area off.

16          I'm just talking about why the area was cordoned  
17 off generally, even if it was done by Capitol Police.

18          MR. FISCHER: And, quite frankly, Your Honor, if  
19 the Court would be leaning in that direction, we would have  
20 no objection to having a question for the jury on that  
21 issue.

22          I'd also point out, Your Honor, in Mr. Caldwell's  
23 case, he never entered the Capitol building, and the statute  
24 differentiates between Capitol buildings and Capitol  
25 Grounds.



1           THE COURT: So here's a question for you:  
2 Why isn't he part of the Capitol building? He was on the  
3 balcony.

4           Yes, he didn't physically enter the building, but  
5 isn't the balcony as much a part of the Capitol building as  
6 being inside the Rotunda?

7           MR. FISCHER: It's not, Your Honor.

8           In fact, I put that in my filing. I set that out  
9 as far as the statutory definition of "Capitol buildings."

10          THE COURT: I mean, I looked at those and I looked  
11 at the -- there's a map that's associated with one of the  
12 statutes you cited. And if you look at that map, which is  
13 an old -- I have it here somewhere printed out -- but it  
14 shows the Capitol building to be part of the Capitol  
15 Grounds.

16          MR. FISCHER: Well, Your Honor, I'm not sure  
17 that -- I don't believe -- there are statutes, not just the  
18 1752, but there are also numerous statutes in Title 40 that  
19 differentiate between Capitol buildings and Capitol Grounds.

20          THE COURT: Yeah, that's what I was referring to.

21          I'm talking about those statutes that you cited in  
22 your brief from Title 40.

23          MR. FISCHER: It would seem to me that if they're  
24 differentiating, if Congress is differentiating between the  
25 two, in this case, it would have a major implication because

1 Mr. Caldwell and the Vice President were never  
2 contemporaneously on the grounds.

3 Now, as far as the building, Your Honor, the  
4 allegation is that he went on the balcony. The balcony is  
5 not covered, it's not an interior of anyplace. I believe  
6 the balcony in question is the balcony where the  
7 Inauguration -- the President speaks during the  
8 Inauguration.

9 THE COURT: Right.

10 MR. FISCHER: But I don't believe that constitutes  
11 a building under the statute.

12 THE COURT: Okay.

13 MR. FISCHER: And so, Your Honor, we'll submit on  
14 the papers besides that, unless the Court has any questions.

15 THE COURT: No, nothing further.

16 MR. FISCHER: Thank you, Your Honor.

17 THE COURT: Thank you, Counsel.

18 Any response with respect to Count 4, Mr. Nestler?

19 MR. NESTLER: Yes, Your Honor, just briefly.

20 One is, Mr. Fischer cited Title 50 of the U.S.  
21 Code. That is not applicable here. So the government  
22 charged 18 U.S.C. 1752. And if we just walk through the  
23 statute, it's very plain in the language.

24 So 1752(a)(1) criminalizes knowingly entering or  
25 remaining in a restricted building or grounds. (c)(1) then

1 defines "restricted builds or grounds."

2 (c) (1) (B) has one of those definitions as any  
3 grounds that are posted, cordoned off or otherwise  
4 restricted in an area where a protectee will be visiting.

5 And then (c) (2) says that Secret Service  
6 protectees are defined elsewhere at 18 U.S.C. 3056. And at  
7 3056(a) (1), the statute says the Vice President is a Secret  
8 Service protectee.

9 That's the end of the analysis in terms of the  
10 sufficiency of the indictment charging 1752.

11 THE COURT: Does it matter, in your view, whether  
12 he was on the inside or the outside of the building?

13 MR. NESTLER: No.

14 THE COURT: In other words, the allegation is that  
15 he made his way to the west balcony. He -- that puts him in  
16 a restricted building, in your view, even though he's on the  
17 outer -- the exterior of that building?

18 MR. NESTLER: Correct.

19 And Your Honor's referring to the map that's at  
20 5102(a) -- so sorry, 50 U.S.C. 5102(a).

21 THE COURT: Right.

22 MR. NESTLER: Refers to the Capitol building and  
23 grounds as defined by a map from 1946.

24 THE COURT: Correct.

25 MR. NESTLER: And that map shows that the building

1     itself is part of the grounds.

