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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

*****)
UNITED STATES OF AMERICA,) Criminal Action
) No. 21-00037
Plaintiff,)
)
vs.)
)
TIMOTHY LOUIS HALE-CUSANELLI,) Washington, D.C.
) September 22, 2022
Defendant.) 10:18 a.m.
*****)

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE TREVOR N. McFADDEN,
UNITED STATES DISTRICT JUDGEAPPEARANCES:

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FOR U.S. PROBATION: CRYSTAL LUSTIG

1 REPORTED BY:

2 LISA EDWARDS, RDR, CRR
3 Official Court Reporter
4 United States District Court for the
5 District of Columbia
6 333 Constitution Avenue, Northwest
7 Room 6706
8 Washington, D.C. 20001
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1 THE COURTROOM DEPUTY: This is Criminal Case
2 21-37, the United States of America versus Timothy
3 Hale-Cusanelli.

4 Counsel, please come forward to identify
5 yourselves for the record, starting with the Government.

6 MS. FIFIELD: Good morning, your Honor. Kathryn
7 Fifield on behalf of the United States. With me at counsel
8 table are AUSA Karen Seifert, Special Agent Anthony Golt
9 from the Naval Criminal Investigative Service and Jorge
10 Casillas, a paralegal from our office.

11 THE COURT: Good morning, folks.

12 MR. SMITH: Good morning, Judge. This is Nick
13 Smith on behalf of the Defendant, Timothy Hale-Cusanelli.

16 THE COURT: Good morning, Mr. Smith.

17 Good morning, Mr. Crisp.

18 | Good morning, Mr. Hale-Cusanelli.

19 | And good morning, Officer Lustig.

20 We're here for the sentencing of

21 Timothy Hale-Cusanelli, who was found guilty by a jury of
22 obstruction of an official proceeding, entering and
23 remaining in a restricted building or grounds, disorderly
24 and disruptive conduct in a restricted building or grounds,
25 disorderly conduct in a Capitol building, and parading,

1 demonstrating or picketing in a Capitol building.

2 I've received and reviewed the presentence
3 investigation report and sentencing recommendation from the
4 probation office as well as the sentencing memoranda from
5 the Government and the Defendant.

6 I've also reviewed the letter attached to the
7 Defendant's memorandum and recent filings by both parties on
8 the definition of "administration of justice."

9 And of course I've seen the videos which were
10 previously admitted at trial.

11 Are there any other documents or materials that I
12 should have reviewed? Ms. Fifield?

13 MS. FIFIELD: Your Honor, the Government submitted
14 via USAfx four exhibits, two of which were exhibits at
15 trial, Exhibits 403 and 411. Those are the trial exhibit
16 numbers.

17 And the two additional exhibits were the recording
18 transcript of the conversation with the CHS, the unredacted
19 version, which was not entered at trial and presented to the
20 jury; and similarly, the unredacted audio was presented to
21 the Court via USAfx.

22 THE COURT: Thank you, ma'am.

23 And Mr. Smith?

24 MR. SMITH: No, your Honor.

25 THE COURT: Mr. Hale-Cusanelli, this sentencing

1 hearing will proceed in four steps, many of which may seem
2 mechanical to you. But I want you to keep in mind why we're
3 here today and the gravity of the situation:

4 You've committed a federal crime. Today's
5 proceeding is a serious matter as it is about the
6 consequences that you will face because of your decision to
7 engage in criminal behavior in violation of federal law.

8 The first step of today's hearing, sir, is for me
9 to determine whether you've reviewed the presentence report
10 and whether there are any outstanding objections to it and,
11 if so, to resolve those objections.

12 The second step is to calculate your recommended
13 sentence under United States sentencing guidelines.

14 The third step is to hear from the Government,
15 from your counsel and you, sir, if you wish to be heard
16 about sentencing in this case.

17 And the last step requires the Court to fashion a
18 just and fair sentence in light of all of the factors
19 Congress set forth in 18 USC 3553(a). As part of this last
20 step, the Court will actually impose the sentence along with
21 the other required consequences of the offense.

22 So turning to that first step, the final
23 presentence investigation report was filed on September
24 14th, 2022. The probation office filed its sentencing
25 recommendation on the same day. Mr. Hale-Cusanelli filed

1 his memorandum in aid of sentencing on September 16th and
2 the Government filed its memorandum on September 15th.

3 Ms. Fifield, does the Government have any
4 objection to any of the factual determinations set forth in
5 the presentence report?

6 MS. FIFIELD: Not to the factual determinations.

7 | No.

11 MR. SMITH: Yes, your Honor, we have.

12 THE COURT: Does the Defendant have any objection
13 to any factual statements set forth in it?

14 MR. SMITH: Just the objections that were noted in
15 the final presentence investigation report. I think it was
16 Page 29. Yes.

19 MR. SMITH: No, your Honor.

20 THE COURT: Mr. Hale-Cusanelli, could you approach
21 the podium, sir.

22 THE DEFENDANT: (Complies.)

23 THE COURT: Sir, are you fully satisfied with the
24 services of your attorneys, Mr. Smith and Mr. Crisp, in this
25 case?

1 THE DEFENDANT: I am, your Honor.

2 THE COURT: Sir, do you feel you've had enough
3 time to talk with them about the probation office's
4 presentence report and the papers the Government filed in
5 connection with sentencing?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: Thank you. You may have a seat, sir.

8 THE DEFENDANT: Thank you.

9 THE COURT: The Court will accept the facts as
10 stated in the presentence report. The presentence report
11 will serve as my findings of fact for purposes of this
12 sentencing.

13 And my appreciation to Officer Lustig for your
14 work on this.

15 The presentence report lays out the probation
16 office's calculation of the advisory guideline range that
17 applies in this case. I'll attempt to summarize that
18 calculation as follows:

19 As described in the presentence report, Counts 1
20 to 3 are grouped, and the applicable offense level is the
21 one that produces the highest offense level. The guideline
22 for Count 1, found in 2J1.2 of the guidelines manual,
23 produces the highest level. That section provides that
24 obstruction of an official proceeding has a base offense
25 level of 14.

The probation office calculates two additional enhancements as to that offense.

Mr. Hale-Cusanelli caused or threatened physical injury to a person in order to obstruct the administration of justice. For this, 2J1.2(b)(1)(B) imposes an eight-level enhancement.

Second, the offense resulted in a substantial interference with the administration of justice; specifically, the Electoral College certification. For that substantial interference, 2J1.2(b) (2) imposes a three-level enhancement.

Mr. Hale-Cusanelli further obstructed justice by giving false testimony under oath that he did not know Congress met in the Capitol. For that obstruction, 3C1.1 imposes an additional two-level adjustment.

All told, the total offense level computed by the probation office is 27.

Mr. Hale-Cusanelli has some prior criminal history, but zero criminal history points, placing him in Criminal History Category I.

So based upon a total offense level of 27 and a criminal history category of I, the guideline range applicable to Mr. Hale-Cusanelli would be 70 to 87 months; and the maximum sentence for Counts 2 and 3 is 12 months.

I think the remaining counts are petty offenses;

1 therefore, the guidelines don't apply to them at all.

2 The guidelines fine range is \$25,000 to \$250,000.

3 Are there any objections to these calculations?

4 Ms. Fifield?

5 MS. FIFIELD: Your Honor, the Government objected
6 to the PSR's approach to calculating the total offense level
7 in the sense that the Government's argument was that the
8 offense level should be calculated for each count and then
9 grouped as opposed to the PSR's approach, which is to group
10 first and then calculate the offense level.

11 At the end of the day, it comes out to the same
12 offense level for the group, so I'm not sure that it makes a
13 difference. But the Government does maintain that objection
14 for the record.

15 THE COURT: So, Ms. Fifield, would this make a
16 difference in other cases but not here? Is that the
17 concern? Or would it never make a difference?

18 MS. FIFIELD: Potentially, yes. But that is the
19 Office's position in each of these cases. And I understand
20 more broadly that the offenses, consistent with the
21 instructions in the guidelines, should be calculated first
22 and then grouped.

23 THE COURT: Mr. Smith?

24 MR. SMITH: Yes. May the defense be heard on
25 these legal objections?

THE COURT: Yes. This is your opportunity.

2 First, do you agree with the Government on that
3 point, the grouping?

15 I'll tell you, I'm not very sympathetic to the
16 argument that your client did not provide false testimony
17 here. So if I were you, I wouldn't spend a lot of time on
18 that point.

19 And similarly, I'm not very convinced by the
20 Government's argument that the Defendant himself injured or
21 threatened someone. So I do want to hear from the
22 Government in a minute, but I think the more fruitful line
23 on that would be what other people did that can be
24 attributed to him.

25 So with those permutations, but primarily on the

1 administration of justice, I'd love to hear from you.

2 MR. SMITH: So thank you, your Honor.

3 So one interesting issue that pops up often in
4 these January 6 cases over and over is an interpretive one.
5 And the Court is faced with a question of whether the plain
6 meaning of a term is primarily derived from a dictionary
7 definition -- sometimes it's a first definition, second,
8 third Webster's -- and on the other hand, whether ordinary
9 meaning comes from the context in which the term is used and
10 the relevant -- they call it -- the courts call it the
11 interpretive community that's using the term.

12 So I guess you might summarize the question as
13 being a dictionary definition versus an empirical meaning.

14 Do speakers use the term in the kind of way that the parties
15 are saying?

16 So the way this has played out in these cases is
17 there will be a term like "proceeding"; and I'm not going to
18 rehash all of the motion-to-dismiss arguments. But a
19 prosecutor even or a criminal defense lawyer might see that
20 term in the context of Chapter 73 in the obstruction laws,
21 and they would say: A proceeding is something that follows
22 an investigation. A proceeding is where decision-makers
23 gather the information from the investigation. They put a
24 legal characterization on it.

25 In these cases, the Government says: Well, we can

1 look in Webster's and it says -- one of the definitions is a
2 series of actions. That's one example.

3 Another example is the word "evidence." Again,
4 lawyers in the criminal justice context would see the word
5 "evidence" and say this is information that proves or
6 disproves a fact and so on, even in the case of a phrase
7 like "execute the law."

8 You have the Government in a number of cases -- I
9 was just talking about one with Mr. Crisp -- where the
10 Government is saying: Well, if we go to Webster's and look
11 at the word "execute," it can mean carry out. But any
12 lawyer in the relevant interpretive community, prosecutors,
13 would say: Execute the law? That's what the Executive
14 Branch does. They're enforcing the law.

15 It's not -- we can't just turn to Webster's and
16 look at the word "execute" because the relevant speakers are
17 lawyers and they're people in the criminal justice system.

18 So, Judge, we submitted a dissent. We cited the
19 dissent in the case called *Bostock*, where the Justices were
20 really exercised on this point. And this is really what
21 they're homing in on, that plain meaning is not just whether
22 you can fit some action inside the corners of any definition
23 you find in a dictionary. Plain meaning is what speakers
24 use. It's empirical.

25 This is a great quote, so I'm going to make it.

1 But Thomas Hobbes says: Words are wise men's counters, but
2 the money of fools. Words are wise men's counters, but the
3 money of fools.

4 What he means by that is, if words are conveying
5 the meaning we want them to, they're serving their purpose.
6 But when we just look at a word, a definition of a word in
7 the abstract, and we don't think about the context in which
8 it's used, they are controlling us and not the opposite.

9 And I think just to get to the point here, with
10 the sentencing guidelines, I think the clearest refutation
11 of the interpretive method that just looks at the dictionary
12 and not context is this issue, your Honor, because if
13 there's any term that prosecutors and defense lawyers and
14 judges are familiar with, it's the "administration of
15 justice."

16 We have submitted case law from I think four or
17 five circuits interpreting that phrase in the context of
18 Title 18.

19 THE COURT: Weren't several of them "due
20 administration of justice"?

21 MR. SMITH: Excuse me, your Honor?

22 THE COURT: Weren't several of them "due
23 administration of justice"?

24 MR. SMITH: That's correct. So the phrase from
25 Section 1503 that they're analyzing is "due administration

1 of justice."

2 THE COURT: Is it possible that that's a different
3 term of art than "administration of justice" here?

4 MR. SMITH: Your Honor, we would probably say not,
5 because the -- you know, I don't think any of the cases
6 focus on the word "due" and that part of the phrase.

