UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Criminal Case No.**
	:	
RICHARD BARNETT,	:	**1:21-cr-0038**
	:	
Defendant	:	
	:	

DEFENDANT RICHARD BARNETT'S OPPOSITION TO THE GOVERNMENT'S MOTION IN LIMINE TO EXCLUDE IRRELEVANT EVIDENCE OF THE CULPABILITY OF OTHERS

Defendant RICHARD BARNETT ("Barnett"), through the undersigned counsel, Bradford L. Geyer, Esq., hereby opposes THE GOVERNMENT'S MOTION IN LIMINE TO EXCLUDE IRRELEVANT EVDIENCE OF THE CULPABILITY OF OTHERS filed at Dkt. # 115, on January 2, 2023.

I. INTRODUCTION AND OVERVIEW

The Government's motion at Dkt. #115 asks that irrelevant information should not be admitted into evidence at trial. What the Government asks in broad-brush strokes is normal as a general principle. However, the Government specifically seeks to declare an entire category of information about the "culpability of others" as per se irrelevant and excluded.

Initially, much of the problem with this is that it is not clear what may or may not be considered included in this category. In the various issues discussed below, the Defendant might not describe his anticipated defense as being "the culpability of others" but it seems likely that the Government would. Therefore, the Defendant Barnett assumes the outer boundaries of what

the Government might seek to exclude or worse during the trial believes was already excluded and is objectionable.

Defendant is not sure that every aspect of the defense he would put on can best be described as the "culpability of others," such as where the actions of others may be probative of Defendant Barnett's intent, motives, etc. In some cases, Defendant Barnett is not guilty because other people are. In other cases, Barnett lacks the intent necessary under a crime charged because of the actions of others. Whether that is properly described as the culpability of others in the eyes of the Government's Motion, Defendant Barnett is unsure.

Furthermore, the analysis of this question is different for different crimes charged and different aspects of what happened.

Without conferring with the Defense, the Government cherry picked from exhibits the defense it uploaded to USAFX in preparation of a meeting with the Government where common ground could be found to narrow admissibility issues in the interests of judicial economy and justice.

In Government Exhibit 31, the Government references an exhibit that included footage of Israel James Easterday violently pulling protestors through the Columbus doors and a woman complaining to another man about their being pulled into the Capitol. At the end of the proposed Exhibit 31 (that the Defense will ultimately decide at trial whether or not it intends to use it or one substantially similar to it), Defendant Barnett is seen to be struggling desperately not to be pulled through the door and this is juxtaposed next to Stephen Ignoramus, a notable livestreamer, who appears also to being pressed through the door.

The Government also references draft exhibits 43, 48 and 50 that were intended as examples of the type of exhibits the Defense may opt to process after adjust time and graphics.

Factually, Defendant Barnett is accused of

a. Entering the U.S. Capitol building at approximately 2:43 PM on or about January 6, 2021.

b. Entering the U.S. Capitol Building at approximately 2:43 PM after the U.S. Capitol Police ("USCP") had ordered a "lockdown" as its after-action timeline describes it at 2:00 PM, after the USCP (Speaker's detail) whisked Speaker of the House of Representatives away from the Speaker's "chair" or "dais" at 2:13 PM according to the testimony of then Parliamentarian Wickham in a related case, after the House recessed at 2:18 PM according to the Congressional Record (2:20 PM according to the Grand Jury) and after both the House and the Senate finally recessed at 2:29 PM, and about the same time that the USCP actually evacuated the Capitol building at approximately 2:45 PM to 2:50 PM.

c. Departing the U.S. Capitol building at approximately 3:20 PM on January 6, 2021.

d. Carrying a hiking stick on January 6, 2021 as likely to be a medical mobility aid as anything else. (The Government of course has the burden of proof of each element of each crime charged beyond a reasonable doubt.)

e. Having two or three conversations with police officers, mostly requesting permission to return to an area of the U.S. Capitol where he believed he had left his flag and requesting to be able to retrieve his flag.

f. "Stealing" (that is, assuming he was not merely discarding the soiled envelope) an envelope after he was cut by the envelope and bled on the envelope.[1]

g. Entering one of the several offices allegedly associated with the Speaker (there

[1] Barnett is not complaining of being injured by dangerous items of the Government.

apparently being more than one room or suite used by the Speaker).

h. At the request of two journalists in that room, posing for a photograph.

i. Attracting news media attention from redistribution of the photograph taken by the two journalists. Having attracted news attention could be the most serious charge in the Government's view.

