

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, .
Case Number 21-cr-32
Plaintiff, .
vs. .
GUY WESLEY REFFITT, . November 19, 2021
10:08 a.m.
Defendant. .
- - - - -

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE DABNEY L. FRIEDRICH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States: JEFFREY NESTLER, AUSA
RISA BERKOWER, AUSA
United States Attorney's Office
555 Fourth Street Northwest
Washington, D.C. 20530

For the Defendant: WILLIAM WELCH, III, ESQ.
5305 Village Center Drive
Suite 142
Columbia, Maryland 21044

Official Court Reporter: SARA A. WICK, RPR, CRR
333 Constitution Avenue Northwest
U.S. Courthouse, Room 4704-B
Washington, D.C. 20001
202-354-3284

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P R O C E E D I N G S

(All participants present via video conference.)

COURTROOM DEPUTY: Your Honor, we are in Criminal Action 21-32, the United States of America versus Guy Reffitt.

If I can have the parties identify themselves for the record, beginning with the United States.

MR. NESTLER: Good morning, Your Honor. Jeff Nestler on behalf of the United States.

MS. BERKOWER: Good morning, Your Honor. Risa Berkower for the United States.

MR. WELCH: Good morning, Your Honor. My name is William Welch, and I'm representing Guy Reffitt.

THE COURT: Good morning again, everyone.

For the record, this is a video conference hearing being conducted pursuant to the Chief Judge's standing order relating to the pandemic, to which Mr. Reffitt has consented.

Correct, Mr. Welch?

MR. WELCH: That's correct, Your Honor.

THE COURT: Mr. Welch, this is a continuation of a hearing on your motion. I will go ahead and let you argue first.

MR. WELCH: Thank you, Your Honor.

I want to begin by directly answering the questions that the Court posed recently specifically. First, yes, Section 1512(c)(2)'s prohibition on obstructing, influencing, or

1 impeding an official proceeding should be understood in light of
2 Section 1512(c) (1)'s prohibition on evidence foliation.

3 And two, "corruptly" as used in Section 1512(c) (2) is not
4 defined. And in the government's paper filing yesterday, it
5 conceded that "corruptly" as used in Section 1512(c) (2) is not
6 defined. That is document 60-1 at pages 9 and 10.

7 Now, the reason that we should understand 15 (c) (2) in
8 terms of what 15 (c) (1) prohibits is that the official
9 proceeding must relate to the administration of justice. The
10 Electoral College vote certification is ministerial. It is not
11 an adjudicatory proceeding, because the Constitution does not
12 give Congress adjudicative power to reject certified Electoral
13 College lists. Vice President Pence said that his duties were
14 largely ceremonial, not adjudicative.

15 The Constitution itself provides that electors shall send
16 certified lists of their votes to the seat of government where
17 the President of the Senate shall, in the presence of the Senate
18 and the House, open them and then count the votes.

19 The Twelfth Amendment provides that once the president has
20 opened all of the certificates, the votes shall then be counted.
21 If there were a deadlock, the House is to immediately choose the
22 next president from the names on the list.

23 Neither the electoral clauses nor the Twelfth Amendment
24 give Congress adjudicative power to reject certified Electoral
25 College lists, nor does the Twelfth Amendment give Congress

1 power to enact legislation to enforce its provisions.

2 Contrast that with the Fifteenth Amendment that does. The
3 necessary and proper clause work to give Congress this power.
4 There are three ways that the necessary and proper clause gives
5 Congress power.

6 One would be foregoing powers, but that would not apply
7 here because it refers to the 17 enumerated powers in Article I,
8 Section 8, but the electoral clauses are in Article II.

9 The second way that the necessary and proper clause
10 provides is all other powers vested into the government. That
11 would not apply because the electoral clauses impose a duty to
12 count. It is not the direct discretion implied by the
13 word "power."

14 The third way would be that all other powers vested in any
15 department or officer would not apply, because Congress is not a
16 department or officer. And the Supreme Court said so in
17 *Hubbard vs. United States*, 514 U.S. 695 at pincite 700.

18 History also suggests that the framers intended Congress's
19 role to be ministerial, because they considered the possibility
20 that there might not be a vote if an elector just did not cast
21 their ballot.

22 Your Honor, each statute in Chapter 73 proscribes
23 obstructive conduct to specific subjects and settings related to
24 the administration of justice. And courts addressing the scope
25 of 1512 have held that obstructive conduct is proscribed if it

1 affects a proceeding that is judicial in nature, for instance,
2 *Arthur Anderson* or *United States vs. Birch*.

3 The Supreme Court has drawn a formal distinction between
4 Congress's legislative and its investigative powers. And the
5 Supreme Court did that beginning in *Kilbourn v. Thompson*, 103
6 U.S. 168.

7 In *Ermoian*, the Ninth Circuit said that the term "official
8 proceeding" was not plain and unambiguous. The dictionary
9 definitions did not conclusively resolve the issue. Instead,
10 the legal, instead of the lay understanding, was suggested by
11 the descriptor "official" preceding the word "proceeding" and
12 the surrounding words in context.

13 Likewise, the legislative history supports that 1512(c)
14 only applies to proceedings that are judicial in nature, such as
15 if you were obstructing a congressional committee that was
16 investigating potential federal crimes.

17 When Senator Lott introduced what is now 1512(c), he said
18 this section would allow the government to charge obstruction
19 against individuals who acted alone, even if the tampering with
20 evidence took place prior to the issuance of the grand jury
21 subpoena. Senator Hatch explained that it would close a
22 loophole created in the available obstruction statute by holding
23 criminally liable a person who acting alone destroyed documents.

24 THE COURT: Mr. Welch, my voice is failing, but I'm
25 going to try to get a question in.

1 If I disagree with you on the official proceeding argument
2 and I find that the official proceeding does cover what Congress
3 is doing here, do you agree that the members of Congress needed
4 to be present for that official proceeding?

5 MR. WELCH: Yes, they would need to be present. If
6 they're in some sort of a recess or there was a suspension, then
7 it would not be an official proceeding.

8 THE COURT: They would need to be physically in the
9 room for this proceeding? You're just saying they don't play
10 any adjudicatory role, but they do need to be present?

11 MR. WELCH: They would need to be present. They would
12 actually have to be in session. It wouldn't be suspended. And
13 I believe the problem here is that they're suspended, and
14 there's a case on point for that that basically does so. I will
15 look for that and get back to you on it.

16 THE COURT: I'm going to ask the government more about
17 its theory here, but as I understand it, the government's theory
18 is that Mr. Reffitt obstructed or impeded this official
19 proceeding by attempting to take steps that would prevent
20 members of Congress from being present. Do you think that
21 fairly captures the government's theory here?

22 Can you hear me, Mr. Welch?

23 MR. WELCH: I'm sorry. I thought you were directing
24 that question to the government.

25 THE COURT: No, no. I'm going to ask them in a moment

1 when it's their turn to clarify their theory of culpability
2 here.

3 But as I understand it, their theory is that the actions
4 that Mr. Reffitt took, he was attempting to obstruct an official
5 proceeding by taking steps to prevent, I think, the members of
6 Congress from being present for this official proceeding.

7 Is that how you understand the government's theory?

8 MR. WELCH: My understanding is -- I don't know if it
9 was specifically preventing them from being present, but my
10 understanding is their theory is that it was an attempt to
11 disrupt or prevent in some way the tally being for anyone other
12 than Donald Trump. It's not entirely clear from the charge how
13 that would happen. It's not entirely clear from their papers.
14 But I glean from what I've read that that's what they intend.

15 THE COURT: You've not requested a bill of
16 particulars, have you?

17 MR. WELCH: No, I have not.

18 THE COURT: I'm going to follow up with Mr. Nestler in
19 a minute. But let's say the way I've described it is their
20 theory -- let me just move to you, Mr. Nestler.

21 Am I capturing the government's theory correctly? I know
22 you argue in the alternative, but your main theory is what? Can
23 you explain it here?

24 MR. NESTLER: Yes, Judge. I believe what you're
25 saying is half correct. One of the ways that we allege

1 Mr. Reffitt was trying to obstruct or attempting to obstruct
2 Congress was by physically preventing the members of Congress,
3 the representatives and the senators, from assembling in order
4 to view and then vote on the ballots. So that is one way that
5 he was obstructing or attempting to obstruct.

6 The other way goes more towards the word "influence," which
7 is that Mr. Reffitt's actions were trying to influence
8 corruptly -- we can get into what the word "corruptly" means --
9 wrongfully with consciousness of wrongdoing the assembled
10 members of Congress from voting in a way that Mr. Reffitt wanted
11 them to vote, the same way somebody might try to obstruct a
12 juror or a judge in a legal proceeding or an adjudicator in some
13 sort of adjudicative proceeding.

14 THE COURT: So in other words, almost an intimidation
15 approach?

16 MR. NESTLER: Yes, and that goes to the word
17 "influence."

18 THE COURT: Mr. Nestler, this is helpful for me. It
19 wasn't entirely clear from the indictment and even from your
20 papers exactly what the government's theory is.

21 So even though Mr. Welch hasn't asked for one, I'm inclined
22 to ask that you all do provide a bill of particulars that
23 outlines specifically your theory. I will give you some time to
24 do that. But I think it's important for me in both deciding
25 this motion and for Mr. Welch in defending his case to be clear

1 exactly what the government's theory is in terms of how
2 Mr. Reffitt is responsible for obstructing or impeding the
3 official proceeding.

4 All right. Moving back to you, Mr. Welch, in light of how
5 the government has described its theory, I'm curious, if you
6 look at 1512 -- he is charged with 1512(c). You say this charge
7 doesn't fit. But if I disagree with you on this being an
8 official proceeding, are you familiar with 1512(d)?

9 MR. WELCH: 1512(d)? Let me just pull it up. I know
10 I referenced it in one of my examples, but I don't remember it
11 off the top of my head.

12 THE COURT: Let me summarize it for you. It provides
13 that whoever attempts to intentionally harass another person and
14 thereby delays or prevents a person from attending an official
15 proceeding shall be guilty of the offense.

16 MR. WELCH: Well, in that situation, it would still
17 need to be someone who was, say, a witness that was going to
18 testify, for instance, or someone who was bringing evidence --

19 THE COURT: I don't think so. It says, to quote
20 it, "Whoever intentionally harasses another person," which isn't
21 defined further in the provision, "and thereby hinders, delays,
22 prevents, or dissuades any person from attending or testifying
23 in an official proceeding."

24 So if I disagree with you and I find this is an official
25 proceeding, I don't see "person" restricted to a juror, a judge,

1 a witness. In fact, other parts of this statute do cover
2 proceedings before Congress. So I think it has to envision a
3 member of Congress could be a person for purposes of this
4 statute.

5 I'm just curious why -- what you would argue there. It
6 doesn't have "corruptly" in it. It just says "intentionally
7 harasses."

8 MR. WELCH: I think it would still need to be -- and
9 there is no allegation even that Mr. Reffitt prevented any
10 member from attending.

11 THE COURT: This statute specifically includes, this
12 provision, an attempt to do so. So the government's theory is
13 that he physically prevented members from attending an official
14 proceeding. He attempted to do so by assaulting federal
15 officers and whatever else he did. He was trying to physically
16 prevent members from going to that official proceeding.

17 MR. WELCH: Well, the problem with that is that you
18 would still need an official proceeding, and the joint session,
19 even if it was an official proceeding, and I don't concede that
20 it was because it was ministerial, not adjudicative, but it was
21 suspended at about 1:15. And at that time that would have been
22 about a half an hour before the alleged obstructive acts in this
23 case. And it happened because the President of the Senate
24 ordered the two Houses to withdraw from the joint session as a
25 result of objections to the Arizona certificate.

1 And the case that I was trying to recall earlier --

2 THE COURT: Mr. Welch, you can't plausibly argue that
3 this session, this official proceeding was not delayed as a
4 result of what happened on January 6 by Mr. Reffitt's actions or
5 others, whether it was in session at that moment or not.

6 MR. WELCH: But his actions individually wouldn't have
7 done that. He never had contact with any member of Congress.

8 THE COURT: He was -- as alleged. I don't know what
9 the government's proof in trial will show, but as alleged, he
10 was encouraging others. He was encouraging a mob; he was a part
11 of a mob. So he wasn't acting unilaterally. He took steps
12 alone, but he was very much a part of the large group that was
13 trying to get in and prevent, the government's theory is,
14 prevent members from attending this official proceeding.
15 Whether it was in session or not, you can't plausibly allege
16 that it didn't delay it considerably.

17 MR. WELCH: But I think *Christoffel v. United States*,
18 338 U.S. 84, says that you have to have an actual competent
19 tribunal, that you can't be in a suspended proceeding, that that
20 wouldn't work. They would have to be actually, you know -- if
21 they blocked the building and wouldn't let people in the
22 building, well, maybe that argument might work. But there's
23 no -- there's nothing -- there's no evidence to the effect that
24 Mr. Reffitt blocked anyone from -- any member of Congress from
25 going in the building.

1 THE COURT: But even though the members were
2 considering objections, and the point is, the session wasn't
3 dissolved, it wasn't over until the count occurred and the
4 result declared. So it was ongoing throughout the day.

5 MR. WELCH: Well, that would then indicate that he
6 didn't delay it, because even after it resumed, you know, a
7 formal session, there were objections that continued for hours,
8 into the wee hours of the next morning.

9 THE COURT: You don't think it delayed attendance at
10 that proceeding when the members were cleared out of the
11 gallery?

12 MR. WELCH: There is no allegation that Mr. Reffitt
13 did that. He's charged alone in this.

14 THE COURT: But attempt. He took substantial steps
15 towards.

16 MR. WELCH: Getting into a confrontation with a police
17 officer on the steps of the building, I don't think that even
18 that would rise to the level of an attempt to stop a member from
19 attending.

20 THE COURT: What was he doing? Not trying to delay
21 the vote or interfere with the vote? Why was he trying to get
22 in the Capitol? To sightsee?

23 MR. WELCH: To protest, that he felt that the election
24 was being stolen.

25 THE COURT: But to influence.

1 MR. WELCH: That would potentially here raise another
2 problem, which is, you know -- well, for instance, when Vice
3 President Gore challenged the results of the election that he
4 ultimately conceded, would that then fall under this as well,
5 because he was attempting to influence the outcome?

6 And that would have been his right, and certainly, that
7 would have been the right of the voters who wanted him to win.
8 So I don't know that there is anything that --

9 THE COURT: He didn't allegedly act in a wrongful way.
10 He was using the judicial process. He wasn't storming the
11 Capitol.

12 MR. WELCH: It would be broad enough -- the
13 government's interpretation would be broad enough to cover such
14 a thing.

15 THE COURT: How is what you're describing wrongful,
16 that you use the courts to challenge an election?

17 MR. WELCH: Well, because, ultimately, the Supreme
18 Court decided that it would have been a violation of Florida
19 voters' rights, and certainly, I think we can agree that, you
20 know, violating voters' rights is something that's wrong.

21 THE COURT: Mr. Reffitt, I'm not going to hear from
22 you right now. Do you need a moment with your attorney?

23 THE DEFENDANT: Yes, Your Honor, please.

24 THE COURT: Okay. Mr. Welch, I will give you a moment
25 in a breakout room.

1 (Defense counsel and defendant conferred.)

2 MR. WELCH: Thank you, Your Honor. I believe we're
3 ready. I'm not sure whether my client is back yet. There he
4 is.

5 THE DEFENDANT: Present and accounted for.

6 MR. WELCH: You're muted, Your Honor.

7 THE COURT: All right. Mr. Welch, you may continue.

8 MR. WELCH: Okay. I don't think that 1512(d) would
9 apply here, Your Honor, because, number 1, it would still have
10 to be an official proceeding. Number 2, it would need to be in
11 session. That would be the *Christoffel* case.

12 And still, it would not be an official proceeding because
13 Congress was not there that day to listen to witness testimony
14 under oath in an investigation. It was not there to receive
15 evidence, whether it's documents, whether it's data files.
16 Congress had a duty to receive the votes and count them. That
17 was --

18 THE COURT: And be present to do so, physically
19 present.

20 MR. WELCH: Well, yes, they would need to be present,
21 but that doesn't make them -- it doesn't make it an official
22 proceeding.

23 THE COURT: We can agree to disagree on that, but you
24 don't -- again, you don't disagree that they needed to be
25 physically present, they needed to attend that proceeding?

1 MR. WELCH: Yes, in order for any type of proceeding
2 to happen, they would need to -- you know, members of the
3 Congress would need to attend. But that would not transform a
4 proceeding involving the Electoral College certification into an
5 official proceeding. The legislative history supports that.

6 And one of the interesting things about the legislative
7 history is that as 1512 was originally passed, it was largely
8 drawn from the National Commission on Reform of Federal Criminal
9 Laws report that was published in 1971. The definitions in that
10 confirm that there was an intentional delineation between
11 actions to obstruct official proceedings on the one hand and
12 obstructing investigations prior to the institution of official
13 proceedings on the other. The Commission report actually
14 defines "official proceedings," and it says a proceeding
15 involving the taking of evidence, a proceeding heard or which
16 may be heard before a government agency or a branch or public
17 servant, and this is key --

18 THE COURT: Why is that not a proceeding that may be
19 heard before a branch or government agency?

20 MR. WELCH: Because in this situation it would need to
21 be an investigation. This was not an investigation.

22 THE COURT: Okay.

23 MR. WELCH: If Congress was saying, like it was doing
24 when it held hearings and it was investigating Enron and they
25 subpoenaed people and those witnesses have to come in and,

1 perhaps, produce documents, if someone had destroyed documents
2 to prevent Congress from having them, even if they weren't
3 physical documents, if they were electronic documents, that's
4 what 1512 is aimed at. If you prevent a witness from attending,
5 you try to talk them into changing their stories or just not
6 showing up, that would be something that 1512 would cover,
7 because in that situation that would be an official proceeding
8 before the Congress. But not everything that Congress does is
9 an official proceeding under the statute.

