The Challenges of Judging the January 6 Capitol Riot Cases

Annual Meeting
Academy of Court-Appointed Neutrals
Ft. Lauderdale, Florida

Judge Paul L. Friedman
United States District Court for the District of Columbia

March 8, 2024

Some context

- 94 U.S. District Courts around the country. We are the federal trial courts. Many states have more than one district, e.g., New York, Florida, Texas, California.
- Congress created districts and allotted a certain number of judges to each. Our Court has 15 authorized active judges (with two vacancies at the moment) and currently eight senior judges.
- All different
  - SDNY – financial, securities, banking
  - Florida – complex narcotics conspiracy and importation cases
  - Border states (Texas, Arizona) – drugs and illegal immigrants from South and Central America.
  - Because our court is in the nation's capital, we have agency cases (APA), challenges to actions of the President and Cabinet departments and agencies, as well as many claims of violations of the Constitution.
  - We have exclusive jurisdiction over habeas corpus petitions from Guantanamo detainees.

Historically, our court has had the following cases:

- Teapot Dome scandal – first Cabinet officer ever convicted (Albert Fall)
- Steel Seizure case
- Watergate
- Pentagon Papers
- Iran Contra
- Whitewater
- The breakup of AT&T and the Microsoft antitrust case
- John Hinckley
- Abscam
- Scooter Libby
- Jack Abramoff
- Senator Ted Stevens
- More recently
    - Michael Flynn
    - Paul Manafort
    - Roger Stone
- And now Special Prosecutor Jack Smith and the indictment of Donald Trump

Before January 6, 2021

- Each active judge averaged about 300 civil cases; the senior judges took fewer.
- Criminal cases – only 100-125 indictments a year total; so maybe 5-10 new criminal cases per judge (e.g., narcotics conspiracy, political corruption by federal and D.C. officials, embezzlement, bank robbery).
    - Virtually overnight – we had 10 times that number!

In the Beginning: January 6, 2021

- Most of us in this room saw what happened on January 6 in real time. Rioters came to the Capitol grounds in large numbers, some bringing weapons, engaging in violent acts, scaling walls, and breaking down doors to gain entry to the Capitol building itself.
- Many of you probably saw some portions of the Congressional January 6 hearings
- And so did many potential jurors.
- As you likely saw on social media and television, many of the rioters took videos of themselves and others while on the Capitol grounds and in the building.
- Surveillance cameras on the Capitol Grounds and in the building also captured the rioters' conduct.
- FBI agents and local law enforcement officers issued Be-On-the-Lookout notices, soliciting tips and information about participants in the riot.
- Friends, neighbors, sometimes even family members called law enforcement.
- As a result, FBI agents began making visits to the hundreds of people identified.

Processing the Cases

1. Most of the rioters lived outside the Washington, D.C. area, so coordination between our Clerk's Office and our magistrate judges with their counterparts across the country was essential.
2. Beginning almost immediately, cases were coming into our Clerk's Office at a significantly higher rate than ever before. The criminal case administrators in the Clerk's Office began working weekends to process the influx of Capitol riot criminal complaints and arrest warrants – over 45 cases the first weekend alone.
3. Once the defendants were arrested, many of them in their hometowns, they were brought before the United States District Court in the arresting jurisdiction.
4. You might be surprised to learn this, but when someone gets arrested for a crime, there's a lot of paperwork involved. Documents filed in the arresting jurisdiction had to be transferred to the U.S. District Court for the District of Columbia before our court could conduct any future proceedings. Documents pertinent to future proceedings included:
    - The Criminal Complaint
    - Executed Arrest Warrant
    - CJA 23- Financial Affidavits (indigent defendants)
    - Waiver of Rule 5 & 5.1 Hearings – extradition and preliminary hearing
    - Commitment to Another Jurisdiction (transfers the case back to DC)
    - Docket Sheet from Arresting Jurisdiction
    - Initial Appearance notes
    - Conditions of Release – because a Magistrate Judge elsewhere had set bail

5. Because of the volume of cases, we were not receiving these documents in a timely enough manner to permit our magistrate judges to conduct the initial appearances in our Court efficiently and timely. So our Clerk's Office had to contact each AUSA assigned to the Capitol riot cases to obtain executed warrants and Rule 5 documentation from the arresting jurisdiction in order to complete the dockets.
6. Once all of the paperwork got here, our **four** magistrate judges had to schedule prompt first appearances and bond review hearings. Our four magistrate judges, working with the D.C. Federal Public Defender, had to find Criminal Justice Act (or "CJA") lawyers for many defendants and formally appoint them.
7. One of the few benefits of COVID was that Congress passed the CARES Act, which permitted both the magistrate judges and our district court judges to conduct many proceedings virtually that the Federal Rules previously required be held in person.