From these factual allegations, Defendant Barnett is accused and being prosecuted, *inter alia*, under

a. Count One, 18 U.S.C. § 231(a)(3) -- Obstructing, impeding, or interfering with any law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder

b. Count Two, 18 U.S.C. § 1512(c)(2) -- Obstruction of an Official Proceeding and Aiding and Abetting

c. Count Three, 18 U.S.C. § 1752(a)(1) and (b)(1)(A) -- Entering or Remaining in a Restricted Building or Grounds with a Dangerous Weapon

d. Count Four, 18 U.S.C. § 1752(a)(2) and (b)(1)(A) – Disorderly or Disruptive Conduct in a Restricted Building with a Dangerous Weapon

e. Count Five, 40 U.S.C. § 5104(e)(2)(C) – Entering and Remaining in Certain Rooms in a Capitol Building

f. Count Six, 40 U.S.C. § 5104(e)(2)(D) – Disorderly Conduct in a Capitol Building

g. Count Seven, 40 U.S.C. § 5104(e)(2)(G) – Parading, Demonstrating, or Picketing in a Capitol Building

h. Count Eight, 18 U.S.C. § 641 – Theft of Government Property

II. GOVERNING LAW

Federal Rules of Evidence Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following:

> unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

https://www.law.cornell.edu/rules/fre/rule_403

> Notes of Advisory Committee on Proposed Rules
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> The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1, 12–15 (1956); Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 Van. L. Rev. 385, 392 (1952); McCormick §152, pp. 319–321. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated. Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.
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> * * *

These are criminal cases. The standard is that an accused is presumed innocent until proven guilty beyond a reasonable doubt. *See, e.g., Taylor v. Kentucky*, 436 U.S. 478 (1978). The Due Process Clause requires the prosecution to prove beyond a reasonable doubt every element of the charged criminal offense. *See, In re Winship*, 397 U.S. 358, 364 (1970). The burden to prove or disprove an element of the offense may not be shifted to the defendant. See id.; see also *Patterson v. New York*, 432 U.S. 197, 215 (1977).

There are no "maybes" in criminal prosecutions. No "maybe" can satisfy the standard of "guilty beyond a reasonable doubt." "Close enough" does not work in criminal prosecutions.

If at the conclusion of the evidence, the evidence shows that a Defendant might have committed a crime, or perhaps not, then under our legal system and constitutional Due Process, a

judgment of acquittal is mandatory, the Count should be dismissed before presenting it to the jury, allowing the jury to consider the case will irretrievably confuse and pollute the jury deliberation just as cream once added to coffee cannot be removed, and/or the Count should be dismissed after trial under Rule 29.

In *Hunter v. District of Columbia* , 47 App. D.C. 406 (D.C. Cir. 1918), for example, the D.C. Circuit Court examined an indictment that alleged that the defendants had "congregate[d] and assemble[d] on Pennsylvania avenue, N.W., [and] did then and there crowd, obstruct, and incommode the free use of the sidewalk thereof on said avenue" in violation of the unlawful assembly statute. *Id.* at 408. Beyond the general terms of acts prohibited by the statute, there was no averment of fact "to inform defendants of the nature of the acts which [were] relied upon by the prosecution as constituting alleged obstruction of the sidewalk, or that would enable defendants to make an intelligent defense, much less to advise the court of the sufficiency of the charge in law to support a conviction." *Id.* at 410. And the fact that the charging document "fail[ed] to set out the acts committed by the defendants which constituted the crowding bstructing of the free use of the walk by them[,]" *Id.* at 409, was a fatal flaw. As stated by the *Hunter* Court:

> [i]t is elementary that an information or indictment must set out the ***facts*** constituting the offense, with sufficient clearness to apprise the defendant of the charge he is expected to meet, and to inform the court of their sufficiency to sustain the conviction. ... In other words, when the accused is led to the bar of justice, the information or indictment must contain the elements of the offense with which he is charged, with sufficient clearness to fully advise him of the ***exact*** crime which he is alleged to have committed.

Id. at 409, 410 *(emphasis added)* (internal quotation marks and citation omitted).

