

# How Jan. 6 Riot Cases Could Affect White Collar Defendants

By **Ben Jernigan** (September 20, 2023)

White collar defense attorneys typically advocate on behalf of corporations and business executives, so it may seem odd to suggest that they would do well to pay attention to case law emerging from the Jan. 6 Capitol riot prosecutions.

But they should. Though these cases deal with fact patterns far afield from typical white collar fare, many address an issue that applies to a broad range of white collar offenses — what it means to act "corruptly."



Ben Jernigan

A large number of the rioters have been charged with, and convicted of, violating Title 18 of the U.S. Code, Section 1512(c)(2), which states that "[w]hoever corruptly ... obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined ... or imprisoned."

The theory is that the defendants sought to obstruct Congress' certification of the 2020 election results.

Washington, D.C., federal courts have spent about two years adjudicating challenges to various elements of this statute and have faced arguments that the defendants did not act with the requisite corrupt mens rea, or state of mind, and that "corruptly" is unconstitutionally vague.

And litigation around the meaning of "corruptly" shows no signs of letting up: In count three of his Jan. 6-related federal indictment, former President Donald Trump stands charged with corruptly obstructing the electoral vote certification.[1]

Jan. 6 cases have exposed a significant lack of clarity around the meaning of "corruptly," and the resolution of this question will matter for white collar defense lawyers. One reason is that Section 1512(c)(2) has long figured prominently in white collar cases, such as the prosecution of a lobbyist involved in the Jack Abramoff scandal for allegedly causing the submission of misleading information to a U.S. Senate committee and a grand jury.[2]

Another reason is that the statutory language of a corrupt mens rea is not limited to Section 1512(c)(2). Far from it, as the U.S. Court of Appeals for the District of Columbia Circuit explained in April in *U.S. v. Fischer*,[3] a case in which U.S. Circuit Judges Florence Pan and Justin Walker formed a panel majority to reverse the U.S. District Court for the District of Columbia's dismissal of Jan. 6 defendants' Section 1512(c)(2) indictments. As Judge Pan noted in that case, "there are around 50 other references to 'corruptly' in Title 18 of the U.S. Code."

And many of these statutes may be even more likely than Section 1512(c)(2) to ground the sorts of charges that would cause a client to turn to a white collar attorney. These include corruptly obstructing a regulatory examination of a financial institution, engaging in bribery involving public officials, offering gifts in connection with procuring loans or influencing other business of financial institutions, and impeding the Federal Deposit Insurance Corp. when acting as conservator or receiver.

Courts analyzing the meaning of "corruptly," as used in the Jan. 6 cases, have settled upon three possible definitions. In *Fischer*, Judge Pan said that past decisions have suggested that "corruptly" might mean:

- "[W]rongful, immoral, depraved, or evil";
- Acting "'with a corrupt purpose,' through 'independently corrupt means,' or both" — this is the interpretation the government urged in *Fischer*; or
- Acting "voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or other benefit to oneself or a benefit of another person."

We might add a fourth potential definition to Judge Pan's list that, at least in the past, has been the position of the U.S. Department of Justice. Its Criminal Resource Manual stated, "The word 'corruptly' simply means 'with a bad or evil purpose.' It is also frequently defined to mean the same thing as 'willfully,' and thus to connote 'specific intent.'"<sup>[4]</sup>

The Criminal Resource Manual is no longer current, and the reorganized Justice Manual does not define "corruptly," but one can hear echoes of "bad ... purpose" and "specific intent" in the government's *Fischer* position that a corrupt purpose suffices.

The Criminal Resource Manual interpretation arguably reduces "corruptly" from a heightened mens rea requirement to a synonym for a mens rea of specific intent — a reading that fails to give distinct meaning to the term "corruptly," and risks criminalizing innocent conduct.

To explain, statutes requiring a corrupt mens rea for conviction often cover conduct that can be undertaken intentionally, but innocently. One example, explored in the D.C. Circuit's 1990 decision *U.S. v. North*,<sup>[5]</sup> and elsewhere, is that a lobbyist might intentionally attempt to influence an official proceeding in any number of entirely proper ways, such as by submitting a white paper to congressional committee staff.

Without the requirement that the lobbyist act corruptly — not just with specific intent to influence the proceeding — Section 1512(c)(2) could render such standard advocacy criminal.

U.S. Circuit Judge Laurence Silberman put it well when writing separately in *North*, which dealt with a similar statutory provision: "[I]t simply makes no sense to construe ['corruptly'] to mean only that one must do it with the intent to obstruct the inquiry or proceeding. ... If attempting to influence a congressional committee by itself is a crime, we might as well convert all of Washington's office buildings into prisons."

Thus, to separate innocent intentional conduct from criminal intentional conduct, "corruptly" must require something more than specific intent.

