

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,)	Criminal Action
)	Nos. 21-344-1 and
vs.)	21-344-2
)	
BRANDON NELSON and)	December 10, 2021
ABRAM MARKOFSKI,)	1:06 p.m.
Defendants.)	Washington, D.C.

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**TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE JOHN D. BATES,
UNITED STATES DISTRICT COURT SENIOR JUDGE
(Parties appearing via videoconference.)**

APPEARANCES:

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Court Reporter: Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

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Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

P R O C E E D I N G S

1
2 THE COURTROOM DEPUTY: Your Honor, we have
3 Criminal Action 21-344-1 and -2, United States of America
4 versus Brandon Nelson and Abram Markofski.

5 We have Mr. Seth Meinero representing the
6 government. I hope I said your last name right, sir. And
7 we have Ms. Jessica Ettinger representing Mr. Nelson, and
8 Mr. Jonas Bednarek representing Mr. Markofski; all parties
9 appearing by video. And we also have Ms. Crystal Lustig
10 representing probation, and she, too, as well is appearing
11 by video.

12 THE COURT: All right. Good afternoon to
13 everyone, at least it is afternoon here.

14 We are here today for sentencing in these two
15 matters -- one case, but two defendants. My intent is to
16 proceed with most of this with both defendants being treated
17 together, but then to separate it out when I get to the
18 point of individualized sentencing.

19 Any objection to that from the defendants?

20 MR. BEDNAREK: No objection from Mr. Markofski.
21 Thank you.

22 MS. ETTINGER: No objection from Mr. Nelson.
23 Thank you.

24 THE COURT: And I assume no objection from the
25 government as well, Mr. Meinero.

1 MR. MEINERO: No, sir. No objection.

2 THE COURT: And as well -- these are sentencings
3 on misdemeanor charges. Count 4 of the information to which
4 each of the defendants has pled is a misdemeanor; and,
5 therefore, we can proceed by videoconference with the
6 consent of the defendants. And it's not really covered by
7 the CARES Act, which is really addressed to felony
8 sentencings; so I have to make sure that I have the consent
9 of each defendant to proceed by videoconference with this
10 sentencing.

11 So let's start with Mr. Nelson.

12 Ms. Ettinger, do I have consent that this
13 proceeding can go forward by videoconference?

14 MS. ETTINGER: Yes, Your Honor.

15 THE COURT: And on behalf of Mr. Markofski,
16 Mr. Bednarek, do I have consent to proceed by
17 videoconference?

18 MR. BEDNAREK: Yes. Thank you.

19 THE COURT: All right. And we will do so.

20 Now, I guess the first question I will ask of each
21 defendant through counsel is whether you have received the
22 presentence report as it's been revised -- I don't think
23 there have been really any revisions -- and whether there
24 are any remaining issues in dispute with respect to it.

25 Ms. Ettinger?

1 MS. ETTINGER: No there are no -- no further
2 issues, Your Honor.

3 THE COURT: Mr. Bednarek.

4 MR. BEDNAREK: Yes. We have received the
5 documents referenced, and we have no additional corrections.
6 Thank you.

7 THE COURT: All right. And the same question to
8 the government.

9 Mr. Meinero, have you received, reviewed, and are
10 there any remaining issues with respect to the presentence
11 report?

12 MR. MEINERO: Not from the government, Your Honor.

13 THE COURT: All right. Under Federal Rule of
14 Criminal Procedure 32(i)(3)(A), I will accept the
15 presentence report as findings of fact on issues not in
16 dispute.

17 We are here because each defendant has pled guilty
18 to Count 4 of the information in this case charging the
19 offense of parading, demonstrating, or picketing in a
20 Capitol Building, in violation of Title 40 of the United
21 States Code, Section 5104(e)(2)(G); and that's a Class B
22 misdemeanor. And this, of course, relates to the events
23 that took place on January 6th, 2021, in and around the
24 United States Capitol.

25 The sentencing guidelines do not apply because

1 this is a misdemeanor to which each defendant has pled. So
2 I will be undertaking a review and sentencing decision based
3 on all of the relevant factors under Section 3553(a) of
4 Title 18 of the U.S. Code; but the sentencing guidelines do
5 not apply and will not obviously be considered.

6 I won't take account of any criminal history
7 that's relevant here; but with respect to each of the
8 defendants, there is no relevant criminal history. Neither
9 Mr. Nelson nor Mr. Markofski has any prior criminal history,
10 with the exception of one speeding violation; but that's not
11 relevant to my consideration and weighing of prior criminal
12 history here.

13 So, with that, I think I actually can turn right
14 to counsel. And then if the defendants themselves wish to
15 say anything -- to them as well; I will hear from you.

16 We'll start with Ms. Ettinger on behalf of
17 Mr. Nelson, and then I will hear from Mr. Nelson. And then
18 we'll go to Mr. Bednarek on behalf of Mr. Markofski and, if
19 he wishes to say anything, I will hear from Mr. Markofski.

20 So, Ms. Ettinger, you are up first.

21 MS. ETTINGER: Thank you, Your Honor.

22 THE COURT: Actually, let me -- lest I forget, I
23 guess I will hear first from the government, not from
24 defense counsel. So, Mr. Meinerer, let's hear first from you
25 on both cases.

1 MR. MEINERO: Very well, sir.

2 Brandon Nelson and Abram Markofski committed one
3 of the longest breaches, perhaps the longest breach of
4 anyone sentenced so far for breaching the United States
5 Capitol, on January 6, 2021.

6 I will start with a general statement, Your Honor.

7 The attack on -- the riot at the Capitol that day
8 was a singularly shameful event in our nation's history, and
9 repugnant to our republic. Every person who participated,
10 including those who committed only misdemeanors, like
11 Mr. Nelson and Mr. Markofski, bears responsibility for that
12 attack on our democratic values.

13 But focusing on their individual conduct as we
14 must, Mr. Nelson and Mr. Markofski traveled from Wisconsin
15 to attend the rally of the former President held earlier
16 that day; they walked to the Capitol together. They knew
17 before they even set foot in the building that a riot was
18 occurring outside according to Mr. Nelson, who gave a more
19 extensive account of what they observed before entering the
20 building. They spent a significant time, perhaps as much as
21 an hour, outside the building before they entered.

22 Mr. Nelson told the FBI that he observed people
23 standing on, cutting into, scaffolding outside the building,
24 and police shooting pepper balls.

25 Mr. Nelson and Mr. Markofski entered at the Senate

1 wing door, which is in the northwest part of the Capitol, at
2 approximately 2:16 p.m. Just about four or five minutes
3 before they entered, rioters breached that entryway by
4 smashing the windows on either side of the doorway, climbing
5 into that space, kicking open the doors, and smashing a
6 window pane on those doors. After that, rioters began
7 cascading inside that entryway through the doorway and
8 through both of the smashed windows.

9 And just about 15 seconds before Mr. Nelson and
10 Mr. Markofski entered, Capitol surveillance video captured a
11 rioter climbing through or into one of the smashed windows
12 on the north side of that entryway. When Mr. Nelson and
13 Mr. Markofski crossed the threshold, debris, shattered
14 glass, lay about the floor underneath those smashed windows;
15 but, despite that, they continued further into the Capitol.

16 They proceeded to the area known as the Capitol
17 crypt as a mob there converged on a thin line of police
18 officers defending that space; and as that mob chanted,
19 Mr. Nelson and Mr. Markofski held up their phones to record
20 what was happening. They were enthusiastic participants.

21 During the chanting, Mr. Markofski nodded his head
22 affirmatively and pumped his fist for a short time; and
23 Mr. Nelson clapped along for a few seconds while that
24 occurred. Just a little over five minutes after the
25 defendants appeared in the crypt, the mob was able to

1 overwhelm the officers, breach the defensive line, and gain
2 access to other parts of the Capitol; but, despite that, the
3 defendants continued further.

4 At about 2:49 p.m., over a half hour after they
5 had entered the building, Mr. Markofski sent a text to a
6 friend boasting from inside the building: We stormed the
7 Capitol and shut it down. He also admitted that at some
8 point, although it's unclear exactly when, a police officer
9 told him he should leave the building for his safety.

