

1 So for all those reasons -- and I can answer any
2 questions if Your Honor has any, the Government does believe
3 that the three-level enhancement under 2J1.2B2 does apply.
4 And again, I apologize if I am misstating the defense's
5 position, but I believe that is the defense's position as
6 well.

7 **THE COURT:** All right. Let me hear from
8 Mr. Balarezo, then.

9 **MR. BALAREZO:** Your Honor, I hate to say that the
10 Government is right, but in this situation, because of the
11 plea agreement where Mr. Miller agreed that the enhancement
12 applied, we're in a position where we could only submit on
13 what the probation office has calculated and rely on their
14 expertise for the calculation.

15 **THE COURT:** All right, thank you. I don't know if
16 the probation office wants to be heard or if probation has
17 said everything it has to say on the issue in its
18 submission.

19 **MS. MOSES-GREGORY:** Your Honor, we will rely on
20 our response to the objection.

21 **THE COURT:** All right, thank you.

22 **MS. MOSES-GREGORY:** Thank you.

23 **THE COURT:** So I've given this question some
24 thought. First off, I accept the parties' representations
25 that this is a term of the plea agreement. And to the

1 extent that it's a close question, I think that it's the
2 sort of thing that the parties can stipulate to in a plea
3 agreement. I accept the parties' representations in the
4 plea agreement, but I do have an independent responsibility
5 to determine the proper guidelines calculation.

6 My view is, although a close question, that the
7 enhancement does apply. The question is really less of what
8 the commentary note -- or application note one says than
9 just what the meaning of the phrase administration of
10 justice is. If one is -- if you're reading the guidelines
11 perhaps in the way that one would read a statute, you might
12 say that there is some uncertainty as to what the -- whether
13 the term administration of justice applies to the Congress'
14 certification of the election results.

15 If one looks at Webster's Third New International
16 Dictionary, administration in this sense means to mete out,
17 and justice means fair treatment. And you can argue it
18 either way, I think, with respect to whether what Congress
19 was doing was meting out fair treatment. One could say that
20 the Congress was sitting in an adjudicative role, and that
21 it was adjudicating in some very, very limited sense,
22 subject to very substantial constraints, the results of the
23 election.

24 My opinion in the Montgomery case does include
25 some language and discussion of how the proceedings before

1 the Congress are analogous to the administration of justice.
2 In that way, Judge Friedrich I think reached the same
3 conclusion in one of her cases. As well, I believe Judge
4 Bates has said the same thing.

5 Black's Law Dictionary refers to administration as
6 the proper functioning and integrity of a court or other
7 tribunal in proceedings before it in accordance with the
8 rights guaranteed to the parties. And, again, there I think
9 it's not entirely clear how that fits in this context.
10 Although, as I said, I think that a portion of my analysis
11 in Montgomery supports the view that what was occurring
12 before the Congress and that was obstructed falls within
13 that definition.

14 But I also think that one can't quite read the
15 guidelines precisely the way one would read a statute, with
16 parsing words with that same level of detail. Because this
17 entire part of the guidelines, part J, is offenses involving
18 the administration of justice. The sentencing commission
19 decided to include in part J -- which applies to offenses
20 involving the administration of justice, obstruction of
21 Congress. And given the fact that the sentencing commission
22 concluded that that provision appropriately fell within part
23 J, I think it's fair to read the phrase administration of
24 justice for purposes of the enhancement broadly enough to
25 cover the statutory provision that the sentencing commission

1 decided to include in part J.

2 Which then just leaves the question of whether the
3 interference was substantial or not. And there, the
4 application note says that substantial interference with the
5 administration of justice includes a premature or improper
6 termination of a felony investigation, not present here; an
7 indictment, verdict or any judicial determination based upon
8 perjury, false testimony or other false evidence, not
9 present here; or the unnecessary expenditure of substantial
10 governmental or court resources. And I'm not sure that I
11 would be prepared to categorize any damage to -- or all the
12 damage to the Capitol complex on that day as necessarily
13 falling within that context. Because I think there does
14 need to be a nexus between the expenditure and the
15 interference with the administration of justice.

16 But I think the fact that the proceedings
17 certifying the presidential election were delayed by several
18 hours; and that the entire United States Congress sat until
19 after midnight -- and I believe it was 1:00 o'clock in the
20 morning, proceeding; and all the attendant costs that come
21 with the entire Congress sitting in this extraordinary
22 session, along with the enormous law enforcement presence
23 that was required to allow them to do that, I think amply
24 supports the finding that the interference here was
25 substantial. So that is my finding.