The *Hunter* Court also observed that the defendants in that case could have engaged in a number of acts that fell outside the scope of the statute, and thus, by failing to specify the

defendants' particular conduct, the indictment was "too vague, general, and uncertain to meet the requirements of the established rules of criminal pleading," which in turn rendered it "insufficient in law." *Id.* at 410.

Specifically, here in this case, the Government has spread the false implication, like an inkblot test, that the U.S. Capitol and its grounds are presumptively restricted areas. But as Federal courts in this District have reasoned in reaching legal conclusions:

> ***The Capitol Grounds*** (excluding such places as the Senate and House floors, committee rooms, etc.) ***have traditionally been open to the public***; indeed, thousands of people visit them each year. Thus, we cannot agree with the defendants that the Capitol Grounds have ever been characterized by the serenity and quiet of a hospital or library.

Jeannette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575 (D.D.C. 1972) *(emphases added)*.

> The courts in this jurisdiction have long recognized that ***"[t]he United States Capitol is a unique situs for demonstration activity"*** and ***"is a place traditionally open to the public thousands visit each year to which access cannot be denied broadly or absolutely,*** [a fact which must be weighed] against the government's interest in protecting against possible `damage to buildings and grounds, obstruction of passageways, and even dangers to legislators and staff.'" *Kroll v. United States*, 590 F. Supp. 1282, 1289, 1290 (D.D.C.1983) (*quoting Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 583-85 (D.D.C.), *aff'd mem.*, 409 U.S. 972, 93 S. Ct. 311, 34 L. Ed. 2d 236 (1972)).

Wheelock v. United States 552 A.2d 503, 506 (D.C. 1988) *(emphases added)*.

III. ARGUMENT

A. **Concerning Count One, 18 U.S.C. § 231(a)(3) -- Obstructing, impeding, or interfering with any law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder –** Defendant Barnett is not guilty of this charged crime for several reasons.

But one of those reasons Barnett is not guilty is that other people obstructed, impeded, or interfered with law enforcement. Defendant Barnett did not. There were people on January 6, 2021, who did obstruct, impede, or interfere with law enforcement. Not Barnett. The fact that other people obstructed, impeded, or interfered with law enforcement means that Barnett did not. This includes the factor that Barnett had no knowledge or intent of obstructing, impeding, or interfering.

The evidence that the Defendant will present about the forming and development of (several) crowds (in different locations, not a single crowd), the plans and objectives of the crowds and their actions and movements will inform the intent and purposes of Barnett.

This is especially true because the current U.S. Department of Justice seems to be abandoning the historic role and requirements of criminal prosecution of proving that individual defendants are actually guilty of committing a crime, and adopting a "close enough" approach arising from the behavior and actions of crowds. The Government appears to be approaching the prosecution of Barnett and many others in related cases on the grounds that some law enforcement officer was obstructed, impeded, or interfered with, therefore the Government need not actually prove Defendant Barnett's individual guilt.

In other words, the Government points to the fact that some law enforcement were obstructed, impeded, or interfered with and then ***presume*** that Barnett is guilty.

To meet this broad-brush stroke, imprecise argument, Defendant Barnett is entitled to prove that the mere fact that some officer somewhere was affected by someone does not mean it was Barnett who did it. The culpability of others explains the generalized impact on law enforcement officers in the air so to speak. The Government cannot prove Barnett's guilt by saying that there must have been some obstruction, impeding, or interference around somewhere,

by someone, but by whom we don't actually know.

That is, it is the nature of the Government's evidence and the theory of the prosecution which requires and entitles Defendant Barnett to prove that other people committed the crime. Barnett did not. The nature of the evidence offered by the Government is that someone somewhere as part of some ill-defined crowd (as if there were only one gathering in one place constituting only one crowd) some unidentified.

It is true that if ten people jointly rob a liquor store, all ten can be guilty. But if the Government – as here – argues that "someone" robbed the liquor store, the Government cannot round up everyone who was within a 3 block radius of the liquor store and declare them all – without any actual proof – of robbing the liquor store. Proof that Person A is the one who robbed the liquor store would be probative evidence that Person K did not.

Counsel assumes that a D.C. jury would not want to live in a city in which the police can grab their children, grandchildren, nieces and nephews off a street corner and prosecute them simply for being in the general vicinity of a crime that the police are unable to actually solve.

