

Right-wing Supreme Court majority signals it may dismiss obstruction charges against January 6 insurrectionists

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Based on their questioning and comments during oral arguments Tuesday, five of the most right-wing Supreme Court justices signaled their intention to rule that the participants in the storming of the US Capitol on January 6, 2021 cannot be charged with obstructing an official proceeding, a serious felony that carries a penalty up to 20 years in prison.

The January 6 assault, carried out by a mob of far-right thugs and fascist groups gathered around Donald Trump, was aimed at preventing the joint session of Congress from certifying Joe Biden's electoral victory, as part of Trump's attempted coup in defiance of the outcome of the election.

The far-right justices, who themselves sympathize with the January 6 coup attempt, engaged in tortured verbal gymnastics on Tuesday in an effort to shield insurrectionists from the plain meaning of the federal statute that criminalizes the unlawful obstruction of "official proceedings," including the counting of votes by Congress. These same justices, when it suits their right-wing agenda, present themselves as "strict constructionists" who strenuously adhere to the plain text and meaning of laws.

The most striking moment during the proceedings came when far-right Justice Samuel Alito demanded to know whether the same law being invoked against the January 6 insurrectionists could be used to prosecute pro-Palestinian protestors who "blocked the Golden Gate Bridge in San Francisco and disrupted traffic." He asked, "Would that be a violation of this provision" if it delayed an official proceeding?

On its face, Alito's question, echoing far-right talking points from the Trump milieu, is absurd and provocative. There is no equivalence between a non-violent anti-genocide demonstration disrupting vehicle traffic—as protests have commonly done going back to the Civil Rights struggles and earlier—and a far-right violent coup attempt aimed at overthrowing the election and establishing a presidential dictatorship.

But this quip from Alito was pitched not to the lawyers in the courtroom, but to the leftward-moving population, against whom it was an implicit threat, and simultaneously to a far-right audience within the state and the financial elite, to whom it was a pledge.

Aside from participants in the fascist mob, the conspiracy to overturn the 2020 election, which Biden won by seven million votes and a substantial margin in the Electoral College, involved dozens of Trump administration officials and Republican members

of Congress, high-level members of the military and police apparatus, and dozens of others outside government, most of whom have not been arrested or charged.

There is a farcical and illegitimate character to the very notion of the Supreme Court presiding over the case of a January 6 insurrection, given that the Supreme Court is itself implicated in the coup attempt.

Emails demonstrate that for weeks following the 2020 election, Virginia "Ginni" Thomas, the wife of the arch-reactionary Supreme Court Justice Clarence Thomas—who has himself accepted hundreds of thousands of dollars worth of vacations and other bribes from far-right Republican billionaires—coordinated with Trump's chief of staff, Mark Meadows, to secure judicial ratification of Trump's coup d'état in the event that the January 6, 2021 electoral vote count was derailed by the fascist mob. In this manner, Thomas was to reprise his role in the Supreme Court's ruling to halt the counting of votes in Florida in 2000 and thereby steal the presidential election for George W. Bush.

The conspiracy to install Trump as dictator on January 6 nearly succeeded. But the response of the Democrats and the Biden administration has been to rehabilitate the Republican Party and the far right as part of their efforts to achieve "bipartisan unity," particularly in support of imperialist war plans in Ukraine and the Middle East, and against China. To date, only some 1,250 insurrectionists have been arrested and charged. Roughly 10 percent are alleged to have used weapons or caused serious injuries to police at the US Capitol.

Criminal charges have ranged from misdemeanor unlawful entry and disorderly conduct to sedition. Over 700 insurrectionists have pleaded guilty and another 150 have been convicted after trials. Sentences have ranged from probation to multiple years in prison. Most sentences have been slightly below federal guidelines.

The formal decision in Tuesday's case, expected before the end of June, could vacate the sentences of about fifty insurrectionists, including the infamous "QAnon shaman" Jacob Chansley, and affect pending prosecutions against more than 100 others, including Donald Trump himself. There are multiple offenses involved in the convictions and prosecutions, however, so the immediate impact of a favorable ruling on the insurrectionists themselves remains to be seen.

Politically, however, such a ruling would have broad and

reactionary repercussions, encouraging fascistic forces and further undermining democratic rights.

Tuesday's argument concerned the case against Joseph Fischer, a police officer for North Cornwall Township, population 9,500, which is located about 90 miles west of Philadelphia. Fischer was charged with seven criminal counts based on his entering the Capitol at about 3:30 on the afternoon of January 6, after texting to a colleague: "Take democratic congress to the gallows ... Can't vote if they can't breathe ... lol."

