What *Fischer v. United States* Gets Wrong About Prosecutorial Discretion

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I. INTRODUCTION

Conservative Supreme Court Justices have recently expressed heightened concerns about prosecutorial power in cases involving former President Donald Trump and the Capitol siege on January 6, 2021. Making good on those worries, the conservative majority in *Fischer v. United States*,[1] rested its decision in part on theoretical concerns about government overreach. The Department of Justice has pushed back on those concerns, but to this point, the debate has been mostly rhetorical and hypothetical.

This essay attempts to fill that rhetorical void—and concretely answer the concerns animating *Fischer*—with evidence from actual cases. A survey of ten January 6 cases directly answers the Justices' hypotheticals and lends strong support to the *Fischer* dissent's conclusion that such "fear is overstated."[2] Those real cases also support Solicitor General Elizabeth Prelogar's argument that Department prosecutors have demonstrated meaningful restraint in bringing the most serious charges against alleged rioters.[3] And because it took just a couple of hours to find ten cases proving the point, this case study suggests that the Justices' fears of prosecutorial overreach in politically charged cases—which clearly animated the *Fischer* majority's textual analysis—are unnecessary and should not have guided the decision-making process in *Fischer*, or in other relevant pending cases.

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[1] Fischer v. United States, 144 S. Ct. 2176, 2189 (2024).

[2] *Id.* at 2201 (Barrett, J., dissenting).

[3] Transcript of Oral Argument at 55–59, Fischer v. United States, 144 S. Ct. 2176 (2024) (No. 23-5572); Brief for the United States at 41–47, Fischer v. United States, 144 S. Ct. 2176 (2024) (No. 23-5572), 2024 WL 923819 *41–47.

II. RHETORICAL FEARS OF OVERREACH

General concerns about prosecutorial discretion reflect a rich and ongoing debate. Some such apprehensions have the benefit of evidence; others find their origins elsewhere. Recently (and atypically), the loudest voices expressing fears about overreach have been those of conservative Justices on the United States Supreme Court. But the relevant evidence—actual charging decisions in the politically charged cases they seem to be most concerned about—does not support those new fears.

During the government's turn at oral argument in *Trump v. United States*, Chief Justice John Roberts offered the following reflection: "You know how easy it is in many cases for a prosecutor to get a grand jury to bring an indictment, and reliance on the faith—good faith—of the prosecutor may not be enough in . . . some cases."[4] That comment was focused on former President Trump's claim to executive immunity. With the Trump decision, the Court has now made clear its preference for presidential, over prosecutorial, power.

If the Chief Justice was looking for evidence to calm his doubts about federal prosecutors' decisions in politically charged cases, he should have found it in another case currently on the Court's docket. *Fischer v. United States*,[5] which the Court just decided, probed the proper scope and application of 18 U.S.C.§ 1512(c), which prohibits corruptly obstructing an official proceeding.[6] *Fischer* asked whether the Department properly applied that statute to certain cases arising from the siege of the U.S. Capitol on January 6, 2021.[7]

At the argument in *Fischer*, the Chief Justice's conservative colleagues seized on the defendants' concerns of prosecutorial overreach. They posed multiple hypotheticals suggesting that the Justice Department's interpretation of § 1512 was overly expansive—and seemed to believe the Department might actually bring such charges against innocent people.[8]

Unfortunately, the final opinion made good on those fears. The majority opinion the Court recently released turned, at least in part, on those rhetorical concerns about perceived, potential abuses of prosecutorial discretion. After engaging in a textual analysis of § 1512—which, as the dissent pointed out, is highly debatable[9]—the *Fischer* majority cited a practical (but still merely

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[4] Transcript of Oral Argument at 74, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939).

[5] *Fischer*, 144 S. Ct. at 2176.

[6] 18 U.S.C. § 1512(c).

[7] *Fischer*, 144 S. Ct. at 2182 ("This case concerns the prosecution of petitioner Joseph Fischer for his conduct on January 6, 2021 . . . . In Count Three, the only count now before us, the Government charged Fischer with violating 18 U.S.C.§ 1512(c)(2).").

[8] *E.g.*, Transcript of Oral Argument at 55–59, *Fischer*, 144 S. Ct. 2176 (2024) (No. 23-5572) (Justice Alito providing hypotheticals to illustrate his concerns over broad usage of the statute).

[9] *Fischer*, 144 S. Ct. at 2195 (Barrett, J., dissenting) ("But statutes often go further than the problem that inspired them, and under the rules of statutory interpretation, we stick

hypothetical) apprehension: that the government's "interpretation would criminalize a broad swath of prosaic conduct, exposing activists and lobbyists alike to decades in prison."[10] That concern seems to have been more than peripheral.

Although this essay will not grapple in detail with *Fischer's* core statutory construction rationale, a note about that analysis helps set the table. The issue in the case concerned "the scope of the . . . 'otherwise' clause in Section 1512(c)(2)." The majority took a narrow view in which "otherwise" impeding an official proceeding must relate to interfering with evidence, while the dissent took Congress's use of the word "otherwise" at face value—and as a term limited by the statute's requirement that a defendant act "corruptly."[11]

What "corruptly" means was also the subject of contentious debate between the *Fischer* majority and dissent.[12] And the majority's rhetorical worries about how a prosecutor might wield the word "corruptly" against "any lobbying activity" was an express underpinning of its textual analysis.[13]

To say the least, the majority's lack of faith in the Department's ability to apply the term "corruptly"—which is central in countless federal prosecutions—is worrisome. Indeed, the Court doubled down on its doubts about prosecutors' ability to apply the meaning of "corrupt" faithfully in another case this term, *Snyder v. United States*.[14] In *Snyder*, as in *Fischer*, the majority used rhetorical fears that prosecutors would target innocent people as a means to narrow the federal prohibition on public corruption.[15] The Court's lack of trust in what imaginary prosecutors might do is palpable.