2                 THE COURT:   Correct.

3                 MR. NESTLER:   And if the government had charged  
4     the defendant with violating that statute, I think we would  
5     be in the same position.   But we didn't.   The Grand Jury  
6     indicted him on 1752.

7                 And so the perimeter, the area that was "posted,  
8     cordoned off, or otherwise restricted," which in this  
9     situation does include the entirety of the Capitol Grounds  
10    that encompassed the building, is where Mr. Caldwell and the  
11    other defendants are charged with being.   There's no need to  
12    resort to any other statutes.

13                THE COURT:   All right.

14                Why don't we move forward and let's -- Ms. Robin,  
15    why don't we bring you into the mix here.   And if you want  
16    to be heard about Count 8 and then the obstruction count,  
17    the tampering count that's specific to Mr. James.

18                MS. ROBIN:   Thank you, Your Honor.

19                Just to be clear, when I filed the initial motion,  
20    it was count 8.   It's now Count 9 in the fifth superseding  
21    indictment.

22                THE COURT:   Right.

23                MS. ROBIN:   So I'll refer to it, for purposes of  
24    this argument, as Count 9, and I'm referring to the assault  
25    count.

1           So as Your Honor referenced earlier, we had filed  
2 two motions, the first was a motion to dismiss what is now  
3 Count 9 and Count 13.

4           And as you alluded to, with the fifth superseding  
5 indictment and the government changing the language, it  
6 really rendered moot half of our argument on the motion to  
7 dismiss, so I won't be making any argument on that.

8           THE COURT: Can I just -- and I'm sorry if I'm  
9 preempting you, but can I just kind of cut to the chase on  
10 your argument --

11           MS. ROBIN: Sure.

12           THE COURT: -- with respect to Count 9, I believe  
13 it is --

14           MS. ROBIN: Yes.

15           THE COURT: -- which is, if I order the government  
16 to identify the officers who your client allegedly  
17 assaulted, would that --

18           MS. ROBIN: Render moot?

19           We believe that would remedy the issue that we  
20 have.

21           THE COURT: All right.

22           And then with respect to your request to identify  
23 the specific Grand Jury session --

24           MS. ROBIN: Or proceeding, right.

25           THE COURT: -- is it your position that the

1 government, in order to prove a crime -- the crime that's  
2 alleged here, has to establish a specific Grand Jury  
3 session, or can a Grand Jury proceeding in general do?

4 MS. ROBIN: So our position with respect to the  
5 request for a bill of particulars is that in order for us to  
6 adequately and intelligently prepare a defense for Mr. James  
7 and to avoid surprise at trial, we need to be able aware of  
8 the particular proceeding.

9 I think --

10 THE COURT: But if the government doesn't have to  
11 prove a particular Grand Jury proceeding, as opposed to just  
12 Grand Jury proceedings in general; that is, the process of  
13 bringing an indictment, the body that brings an indictment,  
14 if they don't have to prove a specific Grand Jury  
15 proceeding, then why does it matter which Grand Jury  
16 proceeding, if any, is at issue?

17 MS. ROBIN: Because they have to prove a nexus  
18 that both *Aguilar* and *Arthur Andersen* talk about in order to  
19 prove him guilty of this particular offense, right?

20 So the nexus, as you referenced earlier, is the  
21 nexus between the alleged obstructive conduct and the  
22 particular proceeding at issue. And that nexus really  
23 involves two things; it involves, number one, a relationship  
24 in time, so that it has to at least -- the proceeding has to  
25 at least have been foreseeable to the defendant that's

1 charged, but it also involves a nexus as to logic and/or  
2 causation -- relationship and logic or causation.

3 THE COURT: I agree with you that there's a nexus  
4 requirement. But what does it matter -- I mean --  
5 particularly in this case, I mean, when the allegation of  
6 document -- or I can't remember whether it was documents  
7 or -- with respect to Mr. James --

8 MS. ROBIN: It's contents on a cell phone.

9 THE COURT: Well, so contents of a cell phone --  
10 I mean, it happens immediately in the aftermath, I don't  
11 remember if it happens on January 6th or not, but sort of in  
12 the immediate aftermath, certainly before any Grand Jury is  
13 convened, I believe.