7 But the "due administration of justice" modifies
8 the phrase "administration of justice" in the sense that I
9 haven't really researched and I'm not sure when
10 administration of justice would not be due if we're talking
11 about properly initiated proceedings. It seems like almost
12 kind of like a redundancy to say "due administration of
13 justice."

14 THE COURT: I think *Black's Law Dictionary* defines
15 them differently.

16 MR. SMITH: Defines "due" from "administration of
17 justice"?

18 THE COURT: Due administration -- they're like two
19 terms of art. And the due administration of justice, I
20 believe, was kind of more broad. Maybe I'm misremembering
21 that. But anyway, it seemed like for us lawyers, they're
22 two different terms.

23 MR. SMITH: So, your Honor, I think, then, you
24 perhaps would have done a better job with the sentencing
25 memo yourself because if "due administration of justice" is

1 broader, that would suggest that "administration of justice"
2 would be even narrower than the definitions that were cited
3 by the courts of appeal.

4 THE COURT: So, Mr. Smith, do you agree that 2J1.2
5 applies? Is your position that there's just no sentencing
6 guideline here?

7 MR. SMITH: So one of the points that Judge
8 Friedrich and I think Judge Moss picked up on was that Part
9 J of the sentencing guidelines itself, the overarching -- it
10 refers to "administration of justice."

11 And I think, your Honor, that that's a bigger
12 problem for the Government, not a less significant one. But
13 I think we still find that the guideline itself applies
14 because if you look at Comment 1, the statutory provisions,
15 it cites Section 1512.

16 So I think there, the Government would have an
17 argument to say that, Well, we specifically cited the
18 statute here in the applicable provisions commentary. On
19 that basis, it would apply.

20 But when it comes to analyzing the term
21 "administration of justice," I don't think -- I think -- we
22 submitted a supplemental memo on how it looks like in every
23 circuit that these -- the courts of appeal have decided that
24 the interpretive method for the guidelines shouldn't differ
25 from how we interpret statutes.

1 THE COURT: Right. But I guess I'm still -- you
2 say this is a problem for the Government. But you're
3 agreeing -- I think I'm hearing this -- that this
4 obstruction of an official proceeding fits under Part J that
5 is defined as offenses involving the administration of
6 justice.

7 That feels like that's awkward for you that
8 this -- the guidelines have said this statute involves
9 offenses involving the administration of justice and so
10 perhaps this is a different term of art or is being used in
11 a different way here in the guidelines than it is in the
12 statute or in *Black's Law Dictionary*.

18 So we would argue that if we have to -- the
19 guidelines instruct us to find the most analogous one, so I
20 can't come up here and tell your Honor that there's nothing
21 the Court can use. So I guess the defense position would be
22 if the Court has to do that and find an applicable
23 guideline, it should be the one where the statutory section
24 in the commentary points to the statute that's being used.

25 But I don't think that that necessarily -- I

1 wouldn't follow the judges cited by the Government who take
2 the next step and say, Well, merely because we have a base
3 offense level we've agreed on, these enhancements can apply
4 as a matter of law. I don't think the Court has to go that
5 far it, given that any -- some -- any kind of guideline has
6 to be used. Otherwise, we're floating in space and there's
7 nothing to use.

8 So I would say -- I don't think that
9 Mr. Hale-Cusanelli's position is jeopardized by agreeing
10 that we have to find some guideline here. And 14 base
11 offense points is something we're not objecting to.

12 THE COURT: I mean, what do you think happened
13 here? Would you agree that the Commission just didn't think
14 about this scenario and this was kind of an inadvertent slip
15 that they used "administration of justice" as a shorthand?
16 Do you think that's what happened?

17 MR. SMITH: Judge, we've filed so much briefing on
18 the motion to dismiss, and I'm sure the Court is sick to
19 death of it.

20 But just to retread one of these points really
21 quickly: I think what the Commission thought is the same as
22 what Congress thought, which is "administration of justice"
23 can entail certain proceedings in Congress pursuant to its
24 power of inquiry, which are analogous to the "administration
25 of justice" in judicial proceedings in a very specific way.

1 Congress is issuing subpoenas to call for witness testimony.
2 So they're gathering evidence in something that's also
3 called an investigation.

4 And although there's no judge, the findings that
5 Congress makes in an inquiry is -- carries legal
6 implications like a judicial proceeding would.

7 So to answer the Court's question, I think that
8 the Commission to the extent it contemplated congressional
9 proceedings was thinking of inquiries and investigations.
10 And so they thought that that phrase "administration of
11 justice" would cover those types of proceedings like in the
12 Iran Contra and, you know, other investigations in Congress.

13 THE COURT: I take --

14 MR. SMITH: Sorry. I don't mean to interrupt your
15 Honor.

16 But we could probably go back to how people like
17 Oliver North and Admiral Poindexter were sentenced if it's
18 possible to still pull those sentencing memoranda from 1993.
19 But I suspect that the Government sought to apply
20 enhancements in that case, and there wasn't any debate from
21 North or Poindexter about whether this was the
22 administration of justice because they defied subpoenas.
23 Allegedly, they lied to Congress.

24 THE COURT: So you're not going to convince me
25 that obstruction of an official proceeding does not cover

1 what's going on here. And I understand you're not trying to
2 retread that ground.

3 MR. SMITH: Understood.

4 THE COURT: But my question is: Is that
5 "obstruction of an official proceeding" -- is your view that
6 they intentionally left that out here? Or "official
7 proceeding," I should say. Or that they saw this as some
8 sort of shorthand for all of what was happening under the
9 statute?

10 MR. SMITH: I think it's the latter, Judge. And I
11 think the Court can also have it both ways.

12 I think it's not undercutting Mr. Hale-Cusanelli's
13 legal argument on his motion for a judgment of acquittal to
14 say: If the Court -- the Court can both find that this
15 offense is stating a Section 1512(c)(2) offense, there was
16 an official proceeding, and that that official proceeding
17 didn't involve the administration of justice, because courts
18 have held that that meaning is clear. It's judicial
19 proceedings or proceedings that imitate judicial ones
20 through a certain kind of way like in this Kelley case we
21 cited from the D.C. Circuit.

22 So I don't think there's anything inconsistent in
23 those positions to both deny Mr. Hale-Cusanelli's post-trial
24 motion and find that "administration of justice" means this
25 specific thing.

1 THE COURT: Maybe you can address the Chief
2 Judge's analysis. I mean, she spent a lot of time and I
3 thought had a very thoughtful analysis for why this does
4 apply. You talked about Judge Friedrich in your response,
5 but I didn't see much on the Chief Judge.

6 MR. SMITH: Well, is there a specific -- so Judge
7 Friedrich's points, I think, were three: that we don't
8 interpret -- the Courts don't interpret the guidelines in
9 the same manner as statutes. Maybe that was Judge Friedrich
10 and Judge Moss.

11 The second point was that an interpretation of the
12 "administration of justice" as it's been interpreted by
13 every court of appeals would create unwarranted disparity.

18 Is there a point that Judge Howell made that's
19 separate from one of those?

20 THE COURT: Well, she talks about the *Black's Law*
21 *Dictionary* definition and suggests that what happened here
22 actually is consistent with that definition of
23 administration of justice and that *Aguilar*, the United
24 States Supreme Court case that talks about administration of
25 justice, actually talks about what a broad term that is and

1 that it can be capacious enough to include this official
2 proceeding.

3 MR. SMITH: Judge, I think this goes back to the
4 initial point I was making about when plain meaning is a
5 dictionary definition and when it's empirical. I think
6 Judge Moss said in his case where he applied this rule that
7 justice is defined as fair play. One of the meanings of
8 justice is fair play.

9 And so that's obviously not what courts mean when
10 they're playing Section 1503. They don't just look at
11 Webster's and say fair play because -- think about the
12 implications of that.

13 So if --

14 THE COURT: Sure. But --

15 MR. SMITH: If I get together with my friends at a
16 restaurant --

17 THE COURT: I get to interrupt you, not the other
18 way around, Mr. Smith.

19 I'm not talking about Webster's dictionary. I
20 think "administration of justice" -- frankly, I agree with
21 you: That is a legal term that is different from just
22 looking up in Webster's "administration" and "justice" and
23 putting them together.

24 But she's pointing to *Black's Law Dictionary* and
25 saying this is a term of art and that term of art fits here.

1 And my recollection is, as I think you just said, your
2 circuit court definitions are looking to "due administration
3 of justice"; and in a statute that may well have a narrower
4 meaning there than *Black's Law Dictionary*, especially given
5 that I think you admit that this statute was intended to
6 fall within this "administration of justice" part.

7 MR. SMITH: So I think the response to the Chief
8 Judge would be: This is an empirical question. Do courts
9 use the phrase and have they used the phrase or prosecutors
10 or defense lawyers in the sense meant by the Court, which is
11 outside the context of how we define "administration of
12 justice" in Section 1503, which is investigation followed by
13 fact-finding and subpoenas and the like?

14 And unless I'm mistaken, I don't think Judge
15 Howell cites an empirical example of a speaker in any
16 context using "administration of justice" in the sense that
17 the Chief did.

18 THE COURT: Let me read you the definition. It
19 says: The maintenance of right within a political community
20 by means of the physical force of the state. The state's
21 application of the sanction of force to the rule of right.

22 Why doesn't that fit what was happening here?

23 MR. SMITH: Because, your Honor, if we look at --
24 this goes back to the distinction I keep harping on, and I'm
25 sorry if it's repetitive.

1 But there's a distinction between looking at an
2 abstract way a word is defined in general terms in a
3 dictionary and looking at how it's used in life and what
4 plain meaning is.

5 Like if we follow the points made by the dissent
6 in *Bostock*, plain meaning is an empirical question. When we
7 turn to a dictionary, that's a kind of shorthand for what
8 the empirical question is likely answered. But the question
9 is whether people have -- people, the relevant speakers, use
10 the term "administration of justice" outside of the context
11 in which we're defining administration of justice in Section
12 1503.

13 And there are no speakers that at least the Chief
14 Judge pointed to or the Government who say the phrase
15 "administration of justice" outside any context that's not
16 defined in the way we mean it in Section 1503. That's
17 always how it's used.

18 So then the question becomes: If the person
19 proposing an interpretation does not cite speakers who use
20 it that way, what exactly are they doing?

21 And I think the danger when we don't look at the
22 empirical meaning of the word is we're disconnecting the
23 legislature from courts. There's no foundation we're
24 standing on if we can just turn to a dictionary and use
25 general phrases and fit it to the facts. We're floating in

1 space again.

2 Basically, that interpretive method would mean
3 that statutes are like the guidelines: advisory, basically,
4 if we don't connect the way we're defining this word to the
5 way speakers use it.

6 And the judge -- I think there's a reason the
7 Chief Judge did not point to speakers or courts using it
8 that way. They don't.

9 And so this is -- and not to draw a larger circle
10 here, but this is happening over and over and over in these
11 cases, where there are settled meanings within
12 interpretative communities for words like "proceeding" or
13 "execute the law."

14 And what the Government is doing is it's saying:
15 Well, let's just open the dictionary and look at a term.
16 But there's no speakers who talk that way.

17 So I think, Judge, our point is that if the Court
18 were to find that "administration of justice" is what was
19 going on in the Capitol on January 6th, that is -- it would
20 not be applying the plain meaning of the word as it's used
21 by speakers. It would be taking general phrases in a
22 dictionary and then fitting it to the facts rather than the
23 other way around.

24 THE COURT: I understand your point.

25 Anything else you want to say on that? Or do you

1 want to speak specifically to why, assuming I disagree with
2 you here on the definition of "administration of justice,"
3 these two enhancements would not apply?

4 MR. SMITH: So one last point I'd like to make,
5 Judge, is that even Judge Moss in one of the cases the
6 Government cited acknowledged that there was probably
7 ambiguity. And I think, you know, not that the Court
8 committed itself with its opening comments, but it said this
9 issue is challenging.

10 We cited in our supplement a case, a D.C. Circuit
11 case -- I can't remember the name -- where the Court applies
12 the rule of lenity to plain ambiguity in the guidelines. So
13 I think here, even if we are not correct about the plain
14 meaning, I think it's very, very challenging to candidly say
15 that this is not ambiguous and that it's unambiguously the
16 case that the Government's position is correct. The very
17 debate we're having would suggest the opposite. And so the
18 rule of lenity would be squarely applied here.