10 The defendants entered the Rotunda for another
11 significant period, and remained there until police officers
12 were finally able to marshal the resources they needed to
13 drive rioters out of that space.

14 Mr. Nelson acknowledged that he saw rioters
15 accosting police officers, and that officers started to push
16 back in attempt to clear the rooms; and the rioters pushed
17 and shoved to get out of the building.

18 Mr. Nelson and Mr. Markofski then exited the
19 Capitol at the Rotunda doors adjacent to the Rotunda; and
20 Mr. Nelson observed, and video surveillance confirmed, that
21 the window panes on those doors were also smashed. They
22 left out of the Rotunda doors at approximately 3:41 p.m.

23 Around that time, at approximately 3:40 p.m., a
24 minute before, around that same time, Mr. Nelson texted his
25 mother that he had been "maced," and that there was "shit

1 everywhere."

2 All in all, the defendants spent well over an
3 hour, if we rely on the geolocation data from
4 Mr. Markofski's phone; about 84 to 85 minutes inside the
5 Capitol during the riot. This is a highly aggravating
6 factor, Your Honor.

7 Each minute a rioter was inside the Capitol, the
8 police had to spend energy addressing the threat and, at
9 times, a violent threat posed to members of Congress, their
10 staff, other police officers, other employees at the
11 Capitol, and even other rioters who were in the building.
12 Each minute was another minute beleaguering law enforcement
13 officers. Further, each minute was a minute our democratic
14 process was delayed; and that delay caused doubt and dismay
15 among the American people that it would resume -- and there
16 was concern that it would resume at all that day.

17 To give a frame of reference for how unusual the
18 incursion -- the duration of the incursion of these
19 defendants was, I have reviewed the sentencing memo
20 submitted by the government for nearly all of the -- and I
21 have counted 49 Capitol riot defendants sentenced before
22 they're being sentenced today.

23 There were about four defendants whom I could not
24 tell how long they were in the building. But a little over
25 a quarter of those 49 defendants, Your Honor, they were

1 inside between one and ten minutes. Nearly half of the 49
2 were inside between 11 and 30 minutes.

3 So if we take that first group and that second
4 group, about three-quarters of these 49 defendants were
5 inside of the Capitol for 30 minutes or less.

6 Another smaller group, about 10 percent, were
7 inside between 31 to 59 minutes; and then another two were
8 in the Capitol for about 60 minutes, perhaps longer than 60
9 minutes. But I have not been able to identify another
10 defendant who was in the Capitol for over 80 minutes, as
11 these defendants were.

12 After January 6th or after --

13 THE COURT: Mr. Meinero --

14 MR. MEINERO: Yes.

15 THE COURT: -- why is the length of time inside of
16 the building of such importance in sentencing?

17 MR. MEINERO: As I said, Your Honor, it was more
18 time beleaguering the officers who had to defend the
19 building; it was more time contributing to the delay and the
20 certification of the Electoral College vote. It added to
21 the aggravation caused by everyone inside that building, and
22 even the American people, because of the delay that caused.
23 So --

24 THE COURT: But there is a list of nine factors
25 that has been developed; where has that been developed from?

1 MR. MEINERO: That factor in the list of nine
2 would go to the first factor when --

3 THE COURT: No. You are not understanding my
4 question.

5 MR. MEINERO: I'm sorry.

6 THE COURT: Where does that list of those factors
7 come from?

8 MR. MEINERO: Oh. That is a list that our office
9 developed, having a bird's-eye view of these cases; and that
10 is a list that our office developed out of --

11 THE COURT: And the length of time inside the
12 building is one of those nine items. Do any of the other
13 nine factors support a stronger sentencing here?

14 If I have to look at those nine factors -- if, in
15 your office's view, I should look at those nine factors, is
16 it only one out of nine that actually supports a more
17 serious sentence here?

18 MR. MEINERO: It's the sixth factor we list, the
19 length of the defendant's time and the area the defendant
20 traveled.

21 THE COURT: It is number six; that's right.

22 MR. MEINERO: Right. It also goes -- well, the
23 entry is, sort of, a separate issue that we listed, number
24 one, how they entered; but the length is one of the nine
25 factors, Your Honor.

1 THE COURT: But let me repeat my question and see
2 if you have an answer for it.

3 MR. MEINERO: Sure.

4 THE COURT: Is it only that factor, the length,
5 which is factor number six -- is that the only one of the
6 nine factors that actually supports a longer sentence here
7 or a more serious sentence?

8 MR. MEINERO: I think -- I think in that list it
9 is the one factor that applies to --

10 THE COURT: So the other eight factors generally
11 would be either neutral or supportive of the defendant's
12 request for a lesser sentence?

13 MR. MEINERO: No. No. Certainly the first
14 factor, when and how they entered, because they entered
15 after spending about an hour outside the Capitol --

16 THE COURT: So what?

17 MR. MEINERO: -- having had an opportunity --

18 THE COURT: So what?

19 MR. MEINERO: So they would have had knowledge
20 about the situation that was brewing at the Capitol; they
21 knew a riot was occurring but went in anyway.

22 They also entered through an entryway that had
23 been breached violently, with smashed windows and a breached
24 doorway, so --

25 THE COURT: But you can make the argument --

1 that's why I say some of them are neutral. You can make the
2 argument on that factor, when and how the defendants entered
3 the Capitol Building, that this was a nonviolent entry.

4 There was no breaching of a police line; they did not break
5 windows or otherwise breach and open doors or windows.

6 They simply walked in after others had done that.
7 So why isn't that a factor that actually is either neutral
8 or in their favor?

9 MR. MEINERO: I don't think it's neutral, Your
10 Honor, because there is still knowledge of the violent
11 nature of the breach, and they went in anyway. And I --

12 THE COURT: So give me an example --

13 MR. MEINERO: -- believe you are correct, there is
14 no evidence --

15 THE COURT: Give me an example, Mr. Meinero, of
16 someone as for whom that factor -- when and how they entered
17 the Capitol Building -- would be neutral or favor them. It
18 seems to me you are saying that anyone who went in, that's a
19 strike against them.

20 MR. MEINERO: Well, it's whether, when, and how
21 they entered. They entered at a relatively early point.

22 I don't know if I would call them part of the
23 "first wave," but very close to this first wave; very early
24 on they were inside the building.

25 THE COURT: But now you're being inconsistent.

1 Now you're being inconsistent, Mr. Meinero,
2 because a moment ago you said that it weighs against them
3 because they were there for a long time outside observing
4 what was happening; and now you are saying that they were
5 one of the first to enter.

6 Those seem to be really inconsistent.

7 MR. MEINERO: I don't think so, Your Honor,
8 because the situation was brewing at the Capitol for quite a
9 while before individuals actually breached the building
10 itself. There was all sort of chaotic activity that was
11 going on outside the building --

12 THE COURT: I am aware of that.

13 MR. MEINERO: -- versus inside.

14 So what I am saying is these defendants were there
15 for a long time. They had a long time to observe the chaos;
16 to make the decision for themselves: This is something we
17 shouldn't be a part of and turn back and get out of there;
18 but they didn't.

19 They saw what was happening; they went in through
20 a -- very soon after one entry point was violently breached,
21 and they remained inside for a -- as far as I can tell,
22 longer than anyone; possibly longer than anyone else who has
23 been sentenced so far.

24 THE COURT: Go ahead.

25 MR. MEINERO: The day after January 6th, Your

1 Honor -- or, actually, after they left the Capitol, they
2 drove back to Wisconsin.

3 Early in the morning on January 7th, after they
4 would have had time to reflect on their conduct and the
5 consequences of it, they texted each other about their
6 experience of the prior day; they weren't regretful, they
7 were proud. Mr. Nelson texted Mr. Markofski: We held the
8 line, no backing down. Mr. Markofski replied: Oh, fuck
9 yeah, brothers and patriots; won't go down without a fight.
10 Mr. Nelson responded: Not I.