The majority's approach to the statutory language begs questions about whether something other than mere text was at play.[16] As the opinion acknowledges, "the Government's all-encompassing interpretation may be literally permissible . . . "[17] If "permissible," why not dispositive?

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to the text anyway. The Court, abandoning that approach, does textual backflips to find some way—*any* way—to narrow the reach of subsection (c)(2). I respectfully dissent.").

[10] *Id.* at 2189.

[11] *Compare id.* at 2187–89, *with id.* at 2195.

[12] *Compare id.* at 2186, *with id.* at 2197.

[13] *Id.* at 2189.

[14] Snyder v. United States, 144 S. Ct. 1947, 1955 (2024); *see* Ian MacDougall, *The Court Can't Think Straight When It Comes to Corruption*, THE ATLANTIC (June 27, 2024) ("The *Snyder* decision is the latest installment in a long-running Roberts Court project to curtail the reach of anti-corruption law.").

[15] *Snyder*, 144 S. Ct. at 1957 ("Is a $100 Dunkin' Donuts gift card for a trash collector wrongful?"); DANIEL I. WEINER, SUPREME COURT WEAKENS SAFEGUARDS AGAINST STATE PUBLIC CORRUPTION (Brennan Center for Justice, July 2, 2024).

[16] The majority and dissents articulated their debate over the statute's language in large part based on the canons of construction. *Compare Fischer*, 144 S. Ct. at 2183–89, *with id.* at 2194–95.

[17] *Id.* at 2190.

Justice Amy Coney Barrett observed, in dissent, that the majority performed "textual backflips" to get around what Congress actually said.[18] Some other aspect of the case must have motivated the conservative justices—all dedicated textualists[19]—to engage in such gymnastics. As the majority opinion put it, the government's "permissible" interpretation was inferior to a reading that better reflected "context."[20] However central the statute's words were, the "context" informing the decision included not only the "surrounding words" in § 1512,[21] but also the conservative justices' unusual emphasis on hypothetical overuse of prosecutorial power.

Indeed, the media's hot takes on *Fischer* were hardly about textual analysis. The decision, the public now at least temporarily has been informed, turned on the majority's belief that the Department of Justice "overstepped" and "overreached."[22] Prosecutorial discretion run amok is now the story, whether or not the facts support that idea.

But contrary to the fears the justices expressed at argument and used to justify their construction of § 1512, the wider set of prosecutions stemming from the siege of the Capitol on January 6 illustrates careful prosecutorial restraint and good faith at work. Properly examined, far from sowing doubts, the January 6 prosecutions can and should lift the public's estimation of the justice system.

While working on January 6 cases at the U.S. Attorney's Office for the District of Columbia, I saw that good faith firsthand.[23] Some may say that my experience must seed a defensive bias, but unlike the rhetorical concerns raised in *Trump* and *Fischer*, the present argument turns only on objective evidence. Moreover, firsthand experience is not necessary to be convinced that this class of cases exemplifies forbearance, not undue zeal.

Other scholars will debate the merits of Chief Justice Roberts's and Justice Barrett's textual arguments. But *Fischer* will also forever be about more than what "otherwise" means.

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[18] *Id.* at 2195.

[19] *See, e.g.*, Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/MY6G-AK6B] ("we're all textualists now").

[20] *Fischer*, 144 S. Ct. at 2190.

[21] *Id.* at 2183.

[22] Adam Liptak, *The Supreme Court Says Prosecutors in Jan. 6 Case Overstepped*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/live/2024/06/28/us/supreme-court-jan-6; Jan Wolfe & C. Ryan Barber, *Supreme Court Rules Prosecutors Overreached in Jan. 6 Cases*, WALL STREET JOURNAL (June 28, 2024), https://www.wsj.com/us-news/law/supreme-court-narrows-law-used-against-some-jan-6-rioters-f77b681d?mod=hp_lead_pos1.

[23] However, all information contained here is gathered from public documents and all opinions set forth here are my own and not those of the Department of Justice.

As one commentator put it, *Fischer* is part of a broader "assault on prosecutorial discretion."[24] Looking at who has, in fact, been charged with what offers a chance to test the force of any fears that the Department is going too far.

III. A RESPONSE WORTHY OF CLOSER EXAMINATION

This essay therefore examines—and ultimately defends—Solicitor General Elizabeth Prelogar's response to the Justices' concerns in *Fischer* about overreach. Likewise, the survey of cases here shows that Justice Barrett was right to observe, in dissent, that the *Fischer* majority's fears were "overstated."[25]

The Solicitor General pointed out that 18 U.S.C. § 1512(c) is necessarily limited by a "stringent mens rea requirement."[26] She added that the D.C. U.S. Attorney's Office had been "constrained" by the requirements that a defendant specifically intended to obstruct Congress's certification of the vote count and that the defendant knew the obstructive conduct was wrongful.[27]

Prelogar's response—like the dispute between the *Fischer* majority and dissent over "fears" of overreach—merits more considered attention. The Supreme Court would be well served by readjusting their fears of the possible and hypothetical to fit more neatly what has happened on the ground. Only a substantive assessment of how the U.S. Attorney's Office has exercised its discretion could produce a reliable decision in *Fischer* (and, by extension, Trump and other politically charged federal criminal cases). Unfortunately, that is not what happened this term.