19 THE COURT: I understand your point.

20 MR. SMITH: But, Judge, on the fact -- there are
21 arguments we'd like to make about them factually not
22 applying. Would your Honor like to hear those now?

23 THE COURT: Yes.

24 MR. SMITH: So I don't even think the Government
25 takes the position that Mr. Hale-Cusanelli caused physical

1 injury or property damage on the --

2 THE COURT: So I'm inclined to agree with you on
3 this. I want to hear -- I think the Government points out
4 that even if he wasn't personally responsible for injury, he
5 is also responsible under 1B1.3 or something.

6 MR. SMITH: Which would be the aiding and abetting
7 concept.

8 THE COURT: Yes. Talk about that.

9 MR. SMITH: I will address aiding and abetting.

10 There is a case, a Supreme Court case, *Rosemond*,
11 R-O-S-E-M-O-N-D. And it says that there are two elements to
12 aiding and abetting: taking some act in furtherance of the
13 specific offense that was committed and intending to
14 commit -- intending to further that specific offense.

15 So it's not like a *Pinkerton* liability, where it
16 can be a slightly different crime that the Defendant's
17 responsible for. It's got to be the specific offense that
18 someone else committed and the Defendant intends to commit
19 that offense.

20 I think here there's no evidence suggesting that
21 when Mr. Hale-Cusanelli tugged the collar of the rioter he
22 was --

23 THE COURT: Sorry. I'm not talking about that.
24 I'm talking more broadly. Just a lot of people were injured
25 that day. There was a lot of property damage. It was done

1 by his fellow rioters. His presence helped cause and create
2 that situation.

3 MR. SMITH: So we would say, your Honor, then,
4 that doesn't come close to satisfying the *Rosemond* standard
5 because that would imply that everyone at the Capitol has
6 committed assault if their physical presence alone -- I
7 think there's a lot of case law saying that presence alone
8 doesn't satisfy the aiding and abetting standard.

9 THE COURT: So you agree other people were doing
10 things that would justify the enhancement here; but under
11 *Rosemond*, he can't be found responsible for aiding and
12 abetting in that context?

13 MR. SMITH: If there were other rioters in the
14 context of this officer who was tackling the rioter who were
15 threatening injury, then they would not only be held
16 responsible under the guidelines; they would be charged
17 ideally with assault, because that's -- threatening to
18 commit bodily injury is assault. But we don't think that
19 presence alone would satisfy that. We don't think the
20 tugging on the collar would satisfy it.

21 On the substantial interference point: If the
22 Court turns to the guideline on substantial interference, it
23 will see that the types of actions that are substantial are
24 ones that are having an effect on the outcome of the
25 proceeding.

1 So there are indictments that are, you know,
2 issued through false testimony. There is court proceedings
3 that are terminated through the actions of the Defendant.
4 So what unites all those examples, your Honor, I think it's
5 comment -- I don't have it handy --

6 THE COURT: I'm looking at it. But it also talks
7 about unnecessary expenditure of substantial governmental or
8 court resources.

9 MR. SMITH: So the argument here is that this has
10 to be specific to the Defendant again and not the entire,
11 you know, crowd. Otherwise, that enhancement would apply to
12 every single person who's -- you know, thousands of people
13 in the Capitol.

14 And I think this goes to a point we made in our
15 brief but we didn't stress enough, perhaps, which is that
16 responsibility is always individually administered.
17 Individual responsibility is an essential part of our
18 justice system.

24 And so it's not enough for the Government to point
25 to a mob and say that because the Defendant is a member of

1 it, he's responsible for all of its actions and
2 consequences.

3 And so we think that the --

4 THE COURT: So they point to -- it's 1B1.3: In
5 the case of a jointly undertaken criminal activity, all acts
6 and omissions of others that were within the scope of the
7 jointly undertaken criminal activity, in furtherance of that
8 criminal activity and reasonably foreseeable in connection
9 with that criminal activity that occurred during the
10 commission of the offense of conviction, in preparation for
11 that offense or in the course of attempting to avoid
12 detection or responsibility for that offense.

13 MR. SMITH: And, Judge, our response to that
14 guideline is that if you look up the case law interpreting
15 joint action, it means two things: conspiracy and
16 potentially *Pinkerton* vicarious liability after the
17 conspiracy or aiding and abetting liability. Those are the
18 two types of joint action that the guidelines are referring
19 to.

20 And we would say that if there's no conspiracy and
21 the *Rosemond* aiding and abetting factors aren't satisfied,
22 then you don't get to that guideline. The guideline's not
23 referring to just a mob.

24 So we think this analysis merges with the
25 unwarranted sentence disparity point. But I don't think the

1 Court wants to get there yet. But, you know, if --

2 THE COURT: No.

3 MR. SMITH: If it's the case that this is
4 substantial interference because other people did these
5 things and the Defendant was present, then it would imply
6 the Government has mischarged hundreds of people, that these
7 misdemeanants who entered the Capitol Building were not
8 properly charged under Title 40. They should have been
9 charged with assault and Section 1512 violations. But that
10 would collapse the two offenses.

11 You know, one point we will make under the
12 unwarranted sentence disparity issue is that there are
13 thousands of people who did things that are in many ways
14 indistinguishable from Mr. Hale-Cusanelli's conduct that day
15 who are not just charged with Title 40 offenses, but --

16 THE COURT: But that's not an unwarranted sentence
17 disparity. It's about when you're found guilty of similar
18 conduct. And I mean, they're not being found guilty of
19 similar conduct. Right?

20 MR. SMITH: Well, so just to make clear what our
21 position is: We do not understand what -- in many cases --
22 and we submitted a chart showing the conduct of
23 misdemeanants who were charged under Title 40; and it's very
24 similar, sometimes worse, than Mr. Hale-Cusanelli's. There
25 were misdemeanants who broke into senators' offices, you

1 know, who kicked down doors or were there when they were
2 kicked down, who were ignoring officers' commands to leave
3 the building. And they were sentenced under Title 40 to
4 probationary sentences.

5 THE COURT: Anything further, Mr. Smith?

6 MR. SMITH: So just to be clear, your Honor, are
7 we arguing, you know, all of our points right now? Or do
8 you want to give the Government an opportunity to speak on
9 the legal issues and we can come back with some of the
10 others?

11 THE COURT: I want to hear your view on the
12 calculation of the guidelines.

13 MR. SMITH: So I think that's it.

14 THE COURT: Thank you.

15 MR. SMITH: Yes.

16 THE COURT: Ms. Fifield?

17 MS. FIFIELD: Good morning, your Honor.

18 THE COURT: Good morning.

19 MS. FIFIELD: I assume the Court would like to
20 start where it began with defense counsel, which is the
21 legal arguments versus the factual arguments as to the two
22 specific offense characteristics that apply under 2J.

23 And I'd like to start with what I think is the
24 biggest problem for the defense, which in part this Court
25 insightfully pointed out, which is that Part J of the

1 guidelines are devoted entirely to offenses involving the
2 administration of justice.

3 And 18 USC 1512 is specifically one of the
4 statutes to which that section -- specifically 2J1.2 --
5 applies.

6 And if the defense is correct that these
7 enhancements can only apply to offenses involving the
8 administration of justice, which somehow do not include
9 several other statutes that have nothing to do with courts,
10 judicial officers or tribunals, there is no way under the
11 application of 2J1.2 to measure the magnitude of a
12 defendant's obstruction.

13 There is a difference between a defendant who
14 obstructs, whether it's a judicial proceeding or a
15 nonjudicial proceeding, by failing to appear and a defendant
16 who obstructs an official proceeding or another proceeding
17 by threatening to cause or actually causing physical injury
18 and property damage.

19 So the first point is that if the Court were to
20 accept the defense's argument, it would lead to some absurd
21 results when it comes to sentencing under several of the
22 Chapter 73 1500 offenses that are cited as the statutory
23 provisions to which 2J1.2 applies.

24 THE COURT: Do we interpret the guidelines
25 differently than we interpret statutes?

1 I mean, I'll tell you, my strong inclination, if
2 this was a statute here and you were charging that the
3 Defendant committed a violation of due administration of
4 justice, I'd say no. I mean, that's not how the due -- or
5 the "administration of justice" has been interpreted by
6 numerous courts. I think it's probably why you didn't
7 charge him under 1503, which is an administration of justice
8 statute.

9 Instead, you charged him under this one that also
10 has the official proceedings that, you know, I think, as
11 I've said, I think is broader or at least different than
12 "administration of justice."

13 MS. FIFIELD: Your Honor, I do think that
14 "administration of justice" as it's used in the sentencing
15 guidelines is broader than it is used in the statutes, which
16 is not to say that the interpretive tools are any different.

17 But the guidelines in terms of both substance and
18 structure differ from the statutes that the defense is
19 talking about, not least of which because a key part of the
20 sentencing guidelines is identifying which guideline goes
21 with which statute, which again gets back to the absurd
22 results that I referenced before.

23 But the guidelines also define the substantial
24 administration of justice extremely broadly to encompass the
25 unnecessary expenditure of substantial government or court

1 resources.

2 And it is the Government's position that those key
3 differences, even using the same interpretive tools as one
4 would use in reading a statute, the plain meaning, the
5 structure of the text, leads to a clear argument that -- or
6 a clear conclusion that this guideline applies to the
7 Defendant's obstruction offense.

8 THE COURT: What do you say to Mr. Smith's
9 argument that no one uses the term this way, "administration
10 of justice"?

11 MS. FIFIELD: Speaking frankly, my first response
12 is no one uses the term "administration of justice."

13 And, you know, it's interesting that I think we
14 can all agree that it is a term of art, and that doesn't
15 necessarily mean that it means the same thing every time
16 that it is used.

17 And to the Court's point that there are extra
18 words involved sometimes, "due administration of justice" --
19 I was looking at as defense counsel was speaking a couple of
20 the other Chapter 73 obstruction offenses. And 18 USC 1505
21 talks about impeding the due and proper administration of
22 the law under which any pending proceeding is being had.

23 So I think the use of the term "administration of
24 justice" is very context-dependent. And in this case, when
25 we're talking about the sentencing guidelines, the

1 sentencing guidelines are designed to adapt to any number of
2 factual circumstances.

3 And oftentimes or in lots of occasions, we are
4 dealing with a situation where the guideline doesn't even
5 specify that the offense that is being discussed, the
6 offense at issue, is associated with that guideline. We
7 have this issue in the Capitol riot cases when it comes to
8 18 USC 231.

9 But this guideline is clear: 18 USC 1512(c)(2) is
10 governed by 2J1.21. And in that context, the administration
11 of justice means something -- simply because the
12 interpretive tools are the same does not mean that it leads
13 to the same outcome or the same interpretation, because you
14 have to consider the structure as part of -- I think that is
15 part of the plain meaning, is considering the structural
16 context in which one finds the term.

17 THE COURT: Let me give you a hypo. So you're
18 familiar with ghost guns.

19 MS. FIFIELD: Yes.

20 THE COURT: So imagine a defendant has been
21 convicted of felon in possession with use of a ghost gun.
22 And you probably know there's this obliteration of a serial
23 number enhancement for firearms charges. It doesn't talk
24 about ghost guns, of course, because ghost guns weren't
25 around when the guideline was created and we haven't had a

1 full Commission until very recently.

2 My instinct would be that the same reasons why we
3 should punish an obliterated serial number on a firearm more
4 harshly would also apply to a concern about someone using a
5 ghost gun. It's not traceable, what have you. But the
6 guideline says nothing about ghost guns.

7 Should I apply that obliterated serial number
8 enhancement?

9 MS. FIFIELD: I am familiar with ghost guns. But
10 not being quite as familiar with the specifics as I think
11 the Court is, I would say there's a good argument that you
12 could do that.

13 I think the funny thing about the guidelines is
14 they are -- they attempt technical order of incalculable
15 facts and circumstances.

16 But I do think they are designed to be a
17 functional tool that, even if the sentencing guidelines
18 haven't specifically addressed a specific factual
19 circumstance that is before the Court, the Court is well
20 within its discretion to look at the clear direction of the
21 guidelines, which in this case 2J1.2 clearly directs the
22 Court to apply it to an offense under 18 USC 1512(c)(2).

23 And the substantial administration of justice
24 clearly captures what the Defendant's offense involved here,
25 which was the substantial expenditure of government

1 resources to recover from this riot just on that day alone.

2 And in terms of the interpretive tools that we're
3 using -- and I do think that, as I've said, the structure is
4 very important -- the defense has argued that it would be
5 absurd to interpret "administration of justice" differently
6 in the sentencing guidelines as in the statutes.