How many cases have been indicted, tried, sentenced, etc.

As of January 6, 2024 – three years since the January 6 insurrection at the Capitol, 1,265 defendants have been arrested and charged in nearly all 50 states and the District of Columbia, 1,185 of them in our Court.

There have been approximately **914 total indictments (felonies) and informations (misdemeanors)** filed so far, charging a total of **1,185 defendants**. These cases were **randomly assigned** to our **15 active judges**, and initially to our **7 senior judges**. When then-Chief Judge Beryl Howell learned on January 7, 2021 how many people might be charged, she asked all the senior judges to step up and take cases, and we all did. Only three senior judges are still taking these cases, as new indictments and informations continue to be filed. And we do expect more indictments – the U.S. Attorney's Office has advised Chief Judge Jeb Boasberg that there will be a total of as many as **1,800 rioters charged** in the end, with about 35 or 40 more indictments filed each month, which will take us at least through calendar year 2024.

There have been **650 guilty pleas** thus far, and about **145 cases** have been resolved by jury trial, bench trial, or trial on stipulated facts. Most trials take a week or two. But the Proud Boys trial took 15 weeks. And the four Oath Keepers trials took a total of 23 weeks, one lasting 9 weeks, another 8 weeks.

Between convictions after pleas and convictions after trial, **764 defendants** have been sentenced by our judges; **467** of them have been sentenced to some period of incarceration. A number of my colleagues have sentenced as many as 45 or 50 defendants. Of those convicted and sentenced, **over 500** have been convicted only of misdemeanors. The remaining defendants have been convicted and sentenced for felony offenses. Enrique Tarrio, the leader of the Proud Boys, received the longest sentence to date for his role in orchestrating January 6: 22 years.

Practice of borrowing prosecutors, defenders, probation officers, etc.

Our court has done a remarkable job of managing the influx of criminal cases – particularly when you consider that the cases began coming in during COVID, when everyone was working primarily from home. We have borrowed courtroom deputy clerks, court reporters, prosecutors, defense attorneys, interpreters, and probation officers, from all over the country to help resolve these cases. But we have **not** borrowed judges from other U.S. district courts. Our active and senior judges have done it all, and I am just so proud of my colleagues.

As I mentioned earlier, the U.S. Attorney for the District of Columbia and the Federal Public Defender have had help from prosecutors and public defenders from other jurisdictions, particularly in the pretrial phase of these cases and during the litigation of motions. When cases are set for trial, however, the D.C. AUSAs and DOJ lawyers have tried most of these cases.

Most defendants are not D.C. residents, so probation offices in other districts monitor defendants before trial and supervise people on probation and supervised release after conviction or plea.

How the USAO went about evidence collection.

In these cases, the FBI and local law enforcement typically conduct voluntary interviews with people who participated in the January 6 riot prior to arresting them. Many January 6 defendants – particularly those who did not engage in violence – have been very forthcoming and cooperative with law enforcement and many have voluntarily provided their phones and other devices to law enforcement.

After the initial interview, arrest and search warrants are sought from a judge. The FBI routinely seizes people's phones, computers, and other devices to search for digital evidence about a person's presence and conduct at the Capitol on January 6. Evidence from people's devices – as well as evidence obtained from third party social media companies – has been featured heavily during trials.

January 6 defendants who have agreed to plead guilty have been required to engage in in-depth debriefing with law enforcement as part of their plea agreements and to turn over their devices if they have not already done so. They have helped identify other people who were at the Capitol that day.