B. **Concerning Count Two, 18 U.S.C. § 1512(c)(2) -- Obstruction of an Official Proceeding and Aiding and Abetting** -- many (but still a tiny fraction of the 10,000 demonstrators that the U.S. Capitol Police estimated at and around the U.S.. Capitol on January 6, 2021) obstructed an official proceeding as early as 1:00 PM. Or at least they may have arguably[2] done so. But Defendant Barnett at 2:43 PM did not.

[2] The Government still must confront the reality that the 750 foot long U.S. Capitol building is gigantic, was designed for Members of Congress to interact with the public, and is routinely filled with hundreds or as many as a thousand non-Congressional personnel on any given business day. The speculative assumption that the presence of people in the building obstructs a Congressional proceeding is lacking in any evidentiary foundation and conflicts with all common sense. Those who have attended, reported on, or monitored Congressional hearings are quite

Now, we are unable to know for sure because the U.S. Capitol Police both in related criminal cases and in litigation in the nature of the freedom of information act is strenuously refusing to disclose the underlying documents, records, communications, texts, emails, reports, radio communications, etc.

Pipe bombs were discovered only a few blocks from the U.S. Capitol, the first reported by a civilian at 12:40 PM but confirmed at 12:50 PM. The second was found at 1:15 PM. Since there were two pipe bombs, confirmed to be real, close to the Capitol and the 1:00 PM Joint Session of Congress, the U.S. Capitol Police presumably could not assume that there weren't more pipe bombs, and perhaps closer to or at or in the U.S. Capitol building. What role did the security screening looking for more pipe bombs play in causing a "lockdown" of the Capitol building at 2:00 PM, and the recess of Congress and evacuation of the building?

The Government won't say. Just last week the Government increased the award for information leading to identification of the pipe bomber to $500,000.[3] The fact that two years later, the Government is still trying to solve these incidents indicates that between 1:15 PM and 2:13 PM on the day January 6, 2021, the Government must have had far less clarity as to the threat of many more pipe bombs threatening the Joint Session of Congress.

What was the tipping point to recessing Congress? As threat assessments developed from January 1, 2021, up to the early afternoon of January 6, 2021, what was the nature of the

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familiar with as many as a hundred journalists crowded in the hallways outside a hearing room with television cameras lined up along the hallway, professional and volunteer citizen lobbyists crowded around hoping to speak to Members of Congress or staff or pass out literature, interested citizens simply watching the events and drama, people visiting their Member of Congress' offices, school children on tours, etc., etc. Thus the Government's arguments fall short of the precision and clarity needed to bring a valid charge and convict a defendant of a crime. There are a few exceptions but the narrowing and bringing an offense into focus is necessary.

[3] **https://www.nbcnews.com/politics/justice-department/feds-boost-reward-500k-information-capitol-pipe-bomber-rcna64268**

threat or threats as the U.S. Capitol Police perceived them? At what point did the situation accumulate to the USCP making a decision to recess the Congress and then evacuate the Capitol?

Why did the USCP recommended the recess of the Chambers of Congress? When?

Why did the USCP order the evacuation of the U.S. Capitol building? When?

The one thing we know with certainty is that it had nothing to do with Richard Barnett. The one thing we can prove with certainty is that other people – not Barnett – are culpable for the obstruction of the Joint Session of Congress on January 6, 2021.

The Motion, however, would simply presume Barnett guilty and then prohibit all evidence that he is not.

Furthermore, a violation of 18 U.S.C. § 1512(c)(2) requires that that Defendant act knowingly and willfully and indeed "corruptly."

Let's say a person has a heart attack in the middle of the U.S. Senate Judiciary Committee confirmation hearing for the nomination of Brent Kavanaugh to the U.S. Supreme Court. That would certainly obstruct the official proceeding and probably require a recess. But it could not be a violation of 18 U.S.C. § 1512(c)(2) because it was not intentional.

Regarding Defendant Barnett, whether or not there was a plan, what the plan was, who was part of the plan, and who was implementing a plan are all relevant to the charge against Barnett of violating 18 U.S.C. § 1512(c)(2).

The culpability of others in actually doing as early as 1:00 PM what Barnett did not do even at 2:43 PM exonerates Defendant Barnett. He is entitled to present this evidence in his defense.

Similarly, the Government attempts belatedly (after being pressed to release the

aforementioned documents and records) to argue that the Joint Session of Congress on January 6, 2021, was delayed from recessing at 2:13 PM to resuming at 8:09 PM. Again, the Government offers only speculation, conjecture, and imagination in support of this idea. The Government's evidence consists of "maybe" or "well, it could have happened." But this is a criminal prosecution.