7 I think it would be more absurd to interpret the
8 phrase "administration of justice" such that it meant one
9 thing for the substantial interference enhancement and
10 something different for the threatening to cause or actually
11 causing physical injury or property damage enhancement.

12 So it seems to me that the guideline are very
13 clear on this. And they give good direction to the Court to
14 look at the factual circumstances that it has before it and
15 apply the guidelines based on the facts, which is what I
16 think we'll talk about next.

17 THE COURT: My concern about this -- and I'll tell
18 you -- I think if the Commissioners were all sitting around
19 here, they'd all agree we should want this offense to be
20 within the enhancements. But they did use different
21 language.

22 And I think Mr. Smith makes good points, that
23 we're supposed to be using the same interpretive tools for
24 guidelines that we use for statutes, you know, the rule of
25 lenity, ambiguity. You have the burden to show the

1 enhancement applies.

2 Why isn't the answer just that they didn't include
3 "official proceeding"? They should have done that; they
4 probably wish they had done that. Maybe they will change it
5 to include that. But they didn't right now.

6 The judges in this district have been pretty clear
7 back at the motion-to-dismiss stage that this isn't an
8 administration of justice. This is something different, an
9 official proceeding, and that we should be consistent.

10 And you can certainly argue for a 3553(a) upward
11 variance and get to the same result. But when I'm trying to
12 faithfully contextually apply the guidelines, is this
13 administration of justice?

14 MS. FIFIELD: I think the first response to that
15 is that notably or interestingly, that was not an aspect of
16 this Court's ruling on whether obstruction of an official
17 proceeding encompassed the conduct that we're talking about
18 in this case.

19 And even though it was an aspect of other courts'
20 decisions that 18 USC 1512(c)(2) captures the conduct that
21 occurred on January 6th, they also arrived at the place that
22 the Government is asking this Court to arrive now, which is
23 that it does mean something different in the context of the
24 sentencing guidelines.

25 And a functional, commonsense approach to the

1 guidelines in this case, just like the Court said, everyone
2 looking at the facts of this case and looking at the way
3 that the guidelines structure these enhancements, it's a
4 commonsense approach to apply them because it measures the
5 degree and magnitude of obstruction.

6 THE COURT: I mean, we have this *Winfield* case in
7 this circuit where really this circuit has been very
8 concerned about us applying the guidelines kind of using the
9 comments to inform the guidelines really kind of directing
10 us to be -- really stay within the text of the guidelines.

11 And even though we think something should be kind
12 of crammed into it and the Commission intended to include
13 it -- you may recall *Winfield* was about "attempts," where
14 the guideline itself doesn't talk about "attempts," but the
15 comments say that "attempts" should be included. And the
16 circuit said that that doesn't work. If it's not in the
17 text of the guideline, it doesn't apply; and you need to
18 proceed that way.

19 I mean, it feels like you're asking me to fix a
20 mistake that the Commission made. And I'm not sure that's
21 my job.

22 MS. FIFIELD: I don't think it is a mistake. I
23 think that the guidelines clearly capture statutes that
24 themselves capture conduct that has nothing to do with
25 judicial proceedings or tribunals.

1 And, you know, that could be -- I have on my list
2 1505, 1511, 1516 and 1519.

3 1505 is obstruction of proceedings before
4 departments, agencies and committees. And that is the
5 statute that I read from earlier, which captures conduct
6 that -- "whoever corruptly, by threats or force, by any
7 threatening letter or communication, obstructs, impedes or
8 endeavors to influence, obstruct or impede the due and
9 proper administration of the law under which any pending
10 proceeding is being had before any department or agency of
11 the United States."

12 THE COURT: Yes. I mean, you probably know you
13 have the FTC; you have all these commissions around here
14 that have surprisingly court-like attributes. You have
15 ALJs, what have you. And so I certainly agree with you that
16 it would go beyond grand juries and what you and I do around
17 here.

18 But there's a lot of other things that the Federal
19 Government does that look a lot like this proceeding that
20 are arguably administration of justice that are several
21 stepped removed from a certification process at the Capitol.

22 MS. FIFIELD: I don't think the Court needs to get
23 there, as I've gone over.

24 But I would go back to the Government's
25 alternative argument that this certification did have some

1 quasi-adjudicative or quasi-investigative aspects. But I
2 think if you're looking at these other statutes, these
3 statutes capture a broad range of conduct. Some of this
4 involves investigations; some of it, like in the case of 18
5 USC 1511, involves enforcement of the criminal laws.

6 The defense talked about the rule of right, as the
7 Court mentioned in Judge Howell's decision. The rule of
8 right is spelled out in the Constitution, the Electoral
9 Count Act. The rule of right was the proper functioning of
10 the peaceful transfer of power by certifying the Electoral
11 College vote.

12 So I do think that if -- I don't want to keep
13 harping on it, but if the Court determines that these two
14 enhancements don't apply, and we're considering all of the
15 conduct that is captured in these Chapter 73 obstruction
16 statutes, there is no way to measure the degree and
17 magnitude of a defendant's obstruction if these enhancements
18 do not apply.

19 THE COURT: I'll hear you on the specific points,
20 the facts here.

21 MS. FIFIELD: I appreciate the Court's flagging
22 that the Court is less persuaded by the Defendant's own acts
23 analysis. But I would like to start there, if it's okay
24 with the Court.

25 THE COURT: Quickly.

1 MS. FIFIELD: Quickly.

2 The Defendant's own acts, as laid out in the
3 Government's sentencing memo, the Government has two
4 theories supporting the Defendant's own acts under the --
5 I'll call it the plus eight.

6 First, the Defendant entered the United States
7 Capitol on January 6th clearly having invoked at least at
8 that stage in his own mind civil war. He was engaging in
9 conduct that was militaristic in nature. He was saying,
10 "Advance, advance, advance." And he later told a witness
11 that he was saying, "Advance, advance, advance" because he
12 was encouraging other rioters to come into the Capitol
13 Building and we need more people. That's what the Defendant
14 said.

15 And that marshaling of a violent mob that the
16 Defendant engaged in was a direct threat to law enforcement
17 and property damage. And that does bleed into a little bit
18 sort of the aiding and abetting analysis. And when I get to
19 the aiding and abetting analysis, that's some of what I'll
20 discuss.

21 But the Defendant himself engaged in that conduct
22 for the stated purpose of taking the building and holding
23 it, which would mean expelling law enforcement, leading to
24 its logical end.

25 More directly, this interaction that the Defendant

1 had with Officer Matthew Shephard in the Capitol Visitor
2 Center is much broader than I think the Government even
3 emphasized in its arguments at trial.

4 Officer Shephard -- the Government put this in its
5 sentencing memorandum -- Officer Shephard talked about what
6 was going on down in the Capitol Visitor Center at the time
7 the Defendant was there. He was talking about the number of
8 rioters who had homemade weapons and projectiles. He was
9 talking about rioters who had chemical spray in their
10 possession. And he talked about these people as a group of
11 which the Defendant was a part.

12 And when he was talking about the officers'
13 priorities about who to detain in what order, because, as he
14 said, they didn't have nearly enough resources down there in
15 the Capitol Visitor Center or anywhere in the Capitol on
16 January 6th, they decided to focus first on rioters with
17 chemical spray and with these homemade weapons.

18 And when Officer Shephard and his fellow officers
19 step out from their formation to attempt to detain some of
20 these more aggressive agitators and folks with weapons,
21 because, as he put it, if they were blinded by chemical
22 spray, they had no idea -- they had no way to protect their
23 weapons, which would have been -- I think the way he put it
24 sort of simply was a terrible situation. We can -- there's
25 no dispute that if a rioter had gotten ahold of a service

1 weapon down in the Capitol Visitor Center, that would be an
2 immediate and serious threat not just to law enforcement,
3 but to anyone else down there.

4 When Officer Shephard steps out with fellow
5 officers to detain rioters who are wielding chemical spray
6 or other weapons, it breaks down into what he called a
7 brawl. You can see that in Exhibit 411 that the Government
8 submitted to the Court. You can't see the officers when
9 this interaction begins because they're off frame. But you
10 can see the brawl that Officer Shephard's talking about as
11 it appears in the top right corner of that frame in Exhibit
12 411.

13 And when that brawl breaks out, the Defendant runs
14 over to this scuffle -- it looks like a rugby scrum -- up in
15 the top right corner of the frame. And then as Officer
16 Shephard is trying to take down the other rioter --
17 Rukstales, I think, is his name -- Hale-Cusanelli had
18 previously backed up to get away from the brawl that he
19 still is watching. And it is at this point when Officer
20 Shephard is attempting to detain this rioter who is
21 struggling and resisting that detention that Hale-Cusanelli
22 swoops in and tries to grab that rioter out of Officer
23 Shephard's grasp.

24 And I think any law enforcement officer would tell
25 you that a person interfering with an ongoing arrest and

1 detention of a different subject is a direct threat to law
2 enforcement in that moment. They would consider it as such.

3 In terms of the aiding and abetting and jointly
4 undertaken criminal activity, I'll say that I hadn't
5 prepared extensive arguments on this because I do think that
6 the Defendant's own acts gets the Court to the plus eight.

7 But there are various points at the riot -- in the
8 riot when even though the Defendant has not been charged as
9 part of a conspiracy or he does not have co-conspirators as
10 a technical matter, it is well-established --

11 THE COURT: 1512 includes aiding and abetting.
12 Right?

13 MS. FIFIELD: Right.

14 THE COURT: And we discussed that --

15 MS. FIFIELD: Right.

16 THE COURT: -- at length at the trial.

17 MS. FIFIELD: Right.

18 The Senate wing door is a great example. At 12:12
19 p.m., when -- or even honestly before that, when we are down
20 on the lower west terrace and the Defendant is picking up
21 and moving bike rack barriers, that could be interpreted
22 pretty easily as assistance being provided to the mob who is
23 minutes later going to attack a line of police at the base
24 of the northwest stairs.

25 Hale-Cusanelli is in that crowd after that line

1 collapses. First, there's a brutal battle on the northwest
2 stairs. That crowd climbs the stairs up to the upper west
3 terrace and then to the Senate wing door, where I think you
4 can fairly say as a group they coordinate to breach both the
5 window to the right of the Senate wing door if you're on the
6 outside and then the door itself. And Hale-Cusanelli was in
7 that crowd. He was inside that door within 90 seconds of
8 the window being smashed.

9 So I think you can -- even just looking at the
10 window, for example, or -- I don't have documentation or
11 information about the cost of the damage to the door, but it
12 was kicked in because it was previously locked and secured,
13 so I imagine there was damage. But even just in that
14 instance, I think, Hale-Cusanelli could be fairly said to
15 have threatened to cause or caused property damage by aiding
16 and abetting others.

17 The same argument and perhaps even a stronger
18 argument goes back to that interaction in the Capitol
19 Visitor Center with Officer Shephard. Hale-Cusanelli was
20 part of a crowd that was actively resisting law enforcement
21 directions to leave and physically engaging with law
22 enforcement who were threatened and who -- that was an
23 ongoing threat to their personal safety and security as well
24 as to the building.

25 That could also include the Government's first

1 argument as to the Defendant's own acts when he's doing this
2 "Advance, advance," calling people into the building. He is
3 by his own words and his own actions working with other
4 rioters so they can bring in more people and take the
5 building, hold the building, clear the building.

6 So I think unless the Court has other questions,
7 I'll conclude by saying I think there are a lot of different
8 ways from a factual perspective that this Court can get to
9 the plus eight. The Government's position is that the
10 strongest argument is that the Defendant by his own acts
11 posed a direct threat to law enforcement.

12 But even through the aiding and abetting route,
13 there are multiple different points during his time on
14 Capitol grounds and inside the Capitol Building where the
15 Defendant works together with other rioters to cause
16 property damage and to present a threat to the safety of law
17 enforcement.

18 THE COURT: Thank you, ma'am.

19 I'll hear very briefly from you, Mr. Smith.

20 MR. SMITH: Judge, just very briefly in response
21 to a couple of the points on the administration of justice
22 the Government just made: Ms. Fifield suggested that if the
23 Court were to construe administration of justice like most
24 other courts of appeal have construed it, under Section 1503
25 that other sections in Chapter 73 might not -- the Court

1 might not have a way to degree -- to measure, meter out the
2 differences between defendants in Section 1505.