Perhaps amplifying the Justices' concerns, the media likes to point out that "hundreds" and "scores" of rioters have been charged under § 1512(c).[28] Although technically accurate, the charge has not been "widely used."[29] Only a

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[24] Randall D. Eliason, *The Supreme Court's January 6 Decision Is Utterly Baffling*, THE ATLANTIC (July 1, 2024), *available at* https://www.theatlantic.com/ideas/archive/2024/06/fischer-v-united-states-supreme-court-decisions-jan-6/678838/.

[25] *Fischer*, 144 S.Ct. at 2201.

[26] Transcript of Oral Argument at 61, *Fischer*, No. 23-5572 (Apr. 16, 2024).

[27] *Id.* at 61–62; *see also* Brief for the United States at 44, *Fischer*, No. 23-5572 (to satisfy mens rea requirement, defendant must use "'unlawful means, or [act] with an unlawful purpose, or both,' and also [have] 'consciousness of wrongdoing,' meaning 'an understanding or awareness that what [he] [wa]s doing [wa]s wrong'") (quoting United States v, Robertson, 86 F.4th 355,362 (D.C. Cir. 2023).

[28] Hugo Lowell, *US Supreme Court Skeptical of Using Obstruction Law in January 6 Cases*, THE GUARDIAN (Apr. 16, 2024), https://www.theguardian.com/law/2024/apr/16/supreme-court-obstruction-trump-january-6 [https://perma.cc/LHC5-MTMH]; Ella Lee, *Supreme Court Justices Signal Wariness of Law Used for Jan. 6 Prosecutions*, THE HILL (Apr. 16, 2024), https://thehill.com/regulation/court-battles/4597463-supreme-court-justices-signal-wariness-of-law-used-for-jan-6-prosecutions/ [https://perma.cc/BE2T-WKQM] ("The scope of a federal obstruction law used against scores of Jan. 6 rioters—and former President Trump — drew scrutiny from the Supreme Court on Tuesday.").

[29] Lowell, *supra* note 29. Lee, *supra* note 29; Alan Feuer, *Supreme Court's Review of Jan. 6 Charge Has Already Freed Some Rioters*, N.Y. TIMES (Apr. 16, 2024), https://www.nytimes.com/2024/04/16/us/politics/supreme-court-jan-6-obstruction.html.

quarter of January 6 defendants face the charge.[30] Looking beyond that statistic, the strongest evidence against any assertion that the D.C. U.S. Attorney's Office has exercised "sweeping" prosecutorial power is in the individual cases themselves.

In fact, many more defendants could have been charged under § 1512(c). The textual requirements of the statute are acting corruptly, or "wrongfully," in attempting to obstruct, influence, or impede a proceeding.[31] In January 6 cases, acting "wrongfully" commonly includes destroying property, assaulting law enforcement officers, or attempting to get into places that are closed—like the House chamber or an exterior door to the Capitol building.[32] After all, breaking windows and even simply walking into buildings guarded by police who had deployed tear gas against you, or who had just been overwhelmed by a mob, are commonly understood to be "wrongful" actions. The *Fischer* dissent embraced that common sense.[33]

Likewise, evidence of intent to "obstruct" or "influence" Congress's certification of the vote count often draws from statements defendants made while at the Capitol or later shared with friends and followers. Many January 6 defendants yelled "Stop the steal!" and "Whose house? Our house!"[34] While such words alone do not constitute a federal crime, when coupled with certain wrongful conduct, these phrases could demonstrate a rioter's desire to do something specific: namely, prevent or delay the vote certification and assert themselves, rather than members of Congress, in a position to control the events of the day.

Most of the defendants on the January 6 docket evinced some intention to obstruct or influence Congress's certification of the vote count and acted "wrongfully" in so doing. Many made pointed, violent statements about their intention to disrupt Congress. Among them, some were initially charged with

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[30] Ryan Goodman, Mary B. McCord & Andrew Weissmann, *The Limited Effects of Fischer: DOJ Data Reveals Supreme Court's Narrowing of Jan. 6th Obstruction Charges Will Have Minimal Impact*, JUST SECURITY (June 28, 2024), https://www.justsecurity.org/96493/supreme-court-obstruction-january-6th/ [https://perma.cc/L87Z-UQQ5].

[31] 18 U.S.C. § 1512(c).

[32] *See, e.g.*, Complaint Statement of Facts, United States v. Alam, No. 1:21-cr-190 (D.D.C. Mar. 5, 2021) (defendant charged with section 1512(c) violation after he kicked and punched the window of the door to Speaker's Lobby, which was guarded by U.S. Capitol Police).

[33] *Fischer*, 144 S. Ct. at 2195–96 (Barret, J., dissenting) (the Court does not dispute that Congress's joint session qualifies as an "official proceeding"; that rioters delayed the proceeding; or even that Fischer's alleged conduct (which includes trespassing and a physical confrontation with law enforcement) was part of a successful effort to forcibly halt the certification of the election results. Given these premises, the case that Fischer can be tried for "obstructing, influencing, or impeding an official proceeding" seems open and shut.").