But here, specifically, hundreds or thousands of people remained at and around the U.S. Capitol hours after Defendant Barnett left at 3:20 PM. The culpability of others exonerates Barnett. If the hundreds or thousands of demonstrators still remaining at or around the Capitol building at 6:00 PM delayed the resumption of the Joint Session of Congress until 8:09 PM, Barnett leaving the area at 3:20 PM did not.

C. Count Three, 18 U.S.C. § 1752(a)(1) and (b)(1)(A) -- Entering or Remaining in a Restricted Building or Grounds with a Dangerous Weapon

The Government seems to be unclear throughout whether it is addressing events in the Capitol building or on the Capitol grounds, having made assurances to the Court in a Pre-Trial hearing that the important testimony was two eyewitnesses to what Barnett did inside the building (supplemented later in the haring with multiple witnesses outside the building). However, the Capitol grounds (really the Capitol building as well) is normally not restricted. 18 U.S.C. § 1752(a)(1) makes clear that the restriction at issue is only temporary, when a Secret Service protectee is ***temporarily*** visiting or staying. This does not involve a nuclear missile submarine that would be restricted at ***all*** times. Because the restriction exists only temporarily, the requirement of notice to the public becomes especially compelling and important. 18 U.S.C. § 1752(a)(1) makes a building or grounds that is normally not restricted 364 days a year, sometimes restricted only for a day or a few days (the Secret Service might want to control a

location a day or two in advance) or even a few hours.

Furthermore, the Vice President by the U.S. Constitution is President (presiding officer) of the U.S. Senate. His or her duties will frequently bring the Vice President to the Senate side of the U.S. Capitol building (although rarely to the House side), including to break a tie. In other words, the notice required by 18 U.S.C. § 1752(a)(1) must be unusually strong, clear, conspicuous, very public, and unambiguous given that any temporary restriction cuts against the normal status of the Capitol and provides the least amount of notice to the public conceivable.

Therefore, the fact that others are culpable of systematically and intentionally removing the bike racks (described in excessive terms as "barricades") on which paper signs of about 11 inches by 14 inches were tied with zip ties exonerates hundreds of defendants including Defendant Barnett.

The statute 18 U.S.C. § 1752(a)(1) applies only to someone who acts "knowingly." Therefore, the choice of the U.S. Capitol Police and Congressional leadership not to post any permanent signs signaling that the area is subject to closure sometimes or to use durable signs on January 6, 2021, resulting in the vast majority of people in the area not knowing that the area was restricted.

The Government presents these issues as if merely being in a restricted area is a crime. In fact, however, only "knowingly" entering a restricted area is a violation of 18 U.S.C. § 1752(a)(1). The Government relies upon an aerial photograph of the U.S. Capitol to which a red line has been artificially added which line does not exist in real life. However, this graphic image was nowhere to be seen at the U.S. Capitol on January 6, 2021. The statute requires "knowingly" and therefore the restricted status of the area is legally irrelevant without notice.

So the actions of others including their culpability are a necessary defense for Defendant

Barnett to show that the grounds and even the building were ***not*** restricted in any legally effective way. The U.S. Capitol Police Board may have ***attempted*** to close the area.[4] But those efforts were ineffective and of no legal consequence. Having tried but failed to provide notice to the public of a restriction,[5] at least with regard to the later-arriving crowds, the U.S. Capitol Police Board did not, actually, in fact, restrict the grounds or the building.

And once again, many judges of this District have fallen in to the idea that people seeing brawls or chaos would be on notice of a restriction pursuant to 18 U.S.C. § 1752(a)(1). That is incorrect. Seeing a brawl means there is a brawl. It does not place anyone on notice that the area was previously legally restricted by a valid order under 18 U.S.C. § 1752(a)(1).

Crowds gathered on the National Mall park area of Washington, D.C. on the Fourth of July or New Year's Eve could degenerate into some fights. But seeing fights would not change the public nature of these festivals to which all citizens of the United States are invited each year. Participants in the July 4th or New Year's Eve celebration, listening to music on blankets on the grass, would anticipate that the U.S. Park Police would arrest the offenders. They would not imagine or conclude that everyone in the peaceful crowd now had to leave the area.