3 That is not the case. If the Court looks to the
4 *Kelley* decision, K-E-L-L-E-Y, which interpreted Section
5 1505, the Court of Appeals said that this is administration
6 of justice because of the particular indicia that it pointed
7 out, the investigation, subpoenas and adjudicative power.
8 So there is no suggestion that Sections 1505, 1511 -- there
9 was one other statute that Ms. Fifield cited -- but there
10 is -- that risk is a bugbear. It's not real.

11 On the factual points, Ms. Fifield started with
12 the suggestion that Mr. Hale-Cusanelli's conduct was
13 starting civil war when he entered the building.

14 Judge, this is hyperbole. And I don't think I'd
15 go too far by saying it's inappropriate. We should reserve
16 phrases like that for circumstances that really describe it,
17 and not elsewhere.

18 I think you'll see that Ms. Fifield didn't really
19 exactly describe what facts satisfy the *Rosemond* standard
20 for aiding and abetting. The case law is clear that
21 presence alone does not satisfy aiding and abetting.

22 There was no -- she didn't cite any specific act
23 that Mr. Hale-Cusanelli took that forwarded the specific
24 intent to cause bodily injury or threat to law enforcement.
25 If interference alone meant assault, which is what

1 threatening to commit bodily injury does, then, your Honor,
2 the Government has charged far, far, far too few defendants
3 with assault. There is interference charges all over the
4 January 6th cases. It's under a statute called Section
5 231(a)(3), which criminalizes interference with law
6 enforcement during a riot.

7 There has to be some kind of difference between
8 interference and assault. The case law has always drawn
9 that distinction.

10 So we didn't hear any facts showing what action
11 Mr. Hale-Cusanelli took that demonstrates an intent to
12 threaten bodily injury. There are none. And presence alone
13 cannot get them there. Waving at a skylight didn't.

14 Judge, on unwarranted sentencing disparities, I
15 understand the Court's disagreement on the comparison with
16 the Title 40 offenses. But, your Honor, in our briefing
17 submission, we submitted some sentences for real, true
18 meat-and-potatoes assault. There are some cases where
19 rioters have punched law enforcement officers, struck them
20 with Lacrosse sticks, pulled down barriers. Those cases are
21 between the -- I guess you could say six months and a year
22 and a day. There's, you know, half a dozen of those. That
23 conduct is unquestionably more severe than
24 Mr. Hale-Cusanelli's.

25 THE COURT: Okay.

1 MR. SMITH: One other case we cited is the
2 *Mostofsky* case, where a defendant went into the Ohio Clock
3 Corridor. He stole a police vest. And he was one of the
4 most prominent rioters in that section of the Capitol.
5 That's an eight-month sentence.

6 THE COURT: Thanks.

7 Let's take a five-minute break.

10 THE COURT: I appreciate the arguments and the
11 briefing on this from the parties.

12 Mr. Hale-Cusanelli objects to the imposition of
13 the enhancements found in 2J1.2(b)(1)(B) and (b)(2) on the
14 ground that the Electoral College certification which he
15 obstructed did not involve the administration of justice.

16 Even though that phrase appears in the sentencing
17 guideline and not a statute, I think it's appropriate to
18 interpret the phrase using the same interpretive canons and
19 methods as for a statute. This approach has broad support
20 among many circuits, as noted in Mr. Hale-Cusanelli's filing
21 from yesterday, ECF No. 115.

22 *Black's Law Dictionary* defines "administration of
23 justice" as "the maintenance of the right within a political
24 community by means of the physical force of the state and
25 the state's application of the sanction of force to that

1 rule of right," closed quote.

2 As that phrase denotes, the administration of
3 justice involves using the state's coercive force to
4 maintain or enforce a legal right.

5 Although I think this is a close call, the
6 certification had no such characteristics. Congress itself
7 cannot enforce the certification results nor impose some
8 sanction of force to its pronouncement. Admittedly, someone
9 cannot be elected president until Congress completes the
10 certification, but that fact does not bear on
11 enforceability.

12 If someone disagreed with the certification or
13 wanted to vindicate it, they would have to begin some kind
14 of judicial proceeding. And, if needed, law enforcement
15 could act to enforce the certification results.

16 Those actions would involve administration of
17 justice precisely because they carry the possibility of
18 punishment by the state.

19 This distinction has the same basis in the
20 separation of powers. When Congress passes legislation, it
21 defines the rights of citizens and in the criminal sense
22 authorizes when the state can use its coercive power to
23 punish wrongdoing.

24 In that sense, every law involves justice. But
25 Congress does not administer the justice it metes out. That

1 is a job for law enforcement and for the courts.

2 Judge Moss made a similar point in *United States*
3 *versus Montgomery*, when he wrote that Congress, quote, "does
4 not engage in the administration of justice," closed quote,
5 578 F.Supp. 3d, 54, Page 65, from this district, from 2021.

6 Although I'm not sure if Congress never engages in
7 the administration of justice, I am convinced that the
8 certification is appreciably different from investigatory
9 hearings or other instances where Congress might be said to
10 administer justice.

11 And I agree with Mr. Smith that this definition
12 from *Black's Law Dictionary* is actually pretty capacious and
13 arguably, as lawyers and we in the courts use that term,
14 "administration of justice," it's even a narrower term that
15 assuredly would not include normal proceedings in front of
16 Congress or even something like the certification. I think
17 perhaps that's different in some sort of impeachment hearing
18 or something where subpoena power is at play, but neither of
19 those apply here.

20 My interpretation is also supported by other
21 decisions in this courthouse, although not directly on this
22 point. All of my colleagues have denied the argument also
23 put forward by Mr. Hale-Cusanelli in this case that the term
24 "official proceeding" in 1512(c)(2) dealt only with those
25 proceedings involving the administration of justice.

1 Indeed, although I did not address that phrase at
2 length in this case, I implicitly rejected it. That denial
3 gives me pause about finding Mr. Hale-Cusanelli's conduct
4 affected the administration of justice.

5 As we all know, the statute trumps a guideline.
6 That's from *Dorsey versus United States*, 567 U.S. 260, Page
7 266, from 2012. And given that statutory supremacy, courts
8 must interpret a statute and a guideline, quote,
9 "harmoniously." That's *United States versus Higgins*, 129
10 F.3d 138, Pages 141 to 142, from the Third Circuit in 1997.

11 I see only incongruity if I agree with the
12 Government here. It would be inharmonious to say on the one
13 hand that "official proceeding" is more expansive than
14 "proceedings involving the administration of justice," but
15 then to say the certification actually involved that
16 administration.

17 If true, my colleagues and I simply could have
18 assumed that the argument from many January 6th defendants
19 was correct and then said that the certification still came
20 under their definition of an official proceeding. We would
21 have saved a lot of time and ink had we done so. But I'm
22 aware of no judge who has taken that approach.

23 I do think it's quite likely the Commission would
24 have included "official proceeding" in this term if they had
25 thought about it or could have foreseen January 6th. But

1 they didn't.

2 Given that courts are supposed to interpret the
3 guidelines with similar interpretive principles to how we
4 interpret statutes, and that it is the Government's burden
5 to prove the application of any enhancement, I think the
6 more prudent course is to find that they have not met their
7 burden here.

8 Of course, that does not preclude me from
9 considering this conduct as a justification for an upward
10 variance under 3553(a).

11 I also note that the comment here to 2J1.2 when it
12 describes the background lists numerous offenses, but they
13 all relate to kind of administration of justice: using
14 threats or force to intimidate or influence a juror or a
15 federal officer; obstructing a civil or administrative
16 proceeding; stealing or altering court records; unlawfully
17 intercepting grand jury deliberations; obstructing a
18 criminal investigation; obstructing a state or local
19 investigation of illegal gambling; using intimidation to
20 influence testimony, alter evidence, evade legal process or
21 obstruct the communication of a judge or law enforcement
22 officer; or causing a witness bodily injury or property
23 damage in retaliation for providing testimony, information
24 or evidence in a federal proceeding.

25 All of those examples that the Commission gives

1 for what obstruction of justice looked like involved some
2 sort of traditional notion of courts' judicial operation and
3 so forth. I think what we have here on January 6th is
4 something different than any of that. It's an official
5 proceeding.

6 I think the defense has conceded that we've got to
7 find somewhere to fit this and that this guideline is
8 correct, the correct place to do it. But I think it's a
9 different question when I go on and actually consider the
10 enhancements -- very significant enhancements, I should
11 add -- that the Government is asking for.

12 I don't think this administration of justice as
13 defined in the enhancement -- as used in the enhancement is
14 a fair way to describe what is happening here, especially
15 given the rules of lenity and ambiguity that Mr. Smith
16 raises.

17 So for all these reasons, I find that
18 Mr. Hale-Cusanelli did not obstruct the administration of
19 justice and that the enhancements in 2J1.2(b)(1)(B) and
20 (b)(2) are inapplicable.

21 Therefore, I find that the appropriate guideline
22 level is 16, resulting in a 21- to 27-month guideline range,
23 prior to the consideration of any variance.

24 The Court will now discuss the applicable
25 penalties under the statute, which include imprisonment,

1 probation, fines and restitution.

2 For Count 1, obstruction of an official
3 proceeding, the maximum term the Court may impose is 20
4 years.

5 For Counts 2 and 3, entering and remaining in a
6 restricted building and disruptive or disorderly conduct in
7 a restricted building, the maximum prison term for each is
8 one year.

9 And for Counts 4 and 5, disorderly or disruptive
10 conduct in a Capitol building and parading, picketing or
11 demonstrating in a Capitol building, the maximum prison term
12 is six months.

13 For Count 1, obstruction of an official
14 proceeding, the maximum fine is \$250,000. There's also a
15 mandatory special assessment of \$100.

16 For Counts 2 and 3, entering and remaining in a
17 restricted building and disruptive or disorderly conduct in
18 a restricted building, the maximum fine is \$100,000 per
19 count.

20 There's also a mandatory special assessment of \$25
21 per count.

22 For Counts 4 and 5, disorderly or disruptive
23 conduct in a Capitol building and parading, picketing or
24 demonstrating in a Capitol building, the maximum fine is
25 \$5,000 per count. There is also a mandatory special

1 assessment of \$10 per count.

2 For Count 1, obstruction of an official
3 proceeding, the Court may impose a term of supervised
4 release of not more than three years.

5 For Counts 2 and 3, the Court may impose a term of
6 supervised release of not more than one year. The other
7 counts are for petty offenses, and thus a term of supervised
8 release is not applicable.

9 Under 18 USC 3624(e), multiple terms of supervised
10 release shall run concurrently.

11 Turning next to probation: Mr. Hale-Cusanelli is
12 eligible for one to five years of probation because Count 1
13 is a Class C felony. One of the following must be imposed
14 as a condition of probation unless extraordinary
15 circumstances exist: a fine, restitution or community
16 service.

17 For Counts 2 through 5, he is eligible for up to
18 five years' probation.

19 That said, the guideline range is in Zone D of the
20 sentencing table, meaning that Mr. Hale-Cusanelli is
21 ineligible for probation under the guideline 5B1.1.

22 According to 18 USC 3663A, restitution is
23 mandatory in this case. The Government has requested \$2,000
24 in restitution.

25 Have I stated accurately the statutory framework

1 under which we are operating in regard to this case?

2 Ms. Fifield?

3 MS. FIFIELD: I believe so, your Honor.

4 But just one clarification for the record: The
5 Court has reached offense level 16 starting at a base
6 offense level of 14 and adding an additional two levels
7 for -- under 3C1.1?

8 THE COURT: Yes. Thank you for clarifying that.

9 Yes.

10 I didn't hear an objection -- well, I think there
11 is an objection, but I'm overruling your objection on the
12 false testimony here in court. I can discuss that later in
13 my explanation for the offense. But I think that is
14 certainly appropriate here.

15 Mr. Smith, any objections regarding the statutory
16 framework --

17 MR. SMITH: No, your Honor.

18 THE COURT: -- under which we are operating?

19 Before I discuss the other sentencing factors that
20 will bear on the Court's final decision, I will at this
21 point share with the parties the particular sentence the
22 probation office has recommended, taking into account the
23 advisory guidelines' sentence, the available sentences and
24 all of the factors listed in Section 3553(a):

25 The probation office has recommended a sentence of

1 60 months' incarceration on Count 1, 12 months'
2 incarceration on Counts 2 and 3 and six months'
3 incarceration on Counts 4 and 5, all to run concurrently.