[34] Dinah Voyles Pulver et al., *Capitol Riot Arrests: See Who's Been Charged Across the U.S.*, USA TODAY (Jan. 15, 2021), https://www.usatoday.com/storytelling/capitol-riot-mob-arrests/ [https://perma.cc/R54S-FXSS].

violating § 1512(c), only to have those charges dropped. Others were never charged at all with violating § 1512(c).

A brief survey of people who have not ultimately faced a § 1512(c) charge is pertinent to the Supreme Court's apparent concern about prosecutorial overreach. I set aside several days to research this question, but it took only a couple of hours to find a neat set of ten cases proving the point. As that suggests, there are surely scores of cases among the hundreds of January 6 prosecutions demonstrating the fault in the Justices' fears.

In short, an objective examination shows that the conservative Justices' worries are unfounded. A fair review of the D.C. prosecutors' approach confirms Prelogar's assertion that the Department has charged § 1512(c) in good faith and with meaningful restraint. The appropriate answer to the hypotheticals and rhetorical concerns the majority relied on at argument and in its opinion lies in real charging decisions like the ones discussed below.

IV. TEN JANUARY 6 CASES RESPONDING TO THE JUSTICES' HYPOTHETICAL CONCERNS AND DEMONSTRATING THE MEASURED USE OF §1512(C)

The following ten cases—and many more like them—should put to rest the specific doubts that seem to have animated the *Fischer* decision. At oral argument, Justice Neil Gorsuch asked whether a heckler in the audience at a Supreme Court argument, or someone pulling a fire alarm before a Congressional vote, would be candidates for charges under § 1512(c).[35] Justice Samuel Alito asked whether § 1512 charges were warranted for protesters blocking traffic all around the Capitol so that members from Virginia "who needed to appear at a hearing" were prevented or delayed from getting to the hearing.[36]

The majority's ultimate opinion picked up where those questions left off. *Fischer's* rationale focused less on Joseph Fischer's conduct than on the hypothetical conduct of purely fictitious "lobbyists" and "activists."[37]

As the survey below shows, acting "corruptly" or "wrongfully" as part of an effort to "disrupt" or "delay" the proceedings of Congress on January 6—even in ways going far beyond the hypotheticals the Justices posed—has not been an automatic ticket to a §1512(c) charge. Why these rioters did not get charged with violating §1512(c) is a question that public documents generally cannot answer, but as this essay explores later, there are some clues in the public record that at least point to the conclusion that the charging decisions were not arbitrary, and were instead exercises of prosecutorial restraint.

1. Multiple members of the Robinson family from Indian Land, South Carolina, traveled to Washington, D.C., to enter the Capitol building on January

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[35] Transcript of Oral Argument at 49, *Fischer*, No. 23-5572 (Apr. 16, 2024).
[36] *Id.* at 57.
[37] *Fischer*, 144 S. Ct. at 2189.

6.[38] The Robinsons were part of a group of rioters who overwhelmed a police line in the Capitol Crypt.[39] They joined a group of rioters who were trying to breach one door to the House chamber, but then the Robinsons found another entry point to the House chamber: the doors to the Speaker's Lobby.[40]

The Robinsons waved other rioters toward the Speaker's Lobby, where they were part of the group who overwhelmed three police officers guarding the door.[41] As the Robinsons and other rioters rejected orders from police officers to back up, Benjamin Robinson "used his body and foot to pound" the door to the Speaker's Lobby.[42] Moments later, another rioter was shot and killed.[43] Despite their clear determination to reach the House chamber and encourage a mob to join them, none of the Robinsons were charged with violating § 1512(c), and were only charged with lesser misdemeanor crimes.[44]

2. Nicholas Rodean, from Maryland, broke two windowpanes in the Senate Wing of the U.S. Capitol building, enabling himself and others to become among the first rioters to enter the building that day.[45] He joined other rioters who pursued U.S. Capitol Police Officer Eugene Goodman up two flights of stairs, to stand off against a line of police officers outside of the floor of the Senate chamber.[46] Rodean carried a hatchet with him that day, along with a "Trump Is My President" flag.[47] When questioned by a police officer, he stated that he was there to "stop the steal."[48]

Rodean was initially charged with, among other crimes, a violation of § 1512(c).[49] Despite the fact that he broke a window to enter the building and once inside, told an officer why he was there, the § 1512(c) charge was dropped in a later superseding indictment.[50] He was convicted at a bench trial of a number of other crimes.[51]

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[38] Complaint Statement of Facts, United States v. Robinson et al., No. 3:22-cr-00417-SVH (D.D.C. May 19, 2022).

[39] *Id.* at 5.

[40] *Id.* at 5–6.

[41] *Id.* at 6.

[42] *Id.* at 7.

[43] *Id.*; Ella Lee, *Judge says Ashli Babbitt Family's Suit Over Jan. 6 Death Must Go to Trial Before End of 2025*, THE HILL (Sept. 13, 2024), https://thehill.com/regulation/court-battles/4879449-ashli-babbitt-wrongful-death-lawsuit/ [https://perma.cc/8W9Q-SFH6].

[44] Complaint, United States v. Robinson, No. 3:22-cr-00417-SVH (D.D.C. May 19, 2022).

[45] Trial Brief for the United States at 1, United States v. Rodean, No. 1:21-cr-57-TNM (D.D.C. Jul. 5, 2022).

[46] *Id.* at 2.

[47] *Id.* at 1–2.

[48] *Id.* at 6.

[49] Indictment, United States v. Rodean, No. 1:21-cr-57-TNM (D.D.C. Mar. 19, 2021).