11 Your Honor, before I address the mitigating
12 factors in this case, I was going to address the issue of
13 disparity. I don't know how much depth you want me to go in
14 or how much weight this Court will place on that factor
15 under 3553(a).

16 I will say, as a very simple matter, these
17 defendants are distinguishable, as I just mentioned, from
18 practically every other defendant so far in their length of
19 time in the Capitol. And I know the defense has mentioned a
20 few cases, or cited a few cases, and can compare
21 defendants -- those defendants to Mr. Nelson and
22 Mr. Markofski; these are highly fact-specific assessments,
23 Your Honor.

24 The permutations of aggravating and mitigating
25 factors for each one of the defendants is limitless; but

1 there were five -- I'm focusing on a few the defense cited.
2 There was Sean Cordon and Danielle Doyle who received
3 sentences of two months' probation; those sentences appear
4 to be outliers in the table of -- we attached to our
5 sentencing memo. Those --

6 THE COURT: Let me -- let me give this assessment,
7 and you tell me where it's wrong.

8 My assessment, from looking -- as you have done --
9 at the cases that have been sentenced so far for pleas to
10 this offense, one count, 5104(e)(2)(G) -- and there have
11 been more than a handful of those; we are now getting a body
12 of sentencings.

13 I would say that the most common sentence has been
14 a sentence of probation, and probation for more than the one
15 or two months that you mentioned; something more typically
16 of two years' probation, I think. There have been occasions
17 of more than two years, but not many. There have been
18 occasions of periods of incarceration, but not usually.

19 So it seems to me that it might be fair to say
20 that the outliers are, as you mentioned, at the bottom;
21 probation for a month or two, or no probation at all -- at
22 least in one instance, I think. And the outliers at the
23 upper end are periods of incarceration or very lengthy
24 periods of probation, five or four years.

25 Why is that not an accurate assessment of the

1 sentencings under the 51 -- under this provision to date?

2 MR. MEINERO: I think the median or means
3 sentence, Your Honor, probably is somewhere in the realm of
4 24 months -- I'm sorry -- yes, 24 months of probation with
5 home detention; sort of an intermediate between straight
6 probation and incarceration. We are seeing, more recently,
7 more and more sentences of incarceration.

8 I am just looking at the list we provided. I am
9 trying to count on the fly here how many sentences of
10 incarceration there have been. We have it organized by what
11 the government recommended.

12 But I am counting 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,
13 11 -- I have counted 12 sentences of incarceration, Your
14 Honor, at least 12 sentences -- from this table of what the
15 Court's imposed. So that is about one fourth, or so, of the
16 defendants who have been sentenced so far. I may be off by
17 a few here, Your Honor -- and I'm sorry I don't have a more
18 definitive answer of the number of defendants who have
19 received sentences of incarceration; but that sounds about
20 accurate to me.

21 So a sentence of incarceration here would be in
22 line -- we are getting into some of the more serious cases
23 or -- some of the individuals who were on this spectrum of
24 conduct are more towards the middle or the higher end of
25 criminal conduct for this offense.

1 THE COURT: Why do you say that? What is the
2 evidence that we're now dealing with the more serious cases
3 of this conduct, which is the parading or demonstrating in
4 the Capitol?

5 MR. MEINERO: Well, we're getting more instances
6 of individuals who engaged in belligerent conduct; I know
7 that's what the defense cited to --

8 THE COURT: But that is not this case. That is
9 not this case.

10 MR. MEINERO: In this case there is not
11 belligerent -- the physical belligerent conduct committed by
12 these defendants; that is correct.

13 However, as I noted, what distinguishes them --
14 what distinguishes them from the others is the duration.
15 And also, Your Honor, I haven't mentioned this yet --
16 because it also goes to mitigation, at least from the
17 defense's perspective -- is these defendants have military
18 service in their background which we see as an aggravating
19 factor here.

20 The reason we see that as an aggravating factor --
21 and, first, I want to state very clearly there is possibly
22 no greater service one can render to the nation than that
23 service; and that service is worthy of the highest respect
24 and praise to Mr. Nelson and to Mr. Markofski.

25 However, they also swore an oath to uphold and

1 defend the Constitution. They were in a special position to
2 understand that oath and to appreciate what this attack on
3 democracy meant. So we see that as an aggravating factor
4 here because what they did flew in the face of the oath they
5 took.

6 THE COURT: Well, I see the military service as
7 cutting both ways. It seems to me that normally it's
8 something that cuts in favor of a criminal defendant. That
9 kind of community service -- that kind of service to the
10 nation is something that is a plus mark for them in
11 consideration of sentencing; that's part of the nature and
12 characteristics of the defendant.

13 But, on the other hand, as you say, within a
14 criminal offense, but particularly this offense, where it
15 involved -- with a threat to our democratic process, it
16 is -- and our constitutional considerations -- it is
17 something that gives the Court pause with respect to the
18 individuals who, notwithstanding their obligations, engaged
19 in this conduct; so it seems to me that that cuts both ways.

20 I would not call it an "aggravating factor"; but I
21 would call it a factor that needs to be considered on both
22 sides of the equation.

23 MR. MEINERO: And I think the way we see it --
24 again, crediting them for that service -- we see that as
25 troubling and more confounding as to why they decided to

1 engage in misconduct; and that's why we mentioned it.

2 Your Honor, I also want to address some of the
3 other mitigating factors here which you mentioned earlier.
4 These defendants have no adult convictions, both have
5 complied with the conditions of their pretrial release; both
6 cooperated at an early stage of the investigation.

7 Mr. Nelson submitted to a prearrest interview and
8 admitted that he entered the Capitol during that prearrest
9 interview. He submitted to a post-arrest interview. He
10 gave consent to search his apartment and identify where FBI
11 agents could find clothing evidence there, which was
12 helpful.

13 I will say some -- more on the negative end, he
14 did minimize his conduct during his post-arrest interview.
15 He suggested because the doors had been breached already and
16 because the Capitol is a public building -- he suggested
17 that he did not know that that was unlawful. But when the
18 interviewing agent confronted him about that and noted that
19 the doors he had entered had smashed windows, he backed away
20 from that statement; and he said, no, I hear what you are
21 saying.

22 Mr. Markofski also, he cooperated at an early
23 stage. He submitted to two prearrest interviews; and, at
24 first, he admitted that he entered the Capitol. At the
25 second -- it wasn't so much an interview, as it was a

1 meeting for him to turn over video and photo evidence to the
2 FBI; and he did that. During the post-arrest interview, he
3 confirmed he had entered the building. He identified where
4 evidence could be found in his residence and car, and
5 provided the unlock code to his cell phone.

6 I will say this -- and this was more negative than
7 Mr. Nelson. Mr. Markofski minimized his conduct more in his
8 post-arrest interview and expressed incredulity that he
9 committed a crime because he saw no trespassing signs and
10 because law enforcement did not stop him; that incredulity
11 was misplaced.

12 THE COURT: It's important -- Mr. Meinerer, it's
13 important to consider not only just what was said in the
14 post-arrest interviews, but what the positions of the
15 defendants are today.

16 MR. MEINERER: Absolutely, Your Honor.

17 THE COURT: And you are not saying that either
18 defendant is doing anything other than admitting in full
19 their conduct and how wrong they were to engage in that
20 conduct?

21 MR. MEINERER: That -- I was going to mention that
22 in about 30 seconds, Your Honor.

23 THE COURT: Okay.

24 MR. MEINERER: But, before that, I also wanted to
25 underscore that they both expressed an early desire to

1 express -- to accept responsibility here.

2 Getting to what you just said, Your Honor, and
3 their remorse; in their sentencing submissions, they both
4 made worthy statements of contrition.

5 Mr. Nelson made, I felt, a very poignant statement
6 about he was ashamed he committed a crime that made fellow
7 citizens and people around him fearful of him. And he
8 acknowledged the irony that if he had still been in the
9 National Guard he would have been called up to restore
10 order; that struck me quite a bit.