10 THE COURT: Mr. Welch, again, we can agree to disagree
11 on that. I'm not sure you have me with your proceeding point.

12 But 1512 and surrounding statutes clearly contemplate a
13 need for certain persons to be in attendance at proceedings, no
14 matter what their nature is. You have (a) (1), whoever kills
15 another person with intent to prevent attendance at an official
16 proceeding, whoever harasses.

17 I disagree with you on the definition of "official
18 proceeding." It just doesn't follow that some of these
19 provisions would not apply in the situation where you prevent
20 someone who has to be at the proceeding from being there.

21 MR. WELCH: Because I think what we're -- it's not
22 just do you obstruct anyone from doing anything. It's narrower
23 than that. I think the Commission's report on which Congress
24 based its writing of this statute clearly shows that Congress
25 intended to address both obstruction of justice in official

1 proceedings at which evidence is taken and in the gathering of
2 information and evidence in investigations prior to the
3 institution of an official proceeding.

4 And when Congress added Section 1512(c) in 2002, it didn't
5 change that. It is still limited to actions affecting official
6 proceedings, and the term maintains its original meaning, and it
7 would be some sort of --

8 THE COURT: Are there any other arguments you want to
9 make on corruptly or the Yates argument?

10 MR. WELCH: What was the first one you said? I'm
11 sorry.

12 THE COURT: On the meaning of "corruptly" or the Yates
13 argument. I want to move away from the official proceeding
14 argument. I've heard enough on that.

15 MR. WELCH: Okay. Your Honor, we agree that
16 "corruptly" as used in Section 1512(c)(2) is not defined. And
17 for that reason, *Poindexter* would still be the law. In
18 *Poindexter*, it was held that it's vague and unconstitutional.
19 So nothing has happened, none of the cases that the government
20 has cited has overruled *Poindexter* or changed *Poindexter*.
21 You're still in a position where it is not defined, and it would
22 still for that reason be vague. A person would not necessarily
23 know what was and wasn't the law based on a vague definition
24 of "corruptly."

25 In addition, if you apply Section 1512(c)(2) to conduct

1 that's unrelated to the availability or integrity of evidence,
2 it then renders surplusage the phrase "otherwise obstruct" in
3 1512(c)(2), the rest of Section 1512, and much of Chapter 73.

4 *Begay* addressed this situation in a similar
5 phrase, "otherwise involves." And the Supreme Court looked at
6 what was covered and not covered. It applied canons of *Ejusdem*
7 *generis* to say that only similar crimes rather than every crime
8 that would present a serious risk of physical injury to another.
9 Otherwise, in Section 1512(c)(2), it's not grammatically
10 distinct from what was in *Begay*.

11 THE COURT: It does -- the clauses are separated by a
12 semicolon, and there's a line break, which does make a
13 difference, in *Yates* and *Begay*.

14 MR. WELCH: But one of the differences is that -- if
15 you're referring to the *Ali* case, there was no list in *Ali*;
16 whereas, there is a list in 1512.

17 So I don't think that that is determinative of the outcome
18 here, and I don't think there's any authority anywhere to say
19 that the presence or absence of a semicolon would make a
20 difference in this case. *Yates* also --

21 THE COURT: You don't think Alito's opinion in *Yates*
22 suggests as much?

23 MR. WELCH: No, I don't think that is determinative of
24 the issue here. I mean, in *Yates*, the Supreme Court rejected
25 the government's claim that a dead fish qualified as an object.

1 THE COURT: It was all in the same sentence.

2 MR. WELCH: But a word is known by the company that it
3 keeps, and this is in an obstruction of justice statute. So to
4 conclude that 1512(c)(2) has nothing to do with obstruction of
5 justice that basically can cover anyone doing anything that is
6 remotely obstructive in some way would just have the exception
7 here swallow the rule. That just is not what *Yates* says.

8 And indeed, there is a list in this situation. And when
9 general words such as "otherwise," you know, follows a list,
10 it's generally understood under *Ejusdem generis* that it limits
11 the list or it limits the general to the context of the
12 specific.

13 Even still, if the Supreme Court said in *Yates* that if
14 recourse to traditional tools of statutory constructions left
15 any doubt about the meaning of "tangible object," then the
16 Supreme Court would invoke the rule of -- that ambiguity
17 concerning the criminal statute should be resolved in favor of
18 lay, and certainly, the government has conceded that there is no
19 other case out there in which 1512(c)(2) has been applied in the
20 way that it's trying to apply it in this case.

21 Ultimately, Your Honor, I think it leads back to
22 *Poindexter*, and corruptly just ends up being vague in this
23 situation, as well as *Begay* and *Yates* saying you should not have
24 this much surplusage in interpreting a statute.

25 THE COURT: Mr. Nestler?

1 Are you done, Mr. Welch? I don't mean to cut you off.

2 MR. WELCH: No, I'm done for now. I might have a
3 reply to whatever the government says.

4 THE COURT: Okay. All right. So Mr. Nestler,
5 following up on the theories that you've provided at the outset,
6 I read your briefs to suggest that one alternative actually
7 related to the evidence in some way, but is that not the case?
8 Is that the alternative theory, that Mr. Reffitt allegedly
9 influenced -- attempting to influence the assembled members from
10 voting in the way they wanted to vote? Is that what you meant
11 by evidence?

12 It was a passing reference to even if the Court interpreted
13 this consistently with (c)(1), 1512(c)(1), that the government
14 could meet that standard. Is that what you meant in terms of --

15 MR. NESTLER: That's an additional alternative
16 argument. The idea that Mr. Welch put forward was that
17 1512(c)(2) has to relate to some sort of document, which we
18 disagree with. Even if it does relate to some sort of document
19 or have some sort of nexus to a document, the government will be
20 able to satisfy that.

21 THE COURT: What is your theory for that?

22 MR. NESTLER: That the proceeding itself involved the
23 constitutional and statutory requirement for examination of
24 original documents.

25 THE COURT: So the examination of the documents could

1 not occur because members weren't physically present; correct?

2 MR. NESTLER: Correct.

3 THE COURT: So it's not a situation -- you're not
4 intending to prove that Mr. Reffitt's actions were an attempt to
5 get ahold of the evidence, the electoral votes, or do anything
6 with the evidence specifically, but, rather, impede the members'
7 ability to do their job in order to examine and object to the
8 electoral votes? Am I capturing what you're saying?

9 MR. NESTLER: It's two pieces, Judge. One is yes
10 related to the individual, so trying to obstruct or influence
11 the people from sitting in the room and looking at the
12 documents.

13 But the other piece of it is the need for Congress to
14 safeguard those pieces of evidence. And so --

15 THE COURT: But is your theory that he was trying to
16 get in to destroy or tamper with the evidence?

17 MR. NESTLER: No, not that he -- we don't intend to
18 prove or attempt to prove that he attempted to destroy the
19 evidence. We intend to prove that he attempted to obstruct a
20 proceeding, and the proceeding itself involved the need to
21 safeguard such evidence. It was a proceeding in which original
22 evidence, document, records were --

23 THE COURT: But whether the members of Congress were
24 physically present or not, there was no risk, was there, that
25 these documents would disappear or not be safe without them

1 present, is there?

2 MR. NESTLER: There was. The documents --

3 THE COURT: You have staff members and other people
4 who are present. These are not sitting on the Capitol steps.

5 MR. NESTLER: No, they're sitting in the well of the
6 House when the joint session is meeting, and then they were
7 transported back to the Senate when the two Houses separated to
8 debate the objection. And they were physically removed from the
9 chamber to prevent rioters from accessing them and tampering
10 with them or destroying them or stealing them.

11 THE COURT: But again, your theory is -- I'm not
12 trying to limit you in any way. Is your theory that he was
13 coming in to try to steal it or tamper with the evidence or
14 destroy it?

15 It's not clear to me -- this is why I'm going to request
16 the government provide a bill of particulars, because it's
17 really not clear to me what your theories are and what you think
18 that the facts that you're going to prove support in terms of
19 obstruction.

20 MR. NESTLER: So we believe that he was intending to
21 obstruct the proceeding. There is different ways that he could
22 have obstructed the proceeding that he was in motion to do so.

23 THE COURT: List those for me. By removing members of
24 Congress, by intimidating them to vote a certain way, and by
25 taking the evidence?

1 MR. NESTLER: And by -- well, tampering is the larger
2 word, but by making it such that the evidence was not available
3 to be examined.

4 So I guess when we're -- when Your Honor is talking about
5 the individuals, so yes, the individuals need to be present in
6 the chamber, but also, the evidence needs to be present in the
7 chamber with those individuals. We need both halves to make the
8 system work. So if the defendant is able to prevent the
9 evidence from being present in the chamber, that also would
10 obstruct the proceeding.

11 THE COURT: Okay. So it's absence of members and
12 absence of evidence?

13 MR. NESTLER: Correct. Those are different ways for
14 which the defendant or other rioters could have or were
15 attempting to or intending to obstruct the proceeding.

16 And just to be --

17 THE COURT: Go ahead. I don't mean to interrupt.

18 MR. NESTLER: Just to be clear, the defendant is
19 indicted also under the theory of aiding and abetting. So the
20 government does not need to prove, though we will discuss our
21 theories, obviously, at the Court's request, that the defendant
22 himself intended to take a ballot box or to burn a ballot box,
23 but the defendant was aiding and abetting others in their
24 obstruction of Congress.

25 THE COURT: But again, you're not going to try to

1 prove that Mr. Reffitt himself or by aiding and abetting others
2 was trying to remove the evidence? You're just saying they're
3 just trying to disrupt thus proceeding as a whole, they're
4 trying to -- to use an analogous situation, they're trying to
5 block the doors to the courthouse?

6 MR. NESTLER: Right. But there's another way to go
7 about that. If we're thinking about a trial as an example,
8 Judge --

9 THE COURT: Sorry. If we're thinking about what?

10 MR. NESTLER: If a trial is happening, the defendant
11 could prevent the jurors or the judge or the witnesses from
12 entering the courthouse or could influence them to make them
13 leave the courthouse so they couldn't do their job.

14 But there's another way that the defendant could have
15 obstructed that court proceeding, which is that there's original
16 physical evidence that needs to be examined during that trial.
17 If the defendant had blocked that truck from entering the
18 building or stolen that evidence on the way to the courthouse or
19 made it such that -- or burned that evidence or somehow made it
20 such that that evidence could not be brought into the courtroom,
21 the defendant also would be obstructing that proceeding by
22 making it such that the people who were assembled to review the
23 evidence did not have the evidence they needed to review.

24 THE COURT: So your point is, by blocking access to
25 the courthouse door or here to the congressional proceeding,

1 it's preventing the presence of individuals who need to be
2 there, it's preventing the presence of evidence that needs to be
3 there?

4 MR. NESTLER: Correct.

5 THE COURT: So by shutting down the whole proceeding,
6 the defendant, Mr. Reffitt, and others were also indirectly
7 withholding evidence or taking evidence, for lack of a better
8 word? They're preventing the evidence from being in there, the
9 room?

10 MR. NESTLER: Correct. And that is unique to this
11 proceeding. There are certainly proceedings that could exist
12 that don't involve records or evidence. This happens to be a
13 situation where the records and evidence are not present because
14 of a subpoena or because of a court order. They're present
15 because the Constitution requires them to be present. The
16 original envelopes that have been sealed are then opened by the
17 vice president in the joint session.

18 THE COURT: Okay. Let me -- so that's your evidence
19 point, is absence of evidence?

20 MR. NESTLER: Correct.

21 THE COURT: Not tampering, not destroying, just
22 blocking the door so evidence can't go in there for the
23 proceeding to happen?

24 MR. NESTLER: In terms of this defendant's intent,
25 yes, that is the nexus to the evidence, if we ever had to prove

1 nexus to tangible evidence, which we don't believe we have to
2 do.

3 THE COURT: All right. Let me for a moment put aside
4 the broad definition of "corruptly" that you're saying the Court
5 should apply, and let me focus on the structure of the statute.

6 When you look at 1512 as a whole, as well as the
7 surrounding provisions such as 1503, 1505, when you look at it
8 as a whole, you see that Congress enacted a number of different
9 provisions that have to deal with people, whether it be judges
10 or jurors or witnesses. And when it did so, it often used
11 language in addition to "corruptly."

12 So for example, 1512(b), Congress also used the
13 terms "intimidation, threatens, or corruptly persuades another."
14 Similarly in 1512(d), which I talked to Mr. Welch about,
15 Congress used the term "intentionally harasses another person
16 or harasses." In 1503 and 1505, Congress said "corruptly or by
17 threats or by force" in both of those statutory provisions.

18 And it's hard to read the statute as a whole and conclude
19 that Congress intended "corruptly" by itself to apply to actions
20 that prevent a juror or a judge or a witness or in this case a
21 member of Congress from attending a proceeding as opposed to, as
22 the defense argues here, that it means something that undermines
23 the integrity of the process of the truth functioning -- the
24 truth function of the proceeding, whether it's, you know,
25 destroying or tampering with or manipulating evidence or

1 testimony or corrupting the decisionmaker, the judge or the
2 juror who is making a decision, as opposed to just removing that
3 person from the proceeding.

4 And so it's hard to look at 1512(c), which only
5 includes "corruptly," and read it to cover all of those things.
6 It doesn't make sense. Before this provision was ever enacted,
7 it doesn't make sense that Congress interpreted "corruptly" that
8 broadly, or it would not have used all these other terms when it
9 was talking about preventing attendance at a proceeding. Again,
10 words like "intimidating," "threatening," "harassing," those
11 seem to get at the physical blockage of -- this person isn't
12 going to be in this proceeding and this person is essential to
13 this proceeding.

14 But "corruptly" is not doing that kind of work. It's more
15 tied to the integrity of the proceeding and is it being
16 manipulated and is the truth function being undermined.

17 So I'm interested in your response to that, and then I have
18 another structural point to make. But what is the Court to make
19 of all of the other terms in all of those other provisions that
20 apply to analogous situations where people who are essential to
21 a proceeding aren't present for the proceeding?

22 MR. NESTLER: Well, Congress often legislates in
23 redundancies, and we cited that point in our brief, Your Honor.
24 That's how the Supreme Court has said in *Connecticut National*
25 *Bank v. Germain*. "Redundancies across statutes are not unusual

1 events in drafting." And Congress should be interpreted to say
2 in a statute what it means and means in a statute what it says.

3 And so it is a valid interpretation to look at other
4 statutes and see what other language Congress used elsewhere,
5 but we start with what language Congress used here in 1512(c).

6 THE COURT: But 1512(c) is a part of 1512 that uses
7 all of these other terms, like "intimidation" and "threatens."
8 It was put into that. It wasn't carved out as its own separate
9 provision.

10 So are you basically -- are you saying that in 1512(b)
11 "intimidation" and "threaten" have no meaning, they're
12 superfluous, there's no need for them to be there?

13 MR. NESTLER: No, Judge. First of all, in 1512(b),
14 the phrase is "corruptly persuades," and that phrase does not
15 exist in 1512(c), which is just "corruptly." And so the corrupt
16 nature in (b) requires a corrupt persuasion of another person.

17 And part of the reason for the introduction of 1512(c) was
18 the lack of the need, and defense counsel even cited this as the
19 legislative history, to persuade another person, that a person
20 can act corruptly by oneself without reference to another
21 person.

22 THE COURT: And what do you take that to mean, you're
23 corruptly persuading another person? Is it that you're
24 persuading a witness to testify in a certain way that's false?
25 How do you interpret that phrase?

1 MR. NESTLER: Well, "corruptly persuades" has been
2 interpreted. I believe that *Arthur Anderson* talked about the
3 definition in 1512(b) about corruptly persuades. And that
4 involves again corrupt conduct, wrongful conduct --

5 THE COURT: Right. But the way you want me to read
6 (c) is you want me to read (c) (1) in that way, you know,
7 corruptly altering, destroying, mutilating that's interfering
8 with the integrity of the proceeding. So you want me to read it
9 consistently with 1512(b) when it comes to (c) (1).

10 But when it comes to (c) (2), which also incorporates
11 "corruptly," you want me to read it to include these other
12 terms, right, "intimidating," "blocking," "using force,"
13 whatever these other provisions -- "threats"? You want me to
14 read all that into "corruptly" in that context of 1512(c) (2)?

15 MR. NESTLER: Not necessarily. So 1512(c) (1) can
16 stand on its own. It does not need to be read in reference to
17 1512(b).

18 THE COURT: I know, but I mean, there corruptly is
19 clearly being used in a way that's more traditional than it's
20 talking about, you know, the administration of justice and
21 proceeding, the truth-finding function. That's the traditional
22 definition there, in a way, you know, tampering with evidence.
23 So it's in line with 1512(b) in the same way that tampering with
24 witness testimony might be. It's a traditional definition.

25 So I'm not saying that you have to read (c) (2) tied

1 necessarily to (1), but I'm saying -- it seems to me that you're
2 asking me to read "corruptly" in (c) (2) as encompassing all of
3 these things, not just the traditional function of corruptly as
4 it relates to the administration of justice, but these other
5 things, intimidation, threats, force, and the like, to include
6 all of your theories here of why Mr. Reffitt obstructed this
7 proceeding. Maybe not all of them, but preventing members from
8 attending, that's a different kind than typical corruptly. It's
9 not -- it just seems different in nature. It's pulling someone
10 out of the courtroom. It's pulling someone out of the official
11 proceeding. It's blocking them from attending. And when
12 Congress intends to do that, it uses these other words to make
13 that clear, and this is -- (c) (2) is a part of the statute. It
14 does just that in other provisions. You have to assume that
15 Congress enacted it with that backdrop.

16 MR. NESTLER: We believe what Congress was doing was
17 enacting a broad catchall, and that is something that Congress
18 does across the U.S. Code, which is to specify certain crimes
19 with certain words, and then as Justice Alito has mentioned,
20 Justice Scalia has mentioned in the *Republic of Iraq v. Begay*
21 case, talks about how Congress recognizes that there are
22 situations that it cannot account for. It did not believe this
23 was going to happen, but it knows there are, quote, known
24 unknowns. And so it enacts these residual clauses to capture
25 the other conduct that might not neatly fit within one of the

1 more specific provisions that it has enacted.

2 And that's --

3 THE COURT: But wouldn't you think that Congress would
4 speak more clearly if this is truly a catchall to encompass
5 everything in 1512 and everything in 1503 and 1505? It
6 eviscerates the need for any other statutory provision.

7 MR. NESTLER: That's how catchalls work, Your Honor,
8 from our perspective.

9 THE COURT: And that's how you read this, that there's
10 no need for any of these other provisions, Congress enacted a
11 20-year stat max that includes everything in this statute and
12 surrounding obstruction-type provisions with this one
13 phrase, "otherwise obstructs, influences, or impedes any
14 official proceeding"?

15 MR. NESTLER: Yes. Congress enacts the broad residual
16 clauses in order to capture those things that are not specified
17 in the other parts of the provisions. And the fact that it's a
18 20-year statute, the government believes, does not have any
19 weight here, as we cited in our supplemental pleading.

20 The contempt statute is something similar, and Congress
21 believed that it was up to the judges at the executive branch to
22 decide which -- well, the appropriate punishment to request and
23 the judicial branch to decide the appropriate punishment to
24 impose depending upon the severity of the conduct.

25 The government -- sorry.

1 THE COURT: The trouble I'm having is there are all
2 these specific provisions, including some you haven't charged,
3 that seem to apply here. As I've discussed already with
4 Mr. Welch, 1512(d), "whoever intentionally harasses another
5 person and thereby hinders, delays, prevents, or dissuades any
6 person from attending an official proceeding," and it does
7 include a specific -- it includes attempt as well.

8 And there, for that conduct, it's very specific about what
9 Congress is trying to do. It's a three-year stat max. But
10 you're saying through this phrase Congress intended to absorb
11 1512(d) in the same statute into this one phrase of a dozen
12 words.

13 MR. NESTLER: Well, first of all, Judge, I want to be
14 careful about discussing what Congress intended. We don't
15 believe we need to talk about what Congress intended to do with
16 the statute, because the clearest indication of what Congress
17 intended to do is the language Congress chose.

18 THE COURT: It chose "corruptly," and this is a vague,
19 undefined word. To the extent Congress has defined it at all in
20 any of these provisions, it has tied it to the traditional, you
21 know, form of influencing, you know, the integrity of the
22 proceeding and administration of justice and the like.

23 MR. NESTLER: We don't believe that Congress has so
24 limited the phrase "corruptly" in 1512(c).

25 THE COURT: No, I get that; I get that. But when

1 you're looking at such an undefined term that you're
2 interpreting so broadly -- you're basically saying the meaning
3 of "corruptly" is wrongful, which has, you know, no obvious
4 limiting principle when it's divorced from the administration of
5 justice and search for the truth. You're essentially asking the
6 jury here to make a moral judgment on what's wrongful.

7 MR. NESTLER: And the Supreme Court in *Arthur*
8 *Anderson*, when looking at the phrase "corruptly," said that
9 corruptly -- that was a 1512(b) case -- said that corruptly
10 should have the everyday meaning, depraves, evil, wrongful.

11 THE COURT: But that was tied to a proceeding that
12 affected the administration of justice. It wasn't blocking
13 people, you know, by assaulting law enforcement officers to
14 prevent members of Congress from assembling. It's a very
15 different kind of use of the word in that context. You're
16 pulling this into a completely new context that these other
17 provisions suggest Congress didn't intend.

18 MR. NESTLER: We believe Congress intended the
19 language that it enacted, and that language is a catchall
20 provision which Congress has done time and time again to capture
21 conduct that it has not specifically prohibited in other
22 provisions.

23 And we do believe that there is a limiting principle, if
24 that is the Court's concern. A limiting principle -- and there
25 are two that we laid out. One is the nexus to the official

1 proceeding. I believe that the colloquy Your Honor had with
2 Mr. Welch actually proves the government's point there.
3 Mr. Welch is arguing that there was no official proceeding and
4 that because the joint session had separated at that point that
5 Mr. Reffitt entered the Capitol grounds.

6 We take on the burden as the government to prove beyond a
7 reasonable doubt to the jury that there was an official
8 proceeding and that Mr. Reffitt intended to obstruct that
9 official proceeding, that specific proceeding. And so if that's
10 the argument Mr. Welch wants to make to the jury, then that's a
11 perfectly valid argument. We take that burden on.

12 I believe that actually reinforces the idea of why this is
13 not appropriate Rule 12 dismissal. That's a factual question
14 for a --

15 THE COURT: Wait, wait. You're suggesting that his
16 defense -- we're going to sort this out with jury instructions
17 ahead of time. You think a legitimate defense is for him to
18 argue that this doesn't constitute an official proceeding?

19 MR. NESTLER: I think that argument would fail in
20 front of a jury, but I think he could certainly argue it.

21 THE COURT: He would have to argue it consistently
22 with instructions.

23 MR. NESTLER: Right. And we would have to prove that
24 the defendant intended to obstruct a specific official
25 proceeding, and we would have to prove that Congress -- that

1 Congress was intending to assemble in a joint session and that
2 was an official proceeding and that the defendant was aware of
3 that and that he was intending to obstruct that. And it is the
4 defense's argument that he lacked the mens rea to obstruct that
5 proceeding, the same way that in *Arthur Anderson* the accounting
6 company lacked the intent to obstruct the later investigation.
7 In *Aguilar*, the judge, who was the defendant in that case,
8 lacked the intent to have a false statement repeated to the
9 grand jury.

10 The government has to take on that burden of proving that
11 the defendant had that intent, and that is ultimately the
12 question for the jury because of that nexus requirement.

13 THE COURT: Your three theories that you've
14 articulated here, one is the physical presence theory. The
15 other is influencing members to vote a certain way. Again, that
16 seems more tied to the traditional use of "corruptly." And
17 maybe your theory about keeping evidence out of the room maybe
18 is, you know, akin to tampering with or destroying the evidence.
19 Again, we're consistent with how corruptly is used.

20 But physically preventing people from entering the room, it
21 just -- it seems like with all of these other provisions, that
22 Congress uses different terminology to cover that kind of
23 conduct.

24 MR. NESTLER: And we believe that the defendant's
25 actions could be criminalized by 1512(d). We're not saying that

1 he didn't violate 1512(d).

2 THE COURT: I don't understand why you didn't charge
3 that one. It seems like it's an easier lift.

4 MR. NESTLER: We have taken on a higher burden for
5 ourselves, Your Honor, by proving 1512(c), which is requiring
6 the nexus and requiring a heightened mens rea of corruptly. The
7 word "corruptly" is not in 1512(d). He only has to act
8 intentionally. We have taken on more for ourselves, and that is
9 our discretion to do, to prove that his conduct was not just
10 intentional but it was corrupt, it was evil and wrongful.

11 THE COURT: But what does that mean? The jury is to
12 decide what's evil? That doesn't untether from a proceeding
13 that's a search for the truth and tampering with evidence,
14 tampering with witnesses? It doesn't have meaning. It's
15 standardless.

16 MR. NESTLER: We don't believe it is, Judge. The
17 Supreme Court said in *Arthur Anderson* that a jury can use the
18 normal meaning of the word "corruptly," and these are the normal
19 definitions of the word "corruptly." So we're relying and our
20 proposed jury instruction on 1512(c)(2) will rely on what the
21 Supreme Court has said it believes "corruptly" means.

22 THE COURT: Again, my response to that is that was
23 involving a completely different kind of situation where the
24 context is the administration of justice and the gathering of
25 evidence.

1 Some of the cases that you cite do use the term
2 "wrongfully," but often, they do so with a word like
3 "dishonestly." And that's omitted here.

4 MR. NESTLER: That's correct, Judge. And that's
5 intentional.

6 THE COURT: Why do you -- you don't explain why this
7 Court should omit a word like "dishonestly" from the definition
8 of "corruptly" and use it with "wrongfully." You just want
9 wrongfully by itself.

10 MR. NESTLER: We don't believe dishonestly applies in
11 this situation, and when other courts have used the
12 word "dishonestly" in addition to "wrongfully," they have been
13 usually in the disjunctive. So we don't believe -- words that
14 are in the disjunctive, we don't believe an additional word like
15 the word "dishonestly" would be necessary in this case. We
16 wouldn't intend to prove that the defendant was acting
17 dishonestly. We would use the first word in the disjunctive,
18 which is "wrongfully."

19 The Seventh Circuit's pattern instruction on 1512(c)(2)
20 actually is, we believe, a good definition of what the
21 word "corruptly" means, especially when we compare that with
22 what the Supreme Court said in *Arthur Anderson*. And it's up to
23 the jury to decide whether the defendant's actions were corrupt
24 on those -- the normal meaning of these terms.

25 THE COURT: Let me make sure that I understand what

1 the government thinks it has to prove. It agrees it has to
2 prove that the defendant acted knowingly and intentionally,
3 right, with the specific intent to obstruct, influence, or
4 impede an official proceeding; correct? Am I right,
5 Mr. Nestler?

6 MR. NESTLER: Yes.

7 THE COURT: Then in addition, on top of that, the
8 government needs to prove that the defendant acted wrongfully,
9 and that's it? Corruptly has no other gloss in the term other
10 than wrongful? That's all corruptly means?

11 MR. NESTLER: That's not correct, Judge. We intend to
12 propose jury instructions that put additional gloss on the
13 term "corruptly."

14 THE COURT: Tell me, what might those be?

15 MR. NESTLER: A person acts corruptly if he acts
16 knowingly with intent to obstruct or impede an official
17 proceeding.

18 THE COURT: But that's -- let's separate. You say
19 there's two things. You have to have plainly and intentionally
20 to obstruct an official proceeding. We can agree that's
21 specific intent. That's covered.

22 But in addition, wrongfully is something separate from
23 that.

24 MR. NESTLER: Right.

25 THE COURT: And what does that mean?

1 MR. NESTLER: And with consciousness of wrongdoing.

2 THE COURT: So it means -- "corruptly" means
3 wrongdoing or a consciousness of wrongdoing?

4 MR. NESTLER: Right, consciousness of wrongdoing. And
5 taking from the *Arthur Anderson* decision from the Supreme Court,
6 corruptly is normally associated with wrongful, immoral,
7 depraved, or evil.

8 THE COURT: So a jury -- let's put aside the specific
9 intent to impede or obstruct an official proceeding, which a
10 jury would have to find. In addition, a jury would have to find
11 that Mr. Reffitt acted corruptly, and that could be wrongfully,
12 immorally. What other words did you use?

13 MR. NESTLER: Depraved or evil.

14 THE COURT: Depraved or evil. And we just give those
15 terms to the jury?

16 MR. NESTLER: Yes. That is what the Supreme Court has
17 said the word "corruptly" means.

18 THE COURT: I know, but where it said it is in the
19 context where you're dealing with the administration of justice
20 and the gathering of evidence.

21 MR. NESTLER: Right. So it's up to a jury to divine
22 whether it's somebody -- or who have called their senator and
23 said, "I don't want you to vote on this bill or I won't support
24 you in the next election." Then the jury would have to
25 understand that was not corrupt. Or Vice President Gore to file

1 a legal challenge to the 2000 election was not corrupt. And so
2 a jury would make that decision that the actors in those cases,
3 they were trying to influence an official proceeding. They were
4 trying to get the outcome they wanted. But they weren't doing
5 so corruptly.

6 And we take on for ourselves a higher burden by proving,
7 and we believe we can meet that burden here, that the defendant
8 was acting wrongfully, immorally depraved, or evil at the time
9 he committed the offense. It wasn't just intentional. It did
10 have this higher mens rea.

11 THE COURT: So you started off by mentioning two
12 theories. There's really three potentially. The evidence is
13 the third theory.

14 Are there any other theories that you haven't shared?

15 MR. NESTLER: Of how the defendant violated
16 1512(c)(2)?

17 THE COURT: Yes.

18 MR. NESTLER: No, Judge.

19 THE COURT: Again, I think to avoid undue surprise at
20 trial and in order to help me resolve this motion, I am going to
21 order you to file a bill of particulars. And given that it
22 sounds like you're pretty settled on your theories, can you do
23 that by November 24th?

24 MR. NESTLER: That shouldn't be a problem, Judge.
25 Just to be clear, the bill of particulars is our legal theory,

1 not our facts?

2 THE COURT: I think it's really -- I'm not looking for
3 you to spell out all the evidence you're going to produce at
4 trial, but I take it that you're saying that Mr. Reffitt's
5 assaults, attempted entry, et cetera, the evidence that you will
6 introduce about what he did outside the Capitol are the facts on
7 which you would rely in order to prove that he had the intent,
8 corrupt intent to do these other things; is that right?

9 MR. NESTLER: Right, and we listed some of those in
10 our pleading, like how we plan to prove the defendant's intent,
11 which of course we have to prove circumstantially based on his
12 words and his actions.

13 And so we do believe we can prove his intent, but that's --
14 just to be clear, our filing will lay out our legal theories by
15 which we believe the defendant intended to obstruct Congress.

16 And given the Thanksgiving holiday, Your Honor, would it be
17 possible to file something the following week, the week of the
18 29th?

19 THE COURT: I will give you until the 29th.

20 Just to be clear, as you sit here, you don't think that
21 there's another theory? This is the full scope of the
22 government's --

23 MR. NESTLER: Yes, Your Honor. I do need to speak
24 with my colleagues, obviously, before I finalize anything with
25 the Court, but that is generally our theory about how we believe

1 the defendant was intending or attempting to intend to obstruct
2 Congress.

3 THE COURT: I will put out a minute order later today.
4 I will impose a date of November 29th.

5 Mr. Welch, is there anything more you would like to add?

6 MR. WELCH: Just a couple of points, Your Honor.

7 The problem with the government's definition of "corrupt"
8 as just wrongful is that that runs head long into *Poindexter* and
9 *North* and also *Reeves*.

10 In *Poindexter*, at page 379, the D.C. Circuit said that
11 words like depraved, evil, immoral, wicked, and improper are no
12 more specific and, indeed, they might even be less specific than
13 the word "corrupt." In *North*, at page 882, they said, "A
14 corrupt intent means the intent to obtain an improper advantage
15 for oneself or someone else."

16 And in *Reeves*, the Fifth Circuit said that to interpret
17 "corruptly" in an obstruction statute as meaning with an
18 improper motive or bad or evil purpose would raise the potential
19 of overbreadth.

20 So where corruptly is taken to require an intent to secure
21 an unlawful advantage or benefit, the statute does not infringe
22 on First Amendment guarantees, and it's not overbroad.

23 I think it's also important to remember what *Arthur*
24 *Anderson* resolved and what it didn't resolve. It resolved the
25 question of whether it was erroneous for the Section 1512(b)

1 jury instructions to exclude consciousness of a wrongdoing
2 element, but it didn't address the issue of whether corruptly
3 may be defined as wrongfully in every context consistent with
4 due process. It concerned corruptly in the context of legal
5 proceedings, not congressional proceedings.

6 And in *North*, Judge Silberman said that finding corruptly
7 in congressional proceedings means something different from the
8 term in legal proceedings.

9 And in addition, there was some talk about *Yates*. And I
10 just want to remind the Court that in *Yates* the Supreme Court
11 said that it is highly improbable that Congress would have
12 buried a general spoliation statute covering objects of every
13 kind in a provision targeting fraud in financial recordkeeping.
14 And the Supreme Court was talking specifically about Section
15 1512(c)(2) when it said that.

16 THE COURT: Okay. Thank you, Mr. Welch.

17 Mr. Nestler, in *Arthur Anderson*, the Supreme Court did say
18 corruptly is normally associated with wrongful, immoral,
19 depraved, or evil. What about Mr. Welch's point that it was in
20 that context that that definition was appropriate, in the
21 context of, you know, proceedings and the administration of
22 justice?

23 MR. NESTLER: We believe that the word "corruptly"
24 would have the same definition here. The Seventh Circuit, in
25 its pattern jury instructions, uses the phrase "wrongful." It

1 relies on the jurors there to know what "corruptly"
2 and "wrongful" mean and to apply their everyday definitions.

3 We don't believe that Congress is required to define every
4 word in a statute, and the Supreme Court has certainly said as
5 much in that we rely on jurors to use the common sense
6 definition of these words.

7 THE COURT: Does it go so far as to extend to include
8 physically preventing members of Congress from attending the
9 official proceeding? That's the one that seems really far
10 afield here.

11 MR. NESTLER: We understand Your Honor's concern. We
12 believe it does. If the defendant's actions were corrupt or
13 wrongful or evil or depraved, then yes, it would apply, and it's
14 up to a jury to make that decision.

15 THE COURT: You conclude that it basically means that
16 this one provision swallows all of 1512 and all the surrounding
17 provisions?

18 MR. NESTLER: We don't believe it swallows the others.
19 We believe it provides the space in the joints. It provides the
20 catchall to capture the conduct --

21 THE COURT: It does more than that. You're saying
22 that it encompasses all of the rest.

23 MR. NESTLER: We don't believe that it encompasses
24 every other -

25 THE COURT: What does it not encompass?

1 MR. NESTLER: Well, we have to go through the
2 different provisions about where they are. Meaning in 1512(d),
3 we have to prove that there is a harassment that occurs. And we
4 haven't delved into the meaning of that phrase, Your Honor, but
5 there are other provisions that are more specific, that define a
6 more specific conduct. Those are the examples that Congress was
7 aware of, had thought of, and therefore specifically prohibited,
8 which is why here Congress enacted the catchall to catch those
9 things that it didn't -- it knew other things existed out there,
10 and it did not know how to proscribe them. So it enacted a
11 general catchall to capture those conducts.

12 THE COURT: I get that 1512(d) that includes the
13 word "harasses" is something different than you may have to
14 prove here. But that doesn't answer my question, which is
15 whether 1512(d) can also -- the substance of what's in there
16 would also be covered by 1512(c) (2).

