HAVE ETHAN NORDEAN'S HOPES BEEN SEMI-COLON'ED BY DABNEY FRIEDRICH'S [CHAPTER AND] VERSE?

Back in June, I noted that Ethan Nordean's lawyers were staking his defense on getting all the crimes charged against him thrown out — from the obstruction charge applied in an unprecedented manner, to the civil disorder tainted by its racist past, all the way to trespassing.

> The biggest advantages that Ethan Nordean and the other men charged in the Proud Boys Leadership conspiracy have are a judge, Tim Kelly, who is very sympathetic to the fact that they're being held in jail as the government fleshes out the case against them, and the 450 other January 6 defendants who have been charged with one or another of the same charges the Proud Boys were charged with. The biggest disadvantages are that, as time passes, the government's case gets stronger and stronger and the fact that seditious conspiracy or insurrection charges not only remain a real possibility, but are arguably are a better fit than what they got charged with.
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> That's why it baffles me that, minutes after Judge Kelly noted that every time Nordean files a new motion, Nordean himself tolls the Speedy Trial clock, Nordean's lawyer, Nick Smith, filed a motion to dismiss the entirety of the indictment against Nordean.
>
> [snip]

> [T]actically, trying to throw out every single crime, up to and including his trespassing charge, charged against one of the key leaders of a terrorist attack that put our very system of government at risk trades away the two biggest advantages Nordean has on legal challenges that won't eliminate the prosecution against Nordean.
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> [snip]
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> [I]f any of these challenges brought by others succeed, then *at that point*, Nordean could point to the appellate decision and get his charges dropped along with hundreds of other people. But launching the challenge now, and in an omnibus motion claiming that poor Ethan didn't know he was trespassing, is apt to get the whole package treated with less seriousness. Meanwhile, Nordean will be extending his own pre-trial detention. The government will be given more time to try to flip other members of a famously back-stabbing group, possibly up to and including Nordean's co-conspirators (whose pre-trial detention Nordean will also be extending). And Judge Kelly will be left wondering why Nordean keeps undermining Kelly's stated intent to limit how much the government can draw this out.

As I noted, on Friday Dabney Friedrich became the first DC District judge to uphold the obstruction application. The decision comes as — predictably — DOJ seems to be closing in on a much more substantive description of the Proud Boy-led plan to assault Congress. All the while, Nordean has been sitting in SeaTac jail, and even got thrown into SHU (solitary) last week for as yet undisclosed reasons.

To be clear: Friedrich's is in no way the last word. Judges Randolph Moss, Amit Mehta, and the judge presiding over Nordean's case, Tim Kelly,

are all due to rule on the issue as well, with a number of the other judges facing such challenges as well. I'd be surprised if all the judges ruled for DOJ.

And because these judges are likely to rule differently, as all the parallel challenges have been briefed, some of the lawyers in the key cases have kept the judges apprised of what was going on in other challenges. For example, *after getting leave first*, the government submitted filings they made in Nordean and Guy Reffitt's challenges to obstruction in the Brady Knowlton docket. Defendants have occasionally used that opportunity to respond.

Yesterday, without first asking for leave to file it, Nordean submitted what was billed as a "notice of new authority" in the case, but which was, in fact, a 23-page point by point rebuttal of and which didn't actually include Friedrich's opinion. As part of that, purportedly to take issue with the grammatical claims that Judge Friedrich made but actually in an effort to attack an example Friedrich used rather than the law itself, Nordean lawyers David and Nick Smith use an Emily Dickinson poem to — they claim — make a point about line breaks and semicolons.

> And the Court did not explain how a semicolon and line break somehow altered the meaning of (c)(2)'s "otherwise" phrase which, as the Court correctly noted, "links" it to the meaning of (c)(1). As Nordean has previously explained, the question of meaning involves grammar, not page format. Subsection (c)(2) is a clause dependent on (c)(1) for its meaning because the predicate "or otherwise obstructs, influences, or impedes any official proceeding, or attempts to. . . ." is not a complete sentence.
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> [snip]
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> As the Court will see, each of the provisions in the case relied on by the

> Sandlin Court is a complete sentence, unlike subsections (c)(1) and (c)(2) of § 1512. Thus, they are grammatically independent in a way that (c)(1) and (c)(2) are not. The same grammatical point distinguishes Justice Scalia's finding in United States v. Aguilar, on which the Sandlin Court relies, that the *ejusdem generis* canon did not apply to § 1503's "omnibus clause." 515 U.S. at 615-16 (finding that the omnibus clause is "independent" of the rest of § 1503 in a grammatical sense: it stands alone as a complete sentence).
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> Contrary to the Sandlin Court's understanding, line breaks and semicolons do not necessarily alter the meaning of the clauses that follow in a sentence. One simple example would seem to suffice:
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>> The reticent volcano keeps
>> His never slumbering plan;
>> Confided are his projects pink
>> To no precarious man.
>
> In the sentence above, the line break between "The reticent volcano keeps/His never slumbering plan" does not indicate that the second line's meaning is "independent" of the first line's. To the contrary, the phrase containing the pronoun "his" cannot be understood without reference to its antecedent in the first line. Similarly, the same pronoun following the semicolon cannot be understood without reference to the first line. Just so with (c)(2)'s "; or otherwise obstructs . . ." We are concerned with meaning, not the surface of the page.

This is poetry!! It is fairly insane to liken poetry, much of the power of which stems from breaking the rules of grammar and which often strives to obscure meaning, to US Code, which

aspires to use grammar in ways that clarify meaning.

There's one more problem, too.

There's some dispute, because there is no final manuscript for this poem, about whether Dickinson used a semicolon or a dash after "slumbering plan." And Dickinson's dashes — literary experts say with all the certitude that drove me from literary academics — put great stake in the ambiguity introduced by such punctuation.

> "The dash is an invitation to the reader to make meaning," Dr. Smith said. "It can also be a leap of faith."

Moreover, these were handwritten works, and so dashes would not even be regular lines. The variation in such lines has been interpreted with various meanings as an immediate expression of Dickinson's intent. [Note: I owe this observation to several people on Twitter but have lost those Tweets; h/t to them]

That is, Dickinson's poem is not so much an apt comment on Friedrich's examples. Rather, it's an example of the uncertainty embodied by the artistic expression of another individual, almost the opposite of laws codified by Congress.

Bizarrely, the citation of Dickinson is among the parts of Smith's brief that Brady Knowlton's attorneys lifted and replicated in their own unsolicited notice and reply. Carmen Hernandez, who is Donovan Crowl's attorney, not only remembered to include Friedrich's opinion, but she didn't include the Dickinson poem.

There have been many aspects of my own literary training that I've used in my coverage of the January 6 investigation. Reading Emily Dickinson (about which I have no expertise) is not one I'd expect to need.

Update: In a hearing today, Judge Kelly joined Friedrich in rejecting the challenge to the

obstruction application.