11 In a similar vein, Mr. Markofski, a current
12 guardsman, acknowledged that his actions put his oath in
13 question and, in his words, brought dishonor to his beloved
14 U.S. Army National Guard. So, absolutely, Your Honor, those
15 statements deserve credit. It still brings us, the
16 government, back to having taken those oaths and still going
17 into the building in the first place.

18 This attack was akin to a battle. There was
19 hand-to-hand combat that occurred at the Capitol over hours;
20 and, unfortunately, they chose the side that was against
21 democracy; and they went in and remained for 85 minutes.
22 Alas, that's something they have to live with and something
23 they must be held accountable for.

24 THE COURT: Let me make sure that I have the
25 government's position clear on other factors.

1 There is no allegation that either of these
2 defendants engaged in any violent conduct, correct?

3 MR. MEINERO: Correct.

4 THE COURT: There is no allegation that they
5 engaged in any acts of destruction, correct?

6 MR. MEINERO: Correct.

7 THE COURT: Is there any allegation that they
8 witnessed acts of violence or destruction and ignored or
9 took some inappropriate steps?

10 MR. MEINERO: The video from inside the crypt that
11 I mentioned, Your Honor -- as I said, they came into view,
12 in the Capitol surveillance video, about five minutes before
13 the mob that preceded them and that grew, after they had
14 entered -- had breached that line and overwhelmed the
15 officers, and then gained entry to the Capitol.

16 I can't say that -- well, I can't say that these
17 defendants represented explicitly that they saw violence
18 committed against anyone. However, Mr. Nelson -- based on
19 what he said he saw before entering, that pepper balls were
20 deployed. He also said that he had witnessed rioters
21 accosting police officers in the Rotunda; and that's at the
22 time that officers began driving rioters out of that space,
23 and rioters were pushing and shoving to get out of the
24 building.

25 So -- and let me also say this. We believe -- or

1 at least we don't have evidence to the contrary that they
2 were separated for any prolonged period during their time
3 inside the Capitol; as far as we know they were together
4 this whole time. So that is -- those are things that
5 Mr. Markofski also would have seen. So I hope that answers
6 your question, Your Honor.

7 But we do believe that they would have -- during
8 this very long time outside and inside the Capitol, have
9 seen things that would have, at least, been chaotic but,
10 also, they would have seen these interactions with officers
11 and the officers being overwhelmed, and activity of that
12 nature.

13 THE COURT: Mr. Meinerer, I am not going to accept
14 that.

15 The government has listed one of the factors as
16 being the defendant's reaction to acts of violence or
17 destruction. What you are saying is anyone who was there
18 must have seen acts of violence or destruction, and they
19 didn't stop them; that's not a factor then. That would be
20 something -- the way you explain it, it's something that
21 would apply to everyone who was there.

22 We're trying to differentiate on a spectrum. When
23 differentiating on a spectrum, it seems to me the government
24 has no evidence or indication that they witnessed and had
25 some improper reaction to acts of violence or destruction;

1 otherwise you are saying that anyone --

2 MR. MEINERO: We have --

3 THE COURT: -- must have seen things and,
4 therefore, that should be held against them.

5 MR. MEINERO: Well, we also -- well, let me just
6 get to the first part.

7 We have Mr. Nelson's words that he saw rioters
8 accosting police officers. So -- now, whether that is the
9 level of violence you are talking about as far as assaults;
10 I can't say that, Your Honor.

11 However, they would have been in there a long
12 period, as opposed to other rioters who may have gone in for
13 only a few minutes and seen much less than they did.

14 THE COURT: But you are also saying that they
15 would have seen things outside, and that's true of everyone.

16 MR. MEINERO: Yes.

17 THE COURT: But enough on this factor. Enough on
18 this factor. I don't think that --

19 MR. MEINERO: Yes.

20 THE COURT: I don't think there is a very
21 strong -- I don't think this factor weighs strongly against
22 either of the defendants.

23 They didn't destroy evidence either, right?

24 MR. MEINERO: No --

25 THE COURT: Indeed, to some extent they helped the

1 government find -- helped the government locate evidence?

2 MR. MEINERO: Correct.

3 THE COURT: There are a couple of -- very
4 minimal -- statements on social media made immediately after
5 or, actually, one during the events.

6 MR. MEINERO: I just want to -- I just want to
7 correct that for a moment, Your Honor. They were texts,
8 private texts; they were not posted on social media.

9 THE COURT: I'm sorry. Texts, not social media.
10 Private texts; you are right.

11 MR. MEINERO: Yes.

12 THE COURT: But that's all. There was nothing --
13 they weren't -- neither of these individuals said anything
14 beforehand, in terms of anticipation of some great activity
15 at the Capitol; and neither of them exhibited any planning,
16 and neither of them have exhibited in social media, texts or
17 otherwise, much in the way of cheering on what happened.

18 Now, there are these text statements right after
19 they were in the Capitol; but that's it, correct?

20 MR. MEINERO: Yes. That's correct. There is not
21 evidence of preplanning, social media promotion of what
22 occurred; so that is correct, Your Honor.

23 The texts -- we mentioned the texts to show their
24 state of mind about how they felt about what they did.

25 Mr. Markofski texted a friend saying he stormed

1 the Capitol -- or we stormed the Capitol and shut it down.
2 Then there was a text the two defendants shared with each
3 other after they went home to Wisconsin.

4 THE COURT: Okay. All right. I think we have
5 exhausted the factors.

6 Anything else that you want to say, please do so,
7 Mr. Meinero.

8 MR. MEINERO: Your Honor, I am finished. And that
9 is -- for all of the reasons I mentioned, that's why we
10 recommend a sentence of 14 days' incarceration for the
11 defendants, plus the \$500 restitution to the Architect of
12 the Capitol, and the \$10 special assessment.

13 Thank you.

14 THE COURT: All right. Thank you, Mr. Meinero.

15 So, now, Ms. Ettinger, I think -- just because I
16 have listed Mr. Nelson first, I am going to turn to you
17 first, and then to Mr. Nelson; and then I will turn to
18 Mr. Bednarek, and then to Mr. Markofski.

19 Ms. Ettinger.

20 MS. ETTINGER: Certainly, Your Honor. Thank you.

21 People should not have to be fearful of fellow
22 citizens and people they arrest; those are Mr. Nelson's
23 words in reflection on his conduct on January 6th, and they
24 articulate some of the deepest hurt that's flowed from the
25 riots. Americans are fearful of other Americans; Mr. Nelson

1 gets it.

2 As the defense has set out in its sentencing memo,
3 he is someone who cares very deeply about other people, and
4 about his service to others; and his conduct in this case is
5 an aberration in an otherwise law-abiding life. His role in
6 the breach is limited; and he's shown deep and true remorse
7 for his conduct and, for that reason, the defense is
8 requesting a sentence of probation in this case.

9 The country is not just feared; it's angry and
10 disappointed about what happened on the 6th. But anger,
11 fear, and disappointment don't define just punishment.

12 Instead, as Your Honor has mentioned, it's found
13 in assessing the spectrum of misconduct from that day, and
14 finding Mr. Nelson's place along it.

15 The government has tried to point to three
16 aggravating factors, and I'd like to look at each of them
17 because our position is that none of the three pushes this
18 case into the realm of one deserving incarceration.

19 First, the government spent quite a bit of time
20 talking about the length of time that Mr. Nelson was inside
21 the Capitol. But any amount of time inside the Capitol was
22 unlawful, and the amount of time spent shouldn't be the
23 metric by which we differentiate terms of probation or terms
24 of jail time.

25 Instead, we should be looking at what happened

1 inside the Capitol and what were Mr. Nelson's actions
2 afterwards because those are the factors that indicate
3 whether there is a risk that he's going to do something like
4 this again; and that more closely aligns with the analysis
5 under 3553.

6 So when it comes to Mr. Nelson --

7 THE COURT: Well, why -- why would you think that
8 the length of time in the building would be irrelevant?

9 I understand that you want to put it in the
10 context of other factors and other considerations; but why
11 would that be irrelevant?

12 Doesn't it make a difference if someone was
13 breaching the Capitol and violating the law for two minutes
14 versus two hours?

