January 6th Over Charging

By Paul Engel

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- DOJ has charged numerous January 6th defendants with corruptly impeding the certification of the 2020 presidential election results.
- Furthermore, SCOTUS found that the DOJ was wrong to file those charges.
- What does this SCOTUS decision mean for the other J6 defendants?

After the January 6th riots the U.S. Department of Justice began charging anyone they thought had participated, but not just for the crimes they committed. According to the DOJ, anyone who showed up at the Capitol had corruptly obstructed or impeded an official proceeding, which was punishable by a fine and imprisonment for up to 20 years. Many claimed that the DOJ was overcharging these J6ers, misusing the law to punish dissenters. When it comes to 18 U. S. C. §1512(c), SCOTUS agreed.

Certifying the Presidential Elections

Before we get into this case, there is a fundamental error in all the parts of this opinion. Chief Justice Roberts wrote in the opinion:

On that day, Congress convened in a joint session to certify the votes in the 2020 Presidential election.

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Justice Jackson wrote in her concurrence:

On January 6, 2021, an angry mob stormed the United States Capitol seeking to prevent Congress from fulfilling its constitutional duty to certify the electoral votes in the 2020 Presidential election.

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And Justice Barrett wrote in her dissent:

At the time, Congress was meeting in a joint session to certify the Electoral College results.

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Do you see the mistake? Congress does not certify the votes of the Presidential Electors.

the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;

U.S. Constitution, Amendment XII

Congress is not present to certify the election, but to observe the votes being counted. The two houses of Congress do have one additional function they may need to perform though:

and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. …

and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President;

U.S. Constitution, Amendment XII

While not directly related to the facts of this case, the fact

that all nine justices of the Supreme Court placed their name on some part of this opinion that falsely claims that Congress has the authority to certify, and by extension overrule, the votes of the presidential electors, should give us all of pause. Now consider how many filings, briefs, complaints, and opinions have been filed as this case worked its way through our judicial system with the lie as part of it. If you are going to charge someone with a crime, the least you can do is get the circumstances around the alleged crime correct.

Background

With all of the controversies, allegations, and shouting back and forth, I've seen one question come up time and time again. Are the J6ers being overcharged by the Department of Justice? One of those accused of a crime punishable by up to 20 years in prison is Joseph Fisher.

According to the complaint, about an hour after the Houses recessed, Fischer trespassed into the Capitol and was involved in a physical confrontation with law enforcement. Fischer claimed in Facebook posts that he "pushed police back about 25 feet," and that he "was inside the [Capitol] talking to police." … Body camera footage shows Fischer near a scrum between the crowd and police who were trying to eject trespassers from the building.

A grand jury returned a seven-count superseding indictment against Fischer. Six of those counts allege that Fischer forcibly assaulted a federal officer, entered and remained in a restricted building, and engaged in disorderly and disruptive conduct in the Capitol, among other crimes. … Those six counts carry maximum penalties ranging from six months' to eight years' imprisonment.

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Mr. Fischer has been charged with a total of seven counts, six of which range from relatively minor to moderately serious.

However, this case revolves around a single count of the indictment.

In Count Three, the only count now before us, the Government charged Fischer with violating 18 U. S. C. §1512(c)(2). Fischer moved to dismiss that count, arguing that the provision criminalizes only attempts to impair the availability or integrity of evidence. The District Court granted his motion in relevant part. It concluded that the scope of Section 1512(c)(2) is limited by subsection (c)(1) and therefore requires the defendant to "'have taken some action with respect to a document, record, or other object.'" …

A divided panel of the D. C. Circuit reversed and remanded for further proceedings. Judge Pan, writing for the court, held that the word "otherwise" in Section 1512(c)(2) means that the provision unambiguously covers "all forms of corrupt obstruction of an official proceeding, other than the conduct that is already covered by §1512(c)(1)." … Judge Walker concurred in part and concurred in the judgment because he read the mens rea element of the statute—"corruptly"—as requiring a defendant to act with "an intent to procure an unlawful benefit."