17 MR. NESTLER: It may be, and 1512(d) may be a lesser
18 included of 1512(c) (2). There are courts that have held that
19 1512(d) is a lesser included of 1512(b).

20 THE COURT: One supplemental filing, when you file the
21 bill of particulars, if you could also -- it doesn't need to
22 have briefing, but can you identify parts of 1512 or surrounding
23 statutes, like 1503, 1505, that you think are not covered by
24 1512(c) (2), if there's any part of the obstruction of justice
25 statutory provisions that aren't captured and, in your words, a

1 lesser included offense of 1512(c)(2).

2 MR. NESTLER: Yes, Judge.

3 Can I just respond to one additional point Mr. Welch made,
4 which is the way that "otherwise" works with regard to
5 1512(c)(2). And Mr. Welch used the word that 1512(c)(2) is
6 understood in light of 1512(c)(1). I just want the Court to be
7 aware, we agree with that. 1512(c)(2) is understood in light of
8 1512(c)(1). It is just not tethered to 1512(c)(1).

9 And what we mean by that --

10 THE COURT: But what does that mean, that it's
11 understood in light of that?

12 MR. NESTLER: Sure. Because of the word "otherwise,"
13 it has to relate back to what 1512(c)(1) says. And
14 so "otherwise obstructs, influences, or impedes" means
15 obstructs, influences, or impedes in a way other than altering,
16 destroying, mutilating, or concealing a record.

17 THE COURT: Does it also mean in a way that impairs
18 the evidence's integrity or availability for use in an official
19 proceeding?

20 MR. NESTLER: No. It means other than that.

21 THE COURT: So it's not even tied to even an object?

22 MR. NESTLER: Correct. That is why we believe
23 Congress -- and we're talking why Congress enacted the statute,
24 which we don't believe we should be defining Congress's intent.

25 But the way the statute is phrased, it is understood in

1 light of (c) (1), because we're reading (c) (2) to mean in a way
2 different than or other than the verbs that are in (c) (1).

3 THE COURT: One way to read this is this is
4 post-Enron, and before these changes, there was a problem
5 prosecuting someone who destroyed a document him- or herself
6 rather than, you know, got someone else to destroy the document.

7 MR. NESTLER: Right.

8 THE COURT: So while I don't disagree with you that
9 it's clear that Congress intended to create a catchall, it
10 doesn't necessarily mean that the catchall can relate to
11 anything, including appearance of people in proceedings, as
12 opposed to anything relating to evidence. It could be a
13 catchall, but a catchall in that context in other ways, still in
14 different ways, but nonetheless still tethered to evidence.

15 MR. NESTLER: Sure, and Congress could have drafted
16 (c) (2) to relate to evidence, but because it said "otherwise
17 obstructs, influences, or impedes any official proceeding," and
18 it's contrasting in (c) (2) with what it said in (c) (1). (c) (1)
19 relates to evidence. (c) (2) says otherwise. So the most
20 natural reading of (c) (2) is obstructs a proceeding in a way
21 that does not relate to evidence.

22 THE COURT: But in so doing, with that broad reading,
23 Congress -- well, tell me if I'm wrong, but I think you're going
24 to say Congress incorporated all of the other proceedings -- all
25 the other provisions, rather, into this catchall. It covers

1 everything, everything it previously enacted.

2 MR. NESTLER: It could have. Congress saw there was a
3 need to close a loophole, and that's why it enacts catchalls.
4 So it saw the need for a catchall and especially the uncovered
5 conduct it did not anticipate.

6 And so in many ways, what Congress did when enacting
7 1512(c)(2) is to capture those things that it knew could be out
8 there, there could be depraved, evil conduct, wrongful conduct
9 that people could engage in that Congress didn't know how to
10 legislate against and proscribe specifically in advance, and
11 that's why this statute is here.

12 THE COURT: What counsels against that or counsels
13 narrowing this interpretation you're giving, is at every other
14 time historically Congress used the word "corruptly," it was in
15 a different way. It wasn't in, you know, blocking people from
16 entering the courthouse. Congress used other language, and I
17 can't buy, you know, the interpretation of, say, 1512(b) that
18 Congress put intimidation and threaten in there on top of
19 corruptly but there was no need to put them in there because
20 corruptly covered it. That doesn't make sense to me.

21 So if Congress had said whoever corruptly or uses
22 intimidation, threats, use of force, harassment, obstruct,
23 influence, impede an official proceeding, I would be more
24 inclined to accept what you're saying.

25 But Congress used one word and one word only, and the only

1 place Congress has ever defined that word is in connection with
2 the administration of justice.

3 So it's hard to make a leap that by just having that one
4 term, that Congress intended to open this provision up to
5 include other provisions that Congress had previously enacted
6 that involved use of force, threats, intimidation, and the like.

7 It seems that Congress would have maybe not announced to
8 everyone hey, this is a catchall, this, you know, incorporates
9 every other proceeding in the code relating to obstruction of
10 proceedings. It might not do that, but you would think that
11 Congress would include some of the other language to make sure
12 courts didn't interpret this more narrowly than Congress
13 intended. And the way they could do that is they could look at
14 all these other provisions and say oh, we want to cover those
15 provisions that also use force and threats, so we really are
16 creating a big catchall.

17 Instead, Congress put this in a section dealing with
18 evidence, and it's not its own separate statute. It's in a
19 statute that has these other more detailed provisions. It can't
20 be at the time they were enacted they weren't superfluous, these
21 terms that Congress used. They had meaning. And so it really
22 suggests that this isn't a super large catchall that the
23 government says it is.

24 MR. NESTLER: And just to be clear, we are not arguing
25 it's a super large catchall that captures every other part of

1 Chapter 73. In fact, I tend to agree with Your Honor that if
2 Congress had used the phrase "corruptly or by force or
3 intimidation or threats does the following things," that would
4 more capture some of the defendant's conduct.

5 We are taking upon ourselves to prove that the defendant's
6 conduct was corrupt without resorting to having a jury
7 instruction that says intimidation or threats.

8 THE COURT: But here's the thing. If in other
9 provisions you would have to prove harassing conduct or
10 intimidation or threats, if that would be required to prove
11 these other provisions, but here, you don't have to prove it.
12 You just have this word "corruptly," which means wrongfully or
13 evil.

14 It's not putting the government to a higher standard of
15 proof. It's putting the government to a lower standard of
16 proof, if that's how we're going to define "corruptly." I agree
17 it puts you at a higher standard if you define "corruptly," you
18 know, in some way tethered to the administration of justice. It
19 does, because you're going to have to show that he, you know,
20 intended to impede and in doing so he was trying to impede, you
21 know, influence the members of Congress to vote another way or
22 effectively destroy the evidence.

23 If I prepare a jury instruction that says that, you do have
24 a higher standard of proof. If I don't, you have a lower
25 standard of proof than you have in all these other provisions.

1 But if I don't put something more on corruptly other than
2 wrongful or evil or depraved, it's kind of standardless, but
3 it's divorced from the administration of justice, as it's always
4 been in *Anderson* and every other context.

5 MR. NESTLER: We agree we are in a unique context
6 because it was a congressional proceeding and not a court
7 proceeding. But regardless, Congress specified in the statute
8 at 1515(a)(1)(B) that a proceeding before the Congress counts as
9 an official proceeding.

10 THE COURT: I buy your argument there. My point is,
11 if you are going to charge somebody, you know, with blocking the
12 courthouse doors, you wouldn't just use the word "corruptly."
13 You would be bringing the case under one of these provisions
14 that's talking about intimidation or threats or use of force.
15 You wouldn't just be lumping it into the corruptly mens rea.

16 MR. NESTLER: Probably because in those situations
17 there's a more easily provable offense, which is why Congress
18 has these specific provisions.

19 THE COURT: The more easily provable offense here is
20 1512(d), attempting to harass people and prevent them from
21 attending an official proceeding.

22 MR. NESTLER: And we would agree that the defendant's
23 conduct would satisfy 1512(d).

24 THE COURT: And that's a felony offense with a
25 three-year max. That goes to the same guideline, the same

1 obstruction guideline as this one. It's more specific, and it's
2 more tied to what the alleged conduct is.

3 MR. NESTLER: And we believe if the defendant is
4 ultimately convicted of 1512(c), then that would be an
5 appropriate consideration for the defense to raise or for the
6 Court to rely on in terms of how severe to sentence the
7 defendant, because Your Honor is looking at comparisons. That
8 would be the appropriate time to look at that. There's no
9 restriction on what the statute --

10 THE COURT: But that provision, which seems to fit the
11 alleged facts here so much better, doesn't have "corruptly"
12 anywhere in it. It says "harasses." The other provisions do
13 have corruptly, but they also have intimidation, threats.

14 So it just -- it makes it difficult to conclude that this
15 (c)(2) provision includes all the rest when Congress delineated,
16 you know, other terms to cover that kind of conduct that didn't
17 relate to document destruction or witness tampering or juror
18 tampering, but keeping people out of the room.

