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BEFORE THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	Case Number 21-cr-32
Plaintiff,	.	
	.	
vs.	.	
	.	Washington, D.C.
GUY WESLEY REFFITT,	.	August 1, 2022
	.	10:08 a.m.
Defendant.	.	
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TRANSCRIPT OF SENTENCING HEARING  
BEFORE THE HONORABLE DABNEY L. FRIEDRICH  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States:	JEFFREY NESTLER, AUSA
	RISA BERKOWER, AUSA
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	U.S. Courthouse, Room 4704-B
	Washington, D.C. 20001
	202-354-3284

Proceedings recorded by stenotype shorthand.  
Transcript produced by computer-aided transcription.

1 P R O C E E D I N G S

2 COURTROOM DEPUTY: Your Honor, we are in Criminal  
3 Action 21-32, the United States of America versus Guy Reffitt.

4 If I can have the parties approach the podium and state  
5 your name for the record, starting with the United States.

6 MR. NESTLER: Good morning, Your Honor. Jeff Nestler  
7 on behalf of the United States.

8 THE COURT: Good morning, Mr. Nestler.

9 MR. NESTLER: And I'm with AUSA Risa Berkower as well.

10 THE COURT: All right. Good morning.

11 MR. BRODEN: Good morning, Your Honor. Clinton Broden  
12 for Mr. Reffitt.

13 THE COURT: Good morning, Mr. Brody. Welcome to the  
14 case.

15 MR. BRODEN: It's Broden, Your Honor.

16 THE COURT: Broden. And Mr. Reffitt.

17 MR. BRODEN: I was going to say, ask your husband. We  
18 used to hang back in the day in Texas.

19 THE COURT: All right.

20 COURTROOM DEPUTY: Excuse me. We also have Crystal  
21 Lustig from Probation.

22 THE COURT: Yes. Thank you, Ms. Lustig.

23 All right. So with respect to masks, anyone who has been  
24 vaccinated and is speaking, feel free to take your mask off.

25 So we are here for sentencing. I've reviewed the final

1 presentence report and recommendation. I've also read the  
2 parties' sentencing memoranda and exhibits, including all of the  
3 letters submitted on behalf of Mr. Reffitt. I've also reviewed  
4 all of the exhibits, including the videos contained in the  
5 government's Dropbox.

6 Are there any other exhibits that I should have reviewed or  
7 mentioned here? Mr. Nestler?

8 MR. NESTLER: Not from the government, Your Honor.

9 THE COURT: All right. Mr. Broden?

10 MR. BRODEN: Your Honor, depending on sort of how  
11 today plays out, we have a couple of videos we may play for the  
12 Court.

13 THE COURT: All right. What do these relate to?

14 MR. BRODEN: They relate to the timing of different  
15 events prior to Mr. Reffitt appearing on the Capitol steps.

16 THE COURT: All right. Have you provided these to the  
17 government?

18 MR. BRODEN: This morning, yes, Your Honor.

19 THE COURT: All right. Mr. Nestler, have you had a  
20 chance to take a look at them?

21 MR. NESTLER: Yes, very briefly.

22 THE COURT: All right. Are you prepared to proceed,  
23 or would you like more time?

24 MR. NESTLER: We're prepared.

25 THE COURT: Okay. So Mr. Broden, you're going to wait

1 and see how things shake out? You're not definitely playing  
2 those?

3 MR. BRODEN: Probably.

4 THE COURT: All right. Mr. Nestler, are there any  
5 victims who seek to be heard today?

6 MR. NESTLER: Yes, Your Honor.

7 THE COURT: And who would that be?

8 MR. NESTLER: Jackson Reffitt submitted a letter,  
9 which will be read by Ms. Berkower, and former Police Officer  
10 Shauni Kerkhoff is here to deliver her victim impact statement  
11 in person.

12 THE COURT: Okay. And you've provided the letter to  
13 the defense?

14 MR. NESTLER: We have not. We just received the  
15 letter. It's short, but Ms. Berkower is going to read it on  
16 Mr. Reffitt's behalf.

17 THE COURT: Okay. Mr. Broden, do you want a few  
18 minutes to see that now?

19 MR. BRODEN: Yes, Your Honor. And we have another  
20 victim. Peyton Reffitt would like to address the Court.

21 THE COURT: Okay. In what format are you suggesting  
22 that these victims address the Court? By witness testimony or  
23 just want to speak at the podium?

24 MR. NESTLER: Ms. Kerkhoff would like to speak at the  
25 podium.

1 THE COURT: Okay.

2 MR. BRODEN: The same, Your Honor.

3 THE COURT: Mr. Nestler, do you have a copy for me?

4 MR. NESTLER: Yes, Your Honor.

5 THE COURT: To the extent either of you have any paper  
6 that reflect what the officer or Ms. Reffitt will say, please  
7 provide that now. I understand you may not.

8 MR. NESTLER: For Ms. Kerkhoff, we do not have a copy  
9 of her statement. She intends to address the Court.

10 THE COURT: Okay. And this is the officer who  
11 testified?

12 MR. NESTLER: Yes, Your Honor.

13 THE COURT: Okay. Do you have a copy of Jackson  
14 Reffitt's statement?

15 MR. NESTLER: Yes, Your Honor.

16 THE COURT: And Mr. Broden, is it fair to assume  
17 Ms. Reffitt doesn't have a written statement?

18 MR. BRODEN: It is, Your Honor.

19 THE COURT: All right. Mr. Broden, you have this?

20 MR. BRODEN: I do, Your Honor.

21 THE COURT: Are you prepared to proceed?

22 MR. BRODEN: I am.

23 THE COURT: All right. Both parties have submitted  
24 objections to the probation officer's presentence report. And  
25 both parties, I assume, have received the recommendation of the

1 probation officer? Mr. Nestler?

2 MR. NESTLER: Yes, Your Honor.

3 THE COURT: Mr. Broden?

4 MR. BRODEN: We have, Your Honor.

5 THE COURT: All right. Mr. Reffitt, have you had a  
6 chance to review the presentence report?

7 THE DEFENDANT: Yes, Your Honor, I have.

8 THE COURT: And have you had adequate time to talk to  
9 your attorney about it?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: All right. Have you had a chance to  
12 correct any errors in the report?

13 THE DEFENDANT: Previously, with the previous  
14 attorney, we didn't correct a few things. The January 19th date  
15 in the presentencing report isn't correct. I was arrested on  
16 the 16th of January. So there's a few anomalies.

17 THE COURT: Okay. But your attorney is going to raise  
18 those here?

19 MR. BRODEN: Your Honor, to the extent there are  
20 misdates or something that don't affect the guidelines, I don't  
21 intend to raise those.

22 THE COURT: Okay. Well, I prefer to get the facts  
23 correct in the PSR. So even if they're not going to affect my  
24 calculations, this report will follow Mr. Reffitt. So I do want  
25 you to take a few minutes and consult with him on any additional

1 factual inaccuracies that need to be corrected in the report.  
2 In all likelihood, I'm going to direct the Probation Office to  
3 change some things in the report. So let's do it all.

4 MR. BRODEN: I will do that, Your Honor.

5 THE COURT: But I will give you a few moments to do  
6 that in just a second.

7 Mr. Reffitt, have you also had enough time to talk to your  
8 attorney about the other filings in this case by the government?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Are you sure?

11 THE DEFENDANT: What do you mean by "filings"?

12 MR. BRODEN: The sentencing memoranda.

13 THE COURT: The sentencing memoranda, and then there  
14 were a number of exhibits attached to the government's  
15 sentencing memoranda. Have you had a chance to review those and  
16 talk to your attorneys about those?

17 THE DEFENDANT: Yes, Your Honor, I have.

18 THE COURT: All right. Mr. Broden, have you had  
19 enough time to discuss the PSR with Mr. Reffitt?

20 MR. BRODEN: I have, Your Honor.

21 THE COURT: All right. So Mr. Broden, let's take just  
22 a few minutes. I'm not going to leave the bench unless  
23 Mr. Reffitt thinks this will take a while.

24 MR. BRODEN: I think we're good with you staying, Your  
25 Honor.

1 THE COURT: All right. Take a few minutes, and let me  
2 know when you're ready to proceed.

3 (Discussion off the record.)

4 MR. BRODEN: I think we're good. There was just the  
5 one date, Your Honor.

6 THE COURT: So let's start with the alleged factual  
7 inaccuracies. Mr. Broden, if you could just briefly run through  
8 the additional ones that Mr. Reffitt has mentioned to you this  
9 morning.

10 MR. BRODEN: Your Honor, the only thing is on page 2,  
11 Mr. Reffitt states that he was arrested on January 16 in the  
12 Eastern District of Texas, not January 19.

13 THE COURT: And that's the only additional  
14 inaccuracies other than the ones that you've already noted in  
15 your memorandum?

16 MR. BRODEN: Correct.

17 THE COURT: Okay. Mr. Nestler, do you agree?

18 MR. NESTLER: Yes, Your Honor, we agree.

19 PROBATION OFFICER: I was just going to note that the  
20 arrest warrant received from the -- from Texas and the docket  
21 reflect January 19. That's why that was in the presentence  
22 report.

23 THE COURT: Okay. But there's no dispute -- what's  
24 the accurate date?

25 MR. NESTLER: January 16.



1 THE COURT: So there was an error in the arrest  
2 warrant?

3 MR. NESTLER: Mr. Reffitt was initially arrested on a  
4 misdemeanor complaint, and then there was a superseding  
5 complaint filed late that day on the 16th. He was formally  
6 arrested on that superseding complaint on the 19th. But he was  
7 taken into custody in connection with this event on January 16,  
8 and we agree January 16 is the appropriate date.

9 THE COURT: Okay. All right. So Ms. Lustig, I will  
10 direct you to make that change to the PSR.

11 And if you all can please make an effort to speak into the  
12 microphones, because the court reporter is having trouble when  
13 you just stand up and speak directly to me. So if you want to  
14 come to the podium, that's fine. If not, speak in the  
15 microphone. At some point I am going to bring you up to the  
16 podium, but right now going through these factual issues, I  
17 don't think it's necessary.

18 All right. Before I address each of the defendant's  
19 alleged factual inaccuracies, Mr. Nestler, let me just ask you,  
20 do you agree with any of the inaccuracies the defense has raised  
21 with respect to the PSR?

22 MR. NESTLER: No, Your Honor.

23 THE COURT: Okay. All right. So first, the defense  
24 objects to the claim in paragraph 20 that Mr. Reffitt recruited  
25 Rocky Hardie to join him on the trip to Washington, D.C.

1 I tend to disagree. I think it's fair to say that  
2 Mr. Reffitt attempted to recruit others to join him in D.C. by  
3 sending a message to the members of the Texas Three Percenters.  
4 It's true that the evidence at trial showed that Mr. Hardie was  
5 already thinking about going to D.C., but "recruiting" is  
6 defined as the action or the process of recruiting or enlisting  
7 people, often for a job or a cause. Here, in the message,  
8 Mr. Reffitt stated, among other things, "Stand and be counted."

9 I think it's appropriate, considering the context of the  
10 message, to say that he recruited, attempted to recruit others  
11 to travel with him to D.C. So Mr. Broden, I'm not making a  
12 change to the word "recruited."

13 The defense also objects to the claim in paragraph 22 that  
14 Mr. Reffitt instructed the crowd how to move forward to ascend  
15 the staircase and overwhelm police officers.

16 I do agree that by waving his arms he was, in effect,  
17 instructing the crowd to move forward, but I do agree with the  
18 defense that his waving of his arm did not provide any  
19 instructions to the crowd about how to move forward or how to  
20 overwhelm the police officers.

21 Mr. Nestler, I will give you a chance to convince me I'm  
22 wrong, but I do think that that's an overstatement to say that  
23 he instructed the crowd. For much of the tape, we don't know  
24 what he was saying, but there's no evidence that he gave any  
25 specific instructions to the crowd. He was simply waving and

1 gesturing for the crowd to move forward. I think that's an  
2 overstatement to characterize it the way the probation report --  
3 PSR does.

4 Do you agree?

5 MR. NESTLER: In half, Your Honor. We believe that  
6 the defendant instructed by showing the other rioters the way  
7 forward, and one of the definitions of "instruct" is to teach or  
8 to train.

9 But Your Honor's point is well-taken. If the language is  
10 changed to "showed" or "demonstrated," that would certainly get  
11 the point across that he was showing the rioters --

12 THE COURT: Well, what I think is correct to say is  
13 that he waved the crowd forward, but it's not correct to say  
14 that he instructed the crowd how to do so. So it should read  
15 that he waved the crowd forward, and I don't think he modeled  
16 anything that the crowd did behind him. He stood on a step, and  
17 he took a bunch of, you know, rubber bullets and ultimately  
18 pepper spray, and he would slowly step up another step. I don't  
19 think he modeled anything that followed him.

20 Agreed?

21 MR. NESTLER: The evidence at trial showed that he  
22 also used his megaphone to address the people below and above.

23 THE COURT: And what did the evidence at trial say he  
24 said in the megaphone?

25 MR. NESTLER: It was not specific. It was generally

1 go forward.

2 THE COURT: Go forward, right. So he -- I think it's  
3 fair to say he waved his crowd forward and he encouraged the  
4 crowd to go forward. That's fair, but --

5 MR. NESTLER: Yes, Your Honor.

6 THE COURT: -- anything more than that to me misstates  
7 the evidence.

8 Mr. Broden, anything you would like to say?

9 MR. BRODEN: No, as long as it's limited to the  
10 waving. And you all are more familiar with the trial record  
11 than I did. I didn't see anything in the trial record that he  
12 gave any instructions in the bullhorn to move forward.

13 THE COURT: I think -- I'm not going to recall the  
14 specific words, but I think that there was some testimony -- or  
15 video evidence, rather, about go, go forward, something --

16 MR. BRODEN: Certainly with the --

17 THE COURT: I think it's a distinction without a  
18 difference. I agree with you he waved the crowd forward, he  
19 communicated go forward, but beyond that, he did nothing else.  
20 So I will direct the probation officer to make that change.

21 The defense also objects to the claim in paragraph 23 that  
22 Mr. Reffitt charged at the officers.

23 Again, Mr. Nestler, I'm inclined to agree with the defense.  
24 Although Mr. Reffitt moved up the stairs toward the officers, he  
25 did not charge them. "Charge" in this context is generally

1 defined as rushing forward as if an assault. Mr. Reffitt wasn't  
2 rushing forward. He slowly advanced up the stairs as the  
3 officers shot him with rubber bullets and pepper spray. But I  
4 don't think he rushed at the officers.

5 Do you disagree?

6 MR. NESTLER: We believe the evidence could show that  
7 he did rush forward in or as if in an assault, which is one of  
8 the definitions, that he was trying to get to the officers. So  
9 he was going towards the officers.

10 THE COURT: He was going toward the officers, but what  
11 evidence of rushing did you produce at trial?

12 MR. NESTLER: Well, his continuous movement forward,  
13 we believe, would constitute rushing.

14 THE COURT: Again, I think it's fair to say he moved  
15 toward the officers, but not charged.

16 MR. NESTLER: Yes, Your Honor.

17 THE COURT: All right. The defense also objects to  
18 paragraphs 24 and 29 of the PSR stating that Mr. Reffitt  
19 directed the deletion of messages regarding his plans and  
20 intentions while in D.C. on January 6, including being armed at  
21 the Capitol.

22 Again, I'm going to instruct the probation officer to state  
23 the facts of Mr. Reffitt's instructions and not to characterize  
24 them. As I read the texts, I didn't find Mr. Reffitt to be so  
25 specific. He simply directs recipients to delete all chats

1 immediately. Yes, contained in those chats are chats, I'm sure,  
2 related to the January 6 trip, but there was no specific  
3 direction about what to delete. He said delete all chats.

4 Correct, Mr. Nestler?

5 MR. NESTLER: That's correct, and in those chats, the  
6 defendant had been communicating with Mr. Teer about being armed  
7 on January 6.

8 THE COURT: Fine, but I think that there's a lot of  
9 characterization going on. You can argue all this, and I don't  
10 disagree with you. But the way the PSR reads, he directed the  
11 members of the -- this is the Texas Three Percenters to delete  
12 all chats, and this is on Telegram; is that right?

13 MR. NESTLER: Yes, Your Honor.

14 THE COURT: And were these chats encrypted?

15 MR. NESTLER: Yes, Your Honor. They're only available  
16 on the individuals' phones.

17 THE COURT: So I'm fine saying that he directed the  
18 Texas Three Percenters to delete all chats on the Telegram app.

19 MR. NESTLER: Yes, Your Honor.

20 THE COURT: Okay. All right. The defense also  
21 objects to paragraphs 26 and 52 of the PSR stating that  
22 Mr. Reffitt instructed Mr. Hardie on what to bring, including  
23 firearms.

24 Mr. Nestler, on this one, I've reviewed Hardie's testimony.  
25 He did not testify that he brought the firearm at Mr. Reffitt's

1 instruction. And in his pretrial interview, he specifically  
2 said he could not remember whose idea it was. The report can  
3 state that both Mr. Reffitt and Mr. Hardie brought firearms, but  
4 it should not say whose idea it was. The evidence isn't there  
5 one way or the other.

6 Do you agree?

7 MR. NESTLER: We believe it's a little more nuanced  
8 than that, Your Honor, in the sense that Mr. Reffitt had sent  
9 messages on Telegram to the whole group, including Mr. Hardie in  
10 advance of Mr. Hardie deciding to come, telling them that  
11 Mr. Reffitt would be driving so that he could bring firearms.

12 THE COURT: But did he instruct them to come and bring  
13 firearms, too?

14 MR. NESTLER: No. He said that that's what he would  
15 be doing.

16 THE COURT: Again, we're talking about what  
17 instructions he gave.

18 MR. NESTLER: Yes, Your Honor.

19 THE COURT: I don't think it's accurate to say he  
20 instructed Mr. Hardie on what to bring, including firearms. I  
21 think the report can state that both Reffitt and Hardie brought  
22 firearms and other gear, but no reference to instruction.

23 All right. I think these are all the factual objections,  
24 Mr. Broden?

25 MR. BRODEN: Your Honor, I was only going to say in

1 relation to that, we also objected to the idea that he recruited  
2 Mr. Hardie. I know you overruled that. But I think for the  
3 record, it was made in connection with that objection also.

4 THE COURT: That, too, but again, I think the  
5 word "recruited" can mean a lot of different things, and often,  
6 it means a larger scale effort to recruit for an army or  
7 something like that. But I do think that we're splitting hairs  
8 to say that that message wasn't an effort to recruit others to  
9 join him. I think it's -- in that context, I think it's  
10 factually accurate.

11 And I appreciate where you're coming from in terms of  
12 whether this warrants a role adjustment, and we will get there.  
13 But just in terms of the word itself, I think it's an accurate  
14 statement.

15 MR. BRODEN: And then to answer your question  
16 directly, that does contain all the factual objections we've  
17 made.

18 THE COURT: All right. So moving on to the legal  
19 objections, the defense raises several. First, the defense  
20 objects to the three-level and the eight-level enhancements  
21 under Section 2J1.1(b) of the guidelines because the defense  
22 argues that the official proceeding is not related to the  
23 administration of justice.

24 The defense also objects to the extensive in scope,  
25 planning, or preparation enhancement in 2J1.1(b) (3), and



1 finally, the defense objects to the two-level aggravating role  
2 adjustment.

3 The government, for its part, objects to the sequencing of  
4 guideline analysis for each count and the impact that that has,  
5 in the government's view, on the application of the obstruction  
6 of justice enhancement under Section 3C1.1.

7 The government also argues that the Court should depart  
8 upwards under several -- or two different -- several, rather,  
9 departure provisions, namely the terrorism exception and the  
10 weapons departure, as well as the 5K2.0 departure. I think the  
11 government makes an argument under that one as well.

12 So starting with the guidelines, the specific calculations  
13 and the legal objections, before we address each objection, let  
14 me just confirm, looking at the PSR -- let me get it in front of  
15 me. I want to confirm that the parties do agree with the  
16 general approach that Probation has taken on pages 9 through 12  
17 of the PSR. I want to confirm that with the exception of the  
18 objections I've just noted, the parties otherwise agree that,  
19 one, Probation has used the appropriate guidelines.

20 You agree, Mr. Nestler? Do you agree, Mr. Broden?

21 MR. NESTLER: Yes, we agree. Just one factual  
22 clarification, Your Honor. I think Your Honor said 2J1.1.  
23 They're all 2J1.2.

24 THE COURT: 2J1.2. I've made that mistake before.  
25 But yes, 2J1.2 is the guideline that Section 1512(c)(2)

1 references.

2 MR. NESTLER: Yes. And that's what the PSR says. I  
3 just heard Your Honor say 1.1.

4 THE COURT: You're correct. I did. Apologies for  
5 that.

6 MR. NESTLER: Thank you.

7 THE COURT: Yeah, 2J1.1 is contempt. That was a  
8 mistake. Okay.

9 MR. BRODEN: Your Honor, the only other thing I would  
10 add, it's not as clear in our objections as I would like them to  
11 be, but I know Mr. Nestler addressed it. With regard to the  
12 eight-level enhancement, there's also the question of whether he  
13 caused or threatened to cause physical -- whatever the term is,  
14 physical injury or property --

15 THE COURT: We'll get there. All right. So you  
16 agree, Mr. Broden, as well that Probation used the correct  
17 guidelines?

18 MR. BRODEN: I do.

19 THE COURT: 2J1.2 and the others?

20 MR. BRODEN: Correct.

21 THE COURT: Okay. The parties also agree that  
22 Probation has grouped the offenses appropriately. Again, with  
23 the exception of what the government has argued with respect to  
24 the application of the Section 3C1.1 obstruction enhancement,  
25 the government otherwise agrees with the grouping analysis;

1 correct, Mr. Nestler?

2 MR. NESTLER: Yes, Your Honor.

3 THE COURT: And same for you, Mr. Broden?

4 MR. BRODEN: We do, Your Honor.

5 THE COURT: And both of you agree that the driver of  
6 the sentence is the obstruction of justice offense and the  
7 corresponding Section 2J1.2 guideline?

8 MR. NESTLER: Yes, Your Honor.

9 MR. BRODEN: We do, Your Honor.

10 THE COURT: Okay. All right. So under Section 2J1.2,  
11 the parties agree that the base offense level is a 14. We're  
12 going to discuss in a moment whether the eight- and the three-  
13 level administration of justice-related enhancement should apply  
14 here. We'll also address whether the offense was extensive in  
15 scope, planning, or participation. And we will discuss whether  
16 Mr. Reffitt should be given an aggravated role enhancement as  
17 well as the obstruction of justice enhancement more than once.

18 So I'm correct that the parties are in agreement on the  
19 multiple-count adjustment in the PSR? The parties also agree on  
20 the acceptance of responsibility adjustment, that it does not  
21 apply here given that Mr. Reffitt went to trial and contested  
22 the government's factual proof?

23 Correct, Mr. Broden?

24 MR. BRODEN: That is correct, Your Honor.

25 THE COURT: All right. So on all of these issues,

1 I've independently calculated the guidelines, and I've consulted  
2 with the Sentencing Commission, and I too agree that Probation  
3 has accurately calculated the guideline issues that we've just  
4 discussed.

5 But let's start with the objections. Let's start with the  
6 administration of justice enhancement. Mr. Nestler, you agree  
7 the government bears the burden for the enhancements under  
8 2J1.2?

9 MR. NESTLER: Yes, Your Honor.

10 THE COURT: All right. And Mr. Broden, as I  
11 understand your arguments -- I understand you clarified. I  
12 wasn't appreciating that you were arguing that the eight-level  
13 enhancement shouldn't apply because I guess what you're arguing  
14 or going to argue is that Mr. Reffitt's words were not a threat.  
15 Is that right? Is that the additional argument you're making  
16 that wasn't clear to me in your papers?

17 MR. BRODEN: Well, certainly, the comments he made  
18 prior to arriving at the Capitol could be -- I don't think you  
19 could not characterize them as threats. How real of a threat  
20 they are are something different. But I don't think -- once he  
21 arrived at the Capitol, I don't think his actions threatened to  
22 cause whatever the proper term is, physical injury or property  
23 damage.

24 THE COURT: But what you're saying is the comments he  
25 made about Speaker Pelosi and Senator McConnell, dragging them

1 out -- I'm not going to be able to quote it exactly, but  
2 dragging them out by their heads and their heads bumping down  
3 every step?

4 MR. BRODEN: Those are threats.

5 THE COURT: Okay. And you do agree those are threats?

6 MR. BRODEN: I do.

7 THE COURT: So how does your argument on the other  
8 threats help Mr. Reffitt in terms of applying the eight-level  
9 enhancement?

10 MR. BRODEN: Well, I think the eight-level enhancement  
11 is for the, quote unquote, obstruction that happened at the  
12 Capitol. I don't think those threats -- I mean, had he  
13 threatened somebody a day before or two days before, granted,  
14 the temporal difference is a lot less, but I think we need to  
15 look at what happened --

16 THE COURT: The microphone.

17 MR. BRODEN: I'm sorry. I think we need to look at  
18 what happened at the Capitol.

19 THE COURT: Okay. Understood. But your arguments are  
20 going more to the 3C1.1 enhancement as opposed to the  
21 eight-level enhancement?

22 MR. BRODEN: Well, the eight-level -- the eight-level  
23 is if the offense involved causing or threatening to cause  
24 physical injury to a person, property damage.

25 And I don't think the offense, the offense being the

1 obstruction that happened going up the Capitol steps to  
2 allegedly stop the electoral count, I don't think that involved  
3 causing or threatening to cause physical injury to a person.

4 THE COURT: I want to make sure I'm tracking your  
5 argument.

6 MR. BRODEN: Sure.

7 THE COURT: You concede Mr. Reffitt made the threat  
8 about the speaker and Senator McConnell, and you agree that  
9 that's a threat that should count in calculating the guidelines  
10 under 2J1.2; correct?

11 MR. BRODEN: I agree that those are threats. I don't  
12 agree that they should --

13 THE COURT: Count for the eight-level enhancement?

14 MR. BRODEN: Correct.

15 THE COURT: Okay. But you don't contest that he made  
16 them or that they're sufficiently tied to the offense that I  
17 should consider whether they cause physical injury to a person  
18 or property damage -- or threaten that, rather, threaten to  
19 cause physical injury to a person or property damage? You're  
20 just saying that you don't think that threat was one to cause  
21 physical injury to a person or property damage?

22 MR. BRODEN: No, it's the sufficiently tied that I  
23 have a problem with. I agree he made the threats. I don't  
24 think it's sufficiently tied to the offense of trying to  
25 obstruct the counting of the electoral vote that allegedly took

1 place when he started up the stairway of the Capitol.

2 THE COURT: Okay. So you agree that it's a threat to  
3 cause physical injury to a person?

4 MR. BRODEN: Correct.

5 THE COURT: But you don't agree that the threat was  
6 made in order to obstruct the administration of justice; is that  
7 what you're saying?

8 MR. BRODEN: Correct.

9 THE COURT: And what is your argument about why the  
10 threat was made? Was it to dismantle the government as a whole?  
11 What is the argument there?

12 MR. BRODEN: The argument really is that it isn't tied  
13 to his actions at the Capitol. It's hyperbole. That's probably  
14 not the best phrase for it.

15 THE COURT: But the hyperbole argument is it's not  
16 really a threat, isn't it? I'm having a hard time not tying it  
17 to his actions at the Capitol. As you say, it was made  
18 temporally close to his actions at the Capitol. It seems like  
19 you're arguing that wasn't a genuine threat, it was bluster.

20 MR. BRODEN: Yes and no. I mean, we're sort of  
21 parsing now. I mean, it was a threat. Whether it was a real  
22 threat, who knows. But I don't think it is tied to the offense  
23 of the obstruction. I mean, he could have made that, you know,  
24 the day after the election. That doesn't tie it to the  
25 obstruction.

1 THE COURT: But you concede that he made it at the  
2 time he's at the Capitol?

3 MR. BRODEN: No. I concede he made it wherever they  
4 came from, The Ellipse --

5 THE COURT: But you think that temporally that's not  
6 close enough to tie it to his actions at the Capitol?

7 MR. BRODEN: Fair characterization, yes, Your Honor.

8 THE COURT: All right. So I thought you were saying  
9 there wasn't a temporal problem.

10 MR. BRODEN: No, I agree that it's certainly more  
11 temporally related than the examples I gave you, but I do not  
12 think it's temporally sufficient.

13 THE COURT: All right. I think I understand it. Are  
14 you or are you not arguing that the three-level and/or the  
15 eight-level enhancement, administration of justice related  
16 enhancements, overstate the seriousness of the offense?

17 MR. BRODEN: Well, we're -- there's a couple things.  
18 One is we're relating -- we're objecting under the whole  
19 administration of justice and whether it applies.