14 So what does it matter which particular Grand Jury  
15 that's been impaneled over the course of many months the  
16 government claims that was obstructed or impeded by virtue  
17 of Mr. James's conduct?

18 MS. ROBIN: Sure.

19 THE COURT: I don't know which Grand Jury, for  
20 example, heard evidence about Mr. James, but I don't know  
21 that they have to prove the case with that degree of  
22 specificity, do they?

23 MS. ROBIN: Well, they have to prove, like I said,  
24 the nexus, which kind of is really two different issues;  
25 one, that there's a foreseeability prong, right?

1 THE COURT: Right.

2 MS. ROBIN: So that gets to the dates.

3 Mr. James wasn't indicted by a Grand Jury until  
4 the end of March, I believe. This alleged obstructive  
5 conduct occurred on or about January 8th.

6 So certainly our defense, if the alleged  
7 Grand Jury proceeding is the end of March, is going to vary  
8 differently, significantly, I would say, than if it's a  
9 Grand Jury proceeding that occurred maybe, you know, six  
10 months later or three months prior. It goes to the issue of  
11 foreseeability; the particular date of the proceedings  
12 certainly does.

13 But also, the second really important point there  
14 is that this alleged obstructive conduct consists of  
15 Mr. James allegedly deleting the Signal chat from his own  
16 cell phone and advising Mr. Grods to delete the Signal chat  
17 from his cell phone. Mr. Grods was never indicted. He pled  
18 guilty to a criminal information. So he was never the  
19 subject of a Grand Jury indictment.

20 So certainly, again, when we're talking about that  
21 nexus, we're talking about a concern also -- not just for  
22 foreseeable, but also the issue of whether or not there's a  
23 causal or some sort of logical connection between -- and  
24 really what we're going to here is intent.

25 And the way that the Supreme Court has kind of



1 talked about it in both *Aguilar* and, again, in --

2 THE COURT: I guess your point is that the only  
3 Grand Jury proceeding he could have really intended to  
4 obstruct was the Grand Jury that heard the evidence against  
5 him, and you want to know which Grand Jury heard the  
6 evidence against him.

7 In other words, say there's a -- he got indicted  
8 at the end of March, the government couldn't come in and try  
9 and prove that he obstructed the Grand Jury that sat in May  
10 and didn't hear any evidence against him at all.

11 MS. ROBIN: I mean, I think that, in a nutshell,  
12 is it.

13 I will say that the language in *Aguilar*, which is  
14 adopted in *Arthur Andersen*, is also really telling here, and  
15 that's that the conduct, the alleged conduct, must have "the  
16 natural and probable effect of interfering with the  
17 proceeding at issue."

18 So really what we're getting at is some sort of  
19 defense that would incorporate this nexus requirement, is  
20 essentially, did this particular Grand Jury proceeding even  
21 request these cell phone contents? If they didn't, that  
22 would certainly go towards an argument in terms of our  
23 defense. But without knowing that, we have no ability to  
24 really make some sort of informed intelligent defense. And  
25 certainly, the intent element is an important part of it.

1           The language from *Arthur Andersen* really couldn't  
2 be any more succinct and applicable than when it says  
3 essentially that, you know, if the defendant lacks  
4 knowledge, that his actions are likely to affect a  
5 particular proceeding, he lacks the requisite intent.

6           And more specifically, quoting directly from  
7 *Arthur Andersen*, one can't be guilty under 1512 for  
8 destroying documents, or persuading others to destroy  
9 documents, when he doesn't have in mind any particular  
10 official proceedings in which those documents might be  
11 material.

12           So when you combine that with the language from  
13 *Aguilar* that the conduct or the endeavor must have the  
14 natural and probable effect of interfering, then certainly  
15 we need to know more about the particulars of the official  
16 Grand Jury proceeding that they're talking about.

17           And the final point I'll make on that is that the  
18 way that the government has structured the indictment,  
19 they're really trying to get around the language that the  
20 statute requires.

21           The statute requires that the obstruction be of an  
22 official proceeding. And when you look at the definitions  
23 of an "official proceeding," the one that's relevant here  
24 under 1515, is a proceeding before a Federal Grand Jury.

25           But that's not how they phrased it in the

1 indictment. They phrased it as just a general Grand Jury  
2 investigation of the events into January 6th. They haven't  
3 given us any time frame of any particular proceeding other  
4 than the FBI investigation which we know by now and they  
5 know by now doesn't -- isn't relevant to this charge, does  
6 not make up a 1512 offense.