4 The probation office also recommends 36 months'
5 supervised release on Count 1, 12 months' supervised release
6 on Counts 4 and 5, all to run concurrently.

7 Finally, the probation office recommends
8 restitution in an amount to be determined at this hearing
9 and a special assessment of \$170. The recommendation of the
10 probation office is based solely on the facts and
11 circumstances contained in the presentence report.

12 I must now consider the relevant factors that
13 Congress set out in 18 USC 3553(a) to ensure that the Court
14 imposes a sentence that is sufficient but not greater than
15 necessary to comply with the purposes of sentencing.

16 The purposes include the need for the sentence
17 imposed to reflect the seriousness of the offense, to
18 promote respect for the law and to provide just punishment
19 for the offense. The sentence should also afford adequate
20 deterrence to criminal conduct, protect the public from
21 future crimes of the Defendant and promote rehabilitation.

22 In addition to the guidelines and policy
23 statements, I must consider the nature and circumstances of
24 the offense, the history and characteristics of the
25 Defendant, the need for the sentence imposed, the guideline

ranges, the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct and the types of sentences available.

8 MS. FIFIELD: This is a great country. And there
9 are a lot of aspects of American life, government, that make
10 that true. But there's a strong argument to be made that
11 the peaceful transfer of power, due process and the right to
12 trial by jury and the rule of law are at the top of that
13 list of what makes America great.

14 This case implicates all three of those things. I
15 think it's interesting when we're talking about what
16 happened on January 6th and the obstruction of the
17 proceeding to certify the Electoral College vote, that was a
18 proceeding that most Americans had never heard of before
19 January 6th.

20 It was interesting at trial when Dan Schwager was
21 on the stand testifying about that proceeding. He was
22 giving this testimony that was frankly quite dry; and then
23 he transitioned -- he was talking about every other January
24 6th that he's been a part of every four years to certify the
25 results of the presidential election.

1 It was dry. And then he got to what happened on
2 January 6th, 2021, when everything fell apart.

3 And I think that's a good way to think about the
4 role that the rule of law plays in our society. For most
5 Americans, most of the time, the guardrails of the law are
6 in the background. It's pedestrian. It's ordinary. We
7 don't think of it. We think of it -- I will say that the
8 ordinariness of those guardrails and of something like the
9 Electoral College certification is on the flip side the
10 thing that makes this country extraordinary, is just how
11 ordinary those things typically are.

12 It's when the guardrails of law are tested that --
13 we've been talking about the rule of right when we were
14 discussing the sentencing guidelines. It is when those
15 guardrails are tested that our response in protection of
16 those things that make this country extraordinary becomes so
17 important. And it becomes important to say that not
18 equivocally, but forcefully, that the rule of law matters.
19 And it needs to be respected.

20 This Defendant, as this Court put it, wanted a new
21 government. And he was willing to take it by force.

22 He went to the Capitol on January 6th. I don't
23 think it's an exaggeration to say he wanted to engage in
24 civil war. He said that himself several times.

25 And if it wasn't -- if the mob was not successful

1 in doing what Hale-Cusanelli wanted, which was to hold the
2 building, if they had had more rioters, they could have held
3 the building. It was just a prelude, but for what this
4 Court, what the folks in this room are doing right now,
5 which is responding to the test of the rule of law and the
6 guardrails of law that keep our society functioning.

7 This Defendant by his acts on January 6th
8 demonstrated he has no respect for that.

9 He also mentioned due process and the right to
10 trial by jury. This Defendant availed himself of those
11 rights. And the right to trial by jury, I believe this
12 Court mentioned it to the jury itself: It is something that
13 makes this country extraordinary.

14 And this Defendant had so little respect for that
15 proceeding, for those rights, that he sat in that chair and
16 he lied to this jury -- that jury -- and this Court. He
17 lied under oath.

18 Oaths are important here, too, especially for
19 those of us who commit at least part of our lives to federal
20 public service. I took an oath. Law enforcement that was
21 at the Capitol on January 6th, they took oaths. We took
22 oaths to protect this country and the Constitution against
23 enemies foreign and domestic.

24 The Defendant took that same oath. The Defendant
25 took everything that this country has to give up to its

1 limit; and he is not at fault for that. He availed himself
2 of the protections of the Constitution, including the right
3 to hold and state unsavory views. That's not what we're
4 here today to talk about.

5 We're here today to talk about the threat on
6 January 6th that this Defendant posed to the rule of law and
7 the peaceful transfer of power and the threat that this
8 Defendant represented when he lied under oath in this
9 courtroom.

10 It's that need to promote respect for the rule of
11 law and for general deterrence that I think is a helpful
12 place to start in all of these January 6th cases.

13 It's difficult to capture when we're doing this
14 one defendant, one case at a time the true magnitude of what
15 happened on January 6th. This Court has said it's a
16 national embarrassment. And it is. And the reason that a
17 national embarrassment is not a small thing, the reason that
18 it matters, is because it impacts the national security of
19 this country. It impacts the position of this country in
20 the global order.

21 And I don't think it's an exaggeration to say that
22 one defendant's participation in what happened on January
23 6th encompasses and to some degree makes that defendant
24 responsible for all of that.

25 And I think Officer Raymond Watts when he

1 testified in this courtroom on a smaller scale, but still
2 just as powerfully, captured it when he said: A breach of
3 the Capitol is a breach of the Capitol. Every single rioter
4 in the Capitol posed a direct threat to the lives of law
5 enforcement, to the lives of members of Congress and to the
6 building itself. And that's not nothing, either.

10 And at best, if the Defendant didn't enter the
11 United States Capitol with the corrupt intent to obstruct
12 the official proceeding, which the jury found beyond a
13 reasonable doubt that he did, he was at least grotesquely
14 indifferent and disrespectful to the rule of law, to the
15 destruction of that building, to the threat to law
16 enforcement.

17 And it is that need to promote respect for the
18 rule of law and for general deterrence that demands
19 meaningful sentences in all of these cases.

20 And the nature and circumstances of this
21 Defendant's offense: There is gravity in what he did that
22 he has in common with everyone else on January 6th. And
23 that should not be taken lightly. But what sets this
24 Defendant apart is the seriousness with which he took his
25 endeavors on January 6th.

1 Now, I anticipate that defense counsel is going to
2 stand up here and again say that this is hyperbole, that
3 this is exaggeration, that the Defendant's a big talker. I
4 don't buy that. I don't buy it because when he was talking
5 to his roommate days following January 6th, he whispered
6 under his breath as if no one else was listening: "I really
7 fucking wish there would be a civil war." You can hear it
8 in his voice. He is not kidding around.

9 And he thought about it for a long time. He read
10 the books. He thought about the structure of government.
11 And what Hale-Cusanelli was after, at least what
12 Hale-Cusanelli attempted on January 6th, was the
13 installation of a new government, as this Court said, a new
14 American order.

15 In terms of this Defendant's history and
16 characteristics, I won't dwell on this point. I am curious
17 whether defense counsel is going to. He devoted a lot of
18 his memo -- memorandum, sentencing memorandum, to minimizing
19 or obfuscating this Defendant's history in terms of
20 antisemitism and threats of violence.

21 The Government doesn't think that that's even
22 what's at issue here today. The First Amendment guarantees
23 this Defendant's, all Americans' right, to hold unsavory
24 views and say unsavory things. Where the law gets concerned
25 and where this Court needs to get concerned is when that

1 bridges into a likelihood that this Defendant is going to
2 commit violence or this Defendant is again going to
3 disrespect the law, the rule of law, by invading perhaps not
4 the United States Capitol, but posing a similar threat which
5 is both abstract and real.

10 THE COURT: Don't you think it's relevant, though,
11 kind of to the extent that there's a motivation for what he
12 did, that it's almost kind of a hate crime-type situation?

13 MS. FIFIELD: I wouldn't go quite that far and get
14 that specific.

15 I think the way that the Government's
16 memorandum -- and what I would say here -- tried to parse
17 this out is it's relevant to his motive to commit the crime.
18 That was the Government's theory of the case from the
19 get-go. And we had pretrial hearings about that. We talked
20 to the jury about that, albeit in a limited capacity due to
21 the Court's pretrial ruling.

22 It's relevant for that limited purpose. And it's
23 also relevant for the limited purpose of whether this
24 Defendant's history and characteristics indicate that he is
25 an ongoing danger to the community. The Government did note

1 in its sentencing memorandum that based on all the
2 information that we have, the circumstances have not
3 changed.

4 The Defendant's -- I don't want to say position,
5 because we are trying to draw -- drawing this line between
6 First Amendment-protected activity, which is absolutely this
7 Defendant and every American's right, getting up to the line
8 of presenting a threat of indicia of dangerousness.

9 And the Defendant's conduct in the jail -- you
10 know, there's been public reporting about this -- also goes
11 to specific deterrence. And specific deterrence -- I think
12 I've said everything that I need to say in terms of whatever
13 the Defendant says today. And I don't know if he will
14 address this Court. But what I expect his counsel to say is
15 that he's sorry.

16 I don't buy it, for the same reason that after
17 January 6th, when he's talking to his roommate and he's
18 whispering under his breath about how much he wants a civil
19 war, that's when he was being unvarnished, unpolished. When
20 he was sitting on the stand under oath, he's telling a
21 different story.

22 I don't have any faith that what the Defendant has
23 told his attorney and has represented in his sentencing
24 memorandum, that that is genuine or reflective of genuine
25 remorse. And that matters.

Contribution matters because at a small -- on a smaller level, the personal level, it does impact a person's likelihood to reoffend.

And on a bigger level, when we're talking about the 3553(a) factors and the purposes of sentencing, one of the most important goals of sentencing is rehabilitation. And contrition has to be a part of that, of being accountable for the wrongs that the Defendant committed against society.

This Defendant has not demonstrated that.

Getting to the guidelines and unwarranted sentencing disparities: The Government's position is that the guidelines are the primary driver of fairness. And so --

THE COURT: That's not super-helpful to you at this point.

MS. FIFIELD: The Government -- if the Court is going to impose a guidelines sentence, the Government would advocate for the top of the range.

However, given the Court's comments regarding upward variances and given the sentences imposed on other defendants who have been convicted of this offense in this context, which the Government still maintains that the threat that this Defendant posed to law enforcement, to the building on this day, that would support an upward variance;

1 if not within the Government's proposed sentencing
2 guidelines range, then quite close to it.

3 The cases that were cited in the defense's
4 sentencing memorandum are not appropriate comparators. It's
5 partially because the guidelines for 18 USC 231(a)(3) and
6 111(a), which are some of the cases -- some of the charges
7 that the defense counsel cited in their sentencing
8 memorandum, in the infinite wisdom of the Sentencing
9 Commission, those guidelines are not as serious, are not as
10 heavy as those for the lead charge with which this Defendant
11 is convicted. The base offense levels for those offenses
12 are much lower.

13 And I do think it's important when we're talking
14 about the guidelines and sentencing disparities, as the
15 Government stated in its sentencing memorandum, before the
16 Court uses comparators, even in the January 6th context, the
17 Court has to be very mindful of the fact that so many of
18 those cases -- in so many of those cases, those Defendants
19 benefited from a three-point reduction -- or three-level
20 reduction for acceptance of responsibility.

21 THE COURT: Do you know why there were a couple of
22 cases -- I think it was in front of Judge Moss -- where you
23 didn't even advocate for the eight-point enhancement?

24 MS. FIFIELD: I can't speak to -- in every single
25 one of these cases, the Government's charging decisions,

1 sentencings recommendations, they're very fact-specific. So
2 I can't speak to the deliberative choices that took place in
3 those specific cases.

4 But the eight points, the Government's choice to
5 advocate for the eight points, is reflective of the
6 Government's position that a defendant by their own acts, by
7 their -- I think if we had relied on -- or if the Court had
8 relied solely on the aiding and abetting theory, I'm not
9 making this argument. I'm not attributing the Government's
10 position to this argument.

11 But under that aiding and abetting theory, there
12 are a lot of defendants that could be susceptible to that
13 eight-point bump. And the Government is exercising its
14 prerogative to keep that eight-point bump pretty closely
15 tailored to a defendant's own conduct that poses a threat to
16 law enforcement or to property inside the building.

