

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, . Case Number 21-cr-32
Plaintiff, .
vs. .
GUY WESLEY REFFITT, . October 15, 2021
Defendant. . 10:13 a.m.

TRANSCRIPT OF ARRAIGNMENT AND MOTIONS HEARING
BEFORE THE HONORABLE DABNEY L. FRIEDRICH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by stenotype shorthand.
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1 P R O C E E D I N G S

2 (All participants present via video conference.)

3 COURTROOM DEPUTY: Your Honor, we are in Criminal
4 Action 21-32, the United States of America versus Guy Reffitt.5 If I can have the parties identify themselves for the
6 record, beginning with the United States.7 MR. NESTLER: Good morning, Your Honor. Jeff Nestler
8 on behalf of the United States.

9 THE COURT: Good morning, Mr. Nestler.

10 MS. BERKOWER: Good morning, Your Honor. Risa
11 Berkower on behalf of the government.12 MR. WELCH: Good morning, Your Honor. William Welch
13 on behalf of Guy Reffitt.14 THE COURT: Good morning, Mr. Welch. Good morning,
15 Mr. Reffitt.16 We are here for -- can everyone hear me? I'm hearing an
17 echo. Not great?

18 MR. WELCH: Not great.

19 THE COURT: All right. I apologize. I'm having
20 issues in this new chambers.21 Mr. Hopkins, is there background noise that we can mute on
22 the public line or otherwise?23 COURTROOM DEPUTY: I've muted the public line. I will
24 look and see if there's anything else that can be or should be
25 muted. Do you hear an echo?

1 THE COURT: I don't hear it now. I was hearing it.
2 So that's helpful. I will try to keep my voice up. If you're
3 having trouble hearing me, just raise your hand.

4 All right. So this is a video conference hearing to both
5 arraign Mr. Reffitt on the superseding indictment and also to
6 address the pretrial motions Mr. Reffitt has filed, as well as
7 the government's motion to vacate the November 15 trial date.

8 Mr. Hopkins, if I can have you please first arraign
9 Mr. Reffitt on the superseding indictment.

10 COURTROOM DEPUTY: Absolutely, Your Honor.

11 Mr. Guy Reffitt, you are being charged with violating Title
12 18 of the U.S. Code Section 231(a)(2), civil disorder; Title 18
13 of the U.S. Code Section 1512(c)(2)(ii), obstruction of an
14 official proceeding and aiding and abetting; Title 18 of the
15 U.S. Code Section 1752(a)(1) and (b)(1)(A), entering and
16 remaining in a restricted building or grounds with a deadly or
17 dangerous weapon; Title 18 of the U.S. Code Section 231(a)(3),
18 civil disorder; and Title 18 of the U.S. Code Section
19 1512(a)(2)(C), obstruction of justice, hindering communication
20 through physical force or threat of physical force.

21 Mr. Welch, do you waive the formal reading of the charge,
22 and if so, how does your client plead?

23 MR. WELCH: We do waive formal reading. Please enter
24 a not guilty plea to all the charges, and we assert and reserve
25 all of Mr. Reffitt's constitutional rights.

THE COURT: All right. Thank you, Mr. Welch.

I know that previously you said that Mr. Reffitt was prepared to proceed by video conference, but I do want to make sure that I make the requisite findings under the CARES Act. So can you articulate for me why both this arraignment and motions hearing needs to proceed now rather than waiting until a later date and why doing so would cause a serious harm to the interest of justice.

MR. WELCH: Well, my client is detained. He has not waived his right to a speedy trial or the requirements of the Speedy Trial Act or the speedy trial rule in this district. He is detained. These motions are ripe and ready to be litigated. And he consents pursuant to the CARES Act and the Court's standing order to proceed virtually this morning.

THE COURT: And is that at least in part because of the pandemic and the health concerns for him?

MR. WELCH: Yes.

THE COURT: All right. Okay. I do find it is appropriate to proceed by way of video consistent with the CARES Act and Chief Judge Howell's standing order relating to the pandemic.

So moving on to the motions, Mr. Welch, I would like to start with the more straightforward motion that you filed, and that is your motion to change venue.

You argue that trying the case here will be prejudicial

1 because of negative pretrial publicity Mr. Reffitt has received
2 and that trying the case in Texas would be more convenient for
3 him and for the trial witnesses.

4 Let me start with the pretrial publicity argument. Even if
5 I were to agree with you on the pretrial publicity, which I'm
6 not sure I do, but even if I were to agree, why isn't this
7 motion premature? Why isn't this something that could be
8 addressed in voir dire if there's a need to do so?

9 MR. WELCH: Well, it certainly could be and certainly
10 precedent in this district says that that is the preferred way
11 to do it.

12 What is different, though, in this case compared to some
13 others is that it's one thing to have a high-profile case that
14 people in the community would be aware of. It's another thing
15 to take that to an even more serious level to say that those
16 same folks' lives are being impacted and disrupted by the
17 allegations in that same case.

18 And by that, I mean that after January 6 the District of
19 Columbia was occupied by troops who were armed to maintain
20 order, and that is something that residents of the District
21 would have had to see as they tried to go about their daily
22 lives. Streets were blocked. Indeed, the Capitol was
23 surrounded for a period of time by an iron fence. That was
24 removed for a period of time and put back up again more
25 recently.

1 That's a visual remainder of the events that happened on
2 January 6, and all of that would prejudice the very same people
3 who would then be the likely jury pool, and none of whom live
4 more than eight miles from where the events of January 6 took
5 place. So that is something that they have to live with. That
6 is in their face, so to speak, as a daily reminder, and it's not
7 just that okay, this is something that is in the news.

8 THE COURT: Well, two points there. Wasn't that also
9 the case with the Boston marathon bombing case and some of the
10 terrorism cases that have been tried in certain venues?

11 And number 2, to the extent residents of the District have
12 been inconvenienced, isn't that now restricted pretty much to
13 the Capitol area?

14 MR. WELCH: I didn't hear the last part about the
15 Capitol.

16 THE COURT: Isn't that restricted now pretty much to
17 the Capitol area?

18 MR. WELCH: Yes, my understanding is that there are no
19 longer National Guard troops patrolling the city. They were for
20 a long time, though, and while things have subsided to a degree,
21 the interruption to the community of Boston in the Tsarnaev case
22 was certainly widespread when there was an active manhunt for
23 Mr. Tsarnaev. But once that manhunt concluded -- and I'm not
24 sure off the top of my head whether it was days, maybe a week or
25 so later -- that was it.

1 The troops patrolling the Capitol lasted for a much longer
2 period of time. The fence around the Capitol building itself
3 lasted for a much longer period of time than the manhunt in
4 Boston did.

5 THE COURT: All right. Well, you would agree with me
6 that at least in this circuit trial courts routinely deny
7 requests absent extreme cases of adverse publicity?

8 MR. WELCH: That is -- that is what the precedent
9 says, Your Honor, and I would just respond to that that I think
10 this is such an extreme case in that it's not just pretrial
11 publicity. My understanding of pretrial publicity is that would
12 be news coverage, the radio, the television, the papers type of
13 thing.

14 And this has all of that, but it also has that additional
15 dimension that the prospective jurors are being reminded as they
16 go about their daily lives about January 6 because of their
17 ability to either go somewhere or not go somewhere.

18 THE COURT: With respect to the publicity, Mr. Welch,
19 you would agree that many of the articles that you cite in your
20 brief are articles that have received national attention,
21 including, I would suspect, in the Eastern District of Texas
22 where Mr. Reffitt resided; correct?

23 MR. WELCH: Correct, and there have been stories
24 there, too, but the stories there have been fewer and older.
25 Whereas, I think once you get outside the Beltway, you don't get

1 the constant daily coverage of January 6. I think that is just
2 the characteristic of the District of Columbia.

3 Granted, you know, there's a congressional committee that's
4 actively investigating, and so that's going to garner some news
5 coverage. But that is going to focus people here on January 6
6 more than people elsewhere. It's not that people elsewhere
7 haven't heard of it or wouldn't care about it, but it's not in
8 their face to the degree that it would be for residents of the
9 District of Columbia.

10 THE COURT: But won't voir dire, jury selection give
11 you and the government an opportunity to suss out who is so
12 influenced by this that they can't be impartial in this case?

13 MR. WELCH: It might, Your Honor, but our point is
14 that because of the added dimension of physical inconvenience
15 for the jurors' daily lives while the city was being patrolled
16 by armed troops and the fence around the Capitol, that that
17 added dimension is likely to take it to the point that most of
18 the jurors, when they're asked, are going to indicate that they
19 have been affected by that.

20 THE COURT: You think physically affected? You think
21 it really affects the daily lives of the vast majority of
22 residents in the District of Columbia?

23 MR. WELCH: Well, when troops are blocking streets and
24 they've got checkpoints of people trying to come downtown, the
25 fence around the Capitol, meaning that you can't walk on that

1 side of the street, you have to cross over to the other side of
2 the street, or you might not be able to drive down a street that
3 you ordinarily would, that's going to be a reminder to folks
4 that January 6 happened.

5 THE COURT: All right. Let me address your
6 convenience argument. Looking at the factors the Supreme Court
7 has identified in *Platt* that courts should consider, it looks to
8 me like they overwhelmingly favor keeping this case here.

9 You point to witnesses and records. You don't provide any
10 detail about the identity of the witnesses or their testimony or
11 the nature of the documents. Aren't the vast majority of the
12 documents likely to be electronic in nature, and is that really
13 a factor that puts a lot of weight on the scale here when
14 looking at these ten or so factors the Court's identified?

15 MR. WELCH: Well, I don't think that they all have to
16 be weighed equally. I think they all have to be considered.
17 And I will concede that some of them are neutral, such as the
18 documents. Things being electronic in nature, it wouldn't
19 really matter whether you tried it here or there, so to speak.

20 But I will point out that Counts 1, 2, and 5 all allege
21 conduct not only within the District of Columbia, but elsewhere,
22 which means the venue would be proper in either place. Granted,
23 Mr. Reffitt is present in the District of Columbia.