7 THE COURT: Okay.

8 Anything further, Ms. Robin?

9 MS. ROBIN: No. Thank you.

10 THE COURT: Mr. Nestler, I assume it's still  
11 you --

12 MR. NESTLER: Yes.

13 THE COURT: -- maybe it's not. Busy afternoon for  
14 you.

15 What's your objection to identifying the  
16 particular Grand Jury session that you allege Mr. James's  
17 conduct to have obstructed?

18 MR. NESTLER: It's not required, Your Honor.

19 So the government is not required to tell the  
20 defense which particular Grand Jury was seated or which  
21 particular meeting of that particular Grand Jury it was that  
22 Mr. James's conduct obstructed. It's sufficient, in the  
23 cases that the government cited in its brief, that the  
24 government to allege, at the Rule 12 stage, that his conduct  
25 obstructed a Grand Jury proceeding.

1 THE COURT: Do you think at trial, you need to  
2 specify a particular Grand Jury proceeding?

3 MR. NESTLER: No.

4 We need to -- the government would need to specify  
5 that a Grand Jury was seated, and the indictment itself  
6 ought to be prima facie evidence of that.

7 And then the government will need to prove a  
8 nexus, which is that Mr. James's intent was to obstruct a --  
9 well, was to delete the Signal thread, and that he knew it  
10 was done corruptly, as we talked about with (c)(1)  
11 earlier -- or with (c)(2) earlier -- this is (c)(1), it was  
12 done corruptly with the intent to obstruct a proceeding,  
13 which is to make sure it was not available for the  
14 Grand Jury to use when investigating.

15 The government will need to prove a nexus,  
16 Your Honor, we said so in our pleading.

17 THE COURT: Right.

18 MR. NESTLER: We agree with *Aguilar* and *Arthur*  
19 *Andersen*. And that's all. The government does not need to  
20 prove more.

21 THE COURT: It's just interesting.

22 You know, in a sense, the earlier the Grand Jury  
23 proceeding, maybe the harder it is for the government to  
24 prove its case.

25 In other words, say he gets indicted six months

1 into the Grand Jury's -- various Grand Jury proceedings and  
2 sessions. The argument is probably more powerful for the  
3 government that he most certainly -- well, it's harder to  
4 know because the question is his state of mind at the time  
5 he engaged in the obstruction. So maybe it matters less, in  
6 terms of proving his state of mind, which Grand Jury session  
7 the government claims was obstructed.

8 MR. NESTLER: That's correct.

9 And the Grand Jury did not have to be impaneled at  
10 the time that he obstructed.

11 THE COURT: Right.

12 MR. NESTLER: It doesn't have to be pending or  
13 even about to be instituted.

14 And it's not necessarily the Grand Jury or a  
15 Grand Jury that was investigating Mr. James. Mr. James's  
16 conduct obstructed a Grand Jury investigation into  
17 co-defendants, let's say, or the events of January 6th writ  
18 large. So there are lots of different facets that the  
19 government could -- or lanes the government could choose at  
20 trial to prove that Mr. James's conduct obstructed the  
21 Grand Jury or a Grand Jury's investigation.

22 THE COURT: Okay.

23 Thank you.

24 MR. NESTLER: Thank you.

25 THE COURT: Ms. Robin, did you want a brief

1 rebuttal?

2 Oh, did you want to add anything?

3 MR. NESTLER: I didn't know if you wanted me to  
4 address the APO charge.

5 THE COURT: The assaulting a police officer.

6 MR. NESTLER: Yes.

7 THE COURT: If you'd like, sure.

8 MR. NESTLER: The government does not believe that  
9 it's required to allege in the indictment the name of the  
10 officer who was assaulted.

11 THE COURT: Have you disclosed it in discovery?

12 MR. NESTLER: Yes, Your Honor, we've disclosed the  
13 body-worn camera files and the names of the officers who had  
14 the body-worn cameras attached to their chest --

15 THE COURT: Right.

16 MR. NESTLER: -- and identified in the indictment  
17 the area and the time and the conduct that we're alleging  
18 Mr. James committed the assaults.