If 200 soccer hooligans, as they are called in Europe because their fighting is legendary, start a melee amidst a crowd of 20,000 peaceful fans, the fans still have the legal right to be in

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[4] The blame of course is overwhelmingly with those who removed the bike racks and thus the signs tied to them. The USCP chose to use very temporary signs easily obscured. But the fault lays with those who ripped apart the line of bike racks – most of which is caught on "civilian" video recordings. Those having the greatest fault, of course, are those whom the Government is determined to prevent the Defendant's counsel from investigating or talking about.

[5] Earlier in time that day, of course, the bike racks were still in place and the signs were still visible. The difficulty here is that events are a sliding scale throughout the timeline of the day. Those arriving in the morning or before around 1:30 PM, approximately, would have seen the bike racks and the "RESTRICTED AREA" signs. Unfortunately, those arriving later would not see the signs and would have no legal notice of a restriction.

the stadium, before, during, and after the fight. Those not participating in the melee would expect the brawling soccer hooligans to be arrested and the game would continue as planned.

D. Count Four, 18 U.S.C. § 1752(a)(2) and (b)(1)(A) – Disorderly or Disruptive Conduct in a Restricted Building with a Dangerous Weapon

This topic ought not require consideration under this Government Motion or in general of the actions of other people. Unfortunately, however, the Government apparently believes, contends, and will argue that people merely being in the general vicinity of other people's disorderly or disruptive conduct makes Defendant Barnett guilty of causing it.

Initially, we must confront any pre-judging or subconscious bias in the use of words: "Disorderly" or "Disruptive" does not mean *distasteful.* The statute does not refer to "I don't like them." This is not an all-purpose statute for condemning disfavored or unlikable people, in the eyes of a law enforcement officer, grand jury, prosecutor or judge. "I don't like them or what they were doing" does not mean "disorderly" or "disruptive."

According to 36 CFR § 2.34, "Disorderly conduct" -- [6]

> (a) A person commits disorderly conduct when, with intent to cause public alarm, nuisance, jeopardy or violence, or knowingly or recklessly creating a risk thereof, such person commits any of the following prohibited acts:
>
> > (1) Engages in fighting or threatening, or in violent behavior.
> > (2) Uses language, an utterance, or gesture, or engages in a display or act that is obscene, physically threatening or

[6] 36 CFR § 2.34, **https://www.law.cornell.edu/cfr/text/36/2.34** This definition is especially appropriate and applicable because it comes from the Code of Federal Regulations for Title 36 - Parks, Forests, and Public Property Chapter I - National Park Service, Department Of The Interior Part 2 - Resource Protection, Public Use And Recreation

> menacing, or done in a manner that is likely to inflict injury or incite an immediate breach of the peace.
> (3) Makes noise that is unreasonable, considering the nature and purpose of the actor's conduct, location, time of day or night, and other factors that would govern the conduct of a reasonably prudent person under the circumstances.
> (4) Creates or maintains a hazardous or physically offensive condition.

Therefore, the fact that others may have created a circumstance of disorder or disruption, does not make Defendant Barnett guilty of disorderly conduct.

If the Government's theory of the case is that because *other people* were disorderly, and therefore their guilt somehow rubs off on Barnett or that there was disorderly conduct "in the air" then Barnett's defense would be entitled to attempt to show that others were culpable of disorderly conduct – not him.

Similarly, "Disruptive conduct" is a disturbance that interrupts an event, activity, or the normal course of a process.

Defendant Barnett cannot be guilty of disorderly or disruptive conduct merely by existing, standing, and breathing inside the U.S. Capitol.

The fact that the Government is confusing and inter-mingling the conduct of other people with Barnett makes it necessary and appropriate for Barnett to show the culpability of those others.

E. Count Five, 40 U.S.C. § 5104(e)(2)(C) – Entering and Remaining in Certain Rooms in a Capitol Building

The Defendant's disagreement with this charge under Count Five is partly on other issues. However, the statute includes the element of the crime charged of "with the intent to disrupt the orderly conduct of official business."

Defendant believes the evidence will show and with regard to the voluminous discovery

exchanged has already shown outside of court that a small crowd of demonstrators were peacefully poking their head in and walking in to a room in the U.S. Capitol (allegedly one of the Speaker's several office areas) when the Defendant Barnett came upon the scene. There were also two journalists already in the room. Thus, Barnett lacked the intent to disrupt. The fact that others were peacefully and rather aimlessly sight-seeing in an office, even if where they should not have been, presented a scene to Barnett that people were just wandering in to look around. That includes that they had no purpose.

Thus the actions of others would inform Barnett of the context and the situation.[7]

It is not so much here that if other people are guilty, Barnett is not.

Here it is more a question that Barnett seeing people simply gathering and looking around the office would negate (in the absence of any direct evidence) Barnett's intent to cause any disruption or harm. Upon seeing a small gathering of Trump supporters simply talking and standing inside the office, Barnett's motivations and intent (again given the lack of any direct evidence of a malignant intent) would be simply to join them, talk with the people already there, and look around. Seeing that the people already in the office had no purpose in mind or underway would tend to negate that Barnett had any purpose, either.

In addition, it appears that before Barnett arrived someone had removed or moved aside or knocked over signs that would have provided him notice that the office might be legally sensitive in the nature of 40 U.S.C. § 5104(e)(2)(C).

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[7] The Government makes the same argument of course with regard to demonstrators seeing chaos by some people and/or brawling by some people, that seeing the context would affect the trier of fact's evaluation of the intent, motivations, and knowing actions of January 6 Defendants. The fact that the context may affect the evaluation of people's motives, knowledge, awareness, or intent is not disputed, nor could it be. Where the Defendant diverges from the Government however is that the legal status of the area might not be changed, legally, by the existence of disruption or chaos alone.

Showing that others had pushed aside or removed such signs may speak to Barnett's intent. That could be interpreted as arguing the culpability of others. It could even be argued that because other people previously did wrong by disrupting or moving the signs, therefore evidence of Barnett's intent is lacking. But Defendant Barnett would not describe in this context that this is a matter of Barnett being innocent because others are culpable. However, Barnett would argue that because others wrongfully maybe even criminally removed or shoved aside signs or notice, which would be culpability, therefore Barnett did not know what office it was or that the office was restricted in the sense of 40 U.S.C. § 5104(e)(2)(C).

F. Count Six, 40 U.S.C. § 5104(e)(2)(D) – Disorderly Conduct in a Capitol Building

The situation and Defendant's argument under Count Six is the same, at least with regard to disorderly conduct as opposed to disruptive conduct, as presented above under Count Four (Section D, *supra.)*

G. Count Seven, 40 U.S.C. § 5104(e)(2)(G) – Parading, Demonstrating, or Picketing in a Capitol Building

The situation and Defendant's argument under Count Seven is generally the same, at least with regard to the Government's expected focus on the effects of conduct, as presented above under Count Four (Section D, *supra.).*

If the Government's argument is that because there was the effect of disruption and disorder within the Capitol, therefore everyone in the vicinity is guilty of causing it, then the same arguments apply here. There is no direct evidence of Defendant Barnett individually parading, demonstrating, or picketing. The Government has not identified what actions or conduct it believes constitute Barnett's parading, demonstrating, or picketing. Therefore,

counsel must speculate to some extent and be prepared for any approach that may come into play. However, the only facts that the Government alleges that Defendant's counsel is aware of are entering the U.S. Capitol, breathing, being alive inside the U.S. Capitol building, and engaging one or more police officers inside the building (and one or more outside the building) in conversation about the fact that Barnett left his flag somewhere and was requesting permission to go back and retrieve it and about his feelings about political matters such as the anger in the country, the election, and the attempt of demonstrators to have their voices heard. The latter were direct conversations with individual police officers, not a broadcast message generally.

Therefore, if the Government's prosecution of Barnett is based upon him simply being among other people who may have affected the events, then those actions of those other people – the "culpability of others" – would become relevant to Barnett's defense. That is, the fact that a vague, broad-brush-stroke, generic accusation of the situation in general was caused by other people, not him, would be a necessary part of his legal defense.

H. Count Eight, 18 U.S.C. § 641 – Theft of Government Property

Defendant Barnett is not aware of an issue pursuant to this Count that would implicate the issues of the Government's Motion one way or the other.

CONCLUSION

The Court should enter the requested order in limine.

Dated: January 8, 2023

RESPECTFULLY SUBMITTED, By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2023, a true and accurate copy of the forgoing was electronically filed and served through the ECF system of the U.S. District Court for the District of Columbia.

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