24 Now, what I wanted to be very careful of in terms of
25 identifying witnesses, number 1, there is a protective order in

1 this case. Number 2, even if there weren't, in my experience,
2 having cases involving cooperators, which this one does, and of
3 course, we've just talked about the publicity, and I think
4 everyone can acknowledge that politics is the elephant in the
5 room as we do all this. Naming names would put people's
6 physical safety at risk. I don't want to do that.

7 THE COURT: Tell me, how many witnesses are you saying
8 live in the Eastern District of Texas who you intend to call?

9 MR. WELCH: It's not that I necessarily intend to call
10 them. I'm looking through the discovery that I've been given.
11 And by my count, there are more witnesses who would be nearer --
12 because I don't know where they actually live, I don't have all
13 their home addresses, but that would actually live in Texas at
14 least, and the Eastern District of Texas would be easier for
15 them, if I'm correct, and there would be, say, five or six of
16 them, there might be more, I don't know, and then I would
17 believe that there are probably two or three who are residents
18 of the District of Columbia.

19 Either way, people are going to have to travel. It would
20 appear that more people are going to have to travel to the
21 District of Columbia for a trial in terms of witnesses.

22 THE COURT: Sorry to interrupt. You're talking about
23 what you can glean from the discovery about the government's
24 case-in-chief?

25 MR. WELCH: Yes.

1 THE COURT: You don't think a large percentage of that
2 case-in-chief will include law enforcement officers who were
3 present that day at the Capitol?

4 MR. WELCH: There are two that have been specifically
5 identified as actually having contact with Mr. Reffitt, and
6 there is a case agent, although I'm not sure whether that case
7 agent who interviewed them did so from Texas or from Washington,
8 D.C. I assume for this that there is a case agent in
9 Washington, D.C.

10 THE COURT: All right. Well, help me understand your
11 argument that keeping the case here in the District disrupts
12 Mr. Reffitt's efforts to resume his business. He would be
13 incarcerated in either district. So help me understand that.

14 MR. WELCH: Well, that is true, and certainly, that is
15 among the weaker arguments in terms of the factors that I'm
16 addressing. I wanted to be complete. I wanted to address them
17 all.

18 But certainly, Mr. Reffitt would like to resume working and
19 helping to support his family. That's not something that he can
20 do easily while detained, granted, in either district, but
21 certainly, if he were closer to home, he would be able to visit
22 family and friends and business acquaintances who -- you know,
23 sometimes people are able to carry on some level of business
24 activity even while they're incarcerated, and I'm talking about
25 legitimate business activity.

1 THE COURT: You don't have any evidence for the Court
2 that the Eastern District of Texas's docket is less congested
3 than our docket, do you?

4 MR. WELCH: I don't have cases, Your Honor. I don't
5 have a docket calendar to present. What I'm looking at is what
6 is available on the courts', both District of Columbia's web
7 site and the Eastern District of Texas's web site and what is
8 covered in the media. And it certainly appears from that that
9 they have not had the kind of constraints, operating constraints
10 on their docket that have been in place in this district due to
11 the pandemic. I'm not criticizing. I'm just saying it's
12 different.

13 And it is absolutely clear that there have been over 600
14 cases at this point that have been brought in the federal court
15 in the District of Columbia just related to January 6. That is
16 more than twice what I understand the District of Columbia
17 normally sees per year on its criminal docket, and that is on
18 top of the backlog of cases that existed due to the pandemic.

19 So there should be no question that this court's docket
20 right now is more backed up and more heavily constrained than
21 probably any other courts in the country, but specifically the
22 Eastern District of Texas.

23 THE COURT: We're going to talk about the government's
24 motion to vacate the trial date in a minute, but right now, you
25 have a trial date, November 15. I'm not sure you could get that

1 in the Eastern District of Texas.

2 Moreover, I suspect that this courthouse will be opening
3 more for just the very reason that you identified, that there
4 are so many cases that need to go to trial, that restrictions in
5 this courthouse I don't think you can assume are going to
6 continue as they are at the moment.

7 MR. WELCH: Well, you might know that better than I.

8 THE COURT: No, I don't know for sure, but it's common
9 sense to suggest that the court in time has to become more open
10 in order to get to honor defendants' speedy trial rights. And I
11 think the court has been very careful in trying to ensure that
12 we follow the appropriate safety protocols that the experts have
13 suggested.

14 But right now, Mr. Reffitt does have a trial date in a
15 month.

16 MR. WELCH: Right, and you're right, and if so, great,
17 as long as that holds. But there could be things that are
18 beyond our control that could --

19 THE COURT: We're going to talk about that in a moment
20 and what happens if that does happen. But at least what you've
21 told me right now doesn't suggest that in the near future the
22 Eastern District of Texas is going to do any better at managing
23 this case than this district.

24 MR. WELCH: And I would agree that if the current
25 trial date holds, then certainly, that would in all likelihood

1 be faster than it could be done in Texas.

2 THE COURT: All right. Mr. Nestler, let me hear from
3 you. First, if you can start with the defense's initial
4 argument about pretrial publicity and about the inconvenience to
5 residents of the District of Columbia.

6 MR. NESTLER: Yes, Your Honor.

7 As Your Honor indicated, the D.C. Circuit's precedent talks
8 about how these issues about pretrial publicity can be
9 adequately addressed at voir dire, and we believe they will be
10 adequately addressed at voir dire here. We don't believe any
11 pretrial publicity was overly specific to this defendant or
12 overly negative or, as we pointed out in our pleading, not
13 factually accurate or included things like in some of the
14 Supreme Court cases, a confession from the defendant. We don't
15 have that information here. So we don't believe that factor
16 would affect the analysis.

17 The Supreme Court has been clear that prominence does not
18 mean prejudice, and impartiality does not mean ignorance. And
19 so just because residents here of the District are aware of what
20 happened at the Capitol on January 6 or it may have been
21 prominent in both the local news and the national news at the
22 time does not mean that the defendant would be prejudiced by
23 having a trial here or could not get a fair jury here.

24 We also want to point out to the Court some of the
25 questions Your Honor indicated to Mr. Welch. The large fence

1 around the Capitol is no longer up. We don't believe there's
2 any daily reminder to the citizens of the District of what
3 happened on January 6. And physical reminders about an
4 incident, that factor does not appear in any of the Supreme
5 Court case law on Rule 21, whether prejudice exists just because
6 jurors might have seen part of the crime scene or where the
7 incident happened.

8 On the convenience factors, Your Honor, we pointed out in
9 our pleading that almost all of the factors weigh against
10 transfer. Plus, the defendant is the one who bears the burden.
11 So any factor that is neutral actually weighs against transfer,
12 because the defendant has to come forward with evidence
13 arguments in support of the transfer. So some of the case law
14 talks about how when the factors are equitable as to any
15 particular interest, equitable actually weighs against transfer.

16 In terms of witnesses, we're very comfortable talking about
17 the number of witnesses and who they will be. We will have law
18 enforcement witnesses here from D.C. We will have people who
19 worked at the Capitol, were present at the Capitol on January 6
20 testifying, as well as summary witnesses on the video systems
21 and those kinds of things and how Congress works to support our
22 various charges like the civil disorder charge and the official
23 proceeding charge, as well as the officers that Mr. Reffitt
24 actually interacted with.

25 In terms of other civilians, Mr. Welch is right, there are

1 a couple of civilians or a few civilians from Texas, and we've
2 disclosed all of their information to Mr. Welch in discovery.
3 And if Your Honor would like, I can go through generally the
4 category they would fall into and their numbers.

5 THE COURT: Go ahead.

6 MR. NESTLER: Sure. So Mr. Reffitt's wife and two
7 children who were present when he uttered his threat after he
8 returned from the Capitol are under subpoena, as well as the
9 individual that Mr. Reffitt traveled from Texas to D.C. with,
10 who, by the way, is not a cooperator but will be a government
11 witness at trial, and all of his *Jencks* information has been
12 provided to the defense already.

13 THE COURT: Was that individual charged as well?

14 MR. NESTLER: No.

15 And so those people are under subpoena. The government is
16 going to arrange and has already arranged for plane flights for
17 those four individuals I just indicated and can easily arrange
18 for travel. I note that the *Platt* factors were enunciated more
19 than 50 years ago when it was more complicated to travel across
20 the country. The government submits that it is not particularly
21 complicated to fly from Texas to D.C. and put them in a hotel to
22 testify and not out of the ordinary.

23 There is also a case agent both in Texas and in D.C., and
24 so the case agent in Texas will also be traveling to D.C. for
25 the trial. Again, the government is comfortable paying for that

1 and coordinating that, and we don't believe that's going to --
2 that inconvenience to that agent, who is a federal employee, an
3 FBI agent, should affect the analysis.

4 THE COURT: All right. Okay. I'm going to rule on
5 the motion to change venue now.

6 I will deny without prejudice Mr. Reffitt's motion to
7 change venue to the Eastern District of Texas pursuant to
8 Federal Rule of Criminal Procedure 21 based on prejudice and
9 convenience.

10 As I've stated already, in this circuit, it's
11 well-established procedure to refuse pre-voir dire requests for
12 change of venue. See *U.S. v. Haldeman*, 559 F.2d 31 at 63
13 through 64. That's a D.C. Circuit case. And only in extreme
14 circumstances may prejudice to the defendant's rights be
15 presumed before voir dire. Again *Haldeman* at 60. Also
16 *Skilling v. United States*, 561 U.S. 358 at 381.

17 Mr. Reffitt has not demonstrated that this is such an
18 extreme circumstance in which extraordinary local prejudice will
19 prevent a fair trial. *Skilling*, 561 at 378. Nor has he
20 demonstrated that the jury pool in this district is
21 presumptively biased against him.

22 The fact that news articles have been printed in local
23 newspapers and other news outlets does not inevitably lead to an
24 unfair trial. Most of these articles consist primarily of
25 factual accounts of events, and as Judge Mehta recently noted

1 when denying a similar motion to change venue, most of these
2 articles were consumed by national audiences and say nothing
3 about the jury pool in the District of Columbia specifically.
4 And that was in *U.S. v. Caldwell*. That's 21-28, docket 415.