19 THE COURT: And how many officers were in that  
20 area?

21 MR. NESTLER: Many.

22 Many officers were in the area.

23 In the immediate area near Mr. James, there were  
24 about three.

25 THE COURT: Okay.

1 MR. NESTLER: But there were many officers in the  
2 Rotunda at the time or in the area.

3 THE COURT: I assume the government knows which  
4 officer Mr. James allegedly assaulted.

5 MR. NESTLER: Yes, though the government's  
6 position is that the government does not need to prove to  
7 the jury the name of the officer who was assaulted.

8 THE COURT: No, you don't need to prove the name.

9 MR. NESTLER: And --

10 THE COURT: But you do need to prove it was an  
11 officer.

12 MR. NESTLER: We have to prove --

13 THE COURT: And presumably, the defense would like  
14 that information just to know which officer you claim it is  
15 that was assaulted.

16 MR. NESTLER: The government's position is that  
17 the assaultive act is the unit of prosecution. And so  
18 Mr. James's act, not necessarily the victim of that act, is  
19 what the government is focused on.

20 THE COURT: Sure.

21 All right.

22 Ms. Robin.

23 MS. ROBIN: With respect to the obstruction count,  
24 the case cited by the government in their reply is  
25 completely inapplicable.

1           I mean, in that case, the Court essentially says,  
2   it's obvious from the rest of the indictment that he knows  
3   which Grand Jury proceeding it is. The defendant in that  
4   case actually testified at that particular Grand Jury and  
5   was also accused of perjuring himself in that Grand Jury.

6           So it's entirely distinguishable from this case,  
7   where we have hundreds potentially of Grand Jury proceedings  
8   to pick from and the defense has no idea which one when  
9   we're trying to mount an intelligent defense that Mr. James  
10  -- that the conduct that Mr. James allegedly committed  
11  didn't have the sufficient nexus to the particular  
12  Grand Jury proceeding. So it's entirely distinguishable and  
13  I would simply say not even helpful to the assessment of the  
14  argument here.

15           Second, with respect to the assault on the law  
16  enforcement officer, I mean, the problem -- I didn't get  
17  into this before because there wasn't much argument, but the  
18  other problem is that without them identifying the victim,  
19  we're essentially facing a situation where the count is  
20  duplicitous.

21           They've alleged -- they claim to have alleged only  
22  one single assault. But then when they're in the paragraph  
23  that they -- paragraphs 165 to 167, the only alleged  
24  descriptive conduct that actually amounts to an assault says  
25  that he pushed -- says -- and this is paragraph 165 --



1 quote, "he yanked and pushed several riot officers out of  
2 the way."

3 So without some sort of description as to which  
4 particular officer he's accused of assaulting they've  
5 actually alleged a number of different crimes in a single  
6 count.

7 And when you're determining whether or not a count  
8 is faulty because it's duplicitous, I mean, the question is,  
9 you must determine if it sets forth separate offenses or if  
10 it merely prescribes various means of committing a single  
11 offense.

12 So we're not talking about -- we don't have any  
13 issue with the language about -- that they're alleging that  
14 he both assaulted, obstructed, all of that. Those are just  
15 different means of committing an offense. But what clearly  
16 makes a different offense is when you add multiple victims  
17 into the mix. So without identifying a particular victim,  
18 that count is faulty and can't survive.

19 So we're suggesting that an easy fix is simply to  
20 provide the bill of particulars. And, quite frankly,  
21 there's no reason not to identify the particular alleged  
22 victim of the offense. It's not as if it's a juvenile, it's  
23 not as if they don't know the identity of the officer, so  
24 there's no reason not to.

25 THE COURT: All right.

1           Thank you, Ms. Robin.

2           All right.

3           So the last motion of the day is the motion for  
4 venue transfer. So I'm happy to hear some additional  
5 argument from Mr. Fischer, if you'd like to make it.

6           MR. FISCHER: Your Honor, first of all, it's a  
7 rare day, indeed, when a defendant tries to get their case  
8 moved out of D.C., out into a rural or suburban -- more  
9 rural or suburban area. I never thought I'd see the day  
10 when I would try to have a case moved out of the District of  
11 Columbia to one of those areas, but this is the type of case  
12 that I believe is necessary and required for the Court to  
13 do.