20 THE COURT: Right.

21 MR. BRODEN: Then to the extent we believe the  
22 ultimate guideline level, if you include those, would overstate  
23 the offense and would justify a variance.

24 THE COURT: And are you tying the overstatement of the  
25 offense to any particular portion of the guideline calculations



1 that the Probation Office has made?

2 MR. BRODEN: Honestly, I hadn't considered that  
3 question. I think it is fair to say that an eight-level  
4 enhancement encounters a lot of different type of behavior. So  
5 to that extent, if you're asking me to tie it to, you know, why  
6 I think we got so high and why a variance is in order, that's  
7 sort of the big one, the eight-level one.

8 THE COURT: All right. So you are making that as a  
9 part of your broader argument that the guideline range is too  
10 severe in this case?

11 MR. BRODEN: Right, the variance argument. I mean, if  
12 the Court agrees it applies, it applies eight levels. It  
13 doesn't give the Court an opportunity to apply less than eight  
14 levels. But I do think it would justify a variance downward.

15 THE COURT: Okay. All right. Before we move forward  
16 with the objection to the administration of justice argument  
17 here, Mr. Nestler -- and I'm going to start having you come on  
18 up because we're talking more. Come on up to the podium. And  
19 if you can just address what Mr. Broden has said regarding the  
20 threat. There are a couple of different layers to that  
21 argument. But I'm most interested right now not in the 3553(a)  
22 overstatement argument but, rather, this threat's too attenuated  
23 to what he did at the Capitol.

24 MR. NESTLER: Sure, Your Honor. So the answer is the  
25 threat is not too attenuated to when he entered the Capitol. At

1 the Ellipse, in the hour or so before he got to the Capitol, he  
2 tried to recruit other people to come with him. And we  
3 submitted the videos as exhibits at the trial. The defendant  
4 stood around almost proselytizing, having everybody stand around  
5 him in a semicircle where he told everybody this is what we're  
6 going to do, I'm armed, we're going to the Capitol, I'm going to  
7 go drag Nancy Pelosi and Speaker McConnell out of the Capitol,  
8 and we're going to do it violently. And that was the gist of  
9 what he was saying to everybody at the Ellipse immediately  
10 before he went to the Capitol and tried to do those exact  
11 things.

12 So we do believe that the threats that he uttered at the  
13 Ellipse were tied temporally to what he did at the Capitol. He  
14 made the same comments to Rocky Hardie in the car ride from  
15 Texas to D.C. We think that's also tied. And similar comments  
16 on the Telegram threats. But we don't even need to get to those  
17 because what he said at the Ellipse counts.

18 In addition to the actual threat that came out of his  
19 mouth, we do believe the defendant's conduct was also considered  
20 threatening. That is exactly what Chief Judge Howell found in  
21 the *Rubenacker* case when she did overrule the defendant's  
22 objection to this exact eight-level enhancement and found that  
23 the defendant's conduct in that case, pointing at officers,  
24 walking towards officers, was threatening conduct.

25 THE COURT: And the failure to respond to the

1 officers' commands to stand down?

2 MR. NESTLER: That's exactly right, Your Honor. And  
3 so we believe that also is threatening conduct. We also will  
4 point out, Your Honor, that the guideline is written broadly.  
5 It's the offense involved causing. So it's a very broad use of  
6 the word "involved," and we do believe that here the offense  
7 certainly involved causing or threatening to cause physical  
8 injury to a person.

9 And finally, we do believe that the offense also involved  
10 causing property damage. The defendant was directly responsible  
11 for the cutting down of the scaffolding near where he was both  
12 to protect him and to allow the other rioters to use that  
13 scaffolding to penetrate further up and go over the officers.

14 THE COURT: But that's -- I mean, this is tied into  
15 what he instructed the crowd to do behind him. His message to  
16 the crowd is come on. It's not destroy things as you come.

17 MR. NESTLER: Right. But this is not talking about  
18 how he directed the crowd. This enhancement here -- we can get  
19 to the 3C1.1 enhancement later, I understand. This is if the  
20 offense involved causing physical injury to a person or property  
21 damage.

22 THE COURT: So he doesn't have to be tied to it; it's  
23 just an automatic?

24 MR. NESTLER: He's tied to it, but he doesn't have to  
25 be the one to instruct other people to do it. He is benefiting

1 from it. Going back to the 1B1.3 and just talking about the  
2 conduct for which he is responsible for, he is responsible for  
3 the conduct that aided and abetted him. These other individuals  
4 were cutting down scaffolding and tarps in order to protect him  
5 from the less-than-lethal weapons that were coming his way. And  
6 so those people aided and abetted -- there was an  
7 aiding-and-abetting relationship there. And so even if he  
8 didn't direct them to do it, the offense did involve property  
9 damage.

10 THE COURT: You know, I'm understanding what you're  
11 saying about the failure to stand down and how that's  
12 threatening. It does seem to me that the guideline that says if  
13 the offense involved causing or threatening to cause physical  
14 injury to a person or property damage -- I mean, you're saying  
15 basically he implicitly had an agreement with the other rioters,  
16 and therefore, he's -- it's almost like relevant conduct  
17 analysis here. He's responsible for everything that was  
18 reasonably foreseeable.

19 And can we say as we sit here now -- looking back at it,  
20 it's obvious. But as we sit here now, can we say that, one,  
21 there was that sort of meeting of the minds and that it was  
22 reasonably foreseeable that all of the inaugural platform,  
23 et cetera, were going to be ripped down? You think so?

24 MR. NESTLER: I don't think we have to go to a level  
25 of what property damage was reasonably foreseeable. We believe

1 it's reasonably foreseeable that property damage would have  
2 occurred as a result of his offense. And so whether it was  
3 people damaging the stairs or damaging the windows or the doors  
4 of the Capitol or cutting down the scaffolding or ripping apart  
5 the scaffolding or the tarp, it's reasonably foreseeable, and it  
6 should have been to the defendant, that his offense involved  
7 causing property damage.

8 THE COURT: So the analysis that I do in terms of his  
9 state of mind for this guideline enhancement with respect to  
10 property damage, is it akin to what I do in terms of  
11 restitution? Is it the same kind of analysis? There's nearly  
12 \$3 million of property damage done, and he's on the hook for  
13 that?

14 MR. NESTLER: We believe he is on the hook for that,  
15 for all of that property damage. We believe that the damage to  
16 the Capitol --

17 THE COURT: You're not seeking --

18 MR. NESTLER: We're not seeking that, but we believe  
19 he is.

20 THE COURT: But you believe he should pay a portion  
21 like every other January 6 defendant; right? I'm not arguing  
22 with you now about the merits of that. I'm just wondering if  
23 it's the same -- if I agree with you on restitution, is it the  
24 same analysis with respect to this guideline provision? I don't  
25 know.

1 MR. NESTLER: We believe it is. It is reasonably  
2 foreseeable, and he does bear responsibility and culpability for  
3 the conduct of others that was reasonably foreseeable in  
4 committing his offense. Even though he didn't personally break  
5 a window or damage a door, we believe that he is culpable for  
6 that conduct under the guideline analysis.

7 THE COURT: Just to be clear, though, for the record,  
8 there is no evidence that he himself committed any property  
9 damage?

10 MR. NESTLER: That's correct.

11 THE COURT: Okay. All right. Anything else you want  
12 to add on that issue, Mr. Nestler?

13 MR. NESTLER: No. I assume we will talk about  
14 administration of justice and the definition of that separately.

15 THE COURT: Yes. Just a moment.

16 MR. NESTLER: Thank you.

17 THE COURT: Mr. Broden, let me bring you up. Before  
18 we get into the administration of justice, let me ask you about  
19 the property damage argument the government is making.

20 Obviously, there's no question that there was an  
21 extraordinary degree of property damage all around Mr. Reffitt.  
22 The way this guideline is structured, can I hold him responsible  
23 for that, because it was reasonably foreseeable -- as he ignored  
24 commands of the officers and advanced up the stairs, certainly,  
25 it's foreseeable people are going to follow him, and it's

1 also -- I'm asking, is it also foreseeable that some of the  
2 people who followed him were going to destroy the platform to  
3 the right of him as he advanced up the stairs?

4 MR. BRODEN: Well, to the extent we're sort of talking  
5 about relevant conduct, I think (a) (1) (A) would more likely  
6 apply. And the question is, did he counsel or command or induce  
7 and all those words to commit property damage, and I don't think  
8 there's any evidence of that.

9 THE COURT: Wait. Where are you directing me?

10 MR. BRODEN: 1B1.3(a) (1) (A).

11 THE COURT: Wait. You're in the guideline, or you're  
12 in the relevant conduct guidelines?

13 MR. BRODEN: The relevant conduct guideline.

14 THE COURT: So tell me where you are. 1B --

15 MR. BRODEN: 1.3(a) (1) (A). I don't know if you have  
16 the same book as me, but it's 23 if you do.

17 THE COURT: So all acts and omissions committed,  
18 aided, abetted, counseled, commanded, induced, procured, or  
19 willfully caused by the defendant. Because -- so the government  
20 is arguing more that this is (a) (1) (B), a jointly undertaken  
21 criminal activity, a scheme, if you will, all actions and  
22 omissions of others that were within the scope of the jointly  
23 undertaken criminal activity in furtherance of that criminal  
24 activity and reasonably foreseeable the defendant would be  
25 responsible for.

1           So is that the line that I have to -- or the issue I have  
2 to decide, whether this is jointly undertaken criminal activity  
3 or, you know, acts that he willfully caused acting alone?

4           MR. BRODEN: Right. And I think we're all sort of in  
5 uncharted waters, and this is not the usual drug case or bank  
6 robbery where it's easy to find those. But I don't think, in  
7 looking at the -- just looking at it overall and looking at the  
8 purposes of the guidelines, that this constitutes jointly  
9 undertaken criminal activity. I mean, he acted by himself.  
10 Now, there were thousands, if not hundreds of thousands of  
11 others who were committing the same -- some of the same, some  
12 different acts. But I think 1B1.3(a)(1)(A) is the better  
13 analysis.

14           THE COURT: Okay. In terms of jointly undertaken  
15 criminal activity, you would agree that he's on the hook for  
16 anything Rocky Hardie did, but as Rocky Hardie testified --

17           MR. BRODEN: Correct.

18           THE COURT: -- he testified that he thought all this  
19 was bluster and Mr. Reffitt's prone to gross exaggerations and  
20 he couldn't believe it when he walked from The Ellipse to the  
21 Capitol and saw people like spiders climbing up the Capitol.  
22 And my recollection is that he testified that he just watched it  
23 all and walked up and touched the outside of the Capitol  
24 building. But he had -- it seemed convincing to me that he had  
25 no intention of going in. To the extent Mr. Reffitt thought



1 they had a jointly undertaken -- you know, jointly undertaken  
2 criminal activity, he was not on board with that plan, he  
3 thought it was preposterous and not going to happen.

4 MR. BRODEN: Right. And that's more sort of the  
5 typical guideline analysis, that if they planned to rob a bank  
6 together he would be on the hook for what Mr. Hardie did.

7 THE COURT: So you agree he's on the hook for anything  
8 Hardie did, but he's not on the hook for everybody else?

9 MR. BRODEN: Anything that Hardie did that would have  
10 been foreseeable to him, yes.

11 THE COURT: And what about -- we will get there, but  
12 on the restitution analysis, is this the analysis I do, or do I  
13 look at that differently?

14 MR. BRODEN: Candidly, the government is only asking  
15 for \$2,000.

16 THE COURT: So I don't have to reach this issue?

17 MR. BRODEN: We have bigger fish to fry than \$2,000.

18 THE COURT: So you're not going to object to a \$2,000  
19 restitution payment?

20 MR. BRODEN: No, we did not object. It was more of a  
21 strategic decision in the sense that we had bigger fish to fry.

22 THE COURT: Okay. All right. So let me -- one  
23 moment. I'm making notes.

24 All right. You're arguing based on law of the case that I  
25 can't apply these administration of justice enhancements, and to

1 make that argument, you're relying on my opinion in *Sandlin* and  
2 the related rulings I've made in this case; right?

3 MR. BRODEN: Right. And of course, there was the -- I  
4 forget the -- I guess it was the *Montgomery* decision, but that  
5 wasn't from this Court. So I think it's a cleaner argument  
6 that, you know, we should have some --

7 THE COURT: So you like Judge Moss's analysis better  
8 than mine?

9 MR. BRODEN: Well, his wording in the motion to  
10 dismiss was a little cleaner --

11 THE COURT: Cleaner, okay.

12 MR. BRODEN: -- or more precise.

13 THE COURT: I thought I was pretty precise.

14 MR. BRODEN: Well, you were. It's just I like the  
15 wording that Congress was not engaged in the administration of  
16 justice, which Judge Moss put in an actual sentence, but you  
17 were pretty close.

18 THE COURT: Well, in effect, I think that's the point  
19 I was trying to make. Judge Howell, I think, in a recent case,  
20 applying these enhancements, did suggest that that defendant's  
21 actions, and I think it's the defendant Mr. Nestler just  
22 mentioned --

23 MR. BRODEN: He is cited in his -- obviously, if the  
24 Court was to adopt that, then I couldn't make this argument.

25 THE COURT: But there's tension between that analysis

1 and my ruling.

2 But here's the thing. There's no question, I did not  
3 decide this guideline issue in any of the opinions. This is a  
4 new issue. So I think your law of the case argument doesn't  
5 work here.

6 And the question for me is, 2J1.2 is in Part J of the  
7 guidelines that generally in its heading define the guideline as  
8 offenses involving the administration of justice. We all know  
9 that by and large the 1512(c)(2) prosecutions involve courts,  
10 grand juries, things that we think of as relating to the  
11 administration of justice. Nonetheless, the vast majority of  
12 judges on this court have held that that statute does apply to  
13 this context.

14 MR. BRODEN: With one notable exception.

15 THE COURT: With Judge Nichols's exception. The  
16 circuit will resolve that soon enough, and you've certainly  
17 preserved that argument for appeal.

18 But once I've decided that this crime can be prosecuted  
19 under that statute, the guidelines very clearly direct that  
20 statute to 2J1.2, which is entitled "Obstruction of Justice."  
21 And it's hard for me to conclude simply because the Sentencing  
22 Commission didn't anticipate and incorporate every definition in  
23 the statute in the shorthand, if you will, for these  
24 enhancements, that that means that the Commission intended to  
25 exclude this offense. Right?

1 I get the argument that I'm sure will be argued on appeal  
2 in this case, that I erred by allowing the government to bring  
3 this obstruction charge for the official congressional  
4 proceeding in this case, that that statute doesn't apply. But  
5 once I determine that statute applies, the back of the  
6 guidelines take me to this guideline.

7 And it seems like it would lead to unwarranted sentencing  
8 disparities to apply it, these enhancements, in only cases  
9 involving what we classically think of as administration of  
10 justice. It seems like the Commission would need to be clear  
11 that we are carving out this type of offense for me to draw the  
12 conclusion that this administration of justice language that's  
13 used as the title to Part J -- to me, it seems like shorthand  
14 for what's covered here -- somehow makes these adjustments not  
15 applicable in this context.

16 MR. BRODEN: Well, I guess the short answer to the  
17 Court's question is, you know, I think we agree that the  
18 Sentencing Commission didn't prepare or think of these type of  
19 offenses.

20 But then the question is, if it's not clear whether it  
21 applies or not, does that go to not applying the guideline or  
22 applying the guideline? And it seems to me under the rule of  
23 lenity that you would not apply the guidelines.

24 THE COURT: Even if I took the sort of plain language  
25 approach and did what you're suggesting, why wouldn't I, under

1 3553(a), enhance his sentence in a commensurate amount based on  
2 these enhancements? Why wouldn't I, by analogy, get to the same  
3 place under 3553(a)?

4 MR. BRODEN: Well, because the Court has a lot more  
5 discretion under 3553(a). We talked about it a little earlier.  
6 Would you apply an eight-level enhancement if you were doing it  
7 under 3553(a). You'd have a lot more discretion. Whereas, if  
8 you decide this guideline applies, you have no choice but to  
9 apply an eight-level enhancement.

10 THE COURT: But I also could say under 3553(a) that I  
11 think the guideline is too high.

12 MR. BRODEN: There's different ways to skin the cat.

13 THE COURT: I can get there either way. I'm just  
14 making the point that even if I were to buy your argument, which  
15 I am not, you can tell, on this, you still face the same problem  
16 under 3553(a). So you can still make the overstatement of the  
17 offense argument with the guideline applying, just like you  
18 would be arguing with me on why an eight-level enhancement  
19 shouldn't apply under 3553(a).

20 MR. BRODEN: You could make that argument for any  
21 objection. It kind of cuts into my job a little bit, but --

22 THE COURT: Well, I just don't see -- one, I don't  
23 think the law of the case applies, given that I was looking at  
24 an entirely different issue. I know that the wording is the  
25 same. I also think Part J generally refers to the

1 administration of justice, and I don't think that we can infer  
2 simply because the Commission didn't include the phrase  
3 "official proceeding of Congress" that it meant for that type of  
4 offense prosecuted under Section 1512(c)(2) to not be subject to  
5 the same aggravating factors that the Commission has delineated  
6 here. So I'm denying that.

7 Is there anything more you want to say about the  
8 government's argument with respect to the threat, the  
9 attenuation of the threat and -- I don't know that I need to  
10 reach the difficult issue regarding the property damage and how  
11 I look at that under the relevant conduct guidelines. I think  
12 that, in my view, the threat at the Ellipse is not too  
13 attenuated to his conduct immediately thereafter. And I also  
14 think his failure to stand down and follow the lawful commands  
15 of the officers was threatening to them. And I think we're  
16 going to hear from Officer Kerkhoff, when she gives her victim  
17 impact statement, about how that impacted her as she was  
18 defending the Capitol and everyone inside.

19 So I don't -- I hear your argument that, you know, maybe  
20 this is an overstatement given the plus 11 under the guideline.  
21 But I think the this is not a threat associated with the offense  
22 is not a compelling one.

23 MR. BRODEN: That's all I have, Judge.

24 THE COURT: Okay. All right. Before I end with this,  
25 you're also not disputing that clearly the three-level

1 enhancement certainly would apply, given my ruling on the  
2 administration of justice issue, because there's no question  
3 that this costs the government a lot to respond with law  
4 enforcement officers and the delay in the vote, keeping members  
5 of Congress there late into the night to finish their job?  
6 You're not arguing with that factual finding I have to make for  
7 the three-level adjustment to apply?

8 MR. BRODEN: I am not, Your Honor.

9 THE COURT: Okay. So let me keep you up there. The  
10 defense is also objecting to the extensive planning enhancement  
11 under 2J1.2(b)(3), which applies if the offense was extensive in  
12 scope, planning, or participation -- or preparation, sorry. The  
13 Court should increase the guideline by two levels.

14 I'll hear you out here, but the record reflects that  
15 Mr. Reffitt started planning this trip a couple weeks ahead of  
16 time. He assembled a lot of gear. It did take some extensive  
17 planning, I think.

18 MR. BRODEN: I guess that's where I -- it took some  
19 planning. But I think some planning --

20 THE COURT: The definition of "extensive planning"?

21 MR. BRODEN: Right. It wasn't spur of the moment for  
22 sure, but I don't think this qualifies for extensive planning.  
23 I haven't seen any cases that found the District Court erred in  
24 applying this case but -- that type of enhancement. But the  
25 same point, if you look at some of those cases, the planning

1 that's gone into them, even the case that the government cites  
2 in its sentencing memoranda, I think the planning is  
3 significantly more extensive.

4 THE COURT: So we found little case law on this,  
5 nothing in D.D.C. or the D.C. Circuit. There's some appellate  
6 case law affirming District Courts' imposition of the  
7 enhancement. It was upheld where a defendant had a plan to  
8 manufacture a false confession.

9 MR. BRODEN: I think that was the case the government  
10 cited.

11 THE COURT: That required multiple steps. That's the  
12 *Petruk* case. It was upheld where the defendant took photos of  
13 the victim's daughter and sent them to him from a fake e-mail  
14 account to disguise his actions. That's the *Bakhtiari* case. It  
15 was applied where a defendant prisoner got a semen sample from  
16 her boyfriend that she preserved and used to accuse a  
17 correctional officer three times of sexual assault -- that's the  
18 *Rodriguez* case -- and where the defendant allowed prisoners to  
19 avoid testing positive for controlled substances by giving them  
20 advanced notice of drug tests or giving them his urine, and the  
21 conduct was far from an isolated occurrence.

22 So there's not a lot right on point, but is it not the case  
23 that other judges have applied this in similar contexts?

24 MR. BRODEN: Well, first, when you talk about the  
25 appellate deals, that's always a danger looking at appellate



1 cases. All they say is the District Court didn't clearly error.  
2 Where the defendant wins, there's rarely an appeal. So we don't  
3 have the luxury of those cases.

4 But just listening to them, I mean, they took the same --  
5 at least with the semen sample and the urine testing at the BOP,  
6 I mean, that is extensive because it's happening and happening  
7 and it's happening on repeated occasions. This is essentially  
8 getting ready for a -- and I hate to minimize it, but getting  
9 ready for a trip.

10 THE COURT: Not a normal trip.

11 MR. BRODEN: And that's why I don't for a moment want  
12 to minimize it. But I don't think it is the extensive type of  
13 planning. Would the Court -- would the Court of Appeals decide  
14 the Court clearly erred in applying it? I don't think so, but I  
15 don't want to concede that point.

16 THE COURT: Are you aware of any case in this  
17 district, any of these January 6 cases, in which one of my  
18 colleagues has not applied the enhancement in similar  
19 circumstances?

20 MR. BRODEN: I don't, and the government can speak on  
21 this more than I do. I only represent one other defendant  
22 charged in this case, and I don't even believe that was a part  
23 of the plea offer, to apply that.

24 THE COURT: We certainly have that issue, what's the  
25 offers in these cases versus, in this case, the trial.

1 MR. BRODEN: I think the case the government cites in  
2 front of Judge Howell, I think that was probably the only case  
3 where there wasn't a plea agreement.

4 Am I wrong about that?

5 MR. NESTLER: To date, the *Rubenacker* case, as far as  
6 I'm aware, is the first case that went to sentencing without a  
7 plea agreement.

8 THE COURT: Okay. And this is the first sentencing  
9 post-trial; correct?

10 MR. NESTLER: Yes, Your Honor.

11 THE COURT: Okay. All right. Well, I hear you, and I  
12 think this is a close call.

13 MR. BRODEN: Close call goes to the runner, Your  
14 Honor.

15 THE COURT: Let me hear from Mr. Nestler. I'm  
16 curious. Do you have any evidence that Mr. Reffitt ordered  
17 items for this trip, or is this just gear he had in his closet?

18 MR. NESTLER: We're not aware of any specific orders  
19 he made in advance of this trip. We do know he made orders for  
20 additional items --

21 THE COURT: Afterwards.

22 MR. NESTLER: -- afterwards. We do believe that --  
23 and I think Your Honor cited a couple of cases about the  
24 extensive planning and preparation. We believe that applies  
25 here. He did drive more than halfway across the country with

1 another person, four guns in the car. He had all of his own  
2 bulletproof armor. Mr. Hardie had his bulletproof armor. They  
3 had radios. He had a helmet. He had a camera for his helmet.  
4 Of course, he brought his firearm with him to the Capitol.

5 This is not an issue -- so one of the issues we will get to  
6 later with allocution, some of the defendant's letters and the  
7 defendant's letter and the defendant's memo talked about how he  
8 was sort of encouraged by President Trump's speech at the rally  
9 to go to the Capitol.

10 And we believe the evidence shows, in fact, the complete  
11 opposite. The defendant intended to go to the Capitol from the  
12 time he was still in Texas. He always planned to go to the  
13 Capitol. That's what the evidence at trial showed. That's what  
14 his messages showed. So whereas somebody may have gone to The  
15 Ellipse and then decided to go with the crowd to the Capitol,  
16 Mr. Reffitt is certainly on the other end of that continuum. He  
17 was the one encouraging other people to go to the Capitol in  
18 order to overtake Congress.

19 THE COURT: All right. Has the government sought this  
20 enhancement in any other case?

21 MR. NESTLER: Not that I am aware of, Your Honor.

22 THE COURT: And in your view, is the nature of the  
23 planning Mr. Reffitt made in this case any different than the  
24 other cases in which defendants brought a lot of gear? What  
25 makes this different?

1 MR. NESTLER: Well, first of all, for many of the  
2 cases that have gone to sentencing, the defendants did not bring  
3 the amount of gear that Mr. Reffitt brought. He probably  
4 brought more gear than anybody else we have talked about who has  
5 gone to sentencing.

6 THE COURT: There was the guy who had a whole arsenal  
7 of weapons and explosives, and he never got on the Capitol  
8 property, or they didn't catch him on the Capitol property, but  
9 he had a ton of stuff. He wasn't, I guess, charged with the  
10 obstruction offense.

11 MR. NESTLER: Correct. So he wasn't charged with  
12 obstruction, correct.

13 THE COURT: But there were others who -- I've  
14 sentenced some as misdemeanors who had helmets and gear and  
15 ties. Other judges have sentenced those. He's not the first to  
16 come with a lot of gear.

17 MR. NESTLER: We believe he had more gear than almost  
18 anybody else who has been sentenced so far. So it's true, if  
19 some other individuals might have had a helmet or a plate  
20 carrier or a weapon that was not a gun -- this is the first  
21 defendant being sentenced who we understand in connection with  
22 January 6 had a firearm on Capitol grounds. So they may have  
23 had one of those things. Mr. Reffitt had all of those things,  
24 plus is responsible for Mr. Hardie's conduct.

25 And Ms. Berkower just corrected me. There are other plea

1 agreements where this enhancement is agreed to by both parties.  
2 I'm not sure any of those have gone to sentencing yet, but there  
3 are other defendants who have agreed to this particular --

4 THE COURT: In the plea agreement?

5 MR. NESTLER: In the plea agreement.

6 THE COURT: Based on gear that a defendant brought?  
7 Is that the driver?

8 MR. NESTLER: I can't speak to whether it's the gear  
9 in terms of the planning and preparation, which would go a lot  
10 towards the gear and what he was planning to do.

11 But we also here have the issue about extensive in scope.  
12 The defendant was trying to overtake Congress. He wanted to sit  
13 in Congress's chair and start a new Congress. It's hard to  
14 imagine an offense that was more extensive in scope than what  
15 the defendant was trying to accomplish here.

16 THE COURT: That's a true point.

17 At some point we're going to have to take a break for the  
18 court reporter. But I would ask the government, I would like,  
19 if you can get in the break, a list of those cases and any, you  
20 know, brief summary of those cases.

21 I'm just -- I'm interested because a refrain you're going  
22 to hear from me a lot today is certainly Mr. Reffitt should be  
23 sentenced more severely than similarly situated defendants who  
24 did not go to trial. I mean, he does not get acceptance of  
25 responsibility.

1           What concerns the Court, and we will get there in a moment  
2 when we talk about the departures that the government is  
3 seeking, is his decision to exercise his constitutional right to  
4 go to trial should not result in a dramatically different  
5 sentence and position by the government because he went to  
6 trial.

7           In other words, like the cases that have pled that involve  
8 assaults and involve weapons nearby -- I know he's the first one  
9 to have, at least that you've been able to prove, a weapon on  
10 him, but that is a concern because, you know -- again, I'm  
11 getting ahead of myself, but the government is asking for a  
12 sentence that's three times as long as any other defendant or  
13 defendant who did not assault an officer. And I know he said  
14 some outrageous things, some absurd things.

15           So this is why I'm asking on the extensive planning,  
16 because the fact that the government has sought this in similar  
17 circumstances makes me inclined to exercise discretion -- and I  
18 do think you've made a good point, Mr. Nestler. I wasn't  
19 focused so much on the extensive and scope of the offense, and I  
20 do think there's a lot in the record regarding what  
21 Mr. Reffitt's intentions -- stated intentions were. In all  
22 likelihood, Mr. Broden will argue here that this was in line  
23 with his, you know, long history of hyperbolic statements. But  
24 it is, as he claimed, hugely extensive in scope.

25           And I do think that there's enough evidence of planning and

1 preparation here in terms of organizing the trip, in terms of  
2 gathering together this wide range of sophisticated gear, not  
3 just firearms, but a helmet, bulletproof vest, flex cuffs,  
4 radios, and megaphones. There was a lot of thought and planning  
5 that went into this offense.

6 So I will under the guidelines give the enhancement, and  
7 I -- Mr. Broden has already telegraphed that this is probably a  
8 part of his argument under 3553(a), that the guidelines  
9 overstate the seriousness of the offense.

10 Am I clear about what I want? I just want the names of  
11 those cases and a brief description of what drove that  
12 enhancement in those cases.