15 MS. ETTINGER: I don't mean to suggest it's
16 irrelevant, Your Honor, because the last thing I want to do
17 is to downplay the conduct, but certainly not Mr. Nelson's
18 position. But it can't have such disproportionate weight
19 that it loses meaning; the context is exactly the point that
20 I would like to emphasize.

21 And so what Mr. Nelson was doing during those 85
22 minutes is more important than just the mere cosmetic fact
23 that he was there for 85 minutes.

24 So if I may, Your Honor, adding on to that
25 context, Mr. Nelson's conduct at the Capitol was that he

1 walked in through a door. He was a wrongful spectator to
2 others' destruction. He made a video that he texted to his
3 mother, and he left.

4 He is not dressed for battle, like Mr. Sean
5 Cordon; he is not throwing chairs at the police, like
6 Mr. Bradley Rukstales; he is not videotaping police officers
7 being assaulted, like Mr. Robert Reeder. And his behavior
8 from waking hours of January 7th onward has been nothing but
9 remorseful.

10 And so that bleeds into the second aggravating
11 factor that the government has pointed to, which is this
12 text message exchange between Mr. Nelson and Mr. Markofski.
13 That text exchange doesn't happen, as the government
14 suggested, after there's been real time to reflect on their
15 actions; it happened at one o'clock in the morning after
16 having undertaken a very long drive from Washington back to
17 Wisconsin.

18 And so what really matters is not how they were
19 feeling so caught up in the buzz of the day, but what they
20 said in the days, months, since then; the weeks that
21 followed. And in that period --

22 THE COURT: Clarify -- clarify one thing for me.
23 That text exchange is between them as they are in the car
24 driving?

25 MS. ETTINGER: It was at 1:19 to 1:20 in the

1 morning. I am not certain whether they were still in the
2 car versus on the way home.

3 On the way home.

4 THE COURT: Okay. Go ahead.

5 MS. ETTINGER: But in the weeks that followed,
6 Mr. Nelson, as the government emphasized, he meets twice
7 with the FBI, cooperates fully, was charged, and pleads
8 guilty.

9 But even more important than those actions, Your
10 Honor, I think that he spent time reflecting on what
11 happened and dedicating himself to making changes in his
12 thinking and his behavior, refocusing on his work, and
13 moving forward with his life.

14 He certainly is not Mr. John Lolos, who is still
15 chanting and giving war cries on the Delta flight home; he
16 is not posting on Facebook like Ms. Dona Sue Bissey; and
17 he's not Ms. Lori Vinson telling the media, in multiple
18 interviews, that she'd do it all over again.

19 Mr. Nelson goes back to work at Mendota; he's
20 pulling overtime shifts to support a very difficult (sic)
21 community of Haitians. And he's distancing himself from
22 politics altogether.

23 I will touch just briefly, Your Honor, on the last
24 of what the government terms an aggravating factor. We, of
25 course, agree with the Court that it is the wrong thing to

1 call out somebody's military service; there is no however or
2 but that follows --

3 THE COURT: I don't think -- I don't think I said
4 that. I said that it was a double-edged sword; it both
5 favored and disfavored him.

6 MS. ETTINGER: Understood, Your Honor. I must
7 have misheard.

8 I think what I would submit to the Court is this:
9 Rather than making Mr. Nelson more culpable, Mr. Nelson's
10 military service has made him more contrite. He is
11 horrified to have participated in an act that caused harm to
12 our country, particularly because he wore a uniform; and
13 that shame and guilt is going to reverberate long after this
14 hearing, and it is something that he is going to carry with
15 him for the rest of his life.

16 So in the end, Your Honor, each of the factors
17 weighs in favor of probation here; Mr. Nelson's focus on
18 serving others; his lack of criminal history; his wrongful,
19 but limited role in the riot. He is somebody who helps the
20 public, not somebody from whom the public needs protection.

21 There is not a risk that he is going to
22 participate in anything like this again. A sentence of
23 probation is serious, and it sends a message; it's
24 sufficient, but not greater than necessary. Thank you.

25 THE COURT: Thank you, Ms. Ettinger.

1 Does Mr. Nelson wish to say something?

2 DEFENDANT NELSON: Yes, Your Honor.

3 MS. ETTINGER: Yes, sir.

4 THE COURT: Please. Good afternoon, Mr. Nelson.

5 DEFENDANT NELSON: Can you hear me?

6 THE COURT: I can.

7 DEFENDANT NELSON: I just wanted to express how
8 sorry I am for being a part of the breach in and of itself.

9 Obviously I observed the damage to the building,
10 but I think what is a lot worse was that day we became
11 further apart as a country, not closer. And I wanted to say
12 I'm sorry to the families and anyone affected by the
13 violence; obviously, particularly, law enforcement. And I
14 know there was an officer that took his life in the
15 aftermath of that; and so that doesn't -- that doesn't make
16 me feel very good.

17 And obviously that day I had bad judgment; there
18 is no question about it. I wish I had made better
19 decisions. But since then I have been working to distance
20 myself from toxic politics, which obviously this was.

21 I can't go back in time. Sometimes I wish that I
22 could. But I guess what I can do going forward is working
23 as hard as I possibly can to learn from all of this, and
24 hopefully put it behind me.

25 THE COURT: All right. Thank you, Mr. Nelson.

1 Mr. Bednarek, you are up.

2 MR. BEDNAREK: Thank you, Judge.

3 And I guess one of the benefits of going last is
4 that I have the benefit of hearing everybody else's
5 positions and arguments to this point; and it's obvious that
6 Mr. Nelson and Mr. Markofski are similarly situated --
7 obviously legally; but also, I think, in the arguments that
8 I would have made. I mean, many of the arguments that I
9 would have made have been made for me either by the Court or
10 by my esteemed colleague who represents Mr. Nelson; so I am
11 not going to rehash on any of those. In fact, I will try to
12 be fairly brief.

13 I submitted a sentencing memorandum in which I
14 intended to provide the vast majority of argument. But as
15 with all sentencing hearings of any type -- let alone this
16 type -- you know, things come up that make me want to
17 comment. And one of the things that we have talked a fair
18 bit about is, as you've referred to, the double-edged sword
19 of the military aspect; I really agree with that, Judge.

20 In fact, in preparation, I was wondering about how
21 to address this with the Court because I understand your
22 concern that it cuts both ways.

23 But the one thing that we haven't talked about, at
24 least with respect to Mr. Markofski, is that the effect of
25 this case and this conviction -- the collateral effect on

1 his military career is as yet undetermined. And it seems to
2 me to be very potentially significant and falls into the
3 realm of punishment. And I say that because he -- well, in
4 the letters and in my sentencing memorandum, I indicate that
5 this has had impact on his progression in the military, and
6 potentially a lack thereof.

7 The other thing that Mr. Markofski benefited
8 from -- and it's clearly in question at this point -- is the
9 financial assistance with his education that is a function
10 of his military career. I don't know what his financial aid
11 future looks like; and I don't know -- and nor does he
12 know -- what his college career looks like from a financial
13 perspective because of the military implications of that.

14 I say that because I feel as though that
15 collateral consequence is going to be felt by Mr. Markofski
16 no matter what sentence you hand down today. You can give
17 him a fine, and still the military is taking action against
18 him. So there are effects from this conviction that go
19 beyond what we're talking about today, at least with respect
20 to Mr. Markofski.

21 The other one, as I referenced in my memorandum,
22 is his employment; he was immediately terminated. We
23 have -- in Wisconsin there is a fairly large conglomerate of
24 convenience stores and gas stations; they are called
25 Kwik Trip. It's actually headquartered in La Crosse,

1 Wisconsin, very near where to Mr. Markofski lives. He got a
2 job there; they found out about this; they let him go.

3 I suspect that future employers may well have
4 concerns, if you will, about Mr. Markofski because of this.
5 I say that because that's another collateral consequence
6 that's going to be felt no matter what happens today.