14           Your Honor, I fully understand that ordinarily the  
15 Court would wait to -- wait until jury selection, wait until  
16 the process of having questionnaires go out, but in this  
17 case, there is so much prejudice against these defendants,  
18 it's off the charts.

19           THE COURT: How do you know that, Mr. Fischer?

20           MR. FISCHER: I'm sorry, Your Honor?

21           THE COURT: How do you know that?

22           MR. FISCHER: Well, Your Honor, this city --  
23 people can differ politically, I understand that, but this  
24 city is very anti-Donald Trump.

25           THE COURT: So? And even if I accept that as

1 true, it doesn't mean your client can't get a fair trial.

2 MR. FISCHER: Well, I think it does, Your Honor.

3 When you have people on the jury who --

4 THE COURT: You haven't put any evidence in front  
5 of me, not any kind of surveys, not any kind of polling  
6 data, nothing --

7 MR. FISCHER: Well --

8 THE COURT: -- that would suggest that a jury pool  
9 in this city is predisposed to not fairly judging your  
10 client or any of these other defendants' conduct.

11 MR. FISCHER: Well, Your Honor, unfortunately, my  
12 client doesn't have the 30- or \$40,000 laying around to get  
13 a poll done.

14 And I don't -- look, Your Honor, in this case,  
15 what separates this case from other cases involving  
16 prejudicial publicity --

17 THE COURT: How about this?

18 I mean, you wrote in your motion, "District  
19 residents, who largely style themselves as chic,  
20 sophisticated, worldly, highbrow urbanites, are repulsed" --  
21 repulsed -- "by rural America's traditional values,  
22 patriotism, religion, gun ownership, and perceived lack of  
23 education." In fact, you wrote that District residents  
24 despise many things that traditional America stands for.

25 I think it would come as maybe news or surprise

1 that people in D.C. aren't traditional Americans and don't  
2 have traditional values that you claim those of us who've  
3 lived here for 20 years and longer, we lack those  
4 traditional values.

5 MR. FISCHER: Well, Your Honor, I don't believe  
6 that that was the intent of what I wrote, to say that people  
7 in D.C. don't have American values. They certainly have  
8 American values. They just happen to hate virtually  
9 everything --

10 THE COURT: "They despise many things that  
11 traditional America stands for."

12 MR. FISCHER: And they do.

13 THE COURT: Okay.

14 MR. FISCHER: They absolutely do.

15 Your Honor, it is not situation normal 15 miles  
16 outside of the Beltway for people to surround politicians'  
17 houses. It is not situation normal that --

18 THE COURT: How do you know any of those people  
19 live in the District of Columbia?

20 MR. FISCHER: That surround houses?

21 THE COURT: Well?

22 MR. FISCHER: Your Honor, it happens all the time.

23 THE COURT: It happens at Mitch McConnell's house  
24 in Kentucky.

25 MR. FISCHER: Well, Your Honor, the -- I mean,

1     you're talking about handful of people.

2             I mean, it's almost every day in this city, you  
3     have a protest --

4             THE COURT: All right.

5             You know, I'm not going to spend a lot of time on  
6     this. I will just say the following, Mr. Fischer:

7             I think you've done a wonderful job for your  
8     client, I really do, but this brief -- and I will be  
9     reserved about what I am about to say -- reads less like a  
10    legal brief than something you might read on a blog, and  
11    that's not acceptable. I mean, I would expect better from  
12    you, I expect better from every other lawyer in this  
13    courtroom.

14            There may be very valid grounds for you to be  
15    concerned about whether your client can get a fair trial or  
16    not. But painting with a broad brush is not the way to do  
17    it. And casting aspersions upon the people that live in  
18    this district is not the way to do it.

19            And I'm not telling you you may not be right, we  
20    may have a difficult time picking a jury in this district, I  
21    don't know, we'll find out, if and when we get to trial, but  
22    writing a brief that looks like it's been ripped out of a  
23    blog post isn't going to do it.

24            And *Skilling* demands more, the case law demands  
25    more. And you just can't come in here and start sneaking

1 statements about things like traditional values and whether  
2 people in a particular city have them or despise them. It's  
3 just not going to fly.

4 And so, you know, I don't know that we want to  
5 spend a whole lot more time on this, but I just wanted you  
6 to be aware of that, and I'll just ask you to be mindful of  
7 that moving forward, okay?

8 MR. FISCHER: And, Your Honor, I appreciate the  
9 Court's comments.

10 And I do want to make it clear that I'm not trying  
11 to denigrate the citizens of the District of Columbia.  
12 There are major disagreements culturally and on issues.

13 I do want to raise one additional issue --

14 THE COURT: I will say this: I have never, not  
15 once in my time as a judge or a defense lawyer, thought that  
16 the people of the District of Columbia who've served on  
17 juries have done anything other than the job they've been  
18 asked to, which is dispassionately view the evidence without  
19 regard to what the conduct is that's alleged and who the  
20 defendant is.

21 And Ms. Hernandez and I disagree about a lot of  
22 things, but she's shaking her head, so I know I'm doing okay  
23 if she agrees with me on that.

24 MR. FISCHER: Well, Your Honor, if I could point  
25 out, part of the frustration -- I'm just going to raise one

1 more issue and I'll sit down and shut up -- my client and  
2 these defendants have been subjected to nonstop race-baiting  
3 day after day after day. And, quite frankly, they're sick  
4 and tired of it. My client's sick and tired of it. He's a  
5 military veteran, he doesn't have a racist bone in his body,  
6 yet every day, he has to see on TV, he has to read newspaper  
7 articles where people write in *The Washington Post* and other  
8 places that he's a white supremest, that he has the Attorney  
9 General go out there and call him a white supremest, a white  
10 nationalist, the Speaker of the House, the President of the  
11 United States.

12 And so, Your Honor, maybe the language I used was  
13 a little bit strong, but my client did not enter -- he did  
14 not enter the Capitol, he did not damage any property, he  
15 was not involved in any conspiracy, and, quite frankly, he's  
16 sick and tired of being painted -- I think I could speak for  
17 the other defendants as well, they're sick and tired of news  
18 media and politicians labeling them as racist. It's  
19 disgusting, it's vile. And, Your Honor, maybe I was a  
20 little bit extreme in my language, but it's very frustrating  
21 to my client.

22 So with that said, Your Honor, thank you.

23 THE COURT: Thank you, Counsel.

24 And, look, I'm not -- I'm not condoning that  
25 either, whether -- we ought not to be characterizing people

1 in large groups. At least in this courtroom, people will be  
2 judged by their individual actions, and I anticipate that  
3 any jury that's selected will do the same.

4 Ms. Hernandez.

5 MS. HERNANDEZ: We agree on a lot of things,  
6 Your Honor.

7 But what I stood up for, Your Honor, the Court  
8 asked some questions that I think were left, perhaps, not  
9 properly answered or could be answered better, and I would  
10 just like to ask the Court for permission to file a  
11 supplemental brief on some of the questions that the Court  
12 asked.

13 THE COURT: Will you file it by the deadline?

14 MS. HERNANDEZ: I will -- Your Honor, my mind --  
15 I'm telling you, this is a very --

16 THE COURT: You know, deadlines matter,  
17 Ms. Hernandez.

18 MS. HERNANDEZ: I understand, Your Honor.

19 THE COURT: And I don't want to be difficult here,  
20 but you and I have a history and you've in been in other  
21 cases before me --

22 MS. HERNANDEZ: This is the only case --

23 THE COURT: -- and deadlines are seemingly  
24 optional.

25 MS. HERNANDEZ: This is the only case where the



1 deadlines were missed.

2 But, Your Honor, I will say the following.

3 THE COURT: I think the record would show  
4 otherwise, but anyway.

5 MS. HERNANDEZ: This is a very difficult issue.  
6 It was like you'd read one case and that case cited ten  
7 cases.

8 THE COURT: All right.

9 But don't ask me for a day and then not file it  
10 and then file a 30-page brief on the eve of the argument.

11 I mean, I read your brief, which won't surprise  
12 you, but don't do that.

13 MS. HERNANDEZ: Let me say this, Your Honor:  
14 My view is I always try to give the Court the best work that  
15 I am able to.

16 THE COURT: I know you do.

17 MS. HERNANDEZ: I read as many cases, all the  
18 cases and more --

19 THE COURT: Okay.

20 MS. HERNANDEZ: -- so that I give the Court --

21 THE COURT: I'm just asking you --

22 MS. HERNANDEZ: I understand.

23 THE COURT: -- file your papers in a timely way.

24 MS. HERNANDEZ: Yes, I understand, Your Honor.

25 THE COURT: All right.

1           Let's talk about what we're going to do next.

2           MS. HERNANDEZ: Thank you.

3           THE COURT: So I think I would like a more fulsome  
4 written response from the government on the argument that's  
5 raised in Ms. Hernandez's brief about whether the statute  
6 encompasses the conduct that's alleged.

7           I mean, I think you and I have had a very long  
8 discussion about it here today, Mr. Nestler, but I think  
9 it would be in everyone's interest, including my own, to  
10 have that position articulated in writing. I know other  
11 judges have asked for that to happen, including Judge Moss,  
12 and he already has a schedule in place in his case.

13           I think the question, Mr. Nestler, is how quickly  
14 you think you can turn something around.

15           MR. NESTLER: About three weeks, Your Honor.

16           THE COURT: Okay.

17           I'll give you two, because I do want to get to  
18 this, I don't want this to sit very long.

19           So I'll ask for some additional briefing from the  
20 government by the 22nd. And if any of the defendants wish  
21 to file essentially what would be a reply, they can do so by  
22 October 6th.

23           Last bit of business, which is where we go from  
24 here in terms of the case. I hoped to have enough time to  
25 kind of talk about where things stand in terms of discovery

1 and the like, but I've got to get to a meeting that I'm  
2 already 15 minutes late for.

3 So can we convene -- because we haven't had a  
4 status conference in this case for at least 30 days -- can  
5 we convene next Thursday at 11:00 a.m. for a status  
6 conference? This obviously is addressed to the lawyers who  
7 are on -- who are remote as well.

8 MR. NESTLER: That's fine for the government,  
9 Your Honor.

10 THE COURT: Okay.

11 Any defense counsel have an intractable conflict  
12 on September 16th at 11:00 a.m.?

13 MR. FISCHER: The 16th is --

14 MR. NESTLER: Your Honor, Yom Kippur is the 17th,  
15 it starts the night of the 16th.

16 THE COURT: Oh, okay.

17 I was just having a conversation with Mr. Douyon  
18 about our detained defendants. We're going to have to bring  
19 them to the courthouse for that hearing. There are  
20 administrative changes being made at the jail with respect  
21 to the remote hearings policy. And while right now I think  
22 we have five rooms available for remote hearings, they're  
23 going to be reduced to two and we have three detained  
24 defendants and you can do the math and figure out that  
25 that's not going to work. So that's what that conversation

1 was about.

2 All right. So 11:00 a.m.

3 Yom Kippur doesn't present a problem, Mr. Nestler?

4 MR. NESTLER: No, Your Honor.

5 THE COURT: Okay.

6 So anybody unavailable at 11 a.m.?

7 You don't have to appear in person unless you want  
8 to.

9 MR. MacMAHON: Your Honor, Edward MacMahon for  
10 Mr. Walden.

11 I'll be out of the country, but I'm sure Mr. Spina  
12 can cover, if the Court is happy with that.

13 THE COURT: That's fine, Mr. MacMahon.  
14 No problem.

15 MR. MacMAHON: Thank you, Your Honor.

16 MR. MACHADO: Your Honor, we didn't hear that  
17 comment that was made.

18 THE COURT: Mr. MacMahon just said that he's  
19 unavailable, he's out of the country on the 16th, but his  
20 co-counsel, Mr. Spina, can certainly participate remotely  
21 and hasn't said he's unavailable.

22 MR. FISCHER: Okay. Thank you.

23 THE COURT: All right.

24 So hearing no other conflicts, why don't we set  
25 11:00 a.m. on September the 16th for a status conference and

1 we will look forward to seeing everybody on that date.

2 Thank you, everybody, for your presentations this  
3 afternoon, it's a lot to think about.

4 Thanks, everyone.

5 Don't wait for me.

6 COURTROOM DEPUTY: All rise.

7 This court now stands adjourned.

8 (Proceedings concluded at 4:23 p.m.)

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C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that  
the foregoing is a correct transcript from the record of  
proceedings in the above-titled matter.

Date: September 10, 2021 /S/ William P. Zaremba

William P. Zaremba, RMR, CRR

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