17 If the Court has no further questions, I'll
18 conclude. If we're quoting philosophers today, John Locke
19 is a philosopher with which the Defendant is no doubt
20 familiar. He said: Where law ends, tyranny begins.

21 It is not hyperbole to say that in this case and
22 in many of these Capitol riot cases, the tests that are
23 being put to the law are an extremely serious -- should be
24 an extremely serious, weighty driver of meaningful
25 sentences, especially in cases where defendants have stated

1 intent that they desire a new government and they are
2 willing to take it by force. That is tyranny.

3 This case is about the rule of law and respect for
4 the law, respect for law enforcement, respect for the
5 constitutional rights guaranteed by the First Amendment and
6 the Fifth Amendment. This Defendant has demonstrated
7 respect for none of that.

8 Thank you.

9 THE COURT: Thank you, ma'am.

10 Mr. Smith, do you wish to be heard on the
11 application of the factors set forth in 3553(a), request a
12 variance or otherwise make a sentencing recommendation?

13 MR. SMITH: I do, your Honor. Thank you. I'm
14 going to be brief. And then I'm going to let
15 Mr. Hale-Cusanelli allocute, and I think he'll be brief,
16 too.

17 The Government stressed the importance of the rule
18 of law here. And I just -- I'm really glad the Government
19 said that, because we could not agree more with Ms. Fifield
20 that -- I think the point we'd like to make here is
21 Mr. Hale-Cusanelli is not disdainful of courts. He's
22 grateful for the Court's brave rejection of the Government's
23 position on the administration of justice, which we would
24 argue is inconsistent with the rule of law, which includes
25 not creating novel interpretations of law and applying them

1 retroactively.

2 Ms. Fifield stressed that -- raised the
3 antisemitic images and comments that the Government raised
4 in this case. And my colleague said something that struck
5 me as a little bit surprising. Ms. Fifield said that she
6 does not think that this is an issue in this case.

7 And that is surprising, because not only is
8 that -- was that made an issue in this case; it dominated
9 many parts of the proceedings. It was a central argument
10 for depriving the Defendant of his liberty, which is another
11 core component of the rule of law. It was a major part of
12 the Government's trial arguments in opening and closing. I
13 think Ms. Fifield herself in one of those situations
14 stressed the Defendant's antisemitism.

15 So I think our question is: If that's not an
16 issue in this case, why was the Government using it?

17 To the extent --

18 THE COURT: I think it's an issue, Mr. Smith. So
19 feel free to convince me I'm wrong.

20 MR. SMITH: Well, I can tell you that -- and
21 Mr. Hale-Cusanelli will tell you himself -- that he regrets
22 and makes no excuses for his ugly and childish comments, but
23 they don't reflect his personal views of the matter. And he
24 needs to learn to clean up his tone and his commentary. But
25 it doesn't imply that he's about to launch a civil war

1 because of certain pieces of literature in his home that was
2 selectively used to present to the Court an image of him
3 that is not accurate.

4 I want to emphasize the punishment that
5 Mr. Hale-Cusanelli has already gone through. I know that
6 courts don't consider pretrial confinement punishment. It's
7 not. It's for protecting society. But nevertheless,
8 defendants receive credit for the time they've served
9 pretrial.

10 And I want to describe some of the conditions.
11 Between January 2021 and June 2021, Mr. Hale-Cusanelli was
12 in his cell 23 hours a day. To people who have not had
13 clients in prison or been in prison themselves, good for
14 them. That's something they should be proud of. But being
15 in a cell 23 hours day is a very mind-numbing experience.
16 It's crushing. It can have psychological effects on people.
17 It can distort their personality throughout their lives.
18 This is a long time in solitary confinement.

19 And that's a pretty significant gauge of
20 deterrence with this Defendant. I think you'll hear him say
21 that he doesn't want to be pitied for something like this,
22 but I think it does show that he has no good reason to be
23 back in court again.

24 Ms. Fifield represented that there was something
25 about Mr. Hale-Cusanelli's conduct in jail that warrants a

1 stiff above-guidelines sentence.

2 Your Honor, we have a document here that I think
3 we'll submit into evidence. It's a D.C. Department of
4 Corrections work performance rating for Mr. Hale-Cusanelli
5 dated yesterday. It's up to date. He has excellent reviews
6 for every single category of prisoner conduct here.

7 I think in summary, Mr. Hale-Cusanelli's
8 supervising captain said, quote, "He is always willing to
9 assist when it's needed. There are no issues with his work
10 performance or behavior," end quote.

11 To the contrary from what Ms. Fifield said,
12 Mr. Hale-Cusanelli's been threatened in jail. There are
13 inmates or at least one inmate who have threatened to take
14 his life. His experience there has been brutal, and not
15 thanks to his own behavior.

16 On the disparity issue with other defendants who
17 have been sentenced under 1512, your Honor, I think even
18 setting aside the guidelines' legal issue, the defendants'
19 conduct in these cases that have already been sentenced is
20 not even close to Mr. Hale-Cusanelli's.

21 So one case that the Government might have been
22 referring to but didn't use the name was Reffitt, Guy
23 Reffitt, who was sentenced I think between 70 and 80 months.
24 He brought a gun with him to the Capitol. He committed what
25 we would call classic obstruction of justice by threatening

1 his son and telling him he would kill him if he spoke to the
2 FBI. He held guns to his wife's head. He said that -- at
3 the Capitol on camera with his GoPro camera that he was
4 going to drag members of Congress out by their hair.

5 This isn't even comparable conduct.

6 The Court referenced some of Judge Moss's 1512
7 cases. I think one of the cases the Court was referring to
8 was an eight-month sentence where the Defendant entered the
9 Senate chamber, which is much farther than
10 Mr. Hale-Cusanelli proceeded.

11 So we think even if you use the Section 1512
12 comparisons, they don't argue for an above-guidelines
13 sentence here.

14 Your Honor, the last point I'll make, and then
15 I'll give it to Mr. Hale-Cusanelli -- and this is a little
16 bit awkward for him, and I feel bad about bringing this up.
17 But he had an incredibly hard upbringing, something, you
18 know, in many ways really shocking. And that's never an
19 excuse for behavior. But it's -- you're supposed to
20 consider the Defendant in the round and their personality
21 and their life experience. We think that that's an
22 appropriate 3553(a) factor to consider here.

23 On the potential for violence, Judge, he has no
24 criminal -- the normal gauge of predicting violence is
25 criminal history. He doesn't have any criminal history for

1 violence. His adoptive aunt has submitted a letter saying
2 she's known him since childhood and he doesn't have a
3 violent bone in his body. No one's disputing he makes
4 really ugly comments, but that can't be the reason to
5 enhance a sentence.

6 I think that's it from us, Judge, so I'm going to
7 let Mr. Hale-Cusanelli speak.

8 THE COURT: Mr. Hale-Cusanelli, you have the right
9 to make a statement or present any information to mitigate
10 the sentence. Would you like to say anything that you would
11 like me to consider before imposing sentence?

12 THE DEFENDANT: Yes, your Honor.

13 Good morning, Judge.

14 THE COURT: Good morning.

15 THE DEFENDANT: I'm grateful for this opportunity
16 to address this honorable Court.

17 I don't want there to be any doubt about my
18 conduct on January 6th. I know that I should not have been
19 inside the Capitol Building. That is not a question. My
20 behavior that day was unacceptable, and I disgraced my
21 uniform and I disgraced the country.

22 When I think about the property damage and the
23 burdens of law enforcement that day, your Honor, I know that
24 my conduct will not be remembered with pride. And, your
25 Honor, I know that I owe -- I owe a massive apology to the

1 members of Congress that day, their staffers, as well as the
2 members of the Capitol Police and the Metro PD that I got in
3 the way of. I'm sorry that they endured the events of that
4 day.

5 And your Honor may want to know why I proceeded to
6 trial if I do feel this way. It's not because I lacked any
7 regret. I just want this honorable Court to know that you
8 shouldn't preclude -- shouldn't preclude that I was
9 operating under the advice of counsel. I was challenging
10 law as applied to my case. And I agreed with counsel.

11 I would like to address the character evidence
12 used against me, your Honor:

13 I don't make any excuses for my remarks. I have
14 been open about the fact that I do say ugly things. And
15 they are childish and, in the eyes of most, repugnant. I'm
16 not going to make excuses for that. But I don't have a
17 history of violence and I don't consider -- I don't consider
18 myself to be a public threat. I don't consider myself a
19 danger to society, your Honor.

20 And I ask this honorable Court to consider that
21 and to consider the true scope of my life.

22 My -- my comment and my behavior, my sense of
23 humor, whatever you want to call it, it doesn't reflect my
24 true sentiments, your Honor.

25 Your Honor, I'm -- I can pledge to you that you'll

1 never see my face in court again after this. I can
2 guarantee you that.

3 I have actually spent over 200 days in solitary
4 confinement. One of the reasons besides my regret that I
5 can promise I don't intend to ever come back is because I
6 never want to live the last two years ever again. And I
7 wouldn't wish it on anyone. And there's been more than just
8 death threats. It's -- it does -- it crushes your soul, the
9 kind of time I've done in solitary. It changes who you are.
10 And I want the Court to know that I don't intend to live
11 through that and I don't intend to burden society to the
12 point where I have to come back to that.

13 So, Judge, I'm not asking for pity. I'm just
14 explaining why I don't intend to come back to a courtroom
15 ever again.

16 Your Honor, if there's any kind of service that I
17 can provide to rectify the damage done to the Capitol
18 Building or to injuries or anything done to the Capitol or
19 Metro Police, I stand by to perform whatever that duty might
20 be.

21 And I am grateful -- I want to say on a personal
22 note, I am grateful to the Capitol Police for the
23 professionalism they showed when I was in the building and
24 I'm grateful for just how the police communicated with me
25 and the way they talked to me. I do owe -- also owe Officer

1 Shephard an apology as well.

2 I thank you for this opportunity, your Honor, to
3 address this honorable Court. I ask for mercy.

4 Thank you, your Honor.

5 THE COURT: Thank you, sir.

6 Sir, you may remain at the podium.

7 THE DEFENDANT: Yes, your Honor.

8 THE COURT: Sir, I've assessed the particular
9 facts of this case in light of the relevant 3553(a) factors,
10 and I now want to provide remarks for the record and for
11 you, sir, about my considerations in regard to the nature of
12 the offense and your history and characteristics:

13 On January 6th, 2021, you participated in a
14 national embarrassment. Your actions on that day were
15 extremely troubling. You were at the front of a mob that
16 attacked police, smashed windows and doors to breach the
17 Capitol Building and proceeded to maraud through the Capitol
18 Building.

19 More, once you were inside, you tried to get
20 others to join you inside, waving through windows to others
21 outside to get them to come in, further escalating a
22 dangerous and volatile situation.

23 And then, when an officer tried to arrest a
24 particularly unruly rioter, you interfered, trying to pull
25 the rioter away from the police officer, Officer Shephard.

1 The sights that we saw on January 6th, the crimes
2 you and others committed on that day, are things Americans
3 never thought they'd see in the Capitol Building. And we
4 certainly hope never to see them again.

5 The jury has found that in doing these things you
6 intended to obstruct the certification process occurring
7 that day, a vital and solemn step in the peaceful transfer
8 of power from one president to the next.

9 Your statements before, during and after January
10 6th show that you had an impressive understanding of the
11 certification process and that you absolutely knew what you
12 and others were doing by storming the Capitol Building when
13 the certification was supposed to be occurring.

14 I was also appalled at your taunts to a Capitol
15 Police officer who was bravely doing her duty on January 6th
16 in the face of overwhelming rioters and violence. You said,
17 "Fuck you! The revolution will be televised, cunt." That
18 is shocking conduct towards a public servant. It is
19 absolutely unacceptable.

20 But that statement is only one of the shocking
21 statements you've made that show a deep hostility and
22 insensitivity towards people who aren't like you. The
23 Government has provided numerous examples of degrading
24 statements you've made about women, Jews and minorities in
25 their filing at ECF 18. You also infamously posed as

1 Hitler. A colleague recalled you saying that babies born
2 with any deformities or disabilities should be shot in the
3 forehead.

4 Your attorney has tried to contextualize these
5 actions as private statements made jokingly to your roommate
6 and a personal photo you took as a lark. But the evidence
7 shows otherwise. The Government's filing shows that
8 numerous Navy seamen had heard you make these derogatory
9 statements and that a supervisor had to counsel you for
10 wearing a Hitler moustache to work.