7 Judge, one of the other things I did in
8 preparation for today -- I have re-read the memorandum, of
9 course, and all of the attachments. And I think it's near
10 to the end of the attachments, the letter from
11 Mr. Markofski's father; he said something, I wrote it down
12 here. He said: It's not our mistakes that define us, but
13 it's how we respond to them. I can't script --

14 THE COURT: I noted that -- I noted that in his
15 letter as well.

16 MR. BEDNAREK: Yes. I can't script a better
17 response to his actions than what Mr. Markofski has done to
18 date. Right?

19 I mean, we can't condone the actions; I get that.
20 That's why he's here; that's why he's pled guilty. But
21 everything he has done -- frankly, before and after, has
22 been totally consistent with somebody that's deserving of a
23 probation sentence and not worthy of somebody that needs to
24 be incarcerated. I feel pretty strongly about that. And I
25 make a career of defending people that I don't get to say

1 that about.

2 Mr. Markofski is the kind of man that everybody
3 would want to call his son, his friend, his colleague, his
4 military partner -- pick the pronoun. And he would be the
5 one that you would want in a foxhole next to you, in a
6 classroom next to you, working with you on a job site.

7 And so I, for one, am extremely optimistic about
8 his future; and I say that wholeheartedly, Judge. So I just
9 ask that you follow the recommendation that presentence has
10 prepared, and let's do a term of probation. I don't believe
11 incarceration is at all necessary. And let's not forget, if
12 he fails on probation, that's what happens; we incarcerate.
13 I believe he deserves a chance.

14 So that's what I have for you, Judge. But I stand
15 ready to answer any questions or address concerns that the
16 Court may have. Thank you.

17 THE COURT: So tell me why, from your perspective,
18 the length of his stay inside the Capitol is not enough of
19 an aggravating factor to warrant a sentence at the higher
20 end of the spectrum?

21 MR. BEDNAREK: Because I would ask not only how
22 long he was in the Capitol but, really, I think what the
23 touchstone should be: What did he do in the Capitol?

24 There were lots and lots of people that were
25 breaking windows; that were accosting police officers; that

1 were engaging in behavior both in the Capitol -- that is far
2 more egregious. To me, his -- this is not to condone it,
3 Judge, I don't mean that; but it's to set it apart from
4 others. His was, essentially, a mere presence in the
5 Capitol.

6 Now, again, that's not legal, as we all know; but
7 he is not in there breaking windows or tossing chairs, as my
8 colleague pointed out. He was -- and I will maybe use air
9 quotes -- he was, sort of, benign in his behavior whilst he
10 was in the Capitol; that's why I don't think the length of
11 time aggravates.

12 THE COURT: All right. Thank you, Mr. Bednarek.

13 Now, does Mr. Markofski have something he wishes
14 to say?

15 MR. BEDNAREK: He does. Thank you.

16 THE COURT: Mr. Markofski, good afternoon.

17 DEFENDANT MARKOFSKI: Good afternoon, Your Honor.

18 Your Honor, I understand that my lawyer has
19 provided you with my written allocution and how you have
20 read it already. I want to emphasize only one point, to
21 you, to the government, and to all of the police officers
22 present on the Capitol on January 6th, I'm sorry.

23 Thank you.

24 THE COURT: All right. Thank you, Mr. Markofski.

25 All right. I am going to make some general

1 observations -- well, not many -- and then talk about each
2 of the defendants as I determine the sentence to be imposed
3 for each.

4 First, let me just say that I have received the
5 presentence investigation reports as to Mr. Nelson and
6 Mr. Markofski; sentencing memoranda -- not just from the
7 government, but from each of the defendants; a supplement
8 from Mr. Nelson; and letters of support for both Mr. Nelson
9 and Mr. Markofski. I have read them all and take them all
10 into account, along with what has been said here this
11 afternoon in determining the appropriate sentence in each of
12 these cases.

13 Both of the defendants have agreed to pay -- and I
14 believe have already taken steps to pay -- the restitution
15 of \$500 that they agreed to; and I will order that amount of
16 restitution as part of the sentence in this case with
17 respect to each of the defendants.

18 I think they have also paid or taken steps to pay
19 the \$10 statutory assessment that is required as well.

20 That brings me to the other monetary
21 consideration, which is a fine. And I say this in the
22 context of the remainder of the sentence that I am going to
23 impose in each of these cases. I believe that fines are
24 warranted in these two cases, especially given what I am
25 going to impose as the remainder of the sentence.

1 Mr. Nelson, based on the information provided to
2 me -- notwithstanding his recent decision with respect to
3 his employment -- I believe Mr. Nelson has an ability to pay
4 a fine; and I am going to impose a fine with respect to
5 Mr. Nelson.

6 Mr. Markofski's ability to pay a fine is perhaps a
7 little less; but I believe that he, too, has the ability to
8 pay a fine. I am going to impose a fine because I think it
9 is warranted; and it will, however, be a somewhat less
10 significant fine than Mr. Nelson.

11 So now I am going to go through the reasons for
12 sentences in these cases and also state what the sentences
13 will be.

14 I will give counsel one final opportunity, after I
15 do so, to make any legal objection before I formally impose
16 the sentence; but I will only go through it once.

17 We need to start with the nature of the offenses
18 here.

19 I don't think anyone is going to question that
20 these are very serious offenses. Even though they're just
21 misdemeanors, these are serious offenses; they involved a
22 threat to our democratic process, and an attack on our
23 democratic values. As the D.C. Circuit yesterday stated:
24 The events of January 6th were the most significant assault
25 on the Capitol since the war of 1812; that was during war

1 time, this was not.

2 Indeed, this is the single, as, again, the D.C.
3 Circuit said -- this is the single, most deadly attack on
4 the Capitol, by domestic forces, in the history of the
5 United States; and it took lives, we cannot ignore that.
6 And we cannot ignore the seriousness of the events and,
7 therefore, all of the participants in the events of
8 January 6th.

9 The defendants participated in an event, basically
10 a riot, or an insurrection, that undermined our electoral
11 process. And the fact that their offenses -- basically
12 entering and roaming about the Capitol -- for over an hour
13 were less serious than those of others who assaulted
14 officers, destroyed property, breached doors or windows, or
15 police lines, encouraged violence, and did those other more
16 serious things -- that does not make these offenses
17 something that is not serious. These offenses remain as
18 very serious offenses and affronts to our democratic values.

19 On the other hand, they do fall on the lower end
20 of the spectrum of offenses; the fact that these are just
21 misdemeanors, and the plea has been taken to a single
22 misdemeanor of parading and demonstrating in the Capitol
23 Building, is an indication that they are on the lower end of
24 the spectrum of offenses; and it's really only the length
25 that each defendant was inside the Capitol that favors a

1 harsher sentence in this case.

2 The government has not really pointed to anything
3 beyond that, with the exception of the military service that
4 I will mention again in a moment.

5 Everything else about the conduct of these
6 defendants would, under the nine-factor test that the
7 government has identified, would support a lesser sentence.

8 They did not engage in violent conduct; they did
9 not incite violence; they didn't engage in any acts of
10 destruction; they really didn't witness and have a bad
11 reaction to any acts of violence or destruction, as I have
12 discussed with the government here today; they did not
13 destroy evidence during nor after the riot; and, indeed,
14 were helpful in locating evidence when the government
15 approached them.

16 They were -- as I mentioned and as has been
17 highlighted by the government, inside the building for a
18 long time, although they did not go into closed offices, it
19 looks like they were more in the open area of the Rotunda
20 and the adjoining areas.

21 There were not statements made by these defendants
22 in person, on social media, or even through texts that put
23 them in the category of individuals who are continuing to
24 show pride in or support the activities on January 6th; to
25 the contrary, these defendants have cooperated fully with

1 law enforcement, did so early; have exhibited strong
2 evidence of remorse and contrition; and those factors, with
3 the exception of the length of time, really support placing
4 them on the lower end of the spectrum for sentencing.

5 How they entered the Capitol Building is, in my
6 view, perhaps slightly in their favor, or at least neutral.
7 They didn't break down a door, breach the police line. They
8 simply walked through the door that had been already opened;
9 now, that doesn't condone their conduct, but that's one
10 factor that the government thinks is important. I think
11 it's either a neutral factor or even slightly in their
12 favor.