[50] Superseding Indictment, United States v. Rodean, No. 1:21-cr-57-TNM (D.D.C. Mar. 9, 2022).

[51] I was among those who prosecuted Mr. Rodean. All of the information here is a matter of public record.

3. Jesus Rivera, like Rodean, went to trial.[52] He was charged with a handful of misdemeanors commonly charged in Jan. 6 cases, but not with violating § 1512(c).[53] Rivera livestreamed himself and others tearing through barricades, police lines, broken doors and windows to enter the Capitol building.[54] He told other rioters: "This is what me and my boy were talking about, saying [that] the only way this would be a real revolution is if we go in and pull their asses out of there. . . . [I]t has to get done, dude. This is what we need. This is what they needed."[55] Although Rivera's actions and words made his disruptive aims clear, he did not face a § 1512(c) felony charge.[56]

4. Samuel Fisher didn't enter the Capitol building, but he traveled to Washington, D.C. armed with weapons.[57] He posted a message on his own website on January 5: "Tomorrow, Trump and We The People will be betrayed again by every so called representative who said they'd fight for us. Ted Cruz, Dan Crenshaw, all of these supposed hardcore constitutionalist republicans . . . all are compromised. They will allow the steal to go on. . . We aren't looking to fight or hurt anyone . . . but the odds that this is going to be solved any other way . . . is next to nothing."[58] Based on his own words, Fisher understood that Congress would be certifying the vote on January 6, and his intention was to disrupt that vote.

Fisher brought weapons, went to the Capitol grounds, and made clear by word and deed that he intended to disrupt the proceedings. But he was not charged with violating § 1512(c).[59]

5. The day before she "charged" the Capitol, Jenny Cudd, from Texas, posted a video in which she stated, "Now I don't know what y'all think about a revolution, but I'm all for it . . . Nobody actually wants war, nobody wants bloodshed, but the government works for us and unfortunately it appears that they have forgotten that, quite a lot. So, if a revolution is what it takes then so be it. Um, I don't know if that is going to kick off tomorrow or not, we shall see what the powers that be choose to do with their powers and we shall see what it is that happens in Congress tomorrow at our United States Capitol."[60]

After going into the Capitol, Cudd posted another video on social media, explaining what she had done: "I was here today on January 6th when the new revolution started at the Capitol. . . . [W]hen Pence betrayed us is when we

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[52] United States v. Rivera, 607 F. Supp.3d 1, 1 (D.D.C. Jun. 17, 2022).

[53] Complaint, United States v. Rivera, No. 1:21-cr-60 (D.D.C. June 17, 2022).

[54] *Rivera*, 607 F. Supp.3d at 1.

[55] *Id.* at 3.

[56] *See generally id.*; Complaint, United States v. Rivera, No. 1:21-cr-60 (D.D.C. June 17, 2022).

[57] Affidavit in Support of Criminal Complaint and Arrest Warrant at 7, United States v. Fisher, No. 1:21-cr-00142-CJN (D.D.C. Jan. 1, 2024).

[58] *Id.* at 10.

[59] *See generally* Guilty Plea Statement of Offense, United States v. Fisher, No. 1:21-cr-142-CJN (D.D.C. Jul. 6, 2022).

[60] Guilty Plea Statement of Offense at 4, United States v. Cudd, No. 1:21-cr-68-TNM (D.D.C. Oct. 13, 2021).

started to storm the Capitol . . . We just pushed and pushed, and we got it . . . and we got in. We got up to the top of the Capitol and there was a door open and we went inside. . . . We did break down the Nancy Pelosi's office door and somebody stole her gavel and took a picture sitting in the chair flipping off the camera. . . They had to evacuate it before we charged the Capitol."[61]

Although Cudd was initially charged with violating § 1512(c), prosecutors dropped the charge as part of her plea agreement to a misdemeanor with a lesser penalty.[62] This is not the usual course for federal prosecutors, who typically seek a plea to "the most serious offense that is consistent with the nature of the defendant's conduct and likely to result in a sustainable conviction."[63] Despite going beyond the limits of the hypotheticals that concerned conservative Justices and the defendant in *Fischer*, Cudd ultimately faced no § 1512(c) charge.[64]

6. Steven Billingsley, from Ohio, recorded himself throughout the day on January 6.[65] As "he stepped over metal barricades lying on the ground," he said, "This is where they had it closed off. We're going past it."[66] In another area of the building's grounds, he was directed by police officers to leave, but instead walked over additional barricades and yelled, "This is our house."[67] After helping someone undo a metal barricade, he told others, "They can't stop us in numbers, remember that. This is war."[68] Later, again after encouraging others to push into a police line, he told someone, "[W]e do want to hurt Pelosi. I do. Yeah, I would hang her from that big—you see that tree over there? We'd put a rope and hang her. We hang her and Schumer over there, they'll all go, 'Oh, shit."[69] Although he didn't enter the building, Billingsley knowingly entered a restricted area and made clear he went to the Capitol to disrupt the proceedings of Congress. But he was charged only with misdemeanors.[70]

7. Robert Petrosh, Jr., from New Jersey, watched rioters push against a line of police officers in the Crypt, and even told one officer, "Give us Nancy, and we will leave."[71] He broke through that police line and headed up to the Rotunda of the Capitol, where he smoked a cigarette and stole microphones from the House Speaker's lectern.[72] He called out the Speaker of the House,

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[61] *Id.* at 5.

[62] *Compare* Indictment, United States v. Cudd, No. 1:21-cr-68-TNM (Feb. 3, 2021) *with* Plea Agreement, United States v. Cudd, No. 1:21-cr-68-TNM (Oct. 13, 2021).