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The crux of the matter is the third count in the indictment, a violation of 18 USC §1512(c)(2). What is §1512(c)(2)? Let's start with a little context.

- 1512. Tampering with a witness, victim, or an informant

18 USC §1512

Section 1512 is about tampering with a witness, victim, or informant. Within this section we find subsection (c):

(c) Whoever corruptly-

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

18 USC §1512

While this may seem to be a small point, the context of the law matters. In this case, it all comes down to the scope of one word, "otherwise".

The controversy before us is about the scope of the residual "otherwise" clause in Section 1512(c)(2). On the one hand, Fischer contends that (c)(2) "applies only to acts that affect the integrity or availability of evidence." …. On the other, the Government argues that (c)(2) "capture[s] all forms of obstructive conduct beyond Section 1512(c)(1)'s focus on evidence impairment."

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Isn't it amazing how 20 years of this man's life, and the life of others who have been similarly charged, can come down to the meaning and context of a single word.

The Case

The history of this law goes all the way back to the early 2000's. After the Enron and other accounting scandals, U.S. Senator Paul Sarbanes and U.S. Representative Michael G. Oxley sponsored a bill in 2002 called Sarbanes-Oxley or "SOX".

The Sarbanes-Oxley Act of 2002 imposes criminal liability on anyone who corruptly "alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding." 18 U. S. C.

§1512(c)(1). The next subsection extends that prohibition to anyone who "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so." §1512(c)(2).

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There's a bit of a problem already with this part of the Sarbanes-Oxley Act. Subsection (c)(1) criminalizes the destruction of records, but is part of a section of the law regarding tampering with witnesses, not records. They could have placed this language in §1510 Obstruction of criminal investigations or ∞1519 Destruction, alteration, or falsification of records in Federal investigations and bankruptcy. Instead, they put this document tampering language in a section of the law dealing with witness intimidation.

Petitioner Joseph Fischer was charged with violating §1512(c)(2) for his conduct on January 6, 2021. On that day, Congress convened in a joint session to certify the votes in the 2020 Presidential election. …

This breach of the Capitol delayed the certification of the vote. The criminal complaint alleges that Fischer was among those who invaded the building. Fischer was charged with various crimes for his actions on January 6, including obstructing an official proceeding in violation of §1512(c)(2).

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The breach of the Capitol did not delay the certification of the vote because, as I've already pointed out, Congress doesn't certify the vote. The breach did delay the counting of the votes, but while Mr. Fischer's actions may have extended the delay, it did not cause it. As the complaint stated, Mr. Fisher did not enter the capitol until an hour after they had recessed. However, that is not why Mr. Fisher challenged this count of his indictment.

He moved to dismiss that charge, arguing that the provision criminalizes only attempts to impair the availability or integrity of evidence. The District Court granted his motion in relevant part. A divided panel of the D. C. Circuit reversed and remanded for further proceedings.

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Which brings us to the critical word "otherwise."

(1) Section 1512(c)(1) describes particular types of criminal conduct in specific terms. The purpose of (c)(2) is, as the parties agree, to cover some set of "matters not specifically contemplated" by (c)(1). … Perhaps Congress sought to criminalize all obstructive acts in §1512(c), and having named a few examples in (c)(1), devised (c)(2) to prohibit the rest. But (c)(2) could have a narrower scope if Congress designed it to fill inadvertent gaps in the focused language of (c)(1).

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Did Congress mean to criminalize all obstructive acts, or was subsection (c)(2) only meant to fill in any gaps they left in (c)(1)? How does a court perceive the intent of Congress?

One way to discern the reach of an "otherwise" clause is to look for guidance from whatever examples come before it. Two general principles are relevant. First, the canon of noscitur a sociis teaches that a word is "given more precise content by the neighboring words with which it is associated." Unit… And under the related canon of ejusdem generis, a general or collective term at the end of a list of specific items is typically controlled and defined by reference to those specific items that precede it. … These approaches to statutory interpretation track the common sense intuition that Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it.

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Have you ever wondered why attorneys and judges like to use fancy latin sayings rather than simple English? If you look at the definitions of both “noscitur a sociis” and “ejusdem generis”, their meanings are pretty close. You define an ambiguous word by it’s context.

Under these principles, the “otherwise” provision of §1512(c)(2) is limited by the list of specific criminal violations that precede it in (c)(1). If, as the Government asserts, (c)(2) covers all forms of obstructive conduct beyond §1512(c)(1)’s focus on evidence impairment, Congress would have had little reason to provide any specific examples at all. And the sweep of subsection (c)(2) would swallow (c)(1), leaving that narrower provision with no work to do.

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I’ve seen this argument before with the General Welfare Clause. If the framers of the Constitution meant the General Welfare Clause to authorize pretty much anything Congress thought was good, why follow it with 17 specific powers?

(2) It makes sense to read (c)(2) as limited by (c)(1) in light of the history of the provision. The Enron accounting scandal exposed a loophole in §1512. At that time, the statute imposed liability on anyone who, among other things, corruptly persuaded another person to shred documents. But it curiously failed to impose liability on a person who destroyed records himself. The parties agree that Congress enacted §1512(c) as part of the broader Sarbanes-Oxley Act to plug this loophole. It would be peculiar to conclude that in closing the Enron gap, Congress created a catch-all provision that reaches beyond the scenarios that prompted the legislation. …

By reading (c)(2) in light of (c)(1), the Court affords proper respect to “the prerogatives of Congress” in carrying out the quintessentially legislative act of defining crimes and setting the penalties for them.

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As Chief Justice Roberts writes in the opinion, (c)(2) of §1512 must be read in the light of (c)(1), leading to the following conclusion.

To prove a violation of Section 1512(c)(2), the Government must establish that the defendant impaired the availability or integrity for use in an official proceeding of records, documents, objects, or as we earlier explained, other things used in the proceeding, or attempted to do so. … The judgment of the D. C. Circuit is therefore vacated, and the case is remanded for further proceedings consistent with this opinion. On remand, the D. C. Circuit may assess the sufficiency of Count Three of Fischer's indictment in light of our interpretation of Section 1512(c)(2).

It is so ordered.

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So Mr. Fischer's case goes back to the Circuit Court to be heard again. This time though, the Circuit Court is to follow the opinion of the Supreme Court and read subsection (c)(2) in light of (c)(1).

Concurrence

Justice Jackson wrote a concurring opinion. While she comes to the same conclusion as the majority, she also brings up a couple of interesting points.

On January 6, 2021, an angry mob stormed the United States Capitol seeking to prevent Congress from fulfilling its constitutional duty to certify the electoral votes in the 2020 Presidential election. … The peaceful transfer of power is a fundamental democratic norm, and those who attempted to disrupt it in this way inflicted a deep wound on this Nation. But today's case is not about the immorality of those acts.

Instead, the question before this Court is far narrower: What is the scope of the particular crime Congress has outlined in 18 U. S. C. §1512(c)(2)?

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Yes, the peaceful transfer of power is fundamental to our norms. However, the transfer should not only be peaceful, but must be legal. While a small group of agitators did storm the capitol, the question that seems to be lost is whether their purpose was to disrupt the peaceful transfer or power or to disrupt the illegal transfer or power? This gets to the mens rea of §1512 (c).

(c) Whoever corruptly-

18 USC §1512

"Mens rea" is latin for "Criminal intent". While I agree that many who entered the capitol on January 6th committed trespass, some even vandalism, was the intent of the group as a whole corrupt? If you have evidence that the elections in many of the states had violated state law, then it was the elections that were corrupt, and attempting to stop their use was both ethical and moral. If, as I had shown at the time, several of the states had appointed presidential electors in a manner other than the one directed by their legislature, then those electors were corruptly appointed and should not be counted. Working to prevent that was not a corrupt attempt to impede an official proceeding, but an attempt to stop the corruption of that proceeding.

Our commitment to equal justice and the rule of law requires the courts to faithfully apply criminal laws as written, even in periods of national crisis, … and even when the conduct alleged is indisputably abhorrent,

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Justice Jackson is correct, the rule of law requires courts to follow the law as written. There is no exception clause for national crisis or emergency. I only wish the courts would have remembered that when so-called "national emergencies" had been invoked in our recent past.

Dissent

Justice Barrett wrote a dissent which Justices Kagan and Sotomayor joined. In her dissent, Justice Barrett wrote.

Joseph Fischer allegedly joined a mob of rioters that breached the Capitol on January 6, 2021. At the time, Congress was meeting in a joint session to certify the Electoral College results. The riot forced Congress to suspend the proceeding, delaying it for several hours.

The Court does not dispute that Congress's joint session qualifies as an "official proceeding"; that rioters delayed the proceeding; or even that Fischer's alleged conduct (which includes trespassing and a physical confrontation with law enforcement) was part of a successful effort to forcibly halt the certification of the election results. Given these premises, the case that Fischer can be tried for "obstructing, influencing, or impeding an official proceeding" seems open and shut. So why does the Court hold otherwise?

Because it simply cannot believe that Congress meant what it said. Section 1512(c)(2) is a very broad provision, and admittedly, events like January 6th were not its target. (Who could blame Congress for that failure of imagination?) But statutes often go further than the problem that inspired them, and under the rules of statutory interpretation, we stick to the text anyway. The Court, abandoning that approach, does textual backflips to find some way—

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So why do Justices Barrett, Kagan, and Sotomayor not

understand that taking a subsection of law out of context is not only judicial malpractice, but certainly bad behavior? I believe it is because it does not get them to the outcome they desire: The severe punishment of those who would challenge an election with physical intervention.

There is no getting around it: Section 1512(c)(2) is an expansive statute. Yet Congress, not this Court, weighs the "pros and cons of whether a statute should sweep broadly or narrowly." … Once Congress has set the outer bounds of liability, the Executive Branch has the discretion to select particular cases to prosecute within those boundaries. By atextually narrowing §1512(c)(2), the Court has failed to respect the prerogatives of the political branches. Cf. ante, at 15. I respectfully dissent.

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Yes §1512(c)(2) is an expansive statute.

having a capacity or a tendency to expand

expansive: Merriam-Webster's Online Dictionary

Subsection (c)(2) expands (c)(1). Both subsections expand subsection (c), which itself expands §1512, whose stated purpose is to define and set punishment for "Tampering with a witness, victim, or an informant". What Justice Barrett is attempting to do is expand (c)(2) beyond its context and pretend it is a statue all to itself.

Conclusion

What can we conclude from this decision? First and foremost, that everyone deserves due process, regardless of how despicable we may think them to be. Remember, no matter how badly you may want someone to pay for their actions, there's probably someone out there who feels the same way about you. If we start denying due process to people, for any reason,

then we are no longer a nation of laws and justice, we've become just another banana republic.

Second, when trying to understand laws, we must read them in their context. This is not the first argument someone has made that looks at a single clause, line, or phrase out of its context in order to get what they want, and it won't be the last.

Lastly, everyone who has been charged with a violation of §1512(c)(2) in connection with January 6th can use this opinion to move that those charges be dropped. Any other charges may proceed, after all, since they are alleged to have committed those crimes, but they do have evidence that their §1512 charges should be dropped.

I'm sure this is not the last we'll hear of January 6th prosecutions. However, we should celebrate the seeking of justice and the rule of law when we see it, especially at our nation's highest court.

E-Mail Paul Engel: paul@constitutionstudy.com