5 With respect to Mr. Reffitt's argument regarding the level
6 of awareness of residents and the extent to which they've been
7 inconvenienced, I believe that can be addressed at voir dire,
8 and any extent to which those jurors might be biased against
9 Mr. Reffitt can also be explored at voir dire.

10 At this stage, the Court can't conclude that a large number
11 of jurors will be dismissed for cause because voir dire has not
12 yet occurred. And if this ends up being the case, Mr. Reffitt
13 can renew his motion following voir dire.

14 Turning to his convenience argument and considering the
15 various factors the Supreme Court identified in *Platt v.*
16 *Minnesota Mining & Manufacturing Company*, 376 U.S. at 240, the
17 factors the Court should consider when deciding Rule 12(b)
18 motions, Mr. Reffitt has not come close to satisfying his burden
19 to show that this case should be transferred to the Eastern
20 District of Texas.

21 Mr. Reffitt himself is located in this district, as he is
22 incarcerated here. The alleged events charged in the indictment
23 primarily occurred in this district. While Mr. Reffitt claims
24 that some witnesses and records are located in Texas and the
25 government confirms that some witnesses will come from Texas,

1 Mr. Reffitt provides no additional detail about other witnesses
2 or records, and the government has the four Texas residents
3 under subpoena. So that should not be a problem here, and they
4 can make travel arrangements for them to be here for trial.
5 Because most of the records in this case are electronic, their
6 location is not significant. Also, counsel for both parties are
7 in this district. Any expense to the parties would not be
8 substantially different in either location, and both are
9 accessible.

10 Though Mr. Reffitt claims that keeping the case here could
11 disrupt his efforts to resume his business, as we've discussed,
12 he remains incarcerated. So it's unlikely that he can resume
13 much work even in the Eastern District of Texas.

14 As I've noted already, there's little or no evidence that
15 the Eastern District of Texas's docket is less congested than
16 the docket in this district.

17 So for all those reasons, I deny Mr. Reffitt's motion to --
18 without prejudice.

19 All right. Mr. Welch, moving on to the motion to dismiss,
20 unlike a number of the other defendants in the January 6 cases,
21 Mr. Welch, you've moved to dismiss the indictment on only two
22 grounds, and that is, first, that Congress's certification of
23 the electoral results did not constitute an official proceeding
24 as defined by Title 18 United States Code Section 1512(c)(2) and
25 that the term "corruptly" is unconstitutionally vague.

1 Other defendants have argued that the "otherwise obstruct,
2 influence, or impede" portion of the statute must be understood
3 in light of (c) (1)'s focus on documents and evidence and, thus,
4 does not encompass any and all acts of obstruction, such as
5 forcibly halting Congress's certification of electoral results.

6 You've not raised that argument here; correct?

7 MR. WELCH: Correct. And Your Honor, I'm only moving
8 to dismiss Count 2, not the entire indictment.

9 THE COURT: Sorry, Count 2. All right.

10 So you're just proceeding on these -- with these two
11 arguments alone?

12 MR. WELCH: Correct.

13 THE COURT: All right. So Section 1515(a)(1) defines
14 "official proceeding" to include a proceeding before Congress.
15 And why isn't the joint session to certify the electoral votes
16 an official proceeding? It seems to me it has all the trappings
17 of a formal hearing before an official body.

18 MR. WELCH: Well, because the Ninth Circuit took a
19 look at a very similar issue in *Ermoian* and concluded that it's
20 not the lay meaning of the term "proceeding," it is the legal
21 meaning of "official proceeding" that should control. And
22 specifically, what they went on to examine and define in *Ermoian*
23 is that it needs to be something like an investigation, that not
24 everything that Congress does has the same character. And what
25 1512(c) specifically would involve is something to do with the

1 administration of justice.

2 And I'm not saying that certification of the Electoral
3 College is not important. I'm just saying it's not what this
4 statute was designed to regulate. This statute was to protect
5 witnesses, prevent someone from, you know -- basically to hold
6 someone accountable who prevents someone from testifying before
7 Congress if Congress were investigating something like what
8 happened in the Enron case.

9 That's what this statute is really designed to do. It's
10 not -- it doesn't give notice to someone that oh, it also covers
11 certification of the Electoral College count. And that's what
12 the legislative history, that's what the Department of Justice
13 would also tend to indicate. It's not that it might not be a
14 violation of some law. It's not a violation of this law.

15 THE COURT: But you say, Mr. Welch, that I need to
16 look at the definition of "proceeding" in a legal sense, and it
17 is defined as, quote, the business conducted by a court or other
18 official body or a hearing. And that's Black's Law Dictionary.

19 So I still don't get why this doesn't meet that definition.
20 And you talk about the need for this to be a proceeding akin
21 to -- you mentioned investigation, but that's not quite right;
22 right? You're talking about a court hearing; right?

23 MR. WELCH: That is what it clearly would be certainly
24 looking at *Ermoian*. There are some types of proceedings,
25 perhaps an administrative body or administrative agency who was

1 conducting an investigation and calling witnesses. Congress
2 does subpoena witnesses sometimes, but that's not what they were
3 doing in this situation.

4 THE COURT: But where do you get that from the text of
5 Section 1515?

6 MR. WELCH: It would not be necessarily obvious from
7 the text, but the text is the starting point, and then looking
8 at it in the context of Chapter 73 and saying okay, what is
9 obstruction of justice, obstruction of justice typically has to
10 do with a court proceeding or even an investigation.

11 And even *Ermoian* -- are you still there, Your Honor? I
12 think we might have lost the judge.

13 MR. NESTLER: I think that's right, Mr. Welch.

14 MR. WELCH: Where did you go?

15 THE COURT: I don't know. I thought I lost all of
16 you. All right. I don't know what happened. It says my
17 Internet connection is unstable. Can you hear me, Mr. Welch?

18 MR. WELCH: I can. I was just going to ask, what was
19 the last thing that you heard me to say?

20 THE COURT: You were starting to answer my question,
21 and you were saying that this proceeding has to be like a court
22 proceeding.

23 MR. WELCH: Yes. And there can be some hearings that
24 Congress might conduct when it subpoenas witnesses when it's
25 investigating that would be like a court proceeding. This was

1 not one. There might even be other things such as you could
2 have an administrative agency that might be doing the same kind
3 of thing, subpoena witnesses, take evidence, that kind of thing.

4 So interfering with Congress's investigative function if it
5 were holding a hearing and subpoenaing witnesses, that might be
6 covered under 1512(c). But obstructing certification of the
7 Electoral College count is not -- and the Supreme Court has
8 distinguished between different activities that Congress has in
9 terms of, you know, what types of things flow from it, and the
10 Electoral College certification is just not something that when
11 you look at the legislative history, when you look at the court
12 cases, and you look at the statutory scheme as a whole, this is
13 not something that would fall within that.

14 THE COURT: But based on the Constitution and the
15 Electoral Count Act, there are all kinds of requirements here
16 that are akin to a court hearing. You have a presiding officer.
17 You have a process by which objections can be heard and debated
18 and ruled upon. You have a decision on the certification of the
19 results that has to be reached before the session can be
20 adjourned. The certificates are like records or documents that
21 are produced during judicial proceedings, and objections to
22 these certificates can be analogized to evidentiary objections,
23 can't they?

24 MR. WELCH: True, but what I would point out is the
25 Supreme Court precedence distinguishing between Congress's

1 legislative and investigative powers, specifically *Kilbourn v.*
2 *Thomas*, 103 U.S. 168, and later *McGrain v. Daugherty*, 273 U.S.
3 136. And in that analysis, it's basically saying that there
4 aren't formal distinctions between Congress's legislative and
5 investigative powers. This is certainly a formal responsibility
6 that Congress has, but it wasn't conducting an investigation.

7 THE COURT: Mr. Welch, you make arguments based on
8 Section 1503 and 1505; right?

9 MR. WELCH: Yes.

10 THE COURT: Isn't 1512(c), though, broader than both
11 of those statutes? Doesn't "official proceeding" mean something
12 different than -- with respect to 1503, it talks about the due
13 administration of justice. 1505 talks about an inquiry or
14 investigation.

15 Doesn't this statute cover something different than these
16 provisions that you've relied upon?

17 MR. WELCH: What I understand it to -- and by citing
18 those, I was trying to show that this statutory scheme deals
19 with obstruction of justice. It was specifically involved and
20 this specific statute was passed to address the destruction of
21 documents that were incriminating specifically. That is what
22 had happened after Enron, and Congress was attempting to address
23 that. So it's targeted. It's not that it says proceeding, so
24 proceeding can be absolutely anything that the government wants
25 it to be.

1 THE COURT: I understand some of that sentiment here,
2 and I will talk to Mr. Nestler about the scope of how this is
3 being interpreted. But simply because this was enacted in the
4 wake of Enron, obviously that's correct, that doesn't mean the
5 words of the statute can't plainly apply to a different type of
6 conduct that triggered the enactment of the statute; right?

7 MR. WELCH: Well, true, but that's what *Ermoian* was
8 looking into. The question there was, you know, that is an FBI
9 investigation, although it hadn't gotten to, you know, the
10 charging stage yet, was an FBI investigation and proceeding.

11 THE COURT: But that's because it wasn't formal.

12 MR. WELCH: Well, and that ends up opening up the
13 question of well, when exactly does something become formal and
14 how can you tell that it's become formal. I guess once an
15 indictment is filed, I guess we can all agree that's formal
16 charging. But it does not fit -- the certification of the
17 Electoral College does not fit within the scheme of Chapter 73
18 in that it is not some sort of a judicial proceeding, it is not
19 an investigation where witnesses are summoned and documents
20 subpoenaed.

21 THE COURT: Well, I don't know how you can quibble
22 with it being a formal proceeding. It's extremely formal in
23 nature, the way in which the procedures work. There's a
24 presiding officer, and there's very much a process here. I get
25 that it's not like exactly a court proceeding, but I just don't

1 see that in the language of the statute.

2 MR. WELCH: Well, right, it's not obvious just within
3 the text of the statute, and that's why the Court should be
4 looking, as the Ninth Circuit did when it dealt with *Ermoian*,
5 and saying well, all right, looking at the statutory scheme as a
6 whole, looking at the legislative history, and looking at the
7 case law for *Ermoian* and some other cases, that this is not --
8 although it is important, although there might have been, you
9 know, a formal rule laid out as to who has to be there and who
10 sits where and what order they do things, it is not an official
11 proceeding as that has been defined by the case law.

12 THE COURT: All right. Mr. Nestler?

13 MR. NESTLER: Yes, Your Honor.

14 *Ermoian* was interpreting 1515(a)(1)(C). In that case the
15 Ninth Circuit was focused on whether the FBI investigation was
16 a, quote, proceeding authorized by law. And so when we're
17 talking about the definition the Ninth Circuit provided about
18 formality, that's a different provision.

19 No Court appears to have interpreted 1515(a)(1)(B), which
20 is a proceeding before Congress, and that's the provision we're
21 dealing with here.

22 So the arguments about the formalities are not applicable,
23 even if there were formalities. As Your Honor indicated, the
24 Congress's joint session on January 6 would obviously qualify.
25 But we don't even have to get to that point. Mr. Welch talked

1 about how the text was only the starting point. The government
2 disagrees, Your Honor. The text here is both the starting point
3 and the ending point. The Supreme Court has been clear when the
4 text is unambiguous, the Court looks no further to look for
5 other contextual clues, including the things that Mr. Welch
6 pointed out in his brief in terms of legislative history or how
7 other statutes might be construed.

8 The language is clear. "Official proceeding" means a
9 proceeding before Congress. This would be a proceeding before
10 Congress. That is the end of the analysis.

11 And as Your Honor indicated, the language Congress used was
12 clear. They used a very broad language, a proceeding before the
13 Congress. If it wanted to use more narrow language, it could
14 have used language that had already existed like in 1505, an
15 inquiry or investigation being had before Congress. It didn't.
16 It just said proceeding before Congress. That is much broader
17 than the definition in 1505.

18 THE COURT: In the government's view, Mr. Nestler, is
19 there any restriction on the type of proceeding before Congress?
20 Does this statute apply to anything, a congressional hearing, a
21 floor vote? What are the limits?

22 MR. NESTLER: Well, a proceeding needs to be a
23 proceeding, an officer presiding. We don't -- there are other
24 definitions in other statutes about Congress conducting official
25 business.

1 THE COURT: What about a committee hearing, a vote on
2 a nominee, a hearing on legislation? Do those qualify as
3 proceedings before Congress that would be subject to this
4 statute?

5 MR. NESTLER: If Congress is in session, then there's
6 a presiding officer, and they've gavelled into session, and
7 Congress is meeting, it's being recorded, it has the trappings
8 of a formal proceeding before the Congress, whether it's a
9 committee or whether it's the full House or the Senate or here a
10 joint session, then yes.

11 THE COURT: So markup of legislation, a nominations
12 hearing, all of those things would be covered?

13 MR. NESTLER: Yes, Your Honor.

14 THE COURT: Debate on the floor about legislation,
15 that's covered as well?

16 MR. NESTLER: It depends on the circumstances, Your
17 Honor. The government submits that here we don't need to reach
18 all those different hypotheticals about where the limits may
19 exist, but here, it's quite clear that a formal joint session is
20 a proceeding.

21 What Congress does is sometimes it does official business.
22 Sometimes it meets as a formal body or via committee. Each of
23 those circumstances would be evaluated on their own terms.

24 THE COURT: All right. Anything else you would like
25 to add, Mr. Nestler?

1 MR. NESTLER: No, Your Honor.

2 THE COURT: Mr. Welch, anything in response? If not,
3 can you address your vagueness argument.

4 MR. WELCH: Sure. I did notice that the government
5 used the term "official business" in concluding its response.
6 And while I would agree that certification of the Electoral
7 College count would be official business, that is not what the
8 statute says, and I think that these terms have different
9 meanings, and the Court should consider that. I don't think
10 it's just wide open to mean anything. Certainly in *Ermoian*, and
11 maybe the government is contending that *Ermoian* was wrongly
12 decided, but in that case they said an official proceeding was
13 the FBI investigation.

14 THE COURT: All right. So just to make sure I
15 understand your position, Mr. Welch, your position is this
16 language, "official proceeding," only covers those proceedings
17 before Congress that are akin to a court hearing such as an
18 impeachment trial or what else?

19 MR. WELCH: I would say it has to be something
20 involving the subpoenaing of witnesses, Your Honor, an
21 investigation. So that way, it would fit squarely within
22 obstruction of justice. I mean, that is where certainly the
23 Enron investigation was going. It's that kind of thing, that if
24 you interfere with a witness appearing, if you destroy documents
25 which you know are going to be evidence before a congressional

1 committee or something like that, that would be covered, but not
2 certification of the Electoral College vote.

3 THE COURT: It has to be tied to an investigation?

4 MR. WELCH: Yes, that's our position.

5 THE COURT: All right. Okay. If you can address your
6 vagueness arguments.

7 MR. WELCH: Certainly.

8 There is a D.C. Circuit case on point, *Poindexter*, and the
9 issue involved the word "corruptly." Court's indulgence,
10 please.

11 THE COURT: Sorry. I don't mean to interrupt your
12 thought there. I just want to clarify. You're making an
13 as-applied challenge; correct?

14 MR. WELCH: Correct.

15 THE COURT: Okay. Go ahead.

16 MR. WELCH: "Corruptly," as used in Section 1512(c),
17 is not defined. And that is the same kind of problem that came
18 up in the *Poindexter* case, and ultimately, the D.C. Circuit
19 ruled in *Poindexter* that it had not been defined, and Congress
20 went back to amend it to include a definition for "corruptly,"
21 but they only did so with application to Section 1505. They did
22 not apply that definition of "corruptly" throughout the chapter
23 or specifically to 1512.

24 So ultimately, we have the same problem here that
25 "corruptly," as it's used in this statute, is undefined. So it

1 then becomes a problem that, you know, how do we know when it's
2 going to be applied. It could end up being arbitrarily applied
3 because someone doesn't like someone else's politics. There's
4 no meaningful standard that is involved in a situation like
5 that. It would violate the due process clause of the Fifth
6 Amendment and potentially, if it's being applied in the context
7 of political speech, the First Amendment.

8 THE COURT: But haven't many courts post-Poindexter
9 limited that case to its particular facts within that case
10 related to lying to Congress, and since then, haven't numerous
11 courts applied it in other contexts and given definition to that
12 term?

13 Courts use the phrase "motivated by improper person." The
14 Supreme Court has explained that "corruptly" is normally
15 associated with wrongful, immoral, depraved, or evil conduct.
16 That's the *Arthur Andersen* case.

17 And so to convict Mr. Reffitt of this offense, the
18 government would have to establish beyond a reasonable doubt
19 that he acted intentionally and with some consciousness of his
20 wrongdoing. Isn't that the standard that prevents arbitrary
21 enforcement?

22 MR. WELCH: Well, Your Honor, unfortunately, though,
23 it -- I don't think any of those were a 1512 case. And so it
24 wouldn't then be defined within the context of 1512. It's
25 specifically limited to 1505, that definition.

1 THE COURT: I thought even the D.C. Circuit rejected a
2 vagueness challenge to "corruptly" as used in 1512(b).

3 MR. WELCH: I'm sorry, but I don't know that case.

4 THE COURT: Okay. I think it's *U.S. v. Morrison*,
5 98 F.3d 619 at 630.

6 MR. WELCH: 98 F.3d what?

7 THE COURT: 619 at 630.

8 MR. WELCH: What I can do, Your Honor, is take a look
9 and file something in response to that perhaps, but
10 unfortunately, I missed the *Morrison* case.

11 THE COURT: All right. And I think the Eleventh
12 Circuit in *Shotts*, 145 F.3d 1289 at 1300, declined extending
13 *Poindexter* to "corruptly" in 1512(b), and it determined
14 *Poindexter* should not be read as a broad indictment on the use
15 of the word "corruptly" in the various obstruction of justice
16 statutes. And also, *U.S. v. Thompson*, 76 F.3d 442 at 452, the
17 Second Circuit said much the same.

18 So I'm wondering, is that authority just limited to the
19 facts of that particular case?

20 MR. WELCH: I don't think that *Poindexter* is limited
21 specifically to the facts of that case. I mean, one of the
22 basic problems there was that "corruptly" hadn't been defined at
23 all, and that's what the D.C. Circuit ruled on. Even when
24 Congress went back and defined it, it only has defined it in the
25 context of Section 1505.

1 THE COURT: Because it was responding to that case.

2 MR. WELCH: Right. I understand that. But that
3 doesn't then create a definition for 1512 when Congress has said
4 that it's specifically defining it with respect to 1505.

5 THE COURT: All right. So it would define it with
6 respect to an adjacent provision, but then it means something
7 else in the -- the very same language in an adjacent provision
8 means something different?

9 MR. WELCH: Well, we would have to ask ourselves why
10 did Congress limit it specifically to 1505. If the intent was
11 to say all right, we have failed to define "corruptly" within an
12 entire chapter, then they could have said "as used in this
13 chapter 'corruptly' shall mean," and then we wouldn't be having
14 this discussion, because it would be defined.

15 THE COURT: They could have, but they also could have
16 just felt like this is an erroneous case we need to fix.

17 MR. WELCH: And we don't know, and that, I think, is
18 the problem. So our position is that as of right
19 now "corruptly" hasn't been defined as far as 1512 is concerned
20 because Congress, for whatever reason, decided to limit it to
21 1505.