The United States Attorney's Office retains several databases of January 6 related material. One database (the "Relativity" database) contains nearly **8 million documents**. Another database (the "Evidence.com" database) contains over **30,000 videos** – including body worn camera footage, Capitol Police surveillance footage, and video footage collected from social media sites and third parties. The USAO makes all of this evidence available to every January 6 defendant. In addition to this "general" January 6 evidence, each defendant is also provided with evidence that is specific to him or her, including videos and photographs.

What kind of offenses have been charged, and which are hard to prove?

There are **four common misdemeanors** that are frequently charged: Entering and Remaining in a Restricted Building or Grounds, Disorderly Conduct in a Restricted Building or Grounds, Disorderly Conduct in a Capitol Building, and Parading, Demonstrating, and Picketing in a Capitol Building – all trespassing type offenses, punishable by up to six months or one year in jail. Almost all of the defendants have been charged with one or more of these offenses, even those also charged with felonies.

The misdemeanors are fairly easy to prove: a person's presence at the Capitol is hard to refute, and the government usually can establish without issue that the Capitol grounds were restricted for the Electoral College vote certification – and thus that the presence of unauthorized persons was disruptive. In misdemeanor trials, defense attorneys tend to focus on what a particular rioter knew or intended at the time they were in the Capitol or its ground: Did they know the area was restricted? Did they see signs, barricades, lines of police officers, or other crowd-control measures?

Two of the misdemeanors – Entering and Remaining in a Restricted Building or Grounds and Disorderly Conduct in a Restricted Building or Grounds in violation of 18 U.S.C. 1752 – become **felony offenses** if the defendant also used or carried a deadly or dangerous weapon or firearm in the commission of the offense, or if the offense resulted in significant bodily injury.

The other felonies commonly charged are: Civil Disorder, 18 U.S.C. 231(a)(3); Obstruction of an Official Proceeding, 18 U.S.C. 1512(c)(2); and Assaulting, Resisting, or Impeding Law Enforcement, 18 U.S.C. 111(a) and (b).

Civil Disorder, 18 U.S.C. § 231(a)(3):

(1) the defendant knowingly committed an act or attempted to commit an act with the intended purpose of obstructing, impeding, or interfering with federal law enforcement officers;
(2) at the time of the defendant's act or attempted act, the officers were engaged in the lawful performance of their official duties incident to and during a civil disorder; and
(3) the civil disorder in any way or degree obstructed, delayed, or adversely affected either commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function.

Obstruction of an Official Proceeding, 18 U.S.C. 1512(c)(2):

(1) the defendant attempted to or did obstruct or impede an official proceeding;
(2) the defendant intended to obstruct or impede the official proceeding;
(3) the defendant acted knowingly, with awareness that the natural and probable effect of his conduct would be to obstruct or impede the official proceeding; and
(4) the defendant acted corruptly.

Assaulting, Resisting, or Impeding Law Enforcement, 18 U.S.C. 111(a)

(1) the defendant assaulted, resisted, opposed, impeded, intimidated, or interfered with any law enforcement officer;
(2) the defendant did such acts forcibly;
(3) the defendant did such acts voluntarily and intentionally;
(4) the defendant did so while the law enforcement officer was engaged in or on account of the performance of their official duties; and
(5) the defendant's acts involved physical contact with the victim of the assault or the intent to commit another felony.
(6) [if the defendant used a deadly or dangerous weapon or caused bodily injury in the commission of this offense, it may be charged as an aggravated felony under 18 U.S.C. 111(b)].

Over **four hundred and fifty defendants** have been charged with this last offense – Assaulting, Resisting, or Impeding Law Enforcement – and over **one hundred** of them with using a deadly or dangerous weapon or causing bodily injury to an officer.

Five law enforcement officers died as a result of the attack on the Capitol. One officer died hours after he confronted the mob at the Capitol, and four others died by suicide in the following days and months. Approximately 140 officers were injured during the attack, some quite seriously.

At trials and during sentencings, I have heard many of these officers emotionally describe their experiences that day. Extensive and powerful video footage – showing violence and assaultive behavior against law enforcement officers – has been shown to juries at trials and to judges at sentencings. And when a January 6 defendant has been charged with assaulting a law enforcement officer (18 U.S.C. 111(a) or (b)), it is the policy of the USAO to only offer plea deals that involve a guilty plea to the assault count.