13 MR. NESTLER: Yes, Your Honor.

14 THE COURT: And if you're able to give them to me  
15 before then through the law clerk, that would be helpful.

16 MR. NESTLER: Yes, Your Honor.

17 THE COURT: All right. So turning to the role  
18 adjustment under Section 3B1.1, again, the government does bear  
19 the burden in showing that this enhancement applies. The  
20 question for purposes of this adjustment is whether Mr. Reffitt  
21 was an organizer, leader, manager, or supervisor in the criminal  
22 activity. And in deciding whether the adjustment applies, the  
23 guidelines instruct courts to consider factors like the exercise  
24 of decisionmaking activity, the recruitment of accomplices, the  
25 degree of planning and organizing of the offense, and the degree

1 of control over others.

2 Mr. Nestler, I will hear from you first on this. For the  
3 same reasons that I've asked Probation to make some factual  
4 corrections to the PSR, I do have some concerns about applying  
5 the role enhancement here vis-a-vis Hardie.

6 I do think he encouraged others to come for sure. He did  
7 gather a bunch of gear. The record is equivocal in terms of  
8 whose idea it was to bring the guns and maybe the rest of the  
9 gear, too. We don't know. I don't recall the government  
10 producing evidence that Reffitt was the leader of all this. I  
11 can understand why the government assumes he was, but I'm  
12 looking for hard evidence that he was a leader. He certainly  
13 didn't control Hardie, who, again, testified convincingly he  
14 thought he was off his rocker and he was not going in the  
15 Capitol.

16 So given the facts elicited at trial, it's difficult for me  
17 to conclude that you've met your burden on the role enhancement.

18 MR. NESTLER: Yes, Your Honor. I would like to start  
19 first by pointing to the sentencing guidelines, the background  
20 commentary for 3B1.1. It indicates that 3B1.1(c) was included  
21 by the Sentencing Commission to account for organizations  
22 without a clearly delineated division of responsibility.

23 And I point that out because we are not -- as Mr. Broden  
24 pointed out, this is not a typical bank robbery case. This is  
25 not a typical gang case. So we don't have an organization here



1 with clearly delineated divisions of responsibility, which is  
2 why we believe Probation was correct to apply 3B1.1(c) and not  
3 (a) or (b). Considering the number of people that were involved  
4 here, (a) or (b) might actually be applicable, but I think (c)  
5 is in the right heartland of what we're talking about.

6 THE COURT: Right. But is your leader argument  
7 vis-a-vis Hardie or the crowd? What is it?

8 MR. NESTLER: Well, it's both. But we're focusing on  
9 the crowd. We understand what Your Honor is saying about  
10 Mr. Hardie. We're focusing on Reffitt's actions with respect to  
11 the crowd. But if I can just --

12 THE COURT: But we've covered this. I mean, what I  
13 found is he encouraged the crowd to move forward. Is that  
14 enough to apply the role adjustment?

15 MR. NESTLER: It's not just that, but that's what  
16 we're getting at.

17 So let me start with Mr. Hardie, if we could. So  
18 Mr. Reffitt did provide Mr. Hardie with flex cuffs the morning  
19 of, that's what Mr. Hardie testified to, in order to detain  
20 people. And Mr. Reffitt, of course, had flex cuffs with him in  
21 order to detain people, members of Congress he wanted to  
22 physically pull out of the building.

23 THE COURT: But Hardie is out of the picture. He did  
24 trespass, but in terms of 1512(c)(2), which is a driver, he's  
25 not charged with that. There's a lack in some ways of a meeting

1 of minds of those two.

2 MR. NESTLER: Understood, Your Honor.

3 So if we go to the Ellipse, so what Mr. Reffitt was doing  
4 at the Ellipse was encouraging those people there at the Ellipse  
5 to come with him to the Capitol in order to storm the Capitol  
6 and overtake the Capitol.

7 THE COURT: Do you have any evidence he knew anyone  
8 else on that day?

9 MR. NESTLER: Yes. In the video that's played, he  
10 yells out to somebody named Gina, and he talks to somebody named  
11 Gina, which is introduced into evidence. So he did know  
12 somebody else who was there.

13 THE COURT: Was this another Three Percenters?

14 MR. NESTLER: That's our understanding, Your Honor.

15 THE COURT: Does the government have any evidence that  
16 he colluded or planned ahead of time with other Texas Three  
17 Percenters? Or there was a reference he made at one time, I  
18 think it was in the Government's Exhibit 1A, the Zoom video,  
19 about being a part of -- a member of the Oath Keepers. Is there  
20 any evidence that he worked collaboratively with other Three  
21 Percenters, the Oath Keepers, or the Proud Boys?

22 MR. NESTLER: Not directly, no, Your Honor.

23 THE COURT: Because it seemed, my impression from the  
24 trial is kind of he's a lone guy there who couldn't even get the  
25 leader of the Three Percenters to join him.

1 MR. NESTLER: Right. So he was trying to recruit  
2 others. So when we talk about his conduct at the Ellipse  
3 immediately preceding the Capitol, he was saying, I'm a member  
4 of Texas Freedom Force, of Texas Three Percenters, of Oath  
5 Keepers, I have all of these other guys here.

6 Now, we don't believe that to be accurate, but what he was  
7 doing was trying to recruit these accomplices in order to go to  
8 the Capitol, to storm the Capitol.

9 THE COURT: Yeah, but a lot of people are ready to go  
10 to the Capitol. To make him out to be like the leader who but  
11 for him individuals were not going to go to the Capitol or, for  
12 that matter, storm the Capitol is, I think, a stretch.

13 MR. NESTLER: We don't believe it's a stretch, Your  
14 Honor, not just to go to the Capitol, but he told them all he  
15 was armed and that he had more people in the crowd who were also  
16 armed.

17 THE COURT: Do you have any evidence to support that?

18 MR. NESTLER: No, not that he actually had that. He's  
19 using those words in order to recruit these accomplices. He  
20 needed the crowd at his back in order to be successful, and he  
21 got it. So what he was trying to do was tell people, you can be  
22 assured that I am armed, all of my people here are armed, if you  
23 come with me and you help me storm the Capitol, we're going to  
24 be able to accomplish our desired objectives because I have all  
25 this support behind me. And he was trying to recruit additional

1 accomplices in order to get that.

2 We're not saying he was the leader. We're saying he was a  
3 leader. And so he was a leader, manager, organizer, or  
4 supervisor.

5 THE COURT: Okay. So in the same way he recruited  
6 Hardie, to some degree -- I agree, he certainly recruited  
7 people, come with me.

8 The other factors I need to look at are the exercise of  
9 decisionmaking activity. He didn't have any -- aside from  
10 encouraging people to come with him, he didn't have any degree  
11 of planning or organizing of the offense. He didn't have any  
12 control over the others. He wants other people around. He  
13 wants people behind him. He wants to be the big guy, the first  
14 to try to storm the Capitol, the first to go to trial. Clearly,  
15 that's what he wants.

16 But does that make him a leader?

17 MR. NESTLER: Court's brief indulgence.

18 Mr. Hopkins, do you mind putting the -- I just want to show  
19 a photo, Your Honor, if we could have the HDMI attached.

20 These are two of the photos that were introduced into  
21 evidence at the trial, Judge. When we're talking about a leader  
22 and what kind of control he had over others, we have to look at  
23 where Mr. Reffitt was. He is in front of hundreds, if not more  
24 than a thousand people on the west front of the Capitol, and he  
25 is out in front of them. They are behind him with a giant

1 wooden plank to protect themselves moving up as he moves up.  
2 He's pointing forward. He has his megaphone. He's addressing  
3 the crowd. I understand we don't have direct evidence of what  
4 he was saying, but he was generally telling other people "move  
5 forward" and telling the police officers "stand down or you're  
6 going to be tried for treason."

7 So what he is doing is he is not just encouraging the  
8 crowd, he is directing the crowd to come with him. They're all  
9 behind him. Look how many people are on the west front here.  
10 If there's any particular person here at this exact time -- this  
11 is 1:50 p.m. -- who is a leader, Mr. Reffitt is the leader here.  
12 He is the one out in front directing people behind him.

13 And he knew the crowd was watching him. He knew that he  
14 was acting with the intent that they follow his lead. He told  
15 the other members of the Texas Three Percenters on the Zoom call  
16 a couple days later, "Nobody was moving forward until I climbed  
17 up the banister and got wrecked the hell out. And then  
18 everybody -- and then I just kept going, go forward, go forward.  
19 I kept screaming take the house. Everybody started ripping the  
20 scaffolding apart."

21 The defendant is bragging about how what he was doing was  
22 controlling, causing, inducing other people to do what he wanted  
23 them to do. Every time he moved forward, they moved forward.  
24 He sent a Telegram message to the other members of the Texas  
25 Three Percenters later on January 6, Exhibit 1B4.1, at 4:17, he

1 told them, "I was the lead up the Capitol stairs." His word, he  
2 was the lead. At 4:19 p.m., he said, "A battle cry like in  
3 Braveheart. The insurrection began immediately after." What  
4 does Mel Gibson's character do in Braveheart? He leads his  
5 troops in battle on the battlefield. He emits a vigorous battle  
6 cry and charges forward, and hundreds, if not thousands of  
7 people behind him charge behind him.

8 That is exactly what the defendant was trying to accomplish  
9 here. He was trying to lead others, including using his  
10 megaphone. And when the officers shot his megaphone out of his  
11 hand, he discarded that and used his voice. And when he  
12 couldn't use his voice anymore, he used his arms to continue  
13 leading people up and pushing them to go forward.

14 I don't need to replay the video. I'm sure Your Honor is  
15 aware of it. But one of the videos, you can clearly see, every  
16 time the defendant moves forward and gets shot, the crowd boos.  
17 The whole crowd is watching him. Everyone is watching him.  
18 Every time he moves forward, the crowd cheers. Then he gets  
19 shot, and the crowd boos. They are all looking to him as their  
20 leader. And he was invigorated by that. He wanted that. That  
21 was what he was doing there.

22 Sergeant Flood even testified that he interpreted the  
23 defendant's hand gestures after he was sitting on the banister  
24 as trying to direct the crowd to follow his lead to move  
25 forward.

1           He didn't need to personally breach the building in order  
2 to be a leader of the building. And we know he didn't  
3 personally breach the building, but he accomplished what he  
4 wanted to do. He got the mob to overrun the officers and  
5 actually breach the building and actually stop the  
6 certification.

7           He wrote in one of the Telegram messages, Exhibit 1B4.6, on  
8 January 9 that he "made it to the top of the stairs." And we  
9 know he did. That was introduced into evidence. And then "they  
10 broke through the doors." And then in the defendant's words, he  
11 said, "My job was done then." That's exactly right. The  
12 defendant's job was to encourage, lead, motivate all the people  
13 behind him to continue pushing forward in order to get into the  
14 building.

15           He told Mr. Teer on the Zoom call, "When everybody saw me  
16 get bear sprayed and shot and go down the banister rail, it was  
17 a full onslaught move forward. Nobody stopped from that moment  
18 on. When I got to the top of the stairs, people were coming up  
19 to me calling me a patriot and knuckle bumping me. Nobody was  
20 moving forward until I climbed up the banister." The defendant  
21 was the one who was leading that crowd there.

22           We have more about his actions with respect to Mr. Hardie  
23 and other members of the TTP. I understand Your Honor's point  
24 about that. But just to show where the defendant's mind-set  
25 was, Mr. Hardie testified he read the defendant's message from

1 December 21st saying he was going to D.C. and encouraging  
2 members to go with him, and Mr. Hardie testified, "I was already  
3 thinking about it. I read Reffitt's Telegram message, and I  
4 said well, I need to go."

5 THE COURT: But again, the argument vis-a-vis Hardie,  
6 I think your stronger argument is the crowd.

7 MR. NESTLER: We understand, Your Honor. And we know  
8 this is not a unique -- sorry, this is a unique circumstance.  
9 The guidelines don't specifically account for this. So that's  
10 why we point to the background commentary. We're dealing with  
11 the flexibility here of an organization that's not clearly  
12 delineated responsibilities.

13 THE COURT: I hear you, and it's a difficult  
14 situation. Usually, the classic role adjustment up or down does  
15 come in a case in which there's a degree of advanced planning  
16 and control and supervision and, you know, less discretion with  
17 those who are below. And I get that it applies in many more  
18 contexts other than classic conspiracy, and yet, it's difficult  
19 to -- particularly given all of the other enhancements that  
20 apply and what the government is seeking in terms of departure,  
21 to cumulatively apply this when he's basically -- your argument  
22 is he's assuming the role of the leader that day; right?

23 MR. NESTLER: Yes.

24 THE COURT: And he -- you say he does know an  
25 individual you know of. But he doesn't know any of those people



1 behind. He's just the first up. Right? It's consistent with  
2 the "I want to be the big guy and I want to go first" and --

3 MR. NESTLER: He's not just the first up, Your Honor.  
4 He has bulletproof padding on. He's wearing plates that can  
5 stop rifle rounds. The people behind him don't appear to be  
6 doing that. He is wearing a ballistic helmet. He is wearing --  
7 he has a gun on his hip, obviously. He has the flex cuffs on  
8 him. He has the megaphone on him. The people behind him in  
9 this picture don't have megaphones with them, they don't appear  
10 to have ballistic helmets, they don't appear to have the same  
11 body armor that he has.

12 He is not only prepared for this, but he is there as the  
13 leader. He is doing what he wanted -- and he said, the Mel  
14 Gibson role in Braveheart. He is leading the battle cry, and  
15 the insurrection is beginning because of his actions. He is  
16 leading this crowd.

17 THE COURT: All right. Mr. Broden, why shouldn't I  
18 conclude -- and I want you to focus on the crowd argument. Why  
19 shouldn't I conclude, based on all the evidence, that he assumed  
20 the role, he was a self-appointed leader that day who, you know,  
21 in his words lit the fire?

22 MR. BRODEN: I was about to say, after listening to  
23 the government's argument, had Mr. Reffitt not shown up,  
24 January 6 never would have happened.

25 THE COURT: Well, you don't have to go that far.

1 MR. BRODEN: Well, I think we're getting close to  
2 there.

3 THE COURT: He can still empower other people who  
4 might have not gone in maybe. We don't know. But did he not  
5 take steps to designate himself as the self-appointed leader?

6 MR. BRODEN: Well, what the government doesn't tell  
7 you, and that will be a part of our presentation on the  
8 variance, there were several other people that climbed those  
9 stairs before Mr. Reffitt.

10 THE COURT: And they're also going up the walls at the  
11 same time?

12 MR. BRODEN: The crowd is behind them, and they're  
13 going up the stairs.

14 THE COURT: Well, the stair argument --

15 MR. BRODEN: Or the banister.

16 THE COURT: I watched the video, Mr. Broden. He's  
17 definitely up front. That's not --

18 MR. BRODEN: At that point in time, he is. I know.  
19 I've seen the video, too, so at that point. But to say that  
20 wouldn't have happened --

21 THE COURT: I don't think that's what they're saying,  
22 that it wouldn't have happened. They're saying that he took  
23 steps -- he kind of took charge. He took -- he was well  
24 prepared to be hit with a lot with his bulletproof helmet and  
25 vest, and he stepped up. He showed leadership. And he helped

1       pave the way for those behind him, not that they wouldn't have  
2       done it but for him, but he --

3               MR. BRODEN: I guess "helped pave the way" implies  
4       that the way wouldn't have happened but for him. That way  
5       happened for people before Mr. Reffitt who climbed that  
6       staircase. All those people would have come up the stairs  
7       regardless.

8               The burden of proof is on the government here. Yes,  
9       Mr. Reffitt was the first person up there, but to suggest that  
10      he was managing those people or whatever the -- leading the  
11      people, organizing the people, supervising the people, that's  
12      just not the case.

13              THE COURT: So here are the factors, again, that the  
14      guidelines instruct courts to consider: Whether he's exercising  
15      decisionmaking activity. I mean, did he --

16              MR. BRODEN: Is that an application note you're  
17      reading from? I tried to find that myself, too. It's Note 4,  
18      the government tells me.

19              THE COURT: So just going through these, the exercise  
20      of decisionmaking authority, I think the sole exercise of  
21      decisionmaking authority is just to stand first and go, right,  
22      be the shield for the crowd. There's more than that that's at  
23      least in evidence. I found that he wasn't instructing others to  
24      come around the inaugural platform or anything like that. He  
25      might have been doing that, we don't know, but there's no

1 evidence before me that he guided or instructed the crowd. So  
2 the decisionmaking authority is just to kind of assume the role  
3 of being the first guy.

4 The nature of participation in the commission of the  
5 offense, same thing. It doesn't add anything. The recruitment  
6 of accomplices, he did encourage the crowd at the Ellipse. The  
7 fruits of the crime do not apply at all.

8 The degree of participation in planning or organizing the  
9 offense, this arguably -- looking at this factor in this context  
10 arguably is double counting with the extensive planning that I'm  
11 already saying he's on the hook for, two levels. So I'm not  
12 looking at that too much here.

13 The nature and scope of the illegal activity, pretty big  
14 scope. The degree of control and authority exercised over  
15 others, I would say zero.

16 But anything else you would like to add in considering  
17 those factors?

18 MR. BRODEN: No. I think the Court needs to  
19 understand that he wasn't the first person up there, and we will  
20 get to that in the variance. He was certainly the first person  
21 or the head of the crowd at that point in time, but when you  
22 think of a leader, you think of -- you do think of exercising  
23 some authority over the people you're leading, and that's just  
24 not the case here. And those people would have come up the  
25 stairs regardless of Mr. Reffitt, and I think we all know that.

1 THE COURT: All right. Mr. Nestler, anything you want  
2 to add?

3 MR. NESTLER: Just briefly, Your Honor.

4 The *Bapack* case, B-a-p-a-c-k, I think Your Honor cited it  
5 earlier, from the D.C. Circuit in 1997, there's some language  
6 there that the determination of a defendant's role in the  
7 offense is to be made on the basis of all of the conduct within  
8 the scope of 1B1.3, not solely on the basis of the elements and  
9 acts cited in the counts of conviction.

10 The reason we cite that is we're talking about the acts of  
11 all the other individuals who were there with Mr. Reffitt at the  
12 time that he was leading them to go forward. We understand Your  
13 Honor's point, and we believe that those factors in Note 4 are  
14 appropriate. We've cited them in our memo.

15 We do believe that the defendant did exercise some control  
16 over others. They weren't doing anything, and he went forward  
17 in front of them and told them to go forward.

18 THE COURT: But he didn't stop them. He didn't say,  
19 "No, you stay back. I'm going first. Follow me." He's  
20 certainly encouraging.

21 I agree 100 percent that he's encouraging people at the  
22 Ellipse to come. He's encouraging people behind him to come.  
23 He's putting himself out front.

24 The struggle I'm having is his self-appointed leadership  
25 position that he assumed in the moment. I'm not saying it can't

1 ever justify an upward adjustment. The problem I'm having is a  
2 lot of what he did stems, in part, from -- like his degree of  
3 participation and planning the offense and him bringing, as you  
4 said, the shield and him bringing the helmet enabled him to do  
5 this stuff. And I'm just having concerns in applying this  
6 because, one, it's your burden; two, I've already held him  
7 accountable for an additional two levels for extensive  
8 preparation. And I just feel like applying both the role  
9 adjustment, as well as the extensive planning adjustment, a  
10 four-level swing, overstates what happened here.

11 I don't -- I mean, I think you've got a good argument. I  
12 think this is a very close call. I don't think he's -- I think  
13 it would be a slam dunk for the government if Rocky Hardie had  
14 joined. He clearly was recruiting. But this sort of meeting of  
15 the minds with everyone behind him, it happened in the moment.  
16 Yes, they were all there to do that.

17 But it just seems to me like -- so Mr. Broden made the  
18 point earlier that whether I apply it because I think it  
19 technically meets the definition, which I think the government  
20 has made a strong argument, and under 3553(a) reduce the  
21 cumulative effect of these two enhancements or I don't apply it,  
22 I think I get to the same answer, which is regardless of whether  
23 this enhancement applies, and I'm inclined to say -- gosh, I  
24 just -- Mr. Nestler, I'm directed to look at these factors.

25 Again, one of them is the exercise of decisionmaking

1 authority. I don't think he has any. I don't think the nature  
2 of participation -- yes, he's like number 1, first one up. So  
3 he's assuming a position of importance there. The recruitment,  
4 he encouraged other people.

5 The claim of a right to a larger share of the fruits, no.  
6 You agree that doesn't apply; right?

7 MR. NESTLER: That's correct.

8 THE COURT: The nature and scope of the illegal  
9 activity, it's significant. The degree of control and authority  
10 exercised over others, it's, I think, zero.

11 So again, I struggle with this. I'm not going to apply it.  
12 And again, this, in large part, stems from the cumulative effect  
13 of the enhancement on the extensive planning. And so whether a  
14 reviewing court would disagree and say I should give him a role,  
15 even so, I think that I would under 3553(a) reduce the sentence  
16 to not have the four-level swing for all of this conduct that I  
17 think is kind of related and tied together.

18 So for that reason, I'm not going to apply the guideline  
19 here.

20 All right. So moving on to the government's objections,  
21 the government objects to a single two-level adjustment under  
22 Section 3C1.1. I think, Mr. Nestler, you've tied this to the  
23 grouping rules, but I just want to take a step back.

24 If Mr. Reffitt were convicted of one and only one offense,  
25 the obstruction offense, which everyone agrees is the driver

1 here, the guidelines are pretty clear. He wouldn't get two  
2 3C1.1 enhancements for two separate obstructive acts. Yes, he  
3 threatened his kids. Yes, he told his fellow Three Percenters  
4 to delete all chats. Both are obstruction-related conduct, and  
5 if there were the only offense, he would get a plus 2, and the  
6 Court would look at the additional obstructive conduct as  
7 perhaps a reason to go higher under 3553(a), but not to apply  
8 3C1.1 twice.

9 MR. NESTLER: We agree.

10 THE COURT: So I think that this grouping argument  
11 you're making, when you concede that the Probation Office has  
12 properly grouped offenses 1, 2, 3, and 5 together and 4  
13 separately, I just think that that argument doesn't help you  
14 any, simply because he also has a civil disorder offense,  
15 coupled with that that we can throw an extra obstruction  
16 enhancement on it to -- to count it when it wouldn't count  
17 otherwise.

18 All of these are being grouped together as the same  
19 conduct; right?

20 MR. NESTLER: Sorry. To be clear, the civil disorder  
21 has nothing to do with this. Count 4 has nothing to do --

22 THE COURT: No, no. I mean there's two civil  
23 disorders. The civil disorder related to the Capitol; right?  
24 There's one that's grouped, and there's one that's not.

25 MR. NESTLER: Correct.



1           THE COURT: So you're saying there's multiple counts  
2 and you could tack this on to something other than the 2J1.2  
3 guideline calculation before you start the grouping rules. And  
4 I think the grouping rules themselves contemplate not every  
5 additional criminal act results in a commensurate increase in  
6 the guideline range. And this is a perfect example of one where  
7 it doesn't happen.

8           MR. NESTLER: We agree with everything Your Honor has  
9 said. I believe there is a specific rule which we've cited  
10 here, which is Note 8 under 3C1.1, that does actually apply to a  
11 specific unique grouping rule for an obstruction of justice  
12 conviction, not conduct. We agree with what Your Honor said.  
13 If he were not convicted of obstruction of justice in Count 5  
14 for threatening his children, we would not be having this  
15 argument. There would be one 3C1.1 application for two points,  
16 and we would not be proceeding further.

17           Because he has a count of conviction, Count 5, for  
18 threatening to harm his children and because of that group's --  
19 there's a unique grouping rule under 3D1.2(c) and 3C1.1, Note 8,  
20 and that's what we're talking about here. In fact, the way that  
21 the guidelines talk about how to apply Note 8 says it needs to  
22 be applied after grouping, not before grouping.

23           THE COURT: So I've read this a couple of times.  
24 You're in 3C1.1, Note 8?

25           MR. NESTLER: Yes.

1           THE COURT: So the government's argument is  
2 essentially because you charged -- this is where it kind of  
3 undermines the whole structure of the guidelines. Simply  
4 because the government added a separate charge for that, the  
5 government gets a plus 2?

6           MR. NESTLER: Well, not just adding the charge; the  
7 jury convicted him of that conduct.

8           THE COURT: No, of course. We're not arguing that he  
9 wasn't convicted. But simply because the way the government  
10 chose to charge this, you're entitled to an additional two  
11 points for the obstructive conduct?

12           MR. NESTLER: Correct. Note 8 is actually quite clear  
13 on how it applies. If we look at the second sentence beginning  
14 with "the offense level," "The offense level for that group of  
15 closely related counts," so this is going to be group 1, which  
16 is Counts 1, 2, 3, and 5, "will be the offense level for the  
17 underlying offense," which I suppose now is 29 points because  
18 after argument earlier, "increased by the two-level adjustment  
19 specified by this section."

20           So that is -- we're reading the guideline commentary.  
21 That's exactly what it says. It's the group -- the group  
22 itself, which is group 1, is 29 points. Now increase by two  
23 levels because one of the counts that grouped, which is Count 5,  
24 is an obstruction offense.

25           THE COURT: Okay. Well, like Probation -- this is a

1 tough issue -- I reached out to the Commission as well, a  
2 separate person, someone who has been at the Commission for 20  
3 years, does not read this application note in the way the  
4 government does.

5 So I think you make a good argument. I think that it's --  
6 it also seems, regardless of whether you're right or not, that  
7 simply through the charging decision -- certainly, charging  
8 decisions affect penalties, and I'm not suggesting otherwise  
9 here. But this is another one where even if I bought your  
10 argument, I'm not sure that there wouldn't be an adjustment  
11 under 3553(a).

12 I certainly am going to consider the multiple acts of  
13 obstruction in deciding where to sentence Mr. Reffitt in the  
14 guideline range. The Commission, the experts are saying that  
15 this is not how to read this application note.

16 MR. NESTLER: We hear Your Honor. We believe it's  
17 Your Honor's discretion to interpret it.

18 THE COURT: No, I agree, but I think that there's  
19 something problematic when you agree that Counts 1, 2, 3, and 5  
20 all grouped together and that if he were convicted of just the  
21 single obstruction offense as opposed to all these group counts,  
22 that you would only get plus 2 here, and to throw in the extra  
23 count and get the extra plus 2 -- I see why you're doing it, but  
24 I just don't think that that's -- the whole structure of the  
25 guidelines are designed that way.

1 MR. NESTLER: Understood, Your Honor. Thank you.

2 THE COURT: So I won't apply 3C1.1.

3 Is there anything for the record, Mr. Broden, that you  
4 would like to add?

5 MR. BRODEN: I'm going to quit while I'm ahead, Your  
6 Honor. So no.

7 THE COURT: So I do find that Mr. Reffitt's total  
8 offense level, after applying the grouping rules and considering  
9 all the counts, is a level 29.

10 Do the parties agree, based on the rulings I've made, that  
11 that's correct?

12 MR. NESTLER: Yes, Your Honor.

13 MR. BRODEN: Yes, Your Honor.

14 THE COURT: Okay. And with a criminal history  
15 category of I, his guideline range is 87 to 108 months in  
16 prison, which is 7.25 years to 9 years.

17 Agreed?

18 MR. NESTLER: Yes, Your Honor.

19 THE COURT: All right.

20 MR. BRODEN: I'm sorry, Judge. Can you say that  
21 again?

22 THE COURT: 87 to 108 months at level 29, criminal  
23 history category I.

24 MR. BRODEN: Yes, I agree.

25 THE COURT: Okay. Mr. Nestler, now for your argument

1 related to the multiple departures, under 3D1.4, also firearms  
2 under 2K2.6 and 5K2.0, I've sort of telegraphed what my concerns  
3 are here with this.

4 And I do want to know, has the government sought -- I know  
5 it's reserved the right to seek this enhancement in multiple  
6 plea agreements. Has it to date sought this enhancement in any  
7 other case?

8 MR. NESTLER: Not yet.

9 THE COURT: All right. And we've got the long list of  
10 cases here that you didn't respond to the defense's responses,  
11 not that I necessarily expected it. But it's -- there's a lot  
12 of troubling conduct that the government -- not just assaults  
13 but also words that the government chose not to seek a departure  
14 for. And you can say well, they were pre-plea, but as I've  
15 already explained, that's troubling to me, because he's getting  
16 a penalty for not pleading guilty of three levels extra. I  
17 don't think that the plea should drive the seeking the  
18 enhancement. I think it should apply regardless.

19 MR. NESTLER: We agree with that, Your Honor. We are  
20 not saying that there aren't cases which in the future we will  
21 not seek the enhancement because somebody pled guilty. We've  
22 reserved that right in many of our plea agreements, and there  
23 are many defendants for whom we may very well be seeking this  
24 enhancement in the future. This happens to be one of the first  
25 defendants who is coming before a court for sentencing for which

1 we are seeking this enhancement.