[63] U.S. Dep't of Just., Just. Manual § 9–27.400.

[64] *See generally* Indictment, *Cudd*, No. 1:21-cr-68-TNM (D.D.C. Feb. 3, 2021).

[65] Guilty Plea Statement of Offense at 3, United States v. Billingsley, No. 21-cr-519 (TFH) (D.D.C. Aug. 15, 2022).

[66] *Id.*

[67] *Id.* at 4.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 1; 18 U.S.C. § 1752(a)(2).

[71] Guilty Plea Statement of Offense at 3, United States v. Petrosh, No. 1:21-cr-347 (TNM) (D.D.C. Jan. 7, 2022).

[72] *Id.* at 4.

misappropriated property, and tried to disrupt what was happening in Congress that day. He was charged with only misdemeanors.[73]

8. Blake Reed, from Tennessee, entered the Capitol building wearing ski goggles and a respirator mask, through a door that had been broken by other rioters.[74] Later that day, he posted photos on Facebook and stated, "We the people have spoken and we are pleased. . . . We the people took the Capitol! . . . Democratic tyranny WILL NOT STAND! WE HAVE SPOKEN!!"[75] He was charged by indictment together with three other rioters; one other rioter was charged with violating § 1512(c), but Reed was not.[76] Here, as elsewhere, the prosecution drew a distinction between defendants that support Prelogar's claims of restraint.

9. Clifford Meteer, another Tennessee resident, advanced through the building with a two-sided sign that said "SAVE THE REPUBLIC" on one side and "STOP THE STEAL" on the other side.[77] Inside, he got close to the House Chamber but was removed by Capitol police from the area.[78] A few days after January 6, Meteer told a friend on Facebook, "[F]rom my point of view, as I have no doubt that skullduggery was done at the polls, the legitimacy of congress has been revoked. Once the sacred vote is violated, a patriots duty is to rattle the cage, to remind them who [r]eally runs the show. And as long no great desecration occurs, honor was preserved."[79] He too was charged with only misdemeanors.[80]

10. Pam Hemphill, from Boise, Idaho, encouraged people via her Facebook page to go to Washington, D.C. on January 6, stating, "It's not going to be a FUN Trump [r]ally that is planned for January 6th, it's a WAR! The fight for America is REAL, show up I don't want to hear your excuses! We have no second chance, if [m]illions and I mean [m]illions show up we may have a chance."[81] At the Capitol building grounds, she passed through metal barriers set up to restrict the area, telling other rioters to break through the barriers, stating, "You just gotta come in . . . [i]t's your house. Come on in."[82] She entered the building that day knowingly and wrongfully and made her intention to

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[73] *Id.* at 1; 18 U.S.C. § 641.

[74] Guilty Plea Statement of Offense at 4, United States v. Reed, No. 1:21-cr-204 (BAH) (D.D.C. Jan. 11, 2022).

[75] *Id.* at 5.

[76] *See, e.g.*, Indictment at 1, United States v. Bledsoe, No. 1:21-cr-00204-BAH (D.D.C. Mar. 10, 2021).

[77] Guilty Plea Statement of Offense at 3–4, United States v. Meteer, No. 1:21-cr-630-CJN (D.D.C. Jan. 13, 2022).

[78] *Id.* at 4.

[79] *Id.* at 5.

[80] Criminal Complaint Statement of Facts, United States v. Meteer, No. 1:21-cr-630-CJN (D.D.C. Aug. 4, 2021); 18 U.S.C. § 1752(a)(1); 18 U.S.C. § 1752(a)(2); 40 U.S.C. § 5104(e)(2)(A); 40 U.S.C. § 5104(e)(2)(G).

[81] Guilty Plea Statement of Offense at 3, United States v. Hemphill, No. 1:21-cr-555 (RCL) (D.D.C. Jan. 26, 2022).

[82] *Id.* at 4.

disrupt the vote count clear in her social media posts. Like the others, she faced only misdemeanor charges.[83]

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In her responses to the hypothetical scenarios posed by Justices Gorsuch and Alito, Solicitor General Prelogar emphasized that, in a § 1512(c) case, the government would need to show not only that the heckler, the fire-alarm-puller, and the traffic-disruptors targeted a specific proceeding, but also that they acted corruptly, or wrongfully—not merely with the intent to obstruct.[84] She also noted that minimal interference with a proceeding likely did not rise to the level of "obstruction" of a proceeding.[85] As the cases above show, her answer was not merely rhetorical—it has the benefit of solid supporting evidence on the District of D.C. docket.

The Department simply has not used § 1512(c) to charge acts such as those outlined in the Justices' questions and the *Fischer* opinion's worries about "activists." Even far more serious conduct than the rhetorical acts the Court cited has fallen short of the felony line in the January 6 prosecutions.

Ultimately, the *Fischer* opinion that best reflects reality is Justice Barrett's dissent. Joined by two colleagues, her observation bears reiteration:

> The Court concludes with an appeal to consequences: Construing (c)(2) broadly would "expos[e] activists and lobbyists alike to decades in prison." Ante, at 14. This fear is overstated.
>
> To begin with, the Court ignores that (c)(2) requires proof that a defendant acted "corruptly." The meaning of this term is unsettled, but all of its possible definitions limit the scope of liability. On one proposed interpretation, a defendant acts corruptly by "'us[ing] unlawful means, or act[ing] with an unlawful purpose, or both.'" United States v. Robertson, 103 F. 4th 1, 8 (D.C. Cir. 2023) (approving jury instructions for (c)(2)). On another, a defendant acts "corruptly" if he "act[s] 'with an intent to procure an unlawful benefit either for himself or for some other person.'" 64 F. 4th, at 352 (Walker, J., concurring in part and concurring in judgment) (quoting Marinello, 584 U.S. at 21; alterations omitted). Under either, the "corruptly" element should screen out innocent activists and lobbyists who engage in lawful activity.[86]

If Chief Justice Roberts and his colleagues were genuinely concerned about overreach in this context, real cases like those above should have assuaged their doubts. Without rebutting such facts, their conclusion is now at least in part

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[83] Criminal Complaint Statement of Facts, United States v. Hemphill, No. 1:21-cr-555 (RCL) (D.D.C. Aug. 2, 2021); 18 U.S.C. § 1752(a)(1); 18 U.S.C. § 1752(a)(2); 40 U.S.C. § 5104(e)(2)(D); 40 U.S.C. § 5104(e)(2)(G).

[84] Transcript of Oral Argument at 50–51, Fischer v. United States, 144 S. Ct. 2176 (2024) (No. 23-5572).

[85] *Id.* at 81 ("[D]e minimis interference doesn't qualify").

[86] Fischer v. United States, 144 S. Ct. 2176, 2201 (2024) (Barrett, J., dissenting).

based on unfounded fear or hesitation, not on a reckoning with the reality of the effort to hold the January 6 rioters accountable for their actions.

The conservative Justices' apparent unwillingness to trust federal prosecutors should give the public—across the political spectrum—reason for pause. One can only hope the Supreme Court will not rely on fictitious concerns of prosecutorial abuse in future cases.

V. TEMPERED ZEAL[87]

Did the Supreme Court really take Joseph Fischer's case to ethereally debate the meaning of the word "otherwise"? Just as likely, latent concerns about prosecutorial discretion prompted them to grant certiorari, after which those apprehensions became central to both oral argument and the ultimate *Fischer* opinion. As this essay shows, however, there was no abuse of power by the Department of Justice that needed the Court's intervention.

The Department restrained its use of the felony statute to a narrow band of worthy cases. Nothing about the application of § 1512 to January 6 defendants should have given lobbyists or activists reason to believe they would soon be prosecuted.

Publicly available documents do not explain exactly why the U.S. Attorney's Office charged some defendants with a violation of § 1512(c), while opting not to charge others with a felony. But that does not mean we have any basis to doubt such reasons existed. The key point is that the Department drew measured distinctions, supported by the circumstances of each case.

No one has demonstrated the charging approach was arbitrary. And as the above shows, the U.S. Attorney's Office cannot fairly be accused of overcharging even on the terms of its own preferred (now defunct) interpretation of the statute. Indeed, applying the Department's (and the dissent's) approach, undercharging could be a fairer characterization.

Now, of course, the Supreme Court has formally opined that a wide range of January 6 cases were overcharged[88]—not just *Fischer's* but any to which the majority's narrow interpretation of the statute applies. The majority would presumably take for granted that the ten cases detailed in this essay (like many more) were not fodder for a § 1512(c) charge. But because *Fischer's* textual analysis is fundamentally debatable—even among devoted conservatives like the Chief Justice and Justice Barrett—questions remain about why the Court undertook "textual backflips" and how the Court's majority must perceive the exercise of prosecutorial discretion in these cases.

This is therefore an opportunity to reflect on how Department prosecutor's approach charging decisions in difficult contexts. The January 6 riot presented the D.C. U.S. Attorney's Office with a host of new and complicated questions

[87] For a discussion of that concept, which forms part of the most famous meditation on prosecutorial power and discretion, see Robert H. Jackson, *The Federal Prosecutor*, 24 J. OF THE AM. JUDICATURE SOC'Y 18 (1940).

about how to enforce laws on the books, including § 1512. The public evidence demonstrates that the DOJ's lawyers took the occasion as a chance not only to hold accountable those engaged in wrongdoing but also to be measured in doling out such accountability.

Comparing Fischer to a handful of defendants who did not ultimately face a § 1512(c) charge is helpful. Fischer exhorted people outside of the Capitol to "charge," and then "had a physical encounter" with a police officer.[89] Before traveling to Washington, D.C., Fischer texted people: "If Trump don't [sic] get in we better get to war; Take democratic [C]ongress to the gallows . . . Can't vote if they can't breathe . . . lol."[90] Accordingly, Fischer's intentions in going to Washington were clear, and once he was there, his attacks on law enforcement and encouragement to others were part of that clear and wrongful purpose. Like many other January 6 defendants, he was also charged with assault in relation to that conduct.[91]

The U.S. Attorney's Office believed that conduct met the clear terms of the statute. With respect to many more rioters, the government demurred, believing misdemeanor charges more appropriate means of accountability.

Some difficulty arises because much about a given case (January 6 or otherwise) is left out of the public record. Although certain decisions may appear arbitrary to an outsider, in my experience, they rarely are. And clues in the public record do suggest some reasons lines were drawn.