13 It's very important to me that they have shown
14 full remorse and acceptance of responsibility and have
15 acknowledged explicitly that the conduct they engaged in was
16 wrong; there is no equivocation on that.

17 Now we don't have guidelines to help in sentencing
18 here; but I think that that collection of factors is
19 important. For Mr. Nelson, he has accepted responsibility;
20 shown remorse; admitted that his conduct was wrong and
21 unlawful. He has minimal social media or text comments that
22 would weigh against him; no prior offenses; was not involved
23 in any planning or anticipation with respect to the
24 January 6th events, or praise thereafter. He does have
25 service to his country and to his community, and family and

1 community support.

2 Now, the service to the country, as I have already
3 said, it cuts both ways; and I don't think I have to dwell
4 on that anymore; it is a factor in the nature and
5 characteristics of Mr. Nelson, but it also raises the
6 question as to why one who had that training, took those
7 oaths, would nonetheless engage in this kind of conduct. He
8 has been employed, been a contributing member of society;
9 and, again, has recognized that his conduct was wrong and
10 even shameful. His service to others is commendable; and
11 his cooperation in the case is also commendable.

12 The same is true for Mr. Markofski, generally
13 speaking. He has accepted responsibility; shown remorse;
14 admitted that his conduct was wrong; has minimal social
15 media or texts, or other comments that would continue to
16 support the activities on January 6th. He has been -- he
17 has shown full contrition. He has no prior offenses; was
18 not engaged in any planning or any anticipation with respect
19 to the events of January 6th.

20 He and Mr. Nelson both have indicated they came to
21 go to the rally and to hear then President Trump at a rally.

22 He has service to the country and to the
23 community, and has strong family and community support; and
24 that service to the country, through his military service,
25 is the same two-edged sword for him, as it is for

1 Mr. Nelson.

2 He has had steady employment and schooling that he
3 has been engaged in; and he knows that his conduct was both
4 criminal and wrong and, indeed, was an affront to his
5 military training. He has, as his counsel has noted,
6 experienced collateral consequences already as a result of
7 his involvement in the January 6th events, and his plea of
8 guilty to this Class B misdemeanor.

9 So where do I come out on sentencing?

10 I am going to impose a relatively small fine for
11 each, restitution as well. I am going to impose some hours
12 of community service, and two years of probation. Not a
13 minimal period of probation, but a significant period of
14 probation. Probation is a serious, weighty sentence, as the
15 Supreme Court and other courts have noted.

16 The primary factor that requires more discussion
17 under 3553(a) -- and there are six factors, the nature and
18 circumstances of the offense, history and characteristics of
19 the defendant -- I have already been through those.

20 The need to reflect the seriousness of the
21 offense, this sentence that I am going to impose does so, in
22 my view, and will promote respect for the law and provide
23 just punishment and, also, afford adequate deterrence both
24 to the individual defendants and to others, more generally.
25 And I think that is true in the context of these cases

1 involving January 6th where you really can't isolate one
2 case. It's the overall government effort, with respect to
3 these events and the serious, serious criminal justice
4 effort that the government has initiated with respect to
5 hundreds of individuals that is going to be a great
6 deterrence; and the sentences that Mr. Markofski and
7 Mr. Nelson will be getting are a part of that.

8 The last factor is the need to avoid unwarranted
9 sentence disparities among defendants with similar records
10 who have been found guilty of similar conduct; that's a hard
11 one to assess, but we do have more and more cases; and
12 Mr. Meinero has discussed them somewhat.

13 Looking at the cases that involve pleas to one
14 count of a 5104(e)(2)(G) offense, most of those defendants,
15 by far -- the overwhelming majority -- have received
16 sentences of probation, not incarceration. They range, as
17 has been pointed out, from probation of just a month or
18 two -- one judge has done that in a couple of cases -- all
19 the way up to several years, even, I think, five years of
20 probation in at least one instance. And they -- some,
21 perhaps, now, more than a handful -- but, still, a clear
22 minority of the sentences have involved a short term of
23 incarceration. Two weeks is not an unusual term as
24 requested by the government.

25 Where incarceration has been imposed, it is my

1 sense that it is generally based on more reasons for it than
2 we have here. The length of time in the Capitol was the
3 only thing that really supports a more serious sentence
4 here. But for those other cases where incarceration was
5 imposed, you have other factors that have weighed in favor
6 of a sentence of incarceration.

7 If you have a defendant that is fully remorseful,
8 has fully accepted responsibility, has acknowledged the
9 wrong of their conduct, and that it was an error -- that
10 they were only involved in entering the Capitol, not any
11 violence or destruction of property, or any praising of the
12 events or incitement of others, and that -- they have really
13 not done anything before, during, or after to encourage or
14 praise such conduct -- I conclude that probation is
15 appropriate for these two defendants. It is especially true
16 given their history of service to the community, including
17 military service, and the fact that there is no risk, in my
18 judgment, of their repeating this kind of conduct.

19 Probation is a sufficient deterrence in the
20 context of the scores of cases that have been brought and,
21 therefore, that is the sentence that the Court will impose.

22 I am now going to read the sentence to be imposed
23 in each of the cases; I will start with Mr. Nelson.

24 Pursuant to the Sentencing Reform Act of 1984, and
25 in consideration of the provisions of Title 18 of the U.S.

1 Code, Section 3553, it is the judgment of the Court that
2 you, Brandon Nelson, are hereby sentenced to a term of
3 24 months, that is two years, of probation on Count 4; in
4 addition, you are ordered to pay a special assessment of
5 \$10, in accordance with 18 U.S.C. Section 3013.

6 The Court authorizes supervision in the
7 jurisdiction of this case to be transferred to the United
8 States District Court for the Western District of Wisconsin.

9 While on supervision, you shall abide by the
10 following mandatory conditions, as well as the standard
11 conditions of supervision, which are imposed to establish
12 the basic expectations for your conduct while on
13 supervision.

14 The mandatory conditions include that: You must
15 not commit another federal, state, or local crime; that you
16 must not unlawfully possess a controlled substance; you must
17 refrain from any unlawful use of a controlled substance, and
18 submit to one drug test within 15 days of placement on
19 supervision, and at least two periodic drug tests
20 thereafter, as determined by the Court; that you must make
21 restitution, in accordance with Title 18 of the U.S. Code
22 Section 3663 and 3663(a), or any other statute authorizing
23 the sentence or restitution.

24 You are ordered to make restitution in the amount
25 of \$500 to the Architect of the Capitol. The Court has

1 determined that you do not have the ability to pay interest
2 and, therefore, waives any interest or penalties that may
3 accrue on that balance.

4 You shall comply with the following special
5 conditions: You must provide the probation officer access
6 to any requested financial information, and authorize the
7 release of any financial information. The probation office
8 may share financial information with the United States
9 Attorney's Office.

10 The defendant, Mr. Nelson, must complete 50 hours
11 of community service within 12 months; the probation office
12 will supervise the participation in the program by approving
13 the program. The defendant must provide written
14 verification of completed hours to the probation office.

15 You are ordered to pay a fine in the amount of
16 \$2,500. The Court has determined that you do not have the
17 ability to pay interest and, therefore, waives any interest
18 or penalties that may accrue on the balance. Having
19 assessed the defendant's ability to pay, payment of the
20 total criminal monetary penalties is due as follows:
21 Payment in monthly installments of \$150 to commence 30 days
22 after the date of this judgment.

23 Restitution payments shall be made to the Clerk of
24 the Court for the United States District Court, District of
25 Columbia, for disbursement to the following victim; and that

1 is the Architect of the Capitol, at the address here in
2 Washington, D.C., in the amount of \$500. The financial
3 obligations are immediately payable to the Clerk of the
4 Court for the United States District Court, here in
5 Washington. Within 30 days of any change of address, you
6 shall notify the Clerk of the Court of the change until such
7 time as the financial obligation is paid in full.