Some of the leaders of the Oath Keepers and the Proud Boys were charged and convicted of another felony: Seditious Conspiracy, 18 U.S.C. § 2384. The elements of seditious conspiracy as Judge Timothy Kelly defined it are: (1) the defendant conspired or agreed with at least one other person, with the goal of opposing by force the authority of the U.S. Government, or preventing, hindering, or delaying the execution of any law of the United States by force; and (2) the defendant joined the agreement with awareness of and the intent to further one or both of its unlawful goals. Former president Donald Trump is not charged with seditious conspiracy.

Charges Against the Former President

While former President Trump is not charged with seditious conspiracy, he is charged with: conspiracy to defraud the United States, 18 U.S.C. 371; conspiracy to obstruct an official proceeding, 18 U.S.C. 1512(k); obstruction of an official proceeding, 18 U.S.C. 1512(c)(2); and conspiracy against rights, 18 U.S.C. 241.

Conspiracy to Defraud the United States: the government alleges that former President Trump used "dishonesty, fraud, and deceit to impair, obstruct, and defeat the lawful federal government function by which the results of the president election are collected, counted, and certified by the federal government."

Conspiracy to Obstruct an Official Proceeding requires that: (1) the defendant conspired or agreed with at least one other person with the goal of committing the crime of corruptly obstructing an official proceeding; and (2) the defendant joined the agreement with awareness of and the intent to further its unlawful goals.

Obstruction of an Official Proceeding requires that: (1) the defendant did or attempted to obstruct or impede an official proceeding; (2) the defendant intended to obstruct or impede the official proceeding; (3) the defendant acted knowingly, i.e., with awareness of the natural and probable effect of his conduct would be to obstruct or impede the official proceeding; and (4) the defendant acted "corruptly."

Conspiracy Against Rights: the government alleges that the former president conspired to deprive United States citizens of their right to vote and their right to have one's vote counted.

Difficult Questions of Law

One of the most commonly charged felony offenses – and perhaps the most frequently litigated – is Obstruction of an Official Proceeding under 18 U.S.C. 1512(c)(2). It carries a maximum penalty of 20 years in prison. The D.C. Circuit has been asked repeatedly to clarify the statute's scope and meaning.

The statute prohibits any person from "corruptly," intentionally, and knowingly obstructing, impeding, or attempting to obstruct or impede, an official proceeding.

On April 7, 2023, the D.C. Circuit issued a decision in United States v. Fischer, 64 F.4th 329 (D.C. Cir. 2023). That was the first big case that the circuit took up about the January 6 offenses. The court of appeals clarified that, as a matter of law, obstruction of the Electoral College vote is obstruction of an official proceeding. Id. at 335. There had been some debate about whether this was the case. Defense attorneys had argued that the vote certification was merely "ceremonial" and therefore not an actual proceeding. See id. at 342-43. They also had argued – and my colleague Judge Carl Nichols had agreed – that the obstruction statute applied only if the defendant did something to documents, records, or other evidence. Id. at 334. The D.C. Circuit rejected both arguments. Id. at 335-39; 342-43; see also United States v. Brock, No. 23-3045, 2024 WL 875795, at *4 (D.C. Cir. Mar. 1, 2024) ("Section 1512(c)(2) is not limited to evidence-related acts.")

On December 13, 2023, the Supreme Court granted certiorari in the Fischer case to address the second of these two issues, relating to the scope of "obstruction" in the statute. See Supreme Court Docket No. 23-5572. Its decision will be crucial and may impact approximately 340 January 6 defendants, some already convicted and others awaiting trial. If the obstruction of an official proceeding statute applies only to evidence impairment, then it will be hard for the government to argue that it covers the conduct on January 6. Oral argument in the case is scheduled for April 16. A decision is expected in June or early July.

Another important issue is the definition of "corruptly" in Section 1512(c)(2). On October 20, 2023, the D.C. Circuit issued a decision in United States v. Robertson, 86 F.4th 355 (D.C. Cir. 2023), that explained that "corruptly" can be proved in several different ways. Just last week, the D.C. Circuit reiterated its understanding of the word "corruptly" in United States v. Brock, No. 23-3045, 2024 WL 875795 (D.C. Cir. Mar. 1, 2024).