2 THE COURT: Okay. And I assume in all likelihood it  
3 might be most applicable in these cases where there's colluding  
4 of efforts. You haven't really disagreed with me that  
5 Mr. Reffitt, except for what he did that day, was acting alone.

6 MR. NESTLER: We believe he was acting as a part of  
7 the malitia group. But in terms of the number of people that he  
8 brought with him to D.C., he only brought one other person with  
9 him to D.C., that's correct.

10 But we do believe that what Mr. Reffitt was intending to do  
11 that day was very different than many other people who Your  
12 Honor has sentenced or have been sentenced previously.  
13 Mr. Reffitt was intending to violently overthrow Congress and  
14 physically drag lawmakers out of the Capitol using his plastic  
15 police-style flex cuffs and his gun. Many people who have come  
16 before Your Honor for sentencing did not have that same intent.  
17 We do not believe that was proven in other cases.

18 THE COURT: Certainly before me. I'm talking about  
19 the range of cases that I've reviewed the dockets for, some  
20 serious assaults, multiple assaults, outrageous statements of  
21 what's going to happen to Speaker Pelosi and others, huge caches  
22 of firearms nearby. Again, I know it's a different charge in  
23 that case because that defendant wasn't on Capitol grounds.  
24 Nonetheless, this is a departure that can apply in any case.

25 MR. NESTLER: It is a departure that can apply in any

1 case, and if the government believes that the guideline range as  
2 found by the Court is not sufficient to capture the defendant's  
3 conduct, the government certainly reserves the right to seek it  
4 and may seek it in other cases.

5 This happens to be the first case, in the government's  
6 estimation, where the guideline range was not sufficient to  
7 capture the extent of the defendant's conduct.

8 THE COURT: And given that the most severe sentence  
9 that's been imposed to date is 63 months, the government  
10 believes that his conduct is nearly three times as aggravated as  
11 those other defendants?

12 MR. NESTLER: Yes. The government believes -- and if  
13 we're talking about the application of 3553(a)(6) and  
14 unwarranted sentencing disparities, the D.C. Circuit is clear  
15 that the best way to guard against unwarranted sentencing  
16 disparities is by sentencing within a guideline range.

17 And so when we're getting to talk about allocution -- I  
18 believe we're just talking about the departure now, but none of  
19 the defendants who -- none of the other people who have been  
20 sentenced that the defendant proffered are legitimate  
21 comparators, we believe, because they don't have the same  
22 guideline range as him. None of them had a level 29, as far as  
23 I'm aware. So none of them have the same guideline range and  
24 so, therefore, don't have the same comparators.

25 THE COURT: But that doesn't mean that they're still

1 not comparators in some sense. What did those other defendants  
2 lack that Mr. Reffitt had here?

3 MR. NESTLER: For one, having a firearm on the Capitol  
4 grounds.

5 THE COURT: Huge, huge, yeah. And does the firearm  
6 justify three times the sentence? It wasn't brandished or used  
7 in any way. That's -- I guess that the question. I agree. The  
8 two distinguishing factors in this case are, one, the firearm,  
9 and two, he went to trial. Those are the biggest.

10 MR. NESTLER: So not just the one firearm. We  
11 deliberately did not structure this in such a way that we're  
12 asking for a certain numerical enhancement for the terrorism  
13 departure or for firearms. We believe that both of those are  
14 two different categories, including we believe the inadequate  
15 scope for a grouping for the firearms.

16 THE COURT: But you didn't seek the firearm departure  
17 in the case where the individual had a whole cache of firearms  
18 in his truck nearby in the Capitol.

19 MR. NESTLER: I don't believe that individual went to  
20 the Capitol, Your Honor.

21 THE COURT: He was near the Capitol.

22 MR. NESTLER: Are we talking about Lonnie Coffman?

23 THE COURT: I neglected to bring my sheet.

24 MR. NESTLER: Mr. Coffman was only convicted of having  
25 an unregistered firearm. He was not convicted of any



1 obstruction charge. He was not on the Capital grounds. He did  
2 not interfere with police. He was convicted of a single offense  
3 of unregistered firearm, 26 U.S.C. 5861(d).

4 That's far different conduct from what Mr. Reffitt was  
5 dealing with. We don't believe he's a sort of Jane 6 comparator  
6 for Mr. Reffitt in any sense.

7 THE COURT: My law clerk is getting it for me. But  
8 didn't he make a bunch of also really vitriolic statements as  
9 well?

10 MR. NESTLER: It's possible, Your Honor. I don't have  
11 the facts right in front of me right now. But I do -- aside  
12 from that, his offense of conviction was for unregistered  
13 firearm. So the guideline range for him is completely separate  
14 and not even close to what the guideline range is for  
15 Mr. Reffitt.

16 THE COURT: But there were others who had multiple  
17 firearms, again maybe not on their person, but he's getting the  
18 bump for the firearm. He's getting a separate count for  
19 firearm. He's getting --

20 MR. NESTLER: But the firearm is not driving his  
21 guideline range. That's why we asked for a departure upward.  
22 We're asking for a departure upward because -- whether he was  
23 convicted of Counts 1 or 3, which are civil disorder,  
24 transporting a firearm, Count 1, and Count 3 is unlawful entry  
25 with a firearm, neither of those two offenses do anything to his

1 guideline range. His guideline range would be the exact same  
2 without them. And in fact, as Your Honor indicated, it would be  
3 the exact same without Count 5.

4 THE COURT: But the problem in these cases, correct me  
5 if I'm wrong, but I suspect that a lot of the defendants in  
6 cases involving obstruction counts with serious assaults, really  
7 disturbing, threatening language, that those defendants also  
8 have had the 2J1.2 enhancements applied, for example the plus 8  
9 and the plus 3; right?

10 MR. NESTLER: That's correct.

11 THE COURT: And so the courts are not following the  
12 guidelines necessarily, are they, in sentencing them  
13 commensurate with the guidelines in every case, in part because  
14 of -- I don't know. You tell me.

15 MR. NESTLER: I'm sorry. I'm not following.

16 THE COURT: For so many guideline ranges -- or  
17 sentences imposed, rather, to be in the range of 41 to 51  
18 months, there's two that are 63 months, in those cases, haven't  
19 some of those defendants had the large bump under the 2J1.2  
20 guideline?

21 MR. NESTLER: Yes.

22 THE COURT: All right. And if they were -- I guess  
23 maybe they didn't have the extra planning?

24 MR. NESTLER: So if they didn't have the extra  
25 planning, that's an extra two points. Of course, they're

1 getting three points off for acceptance of responsibility and  
2 then an additional two-point bump for obstruction of justice.

3 And here, Mr. Reffitt has multiple obstructions of justice,  
4 but we're only counting two points there. So that is a  
5 seven-point swing. So that would answer Your Honor's question  
6 going from a level 22 to a level 29.

7 THE COURT: Okay. So these folks were 51 to 63  
8 months, a lot of them.

9 MR. NESTLER: I believe some were, and I believe some  
10 were in the 41 to 51 range. I don't have the numbers in front  
11 of me for every defendant who's been sentenced. But I believe  
12 it's -- between levels 22 and 24 sounds about correct, Your  
13 Honor.

14 THE COURT: But you've also said that some of those  
15 folks got the planning.

16 MR. NESTLER: And we're looking into providing Your  
17 Honor with that information. Not everyone will get the planning  
18 and the other plus 8 and the other plus 3, depending on their  
19 conduct.

20 THE COURT: So you haven't had another defendant where  
21 they got plus 8, plus 3, and plus 2 for planning?

22 MR. NESTLER: I can't answer that right now, but if we  
23 take a break, we can try to run that answer down.

24 THE COURT: Okay.

25 MR. NESTLER: But if we get back to what we were

1 talking about with firearms, Your Honor, none of these other  
2 defendants have firearms that are driving their sentence for  
3 their 1512 convictions. And Mr. Reffitt is responsible under  
4 1B1.3 for four firearms here: The loaded pistol on his hip, the  
5 AR-15 that he had fully assembled in his car in his hotel in  
6 Georgetown, Rocky Hardie's AR-15 fully assembled in the car in  
7 Georgetown, and Rocky Hardie's pistol and extra magazines that  
8 Rocky Hardie had on him on the Capitol grounds.

9 Those are all factors that make Mr. Reffitt far different  
10 and require, we believe, an upward departure from these other  
11 defendants and, we believe, warrants an additional departure  
12 from the guideline range of a level 29.

13 THE COURT: Okay. All right. Anything else?

14 MR. NESTLER: I'm happy to address it further. I know  
15 we laid it out in our sentencing memorandum. I'm happy to  
16 address these arguments. I have more arguments to make, but I  
17 also know Your Honor wanted to hear from Mr. Broden.

18 THE COURT: I will give you a chance to respond if  
19 there's anything you would like to add.

20 MR. NESTLER: Thank you.

21 THE COURT: Mr. Broden?

22 MR. BRODEN: I don't want to belabor some of my  
23 overarching points. It seems like the distinction in this case  
24 is Mr. Reffitt went to trial, and for that, he is being denied  
25 acceptance of responsibility, and circuit courts have decided

1 that's fair. But to continue to pile on -- I don't want to  
2 necessarily go down this road, but if you look at what the  
3 government is arguing, that Mr. Reffitt's actions were to affect  
4 the conduct of government by intimidation or coercion, we're not  
5 just talking about January 6 cases. We're talking about a lot  
6 of activities that went on in this country, and yet, this is the  
7 only case, the only case where the government has asked for a  
8 terrorism enhancement. And likely, this is the only case where  
9 the defendant has gone to trial. So I don't think it takes  
10 rocket scienry to figure out why the government is asking for  
11 the enhancement in this case.

12 I mean, this could apply to almost every January 6 case,  
13 that somebody took their actions to influence and affect the  
14 conduct of the government by intimidation or coercion. It could  
15 affect any rioting case throughout the United States. It could  
16 affect anybody who engages in a sit-in in some sort of  
17 congressional committee.

18 I think we've really got to be real here and ask why is the  
19 government asking for this enhancement when it could apply to  
20 all these other cases, some far worse activities than  
21 Mr. Reffitt engaged in. And as I said, I don't think it takes a  
22 rocket scientist to figure out why.

23 THE COURT: I'm sorry. I didn't hear that last part.

24 MR. BRODEN: I don't think it takes a rocket scientist  
25 to figure out why they're asking for this enhancement as opposed

1 to the thousands of other cases that would technically involve  
2 somebody committing a federal criminal offense to influence or  
3 affect the conduct of government by intimidation or coercion.

4 THE COURT: All right. Thank you, Mr. Broden.

5 Mr. Nestler, let me start with the 5K2.6 departure. So  
6 this is a departure that can apply to any offense. If a weapon  
7 or dangerous instrumentality was used or possessed in the  
8 commission of the offense, the Court may increase the sentence  
9 above the authorized guideline range. The extent of the  
10 increase ordinarily should depend on the dangerousness of the  
11 weapon, the manner in which it was used, and the extent to which  
12 its use endangered others. The discharge of a firearm might  
13 warrant a substantial sentence increase.

14 So you look at this offense, and you look at the guideline  
15 for possession of a firearm. As we've discussed, in multiple  
16 contexts, the guidelines don't have increases in punishment one  
17 for one for firearms. Like I think you have to get three and  
18 above for firearms.

19 And in my review of cases, these sorts of enhancements on  
20 this ground -- I'm not saying there's not an argument you can  
21 make, but by and large, these tend to be involving cases with  
22 more than, you know, several firearms; isn't that fair?

23 MR. NESTLER: That's fair. And to be clear, the way  
24 we tried to structure the argument, and maybe this didn't come  
25 across correctly, we are trying to say that because of Reffitt's

1 possession of the firearms, the two for himself and the two he  
2 was responsible for Hardie, he should have an upward departure.  
3 Now, whether it's under 5K2.6 or the background commentary in  
4 3D1.4 or even the note in 2J1.2, which 2J1.2, Note 4, has  
5 similar language, which is if the defendant possessed a firearm  
6 in connection with the offense, the Court may consider departing  
7 upward. That's 2J1.2 and Note 4.

8 THE COURT: Because these cases under 5K2.6 really are  
9 different, show me in the guidelines where exactly the firearm  
10 enhancement is?

11 MR. NESTLER: 2J1.2, Your Honor, Note 4.

12 THE COURT: So that provision says, "If a weapon was  
13 used or bodily injury or significant property damage resulted,  
14 an upward departure may be warranted."

15 So you agree this is discretionary?

16 MR. NESTLER: Yes.

17 THE COURT: "In a case involving an act of extreme  
18 violence, for example retaliating against a government witness  
19 by throwing acid in the witness's face or a particularly serious  
20 sex offense, an upward departure would be warranted." Right?

21 MR. NESTLER: Right. We're looking at the first  
22 sentence there, yes.

23 THE COURT: All right. I'm not going to exercise my  
24 discretion to apply either this application note in 2J1.2,  
25 Application Note 4, or the firearm departure provision, which is

1 2K2.6.

2 MR. NESTLER: The related part of that, Your Honor,  
3 just to make sure our record is clear, 3D1.4, the background  
4 commentary also says because of the grouping rules certain  
5 conduct was not adequately accounted for. And we believe the  
6 same thing there. Because the firearms offenses, Counts 1 and  
7 3, don't affect Mr. Reffitt's guideline range of 29, that's an  
8 additional reason to depart upward from the guideline range.

9 THE COURT: Okay. All right. I understand the  
10 argument, and I'm not in any way minimizing the seriousness of  
11 the conduct, having a firearm, and I think it's fair to infer  
12 that it was a loaded firearm. I'm not in any way minimizing  
13 that. I'm just not going to enhance here where he did not use  
14 or brandish it in any way. I think it's an aggravating factor  
15 that I will absolutely consider under 3553(a). I think it  
16 increased the risk to everyone who was present, even though he  
17 didn't brandish or use it, certainly law enforcement officers  
18 and the entire crowd. So I think it's certainly an aggravating  
19 fact.

20 I just don't think it's of -- in this context, of the  
21 nature of the cases in which courts -- or the Commission  
22 instructs courts and courts do exercise their discretion to  
23 impose a departure. So for that reason, I'm not.

24 With regard to the terrorism guideline, and this is  
25 3A1.4 -- and to be clear, 3A1.4 has a specific departure



1 provision that applies to a felony that involved or was intended  
2 to promote a federal crime of terrorism, which this is not.

3 MR. NESTLER: We agree.

4 THE COURT: I know you're not arguing that. But just  
5 to be clear what we're considering here, it's -- everyone agrees  
6 that the terrorism departure itself does not apply, but what the  
7 government is relying on is Note 4 that says there may -- again,  
8 this is discretionary. There may be cases in which the offense  
9 was calculated to influence or affect the conduct of government  
10 by intimidation or coercion or to retaliate against government  
11 conduct, but the offense involved an offense other than one of  
12 the offenses specifically enumerated as a terrorism offense,  
13 statutory terrorism offense.

14 So I think Mr. Broden did a good and thorough job of  
15 pointing out a large number of cases where the guidelines are  
16 lower than this case. I hear the government that there's  
17 probably certain enhancements that are applying here that  
18 weren't in play in all of these cases, and I will certainly take  
19 that into account.

20 But I do want to note for the record some of these cases  
21 that -- correct me if I'm wrong, Mr. Nestler. I think the  
22 government's concern with Mr. Reffitt, obviously, is not just  
23 the actions, but it's his statements as well, the statements  
24 that are captured on video, that are captured on the Zoom  
25 meeting.

1 By the way, how did you get the Zoom meeting?

2 MR. NESTLER: It was recovered from the hard drive at  
3 his house. It appears to have been set up -- his Zoom or his  
4 wife's Zoom account appears to have been set to automatically  
5 record their Zoom meetings.

6 THE COURT: Was this another situation where he was  
7 trying to record, I guess, for posterity's sake what happened in  
8 the meeting like the GoPro? Or is this just a default setting  
9 that enabled the government to see the --

10 MR. NESTLER: It was not found from Zoom. It was  
11 found on the defendant's hard drive. So when his hard drive was  
12 seized during the search warrant on January 16 and then the hard  
13 drive was searched, this video was located on the hard drive by  
14 the FBI.

15 THE COURT: So he had -- correct me if I'm wrong, but  
16 does that mean that he had to affirmatively decide to tape that  
17 meeting?

18 MR. NESTLER: I don't know the answer to that. He did  
19 decide to tape it. Whether it was a default setting that he  
20 somehow had enabled or whether he decided to do it, it was taped  
21 by him and found on the hard drive.

22 To answer Your Honor's question, it's not just his conduct  
23 on January 6 and it's not just his statements before January 6.  
24 It's also everything that he is doing and planning. He was  
25 planning to overtake our government. He wasn't just trying to

1 stop the certification of the vote.

2 And so we included all of the extra language that did not  
3 come out of trial about his future plans. He wasn't done.  
4 January 6 was the preface. When we get into our allocution in a  
5 minute, we will get into that more.

6 But to answer Your Honor's question, the terrorism  
7 enhancement is warranted here because of all of those factors,  
8 including that the defendant planned to attack our government  
9 both on January 6 and afterwards.

10 And we do believe that the language applies. The  
11 defendant's offense was calculated to influence or affect the  
12 conduct of government by intimidation. And the second sentence  
13 after that, Your Honor, says, "In such cases, an upward  
14 departure would be warranted."

15 THE COURT: Let me just for the record -- and I know a  
16 lot of this is in the sentencing memoranda, and I'm not going to  
17 mention every case. I think there are a large number that make  
18 the point that I'm going to make here, which is there are a lot  
19 of cases where defendants committed very violent assaults and  
20 even possessed weapons in their cars or hotel rooms nearby that  
21 received -- did not receive this departure. And some of these  
22 defendants also made statements in line with the extremely  
23 disturbing statements Mr. Reffitt made.

24 So I do want just for the record to highlight a few, the  
25 first being -- and you can have a seat, if you would like.

1 MR. NESTLER: Yes, Your Honor.

2 THE COURT: The first being *Languerand*, 21-35. In  
3 this case Judge Bates imposed a sentence of 44 months'  
4 imprisonment after the government asked for 51 months'  
5 imprisonment. In that case the defendant, at the Lower West  
6 Terrace, threw objects, including a traffic cone, at officers.  
7 He got a police riot shield and held it in front of him as he  
8 was confronting cops defending the Lower West Terrace archway.

9 He bragged about the riot on social media afterwards. He  
10 posted, "Next time we come back with rifles. It's not a game."  
11 He likened the riot to the American Revolution saying "violence  
12 isn't always the answer, but in the face of tyranny, violence  
13 may be the only answer." He posted that the Declaration of  
14 Independence justified overthrowing the government. Though  
15 there's no confirmation, he did post that he brought guns to the  
16 Capitol.

17 During a search of his trailer, authorities found a target  
18 list and pages with militaristic language referring to  
19 Washington, D.C. They also found reference to QAnon. And this  
20 defendant, unlike Mr. Reffitt, has a prior history of making  
21 threats and being belligerent with officers.

22 In the *Fairlamb* case, Judge Lamberth imposed a sentence of  
23 41 months' imprisonment after the government asked for 44 months  
24 of imprisonment. This defendant joined a crowd of rioters who  
25 pushed through a line of officers and took a police baton from

1 the ground. This defendant recorded a video saying, "What  
2 patriots do? We fucking disarm them and then we storm the  
3 fucking Capitol." He later punched an officer in the face while  
4 screaming at them, "Are you an American? Act like a fucking  
5 one."

6 After the riot, he filmed a video threatening future  
7 violence. "They pulled the pin on the grenade, and the blackout  
8 is coming. What a time to be a patriot." Again, that's  
9 *Fairlamb*, 21-120.

10 In the *Ponder* case, 21-259, Judge Chutkan imposed a  
11 sentence of 63 months' imprisonment after the government asked  
12 for 60 months' imprisonment. That defendant assaulted three  
13 police officers by swinging metal poles at them, shattering a  
14 riot shield and striking one in the shoulder. After he was  
15 arrested that day and released, he came back to the Capitol to  
16 participate further in the riot. As he was being arrested, he  
17 told the rioters, "Do not give up." He told police, "When our  
18 country is being attacked with like we are, we have to fight.  
19 That is what the Second Amendment was built on." This defendant  
20 also had a lengthy criminal history.

21 The *Meredith* case, 21-159, Mr. Reffitt's memo mistakenly  
22 labeled this case as Cleveland, but Meredith is the defendant's  
23 last name, not Cleveland. In this case Judge Berman Jackson  
24 imposed a sentence of 28 months' imprisonment after the  
25 government asked for a mid-guideline range sentence. In that

1 case there was disagreement over which range applied. The  
2 government was arguing for 37 to 46 months.

3 The defendant had arrived in D.C. too late to attend the  
4 rally. He made violent statements over text in the days  
5 surrounding the riot. For instance, he said, "Thinking about  
6 heading over to Pelosi's." And then there's an expletive I  
7 won't say. "Her speech and putting a bullet in her noggin on  
8 live TV," with a purple devil emoji. "Ready to remove several  
9 craniums from shoulders. I'm so ready to FK some traitors up.  
10 I'm going to collect a shit tone of traitors' heads. It's not  
11 just me. Someone has to take the trash out. FK these mother  
12 fuckers. I'm going to run that" again "Pelosi over while she  
13 chews on her gums." This defendant had a handgun and a rifle in  
14 his hotel and over 2,500 rounds of ammunition.

15 Just for the record, I will cite other cases in which  
16 courts applied similar range sentences. The facts are all a  
17 little bit different. And as both sides, I think, concede,  
18 there's no apples-to-apples comparison in this case, but other  
19 cases that I think inform my decision here include *Rubenacker*,  
20 21-193, *Mault* and *Mattice*, 21-657, *Wilson*, 21-345, *Miller*,  
21 21-75, *Palmer*, 21-328, *Thompson*, 21-461, *Coffman*, 21-4,  
22 *Bancroft*, 21-271. And there are others as well that I think are  
23 cited by the defense.

24 But the point that I've made repeatedly is you have a lot  
25 of highly disturbing comments, not just isolated comments but

1 comments that are tied in with assaults and in some cases  
2 trespass on the Capitol, in some cases into the Capitol  
3 building, and in some cases pretty egregious physical assaults.  
4 In none of those cases did the government seek any of these  
5 departures, whether it be under 3A1.4(a), Application Note 4,  
6 under 5K2.0, or under 5K2.6.

7 So for those reasons and a real effort on the Court's part  
8 to ensure that there's not unwarranted sentencing disparity  
9 between various defendants, I am not going to -- I'm going to  
10 exercise my discretion to not impose a departure here.

11 All right. We've been going a long while. Let me ask the  
12 court reporter whether you think we can go another 30 minutes or  
13 so before we take a break.

14 MR. BRODEN: Your Honor, can we take a two-minute  
15 break?

16 THE COURT: We will take a two-minute break. I think  
17 the court reporter is going to need a longer break in a moment,  
18 but go ahead.

19 (Recess taken from 12:16 p.m. to 12:20 p.m.)

20 THE COURT: Folks, it's hard to anticipate how long  
21 this will go. I have a 2:00 hearing that may be pushed back, I  
22 think. For the court reporter's benefit, there will be a change  
23 in court reporter at some point. So what we might need to do is  
24 try to get through the allocution on behalf of both sides, and  
25 Mr. Reffitt, you will have a chance to speak if you want to.

1 You don't have to, but you will have a chance. And then I'm  
2 guessing you all might be getting hungry, and we could take a  
3 break and come back.

4 This is a complicated sentencing with a lot of complicated  
5 legal issues. So I think it's important to take the time to go  
6 through these carefully and create a clear record.

7 All right. So at this point, I'm going to turn to the  
8 allocution by each side, and I will start with you, Mr. Nestler.  
9 Just to confirm, all the exhibits that you've provided the Court  
10 have been made available to the public through the Dropbox or  
11 will be today?

12 MR. NESTLER: The latter, correct, Your Honor.

13 THE COURT: All right. So you can go ahead. And one  
14 thing neither party addressed in their sentencing memoranda are  
15 the conditions, and you all may have -- I assume you noticed  
16 that the Probation Office has proposed a restriction on both  
17 association and computer use, and the way in which it's drafted  
18 to me strikes me as very broad.

19 And when we take a break, I might have you all briefly  
20 confer to see if -- neither side has addressed it, but I do have  
21 potential First Amendment concerns with applying those  
22 conditions. So I'm interested in your viewpoints on that.

23 The one case I was able to find dealing with these  
24 provisions was an ISIS terrorism case, so very different factual  
25 case. So again, this is one where it would be helpful if the



1 government could tell me if any court has imposed a similar  
2 condition in any other case relating to January 6. That would  
3 be helpful for me to know in deciding whether that's  
4 appropriate.

5 And it sounds like with restitution the parties are on the  
6 same page. So you don't need to address that.

7 Go ahead, Mr. Nestler.

8 MR. BRODEN: Your Honor, I may not have the  
9 conditions.

10 THE COURT: So that is in the recommendation that I  
11 asked if you all received.

12 MR. BRODEN: I'm sorry. Then no, I did not receive  
13 the recommendation.

14 THE COURT: I'm going to ask that you -- Mr. Hopkins  
15 can print it out for you, and during the break, Mr. Reffitt can  
16 review it. So this is the probation officer's recommendation.

17 MR. BRODEN: We don't get those in Texas. Maybe  
18 that's why I wasn't expecting one.

19 THE COURT: It should be on the docket. It's, I  
20 think, publicly available.

21 MR. BRODEN: Then I missed it, Your Honor.

22 THE COURT: Anyway, you should take a look at that  
23 over the break and review it with Mr. Reffitt.

24 You don't have to address those issues that you haven't had  
25 time to think about, but Mr. Nestler, just your general

1 allocation and your arguments you want to make under 3553(a).

2 MR. NESTLER: Yes, Your Honor. We would like to start  
3 with -- Ms. Berkower is going to read a short letter from  
4 Jackson Reffitt.

5 THE COURT: Okay. Good afternoon, Ms. Berkower.

6 MS. BERKOWER: Good afternoon, Your Honor. This  
7 letter was submitted to the government by Jackson Reffitt with a  
8 request to read it at sentencing as his victim impact statement.

9 THE COURT: If you can keep your voice up, please.

10 MS. BERKOWER: "I believe my testimony will tell a  
11 better story than I am capable of in words. I appreciate taking  
12 the time to read this short letter.

13 "My father, Guy, is someone who over the last five years  
14 has slowly lost himself to countless things. Whether you view  
15 him as a father, family member, or friend, using these labels to  
16 justify anything he has done is completely in the wrong. He  
17 will always be these things.

18 "Regardless of how my family might view me and attempt to  
19 paint me, the amount of evidence piecing together a painful,  
20 slow story of my father falling into a horrible community to  
21 attempt to find his place in his life.

22 "To wrap up this letter, I hope to see my father use all  
23 the safety nets this country and system can provide: Mental  
24 health and improved conditions. The prison system should be  
25 used to not destroy a person but to rehabilitate one. I am

1 confident in the prosecution's decision, as long as mental  
2 health rehabilitation is taken into consideration."

3 Thank you.

4 THE COURT: Thank you, Ms. Berkower.

5 Mr. Nestler?

6 MR. NESTLER: And now the government would like  
7 Ms. Shauni Kerkhoff to be able to address the Court.

8 THE COURT: Of course. Ms. Kerkhoff?

9 MR. NESTLER: Court's brief indulgence. I think she  
10 stepped out during the break.

11 THE COURT: Good afternoon.

12 MS. KERKHOFF: Good afternoon, ma'am. How are you?

13 THE COURT: Doing well. Thanks. And you?

14 MS. KERKHOFF: I'm good. Thank you. Thank you for  
15 allowing me to do this today. I appreciate it.

16 THE COURT: Of course.

17 MS. KERKHOFF: Are we good to go?

18 THE COURT: Yes, good to go.

19 MS. KERKHOFF: I apologize for looking down. I am  
20 reading.

21 THE COURT: No, take your time.

22 MS. KERKHOFF: My name is Shauni Kerkhoff, and I was  
23 on duty as a United States Capitol police officer on January 6,  
24 2021. I was one of the first officers to confront the defendant  
25 that day as he was one of the first to breach the security

1 perimeter. I witnessed him -- my apologies.

2 I was one of the first to confront the defendant that day  
3 as he was one of the first to breach the security perimeter. I  
4 witnessed him lead an angry, motivated mob of armed individuals  
5 whose sole intent was to push past officers, officers who swore  
6 under oath to protect and serve Congress and the American  
7 people.

8 He led this group up the stairs of the Capitol towards  
9 members of Congress who were in full session fulfilling their  
10 civic duty as elected representatives of the American people.  
11 He intended to harm these members of Congress and to stop the  
12 certification of electoral vote.

13 Myself and members of my unit were able to thwart the  
14 advance of the defendant by debilitating him with the use of  
15 less lethal chemical munitions. But I watched in horror as he  
16 encouraged the angry mob to push past him and advance towards  
17 the Capitol, physically assaulting my fellow officers in the  
18 process. Some of those officers still haven't returned to duty  
19 because of their injuries they sustained that day, and others,  
20 to include a good friend, lost their lives as a result of that  
21 day and the actions of the defendant.

22 One such officer, my partner, was pushed into a doorway by  
23 the mob, his arms pinned to his sides. His gas mask was pushed  
24 off the side of his face. He was sprayed with some sort of  
25 clear liquid or binding agent and then bear sprayed. His mask

1 was then placed back on his face, sealed, and his filter was  
2 removed and thrown into the crowd. His less lethal launcher was  
3 then disassembled. He was left debilitated by the bear spray,  
4 unable to see, unable to defend himself and others, surrounded  
5 by the mob the defendant encouraged to continue forward when he  
6 himself could not. I have to live with the fact that I was  
7 unable to protect my partner because we were separated by the  
8 angry mob.

9 What makes me sick is the fact that the defendant to this  
10 day thinks what he did was right. He bragged about his  
11 encounter with me and said it was cute I tried to stop him. He  
12 has written letters and framed himself as a patriot for his  
13 actions that day.

14 His actions weren't acts of patriotism. They're acts of  
15 domestic terrorism. He was intent on harming fellow Americans  
16 and the democratic process itself. This is a man who threatened  
17 to harm his own children if they turned him in.

18 I cannot turn on the TV without seeing videos from that day  
19 of my fellow officers being assaulted and beaten. I have to  
20 worry about my friends and loved ones still on the force. The  
21 defendant's actions that day and the actions of the angry mob he  
22 led up those stairs have made USCP and the Capitol itself look  
23 like a soft target.

24 By testifying as a witness in this trial, I have become a  
25 target for the defendant's followers. My name is plastered all

1 over the Internet and will forever be associated with this case,  
2 the defendant -- this case, the defendant, and that terrible  
3 day. I worry about his followers coming to my house, targeting  
4 myself and my loved ones. My life and the lives of every  
5 officer on duty that day will forever be changed because of the  
6 defendant's actions and the actions of those he encouraged.

7 Because of the defendant's lack of remorse, pride in his  
8 actions, and the turmoil his actions resulted in, I recommend  
9 the defendant receive the maximum sentence.

10 Thank you for allowing me to make this statement today.

11 THE COURT: Thank you, Ms. Kerkhoff. I appreciate  
12 your service, particularly on January 6.

13 MS. KERKHOFF: Thank you, ma'am.

14 MR. NESTLER: Mr. Hopkins, could I have the monitor  
15 and the audio? Thank you.

16 Your Honor, this is what Guy Reffitt had to tell his boss,  
17 the president or leader of the Texas Three Percenters, and Rocky  
18 Hardie about Ms. Kerkhoff when he came home from D.C. to brag to  
19 them.

20 (Video played.)

21 MR. NESTLER: We talked earlier about the defendant's  
22 words, Your Honor. We're not here because of the defendant's  
23 words. For a lot of our perspective of what we see in the  
24 defendant's sentencing memorandum and a lot of what the letters  
25 talk about is his words, as if he's being prosecuted for his

1 hyperbole or for his words. He's not. He's being prosecuted  
2 and he was prosecuted and he should be sentenced for his actions  
3 and his plans.

4 These are not idle words. He didn't sit on a couch in  
5 Texas and spew off into the Internet. He drove all the way  
6 across the country with an AR-15 semiautomatic rifle ready to do  
7 violence upon other people who he didn't agree with. He had a  
8 loaded handgun on his waist, ready to do violence to other  
9 people. As he just told other people, he wishes he had "shot  
10 the bitch" who had shot him. That's what the defendant said,  
11 and that's what he intended to do that day.

12 He was successful that day. The defendant did encourage  
13 and lead the mob up the stairs. He did get people from The  
14 Ellipse to follow him. He does want to be a leader.

15 We're not talking about just some of the words that he  
16 uttered. When he -- before and after he came to D.C. for  
17 January 6, what the defendant wanted to do was physically  
18 overtake Congress.

19 When we go back to what Jackson Reffitt did on Christmas  
20 Eve, Jackson Reffitt had sent a tip into the FBI that his dad  
21 was going to do something big to the legislators. It wasn't in  
22 D.C. It wasn't just he wanted to stop the vote or he wanted  
23 Trump to stay president. That's what Jackson Reffitt understood  
24 his dad wanted to do, something big to the legislators.

25 And everything the defendant did from that point forward

1 was targeted to that path. He recruited other members of his  
2 militia group, which he had a leadership role in. He finally  
3 got Rocky Hardie to come with him. The defendant made all of  
4 the plans, all of the travel arrangements for the hotel, the  
5 driving path, which car to take. He packed his weapons and  
6 Mr. Hardie's weapons and his plate carrier.

7 We talked earlier about not having concrete evidence about  
8 sort of who was in charge between Reffitt and Hardie. But it's  
9 pretty clear after Your Honor saw Mr. Hardie's testimony,  
10 Mr. Hardie was the follower here. Mr. Reffitt was the leader.  
11 Mr. Hardie forgot to bring a plate carrier. He brought ceramic  
12 plates. We can only assume why he would have brought his  
13 ceramic plates but no carrier to carry them in. So what did  
14 Mr. Reffitt decide to do the morning of January 6 but tape him  
15 up so that Mr. Hardie was actually walking around with ceramic  
16 plates taped to his body with gorilla tape.

17 The defendant came into our city with these firearms  
18 planning to do violence to our national legislature. We cited  
19 in our memorandum in support of the terrorism enhancement all of  
20 the statements he made at the Ellipse. As we talked about  
21 earlier, he didn't plan to come to D.C. to go to the rally. He  
22 planned to come to D.C. to go to the Capitol and accomplish his  
23 ends. He told everybody who would listen, "We're going to the  
24 Capitol, we're dragging them out, and I don't care if Pelosi and  
25 McConnell's heads are hitting every step on the way down, that's



1 what we're doing."

2 And what the defendant was trying to do was get more people  
3 behind him. You can see in some of the Telegram messages that  
4 the defendant was saying that he wanted to see how many people  
5 would be with him to see if he could be successful in actually  
6 overtaking Congress. When he got to the Capitol and saw  
7 everyone was standing there and not doing anything, he took  
8 charge, and he needed that crowd at his back. He used that  
9 crowd at his back in order to push forward and accomplish his  
10 ends.

11 As we talked about earlier, his job was done. He is the  
12 one who confronted the officers, led people forward. He didn't  
13 need to personally go inside the building in order to accomplish  
14 what he wanted to accomplish. He got his accomplishment because  
15 everyone else was able to breach the building.

16 When he went home, he was boastful and prideful and  
17 bragging. Even his daughter Peyton Reffitt's letter says that  
18 same thing, and Jackson Reffitt testified to it. We see it on  
19 the Zoom with his other members of the militia group. This was  
20 the beginning for him.

21 And when we talk about comparators for other defendants  
22 from January 6, Mr. Reffitt is in a class all by himself. This  
23 was the beginning. He wanted the rest of his militia group to  
24 start overtaking state capitols all over the country. He was  
25 showing them the way. He attacked the national capitol, the

1 national legislature; the rest of the group should attack the  
2 local ones. He was mad at them they hadn't gone to Austin.

3 THE COURT: Sorry to interrupt, but what about these  
4 other folks who made similar, you know, patriot comments about,  
5 you know, taking over and what's coming? Do you really think  
6 he's the only one espousing?

7 MR. NESTLER: No, not the only one espousing. But he  
8 has the means in order to actually accomplish this. Other  
9 people showed up late, they couldn't get to D.C. on time, or  
10 they weren't convicted -- I think Your Honor listed all of the  
11 other defendants. Many of them were convicted of threats. One  
12 of them was convicted of 875(c), not even of any kind of  
13 obstructive conduct.

14 THE COURT: But how do you say they didn't have the  
15 means? The one guy who had a handgun or rifle in his hotel and  
16 over 2,500 rounds of ammunition? There are others that had real  
17 large caches. To say that others didn't have the means to do  
18 something like Mr. Reffitt did here, I don't think that's a fair  
19 statement to make.

20 I agree with you, completely, it's highly disturbing. My  
21 point is simply, when you say he's in a class all of his own,  
22 I'm not so sure I agree with the government on that.

23 MR. NESTLER: So a couple of responses to that. Only  
24 a couple of defendants actually had those weapons that we're  
25 talking about here, but I don't believe either of those two

1 defendants who had weapons were at the Capitol grounds on  
2 January 6.

3 THE COURT: One was very close, was he not? The car  
4 was close? Am I --

5 MR. NESTLER: I need to go back --

6 THE COURT: -- remembering the facts incorrectly?

7 MR. NESTLER: I don't believe either of those  
8 defendants had any --

9 THE COURT: And if they just were late and it was a  
10 mistake, isn't the government equally concerned about those  
11 folks?

12 MR. NESTLER: 100 percent equally concerned about  
13 those folks, but we're talking about the hundreds of people who  
14 have been sentenced to date and the hundreds more who will be  
15 sentenced. Mr. Reffitt stands out. Those might be two other  
16 examples, Your Honor, but we're talking about two who don't have  
17 any obstructive conduct to be sentenced under that Mr. Reffitt  
18 has.

19 THE COURT: All right. So you're saying, as you stand  
20 here now -- none of us have the benefit of the larger conspiracy  
21 cases that will be tried in this case in the future, but as you  
22 stand here now, you're telling me his actions are more  
23 aggravated than those defendants as well?

24 MR. NESTLER: No, I'm not saying more aggravated than.

25 THE COURT: When you say he's a class of himself,

1 you're saying to date?

2 MR. NESTLER: Yes, to date. To all of the defendants  
3 who have been sentenced to date, he's in a class by himself.  
4 Just starting with the guideline range, his guideline level of  
5 29 is far above anyone else's guideline range. And that is a  
6 reflection of the severity of his conduct, and we believe it  
7 should be higher, as we asked for in the departures, to fully  
8 account for his conduct.

9 But when I say that the other defendants didn't have some  
10 of the same means, it's not just access to the firearms. The  
11 defendant had the infrastructure in order to accomplish his  
12 ends. He was part of a militia group where he had a leadership  
13 role. He was the vetting officer. He was very close with the  
14 president of the group. He was making plans after he got back  
15 to Texas to commit future violent acts, go attack mainstream  
16 media, go attack Facebook, people in his group talking about  
17 coming back to D.C. for the 20th to attack the Capitol at the  
18 inauguration. The defendant was making what he called bug-out  
19 plans in order to go to some compound in Texas in order to have  
20 a standoff against the federal government.

21 This is not somebody who was a lone wolf, who was operating  
22 by his lonesome. He had the means, and he had the personality  
23 and the wherewithal --

24 THE COURT: No, no. To the extent I suggested that, I  
25 meant that day, not that he doesn't have the backing of a

1 malitia group.

2 MR. NESTLER: Right. And so that is a huge part of  
3 the government's concern here and why we believe he should be  
4 sentenced at the high end or even above the guideline range, if  
5 Your Honor would consider varying upward. What the defendant  
6 did was so serious, his malitia membership -- and we laid it out  
7 in our sentencing memorandum, Your Honor, but he had this role,  
8 and he had this sort of aggrieved persona.

9 He reached out to Senator Cruz's office in the fall of 2020  
10 saying that he and his group were going to use all of their  
11 Second Amendment powers against Facebook for taking them  
12 off-line. He needed that platform, that propaganda platform in  
13 order to have the world hear what he needed -- what he wanted  
14 them to hear, so they could hear his voice.

15 When you hear what he told Jackson and when you hear what  
16 he told Mr. Hardie, the defendant was puffing himself up like a  
17 leader, that they needed to do what he said to do. He wanted to  
18 start over. He cites *Marbury v. Madison* repeatedly. I'm sure  
19 Your Honor saw it in some of the things, some of the pleadings.

20 THE COURT: Preposterous, yeah.

21 MR. NESTLER: In his mind, what he wanted, he wanted  
22 to get rid of Congress. What he said at the Ellipse that day,  
23 that those people at Congress -- and he used all sorts of  
24 expletives I won't repeat right now -- that they were there for  
25 too long, they had too much power. And he said this wasn't

1 about Trump, he wasn't here as a Trump supporter. What he  
2 wanted to do was remove Congress.

3 And we talk about why he's different from many of the  
4 people who have been sentenced before. He didn't just want  
5 President Trump to stay in power. He wanted to physically and  
6 literally remove Congress. That is -- we believe he is a  
7 domestic terrorist. We ask for him to be labeled one.  
8 Ms. Kerkhoff just said it. What he was doing was terrorism.

9 THE COURT: So, Mr. Nestler, this is not really  
10 critical for this sentencing, but I just have to say this,  
11 because I'm shocked that the government didn't forecast some of  
12 the evidence that was coming in consideration of all those  
13 motions. I mean, the way you walked back the motion in which  
14 he -- I forget what the word was, he charged the officers. We  
15 were talking about apples and oranges.

16 The way the government didn't give any hint of what was  
17 coming, I had no idea that the purpose, the stated purpose, in  
18 Mr. Reffitt's words, pretrial was to overtake the United States  
19 government. That came out nowhere in your briefing. And I  
20 don't know if you were so close to the case that you didn't  
21 appreciate that the perspective I had was this is a potentially  
22 mere trespasser.

23 Was that at some point apparent to you?

24 MR. NESTLER: It was apparent to me very early on,  
25 Your Honor, but I am very close to the case, and I'm very close

1 to many other cases involving the attack on our democracy that  
2 day. So if we hadn't forecasted that accurately for Your Honor,  
3 I apologize for that, but it was.

4 THE COURT: It created a lot of back and forth that --  
5 the standard that I set forth in *Sandlin* was clearly going to be  
6 met in multiple ways, and that wasn't clear to me from your  
7 argument.

8 MR. NESTLER: Understood.

9 THE COURT: It's just an aside, because you must have  
10 been thinking, if you thought that you were conveying that, how  
11 could she be thinking something different.

12 MR. NESTLER: Understood, Your Honor. We do believe  
13 that what he was doing that day was terrorism. We do believe  
14 that he is a domestic terrorist.

15 When we talk about what some of the other conduct -- and  
16 I'll get into some of the statements he made after the fact  
17 since he's been incarcerated. The defendant's memorandum says  
18 that he's remorseful and he's ashamed. That's what he wrote in  
19 his letter. He didn't say for what. It sounds like he's  
20 remorseful and ashamed for being here.

21 THE COURT: He regrets what he's done to his family,  
22 and he wishes he hadn't screamed at the officers, but that's  
23 about it. I agree with you.

24 MR. NESTLER: So when we look at the manifesto that he  
25 had published on his behalf from the jail, on behalf of the

1 J6ers, and then the memos that he disseminated through his  
2 family, he thinks that he is a martyr. He said he's going to  
3 take a bullet for freedom, for tyranny. He thinks that the  
4 government is some sort of unfairly -- I don't even know exactly  
5 what his world view is, but he thinks that what he is doing is  
6 that he is being a martyr right now, and that is far from the  
7 truth.

8 To address partially what Your Honor just said about the  
9 facts of the case, to be clear, we are not seeking the sentence  
10 we're seeking in this case because Mr. Reffitt went to trial.  
11 We are not seeking a trial penalty in any stretch of the  
12 imagination. It's because of the defendant's conduct here.

13 But one thing that does happen at trial is that the record  
14 is far more fully developed than it is at a plea. And so a lot  
15 of the facts we're talking about here came out because we had  
16 live people testifying at trial.

17 THE COURT: I know. But the government knows what its  
18 evidence is before it pleads it out. You all are not pleading  
19 out cases before you, maybe not the judges, but you know full  
20 well what the scope of the evidence is. So you're reaching plea  
21 agreements based on that knowledge. The judges might not have  
22 the benefit of seeing a defendant, as I had in this case,  
23 basically confess in multiple venues, real-time confession again  
24 and again. It was incredible. Arguably, this case could have  
25 been tried in two days.



1 MR. NESTLER: We agree. The facts that we adduced at  
2 trial were, in part, because we were at a trial posture.

3 THE COURT: But I don't think it's fair to say that  
4 you discovered something in trial that you wouldn't know in a  
5 normal case at the time of plea.

6 MR. NESTLER: Sorry, I didn't mean to say that we  
7 discovered, but the record itself.

8 THE COURT: The judge certainly learns a lot more,  
9 clearly. I didn't have any idea what his role was from your  
10 briefing. So you are aware of the evidence you possess. What I  
11 summarized here, you were aware of that when you made those  
12 sentencing recommendations to those judges.

13 MR. NESTLER: We are, but those judges are not aware  
14 of the same level of factual detail that Your Honor is after  
15 having sat through a trial.

16 THE COURT: But again, that's suggesting that there's  
17 a plea penalty. You are, and you're making recommendations that  
18 are way different than you're making in this case, way  
19 different.

20 MR. NESTLER: We believe the defendant's conduct  
21 warrants it, but we also believe that the facts that were  
22 adduced -- this record is more fully developed than any of the  
23 other records --

24 THE COURT: Understood. My point is simply that it's  
25 fully developed for the government when it walks in and

1 negotiates a plea and takes a plea in a courtroom. It's not  
2 fully developed for the judge, but the government is making  
3 recommendations in these cases that are pretty close in line to  
4 what judges are doing in those cases. They're not recommending  
5 departures. They're not, you know, recommending high end and  
6 all of that, and that's just my point.

7 There's a cost for going to trial, and the guidelines make  
8 pretty clear what that cost is. And the government needs to be  
9 really careful going forward that recommendations it's making in  
10 cases that have similar facts are going to be taken into account  
11 by judges in this court, because we are trying to be really fair  
12 and really even in how we're sentencing defendants.

13 And so this defendant has some frightening claims that  
14 border on delusional, and they are extraordinarily concerning to  
15 the Court. Other defendants did, too. And that's the only  
16 point I'm making, Mr. Nestler.

17 MR. NESTLER: Understood, Your Honor. And we do  
18 believe that the defendant, compared to those defendants who  
19 have been sentenced before -- we don't know what's going to come  
20 after -- is more culpable than others.

21 There are two points about the defendant's -- or three  
22 about the defendant's history with firearms. First is, the FBI  
23 found an illegal suppressor, a firearm silencer at the  
24 defendant's house, which he initially claimed was a fuel filter  
25 for a car and admitted --

1 THE COURT: What's the penalty for that? Would this  
2 be like possession of a firearm? Possession of a silencer would  
3 be 2K2.1 guideline?

4 MR. NESTLER: Yes. It's a possession of a firearm  
5 offense because a silencer is defined as a firearm.

6 THE COURT: And so, what, his range would be somewhere  
7 around base offense level 14 for that offense?

8 MR. NESTLER: I believe it was 18.

9 THE COURT: 18, but then acceptance.

10 MR. NESTLER: Correct.

11 THE COURT: In a normal case.

12 MR. NESTLER: Correct. And we point that out for an  
13 additional fact that -- he did legally possess other firearms  
14 because there's no registration requirement in Texas, but the  
15 silencer was illegal.

16 THE COURT: And that is an action that the Court  
17 certainly can take into account under 3553(a), and also, 3661 of  
18 Title 18 puts no limit on what the Court can consider. And  
19 these are actions, not words. So yes, I hear you loud and  
20 clear.

21 MR. NESTLER: First is the illegal firearm, silencer.  
22 Second is his actions of pointing the firearm at his wife's head  
23 in the summer of 2020. Both Jackson Reffitt and Jody Nicole  
24 Reffitt talked about it openly with a reporter. We provided a  
25 copy of the podcast to Your Honor, that he twice pointed a gun

1 at her head and one of those times shot a gun near her head.  
2 Again, incredibly serious and dangerous conduct with respect to  
3 firearms.

4 THE COURT: I'm just curious. The Probation Office,  
5 as you know, has identified the defendant's clear mental health  
6 issues as a potential basis for a variance in this case.

7 Given that kind of conduct, which is impossible to fathom,  
8 given the unequivocal support his family has given him  
9 throughout the trial -- they're here today. I see them in the  
10 courtroom. They've written letters -- it's hard to reconcile  
11 their views with his actions, and I'm just wondering, given this  
12 insane action with respect to the wife, who he clearly loves and  
13 she him, does the government think that his mental health  
14 conditions warrant any sort of variance?

15 I don't mean necessarily down but in the same way you're  
16 saying the Court should consider things like the additional  
17 firearm, the additional obstruction. Is that not a factor,  
18 potentially a mitigating factor, that the Court should consider  
19 as well in deciding where to sentence him?

20 These are really concerning. I agree 100 percent with what  
21 Jackson Reffitt is saying about the need for mental health  
22 treatment. Probation is suggesting an assessment and treatment,  
23 if necessary. I'm going to impose a condition full-on  
24 treatment. It seems to me obvious, given the information that  
25 we now have about Mr. Reffitt, that he has serious mental health

1 issues.

2 MR. NESTLER: We believe that his mental health issues  
3 can and should be taken into account by Your Honor in fashioning  
4 the sentence. We do not believe they are mitigating  
5 circumstances that would warrant a lower sentence than otherwise  
6 applied.

7 THE COURT: Than otherwise in the guideline range, but  
8 as I'm looking where I might end up in the guideline range, that  
9 is something that you agree is mitigating in the sense of it's a  
10 factor like the aggravating factors I should consider in  
11 deciding where to sentence him?

12 MR. NESTLER: It could be. Your Honor has the  
13 discretion to look to it. We don't believe Your Honor should.

14 THE COURT: You don't?

15 MR. NESTLER: No. We don't believe that the  
16 defendant --

17 THE COURT: And why? Arguably, under -- I know the  
18 departure provision for mental health conditions is a very  
19 difficult one to meet in any case because of case law  
20 interpreting that departure provision, but it does refer to the  
21 extent to which mental health contributed to the offense, and  
22 arguably -- you know, arguably, his mental health condition  
23 contributed to this offense.

24 And so even if it doesn't meet the case law under this  
25 guideline, by analogy, in the same way I'm looking at instead of

1 imposing departures upwards for firearms and upwards for the  
2 terrorism related nature of this, why, by analogy, should I also  
3 not be looking at this mental health situation?

4 MR. NESTLER: Sure, Your Honor. So to be clear, we  
5 agree Your Honor could consider a defendant's mental health  
6 history if it contributed -- well, in any regard, especially if  
7 it contributed to the defendant's offense. We don't believe the  
8 defendant's mental health contributed to the defendant's  
9 offense.

10 THE COURT: You don't?

11 MR. NESTLER: No.

12 THE COURT: You don't think that his mental health  
13 plays a part in his --

14 MR. NESTLER: Well, first of all, the only mental  
15 health diagnosis I saw in the pretrial report, Your Honor, was  
16 that he suffers from anxiety. So there is no other mental  
17 health diagnosis. The defendant explicitly disclaimed needing  
18 any mental health treatment. I agree that he would benefit from  
19 it.

20 THE COURT: Well, he did, but -- I don't want to get  
21 into details of the PSR, but you know there's a history that's  
22 concerning.

23 MR. NESTLER: A familial history.

24 THE COURT: Not just familial. With him in  
25 particular.

1           Anyway, I hear you. You don't think I should consider it  
2 as a mitigating factor under 5K2.0 or 5K2.3 or any of the other  
3 Chapter 5 departures?

4           MR. NESTLER: We don't believe that his mental health  
5 condition --

6           THE COURT: Played any role in his association with  
7 this group and his plans and his firing the firearm at his  
8 wife's head? None of that played any role in his behavior?

9           MR. NESTLER: No. We think he's dangerous.

10          THE COURT: Agreed.

11          MR. NESTLER: He would benefit from mental health  
12 treatment, but we don't believe that any mental health condition  
13 is what caused him to point a firearm --

14          THE COURT: Not caused, contributed in any way.

15          MR. NESTLER: We believe that he had the wherewithal  
16 to plan what he did --

17          THE COURT: No, I'm not suggesting any sort of  
18 diminished capacity at all. I'm just suggesting, you know, by  
19 analogy. I'm not arguing he didn't appreciate the wrongfulness  
20 of his conduct at all. I'm suggesting his actions appear  
21 unhinged at times and to what extent that is a reflection in  
22 part, not in full, but in part to his mental challenges. That's  
23 all.

24          MR. NESTLER: It's certainly a factor Your Honor could  
25 consider. We don't believe that it would warrant any kind of

1 mitigating circumstance here.

2 The third piece of the firearms that I wanted to address is  
3 the defendant's use of this security company to circumvent  
4 Second Amendment laws. As he told others, he created a security  
5 company, which he named TTP Security, and even in his letter to  
6 the Court claimed it didn't stand for Texas Three Percenters, it  
7 stood for something else, but it was very clearly associated  
8 with Texas Three Percenters as a way for him to amass and stock  
9 firearms outside of the government's knowledge.

10 THE COURT: And tell me specifically with the evidence  
11 you have how this scheme worked.

12 MR. NESTLER: What he said was that he created a  
13 security company. He registered it with the Texas Department of  
14 State. And he told others that he could get firearms for them  
15 without -- he used the word "circumvent," by circumventing  
16 Second Amendment or circumventing firearms laws.

17 THE COURT: And do you know how the owner of a  
18 security company can circumvent the registration laws and  
19 otherwise?

20 MR. NESTLER: I don't; I don't. He was telling other  
21 people that he had the ability --

22 THE COURT: I know. He tells people a lot of things.  
23 I'm just wondering, is it true that this does enable people to  
24 circumvent the firearms registration laws and the like that  
25 you're suggesting it did. I know he used the word "circumvent."



1 But help me understand how having the security company helped  
2 him circumvent.

3 Is it simply that it's a cover for him having firearms and  
4 not causing ATF or some other federal agent to be suspicious of  
5 him? That's not really circumventing the laws. That's like not  
6 raising suspicions. But is that the argument you're making?

7 MR. NESTLER: I do believe that's part of it. The  
8 other part of it is that he's able to get firearms and give them  
9 to other people without having the government be aware of it.  
10 So he's able to procure firearms through his company, or at  
11 least that was his plan, and provide them to other members of  
12 the malitia without raising any government red flags because  
13 they would be going to a security company.

14 THE COURT: But any security company has to keep  
15 paperwork, does it not, on who it provides the firearms to?

16 MR. NESTLER: One would assume, yes. But the  
17 defendant was telling other people that he was going to take  
18 care of all of this for them, that was his plan, using TTP  
19 Security in order to do that.

20 THE COURT: So your point is that he's sort of  
21 orchestrating the gathering of firearms by all the Texas Three  
22 Percenters by using this, but not that he truly is circumventing  
23 the laws; right?

24 MR. NESTLER: Correct. Circumventing was his word.  
25 He's using it in order to not amass attention from the

1 government in order to further the aims of his malitia.

2 THE COURT: Okay. I get it.

3 MR. NESTLER: Which is very similar, by the way, to  
4 what he did at the Capitol that day. He told everybody at the  
5 Ellipse before he went to the Capitol he was a member of Texas  
6 Three Percenters to encourage them to come with him, to give him  
7 more credence. But then he hid all of his insignia for TTP and  
8 Three Percenters at the Capitol. And when one of his malitia  
9 members complained to him later that he was going to bring  
10 unwarranted attention on the group, he said, "I'm not a fool. I  
11 hid everything."

12 THE COURT: And who is that? Russ Teer or --

13 MR. NESTLER: That was another member of the malitia  
14 group, I believe, who said that to him, who was coming back at  
15 him on the Telegram thread.

16 But the defendant knew what he was doing. He wanted to use  
17 TTP when it was to his advantage. He used it to recruit people  
18 at the Ellipse. And also, he met other rioters there who he  
19 then tried to recruit afterwards using TTP. But when he knew it  
20 was going to be bad for him and the malitia, he hid it. That  
21 shows a level of sophistication here that we don't often see  
22 with respect to other defendants that have been sentenced with  
23 respect to January 6.

24 And then I just want to go back to the obstruction. The  
25 defendant, on January 10 -- so he was boastful when he came

1 home. He thought that he had started something. He thought  
2 that he had lit the fire, that his militia group was going to go  
3 start attacking other Capitol buildings. He wanted to go to  
4 California, attack Facebook and mainstream media. He was  
5 talking about what was happening in D.C. on the 20th for the  
6 inauguration. All of that is going on with the defendant. He's  
7 happy. He thought they accomplished something.

8 And then he sees that the FBI starts arresting people,  
9 including near him in Texas. And around January 10th, all of a  
10 sudden, everything changes. He does a 180. Mr. Teer gets  
11 brought in for questioning. And who does Mr. Teer reach out to?  
12 Guy Reffitt, so that Guy Reffitt can tell everybody else delete  
13 your comms, this is not a drill, purge communications now, the  
14 shit is hitting the fan.

15 And people do. Rocky Hardie said he got that message, he  
16 got scared. He testified to this. He started deleting all of  
17 his Telegram threads. And some of those Telegram threads, as we  
18 talked about earlier, involve Mr. Reffitt talking about his  
19 plans for January 6.

20 The defendant gets scared. He tells his kids, both Peyton  
21 Reffitt said it in her letter and Jackson Reffitt said it at  
22 trial, he thought the three-letter agencies were coming for him.  
23 And this is not delusional, Your Honor. He thought that the FBI  
24 was going to come looking for him. They did just a few days  
25 later.

1 He is starting to take these actions in order to protect  
2 himself, which is why he threatens to harm his children. They  
3 knew he had firearms in the house, and he told them that if they  
4 turned him in they would be traitors and traitors get shot. He  
5 was going to do whatever was necessary to protect himself.

6 That makes him a danger to his family and a danger to  
7 others. That is a very serious offense there, that obstruction  
8 offense, that we believe ought to be taken into account and Your  
9 Honor factoring in the 3553(a) factors to vary upward from the  
10 top of the guideline range to provide a more severe sentence.

11 In closing, Your Honor, we believe that Your Honor ought to  
12 sentence the defendant to a sentence of incarceration above the  
13 top of the guideline range because of all of these factors in  
14 terms of his obstruction, his actual plan for January 6 that day  
15 and afterwards, and his use of firearms before, during, and  
16 after January 6.

17 THE COURT: All right. Thank you, Mr. Nestler.

18 MR. NESTLER: Thank you, Your Honor.

19 THE COURT: All right. You may proceed.

20 MR. BRODEN: Your Honor, I think Peyton Reffitt wanted  
21 to address the Court first.

22 THE COURT: Okay. Ms. Reffitt, you may come on up.

23 Good afternoon, Ms. Reffitt.

24 MS. PEYTON REFFITT: Good afternoon, Your Honor.

25 THE COURT: Take your time.

1 MS. PEYTON REFFITT: As I know my father, he is not a  
2 threat to my family, and he is very rhetorical, and he does say  
3 a lot of things that he does not mean.

4 His mental health is a real issue. It's been an issue for  
5 himself, and we've always turned a blind eye to it as our family  
6 has always looked at him to be the person in charge of our  
7 family.

8 I'm sorry, Your Honor.

9 THE COURT: Take your time; take your time.

10 Ms. Reffitt, I want to let you know that I've also listened  
11 to your testimony that you gave Magistrate Judge Faruqui at the  
12 time of the detention hearing. I've read your letter. I'm  
13 happy to hear more. But I don't want you to feel as though I  
14 haven't -- I don't understand your perspective here. I welcome  
15 more that you want to add, but rest assured, I have heard your  
16 testimony.

17 MS. PEYTON REFFITT: I guess the last thing I would  
18 like to say is that my father's name wasn't on all the flags  
19 that were there that day, that everyone was carrying that day.  
20 It was another man's name. He is not the leader.

21 And that's all. Thank you, Your Honor. Sorry.

22 THE COURT: That's all right. Thank you, Ms. Reffitt.

23 All right. Mr. Broden?

24 MR. BRODEN: Your Honor, I wanted to do a few things.  
25 First, I wanted to sort of start with a timeline --

1 THE COURT: Come on up to the microphone.

2 MR. BRODEN: Fair enough. A timeline that puts  
3 Mr. Reffitt's actions in some perspective. So I have a timeline  
4 for the Court, and it's going to correspond to some exhibits  
5 that we might introduce.

6 As noted in the timeline, they're all -- they all  
7 correspond to particular exhibits. So at this point, we would  
8 offer Defendant's Sentencing Exhibit Number 1, which was  
9 actually referred to in the sentencing memorandum, which is a  
10 timeline I believe the Capitol Police put together, Defendant's  
11 Exhibit 2 and Defendant's Exhibit 3, 2 and 3 being cameras -- I  
12 don't know who is in charge but I assume Capitol Police, but  
13 cameras of that day.

14 THE COURT: Mr. Nestler, any objection to these  
15 exhibits?

16 MR. NESTLER: Defendant Sentencing Exhibit Number 1,  
17 Your Honor, is actually a document that was produced in  
18 discovery as sensitive. So the government does object to it  
19 being released to the public but does not object to Your Honor  
20 considering it.

21 MR. BRODEN: And however the government or the Court  
22 wants to handle the release of it, I have no problem.

23 THE COURT: Mr. Nestler, help me, without revealing  
24 the contents of this timeline, understand in a general way why  
25 this is sensitive. I just need to make a record that it's

1 appropriate to have this filed under seal.

2 MR. NESTLER: Can I get back to you on that briefly,  
3 Your Honor, at the end of Mr. Broden's allocution?

4 THE COURT: Okay. Of course.

5 MR. NESTLER: Thank you.

6 THE COURT: So I am admitting all of these exhibits,  
7 and I will wait to hear from the government about the need to  
8 seal the timeline.

9 MR. NESTLER: Thank you. And we have no objections to  
10 Exhibits 2 and 3, which are Capitol Police surveillance video.

11 (Defendant's Sentencing Exhibits 1, 2, and 3 received into  
12 evidence.)

13 MR. BRODEN: So with that said, Your Honor, I would  
14 like to play sort of snippets of 2 and 3.

15 THE COURT: These are thumb drives? You're going to  
16 play them for me; right?

17 MR. BRODEN: We're going to play snippets as a part of  
18 the PowerPoint.

19 THE COURT: Is it important for me to watch the whole  
20 thing?

21 MR. BRODEN: The whole thing, no, no, just for the  
22 record.

23 THE COURT: So, Mr. Hopkins, you're going to work with  
24 counsel on what the Court needs to retain and what counsel  
25 should retain for purposes of appeal?

1           COURTROOM DEPUTY: Sounds like fun.

2           THE COURT: Okay. Mr. Broden, I'm not sure we retain  
3 the thumb drive. It might be on you. But Mr. Hopkins knows a  
4 lot more about that than I do.

5           MR. BRODEN: That's fine, Judge.

6           THE COURT: All right. Is all this visible to the  
7 audience?

8           COURTROOM DEPUTY: It is, Your Honor.

9           THE COURT: So this is not the timeline; this is just  
10 Exhibits 2 and 3?

11          MR. BRODEN: It's snippets of 2 and 3 and a reference  
12 to a government exhibit that had been admitted at trial.

13          THE COURT: Okay.

14          MR. BRODEN: Your Honor, the first slide is the  
15 government exhibit that was introduced at trial. So it sort of  
16 puts Mr. Reffitt's location in some sort of time frame. We see  
17 at 1:31 p.m. he's six, seven minutes from the Capitol. I don't  
18 know with that sort of crowd how long it would take for him to  
19 walk there. At 1:31, he's several blocks from the Capitol. We  
20 know from the government exhibit, the compilation exhibit at  
21 trial, that he's first seen on the Capitol banister or steps  
22 around 1:47, the later part of 1:47.

23           And so we would go to Exhibit 2, if I can make my thing  
24 work here, or the second slide. I'm going to just close out and  
25 start again, I think.



1           THE COURT: Before you continue, Mr. Nestler, let me  
2 just say, having reviewed the timeline that you're not sure  
3 about whether it should be sealed or not, I find it hard to  
4 believe that this entire document needs to be sealed. So I  
5 would ask you to consider whether -- if there is sensitive  
6 information, whether it can be redacted. It seems like a lot of  
7 this has come out if not in this trial but in other courtrooms.

8           I don't want to reveal any security information, but it  
9 just looks like it's a timeline on what happened when and when  
10 people were arrested and that kind of thing without names  
11 attached. Maybe you'll convince me, but I don't see the  
12 sensitivity of it.

13           MR. NESTLER: I understand, Your Honor. I'm checking  
14 with a colleague, and we will get back to you shortly.

15           MR. BRODEN: Are we ready, Judge?

16           THE COURT: Yes. Sorry.

17           MR. BRODEN: Not a problem.

18           This is a portion of Defendant's Sentencing Exhibit 2, and  
19 I tried to fast forward to it. It's not really meant to be an  
20 eye exam. The time frame is a little small. It starts showing  
21 you the people that started up these steps before Mr. Reffitt.

22           So we're starting to see at 1:21 this first man starting up  
23 the steps. And that's, what, about 26 or 27 minutes before  
24 Mr. Reffitt goes up those steps. You see the crowd behind him.

25           Fast forward to -- you see them come down. You will see

1 him eventually taken into custody. And that's also reflected in  
2 Defendant's Exhibit 1, which is the timeline. Then we keep  
3 going. You see him interacting with the police officers and  
4 being taken into custody.

5 THE COURT: Mr. Broden, is the purpose of all this  
6 together simply to show that he's not the first?

7 MR. BRODEN: Correct. And I don't want to take up the  
8 Court's time.

9 THE COURT: I'm happy to watch this, but if that's the  
10 point, I get it from the timeline alone, assuming the  
11 government --

12 MR. BRODEN: There's one other with the next slide.  
13 But the point of this slide is to show that three other people  
14 are going up, he's not the tip of the spear, so to speak.

15 THE COURT: And the three other people are going up in  
16 front?

17 MR. BRODEN: I'm sorry?

18 THE COURT: They're going up the stairs in front of  
19 him?

20 MR. BRODEN: Yes. These are long before Mr. Reffitt  
21 even arrives at the Capitol.

22 THE COURT: And do they get past the officers, or do  
23 they come back down?

24 MR. BRODEN: One gets arrested. We don't really know  
25 what happens to the other two. But the first one that went up

1 at 1:21 is encountered, gets arrested, and actually led away.

2 THE COURT: Do you concede that none of them succeeded  
3 in getting past the officers?

4 MR. BRODEN: Yeah.

5 THE COURT: Okay. So your point is others tried to  
6 do --

7 MR. BRODEN: Right, others got in front of the crowd  
8 and went up and were ultimately detained, just as Mr. Reffitt  
9 was sprayed with the OC and --

10 THE COURT: All right. So in your view, he's not the  
11 tip of the spear?

12 MR. BRODEN: Right. This -- I think it just  
13 juxtaposes the government's argument that somehow Mr. Reffitt  
14 made January 6 possible. I know the Court doesn't think the  
15 government went that far, but when I read its sentencing  
16 memorandum, it uses words like "possible."

17 THE COURT: Well, it doesn't help that Mr. Reffitt  
18 himself didn't talk about -- did talk about --

19 MR. BRODEN: Agreed.

20 THE COURT: -- lighting the fuse, lighting the fire.  
21 He wanted to be number 1, whether he was or not.

22 MR. BRODEN: Agreed. But then -- and I was going to  
23 talk about this a little. The government started off its  
24 allocution by saying this isn't about his words. Yet, they  
25 constantly went back to his words. So in effect, they are about

1 his words. We have to make some determination of how serious  
2 his words actually are, whether they're hyperbolic.

3 THE COURT: I understand.

4 MR. BRODEN: And then this last one, the idea that his  
5 actions resulted in the cutting of the tarp and scaffolding,  
6 before he's even seen on the video up there, we see somebody  
7 cutting the scaffolding long before he's waving on -- I  
8 shouldn't say "long before," but a few minutes before he's  
9 waving people on at the top of the stairs. So to suggest  
10 that -- it's going to be in that bottom left-hand corner. But  
11 around 1:34 is when they start -- somebody has a box cutter or a  
12 knife at some point and starts cutting at that bottom. Here he  
13 goes. So the idea that Mr. Reffitt's actions caused all this, I  
14 think, is refuted by the video evidence.

15 THE COURT: Okay.

16 MR. BRODEN: And those are my only points. But I  
17 think in light of some of the government's arguments, it's  
18 important to sort of put this in a little bit of perspective.

19 THE COURT: So two points: One, he wasn't the first,  
20 and two, the property damage started before he ascended the  
21 steps?

22 MR. BRODEN: Right. I'm less concerned about the  
23 property damage per se, more the government's arguments that him  
24 going up the steps led to people cutting the -- so they could  
25 storm the Capitol and, but for Mr. Reffitt doing this, the tarp

1 wouldn't have cut and people wouldn't have climbed the  
2 scaffolding. So I think both of those are false.

3 I certainly agree that a lot of his stuff was highly  
4 disturbing, a lot of his comments. I couldn't even begin to  
5 fathom trying to defend some of his comments. But then we need  
6 to -- the government says it's not about words, but a lot of its  
7 argument is about words.

8 And, for example -- and I meant to look this up, but I know  
9 it was several months before, he supposedly sends this e-mail to  
10 Senator Cruz about going after Facebook. Yet, he doesn't go  
11 after Facebook. I mean, a lot of this is --

12 THE COURT: He does talk about it in the Zoom call  
13 when he gets back home from the Capitol. He hasn't let go of  
14 that notion.

15 MR. BRODEN: Right. There's a lot of mentally ill or  
16 delusional people don't let go of things. But the question is,  
17 was there any indication that he was driving out to Palo Alto or  
18 wherever Facebook is based and doing anything.

19 THE COURT: Well, let me tell you what makes this case  
20 extraordinarily difficult, in addition to the firearm, which  
21 speaks for itself. But the fact remains, as he sits here now,  
22 he has yet to state that what he did was wrong. He is yet to  
23 accept full responsibility for his actions. He has not walked  
24 back his comments about being a martyr. He hasn't walked back  
25 his comments about being a patriot.

1           So here he sits, as I consider what is this man going to do  
2           after he's released from prison, because at some point he will  
3           be, even under the government's sentencing recommendation.  
4           We're not talking about a life sentence for him. What is this  
5           man going to do when he is released.

6           And this notion, the repeated diatribes from jail suggest  
7           that his and others' efforts to foment rebellion in our country  
8           to respond to the so-called tyranny of our government are  
9           legitimate. Like you said, these are frightening claims that  
10          border on delusional. There are plenty of people who feel like  
11          democracy isn't working for them. There's, unfortunately, a lot  
12          in the United States right now who feel that way. But in a  
13          democracy, the answer to frustrations is not rebellion. And  
14          it's really disturbing that he repeatedly persists with these  
15          views that are way outside the mainstream.

16          And these are just flat -- his claims are wrong, and to in  
17          any way analogize the current-day frustrations of Americans with  
18          those of the American colonists who were under the rule of the  
19          British crown and who were being taxed without representation, I  
20          mean, that analogy is so far off the mark it's absurd.

21                 MR. BRODEN: I just took my kids to Boston last week.  
22                 So I understand, Judge.

23                 THE COURT: Patriots honor and respect the rule of  
24                 law. Patriots are like Officer Kerkhoff who defended our  
25                 Capitol, who defended the public servants who were inside the

1 Capitol. That's a patriot.

2 MR. BRODEN: I agree.

3 THE COURT: And he seems to really believe that this  
4 is legitimate and that -- he cites the Supreme Court's decision,  
5 its 1803 decision in *Marbury v. Madison*, along with the First  
6 and Second Amendments to the Constitution, as permitting the  
7 illegal actions he took in this case. I don't see how he gets  
8 there.

9 And the group he's a part of, even Rocky Hardie does  
10 espouse this view that at a certain point rebellion's required  
11 and we're there in democracy. Again, analogizing this to the  
12 American colonists, it's delusional. In a democracy, we vote  
13 our conscience at the election, in the election box. We don't  
14 do it through violence.

15 And he thought or he claimed that he was going to forcibly  
16 remove legislators and install a new government that will be  
17 approved by the judges, the constitutionalists down the street.  
18 Nothing can be farther from the truth, nothing, and to this day,  
19 he has not disavowed these comments.

20 In democracy, we respect a peaceful transfer of power, and  
21 all the claims about the election's being stolen, all of that,  
22 the election was challenged in multiple courts across the  
23 country, and judge after judge said there's no merit to these  
24 claims that there was election fraud to the degree that it  
25 affected the outcome of the election. And the former attorney

1 general of the United States, William Barr, has said repeatedly  
2 that this was utter nonsense. And yet, he and others continued  
3 to believe that the election -- or claim that the election was  
4 stolen.

5 And Mr. Nestler's right. I was shocked. I was wondering  
6 whether a defense at trial might have been that the purpose  
7 wasn't to obstruct the vote, the purpose was so much bigger, it  
8 was to remove the government entirely, the stated purpose. He  
9 is in a class of his own so far as I'm aware in terms of what he  
10 was doing there that day, what he claimed to be there to do.

11 MR. BRODEN: I agreed with the Court up until the last  
12 sentence.

13 THE COURT: Then help me understand that.

14 MR. BRODEN: That he was sort of in this class of  
15 himself, I think that's what -- the Court went through some of  
16 the other cases, and I've certainly cited the other cases. I  
17 really think -- if he was being sentenced in isolation, I think  
18 we would be having probably a different discussion. But he's  
19 not being sentenced in isolation.

20 One of the things when we talk about our democracy and our  
21 Constitution is this idea that you have a right to go to trial.  
22 You're not sentenced to three times as high of a sentence if you  
23 go to trial. And we treat people similarly situated similarly.

24 And so we -- part of the sentencing, and that's why you get  
25 paid the big money, I guess, is to sort of juxtapose these



1 two --

2 THE COURT: Fair enough. There are other individuals,  
3 as I summarized, who made claims about being patriots and claims  
4 about rebellion and the like. It's just his stated purpose that  
5 day seems kind of unique here, which --

6 MR. BRODEN: Well, maybe because he's the one wearing  
7 the GoPro, but I think we're kidding ourselves if we don't think  
8 that was a lot of the people's purpose that day. And some of  
9 them, when you do have comments, are their expressed purposes.  
10 The Court withheld some of the expletives of one of the guys,  
11 but, I mean --

12 THE COURT: The Court what?

13 MR. BRODEN: Didn't read all of the expletives from  
14 one of the sentences. But that was along the same lines, if not  
15 worse.

16 THE COURT: But he's had a long time to sit in jail  
17 since January 6.

18 MR. BRODEN: Well, we can talk about the wisdom of  
19 keeping all these guys together.

20 THE COURT: But here he sits, and does he still claim  
21 that this is justifiable action? He hasn't even admitted that  
22 he committed the offenses with which he was charged and  
23 convicted of by a jury. His letter to me does not say that. He  
24 says he's not proud of what he did on the Capitol staircase that  
25 day and his regrets are immense. He doesn't say what about.

1 MR. BRODEN: I thought he said he was ashamed of his  
2 actions.

3 THE COURT: He said he "never should have been  
4 screaming at the officers at the Capitol, and for that, I am  
5 truly ashamed."

6 Does he still see his actions on some level as a  
7 justifiable rebellion against a tyrannical democratic government  
8 that has a history of over 200 years of peaceful transfers of  
9 power?

10 MR. BRODEN: My discussions with him, and I will share  
11 these with the Court, what he has offered to me is he is done  
12 with being involved in any kind of politics or political  
13 protests or statements. I've had extensive discussions with  
14 him. Obviously, I'm fairly new on the case.

15 THE COURT: But his latest statement, public statement  
16 was, if not weeks ago, a couple months ago, and it's really easy  
17 for a defendant who is facing a judge at sentencing to have a  
18 change of heart.

19 MR. BRODEN: Sort of like the defendants that got  
20 acceptance of responsibility because they come in and plead  
21 guilty and say the right things, whether they really deserved  
22 acceptance of responsibility.

23 THE COURT: Right. And many of those or some of those  
24 have gone on after their statements of remorse at the time of  
25 sentencing to not show any remorse.

1 MR. BRODEN: Right. So my point is, I'm not sure him  
2 coming in, which I really never have seen a defendant who went  
3 to trial come in and say yeah, I robbed a bank, yeah, I dealt  
4 the drugs.

5 THE COURT: Really?

6 MR. BRODEN: Not in my experience in 30 years, but I  
7 can't say it never happened. Then why are they going to trial  
8 in the first place.

9 My point is, I think a lot of these people who have gotten  
10 acceptance of responsibility -- and I understand that's sort of  
11 how the system is set up. To get your three points, they will  
12 come in and say it, but as the Court points out, a lot of them,  
13 you know, as soon as they walk out of the courthouse are giving  
14 press conferences about how they were -- did the right thing and  
15 were misunderstood.

16 THE COURT: So it shouldn't matter what he says now at  
17 the time of sentencing?

18 MR. BRODEN: It is, I think, a little harder in these  
19 type of cases, because I think it is harder to judge the  
20 sincerity based on the track record of what we're seeing.

21 THE COURT: But am I going to be in a position to not  
22 even have the possibility of judging sincerity, that as  
23 Mr. Reffitt sits here he still views himself as a martyr who is  
24 justified in his rebellion against the tyrannical U.S.  
25 government, the democracy in which he lives in?

1 MR. BRODEN: Well, I will say this: The plan was not  
2 to have Mr. Reffitt address the Court, given that there's a  
3 possible appeal and everything. If --

4 THE COURT: I'm not asking for --

5 MR. BRODEN: And I don't want to put this on the  
6 Court, but it is something I could revisit with him if the Court  
7 has that concern.

8 THE COURT: Well, you can understand, from a  
9 deterrence perspective, a specific deterrence perspective, what  
10 is this defendant going to do in the future, that this is  
11 something that is very much on my mind.

12 MR. BRODEN: Well, the one thing I will tell you, and  
13 I guess the Court's going to have to take my word on the  
14 judgment of sincerity, I do believe when he told me he's done  
15 with being involved in politics and demonstrations and things.  
16 I took that as sincere.

17 Now, whether that changes his beliefs --

18 THE COURT: But this is a very carefully crafted  
19 letter. It doesn't say the views that the Texas Three  
20 Percenters or the Three Percenters across the country espouse  
21 are wrong, that rebellion is appropriate, the analogy to 1776.  
22 This is really troubling.

23 MR. BRODEN: I understand.

24 THE COURT: You can feel not proud of what you did on  
25 the Capitol staircase. You can have regrets about what you're

1 putting your family through. And I agree with Mr. Nestler, he's  
2 being sentenced on actions, not words. But this is one where  
3 words could actually help him in some way. But I still have to  
4 wonder, is it too little too late.

5 MR. BRODEN: Well, you know, and I don't want to get  
6 too much in the weeds, but if you're talking about specific  
7 deterrence, I mean, I understand the Court's concerns about the  
8 letter, but I think it's safe to say from reading the letter he  
9 never wants to put his family in this position again. So in  
10 that sense --

11 THE COURT: That's different. He says his family is,  
12 quote, suffering directly while he suffers indirectly for his  
13 actions. That is off the mark, too. He is in prison. He's  
14 directly serving time, and his family indirectly is being harmed  
15 by the poor choices, incredibly poor choices he made. So his  
16 family is not being directly harmed.

17 MR. BRODEN: I agree with that. My point was, when  
18 you talk about deterrence and you ask is he likely to commit a  
19 similar offense in the future, knowing what has happened and  
20 what has happened to his family, whether you characterize it  
21 directly or indirectly -- I agree with the Court, it's  
22 indirectly -- is he going to put his family in a position where  
23 that happens indirectly again. And I think that comes through  
24 from the letter. Regarding the Court's other concerns, I  
25 understand.

1 THE COURT: Okay. Is there anything else you'd like  
2 to --

3 MR. BRODEN: Just a couple, and I'm really kind of  
4 repeating myself. And I agree -- and I apologize. I forget the  
5 officer's name.

6 THE COURT: Kerkhoff.

7 MR. BRODEN: Okay. Officer Kerkhoff, I agree she is a  
8 true patriot, and what she did that day was -- we shouldn't ask  
9 people to do.

10 Listening to her, one of the things that caught me, though,  
11 was the person that sprayed her partner with the bear spray.  
12 Now, should Mr. Reffitt get the same type of sentence as the guy  
13 who actually disabled her partner and sprayed him with bear  
14 spray.

15 And I think that's when we get back to the juxtaposition  
16 we're dealing with, and that's why I think -- as I say, I can't  
17 come up here and defend his actions or defend his statements.

18 THE COURT: You mean the other defendant who used bear  
19 spray against the Capitol Police?

20 MR. BRODEN: Right. I'm just taking one example, but  
21 there's 14 other examples, I think we're up and counting, where  
22 people got more than 24 months. There's only 14 people that got  
23 more than 24 months, and some of those are horrific. And  
24 certainly, Mr. Ponder, when you think of -- the government  
25 points out some instances of uncharged conduct with Mr. Reffitt.

1 Mr. Ponder was convicted twice of robbery, bank robbery and  
2 carjacking, had a history of domestic violence, had a history of  
3 drugs.

4 And so I think that's where the crux of the argument is,  
5 and the Court can tell by my sentencing memoranda. As I said,  
6 if you were sentencing Mr. Reffitt in isolation, it would be an  
7 entire different discussion. But I think given the enormity of  
8 this event and the enormity of defendants, unless the message is  
9 we're going to just throw away the key if we go to trial but if  
10 you don't go to trial we're going to be fine with this --

11 THE COURT: Clearly not that. I have not departed  
12 upward.

13 MR. BRODEN: No, but certainly, the government -- not  
14 throw away the key. I was being hyperbolic in that sense. But  
15 asking for a sentence way above, whether it be twice the amount  
16 or three times the amount, I think, is somewhat academic. I  
17 think he has to be sentenced in proportion to the people that  
18 have gone before him and be sentenced because of his actions.  
19 Granted, he's not getting acceptance of responsibility, but not  
20 be punished because he exercised his Sixth Amendment right.

21 And despite the government's argument, that's the only way  
22 in my mind to explain the government's sentencing recommendation  
23 in this case, three times as much as people spraying bear spray  
24 or spraying fire extinguishers or repeatedly hitting police  
25 officers or wearing horns into the Capitol and speaking on the

1 dais and talk about leadership and inviting people up to the  
2 dais to take pictures, people wandering the Capitol, going into  
3 the speaker's office.

4 I just think there needs to be some proportionality here,  
5 and I think that's sort of where the rubber meets the road, is  
6 to fashion a sentence that is in line with the sentences that  
7 have come before.

8 Mr. Reffitt talks about, well, we may do this in the  
9 future, we may do that. There's nothing you or I or even  
10 Mr. Reffitt -- the prosecutor can do except look at what has  
11 happened in the past and say well, the past is prologue, and  
12 we've got to try to do justice and try to stand for the  
13 proposition that we have talked about earlier and the importance  
14 of our country and the importance of our Constitution. And the  
15 Constitution says Mr. Reffitt should be treated equally to  
16 Mr. Ponder and Mr. Meredith and I forget some of the others.

17 And just to kind of come full circle, we talked about that  
18 eight-level enhancement, which, you know, a lot of conduct that  
19 goes into -- types of conduct that can go into that eight-level  
20 enhancement, we talked about it earlier, but if the Court was to  
21 find it applied, which it did, eight levels is mandatory, but  
22 that doesn't mean you can't take back some of those levels when  
23 it comes to the 3553 factors and recognize there's a whole lot  
24 of type of conduct that could get you those eight-level  
25 enhancements.



1           And finally, I disagree with the government, and I don't  
2 think we need to go into all of Mr. Reffitt's mental history,  
3 and I think that sort of led to it. You feel marginalized, and  
4 it sort of all leads to this. But I think in some of the  
5 letters, the Court has a better appreciation of really what his  
6 mental history is. And unfortunately, a lot of people with  
7 mental illness don't recognize they have mental illness, and  
8 that's a part of the challenge, but that's certainly something  
9 the Court can address in any kind of release conditions.

10           THE COURT: All right. Mr. Broden, you don't dispute  
11 that a fair inference to draw from the facts of this case is  
12 that but for the pepper spray Mr. Reffitt would have been in the  
13 Capitol?

14           After all, he gives real-time text messages to Rocky Hardie  
15 saying, "I can't go in. I've been sprayed." I think he repeats  
16 those later.

17           MR. BRODEN: I've actually asked myself that question,  
18 because it is a -- given everything he has said and supposedly  
19 his fortitude, I would tend to agree with the Court, but at the  
20 same point, I'm somewhat surprised that the pepper spray was  
21 able to stop him if that was really his intent.

22           THE COURT: Well, if you had seen the trial, it was  
23 multiple attempts.

24           MR. BRODEN: I saw the video, no, and I saw the paint  
25 ball or whatever, the clay --

1 THE COURT: Straight in the face.

2 MR. BRODEN: I don't know that I saw straight in the  
3 face, but I certainly saw the --

4 THE COURT: No, no, I mean the pepper spray and the  
5 water and all of that.

6 MR. BRODEN: Well, but then think about this, Judge,  
7 and this is in some of the sentencing memoranda. There are a  
8 couple of people, at least two that I recall writing upon, where  
9 they got removed one way or the other by police --

10 THE COURT: And they came back.

11 MR. BRODEN: And they came back, right. This went on  
12 for three hours. He certainly could have come back.

13 THE COURT: And he didn't do that, but the excitement  
14 was a little bit over when people are coming out of the Capitol.

15 MR. BRODEN: Yeah, I don't have that timeline down  
16 directly, but it certainly didn't stop other people from coming  
17 back and assaulting police officers, maybe towards the end of  
18 the -- I don't want to even use the word "party," but at the end  
19 of the event.

20 THE COURT: All right. Thank you, Mr. Broden.

21 All right. So, Mr. Reffitt, you've sat silently through  
22 the trial. You've heard us talk a lot about you here today.  
23 Now is your opportunity to speak to me if you would like to be  
24 heard before I impose sentence. I've read your letter. You're  
25 also welcome to make an additional statement now if you would

1 like to do so.

2 MR. BRODEN: Judge, may I have one --

3 THE COURT: Of course. Take as long as you want.

4 (Defense counsel and defendant conferred.)

5 THE COURT: All right. Mr. Broden?

6 MR. BRODEN: Mr. Reffitt is going to decline.

7 THE COURT: Understood.

8 So I think everybody needs a brief break. So we're going  
9 to take about -- how much time do you all need to get a quick  
10 bite?

11 MR. BRODEN: It depends whether the court has a  
12 cafeteria. I don't know.

13 THE COURT: Come back at 2:15, 2:30.

14 Does Mr. Reffitt have access to some food?

15 MR. BRODEN: Yes.

16 THE COURT: Okay. All right. So let's come back at  
17 2:30.

18 Does the government have anything additional on those  
19 cases, the guideline calculation?

20 MR. NESTLER: Yes. We can provide something to  
21 chambers during the break.

22 THE COURT: Just make sure Mr. Broden sees it as well.

23 MR. NESTLER: Yes, of course, Your Honor.

24 THE COURT: Anything additional on the -- what were  
25 the other two issues? The sealed record and the conditions that

1 raise First Amendment concerns. Nothing now?

2 MR. NESTLER: Nothing now. We will address that when  
3 we get back.

4 THE COURT: All right. Thank you, all.

5 MR. BRODEN: So we're going to address the  
6 conditions --

7 THE COURT: When we come back.

8 MR. BRODEN: For whatever reason, I hadn't seen them  
9 before. Probably my fault.

10 THE COURT: Take the time. The other option,  
11 Mr. Broden, is if you need -- you all talk ahead of time. If  
12 you needed time to brief this or something -- I'm just really  
13 looking for some guidance beyond what I've been able to find,  
14 which isn't much on this.

15 All right. Thank you, all.

16 (Recess taken from 1:41 p.m. to 2:53 p.m.)

17 THE COURT: All right, folks. Sorry for the delay.

18 Mr. Nestler, I don't know if you will be glad to hear, but  
19 I did have another conversation with the Commission in an effort  
20 to understand why I think what I'm doing is correct.

21 So just for the record, I do want to explain this. And as  
22 I've said, this is an issue that applies with the grouping rules  
23 generally. Given the grouping rules, it is the case that not  
24 every aggravating factor or every mitigating factor necessarily  
25 results in a bump-up in the term of in this case imprisonment.

1           And so while I think that the calculation that I did with  
2           respect to 3C1.1 is correct, it's accurate, I do agree with the  
3           government that this is certainly something that I can consider  
4           in deciding where to sentence Mr. Reffitt within the guideline  
5           range or under 3553(a) as well.

6           So let me just explain briefly. So Counts 1, 2, and 3, as  
7           Probation has done, are grouped under 3B1.2(b) because they  
8           involve the same victim and are connected by a common criminal  
9           objective, scheme, or plan. Count 5, which is the threat to  
10          Mr. Reffitt's children, that is a separate act of obstruction.

11          Under Note 7, which is the piece that I missed, under Note  
12          7, Count 2 is also an obstruction type of offense such that  
13          Section 3C1.1 normally would not allow for any enhancement to be  
14          applied to this offense under 3C1.1. But in this case, because  
15          Count 5 is a significant further obstruction in the  
16          investigation of Count 2, so the threats to the children were an  
17          obstruction act that was to undermine the investigation of the  
18          offense in Count 2, which is an obstruction offense, Note 7  
19          allows for Count 5 to be a specific offense characteristic for a  
20          two-level adjustment under 3C1.1 to Count 2. So Count 5 is  
21          being counted.

22          But what Note 8 tells us is to group the Count 5  
23          obstruction offense with the Count 2 underlying offense, and the  
24          offense level for that group is either the underlying offense,  
25          obstruction offense, which is Count 2, plus two for the

1 obstruction enhancement that was applied under Note 7, or the  
2 level for the obstruction offense, Count 5, whichever is  
3 greater. So here, Count 2 with the plus 2 under 3C1.1 is  
4 greater. So we use that.

5 And so based on all of that, I know it's hard to follow,  
6 but Count 5 has been taken into consideration in the offense  
7 level for Count 2. And the problem is the way the grouping  
8 rules work here. There's a big enough discrepancy between the  
9 two that it's not counting again. So there's that.

10 And then I had asked the government to provide a list of  
11 cases where the 2J1.2(b)(3) enhancement was agreed to in plea  
12 agreements. I also asked the government to explain the basis  
13 for the enhancement in those cases. The government provided a  
14 list of ten cases but didn't explain the basis for the  
15 enhancement, and I just didn't have a chance to review each and  
16 every one of those cases.

17 I've already agreed to apply the enhancement in this case.  
18 I didn't apply the role enhancement for the reasons discussed  
19 earlier and my concern about the potential for double counting,  
20 given the overlap in the basis for these two potential  
21 enhancements. So that's all I will add with that.

22 I understand that Mr. Reffitt does want to make a  
23 statement. Is that correct?

24 MR. BRODEN: That is correct, Your Honor.

25 THE COURT: Okay. All right. Before we move on to

1 that, Mr. Nestler, Mr. Broden, any additional information you  
2 want to put on the record? And you can take your masks off  
3 again if you desire.

4 MR. NESTLER: No, Your Honor.

5 MR. BRODEN: I think other than, and we might not be  
6 at that point yet, the agreement we reached on the conditions.

7 THE COURT: Oh, right, right. And I do -- where did I  
8 put that? I have so much paper here.

9 Okay. So what I understand with respect to the contact  
10 restriction, correct me if I'm wrong, but I understand that the  
11 parties are in agreement that one of the conditions of  
12 supervised release would be -- would read as follows:

13 "You must not associate, communicate, or otherwise  
14 interact, directly or indirectly, with any extremist militia  
15 group or member of such a group, including but not limited to  
16 the Texas Three Percenters, the Oath Keepers, and the Texas  
17 Freedom Force. If you inadvertently associate, communicate, or  
18 otherwise interact with such a group or individual, you must  
19 immediately report this to the probation officer."

20 Does that correctly state the parties' agreement?

21 MR. BRODEN: It does, Your Honor.

22 THE COURT: And the government has agreed that the  
23 propaganda condition that Probation suggested not be imposed  
24 here; is that correct?

25 MR. NESTLER: Yes, Your Honor.

1 THE COURT: Okay. All right. And Mr. Broden, any  
2 concerns about the clarity of this?

3 MR. BRODEN: No, Your Honor. And just to sort of  
4 further our conversation earlier, I did have the conversation  
5 with Mr. Reffitt about the contact restrictions and it could  
6 raise certain First Amendment grounds, but he says he never has  
7 any intention of talking to the people in these groups again, so  
8 he had no problem including that condition as the Court read it.

9 THE COURT: All right. Very well, then.

10 For the record, to be clear, as I will explain in a moment,  
11 I do intend to impose a maximum term of supervised release in  
12 this case. To the extent that Mr. Reffitt in the future  
13 violates this condition or the mental health condition or any  
14 other standard mandatory conditions of release, that would give  
15 me grounds, the defense agrees, to violate him and sentence him  
16 to additional time in prison up to what would be the statutory  
17 maximum of 20 years in this case, taking into account whatever  
18 the sentence is imposed here today.

19 Do you agree with that, Mr. Nestler?

20 MR. NESTLER: Yes, Your Honor.

21 THE COURT: Mr. Broden?

22 MR. BRODEN: I don't disagree. It's been a long time  
23 since I've handled a supervised release revocation. So I forget  
24 how the maximums work.

25 THE COURT: Well, there are guidelines, but the



1 guidelines are not -- even before *Booker*, they weren't binding  
2 on me for supervised release, or judges generally. But I do  
3 have the discretion to impose a sentence of imprisonment up to  
4 the statutory maximum less the time that he would have served at  
5 that point.

6 MR. BRODEN: And I'm not disagreeing. That is my  
7 recollection. I just don't know.

8 THE COURT: Do you agree, Mr. Nestler?

9 MR. NESTLER: Yes, Your Honor, as far as I'm aware.

10 THE COURT: All right. Okay. Are there any other  
11 loose remaining issues to address before I hear from Mr. Reffitt  
12 and give my reasons for the sentence?

13 MR. NESTLER: The only thing is a housekeeping matter  
14 with regard to Defendant's Sentencing Exhibit 1. The government  
15 respectfully suggests that we submit a redacted version of that  
16 for public dissemination.

17 THE COURT: Okay. And I don't have it in front of me,  
18 but is the alert the piece that -- without getting into the  
19 content of it?

20 MR. NESTLER: Some colleagues that are not  
21 Ms. Berkower or myself are handling that document. We just ask  
22 to consult with them and Mr. Broden and submit a redacted  
23 version.

24 THE COURT: All right. Can you do that by no later  
25 than tomorrow?

1 MR. NESTLER: Yes, Your Honor.

2 THE COURT: Okay. So I've accepted all of the  
3 defense's exhibits, and for now, the timeline will remain under  
4 seal with the expectation that the government's going to file  
5 a -- well, the parties jointly might file a redacted version  
6 that addresses any sensitive -- and there may not be,  
7 Mr. Nestler, any sensitive information in there.

8 MR. BRODEN: Just so we are clear, Your Honor, I'm  
9 deferring to the government. It's not my dog in this fight.

10 THE COURT: Understood. But I do think a lot of this  
11 is just standard factual information that's well known now from  
12 all of these various prosecutions.

13 Okay. So, Mr. Reffitt, you said earlier that you didn't  
14 desire to make a statement. I take it you've given it some more  
15 thought, and you would like to be heard today; is that right?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: If you can come up to the podium.

18 THE DEFENDANT: So this is crushing me because of my  
19 anxiety, but I'm going to -- and that's what I hate, is I don't  
20 do well speaking.

21 THE COURT: Take your time, and speak into the  
22 microphone.

23 THE DEFENDANT: I did want to definitely make an  
24 apology, multiple apologies really and accept my responsibility,  
25 because I really do hate what I did. I was, to be colorful, a

1       fucking idiot, and that is how it went. 2020 was -- I was a  
2       little too crazy. Everything went stupid, and I was not  
3       thinking clearly.

4               But I do want to apologize to Officer Kerkhoff, Adam  
5       DesCamp, and Matthew Flood for the interaction I had with them.  
6       Again, that was completely stupid. I was an idiot.

7               And I want to really apologize to my family and to the  
8       Court, to the legislators, and to their staff, and everyone that  
9       was affected by my actions.

10              And I really do -- I will have nothing to do with politics,  
11       nothing. I just can't believe -- and I don't want anything to  
12       do with any groups or militias or any kind of stupid shit like  
13       that. I will be lucky with my mouth if I get into a church  
14       group after this.

15              I really -- it's just -- I don't know what I was thinking,  
16       and I was not thinking clearly, and I do deeply regret  
17       everything.

18              THE COURT: It sounds like your mouth's gotten you in  
19       trouble all the way back to high school.

20              THE DEFENDANT: Pretty much, yes. My mouth is my  
21       biggest enemy. My enemy of my enemy is my friend.

22              THE COURT: A couple of comments I want to make,  
23       Mr. Reffitt. You understand that as I sit here now at the 11th  
24       hour before I'm about to impose sentence on you, I'm hearing  
25       some of what I would have expected to hear much earlier. And I

1 can't help but wonder whether, like many other January 6  
2 defendants, I'm hearing what I'd like to hear from you as  
3 opposed to what you really believe. And so I'm going to ask you  
4 some follow-up questions.

5 THE DEFENDANT: I will try to answer them the best I  
6 can.

7 THE COURT: So you've been convicted of every count in  
8 the indictment. That includes two civil disorder counts, an  
9 obstruction of justice count, a firearm count, and an  
10 obstruction of justice count based on the threats to your kids,  
11 so two different obstructions.

12 Do you agree that you violated the law --

13 THE DEFENDANT: Clearly.

14 THE COURT: -- as the jury found with respect to each  
15 and every one of those offenses?

16 THE DEFENDANT: Yes, Your Honor. I clearly -- yeah, I  
17 fucked up.

18 THE COURT: And what about the claims you've made  
19 about being a patriot and being a martyr and this being an  
20 appropriate rebellion against the tyranny of the U.S.  
21 government? So can you tell me about those claims?

22 THE DEFENDANT: Yeah, one of those letters, I don't  
23 know about that one. But, I mean, some of it, I needed to  
24 support my family, and sometimes to get support for certain  
25 things -- I mean, funding's hard to get. And so you

1 say stuff --

2 THE COURT: I'm sorry. What?

3 THE DEFENDANT: Funding to support my family through  
4 accounts, I mean, they'd be on the street if I didn't say  
5 something that would garner money for them, and I have to  
6 protect my family. If it means going to prison for however long  
7 to protect them, I would always do that.

8 THE COURT: So you're telling me now that not -- your  
9 decision to not accept responsibility early in this case -- I  
10 know there was a plea offer at one point.

11 THE DEFENDANT: No, there wasn't, Your Honor. I never  
12 saw one. I was never given one. I don't know of one. There  
13 was numbers. That's it.

14 THE COURT: Regardless of whether there was a plea  
15 agreement, you certainly could have pled guilty straight up to  
16 the indictment.

17 THE DEFENDANT: I don't know how that went. I don't  
18 understand that part. I was told by -- I was told I'm going to  
19 trial. That's what I was told. So I kept my head down and did  
20 what I was told to do, until now I have to step up, because now  
21 I want to speak out. But, no, I never had that -- I mean, at  
22 the trial, no, I wasn't going to say anything, because I was  
23 told not to. I mean, I just -- my mouth has got me in trouble.

24 THE COURT: I don't want to get into attorney-client  
25 communications, but I'm hearing you suggest that your attorney

1 said you need to go to trial.

2 THE DEFENDANT: That's correct.

3 THE COURT: All right. I'm somewhat familiar with  
4 Mr. Welch. That's not something that is ethical for defense  
5 attorneys to do.

6 THE DEFENDANT: I was never produced a plea agreement,  
7 just some numbers. 41 to 51 months was talked about.

8 THE COURT: You mean you never saw a written plea  
9 agreement?

10 THE DEFENDANT: No, ma'am, no, Your Honor, I never saw  
11 one. I'm just being honest. I just didn't. I've never seen  
12 one.

13 THE COURT: Okay. Your repeated statements in prison,  
14 during the trial, after the trial, about being a patriot and,  
15 again, rebelling against the tyranny of the government, you're  
16 telling me, you want me to believe that the only reason you made  
17 those comments was to raise money for your family?

18 THE DEFENDANT: I think that's parroted throughout my  
19 life. I mean, I've always said things like that. It was all  
20 hyperbole. But it -- yeah, it was never meant to be serious on  
21 that level. I've heard it all my life. People around me say it  
22 all the time. I parrot a lot of stuff. I say a lot of stupid  
23 shit.

24 THE COURT: It's pretty serious to go to the Capitol,  
25 restricted grounds, with a firearm, I presume loaded firearm.

1 THE DEFENDANT: I intended to go to The Ellipse, and  
2 then we were going to go to the Capitol. I didn't know what was  
3 going to happen. It was a big blur.

4 THE COURT: It was a what?

5 THE DEFENDANT: It was a big blur. I was -- it was  
6 just very chaotic and confusing. I showed up. There was a lot  
7 of people there. And then --

8 THE COURT: Again, Mr. Reffitt, in light of all the  
9 comments that you made before January 6, on January 6, and after  
10 January 6, and you compare those statements to the physical  
11 actions, the unlawful acts that you committed on January 6, they  
12 line up. It's hard to sit here and --

13 THE DEFENDANT: I understand.

14 THE COURT: -- agree, with a straight face, draw the  
15 conclusion that you got roped into this on January 6 and caught  
16 up in the crowd. You came prepared with zip ties, armor for --  
17 body armor to protect you from bullets, the helmet, everything  
18 else. That just doesn't ring true.

19 THE DEFENDANT: The helmet was plastic.

20 THE COURT: The helmet was plastic?

21 THE DEFENDANT: Yeah.

22 THE COURT: Even so, you had --

23 THE DEFENDANT: Right.

24 THE COURT: -- bulletproof armor on, did you not?

25 THE DEFENDANT: All that was for defense at the

1       Ellipse because of BLM and Antifa and all the stuff that went  
2       on. I mean, that's what that was about. It wasn't meant for  
3       all of that. It was meant for protection of my body, for my  
4       safety.

5               THE COURT: So how do I know that tomorrow I don't  
6       read about your latest diatribe from prison --

7               THE DEFENDANT: No, that's not going to happen.

8               THE COURT: -- "I'm really a patriot, everybody, keep  
9       sending money to my family, I just said that to get a lower  
10      sentence"? How do I have any confidence that what you're saying  
11      here is heartfelt?

12              THE DEFENDANT: You just don't. I can't say anything  
13      more than what I can say, and it's -- I have to leave that to  
14      you, Your Honor.

15              THE COURT: Can you help me understand why it took so  
16      long? Even like an hour ago, you were reluctant to do this.  
17      How do I not sit here and think because I'm getting ready to  
18      impose sentence, this is the last opportunity, and so you're  
19      going to say what you have to say to get the sentence -- the  
20      most lenient sentence you can?

21              THE DEFENDANT: The reason I'm saying is because I do  
22      think that -- I think everyone deserves to hear my apology. I  
23      think that that's a fair thing to do.

24              And I do have a lot of anxiety. So I do fear what I would  
25      just ramble about and talk about. It's a very calming effect



1 with me. It's very clear that I have an issue with just  
2 rambling and saying stupid shit. I do that a lot. And I don't  
3 want to do that here and cause more problems. I just was scared  
4 to do that before.

5 But clearly, I need to step up here and say this to you. I  
6 really think the Court needs to hear it, and I need to try to at  
7 least release this so that I can say I want nothing to do with  
8 any of this stuff anymore. I want nothing to do with malitia  
9 groups.

10 And I am sorry. I'm so sorry about all of it. I just  
11 don't know how to express it. I don't express myself well  
12 anyway. I never have.

13 THE COURT: So you --

14 THE DEFENDANT: It's difficult for me to let that out  
15 of me and express how much I'm sorry about things and how I feel  
16 about things. I have a hard time expressing it. It's in me,  
17 but I don't portray it well. It doesn't come across well. Most  
18 people don't -- I don't know. I feel like it never comes across  
19 well, and I was scared that it wouldn't come across well. And I  
20 don't want to fuck this up. Excuse my language. I just don't.

21 THE COURT: So you took a long time to write the  
22 letter that you sent to me, didn't you?

23 THE DEFENDANT: Which one?

24 THE COURT: The letter in support of sentencing, the  
25 one where you talked about your regrets in terms of your family.

1 THE DEFENDANT: The allocution?

2 THE COURT: Yes.

3 THE DEFENDANT: It was just hard to put it down on  
4 writing, and then when you put it down and you're trying to --  
5 yeah, it just was -- and it's really -- that's just a very  
6 smidgen of all the stuff that I said. I was just trying to  
7 compress it down more, and it didn't come off so great.

8 THE COURT: It doesn't make sense to me that you  
9 wouldn't be completely forthcoming about how truly remorseful  
10 you are at that point when you have time to reflect, plenty of  
11 time to reflect in D.C. Jail to reflect on just what message you  
12 want the Court to hear.

13 Can you understand, it kind of comes across a little  
14 half-hearted? It was concern about your family, concern about  
15 some law enforcement, not concern about the basic mission that  
16 you pressed again and again and again.

17 THE DEFENDANT: It was 14 pages long. It's not all  
18 there anymore. It was initially much longer, and it had a lot  
19 of apologies in it, but I just tried to compress it down better.  
20 And some of it's missing. And I didn't know what to say. I  
21 don't really know what to say half the time. Clearly, I say too  
22 much.

23 THE COURT: I just don't understand why you would  
24 compress it down. Is part of this that you -- it seems like you  
25 like to be the big guy, the important guy, the first guy to be

1 in trial. You pushed hard for that trial over your defense  
2 attorney's concern about that, the first guy up there, the rebel  
3 in the press. You want to be an important person who makes a  
4 difference, and yet, you're going about it in all of the wrong  
5 ways.

6 THE DEFENDANT: My point exactly, Your Honor, is that  
7 I don't know how to portray myself well.

8 THE COURT: You don't know how to what?

9 THE DEFENDANT: I don't portray myself well.

10 THE COURT: But you've had a lot of time to think.

11 THE DEFENDANT: Yes.

12 THE COURT: Well over a year, year and a half.

13 THE DEFENDANT: And I think about it every day.

14 THE COURT: And you keep publishing these statements  
15 out of jail doubling down on your view about the need for  
16 rebellion and being a patriot and being a martyr.

17 THE DEFENDANT: And I don't know what to say.

18 THE COURT: Up until just a few months ago.

19 THE DEFENDANT: And I don't know how to explain that.  
20 There's so many moving parts in all of this. It's just crazy,  
21 this whole thing. It's very crazy. It's been crazy. It's been  
22 wild.

23 THE COURT: Moving parts, help me understand. What do  
24 you mean by that?

25 THE DEFENDANT: There's just so much involved in all

1 of this Jan 6 stuff. It's not like I robbed a bank. There's  
2 just more to it. It's just crazy. I don't know what happened  
3 with everything as far as -- what happened on January 6, ever  
4 since then, it's just been rough. It's just been crazy. I  
5 write stuff, and then I don't know if that's the right things.  
6 I say things. I don't know if that's the right things. I don't  
7 know.

8 THE COURT: But you're a smart guy, Mr. Reffitt.

9 THE DEFENDANT: Clearly, I'm not that smart. Clearly,  
10 I'm not as smart as I'd like to think I am.

11 THE COURT: But you know when you write things about  
12 rebellion and being a martyr that's not going to be received  
13 well.

14 THE DEFENDANT: Well, and you're right. A lot of it's  
15 what I read. George Washington, Franklin Douglas, different --  
16 Benjamin Franklin, I mean, you read about the forefathers and  
17 the things they said. It just comes from a lot of that. It's  
18 all the founding fathers and stupid shit like that.

19 THE COURT: But how do you analogize the current-day  
20 situation to 1776?

21 THE DEFENDANT: I don't. People send this stuff to me  
22 in the mail, and I read it. And so yeah, that's pretty much how  
23 that works. I get mail all the time in jail from around the  
24 country. And then I read stuff like that. It just -- it sounds  
25 grandeur. It seems like you're supposed to say it. But it's

1 not really -- I don't know. Like again, I'm still no good at  
2 this saying how I feel, about how this works out, but I just  
3 wanted to try.

4 THE COURT: You just wanted a what?

5 THE DEFENDANT: Try.

6 THE COURT: You wanted a trial?

7 THE DEFENDANT: I wanted to try to explain it. And  
8 again, I'm not coming off as well as I would like to.

9 THE COURT: I appreciate your remarks. It's just,  
10 again, a hard situation when, you know, there's been such a  
11 lapse of time and it's taken so long for you to express, you  
12 know, apologies, not just to your family or to law enforcement  
13 officers but, it sounds like, to the country as a whole.

14 And you're now standing in front of me waiting to have  
15 sentence imposed. And I want to believe what you're saying, and  
16 you've heard what I've said about supervised release. You will  
17 come before me within 60 days of release. I will not transfer  
18 this case, I will not transfer jurisdiction to your home in  
19 Texas. So you will be supervised in your residence district,  
20 but any violation comes to me. And you spouting off tomorrow  
21 about that was a load of bunk is not going to be a violation,  
22 but there are many other things that will be. And I hope you  
23 appreciate that there's quite the stick on the back end.

24 THE DEFENDANT: Yes, Your Honor. And before  
25 January 6, I liked to follow the law. I don't know what

1 happened on January 6, but --

2 THE COURT: Well, you had an unlawful --

3 THE DEFENDANT: -- clearly, it wasn't great.

4 THE COURT: Not so much around firearms.

5 THE DEFENDANT: Yeah, no, I won't have any of those  
6 anymore, clearly. Those are gone.

7 THE COURT: You had a silencer without a license. You  
8 had way back -- a while ago, you had a firearm without it being  
9 registered, right, unlicensed possession?

10 THE DEFENDANT: No, that's not correct.

11 THE COURT: What was it?

12 THE DEFENDANT: No, that was a fuel filter that they  
13 are calling a suppressor.

14 THE COURT: So the earlier firearm charge wasn't a --  
15 the conviction that you got probation for?

16 THE DEFENDANT: The unlawfully carrying a weapon from  
17 1993?

18 THE COURT: Yes.

19 THE DEFENDANT: That was a boot knife. That was not a  
20 firearm. It was a boot knife. It was a double-edged boot knife  
21 that I was using as a screwdriver. I was 20 something years old  
22 working on a stereo in my car, and I had to go pay the payment.

23 THE COURT: Okay. That's odd. The way in which it  
24 was described, it seemed like a firearm.

25 THE DEFENDANT: Yeah, it's Texas.

1 THE COURT: All right. There was something else you  
2 said just then. It's late in the day.

3 THE DEFENDANT: Yes, it is. Longest sentencing ever  
4 maybe?

5 THE COURT: Yeah, maybe for me.

6 THE DEFENDANT: Well, we're setting precedence. We  
7 set precedence pretty often around this place, don't we?

8 THE COURT: That's right. Mr. Reffitt, is there  
9 anything else you would like to say before I impose sentence?

10 THE DEFENDANT: I think I've said enough, Your Honor,  
11 and again, I apologize.

12 THE COURT: All right. Thank you.

13 THE DEFENDANT: Thank you for letting me talk.

14 THE COURT: I appreciate it.

15 All right. Mr. Broden, anything else you would like to  
16 add?

17 MR. BRODEN: No, Your Honor, and I'm just going to  
18 repeat what I said today. I mean, I certainly understand the  
19 Court's -- I don't know the exact adjective to use, but why you  
20 might be suspect. But I think the fact that maybe he could  
21 challenge the restriction on dealing with any Three Percenters  
22 and stuff like that and he's not, I think, is at least a smidge  
23 of an indication that he is being sincere about this.

24 THE COURT: All right. Mr. Nestler, would you like to  
25 be heard?

1 MR. NESTLER: Your Honor, just briefly on a couple of  
2 those points.

3 First, Mr. Reffitt not only thinks that he's staring down  
4 the barrel of tyranny and prepared to receive the bullet of  
5 freedom, he also told a reporter for the *New Yorker* just a few  
6 months ago that what happened on January 6 was a false flag, the  
7 whole thing was staged, and Mr. Reffitt had been entrapped.

8 So I know what Your Honor heard today from Mr. Reffitt. We  
9 heard that for the first time today, too. But statements like  
10 that to reporters obviously belie the sincerity of anything he  
11 is saying.

12 I will tell the Court that his manifesto that was published  
13 in May of last year was dictated by him. We have all of the  
14 jail calls and jail messages. He dictated it word for word to  
15 his family from the jail. So it's not like people are sending  
16 him things and he is repeating what he is hearing elsewhere. He  
17 is the one who is making these statements, and we see it again  
18 and again and again. All of the statements he made about being  
19 a martyr and receiving the bullet of freedom, that is from him.

20 There is literally a GiveSendGo up for him right now on his  
21 behalf talking about how he is a patriot. His family is still  
22 using his situation, and I don't know if it's with his consent  
23 or not, to fund-raise right now talking about how it's  
24 preposterous that the government is asking to have him declared  
25 a terrorist, it's preposterous that a sentence so harsh would be



1 used as a deterrent, things like that. There's a post just from  
2 last week on his GiveSendGo.

3 So I say all of this so the Court is aware. Your Honor  
4 just heard from Mr. Reffitt directly, but we don't give any  
5 credence to that, and we don't find any of that to be credible.

6 With regard to the plea offer, again, what Mr. Reffitt is  
7 saying is not credible. We've worked with Mr. Welch for a long  
8 time. Ms. Berkower and I personally engaged in plea  
9 negotiations with him many times. We did discuss a range of 41  
10 to 51 months, and Mr. Welch said he talked to Mr. Reffitt about  
11 it and it was being rejected and Mr. Reffitt would not accept  
12 any felony plea and he would not accept any plea that took  
13 responsibility for a gun, hard stop, not even a question. So  
14 that was as far as we got in our plea negotiations.

15 Your Honor, at the end of the day, we do not believe that  
16 the defendant is remorseful, and we do believe that Your Honor  
17 should vary upward from the sentencing guideline range and  
18 sentence him for the conduct that he is ultimately responsible  
19 for, including all of his statements which do evidence his  
20 intent and his motive.

21 Thank you.

22 THE COURT: Thank you, Mr. Nestler.

23 All right. Before I impose sentence, I'm going to explain  
24 my reasons for the sentence.

25 In deciding a defendant's sentence, a Court must consider

1 consistent with Title 18 United States Code Section 3553(a) not  
2 only the sentencing guidelines, which are merely advisory, but  
3 also the other Section 3553(a) factors. I will not state all  
4 those factors here, but I have considered each in deciding where  
5 to sentence Mr. Reffitt.

6 I will note that the maximum statutory penalty for the lead  
7 charge in this case, a violation of Title 18 United States Code  
8 Section 1512(c)(2), is 20 years in prison. The maximum  
9 statutory term of supervised release is three years.

10 The parties have reached an agreement over restitution,  
11 which I believe is \$2,000. And there has been nearly, as the  
12 record clearly reflects, \$3 million damage to the Capitol  
13 building and grounds as a result of the January 6 events.  
14 That's to date.

15 I've already explained how I determined the applicable  
16 guideline range, which is, again, a total offense level of 29  
17 with a criminal history category I. That results in a guideline  
18 range of 87 to 180 months. That's seven-and-a-quarter years to  
19 nine years in prison.

20 And I've explained why an upward departure is not warranted  
21 here based on the facts and circumstances of this offense and,  
22 in particular, the potential for unwarranted sentencing  
23 disparities for similar cases prosecuted in this court related  
24 to January 6 of 2021.

25 Judges on this court have certainly seen a large number of

1 cases related to the events of January 6, close to, I think,  
2 1,000 to date.

3 Is that right, Mr. Nestler?

4 MR. NESTLER: I believe close to 900, Your Honor.

5 THE COURT: Close to 900. I don't think there is any  
6 question we will get over 1,000, do you think?

7 MR. NESTLER: I agree with you, Your Honor.

8 THE COURT: All right. And as I've already said,  
9 there's no apples-to-apples comparison in many of these cases,  
10 especially in this one. As I did note earlier, in some ways,  
11 Mr. Reffitt is in a class of his own with regard to the purpose,  
12 the stated purpose here, which I don't think I've heard quite as  
13 explicitly, at least in the cases I've reviewed, as he stated it  
14 in terms of literally overthrowing the elected officials,  
15 removing them, and coming down here for the constitutionalist  
16 judges to install a new government. That seems, again based  
17 upon my review of the record, that that's notable and different  
18 than others.

19 Also, in terms of the possession of firearms, that doesn't  
20 mean that no one else at the Capitol or on the grounds or near  
21 the grounds certainly had firearms that day. It's that the  
22 government has not proven that to date except in this case.

23 So in those respects, I do find that he's in a class of his  
24 own, but not in terms of the conduct, in terms of general  
25 threatening conduct, and as I've noted, I've described a number

1 of cases in which other defendants committed very violent  
2 assaults on law enforcement. So I just want to clarify what I  
3 mean by that.

4 There are some key factors that judges on this court have  
5 consistently considered in attempting to draw meaningful  
6 comparisons and distinctions between January 6 defendants. So  
7 rather than summarizing all the relevant facts of this case, I  
8 will begin by focusing on those factors that judges on this  
9 court have relied upon to draw distinctions. The facts are in  
10 the record of the trial. They're also thoroughly discussed in  
11 the parties' sentencing memoranda, and they're well documented  
12 in the factual background section of the PSR which I have  
13 adopted here without objection -- well, certain factual  
14 objections have been clarified and legal objections as well.  
15 But the basic factual background is stated in the PSR and one I  
16 adopted.

17 So first, looking at the key facts which form the nature of  
18 the offense conduct, as I said, most significantly, Mr. Reffitt  
19 carried a firearm on Capitol grounds. This fact, which the jury  
20 found beyond a reasonable doubt, is by far the most aggravating  
21 factor related to this offense. And it is, again, the factor  
22 that makes this case very different than all cases prosecuted to  
23 date.

24 It is true that Mr. Reffitt did not use or otherwise  
25 brandish his firearm. It stayed in its holster the entire day

1 so far as we're aware, even as Capitol police officers pelted  
2 him repeatedly with rubber bullets and pepper spray.

3 Still, as I've explained, his carrying of a firearm, which  
4 I think it's fair to infer was a loaded firearm, at the scene of  
5 the January 6 riots substantially heightened the risk of serious  
6 injury to law enforcement officers who courageously defended the  
7 Capitol, as well as everyone else who was present that day,  
8 Mr. Reffitt included.

9 As I've mentioned, other January 6 defendants have been  
10 prosecuted for having firearms and explosives and other  
11 dangerous weapons in vehicles nearby. Some have had dangerous  
12 weapons on their person. But again, the government's  
13 represented to date that no other defendant on Capitol grounds  
14 has been charged with possessing a firearm.

15 Mr. Reffitt also engaged in two related obstructive acts  
16 when he returned to Texas following January 6. First, he warned  
17 other Texas Three Percenters about the federal investigation,  
18 and he directed members of that group to destroy chats that they  
19 had engaged in online.

20 Second, Mr. Reffitt made highly disturbing threats to his  
21 children if they were to cooperate with law enforcement, inform  
22 law enforcement. Mr. Reffitt's son Jackson told the FBI about  
23 these threats. Mr. Reffitt's daughter Peyton and her boyfriend  
24 Mr. Mitchell also testified at his detention hearing and  
25 submitted letters to the Court. Both testified under oath that

1 they did not believe that Mr. Reffitt meant what he said when he  
2 threatened them. Still, they acknowledge, at least Peyton  
3 Reffitt acknowledges that his actions were, in fact, intended to  
4 intimidate and discourage his children from talking to law  
5 enforcement.

6 So clearly, I think both of these instances are proven  
7 obstructive acts that, although they do not both increase the  
8 defendant's base offense level under the guidelines, as we've  
9 discussed at length, the government argues that the Court should  
10 vary upward or at least sentence high in the range for this  
11 reason. And I'll also add, the government's made the same point  
12 with respect to the additional firearms that were not on his  
13 person.

14 Third, Mr. Reffitt, like many other January 6 defendants,  
15 made many offensive, highly disturbing statements before,  
16 during, and after January 6. Those he captured in real-time on  
17 his GoPro camera, and as I've said, it provided, in effect,  
18 multiple real-time confessions to his crimes. Mr. Reffitt's  
19 camera footage showed that he claimed to be less upset about the  
20 results of the 2020 election than dismantling the government as  
21 a whole. As he said repeatedly on tape, his goal was to drag  
22 the corrupt legislators out of the Capitol and to bring them, in  
23 his words, to bring, quote, the people's house down.

24 His threats continued when he arrived home. He bragged to  
25 his family about what he did at the Capitol. Those comments

1 were taped by his son Jackson. And soon after January 6,  
2 Mr. Reffitt spent about an hour and 40 minutes on Zoom, this is  
3 Government's Exhibit 1A, discussing various grand plans and  
4 half-baked ideas to take over state capitols and attack media  
5 outlets.

6 He also referenced his security company. I can't remember  
7 if it was in the Zoom tape or other chats. But the government  
8 is correct, he referenced his security company and his  
9 willingness to use it to obtain firearms for other Three  
10 Percenters members.

11 In addition to the aggravating factors, there are a number  
12 of mitigating factors that distinguish this case from other  
13 January 6 defendants who have been charged with the obstruction  
14 offense. Under Section 1512(c)(2), first, Mr. Reffitt did not  
15 assault any law enforcement officers that day. He did refuse to  
16 follow their commands. He did advance up the stairs. And that,  
17 certainly, as the officer explained, Kerkhoff, it was  
18 threatening. So I don't mean to suggest that it wasn't  
19 threatening. What I mean is there was not a violent physical  
20 assault as occurred in other January 6 cases.

21 Second, he did not enter the Capitol building. But as  
22 we've discussed, according to a message he sent Rocky Hardie  
23 that day, it appears to the Court that that was not for lack of  
24 trying. It was, rather, because he had been immobilized  
25 eventually with pepper spray after many attempts to pelt him

1 with rubber bullets and pepper spray as well.

2 But the fact does remain, he did not go inside the Capitol.  
3 The government has not shown, aside from Rocky Hardie, it's not  
4 shown that Mr. Reffitt actively coordinated ahead of time with  
5 other members who were at the Capitol on January 6, other  
6 members of the Three Percenters. There was another member of  
7 the Three Percenters, the government points out, he did know.  
8 But unlike some of the other groups, namely the Proud Boys and  
9 the Oath Keepers who have been charged with large-scale  
10 conspiracies, which by the way at this point are unproven, I  
11 simply want to make the point that there's not a charged  
12 conspiracy in the same way that other allegations suggest a  
13 level of coordination and planning ahead.

14 Mr. Reffitt did try to encourage Three Percenters to come.  
15 The leader did drop out, hard to know exactly why, but at least  
16 the facts as proven at trial don't support the conclusion that  
17 he was working hand in hand with other folks at that time beyond  
18 the government's point that he, you know, encouraged people to  
19 follow him and he, in the government's view, assumed a  
20 leadership role on the spot. But there was not the degree of  
21 preplanning that appears to exist or at least be alleged in  
22 other cases.

23 Turning to Mr. Reffitt's personal history and his  
24 characteristics, first his criminal history. It's relatively  
25 dated. It's a category 1. We've talked, I've talked with him



1 just now about his offense which he says related to a knife.  
2 For that offense, he received probation, and I believe in, is  
3 it, 2009 or 2013, that he -- 2009, Mr. Reffitt was convicted of  
4 driving under the influence.

5 There's also strong evidence in the record that Mr. Reffitt  
6 held a gun next to his wife's head previously and apparently  
7 shot it on another occasion, not at her but by her head. Again,  
8 this is highly disturbing conduct that contributes to the  
9 concerns the Court has about Mr. Reffitt's mental health  
10 condition.

11 Mr. Reffitt has a very supportive family that describes him  
12 on balance as a caring and loving father who would do anything  
13 to support them. His daughter Peyton, whose political views  
14 align more with her brother Jackson's than with her father's,  
15 has explained that her father was there for her in similarly  
16 difficult times when she was depressed. Both of Mr. Reffitt's  
17 daughters describe him as the kind of guy who will open his home  
18 to kids in trouble and do anything to help out a friend. That's  
19 true also for some of the letters from friends. There's  
20 evidence that he helped take care of his grandmother who lived  
21 with the family for most of the kids' childhood.

22 Mr. Reffitt had a very successful career at one time in the  
23 oil industry until 2016 when the industry collapsed. At that  
24 time Mr. Reffitt was living abroad with his family in Malaysia  
25 providing generously for them and insisting that they be exposed

1 to a wide range of cultures and viewpoints. His daughters, in  
2 particular, refer to his efforts to do that.

3 It's also clear that Mr. Reffitt over the years has worked  
4 very hard to provide for his family and that he felt deep  
5 despair and disappointment in himself when he was unable to  
6 provide for his family after the collapse of the oil industry  
7 and then the pandemic.

8 The record suggests that Mr. Reffitt experienced a mental  
9 health crisis of sorts in this period. There's also evidence,  
10 as documented in the PSR, paragraphs 103 through 107, that he  
11 has had significant struggles with mental health issues and with  
12 excessive drinking over the course of his adult life. He has a  
13 prior conviction. In the Zoom video, which if viewed start to  
14 finish he can be seen downing several beers over the course of  
15 that tape.

16 The Probation Office has identified Mr. Reffitt's long  
17 history of mental health challenges as a potential basis to vary  
18 downward from the guideline range under Section 3553(a). Not  
19 only does it constitute a potential grounds for variance, but  
20 the mental health challenges are factors that the Court can and  
21 will take into account in deciding where to sentence Mr. Reffitt  
22 within the guideline range and in fashioning conditions of  
23 release and recommended programming, which we've discussed  
24 already.

25 Mr. Reffitt's family and friends and even his son Jackson

1 testified that he is certainly prone to exaggeration. All of  
2 them say he became very wrapped up in the divisive political  
3 climate, again especially during the pandemic when he was  
4 struggling to find work and pay bills.

5 Remarkably, as we've talked about a lot here today, he  
6 somehow viewed his illegal -- his multiple illegal actions on  
7 and around January 6 as helpful for his family, specifically his  
8 children and his grandchildren.

9 Another significant factor that the Court is considering  
10 and must consider in fashioning a sentence that is sufficient  
11 but not greater than necessary is the need to avoid unwarranted  
12 sentencing disparities. I've touched on this already in  
13 discussing the ways in which this case is similar and different  
14 than other cases that have been sentenced in this court. As  
15 mentioned, to date, the longest sentence that has been imposed  
16 in a January 6 case is 63 months' imprisonment.

17 This is, however, the first sentencing hearing in which a  
18 defendant went to trial rather than pled guilty, and as a result  
19 of that decision alone, the guideline range for this offense is  
20 roughly two years higher than it would have been had Mr. Reffitt  
21 accepted responsibility early and received a full reduction for  
22 acceptance of responsibility, which he's not eligible now,  
23 having taken this case to trial and also having disputed the  
24 factual case that the government presented through  
25 cross-examination of witnesses and the like.

1           Although no mandatory minimum sentence applies here, for  
2 context, I do think it's helpful to know that carrying a firearm  
3 in connection with a crime of violence does carry a mandatory  
4 minimum statutory penalty of five years in prison. The civil  
5 disorder, the obstruction offenses, the trespassing offenses,  
6 Mr. Reffitt, all those offenses that he was convicted of do not  
7 meet the statutory crime of violence definition.

8           Nonetheless, the actions of the mob of which Mr. Reffitt  
9 was a part of was certainly violent, and here, Mr. Reffitt  
10 engaged in crimes in addition to unlawfully possessing a firearm  
11 on Capitol grounds, again such as obstructing Congress,  
12 obstructing the criminal investigation, and by threatening his  
13 kids and trespassing.

14           So this, as well as the sentences imposed in other  
15 January 6 cases, as well as the guideline calculations, all  
16 support a significant sentence of imprisonment in this case.

17           A final and critical factor that the Court will emphasize  
18 today is Mr. Reffitt's statement of remorse -- statements of  
19 remorse or lack thereof. As I've made clear here, Mr. Reffitt's  
20 reluctance to admit early that his behavior was illegal is  
21 concerning. And I want to be very clear and unequivocal in  
22 this. As I've said, under no legitimate definition of the term  
23 "patriot" is Mr. Reffitt's behavior on or around January 6  
24 worthy of the term. What he and others who attacked the Capitol  
25 on January 6 did is the antithesis of patriotism. Together,

1 Mr. Reffitt and others put law enforcement officers like Officer  
2 Kerkhoff, who courageously defended the Capitol, as well as  
3 government officials and staff, the public servants who were  
4 inside the Capitol that day, at enormous risk. The officers at  
5 the Capitol were patriots, as well as those who fought and even  
6 died defending our freedoms, our democracy, the rule of law, and  
7 even our peaceful transition of power. Those are the patriots;  
8 those who stormed the Capitol are not. Not only are they not  
9 patriots, they are a direct threat to our democracy and will be  
10 punished as such.

11 As I hope I've made clear, Mr. Reffitt has every right to  
12 voice his strongly held views about the state of our country,  
13 its elected officials, and other views he holds about what's  
14 wrong in our country. And under our Constitution, he has a  
15 right to express those views freely, to protest peacefully, to  
16 associate with those who hold the same views, to vote at the  
17 ballot box to remove politicians from office, to support  
18 political candidates.

19 But what Mr. Reffitt and the hundreds of other Capitol  
20 rioters did not have the right to do was to storm the Capitol,  
21 to illegally carry firearms, to trespass, to refuse law  
22 enforcement's commands, or to resort to violence.

23 In this country, we respect the peaceful transfer of power.  
24 We vote our conscience at the ballot box. And to the extent  
25 there are legitimate challenges to an election, our courts stand

1 ready to address them. And with respect to the 2020 election,  
2 as I've stated already, there were no meritorious challenges  
3 brought in any state or federal court. Every single court  
4 rejected them as baseless.

5 I am pleased to hear Mr. Reffitt's attempt here, though  
6 late, to take responsibility for what he did and to denounce  
7 some of the -- well, both his actions and his statements. As  
8 I've said, it's awfully late, but I am crediting it to a degree.

9 I simply don't find credible, though, the statements that  
10 he makes regarding any plea offer. I don't think that that's a  
11 statement I can credit, and I genuinely hope that Mr. Reffitt's  
12 statements, if there's future statements coming out of prison or  
13 after he's released from prison when he's on the outside, that  
14 they are not inconsistent with what he stated here in the  
15 courtroom this afternoon.

16 The other thing that I want to make very clear before I  
17 announce sentence is that it bears emphasizing clearly that  
18 although I've referenced Mr. Reffitt's disturbing comments as  
19 potential aggravated factors in this case, the basis for the  
20 sentence imposed here reflects what Mr. Reffitt actually did on  
21 and around January 6, not what he said.

22 And just to review, among other things, he carried a gun on  
23 Capitol grounds that he trespassed on, and he refused to abide  
24 the lawful commands of law enforcement officers who fought to  
25 defend the Capitol. He, along with the rest of the crowd,

1 obstructed the electoral vote count. He delayed the vote count.  
2 He required -- his actions and the actions of others required  
3 law enforcement officers to come in and protect the members of  
4 Congress who were fulfilling their constitutional duty. He  
5 stored an AK-47 in a D.C. parking lot, which was unlawful. He  
6 possessed an unlicensed and unlawful silencer in his home. And  
7 he further obstructed justice by threatening his kids and  
8 directing others to delete evidence in a federal investigation.

9 All of these illegal actions, not his words, justify the  
10 sentence the Court imposes here.

11 Considering where to sentence or whether to -- within the  
12 guideline range or whether to sentence above or below the  
13 guideline range, I am taking into account all of the aggravating  
14 and the mitigating factors that we've discussed here. I'm  
15 taking into account the fact that he engaged in multiple acts of  
16 obstruction and he possessed or had constructive possession of  
17 multiple firearms. I'm taking into account his serious mental  
18 health issues.

19 I'm also making an effort to ensure that there are not  
20 unwarranted sentencing disparities. And so I am taking into  
21 account the other cases that have been sentenced in this court.  
22 Although no two cases have the same facts, I do think that there  
23 are, in many respects, analogous cases that have been sentenced  
24 in this district related to the January 6 events themselves.

25 I'm also taking into account, although Mr. Reffitt's

1 statements did not come as early and are not as fulsome and  
2 there are aspects of it I find a hard time crediting, I do  
3 credit him for apologizing here. And again, I trust that what  
4 we hear, if anything, from Mr. Reffitt going forward is  
5 consistent with those comments and not the many other comments  
6 that he's made before January 6, after January 6, during  
7 January 6.

8 So considering all of these aggravating and mitigating  
9 factors, in the end, I am not going to vary upwards or  
10 downwards, and I do conclude, principally looking at the other  
11 cases' sentencing in this district, I do conclude that a  
12 sentence at the low end of the guideline range, which is 87  
13 months, or seven-and-a-quarter years, is sufficient but not  
14 greater than necessary to achieve the purposes of sentencing.

15 This is, of course, taking into account the fact that  
16 Mr. Reffitt is not entitled to a three-level downward adjustment  
17 for acceptance of responsibility. And considering that, instead  
18 of his sentence being 63 to 78 months, it's 87 to 108 months.

19 And for all the reasons I've stated, I think this sentence  
20 is comparable to the other sentences imposed by other judges in  
21 this court.

22 As I've said, I'm also going to impose the maximum term of  
23 supervised release, which is three years, with stringent  
24 conditions to ensure that Mr. Reffitt gets on and remains on a  
25 law-abiding path after he's released from prison.



1           Again, I won't transfer jurisdiction of this case to  
2 another district. In the unlikely event that today's remorse is  
3 short-lived and Mr. Reffitt violates his terms of supervision, I  
4 stand ready to impose a maximum term of imprisonment that I can  
5 impose for any future violations up to the statutory maximum  
6 penalty of 20 years.

7           All right. I will now read the formal sentence of the  
8 Court, and I will give both parties a chance to object before I  
9 actually impose sentence in this case.

10           Pursuant to the Sentencing Reform Act of 1984 and in  
11 consideration of the provisions of Title 18 United States Code  
12 Section 3553, as well as the advisory sentencing guidelines, it  
13 is the judgment of the Court that you, Guy Wesley Reffitt, are  
14 hereby committed to the custody of the Bureau of Prisons for  
15 concurrent terms of 60 months, or five years, on each of Counts  
16 1 and 4, and 87 months, or 7.25 years, on each of the Counts 2,  
17 3, and 5.

18           You're further sentenced to serve a 36-month, three-year,  
19 term of supervised release on Counts 1 through 5 with such terms  
20 to run currently.

21           In addition, you are ordered to pay a special assessment of  
22 \$100 per count, for a total of \$500, in accordance with Title 18  
23 United States Code Section 3013.

24           While on supervision, you shall abide by the following  
25 mandatory conditions, as well as the standard conditions of

1 supervision, which are imposed to establish the basic  
2 expectations for your conduct while on supervision.

3 The mandatory conditions include not committing another  
4 federal, state, or local crime, not unlawfully possessing a  
5 controlled substance, refraining from any unlawful use of a  
6 controlled substance, submitting to one drug test within 15 days  
7 of placement on supervision and at least two periodic drug tests  
8 thereafter as determined by the Court, cooperating in the  
9 collection of DNA as directed by the probation officer, making  
10 restitution in accordance with Title 18 United States Code  
11 Sections 3663 and 3663(a) or any other statute authorizing a  
12 sentence of restitution.

13 In addition, as the parties have agreed, I am imposing  
14 restitution in the amount of \$2,000, and I believe these should  
15 be paid to the U.S. District Court for the District of Columbia.  
16 Correct, Mr. Nestler, with ultimately the money going to the  
17 Architect of the Capitol? Is that right?

18 MR. NESTLER: Yes, Your Honor.

19 THE COURT: All right. In addition, you shall comply  
20 with the following special conditions. Number 1, you must  
21 submit to and participate in mental health treatment and comply  
22 with the treatment program recommended and follow the rules and  
23 regulations of the program. The probation officer, in  
24 consultation with the treatment providers, will supervise your  
25 participation in the program.

1           In addition, you must provide the probation officer access  
2 to any requested financial information and authorize the release  
3 of any financial information. The Probation Office may share  
4 the financial information with the U.S. Attorney's Office.

5           With regard to the contact restriction, as I've stated  
6 already, you must not associate, communicate, or otherwise  
7 interact, directly or indirectly, with any extremist militia  
8 group or member of such a group, including but not limited to  
9 the Texas Three Percenters, the Oath Keepers, and the Texas  
10 Freedom Force. If you inadvertently associate, communicate, or  
11 otherwise interact with such a group or individual, you must  
12 immediately report this to the probation officer.

13           As I've noted, within 60 days of release from  
14 incarceration, you will appear before the Court for a re-entry  
15 progress hearing, and the United States Probation Office in the  
16 district in which you are supervised will submit a progress  
17 report to the Court within 30 days of the beginning of your  
18 supervision, and upon receipt of the progress report, the Court  
19 will determine if your appearance is required.

20           The Court finds you do not have the ability to pay a fine,  
21 and therefore, I waive imposition of the fine. And again, the  
22 financial obligations are immediately payable to the Clerk of  
23 Court.

24           Within 30 days of any change of address, you shall notify  
25 the Clerk of Court of the change until such time as the

1 financial obligations are paid in full.

2 Because I'm waiving the ability to pay the fine, I will  
3 also waive the interest that might accrue as well on this.

4 Again, the Probation Office shall release the presentence  
5 report to all appropriate agencies, which includes the Probation  
6 Office in the approved district of residence. In order to  
7 execute the sentence of the Court, the treatment agency shall  
8 return the presentence report to the probation officer upon  
9 completion or termination from treatment.

10 Pursuant to Title 18 United States Code Section 3742,  
11 Mr. Reffitt, you do have the right to appeal the verdict and the  
12 sentence imposed in this case. If you choose to appeal, you  
13 must file any appeal within 14 days after the Court enters  
14 judgment, which in all likelihood will be tomorrow, but I'm not  
15 sure.

16 As defined in Title 28 United States Code Section 2255, you  
17 also have the right to challenge the conviction entered or the  
18 sentence imposed if new and currently unavailable information  
19 becomes available to you or on a claim that you received  
20 ineffective assistance of counsel in entering a plea of guilty  
21 to the offense of conviction or in connection with sentencing.  
22 If you're unable to afford the cost of an appeal, you may  
23 request permission from the Court to file an appeal without cost  
24 to you.

25 Before I order that the sentence as announced is to be

1 imposed, does either party have any objections or does Probation  
2 have any objections to the sentence announced that's not already  
3 noted on the record? Mr. Nestler?

4 MR. NESTLER: No, Your Honor.

5 THE COURT: Mr. Broden?

6 MR. BRODEN: No, Your Honor.

7 THE COURT: All right. Probation?

8 PROBATION OFFICER: No, Your Honor. Thank you.

9 THE COURT: So I will order that the sentence  
10 announced be the sentence imposed.

11 And, Mr. Reffitt, I do -- before we adjourn, I do want to  
12 say, you really are a talented, intelligent man who has a great  
13 deal to offer your family and the country. And yes, your family  
14 suffered emotionally and financially because of the bad choices  
15 you've made, but you still have the opportunity to make them  
16 proud, to make your country proud. You can speak to those who  
17 have held the views that you have held, I hope, in the past in a  
18 way that other people can't. And you can actually play a role.  
19 You can be a real leader, not the kind of leadership you  
20 demonstrated or tried to demonstrate on January 6, but a real  
21 leader in trying to turn things around and becoming a part of  
22 the solution in this country.

23 I recognize our democracy's not perfect. There's still  
24 much to be grateful for. You have been blessed to live in a  
25 country in which you have more protected rights than any country

1 in the world.

2 And while you serve your term of imprisonment, I hope that  
3 you will pursue a different law-abiding path with the same  
4 degree of passion you pursued this path. And I know you have  
5 the ability to do this, and I genuinely hope that you will seize  
6 the opportunity, if for no other reason than to make your family  
7 proud, who care deeply about you.

8 I also hope while you are in prison you will take the  
9 opportunity to help those who are less fortunate than you.  
10 There are a lot of people who can really benefit from someone  
11 with your intellectual -- your abilities, your charisma. They  
12 can develop job skills. They can be encouraged to figure out a  
13 path moving forward when they get out. They can learn to read  
14 and write.

15 You can do things while you're in prison that will help set  
16 not just yourself up but other people up for success on the  
17 outside. And when I see you within 60 days of your release, I  
18 very much hope and look forward to hearing how you've used your  
19 time in prison not only to take advantage of every programming  
20 opportunity that's offered to you in terms of mental health,  
21 substance abuse, alcohol abuse, but also to really make a  
22 difference and to be a leader in prison.

23 All right. Is there anything else from the government?

24 MR. NESTLER: No, Your Honor.

25 THE COURT: From the defense?

1           MR. BRODEN: Judge, we would simply ask that you  
2 recommend that he be designated to a facility as close to the  
3 Dallas-Fort Worth area as possible.

4           THE COURT: All right. I will do so.

5           And Mr. Reffitt, I guess he will not be eligible for any  
6 reduction under the RDAP program given that he had a firearm in  
7 this offense?

8           MR. NESTLER: I do not know, Your Honor.

9           MR. BRODEN: I don't think so, but it wouldn't hurt to  
10 recommend it.

11          THE COURT: I will recommend the RDAP program.

12          My view on that, Mr. Reffitt, is regardless of whether you  
13 get credit for it, you can certainly benefit, given your history  
14 of alcohol abuse and also some drug abuse in your past, not  
15 recent past. Again, that's another example of the ways in which  
16 you can make the most of what I'm certain will be a difficult  
17 time, and I hope you will do so.

18          All right. Thank you, everyone. Sorry for the long  
19 hearing, but I think it's important to flush out on the record  
20 all the reasons for the sentence in this case.

21          (Proceedings adjourned at 4:00 p.m.)  
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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Sara A. Wick, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Sara A. Wick

August 16, 2022

SIGNATURE OF COURT REPORTER

DATE