11 While these statements and actions are blameworthy
12 in themselves, and I can and do consider them as aggravating
13 factors in your sentencing that go to your dangerousness,
14 they are particularly relevant here because the Government
15 has convincingly shown that your animus toward racial and
16 religious minorities was at least in part responsible for
17 your desire to obstruct the certification process.

18 You told your roommate that you hoped for a civil
19 war in order to provide a clean slate and suggested that all
20 Democrats are Jews and therefore should be arrested.

21 I recognize that people can say provocative things
22 just to get a response from people, and I believe that was
23 part of your motivation in making some of these remarks.
24 But I hope you see statements like these nonetheless have
25 real-world consequences. They frighten and offend others;

1 they normalize violent, racist and antisemitic behavior; and
2 they apparently helped you justify your conduct on January
3 6th.

4 And I can't help noting that antisemitic incidents
5 have been rising in the last few years. Jewish people have
6 faced millennia of discrimination, oppression and violence.
7 Thankfully, this country has been a safe haven for them and
8 they have contributed in many ways to our nation.
9 Statements and actions like yours make them less safe and
10 less confident they can participate as equal members of our
11 society.

12 I understand that you had a very difficult and
13 traumatic childhood, and I'm sorry for that. No one should
14 have to go through the rejection and abandonment that you
15 endured. I think it's fair to assume that those experiences
16 have encouraged your instinct to lash out and say hateful
17 thing to others.

18 While your childhood does provide important
19 context for your actions, I don't think it excuses them --
20 and I think you agree with me there -- nor does it provide a
21 reason for a downward variance here.

22 You're 32 years old, and you are fully responsible
23 for your actions.

24 I've also considered your employment and military
25 service. I don't agree with any implication that you should

1 be punished more harshly because of your involvement with
2 the military, but nor does it provide a reason to vary
3 downward, especially given that so many of your racist and
4 antisemitic comments occurred in the military environment.

5 Similarly, I disagree with the suggestion that you
6 should receive credit for being incarcerated during COVID.
7 I haven't seen that as a basis for downward variance in
8 other cases either. I recognize that life was particularly
9 difficult for people who were incarcerated during COVID.
10 Frankly, everyone lost freedoms and quality of life over the
11 last couple of years.

12 I do appreciate your statements of remorse now. I
13 credit those, and I think I understand your desire to follow
14 your counsel's advice. I think that is understandable. And
15 certainly I do credit your remorse; and frankly, your
16 sentence would have been more severe but for your comments
17 now and what I take to be a real recognition of the harm
18 that you've caused.

19 Both attorneys have pointed to other obstruction
20 of official proceedings cases from this district in support
21 of their proposed sentences. Ultimately, I think your case
22 has several aggravating factors that set it apart from other
23 cases. But I also don't think they would support the
24 significant gap between the Government's recommendation and
25 most of the other obstruction sentences, I think the highest

1 of which other than the *Reffitt* case I think was 51 months.

2 I see the following aggravating factors here:

3 first, your sexist, racist and antisemitic comments and

4 motivation, which I've already discussed; second, your --

5 the lack of acceptance of responsibility, unlike most of the

6 other cases that resolved through a guilty plea; third, your

7 decision to lie on the witness stand.

8 I absolutely believe all criminal defendants have

9 the right to testify in their own behalf. But they, like

10 all witnesses, must do so truthfully. You did not do so

11 here.

12 In particular, neither the jury nor I believed

13 your claim that Congress -- that you didn't know that

14 Congress resides in the Capitol Building. That was a

15 risible lie, both given your clear knowledge about the

16 certification process and your statement to your roommate

17 that you were right next to the House of Representatives

18 when you were in the Capitol Visitor Center. This was an

19 obvious attempt to avoid responsibility for knowingly

20 obstructing the certification process.

21 Similarly, I didn't believe you when you claimed

22 that you didn't know Officer Shephard was a policeman when

23 you tried to pull a rioter away from him. Officer Shepard

24 was in full uniform and directly in front of you. It's

25 absurd to think you decided to intervene in that altercation

1 without realizing you were aiding a fellow rioter to elude
2 lawful arrest.

3 I also think your conduct there also sets your
4 case apart from many of the other obstruction cases.

5 Having said all that, I do think the guideline
6 range calculated by the probation office and recommended by
7 the Government results in an overly harsh sentence here. In
8 particular, I think the eight-level enhancement under
9 guideline 2J1.2(b)(1)(B) is too severe, given that you
10 yourself didn't injure or threaten anyone, nor did you
11 damage any property.

12 I take it that this enhancement is primarily aimed
13 at those seeking to obstruct justice by witness intimidation
14 or the like. That did not happen here.

15 Having said that, I cannot ignore the significant
16 property damage and numerous law enforcement injuries
17 committed by your fellow rioters, which I think your
18 presence and actions helped make possible.

19 I also think that your conduct with Officer
20 Shephard is relevant in analogizing it to that guideline
21 provision.

22 Therefore, I think some additional punishment is
23 warranted, but not the full eight levels recommended by the
24 guidelines.

25 I do think the substantial interference

1 three-level enhancement is appropriate. Regardless of
2 whether the "administration of justice" language actually
3 applies to this situation, I have no doubt that the
4 Commission would have intended for this to apply to
5 substantial interference with an official proceeding like a
6 certification process, which is itself more significant than
7 almost any court proceeding.

8 This reasoning also applies to the prior
9 enhancement I discussed. Even though by its terms it only
10 mentions "administration of justice," I think this official
11 proceeding is substantially comparable for 3553(a) purposes,
12 although as I say I don't think the guideline by its terms
13 applies.

14 And you and your fellow rioters were responsible
15 for substantially interfering with the certification,
16 causing a multiple-hour delay, numerous law enforcement
17 injuries and the expenditure of extensive resources.

18 Speaking of resources, I agree with the
19 Government's assessment for the need of restitution here,
20 and I will order \$2,000 in restitution for the reasons
21 articulated in the Government's memorandum.

22 Ultimately, I'm going to sentence you to four
23 years' incarceration. Whether this is seen as an upward
24 variance from what I believe is the accurate guideline
25 calculation or a downward variance from what the probation

1 office calculated, I would still render the same sentence.

2 I don't think the guidelines as calculated by me
3 appropriately account for your racist and antisemitic
4 motivation. I also believe the extensive damage and
5 injuries caused on January 6th with your fellow rioters
6 require additional punishment beyond what my calculation
7 allows.

8 I also think that your intervention in the arrest
9 by Officer Shephard requires additional punishment beyond
10 what my calculation envisions.

11 As I've indicated, though, I don't think the full
12 eight-level enhancement envisioned in the probation office's
13 calculation is appropriate, given your culpability here.

14 My sentence also reflects a concern about
15 unwarranted sentence disparities, and I think that this
16 sentence appropriately fits in relation to the other
17 obstruction sentences rendered in January 6th cases.

18 Sir, this is a significant sentence. And it means
19 that you'll be facing several more years behind bars. I
20 think that is necessary because of your actions on January
21 6th. Having said that, I don't think you're unredeemable.
22 You are clearly an intelligent man. You've survived a lot
23 of adversity already in your life. You did not allow your
24 childhood to define you or to limit you, and you can do so
25 the same again here.

1 You will still be a young man when you're
2 released; and I will hope that you will continue to serve
3 your country and make a life for yourself when you get out.

4 I will now impose the sentence.

5 It is the judgment of the Court that you, Timothy
6 Hale-Cusanelli, are hereby sentenced to a term of 48 months'
7 incarceration on Count 1, 12 months each on Counts 2 and 3
8 and six months each on Counts 4 and 5, as well as a \$170
9 special assessment. You shall also serve a three-year term
10 of supervised release on Counts 1, 2, 3 and 4 -- I'm
11 sorry -- 1, 2 and 3.

12 All sentences of incarceration are to be served
13 concurrently and all sentences of supervised release are to
14 be served concurrently.

15 Within 72 hours of release from custody, you shall
16 report in person to the probation office in the district to
17 which you are released.

18 While on supervision, you must abide by the
19 following mandatory conditions: You must not commit another
20 federal, state or local offense; you must not possess or use
21 any controlled substance. I waive the requirement that you
22 submit to one drug test. You must cooperate in the
23 collection of DNA. You must submit to -- you must also
24 abide by the recommended standard conditions of release
25 found in guideline 5D1.3(c).

1 You shall also comply with the following special
2 conditions: You are ordered to make restitution to the
3 Architect of the Capitol in the amount of \$2,000.
4 Restitution shall be made to the Clerk of the Court for the
5 U.S. District Court for the District of Columbia for
6 disbursement to the Architect of the Capitol, Office of the
7 Chief Financial Officer. Payment of all financial
8 obligations described herein are specific requirements of
9 your probation.

10 You must pay the balance of any financial
11 obligation owed at a rate of no less than \$100 each month.
12 A \$170 special assessment is immediately payable to the
13 Clerk of the Court for the U.S. District Court for the
14 District of Columbia.

15 Within 30 days of any change of address, you shall
16 notify the Clerk of the Court of the change until such time
17 as this financial obligation is paid in full.

18 The probation office shall release the presentence
19 investigation report to all appropriate agencies, which
20 includes the United States Probation Office in the approved
21 district of residence, in order to execute the sentence of
22 the Court.

23 Pursuant to 18 USC 3742, you have the right to
24 appeal the sentence imposed by this Court if this period of
25 imprisonment is longer than the statutory maximum. If you

1 choose to appeal, you must file any appeal within 14 days
2 after the Court enters judgment.

3 And as defined in 28 USC 2255, you also have the
4 right to challenge the conviction entered or sentence
5 imposed if new and currently unavailable information becomes
6 available to you or on a claim that you received ineffective
7 assistance of counsel in entering a plea of guilty to the
8 offense of conviction or in connection with sentencing.

9 If you are unable to afford the cost of an appeal,
10 you may request permission from the Court to file an appeal
11 without cost to you.

12 Pursuant to *United States versus Hunter*, 809 F.3d
13 677 from the D.C. Circuit in 2016, are there any objections
14 to the sentence imposed that are not already noted on the
15 record? Ms. Fifield?

16 MS. FIFIELD: No objection. I do have two short
17 clarifying questions.

18 THE COURT: Okay.

19 MS. FIFIELD: First, I take it the Court does not
20 intend to impose a fine as part of the sentence?

21 THE COURT: No. Thanks for asking. I'm waiving
22 the interest on the restitution.

23 MS. FIFIELD: And would the Court mind repeating
24 the quantity of the special assessment?

25 THE COURT: I think it's \$170. Is that --

1 MS. FIFIELD: Thank you.

2 THE COURT: Yes.

3 Mr. Smith, any questions?

4 MR. SMITH: No, your Honor. No objections beyond
5 what's in the papers and discussed today.

6 But we had a request for BOP placement.

7 THE COURT: Okay.

8 MR. SMITH: The Defendant's from New Jersey, so it
9 would be Fort Dix. The Fort Dix facility in New Jersey,
10 which is --

11 THE COURT: Any concern about that, Ms. Lustig?

12 THE PROBATION OFFICER: No, your Honor.

13 But I did have a clarification. I believe you
14 said 36 months of supervised release on each of Counts 1, 2
15 and 3 to run concurrently. However, the maximum term that
16 may be imposed on Counts 2 and 3 is 12 months.

17 THE COURT: Yes. Thanks for that. That was my
18 mistake.

19 36 months on Count 1, 12 months on Counts 2 and 3.
20 And those are all to run concurrently.

21 Ms. Fifield, do you have any objection to the
22 placement recommendation?

23 MS. FIFIELD: No objection.

24 THE COURT: I will make that recommendation.

25 Anything further, Ms. Fifield?

1 MR. SMITH: Thank you, Judge.

2 MS. FIFIELD: Nothing from the Government, your
3 Honor.

4 THE COURT: Mr. Smith?

5 MR. SMITH: No, your Honor.

6 THE COURT: Good luck to you, sir.

7 THE DEFENDANT: Thank you, your Honor.

8 (Proceedings concluded.)

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CERTIFICATE

I, LISA EDWARDS, RDR, CRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings produced to the best of my ability.

Dated this 27th day of September, 2022.

/s/ Lisa Edwards, RDR, CRR
Official Court Reporter
United States District Court for the
District of Columbia
333 Constitution Avenue, Northwest
Washington, D.C. 20001
(202) 354-3269

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