When Judges Pan and Walker reversed the district court's dismissal of the Jan. 6 defendants' Section 1512(c)(2) indictments in *Fischer*, their analysis turned principally on other elements of the statute.

Judge Pan reasoned that, under any potential definition of "corruptly," the defendants'

alleged behavior — undertaking the independently unlawful action of assaulting law enforcement officers during the riot while intending to confer upon their preferred candidate the benefit of winning an election — was corrupt.[6]

Judge Walker concluded that "'corruptly' ... requires a defendant to act 'with an intent to procure an unlawful benefit either for himself or for some other person.'"

A pending case before the D.C. Circuit, *U.S. v. Robertson*, [7] also tees up the issue. At oral argument, Judge Pan and U.S. Circuit Judge Cornelia Pillard expressed skepticism that the definition should include any requirement of an intent to procure a benefit for oneself or another.

But they also seemed open to the possibility of resolving the case on the narrow ground that using an independently unlawful means suffices for acting corruptly, even if the element can be satisfied in other ways.

Fischer and Robertson are not likely to be the last word on the subject. One of the Fischer defendants filed a petition for certiorari presenting the question of the definition of "corruptly" in Section 1512(c)(2).[8] And with that statute promising to play a central role in the federal prosecution of Trump, the U.S. Supreme Court may face multiple opportunities to address the issue.

The ultimate resolution of the issue is very likely to pose certain risks and opportunities for white collar defense attorneys whose clients are charged under one of the many federal statutes requiring a corrupt mens rea.

In particular, any circuit or Supreme Court-level adoption of Judge Walker's narrower rule might yield fruitful arguments for defendants.

To be sure, even Judge Walker's requirement of an intent to procure a benefit is not the narrowest possible construction of that word — Judge Walker's and Judge Pan's opinions appeared to agree that such a requirement could be satisfied by an intent as "diffuse" as wishing to secure the presidency for a favored candidate.[9]

Still, there are situations in which the "benefit" definition might not neatly apply. A bank employee who hides evidence of losses from a regulator might act out of a desire to protect her employer from embarrassment, not out of a desire to obtain any affirmative benefit for the employer.[10]

And a businessperson might bribe a lender to withhold a loan from a rival not out of a desire to obtain any competitive benefit, but simply out of spite.[11]

Have these individuals acted with an intent to procure an unlawful benefit either for themselves or for some other person?

White collar defendants may still benefit even under the adoption of the government's broader definition — i.e., "corruptly" is satisfied either by acting in an independently unlawful manner or by acting with a corrupt purpose.

A defense argument designed to force prosecutors into clarifying the seemingly broad concept of corrupt purpose might put the government in the position of having to argue for an unreasonably expansive definition — perhaps by resorting to vague definitions like "immoral" — or offering a narrowing construction that does not as neatly apply to the

conduct charged.

At oral argument in *Robertson*, government counsel offered several ways of satisfying the government's proposed "corrupt purpose" definition, including using deceit or dishonesty, seeking to obtain an unlawful advantage or benefit, or seeking to violate a legal duty.

Again, it is not hard to imagine the means by which an individual may commit the acts underlying one of the corruption crimes — offering a gift to influence a loan decision, for instance — without engaging in any deceit, violating any independent legal duty or seeking to obtain an unlawful benefit.

Government refusal to offer narrowing constructions might expose the corrupt mens rea to a constitutional vagueness challenge.[12]

Of course, it is also possible that courts will define "corruptly" in ways that vary between Section 1512(c)(2) and other statutes, thereby making the Jan. 6 cases less meaningful for white collar attorneys.

Still, lawyers defending against prosecutions under statutes with a corruption mens rea should keep a close eye on these cases and recognize that, however they play out, the emerging case law around the use of "corruptly" is likely to provide useful lessons.

---

*Ben Jernigan is an associate at Zuckerman Spaeder LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] *United States v. Donald J. Trump*, No. 23-cr-00257, D.D.C. Aug.1, 2023.

[2] *United States v. Ring*, 628 F. Supp. 2d 195, 204, D.D.C. 2009.

[3] *U.S. v. Fischer*, 64 F.4th 329, 341.

[4] DOJ Criminal Resource Manual § 2044.

[5] *United States v. North*, 910 F.2d, 882, D.C. Circuit 1990 (per curiam).

[6] *Fischer*, 64 F.4th at 340 (opinion of Pan, J.).

[7] *United States v. Robertson*, No. 22-3062, D.C. Circuit.

[8] *Miller v. United States*, No. 23-94, S. Ct. Jul. 28, 2023.

[9] *Fischer*, 64 F.4th at 381, (Katsas, J. dissenting); *id.* at 340 (opinion of Pan, J.); *id.* at 361 (Walker, J., concurring in part and concurring in the judgment).

[10] See 18 U.S.C. § 1517.

[11] See 18 U.S.C. § 215(a).