First, under Brock and Robertson, the government can establish that a person acted "corruptly" where he used "unlawful means" to obstruct or impede an official proceeding. United States v. Robertson, 86 F.4th at 369; see id. at 367. What does "unlawful means" mean? Well, that is less than clear, as I realized when I instructed a jury about this offense – only to receive several notes from the jury during its deliberations asking for clarification.

Second, the government can establish that a person acted "corruptly" where that person acted with an unlawful purpose. United States v. Robertson, 86 F.4th at 367; see United States v. Brock, 2024 WL 875795, at *6. What does "unlawful purpose" mean? This is a little clearer. The D.C. Circuit has said that it can mean that a person acts with the intent to procure a benefit for himself or another person that is not in accordance with their legal rights. United States v. Robertson, 86 F.4th at 368. It can also mean that the person acts with "consciousness of wrongdoing." Id. Or it can mean that a person uses dishonesty to persuade another to withhold information from the government. Id.

It is possible that the Supreme Court will clarify the meaning of "corruptly" in Fischer. But because the question is not directly presented, the Court may say nothing about it.

The D.C. Circuit's decision in Brock answered another question related to Section 1512(c)(2) – this one more technical, but just as consequential. The statute carries a maximum sentence of 20 years in prison. But the actual sentences courts give depend on how we apply the Federal Sentencing Guidelines. These Guidelines are issued by the U.S. Sentencing Commission. They are advisory only, but they are always the starting point for our sentencing decisions. Judges calculate a particular defendant's guideline sentencing range based on the offenses a defendant was convicted of, the defendant's conduct in carrying out the offenses, and the defendant's criminal history. We can sentence a defendant within the guidelines range, or we can vary below that range if we think the sentence is too harsh in light of mitigating circumstances.

With respect to statutes relating to obstruction of justice, the Sentencing Guidelines instruct Courts to increase the guideline sentencing range of a defendant by a significant amount – often by two to three years – if their offense had certain features involving "the administration of justice." The government had argued – and most of my colleagues had agreed – that the Electoral College vote is part of "the administration of justice." But many defendants in these cases had maintained – and my colleague, Judge Trevor McFadden agreed – that the words "administration of justice" refer only to judicial or quasi-judicial proceedings – making them ineligible for the heavy enhancements to their sentences if they were convicted of violating 18 U.S.C. § 1512(c)(2).

In its decision in Brock, the D.C. Circuit agreed with the defendants. Certification of the Electoral College vote by Congress, they said, is not part of the "administration of justice." United States v. Brock, 2024 WL 875795, at *10. It "bears little resemblance to the traditional understanding of the administration of justice," which is "judicial or quasi-judicial" or investigative. Id. at *11. A defendant can obstruct an "official proceeding" without obstructing the "administration of justice." As a result, the over one hundred defendants who have already been sentenced for their Section 1512(c)(2) convictions likely will argue that they need to be resentenced to shorter periods of incarceration. And there are at least that many defendants convicted of Section 1512(c)(2) violations who have not yet been sentenced. Courts will not be able to apply the "administration of justice" sentencing enhancements to them either – potentially cutting years off their time in prison.

Some Personal Observations

These cases often require courts to balance national security interests and criminal defendants' individual rights. For example, the parties sometimes litigate whether evidence of the specific locations of U.S. Capitol Police surveillance cameras is admissible. Whether defendants seek admission of the locations of these cameras or not, the government routinely asks the court for a pretrial ruling that would prohibit any testimony and evidence about where in the Capitol building these cameras are located.

The government also resists the solicitation of testimony about U.S. Secret Service protocols and where specifically the Vice President was taken during the attack. The tension between defendants' constitutional rights and national security is perhaps most evident in misdemeanor cases, where the government must prove that the area was "restricted" because the Vice President was temporarily visiting the Capitol. So the Vice President's whereabouts that day are unquestionably relevant – but courts have had to decide how much or how little detail to allow in testimony about Secret Service protocols and the Vice President's movements throughout the building.