In one case, for example, the U.S. Attorney's Office was explicit about its decision to withdraw a perhaps on-the-line charge of violating § 1512(c). Karl Dresch, who traveled from Michigan to Washington, D.C., posted on social media about the trip a few days beforehand that he was preparing to go to "DC," and was "prepared for chemical attacks and what not."[92] He also urged others to do so by way of his Facebook account, writing, "NO EXCUSES! NO RETREAT! NO SURRENDER! TAKE THE STREETS! TAKE BACK OUR COUNTRY! 1/6/2021=7/4/1776."[93] He then entered the building on January 6, walking through the Crypt and the Visitor's Center.[94]

In a sentencing memorandum filed with the Court, prosecutors noted that they had initially charged Dresch with violating § 1512(c), but "after careful review of this matter and in an effort to achieve consistency with respect to these cases, the government concluded that it was appropriate to offer the defendant a plea to a misdemeanor."[95] Perhaps the fact that Dresch had not destroyed or attempted to destroy property, or engaged in other physical conduct beyond

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[89] United States v. Fischer, 64 F.4th 329, 332 (D.C. Cir. Apr. 7, 2023).

[90] *Id.*

[91] Indictment at 2, United States v. Fischer, No. 21-MJ-2387 (D.D.C. Mar. 19, 2021).

[92] Sentencing Memorandum for the United States at 3, United States v. Dresch, No. 1:21-cr-71 (ABJ) (D.D.C. Aug. 3, 2021).

[93] *Id.*

[94] *Id.*

[95] *Id.* n.1.

wrongfully entering the building, was a consideration for the exercise of discretion here.

That particular line-drawing would help to explain why many of the defendants discussed above, all of whom expressed some intent to disrupt the Congressional proceedings, were not charged with violating § 1512(c). And that decisional data should give comfort to those who express doubts like those voiced by conservative Justices at the argument in *Fischer*.

In the case of Nicholas Rodean, the flag—and hatchet-carrying rioter, there are clues in the public record as well. The sentencing judge found that his "Asperger's [s]yndrome . . . mitigate[d]" his otherwise serious conduct.[96] Rodean's sentence after conviction at trial was significantly below the recommended range, based on the judge's view of the defendant's mental state.[97] Similar considerations could certainly inform whether prosecutors pursue charges that carry a "stringent mens rea requirement."[98]

In other cases, such as that of Samuel Fisher (not to be confused with Joseph Fischer), federal prosecutors also likely engaged in a more nuanced assessments of the federal interest in elevated charges. Fisher brought weapons to Washington, D.C., for the riot,[99] but he also faced charges from another jurisdiction—New York state—because his January 6 crimes also entailed violations of state gun laws.[100] In making charging decisions, federal prosecutors must consider whether a "federal interest" is served by prosecution, and whether the defendant is subject to "effective prosecution" elsewhere.[101] Fisher's prosecution in Manhattan could certainly have factored into the decision not to charge him with a felony federally.

Line-drawing of those types has occurred time and again in the January 6 context, just as it occurs throughout federal law enforcement. These cases provide concrete evidence that prosecutors are exercising discretion and are not simply charging each eligible defendant with violating § 1512(c). Though the current Supreme Court may not trust the good faith of DOJ prosecutors, these

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[96] Clara Niel, *Frederick Man Gets 8 Months Home Detention for Jan. 6 Capitol Riot; Prosecution Sought Prison Time*, THE FREDERICK NEWS-POST (Oct. 26, 2022), https://www.fredericknewspost.com/news/crime_and_justice/courts/frederick-man-gets-8-months-home-detention-for-jan-6-capitol-riot-prosecution-sought-prison/article_2c0ec247-1664-51a1-8eb5-98574b5b84d1.html [https://perma.cc/5EX5-FMQF]; *see also* Kyle Cheney, *Jan. 6 Rioter Gets Probation Not Prison After Judge Finds Autism Played a Role*, POLITICO (Oct. 26, 2022), https://www.politico.com/news/2022/10/26/jan-6-rioter-gets-probation-not-prison-after-judge-finds-autism-played-a-role-00063588 [https://perma.cc/2WHA-6SDN].

[97] Niel, *supra* note 96.

[98] Transcript of Oral Argument at 61, *Fischer*, No. 23-5572 (Apr. 16, 2024).

[99] Complaint Statement of Facts at 5, United States v. Fisher, No. 21-cr-142-CJN (D.D.C. Jan. 20, 2021).

[100] Sarah Maslin Nir, *'Dating Coach' Charged in Capitol Riot Gets Prison Term for Gun Crime*, N.Y. TIMES (Apr. 4, 2022), https://www.nytimes.com/2022/04/04/nyregion/samuel-fisher-brad-holiday-january-6.html.

[101] U.S. Dep't of Just., Just. Manual § § 9–27.230, 9–27.240.

real cases involving real people show that the Department has been more cautious than swashbuckling. The Court's concerns, at least in this context, do not reflect reality and are not necessary.

January 6 rioters have tried every argument to escape accountability: versions of "The President told me to break the window"; "Despite trampling on broken glass and hearing alarms, I had no idea that entering the Capitol was wrongful"; "It wasn't me spraying pepper spray at the police officers"; "I was just there to peacefully protest."

Those arguments have not succeeded. The rioters should not have been permitted to avoid accountability based on a suggestive, purely hypothetical (and demonstrably overblown) argument that federal prosecutors have abused their power to overcharge cases arising from the Capitol siege.

Other arguments about prosecutorial discretion in different contexts are for another day. But the Court should have welcomed this as an opportunity to acknowledge fair play, not as a chance to grind an axe about prosecutorial power. This is the justice system working well. The majority's decision to opt for a dubious reading of § 1512's text based on an unfounded fear or suspicion of the Department of Justice was an unfortunate mistake.