22 THE COURT: All right. Mr. Nestler? Again, what's
23 the limiting principle here? How far does this go?

24 MR. NESTLER: Yes, Your Honor.

25 So first on the definition of "corruptly," Your Honor is

1 correct, and we cited the *Morrison* case in our opposition brief.
2 That was a 1512(b) case, and the D.C. Circuit rejected a
3 vagueness challenge to the word "corruptly" in 1512(b). It's
4 not 1512(c), but "corruptly" is used throughout 1512, and many
5 courts have rejected vagueness challenges to 1512, including the
6 *Holloway* case, which was the District Court case before the case
7 had appealed and was renamed *Ermoian*, where the District Court
8 rejected the *Poindexter*-based challenge to the word "corruptly"
9 in 1512(b) (2), the exact statute we're dealing with here.

10 The limiting principle, Your Honor, is -- there are two for
11 how the government interprets 1512(c) (2). The first is a nexus
12 to an official proceeding, and the government derived that
13 primarily from the *Arthur Andersen* case, and even going back
14 further to the *Aguilar* case, that defendant's conduct has to
15 have a nexus to the official proceeding.

16 The government believes that it can easily satisfy that
17 burden here, given that Mr. Reffitt was on the steps of the
18 Capitol as Congress was meeting. But in general, we believe
19 that that is a meaningful limitation and restriction. If
20 Mr. Reffitt's actions took place weeks or months earlier from a
21 different location, perhaps the jury would not find that there
22 was a sufficient nexus to the official proceeding itself.

23 THE COURT: So does the government not believe that
24 January 6 defendants who were yelling from outside the Capitol
25 and encouraging those who either tried like Mr. Reffitt to get

1 in the Capitol, as you've alleged, or actually got into the
2 Capitol, are those not covered by this statute?

3 MR. NESTLER: So they certainly are, could be covered
4 by the statute. It's a question ultimately for the jury whether
5 the government has proved beyond a reasonable doubt that the
6 defendant's actions had a nexus to the official proceeding. And
7 the further the defendant is removed both geographically and
8 temporally from the official proceeding, it might be harder for
9 the government to prove that or for a jury to find that. But
10 that is a --

11 THE COURT: What about a defendant who -- could an
12 individual who is yelling from the Senate gallery be charged
13 under 1512(c)?

14 MR. NESTLER: Under 1512(c)(2), if the person has the
15 correct mens rea, if they have a corrupt intent.

16 THE COURT: So someone yelling and being obstructive
17 and not listening to the guards to quiet down, is that, in the
18 government's view, an adequate corrupt intent?

19 MR. NESTLER: It's a question for the jury, Your
20 Honor, whether that person's intent would be corrupt.

21 THE COURT: So you believe you could charge it, but a
22 jury might not find it based on the evidence? Is that your
23 position?

24 MR. NESTLER: If Your Honor is indicating whether
25 somebody who is just yelling during a congressional proceeding

1 could be charged under 1512(c) (2), it depends on the facts.
2 It's not what we have here, obviously, but it depends on the
3 facts about what that person was intending to accomplish by
4 their yelling.

5 THE COURT: An example of yelling that you would think
6 would meet the statute?

7 MR. NESTLER: Well, an example of yelling in that
8 situation is yelling some sort of threatening or other type of
9 language at the people who were actually conducting the
10 proceeding. Yelling to get a point across is different than
11 yelling in order to intimidate the people who are actually
12 making the decision, and that goes to the definition of
13 "corrupt," whether the intent of the person who was making the
14 obstructive conduct was intending to act corruptly. Was it
15 wrongful? Was it depraved? Was it evil? Those are ultimately
16 words that are known in common parlance and that a jury could
17 determine.

18 And a person who stands up and says don't vote on this bill
19 or I don't like what you're doing here, that probably would not
20 be charged, and the jury probably wouldn't find that person was
21 acting corruptly.

22 A person who stands up and yells everybody better leave the
23 chamber right now because otherwise we're going to jump onto the
24 House floor and kill you or hurt you or rip up all your papers,
25 that person is probably acting corruptly.

1 There is, of course, in-between scenarios, but we would
2 have to go through each scenario to tell.

3 Here, we don't need to get into those hypotheticals.
4 Mr. Reffitt's own statements indicated his corrupt intent, that
5 he was going to the Capitol to find Nancy Pelosi to drag her out
6 by her ankles so that she wouldn't vote to certify the Electoral
7 College in favor of his preferred presidential candidate.

8 So we believe we can prove that to a jury, but ultimately,
9 that's up to a jury to decide whether we met our burden to prove
10 that he acted with corrupt intent.

11 THE COURT: Anything else, Mr. Nestler?

12 MR. NESTLER: No, Your Honor.

13 THE COURT: Mr. Welch?

14 MR. WELCH: The problem with that, Your Honor, is it
15 ultimately leaves up to a jury the question of what the law
16 means in that situation, that basically they'll know it when
17 they see it.

18 THE COURT: No, no, no. You're going to fight this
19 out at the time of jury instructions. They'll receive a
20 standard, and they'll have to determine whether the facts meet
21 that standard. It's not the jury looking at corruptly in a
22 vacuum and trying to each figure out what that means to him or
23 her. There will be an instruction that would be in line with
24 what other courts have done that would guide the jury.

25 MR. WELCH: The ultimate problem here even still, Your

1 Honor, would be that that is not something that 1512 has
2 defined. It's still going to be a vague thing, because we can't
3 say that whatever definition might have applied in another
4 situation would apply here.

5 THE COURT: But we can look to the definition Congress
6 has given in a related provision. We can look to case law. But
7 that's often the case. Statutes don't define every word.
8 That's what we do frequently.

9 MR. WELCH: And I understand that, but as I was
10 thinking about some of Mr. Nestler's examples, I was thinking
11 about well, you know, what if a person is just screaming
12 nonsense, you know. Then it could be just as obstructive, but
13 apparently, that would not be a crime. Whereas, if the person
14 were explicit about their goals, it is a crime. That is not a
15 meaningful standard to then leave it up to a jury to decide
16 well, that's the law or that isn't the law.

17 THE COURT: The Supreme Court has explained corruptly
18 is normally associated with wrongful, immoral, depraved, or evil
19 conduct. And I think that means that the government will have
20 to establish beyond a reasonable doubt that Mr. Reffitt acted
21 intentionally and with consciousness of wrongdoing.

22 MR. WELCH: Well, then our position ultimately comes
23 back to the fact that that term "corruptly" has not been defined
24 as far as 1512 is concerned. It might be defined in other
25 contexts, but not in 1512.

THE COURT: All right. Understood.

So I am going to take this motion under advisement, but I do want to discuss the government's motion to vacate the trial date, and I would like you all to assume -- I haven't decided how I will rule, but I want you to assume for purposes of discussing this motion that the Court would deny the motion to dismiss, because we need to proceed as though that could be the case, and we're a month away from trial right now.

So Mr. Welch, you've objected. You've tied your objection to the change of venue, which the Court has denied, suggesting that if I were to change venue here, that you wouldn't have an objection to the trial date being vacated. But I've denied that motion, and so we are where we are.

I certainly appreciate that Mr. Reffitt has a constitutional right and a statutory right to a speedy trial, and he has asserted that right. And based on that, I am inclined to keep the November 15th trial date as scheduled, but I do have concerns about whether proceeding on that date is in his best interest and the public's interest.

So can you address, you know, are you ready to go to trial? I had ordered -- and we will talk about this in a moment. I had ordered both sides to file motions in limine on or before September 17th. Neither side has filed any. I can't help but think that there are objections to exhibits and witness testimony that both sides could have anticipated, and those are

1 issues that I had hoped to address if not today, at the initial
2 pretrial.

3 But no motions have been filed. And these are issues that
4 we have to resolve in front of trial. If I am keeping this
5 week -- and by the way, I'm keeping -- I'm slotted in -- based
6 on what the parties have told me, my understanding is that the
7 government's case and the defense case together, you do not
8 expect this trial to last more than five days.

9 Is that the case? Mr. Nestler?

10 MR. NESTLER: Yes, Judge.

11 THE COURT: And Mr. Welch?

12 MR. WELCH: That's my understanding, Your Honor.

13 THE COURT: All right. Because that would be all that
14 we have. If we start on November 15th, we will start jury
15 selection on that date. The 16th we would not have access to
16 the ceremonial courtroom. So we would not be able to continue
17 any voir dire on that date. We would have to come back on the
18 17th and hope to finish up jury selection and have opening
19 statements. And then that would give us exactly five days, the
20 18th, 19th, 22nd, 23rd, and the 24th, the Wednesday before
21 Thanksgiving. That's all we will have. There are trials boxed
22 on either side.

23 So that's a tight window, and in order to try this case in
24 that amount of time, we have to tee up issues, legal issues that
25 can be resolved before trial. We cannot have lengthy recesses.

1 This will not work.

2 So you haven't filed any motions in limine. I'm concerned
3 that neither side has. You know, for that reason, if we're
4 sticking with this trial date, I'm moving up the date for
5 exhibits and witness lists to be exchanged and jury instructions
6 and everything else, because we have to suss out where those
7 arguments are. And some no doubt relate to the definition of
8 the word "corruptly," and we have limited time to do a lot of
9 things here, Mr. Welch.

10 So I'm pressing on this because I don't want to keep this
11 trial date and keep another defendant who has been waiting for
12 trial away from trying their case and getting prepared in
13 anticipation of trying their case only to find out in two weeks
14 or three weeks that the defense wants more time.

15 And the government is telling us you don't have all the
16 evidence you're entitled to. So far as I can tell, the
17 government is acting with due diligence and in good faith, but
18 there is evidence forthcoming that might be helpful to
19 Mr. Reffitt that you will not have if you go on November 15.

20 So I want you to address these points and why you're
21 insisting on going on November 15, and are you waiving his right
22 to receive potential *Brady* evidence? Is that what you're doing?
23 You can't come back later and say well, I didn't have that.
24 You're making a choice to go on that date.

25 MR. WELCH: Your Honor, first, my client has given me

1 explicit instructions not to waive his right to a speedy trial
2 and to get him to trial as soon as possible. He is detained.

3 Second of all, I don't think that the Due Process
4 Protections Act or the Speedy Trial Act require a defendant to
5 waive either one. There is a potentially ridiculous amount of
6 disclosure that might be made in this case. As I understand it,
7 investigations are ongoing. We have no idea when that might
8 conclude. And Mr. Reffitt should not have to sit at D.C. Jail
9 for however many weeks, months, potentially years that it might
10 take for the government to be satisfied that it's looked at
11 everything and turn that over.

12 There has been some sort of an arrangement that the
13 government has made with a private company, evidence.com, to
14 make disclosures. And my understanding is the government is
15 taking the position that once they've done that they're off the
16 hook. I don't know that that's the case.

17 And I don't know that Mr. Reffitt has to waive anything.
18 He has both a right to a speedy trial and a right to the
19 evidence. And if the government is unable to disclose all of
20 the evidence before the trial date, then that potentially
21 becomes a 2255 issue, I think, down the road. But I don't think
22 he has to pick and choose here which rights he wants to
23 exercise. I don't think this is like okay, if you plead, then
24 you can't have your trial rights, and if you go to trial, you
25 can't have the plea. I don't think it's an either/or situation

1 like that.

2 THE COURT: And I don't mean to suggest that it is.

3 I'm just concerned that there could be information that's
4 forthcoming that would be helpful.

5 MR. WELCH: There certainly could be. I don't deny
6 that. I don't know what else is out there. I do know that as
7 of now I have -- at the government's request, I have contacted
8 the Federal Public Defender's Office and asked about access to
9 evidence.com, and it's not available to me yet. So whatever
10 they think they've disclosed to me by putting it on evidence.com
11 has not been disclosed. I don't have it.

12 Now, that said, I don't know how long it might take
13 somebody to get through all of the terabytes of data that might
14 be out there in terms of video.

15 THE COURT: Mr. Reffitt's situation should be a little
16 bit different than many of the January 6 defendants because he
17 never got in the Capitol. Right?

18 MR. WELCH: That's correct. He never went inside the
19 Capitol, Your Honor, and my understanding is -- and it seems
20 like I have the information that is specifically available to
21 him. It seems like whatever else might be out there that the
22 government has not disclosed is hypothetical as to whether it
23 might have any helpful value to Mr. Reffitt.

24 THE COURT: Right. But it still doesn't answer my
25 question. Why have you not filed any motions in limine? Are

1 you not objecting to any of this evidence? You don't have
2 concerns about the witnesses or the evidence at this point?

3 MR. WELCH: I always have concerns about the witnesses
4 and the evidence, but it ends up being more a question of unless
5 there is something that I obviously see ahead of time that I
6 know is contrary to law, then I don't want to necessarily jump
7 out and highlight something.

8 For instance, you know, one of the motions in limine that I
9 would have filed would have been regarding whether there was any
10 403(b) evidence that was more prejudicial than probative, but I
11 haven't received a 403(b) notice. None's on file in the docket.

12 THE COURT: All right. Well, Mr. Welch, you say you
13 don't want to highlight issues. What I'm telling you now is you
14 can't sandbag on issues that you're aware of now that we need to
15 resolve, because if there are complicated legal issues, we need
16 to address them up front, pretrial.

17 MR. WELCH: Understood. And I didn't mean to create
18 that impression. What I meant was, I don't want to highlight
19 for the government things that they would then want to follow-up
20 on. For instance, you know, since there is a notice requirement
21 with respect to 403(b), I don't want to file a motion in limine
22 about 403(b) evidence when they haven't filed notice.

23 THE COURT: I'm sure they're arguing that all of this
24 stuff is intertwined with his defense. And do they have to file
25 it, if that's their perspective, that he started in Texas and

1 did X, Y, and Z on his way to D.C.? Does that, in your view,
2 require a 403(b) notice?

3 MR. WELCH: I think I was thinking more about whether
4 there were any, for instance, prior allegations in terms of
5 something indicating a lack of honesty, a prior perjury charge,
6 even if it wasn't --

7 THE COURT: Are you talking about 404(b)?

8 MR. WELCH: I'm sorry. Yes, I meant 404(b), and I
9 would be responding with 403.

10 THE COURT: Okay. But there are other, surely --
11 aside from that, assuming there's no 404(b) evidence here, other
12 alleged bad acts that the government seeks to introduce here,
13 are you telling me that based on the evidence that you've
14 received in discovery you're not going to have objections to any
15 category of that evidence or testimony or cooperator or
16 anything? This is hard to believe.

17 MR. WELCH: There might be. I'm looking at it. I'm
18 thinking -- and I'm not trying to sandbag the Court. I'm also
19 not trying to telegraph a road map to government about what my
20 defense strategy is likely to be.

21 THE COURT: Again, Mr. Welch, this is not a situation
22 where we can start the trial and then bump everyone back after
23 me. I've asked the court for an amount of time that both sides
24 have told me is the amount of time needed to try this case, and
25 that's all we have. And as you've heard, we've lost one of

1 those days, and we have -- the second week is Thanksgiving week.
2 So we really have five business days to try this case.

3 And if in the middle of trial there are big surprises, this
4 is not going to inure to your benefit if you haven't confronted
5 some of this, if not to the government then to me so that I can
6 be prepared.

7 MR. WELCH: I understand that, and I understand what
8 the government has disclosed to me in discovery. It seems
9 relatively straightforward to me. I don't necessarily feel,
10 after having considered what motions in limine might have been
11 filed by the motions deadline, that it would have been helpful
12 to my client's defense at this point to have filed them.

13 THE COURT: But you're telling me they're coming? Is
14 that what you're saying?

15 MR. WELCH: No. I do not -- if I had a motion in
16 limine, Your Honor, that I intend to file, I would have filed it
17 by the due date. I took Your Honor's order very seriously.

18 THE COURT: All right.

19 MR. WELCH: I'm not seeing that. There's always stuff
20 that -- and I'm not trying to sandbag anyone. There's always
21 stuff that comes up during a trial. In looking at this and
22 thinking about if I was a prosecutor, out of everything that's
23 been disclosed, I don't think that, given the universe of
24 discovery that the government has proclaimed, they're going to
25 present it all in five days. So clearly, they're going to have

1 to take a more targeted approach, and then my response to that
2 would be based upon the government's first move.

3 I don't see anything jumping out at me saying I need to
4 file a motion in limine on this or that. I have considered it.

5 THE COURT: All right. So Mr. Nestler, there's been
6 no 404(b) notice. Is it fair to conclude that there is no
7 404(b) evidence the government will seek to introduce against
8 Mr. Reffitt?

9 MR. NESTLER: Yes, Your Honor. I think we addressed
10 this at our last hearing when we discussed this issue. Your
11 Honor had imposed an earlier, I think in September, 404(b)
12 notice deadline, and we indicated that there is nothing that we
13 consider to be 404(b) evidence. There is evidence about
14 Mr. Reffitt's trip to D.C., and we believe all of that evidence
15 and what he did afterwards would all be inextricably intertwined
16 with this crime.

17 THE COURT: All right. Well, Mr. Nestler, I know the
18 government wants more time, but it does seem like Mr. Reffitt is
19 in a somewhat unique category here, having not breached the
20 Capitol.

21 And am I correct you've provided all of the
22 defendant-specific evidence with regard to Mr. Reffitt?

23 MR. NESTLER: We have substantially completed
24 defendant- and case-specific discovery with regard to
25 Mr. Reffitt and the witness who traveled to D.C. with

1 Mr. Reffitt. We continue to go through our files, and there may
2 be some additional small *Jencks* productions or some other sort
3 of small productions, but we believe we have substantially
4 completed all case-specific discovery.

5 THE COURT: All right. Well, I'm going to encourage
6 you to continue to press on that, because last-minute
7 disclosures will derail this.

8 MR. NESTLER: Understood, Judge. We have been going
9 through, and I hope Mr. Welch would agree, we have been
10 producing materials on a frequent basis. We filed our notice of
11 discovery this morning, all the discovery letters we have
12 provided, and we are looking through the FBI's holdings to try
13 to find any additional material that might be out there related
14 specifically to Mr. Reffitt. If we find anything, we will, of
15 course, get it to Mr. Welch as soon as we can.

16 But in terms of --

17 THE COURT: Sorry. Go ahead.

18 MR. NESTLER: In terms of categories of materials,
19 Mr. Welch has all the grand jury materials. He has all the
20 defendant's custodial statements. He has the Capitol Police
21 radio runs, the search warrant photos, all of the search
22 warrants, all of the arrest warrants, all of the videos that
23 were recovered from the defendant's phone, defendant's devices,
24 the GoPro camera on defendant's head, news media videos of the
25 defendant, Capitol Police surveillance video showing the

1 defendant. So we believe we've covered the ground in terms of
2 materials related to Mr. Reffitt.

3 Of course, I can't promise that we've gone through every
4 last thing, but we continue to look for it, and we believe we
5 are substantially complete.

6 That's with regard to Mr. Reffitt and the witness who was
7 under investigation who traveled with him. We have provided all
8 of those materials, including the extractions from that
9 witness's devices and interviews and other materials of that
10 witness's statements that are in our hold.

11 THE COURT: So Mr. Reffitt has all of the evidence
12 that was extracted from his electronic devices, his computers,
13 his GoPro, all of that?

14 MR. NESTLER: Yes.

15 THE COURT: And have you turned over at this point --
16 it sounds like you may have turned over all the *Jencks*?

17 MR. NESTLER: Not all of the *Jencks*. We have to go
18 through e-mails from other sort of smaller categories of things,
19 but in terms of -- for FBI personnel. But in terms of *Jencks*
20 material for civilian witnesses, yes, it has all been provided.

21 THE COURT: All right. When can you provide the rest?

22 MR. NESTLER: We can -- two weeks, Your Honor, should
23 be sufficient for us to try to collect the remainder of any
24 *Jencks* material for the law enforcement witnesses.

25 THE COURT: All right. And in terms of the

1 government, no motions in limine you anticipate?

2 MR. NESTLER: We don't anticipate any motions in
3 limine. And I hear what Mr. Welch is saying. There is a large
4 universe of materials we've provided. We were trying to be
5 overinclusive. That was the point of our filing the motion,
6 Your Honor. We believe it's large swaths of material that could
7 be considered Rule 16 or could be considered *Brady* material. We
8 don't know. We haven't gone through it all yet.

9 But I will say we have had conversations with Mr. Welch on
10 a frequent basis, including just two days ago, and have asked
11 him if there's specific categories of information or types of
12 information or things he wants us to look for and provide him,
13 we will do so, and we've had those conversations.

14 I'm happy to ask him through the Court now if there's any
15 other categories or things he thinks are missing, some other
16 category of something, and we will try to track it down. We've
17 been trying to do that for him for the past several months in
18 order to get everything.

19 In terms of our evidence, I think it would make sense for
20 us to provide Mr. Welch with our witness list and our exhibit
21 list and discuss with him our theory of admissibility of all the
22 pieces of evidence. And if he has objections -- I hope he would
23 not, but he might, and we would have to address that in a motion
24 in limine posture for a potential business record or some sort
25 of government record if he objected.

1 THE COURT: That would be helpful if you all are
2 willing to meet and confer upfront to try and identify any of
3 those issues.

4 But what I will say, the government and the defense, you
5 have obligations that you all should be exchanging exhibits and
6 witness lists by noon on November 1st, no later. Obviously, if
7 you can -- and I will put this out in an order as well.

8 And *Giglio* materials, Mr. Nestler?

9 MR. NESTLER: Yes, Judge, that same deadline ought to
10 be sufficient for any law enforcement *Giglio*. We are not
11 currently aware of any, but we continue to run that down. In
12 terms of civilian *Giglio* information, we believe we've provided
13 a large amount of it. We will continue to run those conflicts
14 down.

15 THE COURT: Okay. Great.

16 So that we can address as many issues as possible at the
17 initial pretrial conference on November 3rd, I would ask that
18 the parties file joint jury instructions, *voir dire*, and a
19 statement of the case the week before, by close of business on
20 the 29th of October. If you can't agree on jury instructions
21 and you're not submitting, you know, standard pattern
22 instructions, you need to provide authority that supports your
23 view. Don't just give your alternative without explaining why
24 the Court should give that alternative instruction.

25 Should either party change its mind about motions in

1 limine, I will extend the time to file any until the close of
2 business on October 21, any oppositions by October 28, any
3 replies by noon on November 1.

4 You should know that the courtroom itself will be open to
5 the public. There will also be an overflow courtroom and/or,
6 probably both, a media courtroom. But Mr. Welch, Mr. Reffitt
7 needs to understand -- I know it sounds like some family members
8 will be witnesses at trial, but if other family members or
9 family want to view his trial, they will need to come to D.C.
10 and be present in one of these courtrooms, either the courtroom
11 that I will be in, the trial will be, the jurors and the
12 attorneys, Mr. Reffitt will be in, or the overflow courtroom.
13 And then like I said, there will be, in all likelihood, a media
14 courtroom. But they should not presume that they can listen on
15 the public line to his trial.

16 Understood?

17 MR. WELCH: Understood.

18 MR. NESTLER: Your Honor, can I ask a clarifying
19 question about the schedule?

20 THE COURT: Yes.

21 MR. NESTLER: Your Honor indicated that you believe
22 that voir dire would take two days. That's that Monday and that
23 Wednesday?

24 THE COURT: It would be great if it didn't, but I
25 think we've got to complete it on the 17th.

1 MR. NESTLER: We're just planning witness travel and
2 the other related topics. I didn't know if Your Honor wanted to
3 make that sort of formal, that we would open on the 18th?

4 THE COURT: No, I think the parties need to be
5 prepared to open on the 17th.

6 MR. NESTLER: Okay, prepared to open on the 17th.

7 THE COURT: We may not get there, but that's my hope,
8 is that we complete voir dire and you do opening statements on
9 the 17th. So both sides need to be prepared for that. It might
10 be too ambitious to think we could start witness testimony on
11 that date, but certainly, the morning of the 18th. And if the
12 government could have someone on standby if we surprise
13 ourselves and somebody could be called the afternoon on the
14 17th, that would be great.

15 I just really don't want to get into a situation for the
16 parties or the jurors that this is extending into -- I don't
17 know what will happen if we go into the following week after
18 Thanksgiving. So I'm really trying to avoid that.

19 MR. NESTLER: I just wanted to make sure you weren't
20 expecting anything on the 16th. That was the reason why I was
21 asking.

22 THE COURT: Well, I will check, and I will let you
23 know if there's any alternative to jury selection on the 16th.
24 I don't think there is, but I will make that inquiry. If there
25 is, that would be very helpful. But I've been informed that the

1 ceremonial courtroom is not available on that date, which makes
2 me think there's not, but I will check on that.

3 MR. NESTLER: Thank you. That helps with scheduling.

4 THE COURT: Of course.

5 MR. NESTLER: And in terms of jury selection, does
6 Your Honor know the size of the panel, so we are prepared with
7 how many jurors to expect?

8 THE COURT: I don't. I will check on that. I will
9 have conversations and through Mr. Hopkins let you know about
10 that.

11 We will go over pretrial procedures. There are some
12 additional COVID protocols that we will all need to be familiar
13 with. So I will try to review some of those on November 3rd and
14 also make sure court staff is available to answer questions you
15 all might have about logistics and where witnesses can be and
16 that kind of thing.

17 MR. NESTLER: We appreciate that.

18 THE COURT: All right.

19 MR. NESTLER: Can I ask, Judge, I know Your Honor had
20 a colloquy with Mr. Welch about understanding that if we go to
21 trial now Mr. Reffitt is not going to have access -- or go to
22 trial on November 15th, he is not going to have access to the
23 larger swaths of discovery or the additional terabytes. And we
24 don't know what's in there. I didn't know if it made sense for
25 Your Honor to ask that question of Mr. Reffitt, if Your Honor

1 was willing, to make sure he understood that that was going to
2 be happening, assuming Your Honor denies our motion?

3 THE COURT: I will. And Mr. Welch, I'm also going to
4 ask you to, after this hearing -- and Mr. Hopkins can facilitate
5 a breakout room right now for you and Mr. Reffitt. I would
6 encourage an in-person visit, if possible. I just want to make
7 sure that you've -- he's had enough time to think through this.
8 A lot has happened today in this hearing. I just want -- I want
9 him to have the opportunity to think about this and be certain
10 about it.

11 But I understand what you're saying here. I'm not trying
12 to talk him out of this. I just want to make sure he's thought
13 it through completely. This is a big decision.

14 I will tell you this: While I can't tell you -- if
15 Mr. Reffitt did want to continue this trial for some limited
16 period of time, I can't guarantee a future court date, but what
17 I can tell you is if he made that decision soon, I can't be 100
18 percent confident, but I think there might be a way to try this
19 case in January. Again, there are no guarantees here, but I've
20 made an inquiry, and I think that there's a potential for that,
21 so if that's something you want to explore.

22 I'm not going to set another status hearing date right now
23 for you, Mr. Welch, to come back, but I want you to have that
24 conversation in the next week or so with him and let me know,
25 file something, reach out to Mr. Nestler, Mr. Hopkins. If

1 necessary, we can schedule a status hearing to discuss it
2 further. But I'm not going to set that now. It's hard enough
3 for everyone to get video time to do that. But I want to make
4 sure.

5 All right. So Mr. Reffitt, I know you're on mute right
6 now. Can you unmute yourself?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: All right. So I know you've heard this
9 discussion, Mr. Reffitt, and you're well aware that there is
10 additional evidence that has not been produced by the government
11 that will not be produced before your trial date on November 15,
12 and that evidence could well be helpful to you at your trial.

13 And I understand from your counsel that you are asserting
14 your right to a speedy trial and you want to proceed on
15 November 15. I just want to make sure that that is, in fact,
16 the decision you want to make, that you want to proceed knowing
17 that you will not have all of the evidence at that point. It
18 sounds like the government's provided a great deal of evidence
19 that relates specifically to you, and I'm sure you've seen that
20 with Mr. Welch. But there is other evidence that they have that
21 could end up being helpful to you at trial.

22 And your attorney is telling me that despite that, you
23 still want to go to trial on November 15th, and I want to make
24 sure as you sit here now that's your decision. Again, as I just
25 mentioned, I want your attorney to have additional conversation

1 with you about this. This is an important decision to make.

2 Do you understand that?

3 THE DEFENDANT: Yes, Your Honor, I understand.

4 THE COURT: And is it your desire to proceed on
5 November 15, knowing that you will not have all the discovery
6 that's in the government's possession?

7 THE DEFENDANT: It is my desire for the November 15th.

8 THE COURT: Is to go to trial on November 15?

9 THE DEFENDANT: Yes, ma'am. I will also consult with
10 my counsel to confirm that decision, but it is my desire.

11 THE COURT: All right. Well, do understand, if in
12 talking to Mr. Welch there are additional pretrial motions you
13 would like to file or additional challenges to the evidence
14 that's been produced to date or statements you may have made, I
15 don't know what might be out there, but you could certainly do
16 that. And having additional time would give you the chance to
17 do that, if there are other legal arguments you would like to
18 make.

19 And it also would give you additional time to review the
20 discovery, the voluminous discovery that Mr. Welch has in his
21 possession now and to plan your defense with Mr. Welch, as well
22 as receive additional discovery, in all likelihood, from the
23 government.

24 You've heard me explain. I can't at this point say if you
25 don't go on November 15 you can go on January 23 or whatever the

1 case may be, but at least right now, I think that there would be
2 a decent chance that that could happen. But I don't want to
3 create an expectation I can't meet.

4 So right now, we are, as always, tentatively confirmed for
5 November 15. So unless I hear from you, Mr. Welch, or
6 Mr. Reffitt, if you're changing your mind now, speak up. You're
7 not. All right.

8 THE DEFENDANT: That is correct. I have not had a
9 mind change. November 15 is my desired date.

10 THE COURT: Very well.

11 Mr. Nestler, are there any further colloquy questions you
12 would like me to pose to Mr. Reffitt?

13 MR. NESTLER: Likely yes, but I'm not prepared to
14 offer them to you now, Your Honor. I think that if we have
15 Mr. Welch and Mr. Reffitt agree and don't tell us they want to
16 change, we may have some other colloquy questions to suggest.

17 THE COURT: Just because it is so difficult to
18 schedule things, why don't we go ahead and set a status hearing
19 in the next week if we can, Mr. Hopkins, to give both sides an
20 opportunity to consider this issue.

21 COURTRoom DEPUTY: I will see what's available,
22 obviously dependent on which dates are good with counsel.

23 THE COURT: For me, it would be helpful if counsel
24 could be available -- and I don't know if D.C. Jail is
25 available, but 11:00 a.m. -- I'm sorry. 11:30 a.m. on the 21st,

1 would that work for counsel and, Mr. Hopkins, with D.C. Jail or
2 noon?

3 COURTROOM DEPUTY: Noon is their lunchtime. So they
4 never let us have that. 12:30, we have a case with two
5 defendants that's taking up that slot.

6 THE COURT: What about 11:30?

7 COURTROOM DEPUTY: No, 11:30 won't work.

8 THE COURT: What about 3:30 or 4:00 p.m. on that day?

9 COURTROOM DEPUTY: That won't work either, Your Honor.

10 THE COURT: What will work on that day?

11 COURTROOM DEPUTY: The earliest that we could
12 potentially get somebody in, maybe 1:30. Honestly, Your Honor,
13 that probably won't work either. Because we're taking up two
14 slots and 2:00 most likely will be taken, that won't work.

15 THE COURT: Is the 2:00 -- it's not a telephone
16 status?

17 COURTROOM DEPUTY: The 2:00 for us, yes, it is a
18 telephone status, but for D.C. Jail, one of the rooms is
19 designated for magistrate court, and the other room is taken up
20 by another judge.

21 THE COURT: And 2:30 won't work?

22 COURTROOM DEPUTY: 2:30 won't work because they build
23 in buffer time to clean the rooms in between the hearings.

24 THE COURT: Mr. Hopkins, I'm wondering --

25 COURTROOM DEPUTY: We have a 3:00 set for that day.

1 THE COURT: I know, but is it possible, do you think,
2 to change the 2:00 p.m., or that won't work?

3 COURTROOM DEPUTY: Actually, Your Honor, since that's
4 Northern Neck, we might be able to get in at --

5 THE COURT: Speak up if we're talking about times that
6 won't work for you.

7 MR. WELCH: Thursday, the 23rd is good.

8 THE COURT: Mr. Hopkins, could we work around that
9 2:00, even if it means moving it? I know that's complicated.

10 COURTROOM DEPUTY: No, unfortunately, no. 4:00 we
11 can't do either. Potentially, there's a gap between 2:30 and
12 3:00, but they're going to need to clean the rooms. So really,
13 the 21st is not a good day. Too much legal -- too much
14 logistics, and there's no way they could do it.

15 THE COURT: All right. How about late in the day on
16 October 20th?

17 MR. WELCH: That's bad on my calendar, unfortunately,
18 Your Honor.

19 THE COURT: The whole day is?

20 MR. WELCH: I have a witness in Baltimore who is
21 prepping, a government witness who is prepping for a trial.

22 THE COURT: How about 9:00 a.m. on October 25th?

23 COURTROOM DEPUTY: That won't work. Both slots are
24 taken.

25 THE COURT: All right. I tell you what. This is a

1 big puzzle, and this could take all day. So I'm going to let
2 Mr. Hopkins work on that with you all offline, but the goal
3 would be roughly in a week or so to set this for a status
4 hearing.

5 MR. NESTLER: Your Honor, if the point is to have a
6 full colloquy with Mr. Reffitt, I take Mr. Welch at his word and
7 Mr. Reffitt as well that they are persisting in the trial date.
8 We're comfortable proceeding without a status hearing so long as
9 we're not -- I don't want to use the word "sandbag," but at the
10 last second we're told the defendant has changed his mind. So
11 if I could suggest perhaps setting a deadline next week to have
12 a confirmation from the defense that this is what they want.
13 That way, we're not in the throws of trial preparation --

14 THE COURT: That's fine with me. That was my
15 inclination initially, but you suggested perhaps wanting to do
16 more of an inquiry.

17 But Mr. Welch, perhaps you can file something making clear
18 what you've explained to Mr. Reffitt, what his desires are, and
19 we can go with that.

20 MR. WELCH: I understand.

21 Your Honor, one quick scheduling thing that I personally
22 need to confirm. On the 3rd, Judge Bates has been trying to
23 schedule another matter with me, and I did consult with
24 Mr. Hopkins the other day, and I just want to confirm that you
25 anticipate our pretrial conference will just be during the

1 morning, because Judge Bates needed to schedule a Rule 11
2 hearing with me for 2:00 in the afternoon, and I wanted to make
3 sure that I could tell him that I'm available for that.

4 THE COURT: I sure hope so.

5 MR. WELCH: Thank you.

6 THE COURT: But you all should -- and Mr. Hopkins,
7 just looking at what's on the calendar, we probably should see
8 if we can get more time than what you have scheduled for that.

9 COURTROOM DEPUTY: I can do that. I just saw that you
10 have something in the middle of the day. So I didn't want to --

11 THE COURT: No, that's fine. Just get as much time as
12 we can on the 3rd.

13 But yes, Mr. Welch, that's not --

14 COURTROOM DEPUTY: That's an in-person hearing, too,
15 Your Honor.

16 THE COURT: Oh, it's in person. Great. All right.
17 So that won't be a problem with D.C. Jail.

18 So yes, Mr. Welch, I will let you go in time for, what,
19 2:00? You might not have lunch before then, but --

20 MR. WELCH: 2:00.

21 THE COURT: I will give you 15 minutes for lunch.

22 MR. WELCH: You're too generous.

23 THE COURT: No, I'm kidding. The more organized you
24 all are, the more seamless and the quicker that will go.

25 MR. WELCH: Okay.

1 MR. NESTLER: Understood, Judge.

2 And I guess if Your Honor wanted to give Mr. Welch a
3 deadline, we just want to make sure that if we're going -- I
4 take it Your Honor -- is Your Honor denying the motion, or is
5 Your Honor holding it in abeyance, just so we understand?

6 THE COURT: Well, at this time I'm denying the
7 government's motion. If the defense wants to continue this
8 matter, then I obviously will entertain that.

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

10 THE COURT: So Mr. Welch, I want to give you the time
11 you need. In the next week, no later than October 22nd, can you
12 file something, and if you know for certain before, file it
13 sooner so that resources are being expended in the proper way.

14 MR. WELCH: Understood.

15 THE COURT: All right. So we will not set a status
16 hearing, but next time I will see you is for the pretrial on
17 November 3rd.

18 In addition, I believe we reserved a second pretrial. Can
19 you all remind me of that date? I want to make sure we have it
20 on the calendar.

21 MR. NESTLER: Yes, November 9th. We also have that
22 one in person, Judge, at 10:00 a.m. I have it on my calendar
23 for November 9th at 10:00 a.m.

24 COURTROOM DEPUTY: That is correct.

25 THE COURT: Mr. Hopkins, we might need to move that

1 11:00 matter.

2 All right. So any effort to --

3 COURTROOM DEPUTY: I'm sorry, Your Honor. Forgive me.

4 Do you mean the 12:00 matter? I see something at 12:00.

5 THE COURT: Yes. Sorry.

6 Mr. Nestler, I do appreciate, I can tell the government is
7 making efforts to try to confer and work collaboratively with
8 Mr. Welch. So I encourage that. I appreciate it. And to the
9 extent issues percolate, you all file those motions, please.

10 MR. NESTLER: Yes, Judge.

11 THE COURT: So we can resolve as much as possible at
12 that initial pretrial hearing.

13 MR. WELCH: Understood. The only thing that I can
14 think of that would prompt something like that, Your Honor, is
15 if the government discloses something that I don't have and it
16 generates some sort of motion. That is why I would anticipate
17 then suddenly filing a motion in limine.

18 But looking at what I have had disclosed to me thus far,
19 considering the government's case and the time in which we have
20 to try it, I have considered the issue of motions in limine to
21 this point, and I have not filed any because I did not see
22 any --

23 THE COURT: Understood. It sounds like, based on what
24 Mr. Nestler has said, there aren't any surprises coming.

25 Right, Mr. Nestler?

1 MR. NESTLER: No surprises, Judge. We are informed by
2 our discovery team that there will be another large, voluminous
3 production coming in the next couple of days, and I'm also
4 working to make sure Mr. Welch gets access to the evidence.com.

5 THE COURT: All right. It probably would be helpful
6 to him to the extent you can talk to someone who is familiar
7 with the content of that.

8 MR. NESTLER: And I will put it here on the record,
9 and we told this to Mr. Welch. If he wants us to help him walk
10 through any evidence and point out things that we think are
11 important, we are always happy to do so. I think we've actually
12 worked quite well together up to this point.

13 THE COURT: That's great to hear. I encourage you to
14 keep that up.

15 Thank you. And we will be back on November 3rd.

16 Anything else, Mr. Welch?

17 MR. WELCH: Yes. If Mr. Hopkins could put my client
18 and me in a breakout room for a little bit, we would appreciate
19 it.

20 THE COURT: Of course.

21 COURTROOM DEPUTY: I have it ready to go as soon as we
22 conclude the hearing.

23 MR. WELCH: Thank you.

24 THE COURT: All right. Thank you.

25 (Proceedings adjourned at 12:00 p.m.)

1 CERTIFICATE OF OFFICIAL COURT REPORTER
23 I, Sara A. Wick, certify that the foregoing is a
4 correct transcript from the record of proceedings in the
5 above-entitled matter.6
7 Please Note: This hearing occurred during the
8 COVID-19 pandemic and is, therefore, subject to the
9 technological limitations of court reporting remotely.10
11
12 /s/ Sara A. WickOctober 24, 2021

13 SIGNATURE OF COURT REPORTER

DATE

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