Fischer texted his police chief to "post my bail ... It might get violent," adding he and his fellow insurrectionists would "storm the capital [sic] and drag all the democrates [sic] into the street and have a mob trial." Fischer made a cellphone video inside the Capitol Rotunda in which he urged his fellow rioters to "charge," and then crashed into a police line.

The most serious of the seven charges against Fischer alleges that he violated Title 18 of the United States Code § 1512(c)(2). The law dates from 2002, when Congress realized that no federal law penalized the deliberate destruction of records compiled by Enron, the energy swindler, which had been subpoenaed for investigation.

Section 1512(c)(1) penalizes anyone who "alters, destroys, mutilates, or conceals a record, document, or other object ... with the intent to impair the object's integrity or availability for use in an official proceeding." Subsection (2) penalizes anyone who "otherwise obstructs, influences, or impedes any official proceeding."

Fourteen District of Columbia judges have upheld Section 1512(c)(2) obstruction charges against January 6 defendants. Breaking ranks, however, District Judge Carl Nichols, a Trump appointee and former law clerk for Clarence Thomas, dismissed the obstruction charge against Fischer, purportedly finding that due to the circumstances under which the law was enacted, the law applies only to evidence tampering and destruction.

The District of Columbia Circuit Court of Appeals reversed, 2-1, holding that "the statute is unambiguous," and therefore Subsection (2) "applies to all forms of corrupt obstruction of an official proceeding," which includes swarming the Capitol in a mob to prevent the tabulation of Electoral College votes.

Circuit Judge Gregory Katsas, another former Thomas law clerk and Trump appointee, dissented. In a passage more reminiscent of Lewis Carroll than William Blackstone, Katsas wrote that the term "otherwise," as used between the two subsections of Section 1512(c), does not mean "in a manner different from," but rather "in a manner similar to."

Thus, according to Katsas, because storming the Capitol and assaulting police officers to stop the counting of electoral votes is not "similar to" corporate con artists destroying their records, Fischer cannot be charged under Subsection (2) for obstruction.

There is nothing unusual about prosecutors applying statutory definitions of crimes to encompass novel circumstances beyond the original purpose of a law. It is unusual, however, to watch so-called law-and-order judges contort the English language, giving words their opposite meaning, to frustrate prosecutors. Yet that is precisely what happened at Tuesday's argument, as the January 6 sympathizers on the bench did their utmost to bend the law in

favor of one of the shock troops of the January 6 mob.

Thomas, joined by Chief Justice John Roberts and Alito, Neil Gorsuch and Brett Kavanaugh, sympathized openly with Fischer's argument that "otherwise" in the context of this statute did not distinguish the general prohibition of obstruction in Subsection (2) from the specific prohibition against falsifying or destroying documents in Subsection (1).

The right-wing justices' reading of "otherwise" so as to limit Section 1512(c)(2) to obstruction based on evidence tampering renders an absurd result that essentially tears the statute out of the United States Criminal Code.

The position of the sixth right-wing justice, Amy Coney Barrett, was less clear, but her vote is not required for a majority.

At least two of the three so-called "liberal" justices spoke clearly in favor of charging insurrectionists with violating Section 1512(c)(2). Elena Kagan told Fischer's lawyer that Subsection (2) does not say "'otherwise spoils evidence,' ... it says 'otherwise obstructs a proceeding.'"

Justice Sonia Sotomayor, in response to the suggestion that Section 1512(c)(2) had never been used to prosecute someone for physically interfering with an official proceeding, responded, "We've never had a situation before ... like this with people attempting to stop a proceeding violently. So I'm not sure what a lack of history proves."

US Solicitor General Elizabeth Prelogar, in response to a hypothetical by Alito that suggested that under the prosecution theory people in the Supreme Court gallery who stood up and yelled support for one side or the other, delaying an argument for five minutes, could be sentenced to 20 years in prison, said that would be "fundamentally different ... than if they had stormed into this courtroom, overrun the Supreme Court police, required the Justices and other participants to flee for their safety, and done so with clear evidence of intent to obstruct."

In a recent Supreme Court filing in the presidential immunity case set to be argued next week, Special Counsel Jack Smith argued that the obstruction charges against Trump would still be valid because of the phony electoral certificates prepared for the joint session of Congress, and Trump has also been charged with conspiracy to defraud the United States and conspiracy to interfere with constitutional rights, including the right to vote.



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