8 The probation office shall release the presentence
9 investigation report to all appropriate agencies, which
10 includes the United States Probation Office in the approved
11 district of residence in order to execute the sentence of
12 the Court.

13 Now, with respect to Mr. Markofski -- and excuse
14 me for one moment -- pursuant to the Sentencing Reform Act
15 of 1984, and in consideration of the provisions of Title 18
16 of the U.S. Code, Section 3553, it is the judgment of the
17 Court that you, Abram Markofski, are hereby sentenced to a
18 term of 24 months, that is two years, of probation on
19 Count 4. In addition, you are ordered to pay a special
20 assessment of \$10, in accordance with Section 3013 of
21 Title 18.

22 The Court authorizes supervision and jurisdiction
23 of this case to be transferred to the United States District
24 Court for the Western District of Wisconsin.

25 While on supervision, you shall abide by the

1 following mandatory conditions, as well as the standard
2 conditions of supervision, which are imposed to establish
3 the basic expectations for your conduct while on
4 supervision: The mandatory conditions include that you must
5 not commit another federal, state, or local crime; you must
6 not unlawfully possess a controlled substance; you must
7 refrain from any unlawful use of a controlled substance, you
8 must submit to one drug test within 15 days of placement on
9 supervision, and at least two periodic drug tests thereafter
10 as determined by the Court; and you must make restitution,
11 in accordance with Title 18 of the U.S. Code, Section 35 --
12 I'm sorry -- 3663 and 3663(a), or any other statute
13 authorizing a sentence of restitution.

14 You are ordered to make restitution in the amount
15 of \$500 to the Architect of the Capitol. The Court has
16 determined that you do not have the ability to pay interest
17 and, therefore, waives any interest or penalties that may
18 accrue on the balance.

19 You shall comply with the following special
20 conditions: You must provide the probation officer access
21 to any requested financial information, and authorize the
22 release of any financial information. The probation office
23 may share financial information with the United States
24 Attorney's Office.

25 The defendant, Mr. Markofski, must complete

1 50 hours of community service within 12 months. The
2 probation office will supervise the participation in the
3 program by approving the program. The defendant must
4 provide written verification of completed hours to the
5 probation officer.

6 You are ordered to pay a fine in the amount of
7 \$1,000. The Court determines that you do not have the
8 ability to pay interest and, therefore, waives any interest
9 or penalties that may accrue on the balance.

10 Having assessed the defendant's ability to pay,
11 payment of the total criminal monetary penalties is due as
12 follows: Payment in monthly installments of \$100 to
13 commence 30 days after this date of the judgment.

14 Restitution payments shall be made to the Clerk of
15 the Court of the United States District Court here in
16 Washington for disbursement to the Architect of the Capitol
17 at its address here in Washington, and that amount is \$500.

18 The financial obligations are immediately payable
19 to the Clerk of the Court for the U.S. District Court, in
20 Washington, D.C. Within 30 days of any change of address,
21 you shall notify the Clerk of the Court of the change until
22 such time as the financial obligation is paid in full.

23 The probation office shall release the presentence
24 investigation report to all appropriate agencies, which
25 includes the United States Probation Office in the approved

1 district of residence in order to execute the sentence of
2 the Court.

3 Now, Mr. Nelson and Mr. Markofski, each of you was
4 convicted as a result of a plea of guilty. You can appeal
5 your conviction if you believe that your guilty plea was
6 somehow unlawful or involuntary, or if there is some other
7 fundamental defect in the proceedings that was not waived by
8 your guilty plea. You also have a statutory right to appeal
9 your sentence under certain circumstances, particularly if
10 you think the sentence is contrary to law. However, a
11 defendant may waive those rights as part of a plea
12 agreement; and you have entered into a plea agreement which
13 waives some or all of your rights to appeal your conviction
14 and the sentence itself. Such waivers are generally
15 enforceable; but if you believe the waiver is unenforceable,
16 you can present that theory to the appellate court.

17 You do have the right, each of you, to apply for
18 leave to appeal in forma pauperis. And if you were to so
19 request and qualify, then the Clerk of the Court would
20 prepare and file a notice of appeal on your behalf; and that
21 would basically be free of cost, that's what that "in forma
22 pauperis" means. But I note that you are represented by
23 very able counsel, in each instance, and presumably they
24 would assist you in this process if you wish to follow it.
25 With few exceptions, any notice of appeal must be filed

1 within 14 days of the entry of judgment; and I expect that
2 judgment -- given the lateness of the day -- may not be
3 entered today, but should be entered by Monday.

4 With that, let me ask counsel if there is any
5 reason, other than reasons that have been indicated here
6 today, why this sentence should not be imposed for each
7 defendant as I have just stated? Ms. Ettinger?

8 MS. ETTINGER: No, Your Honor. No reason not to
9 impose the sentence as stated.

10 THE COURT: Mr. Bednarek?

11 MR. BEDNAREK: No. No reason not to impose the
12 sentence as stated.

13 I may have missed this, but were Counts 1 through
14 3 dismissed?

15 THE COURT: They will be in a moment.

16 MR. BEDNAREK: Thank you.

17 THE COURT: And then, Mr. Meinerer, any reason not
18 to impose the sentence as I have just indicated, other than
19 what you have already argued?

20 MR. MEINERER: No, sir. No objection from the
21 government.

22 THE COURT: All right. With that, Mr. Meinerer, is
23 there a further step we need to take with respect to the
24 information in this case?

25 MR. MEINERER: There is, Your Honor.

1 The government moves to dismiss Counts 1 through 3
2 of the information pertaining to both defendants, Mr. Nelson
3 and Mr. Markofski, pursuant to the plea agreement.

4 THE COURT: And that motion is granted. And those
5 counts, Counts 1, 2, and 3 of the information in this case,
6 21-344, will be dismissed as to Mr. Nelson and as to
7 Mr. Markofski.

8 Anything else that we need to cover before I
9 formally impose the sentence, Mr. Meinero?

10 MR. MEINERO: No, Your Honor. Thank you.

11 THE COURT: Ms. Ettinger?

12 MS. ETTINGER: No, Your Honor. Thank you.

13 THE COURT: Mr. Bednarek?

14 MR. BEDNAREK: Nothing, Your Honor. Thank you.

15 THE COURT: All right. The sentences, therefore,
16 are imposed, as I have indicated, for Mr. Nelson and for
17 Mr. Markofski; those are the sentences of the Court.

18 And, with that, I believe we are done here today
19 for these cases.

20 I do want to say that I appreciate both the
21 seriousness of these offenses and, also, the remorse,
22 contrition, and acceptance of responsibility that each
23 defendant has indicated; and it is that that has kept you in
24 a sentence of probation rather than any other sentence. And
25 I hope that is faith well placed in each of you; I think it

1 is; I certainly would be surprised to hear otherwise in the
2 future.

3 I hope that you will put these -- this conduct
4 behind you, but that you will continue to reflect on it and
5 on the importance of upholding the democratic values of this
6 great country, and abide by the rule of law and the
7 principles that are so valuable in our democratic process.

8 With that, this proceeding is completed; and I
9 thank you all very much.

10 THE COURTROOM DEPUTY: All right. This Honorable
11 Court stands in recess until return of court. And good day,
12 everybody.

13 MR. MEINERO: Thank you, Mr. Bradley. Thank you,
14 Your Honor. Thank you, Counsel.

15 (Whereupon, the proceeding concludes, 2:34 p.m.)

16 **CERTIFICATE**

17 I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby
18 certify that the foregoing constitutes a true and accurate
19 transcript of my stenographic notes, and is a full, true,
20 and complete transcript of the proceedings to the best of my
21 ability.

22 PLEASE NOTE: This hearing was held via
23 videoconference and telephonically, in compliance with the
24 COVID-19 pandemic stay-safer-at-home recommendations and is
25 therefore subject to the limitations associated with the use
of technology, including but not limited to telephone signal
interference, static, signal interruptions, and other
restrictions and limitations associated with remote court
reporting via telephone, speakerphone, and/or
videoconferencing capabilities.

Dated this 21st day December, 2021.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter