

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, .
Plaintiff, . Case Number 21-cr-32
vs. .
GUY WESLEY REFFITT, . February 18, 2022
Defendant. . 12:42 p.m.
- - - - -

TRANSCRIPT OF CONTINUED PRETRIAL CONFERENCE AND
STATUS CONFERENCE
BEFORE THE HONORABLE DABNEY L. FRIEDRICH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States: JEFFREY NESTLER, AUSA
RISA BERKOWER, AUSA
United States Attorney's Office
555 Fourth Street Northwest
Washington, D.C. 20530

For the Defendant: WILLIAM WELCH, III, ESQ.
5305 Village Center Drive
Suite 142
Columbia, Maryland 21044

Official Court Reporter: SARA A. WICK, RPR, CRR
333 Constitution Avenue Northwest
U.S. Courthouse, Room 4704-B
Washington, D.C. 20001
202-354-3284

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

P R O C E E D I N G S

(All participants present via telephone or video conference.)

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

Representing Mr. Reffitt, we have Mr. William Welch, and representing the United States, we have Mr. Jeffrey Nestler and Ms. Risa Berkower. And Mr. Reffitt is appearing by way of video.

THE COURT: All right. Good afternoon, everyone. I'm appearing by telephone because I can't get on the network at the moment. My apologies.

We do have a lot of issues to cover today. I think I want to start with the Court's proposed modifications to the 1512 jury instructions, and after that, we can move on to the witnesses and exhibits. I think we also have voir dire and then some practical issues about trial.

So starting with the substantive instruction for the 1512(c)(2) offense, I will give both of you a chance to provide feedback.

And by the way, if anyone is having difficulty hearing me, please speak up. Mr. Hopkins, are you hearing me clearly?

COURTROOM DEPUTY: Very clearly, Your Honor.

THE COURT: Okay. Am I too loud?

COURTROOM DEPUTY: Not at all. You're just right.

1 THE COURT: All right. Good. Let me know.

2 So the instruction that I just posted expands the elements
3 section of the instruction by pulling elements out of the
4 definition of "corruptly" that the government had proposed. So
5 both the knowledge and the intent requirement have been added to
6 the elements section.

7 And on those issues, I do agree with the government that
8 the word "specific" before "intent" is unnecessary. So I've
9 removed it.

10 With respect to knowingly, I pulled this out of the
11 "official proceeding" definition language, that the government
12 must prove that the defendant was aware that the natural and
13 probable effect of his conduct was to obstruct the official
14 proceeding, and I included that in the knowingly element.

15 Are there any issues from either side with respect to those
16 changes? Mr. Nestler?

17 MR. NESTLER: Yes, Your Honor, a couple of small
18 clarifications. I had sent an e-mail to chambers last night
19 just to highlight this so the Court could see it in writing. I
20 don't know if Your Honor had a chance to look at that yet.

21 THE COURT: I have not.

22 MR. NESTLER: Okay. A couple of small edits, but in
23 general, the government does not have any objection to this.
24 The first edit would be to swap -- place the fourth element
25 first. The way the Court proposed it, it had three mens rea

1 elements and then the actus reus element.

2 THE COURT: Let's start just with these two, on the
3 knowingly. Let's just do this in piecemeal rather than all of
4 your comments together.

5 MR. NESTLER: Sure.

6 THE COURT: The language that I'm proposing, I know
7 you agree with eliminating the word "specific" before "intent."

8 The definition of "knowingly," which is pulled out of the
9 "official proceeding" definition and added to the elements, any
10 objection from the government on that change?

11 MR. NESTLER: Just to one word, and the word
12 being "was" should be "would be" because we're putting ourselves
13 in the defendant's shoes at the time he committed the actions.
14 So it should read that "the defendant acted knowingly with
15 awareness that the natural and probable effect of his conduct
16 would be to obstruct or impede the official proceeding" rather
17 than "was to obstruct."

18 Otherwise, the government has no objection.

19 THE COURT: All right. Mr. Welch?

20 MR. WELCH: Your Honor, I don't object to that change.

21 THE COURT: Okay. All right. So moving on to what
22 Mr. Nestler started to talk about, which is the "corruptly"
23 definition, so the instruction reads, "A person acts corruptly
24 by using unlawful means or by acting with an unlawful purpose or
25 both."

1 I fixed the problem in the Court's initial proposal that
2 required an improper purpose in all cases. That was not my
3 intention. As I explained in the *Sandlin* opinion, a defendant
4 can act corruptly by using corrupt means or by having a corrupt
5 purpose. So the latest proposal corrects that discrepancy.

6 I've also replaced the "unlawful or lawful end"
7 with "unlawful purpose" in response to the government's concern
8 about the jury being confused.

9 I'm still not comfortable with the government's proposal
10 of "wrongful purpose." I'm going to stick with unlawful and be
11 consistent, unlawful means or unlawful purpose. I think this
12 formulation follows naturally from the definition of "wrongful,"
13 which is defined as "contrary to law, statute, or established
14 rule." And that was quoted in *Sandlin*, I think. Improper and
15 wrongful are too vague.

16 Mr. Nestler, government's concerns with those changes?

17 MR. NESTLER: Briefly, Your Honor.

18 The Court had changed "have an unlawful purpose" to "act
19 with an unlawful purpose." And we believe what is more
20 appropriate here, because we're talking about the defendant's
21 mental state, is to talk about the defendant having the unlawful
22 purpose rather than acting with the unlawful purpose.

23 Of course, as I noted, we would prefer the
24 language "wrongful or improper," because what's inside of
25 someone's head is not in itself unlawful. That which is inside

1 of someone's head can be improper or wrongful. That's why we
2 had formulated it that way. We don't think that unlawful
3 necessarily fits onto what someone's intent was, the reason that
4 they're taking a certain action.

5 But we understand the Court's point about wanting to use
6 unlawful, but that's why we suggested using wrongful or improper
7 or both even.

8 THE COURT: Okay. Mr. Nestler, I've -- as we've
9 discussed in the past, it seems to me like the heart of the
10 government's case is the alleged unlawful means that Mr. Reffitt
11 used or engaged in to obstruct the proceeding. I think in
12 briefing, I think the government suggested that it will prove at
13 trial that Mr. Reffitt, if he didn't assault Capitol police
14 officers, he attempted to assault or that he aided and abetted
15 others who assaulted Capitol police officers.

16 Is that correct? That's the government's means theory?

17 MR. NESTLER: Generally, yes.

18 THE COURT: Okay. And help me understand your
19 purpose. Whether it's wrongful or improper purpose as you want
20 or unlawful purpose as I'm inclined to instruct the jury, help
21 me understand, what is the purpose?

22 Previously, you've said that Mr. Reffitt -- I think you
23 gave three ways that he violated 1512(c)(2), and you said one
24 was stopping the certification proceeding from occurring in a
25 timely fashion, you said by impeding lawmakers from

1 participating in the certification proceeding, and then you said
2 by preventing lawmakers from considering ballots and other
3 documents.

4 Is that the government's purpose theory?

5 MR. NESTLER: That is the -- that is the means theory.
6 The purpose is why the defendant was taking the actions he was
7 taking. And so the reason that he was taking the actions he was
8 taking, we believe, was corrupt and that it was wrongful and
9 improper or morally debased.

10 THE COURT: But how -- divorced from any means, what
11 does that mean? That you just have a corrupt thought with no
12 action? That's -- that can't -- it seems like you can violate
13 1512(c)(2) by either corrupt means or corrupt purpose or both.
14 So purpose could stand alone. And how can you say someone's
15 obstructing with just this intent in the head that has no
16 action?

17 MR. NESTLER: Well, they have to have the -- they have
18 to take an action. There's certainly an actus reus in the
19 element. The corruptly is the mens rea element. We're talking
20 about the definition of one of the elements, and that's the mens
21 rea element. We're not saying that somebody's thought is itself
22 illegal. We're saying that that thought, that mens rea
23 requirement coupled with the action is what violates the
24 statute.

25 THE COURT: And so the act here would be the attempted

1 or aiding and abetting the assault?

2 MR. NESTLER: Yes, and the interference with police
3 officers. That is the act that's been taken. So if the
4 defendant is taking that act for a corrupt purpose or morally
5 debased purpose or wrongful or improper purpose, that would
6 violate the statute.

7 If the defendant is taking that action for a purpose that
8 is not corrupt or wrongful or morally debased, then arguably he
9 would not have been violating the statutes. He would not be
10 acting corruptly. He could be interfering with law enforcement
11 officers, but doing so for a reason within his own head that was
12 not morally debased or corrupt.

13 THE COURT: But how is this distinct -- this
14 definition of "corrupt," how is it distinct from a defendant's
15 specific intent to impede or obstruct a proceeding? What's --
16 how is that anything more than the specific intent you have to
17 prove, that element, to have -- to be guilty of an obstruction
18 offense? What's more -- what extra is added to that?

19 MR. NESTLER: Not much, Judge. That is why we had the
20 defendant acting with the intent to obstruct or impede within
21 the definition of "corruptly."

22 THE COURT: But the cases, *Silverman* and *Norris*, said
23 corruptly is doing extra work; it's not specific intent to
24 impede or obstruct. And *Andersen* suggested, too. So corruptly
25 has to be something more than just specific intent to impede or

1 obstruct. So what is it?

2 The way you describe it, I don't -- I don't understand what
3 that corrupt intent is that's separate from the intent to
4 obstruct the proceeding.

5 MR. NESTLER: In this situation, under 1512(c)(2), we
6 believe it's the same thing.

7 THE COURT: But doesn't the case law quite clearly say
8 you can't read corrupt out of the statute?

9 MR. NESTLER: We're not reading corrupt out of the
10 statute when the defendant is intending to obstruct or impede
11 the official proceeding. He has to be acting corruptly. And
12 that means he has to be acting wrongfully and/or morally debased
13 or unlawfully. He has to be doing something else. That's where
14 the corrupt has the extra language. That's why we're saying
15 that the attempt to obstruct or impede the proceeding is part of
16 the definition of "corrupt." We're not saying it's the
17 entire --

18 THE COURT: I read the cases to mean those are two
19 separate things. And in this case it's very hard for me to see
20 how the government can proceed on a theory of unlawful purpose.
21 I guess the unlawful means, but it's -- if that can stand alone
22 and a jury can find either unlawful means or unlawful purpose, I
23 don't understand what your -- what extra work corruptly is doing
24 the way you're describing it here.

25 MR. NESTLER: The unlawful purpose is one of the ways

1 to prove that the defendant acted corruptly.

2 THE COURT: Understood. But I don't see how it's
3 distinct from acting with a specific intent to impede the way
4 you've described it.

5 MR. NESTLER: Because the intent to impede needs to --
6 there are reasons why and there are positions people can take to
7 impede or obstruct a proceeding that are not corrupt. That goes
8 to the government's example paragraph.

9 THE COURT: But your means here, you know, if proven,
10 are clearly unlawful.

11 MR. NESTLER: Correct.

12 THE COURT: Why do you need -- from the get-go, I
13 don't understand why the government's pressing, and I think it's
14 potentially very confusing to the jury. It seems to me if you
15 can't prove the unlawful means in this case, you will lose this
16 case, and why you're pressing on this unlawful purpose as a
17 stand-alone basis to prove the defendant acted corruptly, I
18 don't understand. It seems like you rise and fall on whether
19 you prove -- well, I don't want to say that. At a minimum, you
20 need to prove the attempt or the aiding and abetting the
21 assaults, or you're not going to prove the obstruction.

22 So I just -- I wonder, one, I'm not sure I buy your
23 interpretation of unlawful or wrongful or immoral, whatever,
24 improper purpose, however you want to define it, but I'm
25 sticking with unlawful purpose here. And in this case, in this

1 context, I think they all merge into means, and it's potentially
2 confusing to the jury.

3 And to the extent there's something independent that you've
4 expressed here separate from unlawful means that would support a
5 finding of, you know, the defendant acting corruptly, I'm just
6 not sure it's a viable theory. I'm just warning you now.

7 And I will give this more thought, but it seems like all of
8 this is, you know, getting conflated into the means.

9 MR. NESTLER: Understood.

10 THE COURT: But the government, your position is that
11 the Court should instruct on both unlawful means and unlawful
12 purpose? That's what -- the government wants to proceed on two
13 theories?

14 MR. NESTLER: Yes. A person can act corruptly by
15 unlawful means or an unlawful purpose or both.

16 THE COURT: All right. I'm not sure I'm following. I
17 want to think about it more. Openings, of course, is not a time
18 for arguing theories of the case, but you should avoid any
19 reference to the unlawful purpose theory in the opening. I may
20 need to see how the evidence comes in. As my opinion in *Sandlin*
21 makes clear, the unlawful means theory, at least where the
22 conduct is inherently criminal, survives. Beyond that, I
23 haven't ruled. So just keep that in mind as you're trying the
24 case.

25 MR. NESTLER: Understood, Your Honor.

1 THE COURT: Okay. All right. So Mr. Welch, on these
2 issues that I've discussed with Mr. Nestler, anything you would
3 like me to consider?

4 MR. NESTLER: Yes, please, Your Honor, and I will be
5 brief about this, because I think you already know what they are
6 and you've already addressed them.

7 But in terms of the third element that the defendant -- it
8 says the defendant acted corruptly. There is no reference in
9 that to knowingly and dishonestly or with a wrongful purpose
10 obstructing, influencing, or impeding the due administration of
11 justice. It's our position that that needs to be a part of the
12 third element.

13 In addition, we maintain that to act corruptly means to act
14 with an improper purpose and to engage in conduct knowingly and
15 dishonestly with the intent to obstruct, impede, or influence
16 the due administration of justice. Corruptly requires the
17 government to prove beyond a reasonable doubt that the defendant
18 committed an obstructive act with the intent to obtain an
19 unlawful advantage for himself or an associate and that he
20 influenced another person to violate their legal duty.

21 So that's our position.

22 THE COURT: Yeah, understood, Mr. Welch. And as I've
23 explained before, your proposals continue to contradict my prior
24 rulings. I appreciate you want to preserve your issues for
25 appeal. But as I said at the last hearing and as I ruled in

1 *Sandlin*, I don't believe to violate 1512(c) (2) a defendant need
2 have intended to obstruct, impede, or influence the due
3 administration of justice. A defendant also does not need to
4 have influenced another to violate his or her legal duty to fall
5 under Section 1512(c) (2).

6 I know you're -- well, you're probably going to get to the
7 motive and the acting to advantage oneself or another. But as
8 I've said before, too, I think that's often the motive for
9 someone to act corruptly but not always. And so I think that
10 requiring the government to prove the defendant acted either
11 with unlawful means or purpose, as I've explained -- well,
12 certainly, unlawful means will be adequate, and unlawful purpose
13 in this context, we will have to see. But as you know, I've
14 rejected those arguments.

15 But nothing more particular with respect to the specifics
16 of the latest iteration of this instruction that you would like
17 to add beyond the comments that you've already made?

18 MR. WELCH: Actually, there is one more. In the final
19 sentence which is in the example that the Court provides, the
20 second example, "In contrast, an individual who obstructs or
21 impedes a court proceeding by bribing a witness to refuse to
22 testify in that proceeding," that I don't have a problem with,
23 but the following phrase, "or by engaging in other independently
24 unlawful conduct," that would probably be vague to the jury. So
25 I would ask the Court to delete that phrase from the second

1 example.

2 THE COURT: All right. I'll think about it.

3 What was your position, Mr. Welch -- I know initially, I
4 think, you were opposed to examples. Am I correct? Am I
5 remembering correctly?

6 MR. WELCH: Yes.

7 THE COURT: Are you still opposed to examples, or do
8 you like these examples?

9 MR. WELCH: We're okay with these examples.

10 THE COURT: Okay. Well, these -- I did change the
11 examples from those that the government had proposed because I
12 thought they were far too close to the alleged facts of this
13 case, particularly the reference to acting with violence. And I
14 was concerned that a jury might interpret them as an instruction
15 about how to decide this case rather than just an example.

16 So that's why I took this out of Congress and referred to
17 conduct in the context of a court proceeding. It could
18 constitute obstruction. These are also examples that are well
19 established in the case law in *Arthur Andersen* and *Khatami* case.
20 The Ninth Circuit refers to bribing someone.

21 So Mr. Welch, you like them. Mr. Nestler, what's your view
22 on these examples?

23 MR. NESTLER: The government believes that the
24 examples will make more sense to the jury if they were in the
25 congressional context rather than the court proceeding context.

1 And we drew our examples from the case law as well.

2 THE COURT: This broad reference to acting with
3 violence, what does that mean? That's not tied to specific
4 offenses. It's --

5 MR. NESTLER: It's another means of independently
6 unlawful conduct, another example of independently unlawful
7 conduct.

8 THE COURT: Well, again, I just think it's awfully
9 close to the facts of this case, and I'm concerned that the jury
10 would take it as a hint from the Court on how to decide the
11 case. So for that reason, I'm not inclined to adopt the
12 congressional examples.

13 But if not, Mr. Nestler, is it the government's preference
14 that I not have any examples at all, or do you still think that
15 the examples would be helpful to the jury in figuring out these
16 concepts?

17 MR. NESTLER: It's important to the government to have
18 the phrase "engaging in other independently unlawful conduct,"
19 which was cited by the Court in *Sandlin*. And so with that
20 phrase, the government sees some utility in having this example
21 paragraph. So that's where we would come down on this.

22 THE COURT: So absent that, you would prefer the
23 examples out?

24 And it is consistent with my opinion in *Sandlin*. So I'm
25 inclined to keep it in. But I will give this some thought,

1 Mr. Welch.

2 But if this were to come out, Mr. Nestler, would the
3 government's view be to not include the examples?

4 MR. NESTLER: Correct.

5 THE COURT: Okay. And Mr. Welch, is your view that if
6 it stays in I should not include the examples?

7 MR. WELCH: No. We would just like it taken out.

8 THE COURT: Okay. But if it stays in, you still
9 prefer the instruction with the example than without any at all?

10 MR. WELCH: Correct.

11 THE COURT: Okay. All right. So turning next to the
12 "official proceeding" definition, as I understand it, both
13 parties agree that the Court can instruct the jury as a matter
14 of law based on the Court's holding in *Sandlin* that Congress's
15 joint session constitutes an official proceeding.

16 Am I correct, Mr. Nestler?

17 MR. NESTLER: That's the government's position.

18 THE COURT: And Mr. Welch?

19 MR. WELCH: Although we disagree with the definition,
20 we believe that the Court must instruct the jury on the law.

21 THE COURT: Okay. All right. Well, I agree with both
22 sides it's appropriate for the Court to do so, and I will
23 instruct consistent with my ruling in *Sandlin*.

24 As requested by the parties, even though I don't know that
25 it's necessary here but since both sides want it, I'm going to

1 give it. I've modified the language to make clear that an
2 official proceeding need not be pending or about to be
3 instituted at the time of the offense, but that if the official
4 proceeding was not pending or about to be instituted, the
5 government must prove beyond a reasonable doubt that the
6 proceeding was reasonably foreseeable to the defendant.

7 And as I mentioned earlier, I moved the knowledge piece up
8 into the elements that we've already discussed.

9 So are both sides okay with the official proceeding
10 language as it's now written?

11 MR. NESTLER: Yes, Your Honor.

12 THE COURT: Mr. Welch?

13 MR. WELCH: Other than maintaining our disagreement
14 and our objection that certification of the Electoral College
15 vote does not qualify as an official proceeding, I'm not
16 objecting to this specific language beyond that.

17 THE COURT: Okay. All right.

18 So moving on to the parties' other substantive -- before I
19 do, have we covered 1512(c), all of your concerns and issues
20 with respect to the Court's proposed instruction? Mr. Nestler?

21 MR. NESTLER: A couple of small edits, Judge.

22 THE COURT: Okay.

23 MR. NESTLER: And that would just be -- they're mostly
24 stylistic, but first is, the Court has four elements.

25 THE COURT: Yes.

1 MR. NESTLER: The government believes that the first
2 element should be the actus reus, and then we should list the
3 mens rea. So we should start with "first, the defendant
4 attempted to or did obstruct an official proceeding" and then go
5 to 3.

6 THE COURT: Any objection to that, Mr. Welch?

7 MR. WELCH: No.

8 THE COURT: So I will make that change.

9 MR. NESTLER: The second is that in what's currently
10 the fourth element, it says "any official proceeding." That
11 should be "an official proceeding."

12 THE COURT: Yes. Okay.

13 MR. NESTLER: And then the last change would be, in
14 the current first element, "the defendant acted with the intent
15 to obstruct," we believe that should be more naturally read
16 as "the defendant intended to obstruct" to make clear this is a
17 mens rea element, not an actus reus element.

18 THE COURT: Any objection, Mr. Welch?

19 MR. WELCH: I think it needs to stay "acted with the
20 intent," because as we've been talking about before, there's
21 this whole idea about some vague, unlawful purpose or unlawful
22 means. And it's not enough to have one without the other. So I
23 would think that you'd have to show the actus reus, and then you
24 have to show the mens rea in conjunction with it.

25 THE COURT: All right. I'm going to think about that

1 one.

2 Anything else, Mr. Nestler?

3 MR. NESTLER: No, Your Honor.

4 THE COURT: Mr. Welch, any additional points with
5 respect to either the elements or the definitions of the
6 1512(c)(2) offense?

7 MR. WELCH: Nothing further, Your Honor.

8 THE COURT: All right. So moving on to the parties'
9 jointly proposed substantive instructions relating to the other
10 counts.

11 So yes, the Court's aware that *Arrington's* requirement that
12 the object must be capable of causing serious bodily injury or
13 death to another person refers only to those weapons that are
14 not inherently deadly. And certainly, a gun count is inherently
15 a deadly weapon.

16 The problem with the parties' initial proposed instruction
17 is that it did not reference a firearm, nor did it instruct that
18 a firearm qualifies as an inherently deadly weapon and, thus,
19 that *Arrington's* extra requirement was unnecessary.

20 The initial instruction also didn't say that only an
21 inherently deadly object need not actually be capable of
22 inflicting harm or injury. So at least as initially written,
23 the proposed instruction would have allowed the jury to find
24 that an object that's not inherently deadly qualifies as a
25 deadly or dangerous weapon, even if it is not capable of

1 inflicting harm or injury, and that would be inconsistent with
2 *Arrington*.

3 So I understand now that you all want to include "or
4 firearm" in this definition, because the government intends to
5 prove at trial that Mr. Reffitt carried a semiautomatic handgun.
6 But this leads to the question of -- and that all makes sense to
7 me, but it leads to the question of, if that's what the
8 government intends to prove, what is the point of including an
9 instruction on deadly or dangerous weapon at all? Doesn't this
10 have the potential to confuse the jury, Mr. Nestler, if the --
11 if it's a firearm, why not just stick with the firearm language?
12 Why overly complicate this?

13 MR. NESTLER: The title of the statute, Your Honor,
14 is "deadly or dangerous weapon" for 18 U.S.C. 1752(b) (1) (A), and
15 the government believes it's more appropriate to stick with the
16 statutory language. So that's why we proposed it in that
17 fashion.

18 THE COURT: Okay. Well, if both parties want to
19 include both the firearm and the deadly or dangerous weapon,
20 then the Court's going to need to instruct the jury that a
21 firearm qualifies as an inherently deadly weapon and, thus,
22 there's no need for proof that the object is capable of
23 inflicting harm or injury, and your latest iteration does not do
24 that.

25 MR. NESTLER: Understood, Your Honor.

1 THE COURT: So Mr. Welch, do you object to adding that
2 language? I don't think there's any dispute that a firearm
3 qualifies as an inherently deadly weapon, but that's still the
4 gap I see in this proposed language.

5 MR. WELCH: No objection, Your Honor.

6 THE COURT: Okay. All right. I will ask you all to
7 agree on some language. It's just easier for me. And then if I
8 need to change it, I will let you know. But go ahead and work
9 collaboratively on this to make that change.

10 All right. The instruction number 20, the elements
11 entering or remaining in a restricted building or grounds with a
12 deadly or dangerous weapon and the use of the term "vice
13 president elect," the Court is going to grant the government's
14 unopposed motion to strike references in Count 3 of the second
15 superseding indictment to the vice president elect. The
16 indictment currently reads that "Mr. Reffitt did knowingly enter
17 and remain in a restricted building or grounds where the vice
18 president and vice president elect were temporarily visiting.
19 Section 1752 prohibits unlawful entry into a restricted building
20 or grounds, which are defined as any posted, cordoned off, or
21 otherwise restricted area of a building or ground where the
22 president or other person protected by the Secret Service is or
23 will be temporarily visiting."

24 Both the vice president and the vice president elect
25 qualify as another person protected by the Secret Service. So a

1 defendant could violate the statute either by the vice president
2 or the vice president elect being present in the building or on
3 the grounds. So the indictment here is charging the commission
4 of any one offense in several ways. That's *U.S. v. Miller*,
5 471 U.S. at 136. The vice president's presence alone is
6 sufficient to violate the statute, and it's immaterial that the
7 vice president elect, as the government now admits, was not at
8 the Capitol. Therefore, the withdrawal from the jury's
9 consideration of the other alleged method of committing a
10 violation of the statute does not constitute a forbidden
11 amendment of the indictment. And again, that's *Miller* at 145.

12 Other courts have permitted the striking of certain
13 language in an indictment when the prosecution is simply
14 narrowing the scope of the charges and adding nothing new to the
15 grand jury's indictment, thus constituting no impermissible
16 broadening. See *United States v. Quinn*, 401 F.Supp. 2d at 90, a
17 D.D.C. case, quoting *U.S. v. Holland*, 117 F.3d at 595, D.C.
18 Circuit case. See also *Poindexter*, 719 F.Supp. at 9.

19 So with the consent of the defendant, the Court will amend
20 the charging language in Count 3 from "where the vice president
21 and vice president elect were temporarily visiting" to "where
22 the vice president was temporarily visiting." And to avoid
23 confusing the jury, the Court will not instruct the jury that
24 the list of Secret Service protectees includes the vice
25 president elect.

1 All right. Any need to address anything more with respect
2 to that instruction? Mr. Nestler?

3 MR. NESTLER: No, Your Honor.

4 THE COURT: Mr. Welch?

5 MR. WELCH: No, Your Honor.

6 THE COURT: Okay. And the "will be temporarily
7 visiting" point, given, Mr. Nestler, you've represented that the
8 vice president was on the Capitol grounds at the same time as
9 Mr. Reffitt. I just don't see why the government would object
10 to removing "or will be temporarily visiting" from the jury
11 instruction. The indictment says only that the vice president
12 was temporarily visiting the restricted building or grounds when
13 Mr. Reffitt entered, and the government hasn't moved to amend
14 the indictment to say where the vice president was or would be
15 temporarily visiting. I'm not sure that you could.

16 So why isn't the answer here just to have the government
17 prove that the vice president was on the Capitol grounds at the
18 same time as Mr. Reffitt?

19 MR. NESTLER: We intend to do that, Your Honor. The
20 definition for the term "restricted building or grounds" is
21 where that phrase comes from, so not the indictment itself. But
22 the statute defines "restricted building or grounds" as a place
23 where, quote, a person protected by the Secret Service is or
24 will be visiting, temporarily visiting.

25 THE COURT: I know. But your indictment and what the

1 grand jury found doesn't say that.

2 MR. NESTLER: That's correct, Your Honor.

3 THE COURT: So I'm not inclined to do it. If both
4 were in there, I would agree with you, but they're not.

5 MR. NESTLER: Understood, Your Honor.

6 THE COURT: Mr. Welch, anything to add there?

7 MR. WELCH: No, Your Honor.

8 THE COURT: So on the proposed instruction number 19,
9 transporting a firearm in furtherance of a civil disorder, the
10 use of the term "commerce," the parties are agreeing to omit the
11 phrase "or travel" for the definition of "commerce" for purposes
12 of Section 231 of Title 18.

13 Mr. Nestler, by my question I don't want you to think --
14 I'm inclined to include the term because I question whether the
15 jury will be able to understand whether a firearm that just
16 crosses state lines qualifies as being transported in commerce
17 under the statute. But I want authority for this. And an
18 out-of-circuit district court's jury instruction in a case where
19 the Court adopted the government's proposal without any
20 authority for the proposition doesn't give me a lot of
21 confidence in it.

22 Do you not have any authority that would support including
23 the travel in the definition, which again I would be inclined to
24 do? I would ask that you all provide it to the Court. Do you
25 just not have anything to support that? Do you think that's not

1 the law?

2 MR. NESTLER: We do think that the word "travel" would
3 be appropriately included here, Judge. The point here is that
4 the commerce was affecting the civil -- sorry, that the civil
5 disorder was affecting commerce. And that's what the definition
6 of "commerce" means. So we're not having to prove the -- we're
7 not having to prove travel.

8 And there are plenty of definitions of the word "commerce"
9 within the U.S. Code, some with reference to travel. Usually
10 the phrase is "travel in interstate commerce." So they go hand
11 in hand. So 18 U.S.C. 231 does not have that phrase of "travel
12 in interstate commerce."

13 The only --

14 THE COURT: You all confer. I would be inclined to
15 include it. I just want you all to give some authority beyond
16 the Southern District of Alabama case. All right? So I will
17 leave that to you.

18 MR. NESTLER: Sure.

19 THE COURT: All right. But on this instruction, I
20 thought that this was -- I thought the purpose of this
21 instruction was about the gun being transported in commerce, not
22 that the civil disorder was disrupting commerce.

23 MR. NESTLER: Court's brief indulgence. Let me just
24 pull up my -- you're correct, Judge. This is for the definition
25 for the transporting the firearms charge at 231(a)(2), not for

1 231(a)(3), which also has a definition of "commerce" drawn
2 from --

3 THE COURT: Then I think this is potentially confusing
4 for the jury. If the law does support including "travel," I
5 need authority, and I would be inclined to do it, particularly
6 given that the parties have suggested that the Court do that.
7 All right? So Mr. Nestler and Mr. Welch, if you can provide
8 authority that would support that, I will consider keeping it
9 in.

10 So moving on to the defense's proposed Red Book
11 instructions, the defense is suggesting that the Court instruct
12 the jury on the Red Book instructions relating to 1.201,
13 photographs of the defendant, 2.204, testimony of immunized
14 witness, 2.205, an informer's testimony, 2.211, refusal of a
15 witness to answer questions, 2.212, indication of Fifth
16 Amendment privilege, 2.216, a prior inconsistent statement of a
17 witness, 2.3, missing witness or other evidence, and 2.305, a
18 statement of the defendant as substantive evidence.

19 Obviously, some of these need to wait for trial, but let's
20 talk about the ones that we can talk about now.

21 Mr. Nestler, you oppose all of these or just some of these?

22 MR. NESTLER: We oppose all of them. I mean, the ones
23 that may be applicable, if a witness invokes their Fifth
24 Amendment right or provides an consistent statement while
25 testifying, of course, we won't oppose them, but we will have to

1 wait to see what happens.

2 The remainder, we oppose.

3 THE COURT: Sorry. Let me -- sorry to interrupt. The
4 statement of a defendant is substantive evidence, you oppose
5 that?

6 MR. NESTLER: Yes.

7 THE COURT: And the missing witness or other evidence,
8 you oppose that?

9 MR. NESTLER: Yes.

10 THE COURT: Okay. I know your position on the
11 immunized witness because that's covered by the general
12 credibility instruction. I'm going to reserve judgment on this,
13 but Mr. Welch, I am inclined to agree with the government here,
14 but tell me, Mr. Welch, what your objection to the general
15 credibility instruction is, given the notes attached to these
16 instructions.

17 MR. WELCH: Well, the problem here is that the
18 immunized witness is different from the other witnesses who will
19 be testifying. And while the general credibility might apply to
20 all of them, he now has a motive, because he was under
21 investigation himself for all of the same offenses and perhaps
22 an additional offense, and his words cannot hurt him. When he
23 gets on that witness stand, the jury needs to be aware that what
24 he says, even though he's going to admit to crimes himself, that
25 he will never be charged with crimes as a result of his words,

1 even though he's going to confess to them. And so he now has a
2 motive to protect himself, to shade his version of the story,
3 shade the truth to help himself.

4 THE COURT: I understand all of that, but I assume
5 that you're going to explore this fully on cross-examination and
6 make the argument in your closing. In instances where that
7 occurs, I think courts have said there's not necessarily a need
8 for an additional instruction on top of the general credibility
9 instruction.

10 So what makes this case different?

11 MR. WELCH: I think courts have said that in
12 situations where the people were also actually charged as
13 accomplices; where in this situation, the immunized witness has
14 not been charged.

15 So while the government and I have been going back and
16 forth about, well, you know, is he an unindicted co-conspirator
17 in this or not, and they claim he's not, but I'm looking at it
18 and saying, you know, he's as involved allegedly as my client
19 is, and yet, he faces no consequences. And his testimony is
20 basically geared to please the government so that he avoids ever
21 facing consequences.

22 That's different than every other witness in this case, and
23 simply saying well, it's a general credibility just like all the
24 other witnesses, like Agent Hightower or, you know, Jackson
25 Reffitt or anyone else, is just, you know, not accurate, and a

1 jury needs to be aware that they need to be especially, you
2 know, cautious when considering the immunized witness's
3 testimony.

4 THE COURT: So Mr. Nestler, why is this witness not a
5 co-conspirator?

6 MR. NESTLER: The witness is not charged as a
7 co-conspirator, and we don't intend to admit any evidence that
8 this witness conspired with the defendant. This witness heard
9 the defendant's own statements and committed his own -- this
10 witness's own actions by bringing firearms into the District of
11 Columbia but did not actually act in concert with the defendant
12 when the defendant was committing the defendant's crimes.

13 THE COURT: All right. I think I'm going to reserve
14 and learn more about the nature of this. This would be an
15 instruction at the end; right, Mr. Welch?

16 MR. WELCH: Yes, it would be a final instruction.

17 THE COURT: All right. So I'll reserve on that.

18 What about the issue of the informer testimony? Is this
19 the same witness that you're making the same point, or is this
20 another witness?

21 MR. WELCH: No, it's another witness, Your Honor.

22 THE COURT: Okay. And if I understand the
23 government's position on this, this other witness is not
24 actually an informer, informer as a legal term, and this witness
25 does not fit the definition of that.

1 Do you disagree, Mr. Welch?

2 MR. WELCH: Your Honor, I think it is something that
3 might become apparent at trial. You never know what a witness
4 is going to end up saying. I would tend to agree that this is
5 not -- the witness I'm thinking of is not someone who, you know,
6 has been charged in another case and is cooperating in the hope
7 of earning leniency. At least that hasn't been disclosed to me
8 thus far. But my concern is that you never know what's going to
9 come out during trial.

10 THE COURT: All right. Of course, while I try to
11 cover some of these more difficult legal issues pretrial just
12 because, you know, we want to keep this trial moving,
13 particularly during the pandemic, I certainly expect to have a
14 charging conference and these issues to be revisited. So we
15 don't have to resolve all this now without the benefit of the
16 evidence. It is helpful, though, Mr. Welch, to know which
17 instructions you will be asking for at that time. So it sounds
18 like we can and probably should wait on decisions on all of
19 these until the evidence is presented.

20 Before I move on to -- I guess I wanted to talk briefly
21 about the need for -- whether there's a need for a special
22 verdict form, but is there anything else on instructions that we
23 should discuss before we move on to these other areas?

24 MR. NESTLER: Judge, on the -- this is Mr. Nestler.
25 On the point for the substantive evidence and the statements of

1 the defendant, just so the record is clear, we don't believe --
2 we're not intending presently to introduce any statements the
3 defendant made to the police, though we are intending to
4 introduce statements he made to others, and this instruction
5 only applies to statements he made to the police.

6 THE COURT: I see. You're not introducing any
7 statements he would have made -- was he present at the time of
8 the search?

9 MR. NESTLER: He was present at the time of the
10 search, yes.

11 THE COURT: All right. So none of those are coming
12 in?

13 MR. NESTLER: We're not presently intending to
14 introduce those statements, no.

15 THE COURT: Okay. At least in your case-in-chief?

16 MR. NESTLER: Correct.

17 THE COURT: Okay. All right. In light of that,
18 Mr. Welch, does that change your mind?

19 MR. WELCH: Well, if the government is committed to
20 doing that and then doesn't ultimately do it at trial, well,
21 then, I guess that would be moot.

22 THE COURT: All right. Is there anything else,
23 Mr. Nestler or Mr. Welch?

24 MR. NESTLER: Yes, one other point on the jury
25 instructions, Judge. After further review as a matter of

1 litigation risk avoidance, we would suggest amending the
2 instruction for the entering or remaining charge so that the
3 mens rea element of knowingly applies both to the entering
4 component and the unlawful authority component.

5 As it stands right now, the parties propose four elements
6 for that charge, and we would suggest actually heightening the
7 government's burden so that we would have to prove the
8 defendant's mental state, which is knowingly, both for the
9 defendant entering or remaining in a restricted building or
10 grounds and for doing so without lawful authority.

11 I'm sorry for the late notice on this. I can propose that
12 language in writing, if that would be helpful.

13 THE COURT: Yes. I take it you don't object,
14 Mr. Welch?

15 MR. WELCH: Correct.

16 THE COURT: So Mr. Nestler, what I'm going to ask is
17 that you two together address these issues that have come up on
18 these other instructions with a revised copy.

19 MR. NESTLER: Yes, Judge.

20 THE COURT: And what would be most helpful is for you
21 to submit it with the red line so that I can see the changes
22 that you made rather than have to, you know, look for the one-
23 word change here and there.

24 MR. NESTLER: Yes, Your Honor. The parties will get
25 together and submit something.

1 THE COURT: If you could do so by Wednesday of next
2 week. Does that give you enough time?

3 MR. NESTLER: That should be fine, Judge.

4 THE COURT: Okay. All right. So moving on to this
5 issue of the special verdict form, as I understand it, the
6 government's proposed a special verdict form for a civil
7 disorder charge in Count 4. The defense is asking that no
8 special verdict be used.

9 Mr. Nestler, can you help me understand your position?
10 Aren't these means versus elements, and if so, why are you
11 seeking a special verdict form?

12 MR. NESTLER: To be clear, Judge, we are not seeking a
13 special verdict form. We are deferring to the defense, and if
14 the defense does not want a special verdict form, then the
15 government is amenable to not having a special verdict form.

16 THE COURT: Okay. Am I correct, Mr. Welch, you do not
17 want a special verdict form with respect to this offense?

18 MR. WELCH: Correct.

19 THE COURT: Or with respect to any other, such as the
20 1512(c) offense?

21 MR. WELCH: Correct.

22 THE COURT: All right. And Mr. Nestler, your position
23 on special verdict form with respect to that offense?

24 Given the Court's concerns on unlawful means and unlawful
25 purpose prongs of the "corruptly" definition, I'm reserving

1 judgment on that. I may do one anyway. But both sides would
2 prefer I not? Is that what I'm hearing?

3 MR. NESTLER: We would both prefer that you not and
4 also would prefer that the Court defer to the defense on behalf
5 of the defense's request or not for a special verdict form,
6 given the case law on that topic.

7 THE COURT: Okay. And Mr. Welch, you're certain you
8 don't want a special verdict form?

9 MR. WELCH: Certain, do not want a special verdict
10 form.

11 THE COURT: With respect to any of these offenses?

12 MR. WELCH: Correct.

13 THE COURT: Okay. All right. Well, I'm taking that
14 into account. I have not decided, but I will look at the case
15 law on that.

16 All right. Moving on to exhibits and witnesses, Mr. Welch,
17 aside from the government's marked exhibits at least, I don't
18 know that they intend to introduce them, but the Twelfth
19 Amendment and Electoral Count Act exhibits, am I correct that
20 you have no objections to any of the government's exhibits?

21 MR. WELCH: Not in the sense that those -- that is
22 what the law currently says, Your Honor. I'm not objecting to
23 the exhibits for that purpose. There was in the papers, the
24 motion to dismiss that the Court has already ruled on, we
25 questioned the constitutionality of the Electoral Count Act in

1 that, and we would maintain to question that. The Court has
2 already ruled on it.

3 What it currently says is not something that I would object
4 to, but I would certainly maintain and I will almost certainly
5 renew the motion to dismiss later on and most likely be making
6 the same arguments with respect to --

7 THE COURT: Yes. And I denied your motion without
8 prejudice. So you certainly -- I would expect you to renew
9 that.

10 All right. So you don't object to the -- sorry to phrase
11 it that way. I know you have an issue with the Senate witness.
12 But just with respect to the government's exhibits, you don't
13 have any objections as to authenticity or anything else?

14 MR. WELCH: No.

15 THE COURT: Okay. And so Mr. Nestler, on this issue,
16 I'm -- I guess I'm confused about the role that Mr. Schwager is
17 going to play here. As I understand it, he's former counsel --
18 is it counsel to the Secretary of the Senate? Is that right?

19 MR. NESTLER: Yes, Your Honor.

20 THE COURT: And he was there that day, and so while I
21 certainly think it's appropriate for him to give eyewitness
22 testimony as to what was happening that day and, perhaps, where
23 Congress was in the process that was happening, I don't
24 understand the relevance of him getting into the constitutional
25 and the legal bases for Congress's certification of the

1 Electoral College vote, especially given the parties' -- both
2 the stipulation, as well as the agreement that this is an
3 official proceeding, the joint session of Congress is an
4 official proceeding.

5 So you're going to need to help me understand how you
6 envision using this witness, and I don't think it's appropriate
7 for him to go off on the Constitution and the Electoral Act and
8 all of that. It could be confusing to the jury and not
9 relevant.

10 MR. NESTLER: The purpose for his testimony, Your
11 Honor, is, one, for eyewitness account of what happened. But
12 two is to explain why Congress was meeting on January 6, the
13 significance of that in our constitutional system.

14 And so his role at the time on January 6 of last year was
15 to advise the Secretary of the Senate, who works for the Senate,
16 advises the Senate on how to do its procedures. It's basically
17 like a standard operating procedure. It's the manual for why we
18 meet at what time and where and who sits where and who has what
19 job.

20 And all of that is particularly relevant because it goes to
21 why the defendant was there that day, which was to stop this.
22 And so that's why it's probative. And so we are not --

23 THE COURT: Are you intending to introduce this law,
24 like the Twelfth Amendment and the Electoral Count Act?

25 MR. NESTLER: Yes.

1 THE COURT: But that's -- I don't understand why he
2 can't just explain under the Constitution and the Act this is
3 what happens, just matter of factly. Like, what -- this is --
4 what's the relevance to what the jury must find to convict
5 Mr. Reffitt?

6 MR. NESTLER: Well, the jury has to find that the
7 defendant had the intent to obstruct the proceeding, and so the
8 bases for the proceeding are both the Constitution and the
9 statute.

10 And so the reason why Congress was meeting and the way
11 Congress was meeting in terms of proceeding in a joint session
12 with the vice president present and all of the senators and
13 representatives present and voting and reviewing the ballots,
14 all of that is relevant to what Congress was doing that day.

15 So he is simply going to be explaining that is the basis
16 for why Congress was meeting and how Congress was meeting.
17 So --

18 THE COURT: Sorry to interrupt. I don't have it in
19 front of me right now, but don't you have a stipulation
20 explaining what happens in this -- in the joint session?
21 Haven't you all agreed to a bunch of stuff, and to the extent
22 something is missing in there, Mr. Welch, would you agree to
23 include it?

24 MR. WELCH: I'd have to see what it was, Your Honor.
25 But yeah, I mean -- I don't have an objection to Mr. Schwager

1 saying what he saw, you know, what he was doing that day.

2 The issue ends up being my concern here that it sounded
3 like in the government's precis about his testimony that he was
4 going to be giving some sort of legal opinion or legal authority
5 about this.

6 THE COURT: Yeah, Mr. Nestler, I'm concerned as well.
7 To the extent you all can't reach a stipulation, it seems like
8 the Court could instruct the jury that under the Act, you know,
9 the members gather at this time on this date, that kind of
10 thing, without the need to introduce laws as exhibits and have a
11 complicated colloquy with Mr. Schwager about this process.

12 I think that there may be a few nuggets that are relevant
13 here in terms of timing and date and who is supposed to be
14 present and what's going to happen that day. But I think it can
15 be abbreviated and no need to introduce all of this stuff that
16 will be confusing to the jury.

17 MR. NESTLER: Respectfully, Your Honor, we don't think
18 it's going to be confusing to the jury, and we think we have it
19 streamlined. We've already met with Mr. Schwager, obviously.

20 The importance of the Act, the Electoral Count Act and the
21 Twelfth Amendment to the Constitution to what was happening on
22 January 6 of 2021 is central to the government's case. That's
23 why the defendant and the rest of the mob were at the Capitol
24 that day.

25 And so having Mr. Schwager explain that -- and to the

1 extent we suggested in our prior pleading that he would be some
2 sort of expert or constitutional expert, that was, obviously, an
3 error. We are not intending for him to make any legal
4 conclusions or opine on anything. It doesn't matter that he is
5 a lawyer even. What matters is he was in Congress that day to
6 see what happened and he knows why Congress was meeting that day
7 and the importance of Congress meeting that day to our
8 constitutional system. And that is the reason why --

9 THE COURT: That's the part that I worry about the
10 prejudice to the jury. So again, the Court can instruct the
11 Constitution provides, the Act provides. I don't know that
12 there's a need for the witness to spend a lot of time discussing
13 this.

14 MR. NESTLER: And I understand, Judge. We are not
15 planning to have him spend a lot of time discussing this. First
16 of all, the Constitution itself and the four statutory
17 provisions, 3 U.S.C. 15 through 18, we believe, are
18 self-authenticating and so can be admitted to the jury.

19 And we were planning to admit them through Mr. Schwager
20 because he's familiar with them, but we can certainly admit them
21 through the Court just instructing the jury, if that's the
22 preference of the Court and defense counsel.

23 THE COURT: All right. Mr. Welch?

24 MR. WELCH: That would be fine, you know --

25 THE COURT: Which would be fine?

1 MR. WELCH: -- if you want to do it that way.

2 THE COURT: Which way?

3 MR. WELCH: To simply have the Court instruct on it.

4 THE COURT: Yeah, that's my inclination, Mr. Nestler,
5 and streamlining his testimony. There are a few critical facts,
6 but there's a lot in here that's potentially confusing. And,
7 you know, again, I do worry about potential prejudice to the
8 defendant. I think the relevant facts, you can propose
9 something with Mr. Welch that the Court could consider
10 instructing the jury on and run through it in a succinct way
11 with the witness. But that's how I'm looking at it.

12 MR. NESTLER: I understand what the Court is saying.
13 The point from the witness is to discuss why everything was
14 there. The Twelfth Amendment is important to his job and to
15 Congress's job and so is the Electoral Count Act. So that's why
16 the Senate passed a resolution, a concurrent resolution on
17 January 3 in order to have these procedures consistent with the
18 Twelfth Amendment and the Act. And so he's going to say that.
19 We're not going to belabor the point.

20 THE COURT: That's the sentence. These procedures are
21 consistent with the Constitution and the Act; right? What more
22 beyond that needs to be said?

23 MR. NESTLER: Well, we need to talk about why it's
24 important, because that's when Congress decides who the next
25 president's going to be, and that's why the defendant was there

1 at Congress that day. So --

2 THE COURT: But this witness cannot testify that
3 that's why Mr. Reffitt was there that day.

4 MR. NESTLER: Correct.

5 THE COURT: This witness can testify this is the
6 procedure and it's set forth in the Constitution and the Act and
7 this is the way, you know, the peaceful transfer of power occurs
8 and the new president is formally selected. He can say all
9 that. I'm just saying very succinctly.

10 MR. NESTLER: That was our plan, Judge. We are
11 planning to do it succinctly. We are planning to display the
12 statute and the Constitution and have him read a sentence or two
13 from each, the important sentences, the date, the time, the
14 location, what they're doing. That was the -- our intent with
15 him was to put it up on the screen and say this is the Twelfth
16 Amendment and what do the first two sentences of the Twelfth
17 Amendment say, and this is 3 U.S.C. 15, what does the first
18 sentence say.

19 And that is what's going to be the importance for the jury.
20 We're not getting into all the minutia -- I know some of the
21 statutes can be long and confusing. We're not planning on doing
22 that. We're planning on having him hit the high points about
23 why those are important and then talk about what he actually
24 observed that day.

25 THE COURT: All right. Well, Mr. Welch, your position

1 on this?

2 MR. WELCH: I don't know the value in having this
3 witness read to the jury, but, you know, I'm not going to tell
4 the government how to present their case either.

5 My main concern with this is that he would get into giving
6 a legal opinion. That is what was proffered in or suggested in
7 the government's summary of his testimony. I mean, certainly,
8 he can -- it's appropriate to testify about what he saw that
9 day, what he did that day, like anyone.

10 THE COURT: So Mr. Nestler, it sounds like you can
11 walk through this stuff pretty succinctly. What I'm trying to
12 avoid is testimony, you know, suggesting this is -- potentially
13 inflammatory stuff, like this is the death of democracy, this
14 is -- it's just factual, this is what the law requires and this
15 is what we were there to do.

16 MR. NESTLER: I understand, Judge. We're not
17 intending for a witness to talk about the death of democracy.

18 THE COURT: All right. Have we covered all of your
19 concerns, Mr. Welch?

20 You all consider whether it makes sense to have the Court
21 instruct on the critical parts of the Act and the Constitution,
22 Mr. Welch, versus have this stuff introduced into evidence.

23 MR. WELCH: I think it would be appropriate to have
24 the Court just instruct on it, but certainly, the government is
25 free to decide how it wants to present its case.

1 THE COURT: All right. Well, Mr. Nestler, do you want
2 to confer with Mr. Welch on this?

3 MR. NESTLER: Sure, we will confer, and I appreciate
4 what he's saying, that the government has the ability to present
5 a coherent narrative to the defense -- sorry, to the jury to
6 make its case. I appreciate Mr. Welch saying that. We will
7 discuss it with him, and if we have a proposed stipulation, we
8 will let the Court know.

9 THE COURT: All right. Mr. Welch, any objections to
10 any of the other government witnesses?

11 MR. WELCH: No.

12 THE COURT: Okay. In terms of -- Mr. Nestler, I
13 issued this pretrial order, as you know. I didn't know whether
14 the government had already turned over *Giglio* and *Lewis*
15 materials. Is that forthcoming, or have you done that already?

16 MR. NESTLER: We've turned over any *Giglio* or *Brady*
17 materials that are in our possession. We're not aware of any
18 *Lewis* materials.

19 THE COURT: And I'm just -- I'll ask again, both of
20 you, Mr. Nestler, based on what's been turned over, there's no
21 motion to limit the cross-examination of any of your law
22 enforcement witnesses based on what's been turned over?

23 MR. NESTLER: No motion from our perspective, no, Your
24 Honor.

25 THE COURT: Okay. And Mr. Welch, with respect to the

1 law enforcement or the family members and the immunized
2 witnesses, I know -- I think the government turned over *Jencks* a
3 while ago. There's no motion to limit their testimony in
4 any way?

5 MR. WELCH: No, Your Honor.

6 THE COURT: And Mr. Nestler, no motion to limit their
7 cross-examination in any way?

8 MR. NESTLER: No.

9 THE COURT: Okay. I'm just, again, trying to make
10 sure there aren't issues we can decide pretrial that will keep
11 things moving during trial.

12 All right. Moving on to voir dire, I gave you an updated
13 version of the voir dire questions I intend to ask. As you can
14 see, I incorporated some but not all of the government's
15 proposed additions. I did want to add the question on the
16 juror's ability to not read the press during trial. I think
17 that's important. And I'm not sure that that was included. I
18 did incorporate the defense's modification, an expansion, I
19 think, of the defense's proposed addition relating to the
20 presumption of innocence and the defense's suggestion to edit
21 the question about living or working at the Capitol.

22 I didn't incorporate many of the government's proposed
23 questions that I thought would be more appropriate for
24 questionnaire, and I will be asking yes-or-no questions up front
25 in the general voir dire. So obviously, some of the

1 government's proposed questions will be natural follow-up
2 questions, should a prospective juror answer yes to any of the
3 questions I ask, for example what kind of a case did you serve
4 on as a juror and that kind of thing.

5 Any comments, concerns about what's omitted or additional
6 thoughts on what hasn't been raised but should be considered?
7 Mr. Nestler?

8 MR. NESTLER: Ms. Berkower is going to handle our voir
9 dire arguments, Your Honor.

10 THE COURT: Okay. Ms. Berkower?

11 MS. BERKOWER: Good afternoon, Your Honor.

12 THE COURT: Good afternoon.

13 MS. BERKOWER: Yes, Your Honor. I guess one of the
14 questions that we did have before we get into exactly what we
15 believe may be missing is it was a little unclear from Your
16 Honor's proposal whether -- what kind of follow-up there would
17 be, whether that would be something Your Honor would do or
18 whether it's something we would do and whether we would be able
19 to get into some more details.

20 And the reason I raise that is there was one main area of
21 concern that we did think there needed to be additional
22 questioning on, and that relates to pretrial publicity and the
23 effect on potential or prospective jurors, and that's based on
24 some of the case law in the D.C. Circuit and the Supreme Court
25 concerning the inquiry that's appropriate into the extent of a

1 prospective juror's knowledge of the case, whether they formed
2 an opinion on it, and whether they can set it aside.

3 And so part of what I want to make clear before we sort of
4 dive into that a bit more is whether this is just the initial
5 set of questions Your Honor was going to be posing and then we
6 could do follow-up that got into those areas or whether this was
7 the complete set of questions? We do not believe that --

8 THE COURT: No, and I should have made this clear up
9 front. Like many judges on this court, I do the note card
10 approach. So I ask a series of questions and ask the jurors to
11 answer yes or no. On note cards, if they answer yes to question
12 4, then they write the number 4. And then they will be brought
13 into a separate courtroom for individualized voir dire. And I
14 will begin following up with them on what their yes answers are
15 and probing a little bit more the basis for the yes answer.

16 And I also will permit both sides brief follow-up, but I do
17 mean true follow-up. This is not an opportunity for you all to
18 preview your arguments or make speeches or preview the facts of
19 the case or ingratiate yourselves to the jurors. This is pure
20 follow-up. So you will both get a chance to do that. And if
21 you all go on and on, I will probably start asking some of your
22 questions and/or cut you off.

23 But I do -- I certainly appreciate that the first four
24 questions are critical here in terms of voir dire and ensuring
25 that we have a jury that doesn't have a formed opinion for one

1 side or the other and that they are not biased. So this is not
2 the end game, by any means, and many of the government's
3 questions were, you know, natural follow-up.

4 In this case, Ms. Berkower, your questions about how many
5 videos, one or two, three or four, five or six, seven, twelve, I
6 question. It's not that I don't think it's appropriate to probe
7 the extent to which prospective jurors have seen and heard about
8 the events of January 6, but I think we all have to assume that
9 the vast majority, if not all, will have seen or heard, perhaps
10 seen videos. And whether they've seen 15 clips, short 10-second
11 clips, or one long about, let's hope not, but Mr. Reffitt, it's
12 not necessarily the number that's going to be so telling.

13 So I can't say that I intend to track exactly what the
14 government has here in terms of appropriate follow-up. But you
15 will get your chance, and I think we all share the same goal
16 here.

17 And I'm leading with these questions in part because it
18 would be really helpful in the event both sides believe that
19 there's a basis for a strike for cause with any individual
20 juror, that we come up with some, you know, signal that you all
21 can give me such that we don't go through all of the yes
22 answers, which might be numerous in a case like this. This is
23 something we can talk about next week. But if you all are in
24 agreement that somebody should be stricken for cause, it would
25 be great for me to get that hint from you before I go through 20

1 minutes of additional colloquy with a juror that both sides
2 think should be stricken.

3 So I don't know if that answers your question in full, but
4 I will give you a chance to follow up, assuming it's not abused.

5 MS. BERKOWER: Thank you, Your Honor. That clarifies
6 a number of things.

7 I think -- understanding, then, the procedure that Your
8 Honor is going to use, and I'm sure we can speak with Mr. Welch
9 about the manner in which, you know, we should come up with a
10 system to alert the Court if we both believe that a particular
11 juror would be -- should be stricken for cause so that we don't
12 waste time.

13 But setting that aside, I think that in the initial set of
14 questions, based on some of the case law that's out there
15 concerning pretrial publicity, we would request a couple of
16 additional questions in the case-specific event section of Your
17 Honor's proposal to have a better sense of any potential people
18 that could be struck right away for cause.

19 And I understand if Your Honor is not comfortable with
20 people estimating the number -- the amount of news they've
21 consumed. We can phrase it differently. But generally, the
22 case law has made clear that there does need to be a somewhat
23 thorough inquiry into the general volume of pretrial publicity
24 that the prospective juror has encountered and then the effect
25 of that on the potential juror.

1 And the cases I'm referring to are *United States vs.*
2 *Haldeman*, 559 F.2d 31, D.C. en banc opinion from 1976, which
3 addressed this in the context of a trial for people involved
4 with Watergate, and then *Mu'Min vs. Virginia*, 500 U.S. 415 from
5 1991, and then also *Skilling vs. The United States*, 561 U.S.
6 368 from 2010, which dealt with the Enron-related trial.

7 And in all of those cases, Your Honor, the courts found
8 that there did need to be a little bit more in-depth inquiry
9 into what the person had seen.

10 And the way we would propose doing that here, Your Honor,
11 is in this case we know that there is a little bit of difficulty
12 in assessing the potential -- whether someone even knows who
13 Mr. Reffitt is by name, because so much of the media and
14 publicity is just videos, and they may not particularly know,
15 you know, him by name but they may know him from a particular
16 video or they may know him from the surrounding facts of the
17 case, including, you know, the different allegations in the
18 indictment, including the last one that he made a threat against
19 family members.

20 And so the way we would propose, perhaps, adding and
21 building on to the first four questions that Your Honor has
22 proposed would be to ask a couple of additional questions. And
23 I can sort of say them out loud now, if Your Honor would like,
24 and we can talk about them --

25 THE COURT: Sure.

1 MS. BERKOWER: -- and we can potentially submit them.

2 So I think the first question, keeping in mind that case
3 law that directs us to develop some information about how much
4 information the prospective juror has been exposed to, we would
5 propose asking, "How much attention did you pay to the news
6 about events at the Capitol on January 6?" And then as a
7 follow-up to that, "Have you followed news accounts of specific
8 individuals who are involved in events at the Capitol on
9 January 6?"

10 And in our mind, if the person has not been following news
11 about specific individuals, that's a signal at least to the
12 government that it may be less likely that they have familiarity
13 with this particular defendant and the allegations in this
14 particular indictment.

15 And then a follow-up to that would be, "Have you heard or
16 seen anything in the news or elsewhere about the allegations in
17 this particular case?" And then going back to Your Honor's
18 question number 1, "Have you seen anything in the news or
19 elsewhere about Guy Reffitt, this particular defendant?"

20 I think those, in our view, would more clearly establish --
21 you know, yes answers to those would allow for follow up that
22 could allow Your Honor to develop a record or the government or
23 Mr. Welch in attorney-conducted follow-up about what exactly
24 this person has been exposed to. And it would allow the Court,
25 then, to follow up or us, if Your Honor would prefer, to talk

1 about whether the person had formed an opinion about the guilt
2 of this defendant, which I know is a question Your Honor asked,
3 question number 12.

4 We would also propose asking another question, "Have you
5 formed an opinion about the guilt of people involved in events
6 at the Capitol on January 6 more generally?" Because we do
7 think that because this was an event that involved so many
8 people, that that is something that also should be explored and
9 put on the record.

10 And then the follow-up to that is whether -- a direct
11 question to the person of whether they could set aside any prior
12 opinions that they have formed if they were to be selected as a
13 juror. We, of course, would like some follow-up to that as
14 well.

15 So I know that was a big -- that was a lot of information,
16 but that's generally what we had in mind with regard to
17 modifying the Court's proposal to develop that record more
18 clearly.

19 THE COURT: Okay. Well, I appreciate that,
20 Ms. Berkower, and I fully intended to drill down on the extent
21 and the nature of the news. But it sounds like what you're
22 suggesting is that the first question be, which is certain to be
23 probably a yes from everyone, "Have you seen or heard anything
24 in the news or elsewhere about the events of January 6?" Is
25 that the lead-in?

1 MS. BERKOWER: I think the lead-in could be -- well, I
2 guess that's true, if you're trying to ask yes-or-no questions.

3 THE COURT: Have you had conversations with Mr. Welch?
4 Are you all in agreement here? Or Mr. Welch, do you have a
5 different perspective?

6 I certainly agree with the government, and I know you do,
7 too, that there has to be a lot of information pulled out from
8 prospective jurors who have heard certainly about this case and
9 certainly anyone who has strong feelings or opinions about the
10 events of January 6, that those need to be flushed out, as well
11 as, you know, anyone who lives or works near the Capitol or
12 anyone who has any connection.

13 So I'm sorry if I've left you all with the impression that
14 this was, you know, these questions and nothing more. I think
15 the kinds of things you talked about, Ms. Berkower, are
16 appropriate.

17 But Mr. Welch, I want to hear your perspective as well.

18 MR. WELCH: Well, Your Honor, I agree with the
19 additional questions that the government is proposing.

20 And just to give further support to that, there has been a
21 survey of D.C. residents by Select Litigation. They surveyed
22 400 D.C. residents. And in their survey, they found that 70
23 percent, perhaps even a little bit more, I think it was actually
24 71 percent have already formed an opinion about the people who
25 were involved in January 6.

1 So with that being said, I think we're going to need to
2 address that. Because if people have already formed an opinion,
3 then it might be very difficult for them to set that aside.

4 THE COURT: Yeah, I don't know how valid that study
5 is. I'm not questioning that many people are aware of the
6 events and that some have strong opinions. I'm not sure that
7 I'm -- I've just heard about this survey. I know nothing about
8 its methodology or anything like that. And to the extent you're
9 relying on that for any motion or whatever, you should be
10 putting that before me now so I can get into the weeds on that
11 and learn more about it, Mr. Welch.

12 MR. WELCH: I understand.

13 MS. BERKOWER: Your Honor, may I add something to what
14 Mr. Welch just said?

15 I would note that the ultimate question -- the Supreme
16 Court has made very clear that the ultimate question of whether
17 a prospective juror is fit for service is not whether they have
18 an opinion coming in to the case, but whether they can
19 effectively set that aside and only deciding the case based on
20 the evidence presented and the law as the Court instructs.

21 And the case law on that, the leading case is *Irvin v.*
22 *Dowd*, 366 U.S. 717 from 1961, quoting from that at 722 to 723.
23 "It is sufficient if the juror can lay aside his impression or
24 opinion and render a verdict based on the evidence presented in
25 court."

1 And so I think what we're getting at with our request for
2 the additional questions here is understanding if the person was
3 exposed to media, have they formed an opinion, and then is the
4 Court and are the parties satisfied that the person can set that
5 opinion aside and render a fair verdict based only on the
6 evidence.

7 And so I think we, of course -- I'm sure if Mr. Welch
8 submits something in writing we will want to respond about this
9 survey that he read. But in our view, that simply does not --
10 that's not the end of the inquiry. And part of the basis for
11 asking these additional questions is to be able to really allow
12 a determination to be made at the end of the voir dire of
13 whether or not the person -- we believe that the person can, in
14 fact, set aside any opinion he or she may have formed and be
15 fair. And that is also something that the *Mu'Min* case that I
16 mentioned earlier addressed, that really at the end of the day
17 the question is whether the juror is to be believed when he says
18 that he hasn't formed an opinion about the case.

19 So I just add that to Mr. Welch 's, you know, comments from
20 a few minutes ago to make clear that it's our position that even
21 if there are people in the pool who have been exposed to media
22 and who have formed opinions, if upon a thorough inquiry from
23 the Court we are satisfied they can set that aside, there
24 certainly can be an appropriate jury picked from this pool.

25 THE COURT: Okay. Well, Ms. Berkower, perhaps it

1 makes sense -- I don't know. If you all are on the same page,
2 it would be great to submit something jointly. If not, why
3 doesn't the government submit something by Tuesday and the
4 defense by Thursday for additional follow-up.

5 But keep in mind, I'm intending to ask no more than half a
6 dozen questions that trigger a yes-or-no answer that then result
7 in additional drilling down on whether the person can -- has a
8 formed view and whether they can be a fair and impartial juror.
9 So the list of questions isn't going to capture everything, nor
10 should it. There's got to be follow-up.

11 But I'm certainly receptive to your suggestions on what
12 that follow-up should be. And to the extent you think I should
13 add an additional question or two to the -- or broaden any of
14 these to ensure that we get the yes answer so that there's
15 appropriate follow-up, I'm very open to it.

16 I think this is a critically important part of the trial.
17 So I don't want either side to think that I'm whetted to this.
18 I'm just trying to get a manageable voir dire for the whole
19 panel and then bring them one by one and have a more detailed
20 colloquy with each juror.

21 So does that work, Ms. Berkower? Can you do that by
22 Tuesday and Mr. Welch by Thursday? And if you all can do it
23 together by Tuesday, even better.

24 MS. BERKOWER: Yes, Your Honor, I think we can
25 certainly work on trying to submit a proposal with Mr. Welch

1 jointly, and we will work on that.

2 THE COURT: Why don't you all try to do it by Tuesday,
3 and then to the extent you can't reach agreement, have your
4 respective positions at the end of what you agree should be
5 follow-up questions.

6 MS. BERKOWER: We'll do that. Thank you.

7 Before we move off --

8 THE COURT: By Tuesday?

9 MS. BERKOWER: We can do it by Tuesday, yes.

10 One more point on the voir dire, Your Honor, that I wanted
11 to raise before we moved off of this topic. In question 14 that
12 you had proposed, you said this case involves allegations about
13 the possession of a handgun which was not fired and refer to a
14 handgun throughout that.

15 There actually will be evidence about more than one
16 firearm, none of which were fired, so that's still true. But
17 upon rereading that in anticipation of coming here to court
18 today, we realized it might be more appropriate to just say,
19 "This case involves allegations about the possession of guns or
20 firearms."

21 THE COURT: Mr. Welch, any objection to changing that
22 to firearms?

23 MR. WELCH: I think it should be "gun or firearms,"
24 Your Honor, because the specific -- there's firearms that are
25 seized that are not charged and that are not alleged to have

1 been charged. There are also specific counts that involve a
2 handgun.

3 So I think that -- if there's someone out there who has
4 such strong feelings about any kind of guns, that we need to
5 identify that person.

6 THE COURT: Isn't a handgun a type of firearm?

7 MR. WELCH: It is. And I think that -- I suppose if
8 you just say firearm, people could get it. But since the
9 allegation is handgun, semiautomatic handgun in one of the
10 counts, we're dealing with regular people. They might not be
11 lawyers. Indeed, some of them probably won't be lawyers. And
12 we want to make sure that we use words that regular people are
13 going to understand.

14 THE COURT: And you think a regular person won't know
15 that a handgun is a firearm?

16 MR. WELCH: A handgun is a subset is my concern. And
17 if you only say firearms --

18 THE COURT: You don't think that by saying "firearms"
19 we're covering every potential kind of gun and it's the broadest
20 way to ask the question that includes handguns all the way up to
21 a machine gun? Your concern is that someone's going to think a
22 handgun doesn't fall within the umbrella of a firearm?

23 MR. WELCH: My concern is that since the actual
24 indictment, since I believe the verdict sheet also makes
25 reference to a handgun, let's use the actual language.

1 Certainly, firearms is accurate. I'm just suggesting handgun or
2 firearms in order to make sure that we get people's --

3 MS. BERKOWER: Your Honor, may I interject the reasons
4 why we're making this request? That may clear things up.

5 Count 1 of the second superseding indictment charges
6 Mr. Reffitt with transporting two firearms in commerce, and it
7 specifies, "That is, a rifle and a semiautomatic handgun."

8 And so it struck us that since the Court is inquiring into
9 whether people have certain concerns or biases concerning guns,
10 that referring to just a handgun when the indictment charges
11 Mr. Reffitt with transporting both a rifle and a handgun, it
12 would be more appropriate to refer to firearms, plural, or guns,
13 plural, but just referring to a handgun may not do it.

14 THE COURT: I think this is -- I don't see this as an
15 issue. I'd like to use a word that encompasses everything so
16 that any juror who has a problem with a handgun, a rifle, a
17 machine gun, you name it, is going to say yes. And then if they
18 say yes, then we can follow up.

19 But I guess I'm just not -- I'm not following you,
20 Mr. Welch, that someone's going to say yes, they have a problem
21 with a handgun, but not say yes, they have a problem with a
22 firearm.

23 MR. WELCH: And I'm not suggesting -- I'm sorry.

24 THE COURT: No, go ahead.

25 MR. WELCH: I'm not suggesting that someone would

1 necessarily say that. I'm just thinking that when someone hears
2 that, they're listening, they might say oh, okay, the question
3 was about firearms, but then when they actually get down to it,
4 when they're selected, they're on a jury, and then they say oh,
5 now it's about rifles, now it's about handguns.

6 I was just thinking be broad, cast a broad net at the
7 outset, and avoid the situation where somebody is not
8 necessarily sitting there interpreting. We have all kinds of
9 people that will come through the venire process, and if the
10 word changes, it might get by somebody. It might not get by you
11 or me, but it might get by somebody.

12 THE COURT: What is the evidence that's going to come
13 in here? It's going to be a rifle and handgun? Is that it?

14 MS. BERKOWER: Yes, Your Honor. There will be
15 evidence that the defendant transported both a rifle and a
16 handgun to the District of Columbia and that he brought them
17 with the intent to use them both on January 6. There will be
18 evidence that he assembled his rifle and left it in his car for
19 purposes of returning to it and potentially using it later in
20 the day and that he brought his handgun with him and was armed
21 with it while he engaged with the Capitol Police on the steps of
22 the Capitol during the riot.

23 THE COURT: Okay. Will this satisfy everyone if I
24 say, "This case involves allegations about the possession of
25 rifles and a handgun, none of which were fired. Does anyone

1 have such strong feelings about firearms that you cannot put
2 them aside and serve as a fair and impartial juror in this
3 case?"

4 Does that capture everything for everybody?

5 MS. BERKOWER: That's fine for the government.

6 MR. WELCH: Yes, Your Honor.

7 THE COURT: All right. What else, Ms. Berkower?
8 Anything else?

9 MS. BERKOWER: Just a few other questions, small ones,
10 about jury selection.

11 Has Your Honor made a determination about how many
12 prospective jurors will be brought into the Ceremonial Courtroom
13 for the initial round of questioning?

14 THE COURT: Yes. That will be, I think, roughly 50.
15 So we will, in all likelihood, have to do this twice. Maybe
16 not, but potentially. So 50.

17 And to the extent you all have not been in touch with John
18 Cramer for technology issues, to the extent you've not
19 coordinated with Mr. Hopkins to take a look at the layout of the
20 courtroom where the case will be tried, you should do that.

21 I jumped ahead. But Ms. Berkower, more about jury
22 selection?

23 MS. BERKOWER: Yes, Your Honor. I think at the last
24 hearing you mentioned you were going to look into whether you
25 had the ceremonial courtroom available both on the 28th and the

1 1st of March.

2 THE COURT: I've been told we do.

3 The way this will work is I will do the general voir dire
4 with the first 50, and we will send the rest of those who have
5 been summoned probably -- I don't know. I need to get advice
6 from the jury office about whether they should go home or just
7 come back late in the afternoon. But we'll go through the first
8 50, and then we will move from the Ceremonial Courtroom to
9 Courtroom 16 where individualized voir dire will take place.
10 And one by one, jurors will be brought in and follow-up
11 questions will be asked.

12 And then if we don't have enough qualified jurors at the
13 end of that 50, we will go back and do another round of general
14 followed by another round of individual.

15 So I don't think I have the Ceremonial Courtroom on
16 Wednesday. So we really need to aim to pick this jury Monday
17 and Tuesday.

18 And I am interested -- I am on the fence about number of
19 alternates. I'm inclined to say at least three, in part because
20 with the COVID protocols, you know, jurors are told to stay home
21 if they're not feeling good, and this is the start of allergy
22 season. I myself may have some sniffles; it doesn't necessarily
23 mean that I've got COVID. But if that's the standard, if that's
24 what they're being told, you know, I don't want to get in a
25 situation where we lose our jury.

1 Thoughts from either side on number of alternates?

2 MS. BERKOWER: Yes, Your Honor. We would suggest, in
3 light of all the considerations you just listed, selecting four
4 alternates to ensure that we continue through the end of the
5 case with an adequate number of jurors.

6 THE COURT: Mr. Welch, do you have a view?

7 MR. WELCH: I'm sorry?

8 THE COURT: Do you have a view?

9 MR. WELCH: Yes. I was going to suggest four as well.

10 THE COURT: Okay. All right. We will aim for that.

11 So once we get the number of qualified -- the total number
12 of qualified jurors, which is somewhere around 38 -- and by the
13 way, after the individualized voir dire, any strikes for cause,
14 motions to strike for cause will need to be made when that juror
15 is done at the time. All right? We're not going to wait until
16 the end. This could take a while, and while everything is
17 fresh, we should be making -- you should be making those
18 arguments, and I should be making those calls right away.

19 So once we have enough qualified jurors, then -- as I've
20 mentioned before, I don't know whether the Ceremonial Courtroom
21 will be available to go back to the Ceremonial Courtroom and do
22 peremptories, which do occur simultaneously with the whole group
23 of qualified jurors, whether we can do it in one room, in the
24 Ceremonial Courtroom, or whether we're doing it in the courtroom
25 where the trial will be, which is Courtroom 14, and a second

1 courtroom.

2 Previously, I think that both sides said there wouldn't be
3 an objection to doing peremptory strikes in two courtrooms if we
4 didn't have access to the Ceremonial Courtroom. Is that still
5 the case?

6 MS. BERKOWER: That's fine with the government, Your
7 Honor.

8 THE COURT: Mr. Welch?

9 MR. WELCH: I think that would be fine.

10 THE COURT: All right. I hope we don't have to do it
11 that way. I hope we could go back to the Ceremonial Courtroom.
12 I don't know, and we could lose it. So I just wanted to make
13 sure that that's acceptable to both sides.

14 MS. BERKOWER: I'm sorry with the additional questions
15 on this, but Your Honor mentioned 38 to qualify. Has Your Honor
16 determined the number of peremptories for each side, then, if
17 that accounts for the alternates as well?

18 THE COURT: No, I need to do the math. I was just
19 guesstimating. Maybe it's 40. I need to sit down and add it
20 all up. Generally, with two alternates, it's one peremptory for
21 each side. So I guess my initial thinking is two for each side
22 with four.

23 Do you have a view?

24 MS. BERKOWER: That would be our request.

25 THE COURT: Mr. Welch?

1 MR. WELCH: I think that's correct. I just need to
2 check.

3 THE COURT: Yeah, okay. So if we're talking two plus
4 two plus 10 plus 6, that's 20, plus 12 plus 4, I think that's
5 36.

6 MS. BERKOWER: That's my math as well.

7 THE COURT: So 36, but maybe we get -- I don't know.
8 We'll see how it's going, but if we're breaking before lunch or
9 something, I might want to qualify, you know, 37 or so in case
10 someone didn't return. But if we're just -- if we're finishing
11 at a time that we're not letting jurors leave, then maybe 36
12 would be adequate. We don't need an extra to get through the
13 peremptories.

14 So once we have 36, 37, we'll release the jurors and move
15 to peremptories.

16 MS. BERKOWER: I think this actually will be my last
17 question on this. I hope so, Your Honor. I'm sorry for the
18 continuing list.

19 THE COURT: No, I'm glad you're asking.

20 MS. BERKOWER: For peremptories, you mentioned they
21 will be done simultaneously. I just want to make sure I
22 understand Your Honor's practice correctly for exercising those.

23 THE COURT: So you will do your six and Mr. Welch will
24 do his ten at the same time. So it's possible you're striking
25 the same person.

1 MS. BERKOWER: And we will do the alternate strikes
2 after the jury has been selected, or does that include
3 alternates?

4 THE COURT: I think we will do the jury and then we
5 will do the alternates. But I don't know whether I would be
6 moving people around to let them know, you know. I think it
7 would be -- we would do one and then the other but in a way that
8 isn't obvious that's what we're doing to the jurors.

9 Does that make sense?

10 MS. BERKOWER: Yes.

11 THE COURT: And before trial begins, I will ask you
12 all to each provide two numbers that will be the alternates, but
13 the alternates, of course, won't know they're alternates. So
14 the government might say 4 and 10, and then, Mr. Welch, you have
15 two other numbers.

16 So they will be scattered throughout the gallery in the
17 courtroom. The courtroom, we'll just have room for the
18 participants in the case and the jury. There will be an
19 overflow courtroom and a media room. So members of the public
20 and the media will be able to watch live-stream video in those
21 rooms. As I've said a couple times before, the public line will
22 not be accessible.

23 MS. BERKOWER: And so Your Honor --

24 THE COURT: Go ahead.

25 MS. BERKOWER: -- if we're doing this simultaneously

1 and it means that we may end up striking the same person, does
2 Your Honor then pick the jury from the first seat through the
3 remaining numbers? It means we will end up with potentially
4 more than the jury at the end. There will be additional people
5 if we strike people at the same time.

6 THE COURT: Right. So that's why the order does
7 matter, the way in which they come in. So the first 12 that
8 remain will be the jury.

9 MS. BERKOWER: Part of the reason I ask, Your Honor,
10 is I've had this issue come up with regard to identifying the
11 alternates.

12 THE COURT: Maybe we need to do the alternates at the
13 same time. Let me think about this, Ms. Berkower. It might
14 make more sense to do it all -- I don't know. You all think
15 about it. I will think about it. And let's talk next week. I
16 see how it could be difficult.

17 MS. BERKOWER: I would just make a note for the Court,
18 I don't have it at my fingertips, but I remember this issue
19 actually came up in a prior trial I had. And I remember, I
20 think, that one of the Rules of Criminal Procedure, I don't have
21 it at my fingertips right now, actually addresses peremptory
22 strikes of alternates and speaks to this issue at least a little
23 bit. So I can provide that to the Court.

24 THE COURT: I'll refresh my memory on this. So let's
25 discuss the process for alternates next time to make sure we're

1 all on the same page.

2 MS. BERKOWER: Thank you, Your Honor.

3 THE COURT: Okay. And for voir dire, you know, I do
4 know there's been a fair bit of press about this case and
5 Mr. Reffitt in particular. I have not followed it, and if there
6 are specific issues that have been in the press that you all
7 think I need to be made aware of before the voir dire, you know,
8 please let me know, because I'm not -- I'm blissfully unaware of
9 all of that. If you think there's something that will be
10 helpful to know for purposes of a thorough follow-up, please let
11 me know.

12 MS. BERKOWER: We will. Thank you, Your Honor.

13 THE COURT: I think I asked this before, but are the
14 parties' anticipated witnesses vaccinated?

15 MR. NESTLER: I don't believe you've asked that
16 previously, Your Honor. I think it's fair to state for all of
17 the government witnesses, yes, but we can inquire if the Court
18 would like us to inquire.

19 THE COURT: It would be helpful. The numbers seem to
20 be going down, but for obvious reasons, not having witnesses
21 wearing a mask, that's where I'm leaning, but I'm interested in
22 what you all have to say and your perspective on that issue.

23 MR. NESTLER: Yes, Judge. That actually fed into a
24 question I was going to ask, which is what Your Honor's
25 preference was for mask wearing while people are speaking,

1 notably counsel who is examining a witness and the witness
2 himself or herself.

3 THE COURT: Did we not have this conversation once
4 about vaccinations?

5 MR. WELCH: We have not had this conversation, Your
6 Honor.

7 THE COURT: No? All right. You've told me
8 Mr. Reffitt's vaccinated.

9 MR. WELCH: No, Your Honor. He's had COVID. That's
10 why I was trying to get his medical records previously.

11 THE COURT: Okay. I guess it would be helpful for the
12 Court to know, and this is obviously, you know, private, but if
13 there's a way that you all can inform me, that would be helpful
14 in making decisions about how to ensure that the safety
15 protocols of the court are followed.

16 MR. NESTLER: Yes, Judge. We will inquire, and we can
17 talk about it when we get together next week.

18 THE COURT: I'm trying to think if there are any other
19 points that we should discuss.

20 Mr. Welch, are there family members who are not witnesses
21 who will be attending the trial in person?

22 MR. WELCH: My understanding is yes, they would like
23 to be there.

24 THE COURT: Can you let me know how many? I want to
25 make sure there's seating available for them in the overflow

1 room.

2 MR. WELCH: I will find that out.

3 THE COURT: With the number of jurors, particularly
4 with four alternates, it really makes the courtroom very tight
5 in terms of social distancing. But I would want to make sure
6 that there's room for them in the overflow, which by the way
7 will have four separate cameras. It will have one on the
8 witness, one on the attorney, one on any evidence, and I think
9 one on me, not on the jury.

10 MR. NESTLER: Understood, Your Honor. On that, two
11 small points. One is, we may suggest that the Court arrange for
12 two overflow courtrooms, if possible. I know you said one media
13 courtroom and one public courtroom. We do believe there will be
14 potential for many attending, so the more space the better
15 probably.

16 THE COURT: I hear you, Mr. Nestler. I just don't
17 know that that's possible given the other trials that are going
18 on in the courthouse at the same time.

19 MR. NESTLER: I totally understand. I just wanted to
20 make that point.

21 And then the other question is, would the Court be amenable
22 to having one seat in the courtroom itself, Courtroom 14, for
23 witness counsel?

24 THE COURT: How many witnesses have counsel?

25 MR. NESTLER: All of the law enforcement witnesses and

1 the witness who works for the Senate.

2 THE COURT: Okay. Let me check on that.

3 MR. NESTLER: To be fair, it's the Secret Service's
4 general counsel's office, the Capitol Police's general counsel's
5 office, and the Senate legal counsel for their respective
6 witnesses.

7 THE COURT: And their concern is about potential
8 privileges?

9 MR. NESTLER: Potential privileges and sensitivities.

10 THE COURT: All right. I will check on that. Will
11 you remind me about that next time we meet?

12 MR. NESTLER: We will.

13 THE COURT: Okay.

14 MR. WELCH: Your Honor, this is Bill Welch.

15 THE COURT: Yes.

16 MR. WELCH: While we're on this point, just because
17 we're late, Mr. Reffitt asked that the Court reconsider having
18 the public line available because of the difficulty in the
19 public accessing the courthouse, accessing the actual courtroom
20 where this is going on. There is a right to a public trial, and
21 we believe it would facilitate that, given the current operating
22 procedures under the pandemic, to at least have people able to
23 listen to the proceedings on the telephone who can't actually
24 physically come in, given the capacity limitations.

25 THE COURT: Well, this is an issue we address all the

1 time in normal times without a telephone line open. And one of
2 my main concerns about that is the potential for witnesses who
3 could be listening in. And so I've decided that won't be open.

4 I will bring the request for a second overflow courtroom to
5 the court's attention. But just like in every other
6 high-profile case, there's often seating limitations. So this
7 is no different than in normal, nonpandemic times.

8 MR. WELCH: On another note, if I might, you had asked
9 Ms. Berkower about the questions that she had about the Court's
10 proposed voir dire, and I had one comment on the Court's
11 question number 18. And that is, "Have any of you had
12 experience as a juror in a previous criminal trial that would
13 affect your ability to be a fair juror in this trial?"

14 I would ask that the Court just ask whether they had
15 experience as a juror in a previous trial. Somebody could have
16 had a bad experience in a civil trial.

17 THE COURT: That's a good point. I will make that
18 change.

19 Anything else, Mr. Welch, on that?

20 MR. WELCH: Not on the voir dire, Your Honor. There's
21 a couple of housekeeping things that I think Mr. Nestler wanted
22 to raise and I wanted to raise as well not related to voir dire.

23 THE COURT: Okay. Go ahead.

24 MR. NESTLER: Just one thing, just for the record,
25 Your Honor, along the lines of the courthouse being open. We

1 wanted to note for the record that we noticed that Chief Judge
2 Howell issued Standing Order 22-07 on February 15 of this year
3 making clear the courthouse was open to all persons for all
4 purposes.

5 THE COURT: That's right. And this order went out, I
6 think, hours before that. That's why it wasn't referenced. But
7 yes, there are no longer limitations on individuals entering the
8 courthouse now. Thank you for making that point.

9 MR. NESTLER: Thank you, Your Honor. Just to make the
10 record clear in this case.

11 And the other question that we had was, at counsel table we
12 would like to have Ms. Berkower and myself along with our
13 paralegal and an FBI case agent. I just wanted to make sure the
14 Court was aware of that and address any concerns the Court would
15 have.

16 THE COURT: Yes. This is, what, Agent Hightower? Is
17 he the case agent?

18 MR. NESTLER: Agent Hightower from Texas and Agent
19 Ryan from D.C. are the two co-case agents, and we will have one
20 of them.

21 THE COURT: All right. Any objection, Mr. Welch?

22 MR. WELCH: Mr. Nestler did ask me about that, and I
23 responded shortly before the hearing. So I'm not sure that he
24 saw my response to that.

25 My understanding is that per the rule there can be any case

1 agent. So certainly that I don't have a problem with. I think
2 the government needs to make an election who that is going to
3 be. I don't think they can move that person in and out.

4 But along with that, I also had a similar request.
5 Nicholas Smith has been helping me with this case in kind of an
6 informal capacity. I'm not asking for him to be appointed
7 pursuant to the CJA or anything like that, but if I need some
8 help -- and I've already asked my client, and he is okay with
9 it -- would it be okay if likewise Mr. Smith were to sit with us
10 at counsel table?

11 THE COURT: So Nicholas Smith is a paralegal?

12 MR. WELCH: He is actually an attorney, Your Honor.
13 But he's been just working with me and helping me out on this
14 case because there's a lot of work involved in it.

15 THE COURT: Has he entered an appearance in this case?

16 MR. WELCH: No, he has not, and I'm not asking him to.

17 THE COURT: Well, I think he should if he's involved
18 in this case.

19 MR. WELCH: Well, I will consult some more with him
20 about that and whether he wants to do that or not. But our
21 request is just to have him sit at counsel table.

22 THE COURT: I think the rules require, Mr. Welch, that
23 counsel who is helping in the case be -- enter an appearance.

24 MR. WELCH: He's been consulting, but he hasn't --
25 he's been consulting with me, but he hasn't actually been, you

1 know, involved directly with my client.

2 THE COURT: All right. Anything else?

3 MR. WELCH: I believe that covers it.

4 THE COURT: Mr. Nestler?

5 MR. NESTLER: Just to be clear, from the government's
6 perspective, we will have either Agent Hightower or Agent Ryan
7 sitting with us, and one or both of them will likely testify at
8 the trial. We just wanted to make sure that the Court was aware
9 of that.

10 THE COURT: Okay. Just you can't flip them back and
11 forth.

12 MR. NESTLER: Understood. We just haven't decided
13 which one it will be yet.

14 THE COURT: Okay. All right.

15 MR. NESTLER: The other question we had was if the
16 Court had time limitations for openings anticipated or if the
17 parties are just left to use their best judgment?

18 THE COURT: Well, it depends. Can you give me a rough
19 estimate of what your best judgment is?

20 MR. NESTLER: I would suggest I have very good
21 judgment, Your Honor. We would probably be in the range of 25
22 minutes, but we haven't done a stop watch yet. So anything
23 under 30 minutes, I think, would be fine. I didn't know if Your
24 Honor had some sort of strict limitations that we weren't aware
25 of, and I didn't want to get too far down the line.

1 THE COURT: 30 minutes seems reasonable to me. So if
2 that's what you're saying you intend to stick to, if you go a
3 minute over, I'm not going to cut it off, but I would ask that
4 you be sensitive of the time.

5 MR. NESTLER: Understood, Judge.

6 THE COURT: Mr. Welch, does that work for you?

7 MR. WELCH: Yes.

8 THE COURT: Okay. All right, then. Any other
9 housekeeping issues? We should talk about the next hearing
10 date, but are there any other issues that we need to --

11 MR. NESTLER: The only other housekeeping issue for us
12 is related to exhibits, Your Honor. The pretrial order asked
13 the government to provide binders next week, which we will of
14 course do. How would the Court like to receive our media
15 exhibits? Is a flash drive preferable?

16 THE COURT: Probably. There have been issues recently
17 with being able to access some of the government's flash drives.
18 So I don't -- let me check on that with Mr. Cramer. I just want
19 to make sure I get it in a form that we can actually see.

20 MR. NESTLER: Understood. Whatever the Court would
21 prefer. I just wanted to make sure as we were preparing
22 everything how the Court wanted to see it.

23 THE COURT: I don't know that I'm going to watch all
24 this. It's just helpful to see what you all have coming.

25 MR. NESTLER: Of course.

1 THE COURT: I don't want to create a bunch of extra
2 work. What is the -- from the government's perspective, what's
3 the easiest way to provide that?

4 MR. NESTLER: Putting it on a flash drive is
5 probably -- actually, either way. The file exchange is probably
6 the easiest way to provide it.

7 THE COURT: Is that what some call the Dropbox?

8 MR. NESTLER: Yes. It's called USAfx. It's owned by
9 Dropbox.

10 THE COURT: That's fine. And Mr. Nestler, these
11 exhibits with videos, are they truncated to just the relevant
12 part, or are these going to be larger files that the government
13 is zeroing in on certain portions? Please tell me you're not
14 playing hours of video.

15 MR. NESTLER: Ultimately, at the end of the day, we
16 will have a substantial amount of video, but the video is
17 focused on Mr. Reffitt.

18 So to orient the Court, there are three different
19 surveillance cameras that capture Mr. Reffitt for a total of
20 about 40 minutes. So we will be introducing those cameras.
21 We'll also be introducing a montage from various cameras around
22 the Capitol, both inside and outside, to demonstrate the civil
23 disorder or the riot as it progressed. That's about a half hour
24 video file. And then we have a couple of video files recovered
25 from the defendant's phone and devices that we will be playing

1 and another video montage of the official proceeding, which is
2 about 10 minutes long showing Congress doing its work.

3 THE COURT: All right.

4 MR. NESTLER: But yeah, we are not planning to
5 introduce large amounts of surveillance video that doesn't show
6 anything relevant.

7 THE COURT: Okay. And the 40 minutes from three
8 different cameras, does that mean 40 times 3, or does that mean
9 the three together are roughly 40 minutes of video?

10 MR. NESTLER: Roughly 40 minutes of video. We
11 actually took the cameras and put them all together into one
12 exhibit so that it's easy to move through. We're trying to make
13 it as simple as we can for the Court and the jury.

14 THE COURT: Okay. And Mr. Welch, you've reviewed
15 these exhibits and don't have any objections to their
16 authenticity or the way in which they've combined things?

17 MR. WELCH: With the exception of Exhibit 204 that the
18 government is supposed to be getting the final version on.
19 There was still one problem with the previous revised version.
20 I understand they're working on getting me a revised revised
21 version.

22 THE COURT: This is the one that had the headings or
23 the subheadings? Is that what you're talking about?

24 MR. WELCH: Correct. And then what happens is, at the
25 very end of it, it displays the file name, which also makes what

1 I feel is an inappropriate reference across the screen. So that
2 needs to be edited out.

3 THE COURT: I agree. All right.

4 Mr. Nestler, you're working on that?

5 MR. NESTLER: Yes.

6 THE COURT: Are there transcripts of -- I don't know
7 whether there's telephone calls or anything that requires a
8 transcript, and if so, have those been provided, and Mr. Welch,
9 do you have any objections to them?

10 MR. NESTLER: The answer is yes, there are
11 transcripts, and yes, they have been provided to Mr. Welch.

12 THE COURT: And Mr. Welch, do you have any objection
13 to any of that?

14 MR. WELCH: No, I don't, Your Honor.

15 THE COURT: Okay. All right. It sounds like you all
16 are -- yes.

17 MR. NESTLER: On the topic of exhibits, Your Honor, to
18 help move things along at the trial, would Your Honor allow us
19 to authenticate the exhibit at the same time we're already
20 displaying it to the jury so that everything can be pre-admitted
21 and not have to go through step-by-step authentication?

22 THE COURT: What do you mean exactly?

23 MR. NESTLER: I mean, instead of displaying a
24 photograph to a witness and asking the witness -- just the
25 witness, not the jury, asking the witness if they know what it

1 is, if it's fair and accurate, and then moving for its
2 admission, and then publishing it to the jury, our preference
3 would be to just display it to the witness and the jury at the
4 same time and then ask all of the authentication questions,
5 considering that Mr. Welch has no objection to our exhibits.

6 THE COURT: And are they correct, Mr. Welch, you don't
7 object to that because you envision all of this coming in
8 without any authentication arguments?

9 MR. WELCH: I do, depending on -- I would expect that
10 what they're talking about is the photographer who took pictures
11 during the search at Mr. Reffitt's house. That would probably
12 be the bulk of it, and I don't anticipate a problem with that.

13 But as with other witnesses, perhaps, authenticating other
14 things, there's the potential that a different witness is used
15 or a witness doesn't do what's anticipated. Then it's a problem
16 because then the jury has already seen it. I don't have a
17 problem with the photographer stuff coming in that way. With
18 other witnesses, I see a potential problem.

19 THE COURT: Mr. Nestler, it sounds like this shouldn't
20 be a problem, but it's hard to pull back if it is. So maybe you
21 all having a discussion would address this issue. In the
22 abstract, I don't have a problem with it, but I don't want
23 Mr. Welch -- to draw an objection because it's the wrong witness
24 and then the jury's seen it and we have a problem.

25 MR. NESTLER: I understand. That was the reason why

1 the government filed our witness list the way we did, to lay out
2 each of our witnesses and the exhibit they were going to
3 authenticate and introduce, so if the defense believes that
4 those witnesses aren't able to authenticate those exhibits or
5 that those exhibits are somehow otherwise inauthentic, that
6 we could discuss it in advance. Otherwise, that's how we're
7 planning to do it, and we should plan to proceed most
8 expeditiously.

9 THE COURT: Mr. Welch, it will save time. Obviously,
10 I don't want you to waive any legitimate objection and have the
11 jury see something they shouldn't. So can you take a look at
12 that and let me know if you have concerns about any particular
13 set of exhibits?

14 MR. WELCH: Sure.

15 THE COURT: That would be great. That could help
16 things move more quickly.

17 MR. NESTLER: And then the only other topic to discuss
18 is discovery. To let the Court know, we did file a status
19 update last week -- I guess earlier this week based on the
20 status of global discovery as of February 9th of 2022. In that,
21 we represented that we had or would be conducting additional
22 database searches to make sure that we've completed the lay of
23 the land for global discovery, and we have done so and now until
24 we're -- we've pushed some additional materials through our
25 Relativity database to the defense, and we will be informing him

1 of that. But It's just one document that hadn't been produced
2 previously from global discovery.

3 THE COURT: Has Mr. Welch seen that?

4 MR. NESTLER: No, we just found this one document.
5 The point was, we were running checks through global discovery,
6 and there was just one document that was not in Mr. Reffitt's
7 case files or the witness's case files that we found that was
8 relevant to this case. So we're pushing that to the defense
9 today. But beside from that, we have -- and it's a two-page FBI
10 report of a witness statement.

11 But aside from that, we've run our different database
12 searches for geofence and facial recognition and the FBI
13 database and our own discovery databases. So we believe we've
14 completed our discovery at this point.

15 THE COURT: All right.

16 MR. NESTLER: But we will continue to look and
17 monitor, and if anything additional comes up, we will of course
18 let Mr. Welch know.

19 THE COURT: All right. Anything else?

20 MS. BERKOWER: Your Honor, just one more very brief
21 thing from me. I know earlier I mentioned there was a Federal
22 Rule of Criminal Procedure that addressed selection of alternate
23 jurors, and I just wanted to make note, it is Rule 24, and it
24 does specify that alternate jurors need to be -- that alternate
25 peremptories need to be used for alternates only.

1 So to the extent the Court may be considering doing all
2 peremptories all at once, I just wanted to flag that for the
3 Court, that that rule seems to indicate that we have to do it in
4 at least two tranches.

5 THE COURT: Okay. Makes sense.

6 All right. Anything else?

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

8 MR. WELCH: No, Your Honor.

9 THE COURT: Okay. So we have a tentative hearing date
10 of February 23 at 10:00 a.m. We also have one on the 24th at
11 11:30. We may not need both, but I'm inclined to keep the
12 first, and then we can see if there's a need for the second.

13 Do you all agree?

14 MR. WELCH: Yes, Your Honor.

15 MR. NESTLER: That's fine. We don't believe we will
16 end up needing Thursday's hearing considering how thorough we
17 were today, but that's fine.

18 THE COURT: All right. And if -- keep it on your
19 calendars now, just because I do have some other matters that
20 are percolating. If that were to cause me to get pulled in
21 another direction, I might prefer to meet one more time on the
22 Thursday.

23 Is that going to create a problem in terms of you all
24 preparing for trial, to keep them both on? I don't expect to
25 need both. I just hesitate right now to say only Wednesday.

1 MR. NESTLER: That is fine for the government, Your
2 Honor.

3 MR. WELCH: It's not a problem, Your Honor.

4 THE COURT: Okay. All right. If you don't hear from
5 us first thing on Tuesday, then just assume we will move forward
6 on Wednesday and in all likelihood not have the Thursday
7 hearing.

8 MR. NESTLER: Yes, Your Honor.

9 THE COURT: Okay. Thank you all.

10 (Proceedings adjourned at 2:52 p.m.)
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATE OF OFFICIAL COURT REPORTER

2
3 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. Wick

February 24, 2022

13 SIGNATURE OF COURT REPORTER

DATE
14
15
16
17
18
19
20
21
22
23
24
25