The First Amendment has also posed some interesting issues. Is it a legitimate legal defense for a defendant to argue that they were merely engaging in protected First Amendment activity while storming the Capitol? Is it a legitimate defense or persuasive argument particularly for those who did not engage in violence? Most of the people charged genuinely believed that the 2020 election was rigged or stolen. And even if January 6 defendants had no First Amendment defense as a matter of law, will juries see their conduct as legitimate protest and advocacy? Juries often see video of defendants at the Capitol engaging in chants such as, "Who's house? Our house!"; "Stop the Steal!"; "Police stand down!"; and "USA!" Some people there were praying and singing the national anthem. On the other hand, some people there were shouting "Hang Mike Pence!" and calling other rioters to action as they breached doorways and entered through broken windows.

Such issues also come up at sentencing, particularly in the misdemeanor cases. Many people express remorse for having broken the law that day, but insist that they didn't realize the illegality of their actions in the moment – they were swept up in the fervor of the crowd and believed that they, and many other "patriots," were merely responding to the request of President Trump to march to the Capitol and make their voices heard.

Jury selection has also been challenging in many cases. Many District of Columbia residents feel strongly about what happened and were personally affected – emotionally and financially – as the city shut down that afternoon. In a city whose residents are predominantly Democrats, many have strong negative feelings about Donald Trump. And many potential jurors have strong feelings about law enforcement officers – some positive, some negative. During jury selection, judges and advocates must determine whether potential jurors can put those feelings aside to decide these cases in a fair and impartial manner.

Finally, judges are used to having our decisions criticized; it comes with the territory and we are a thick-skinned bunch. But my colleagues and I have been extremely troubled by the personal, often vitriolic attacks on the courts, on individual judges, on the legitimacy of the January 6 prosecutions, and on the rule of law itself. Some of my colleagues, their families, and staff have confronted threats of physical violence, some accompanied by racial epithets against some of my Black colleagues. Such threats and calls for physical violence against judges used to be rare; now, sadly, they are not. As Judge McFadden has said, such threats are not only reprehensible; they are "nothing less than an attack on our system of government."

Having presided over these cases and seen hours of powerful videos of what actually happened at the Capitol on January 6, my colleagues and I are also deeply troubled by the attempt to rewrite history on the part of some politicians, present and former government officials, members of Congress, members of the media, and so-called influencers on social media and podcasts. In a recent sentencing, Judge Royce Lamberth said:

> In my thirty-seven years on the bench, I cannot recall a time when such meritless justifications of criminal activity have gone mainstream. I have been dismayed to see distortions and outright falsehoods seep into the public consciousness. I have been shocked to watch some public figures try to rewrite history, claiming rioters behaved "in an orderly fashion" like ordinary tourists, or martyrizing convicted January 6 defendants as "political prisoners" or even, incredibly, "hostages." That is all preposterous. But the Court fears that such destructive, misguided rhetoric could presage further danger to our country.

***

> So let me set the record straight, based on what I've learned presiding over many January 6 prosecutions, hearing from dozens of witnesses, watching hundreds of hours of video footage, and reading thousands of pages of evidence. On January 6, 2021, a mob of people invaded and occupied the United States Capitol, using force to interrupt the peaceful transfer of power mandated by the Constitution and our republican heritage.
>
> This was not a protest that got out of hand. It was a *riot*; in many respects a *coordinated* riot. "Protestors" would have simply shared their views on the election—as did thousands that day who did not approach the Capitol. But those who breached and occupied the Capitol building and grounds halted the counting of the Electoral College votes required by the Twelfth Amendment. The rioters interfered with a necessary step in the constitutional process, disrupted the lawful transfer of power, and thus jeopardized the American constitutional order. Although the rioters failed in their ultimate goal, their actions nonetheless resulted in the deaths of multiple people, injury to over 140 members of law enforcement, and lasting trauma for our entire nation. This was not patriotism; it was the antithesis of patriotism.

Judge Lamberth concluded:

> This is a matter of right and wrong. And it is up to the Court to tell the public the truth: The actions of those who broke the law on January 6th, were *wrong.* The Court does not expect its remarks to fully stem the tide of falsehoods. But I hope a little truth will go a long way.

And so do I. That is why I readily agreed to discuss the January 6 cases with you today. You and other leaders of the profession need to be reminded of the events of January 6 and the attempts by some to embrace and communicate a false narrative. You need to speak out. Be truth-tellers, and help restore respect for the judicial process and the rule of law. Remember, another election is almost upon us. And so is another January 6.