19 MR. NESTLER: Right. What the defendant was doing,
20 and we can explain this more, it's not just keeping people out
21 of the room. Of course, we talked about influencing to vote a
22 certain way. But it was to make it such that the proceeding
23 would not go forward at the time that the defendant didn't want
24 it to go forward and to reach the result that the defendant
25 wanted to breach.

1 So it's not just blocking a court's door. There are other
2 things happening related to the proceeding that was going on on
3 January 6 and what it was doing in terms of declaring the winner
4 of the presidential election, that the defendant was trying to
5 accomplish his goal by preventing the proceeding itself from
6 occurring, not just having the door being blocked, not just
7 preventing a certain person from going in, but the proceeding
8 itself from actually --

9 THE COURT: The same would hold true with a criminal
10 trial. If you prevented the judge who was trying the case from
11 coming into the courthouse, you're preventing evidence from
12 being produced. You're preventing the process from going on.

13 But in those instances, I think the defendant doing that is
14 going to be using, you know, force, threat, harassment,
15 something other than corruptly.

16 MR. NESTLER: But in this situation, the delay of the
17 proceeding itself is the end. So in a situation where blocking
18 the courthouse doors the courthouse was going to reopen the next
19 day, that is a lower ultimate harm. It is illegal, and we
20 believe it will be covered by the other provisions of the
21 statute or by (c) (2).

22 But the ultimate harm that the defendant is trying to
23 obtain there is lower. Here, the defendant is trying to obtain
24 a specific harm to the country, to Congress, to our
25 constitutional order, which is preventing the proceeding from

1 happening at the exact time it's supposed to happen, because all
2 of these other pieces for our system of constitutional democracy
3 require that Congress meet at 1:00 p.m. on January 6 in the
4 Capitol in order to declare the president and vice president so
5 all the other pieces related to the inauguration and the
6 transfer of power can happen. And so the delay of the
7 proceeding itself, separate and apart from preventing a certain
8 congressperson or certain senator from being present, actually
9 accomplishes the end result.

10 In other words, at a trial, there are -- let me put it this
11 way: For Congress, if a certain congressperson wasn't able to
12 attend, the proceeding would have still gone forward. It's the
13 fact that Congress itself, the joint assembled Congress, all 535
14 people, could not be there to perform its constitutional duty,
15 that is what was being obstructed, and that was --

16 THE COURT: But your theory number 1 is physically
17 preventing all members of Congress from attending the official
18 proceeding.

19 MR. NESTLER: Correct. Or on the flip side,
20 preventing the official proceeding from going forward because
21 the --

22 THE COURT: This is why we need more clarity in a bill
23 of particulars, because your theory is shifting somewhat. I'm
24 not criticizing you for it, but I think in order to resolve this
25 motion, I need to understand what the theory is.

1 MR. NESTLER: Yes, Judge.

2 THE COURT: All right. Anything else, Mr. Welch or
3 Mr. Nestler?

4 MR. WELCH: I believe I've covered the points I
5 intended to cover today. Thank you.

6 THE COURT: So, Mr. Nestler, you will file the
7 information we discussed by November 29th; correct?

8 MR. NESTLER: Yes, Judge.

9 THE COURT: All right. Thank you all.

10 MR. NESTLER: Should we set a further date, Your
11 Honor?

12 THE COURT: Have I -- I have not reviewed the docket.
13 Remind me, Mr. Nestler, do we not have the pretrial date set?

14 MR. NESTLER: I don't believe we do. We received a
15 minute order after Your Honor's ex parte hearing with the
16 defendant and defense counsel rescheduling the trial from
17 November 15th to February 28th. I can double-check if that
18 minute order included anything else.

19 THE COURT: For the time being -- what would the
20 parties suggest in terms of the next court date? Remind me.
21 Did I not set deadlines for the filing of motions in limine?

22 MR. WELCH: Yes.

23 THE COURT: When are those due?

24 MR. WELCH: The 24th of this month, next week.

25 THE COURT: Then they'll be ripe for resolution when?

1 MR. WELCH: I think there was some time for a reply.
2 I've just got to look at that.

3 MR. NESTLER: We already filed three motions in
4 limine, Your Honor. I believe that the defense is (distorted
5 audio), as well as filing any motions in limine based on the
6 evidence we intend to introduce, which we've already provided.

7 THE COURT: Sorry, Mr. Nestler. I didn't catch what
8 you said. You said you've already filed three motions in
9 limine?

10 MR. NESTLER: Yes, and I don't believe the defense has
11 responded to any of them.

12 And I believe we also provided the defense, prior to our
13 last trial date and consistent with the judge's -- with Your
14 Honor's instructions, a copy of our exhibit list and drafts of
15 all of our exhibits.

16 And so I believe Your Honor's intention was for the defense
17 to file any motions in limine attacking or objecting to any of
18 our evidence so we could actually --

19 THE COURT: Absolutely. I trust, Mr. Welch, that
20 those are going to be filed by the 24th?

21 MR. WELCH: Correct. And oppositions are due
22 December 8th.

23 THE COURT: Are you interpreting my order to give you
24 until December 8th to respond --

25 MR. WELCH: No, no. My understanding was that I had

1 to have that in by the 24th. And then when you had asked about
2 when things would be ripe for the purposes of scheduling another
3 hearing, as the government is asking for, the oppositions are
4 due December 8th is what I was saying.

5 THE COURT: Are you conceding the government's
6 motions?

7 MR. WELCH: No.

8 THE COURT: And when were those filed, Mr. Nestler?

9 MR. NESTLER: Court's indulgence.

10 Those were filed on October 21st.

11 THE COURT: Again, Mr. Welch, you must have
12 interpreted my order to give you until December 8 to oppose
13 motions in limine that were filed in October?

14 MR. WELCH: Yes, to oppose those. My motions in
15 limine are due the 24th. Oppositions to all motions in limine
16 from either side are due the 8th of December.

17 THE COURT: Mr. Welch, you've had a lot given to you
18 early, and I'm going to ask that you respond to those motions --
19 I can understand the ambiguity in the order, but given that
20 these motions have been pending as long as they have, I think
21 that you can file a response before the 8th.

22 So how long do you need to do that?

23 MR. WELCH: Let me look at my calendar, please.

24 How about the 1st? Would that be acceptable?

25 THE COURT: Okay. You will file that the 1st of

1 December. And the motions will be ripe by December 15th; is
2 that right?

3 MR. WELCH: I believe so.

4 MR. NESTLER: Yes, Your Honor.

5 THE COURT: I'm inclined to set a hearing late the
6 first week of January. What is counsel's schedule like on
7 January 6 and 7?

8 MR. NESTLER: I'm available on January 6 and 7, Your
9 Honor. I'm just double-checking with -- we would prefer
10 January 6, Judge.

11 MR. WELCH: Your Honor, I would need to ask for the
12 afternoon on those days, because currently -- and I can let you
13 know when this changes -- the Court of Special Appeals has asked
14 me to be available for an oral argument that week and a couple
15 of days the following week, but they haven't told me
16 specifically which ones. Now, those are always in the morning.

17 THE COURT: Are you available in the afternoon on the
18 6th, Mr. Nestler?

19 MR. WELCH: Yes, I would be.

20 MR. NESTLER: And that's fine with the government,
21 yes.

22 THE COURT: So we will set this for 2:00 p.m., and
23 that will be, for lack of a better word, an initial pretrial
24 hearing, but it's really intended to take up your motions in
25 limine at that point.

1 And to the extent -- I know I need to put out a more
2 fulsome pretrial order, which I will do, before the Thanksgiving
3 break. But at a minimum, you all should be prepared to argue
4 any motions I haven't resolved by January 6th on that date.

5 MR. NESTLER: Yes, Your Honor. And just to be clear,
6 Your Honor also asked us to submit joint proposed jury
7 instructions and voir dire by the 24th, and we're intending to
8 provide our drafts to Mr. Welch at the end of the day today of
9 those documents.

10 THE COURT: Mr. Welch, this is a joint submission. So
11 I'm really not looking for dueling instructions and voir dire on
12 everything. If there's certain areas that you all disagree on,
13 which I suspect there will be, fine, but tell me also what you
14 agree on.

15 MR. WELCH: I understand.

16 THE COURT: Okay. All right. So is there a motion to
17 exclude time from now until January 6 in calculating the date
18 for a speedy trial, or have I already excluded time until the
19 date of trial? Mr. Hopkins?

20 COURTROOM DEPUTY: I'm checking that right now, Your
21 Honor. It looks like you have -- you've excluded time until the
22 28th of February, Your Honor.

23 THE COURT: All right. So no need to do so again.

24 So I will see you back on January 6th at 2:00 p.m.

25 (Proceedings adjourned at 12:03 p.m.)

1 CERTIFICATE OF OFFICIAL COURT REPORTER

2
3 I, Sara A. Wick, certify that the foregoing is a
4 correct transcript from the record of proceedings in the
5 above-entitled matter.
6

7 Please Note: This hearing occurred during the
8 COVID-19 pandemic and is, therefore, subject to the
9 technological limitations of court reporting remotely.
10

11
12 /s/ Sara A. Wick

November 21, 2021

13 SIGNATURE OF COURT REPORTER

DATE
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