UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Criminal Case No.**
	:	
MICHAEL GIANOS,	:	**1:22-cr-00074 (JMC)**
	:	
Defendant	:	
	:	

OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT

I. INTRODUCTION

Defendant MICHAEL GIANOS ("Gianos"), through the undersigned counsel, John M. Pierce, Esq. hereby objects to the Government's Pre-Sentence Investigation Report prepared by the U.S. Probation Office dated June 20, 2023.

Gianos pled guilty to one count of violating only 18 U.S.C. § 1752(a)(1), which prohibits:

> 18 U.S.C. § 1752(a)(1) *(emphases added).*
>
> **(a)** Whoever—
>
> **(1)** ***knowingly*** enters or remains in any restricted building or grounds without lawful authority to do so;
>
> * * *
>
> [shall be punished]
>
> * * *
>
> **(c)** In this section—
>
> **(1)** the term "**restricted buildings or grounds**" means any posted, cordoned off, or otherwise restricted area—

> **(A)** of the White House or its grounds, or the Vice President's official residence or its grounds;
> **(B)** of a building or grounds where the President or **other person protected by the Secret Service** is or will be temporarily visiting; or
> **(C)** of a building or grounds so restricted in conjunction with an event designated as a special event of national significance; and
> **(2)** the term "**other person protected by the Secret Service**" means any person whom the United States Secret Service is authorized to protect under **section 3056 of this title** or by Presidential memorandum, when such person has not declined such protection.

* * *

Said plea agreement with the United States is posted on the Court's electronic records at ECF Dkt. # 72, on April 28, 2023. The Government prepared a "Statement of Offense" which has been posted as ECF Dkt. # 73 filed on April 28, 2023. The plea agreement includes stipulating to the Statement of Offense.

Defendant Gianos does not intend to pick upon the PSR or its recommendations to any unreasonable extent nor to raise any significant difficulty in completing the plea agreement. The Government and Defendant have stipulated to the Statement of Offense even if there are parts that perhaps each side would prefer to see a little different. The process is in fact guided by the Plea Agreement and the Statement of Offense incorporated in it.

Nevertheless, the Government from time to time argues on sentencing factual assertions beyond what has been established or stipulated to. Furthermore, argument on sentencing can include the Government's interpretation, spin, or gloss as to the facts asserted in the Statement of

Offense. Therefore, in spite of Gianos stipulating to the Statement of Offense, Gianos objects to some of the interpretation placed upon those statements and other matters outside of the Statement of Offense.

In short, the Government lays out its best case and so does the Defendant, even where the parties are in fact quite close in the likely result and have relatively little to disagree over here.

The Pre-Sentence Investigation Report reminds us as does Defendant that the Court has currently scheduled the sentencing hearing on July 25, 2023, at 10:00 AM.

II. SUMMARY OF RECOMMENDATIONS

The U.S. Probation Office explains and supports in detail the following key results which that office recommends:

- Assigning a total offense level of 4 points within the framework of the U.S. Sentencing Guidelines analogizing the offense pled to of trespassing under §2B2.3 of the Sentencing Guidelines.
- Adding an enhancement of 2 points for the Specific Offense Characteristics (paragraph 39) claiming that the US Capitol is "secured" 24 hours a day.
- Deducting a reduction of 2 points for acceptance of responsibility and cooperation as exemplified by pleading guilty, under §3E1.1(a).
- Assigning a criminal history category of I and adding 1 point for past criminal history.
- As a result, the Probation Office advises that "The maximum term of imprisonment is 12 months for this Class A Misdemeanor," being 18 U.S.C. 1752(a)(1).
- Based on the circumstances of this case, the Probation Office advises that a sentence of zero months to six months is proper and recommends the same range.
- The Probation Office further advises that no sentence of imprisonment is required.
- The Probation Office recommends that Defendant Gianos return a completed Personal Financial Statement as the Office is unable to determine Gianos' ability to pay a fine and/or restitution.

- The Office asserts that under §5E1.2(a) the Court "shall" impose a fine in all cases unless the Defendant establishes that "he is unable to pay and is not likely to become able to pay at any time," which presumably includes by reference to the amount of a proposed fine not merely all or nothing.

- Counsel adds that it is not presently clear if Defendant Gianos will forego the opportunity to prove inability to pay.

- Said Office advises that under the Guidelines, a fine in the range of $500 to $9,500 is applicable. A maximum of $100,000 is allowable, it advises.

- That Office advises that Defendant could ask the Court to impose no fine.

- Naturally, however, Defendant Gianos like the average person would prefer even an onerous fine over incarceration.

- That Office recommends that Defendant Gianos pay restitution of $500 toward the estimated $2,881,360.20 of damages to the United States Capitol claimed.

- Supervised release of up to five years is possible that Office advises. The term of release shall be no more than three years if the offense level is five or less.

- The Probation Office recommends supervised release, if any, of one year.

- However, supervised release is required if the Court imposes a sentence of more than one year.

- The Court may impose all or a combination of the additional conditions of (a) payment of restitution, (b) financial disclosure, (c) community service in lieu of a fine, (d) no possession of or access to firearms and/or dangerous weapons during supervision, (e) monitoring technology for a period of 90 days, (f) following the rules and regulations of the location monitoring program, and (g) substance abuse testing to ensure continued abstinence from illicit substances.

- The Office recommended participation in a Drug Abuse Education Program, although counsel believes that this is precautionary and not a finding that there is a drug abuse problem, at least not currently. Therefore, counsel would modify any such condition to defer to the recommendation of such a program to determine what they find in fact to be appropriate and necessary in fact.

- The Office recommended participation in a Criminal Thinking Treatment Group, although counsel believes that this is precautionary and not a finding that there is a thinking problem. Therefore, counsel would modify any such condition to defer to the recommendation of such a program to determine what they find in fact to be appropriate and necessary in fact.

- Drug testing which the Probation Office believes to be mandatory.

- A special assessment of paying $25 is mandatory that Office believes.

III. KEY ACTUAL DISAGREEMENTS

Counsel for Defendant attempts to identify up front for the Court where there are some small disagreements.

A. SPECIFIC OFFENSE CHARACTERISTICS (Enhancement of 2 points)

Although the addition of 2 points to a total of 4 points might seem to be excessively disputatious, the rationale for this enhancement is a continuing trend that concerns January 6 Defendants. The Court may have recognized that many Defendants relating to events of January 6, 2021, feel strongly about upholding due process and holding back what they regard as an erosion of traditional concepts of law and rights. Therefore, even though it might not actually change the Court's sentencing decision, Defendant would like to make note of some concerns.

Here, the "Special Offense Characteristics" seem to be indistinguishable from the base offense. This is a common observation across January 6 cases.

Therefore, counsel would draw the Court's attention to the question of whether there is a sufficient difference between the base offense and the "special offense characteristics" to support a distinction of two different sources of points.

Specifically, 18 U.S.C. 1752(a)(1) is not an anti-trespassing statute.

It is correct to analogize it to trespassing as the closest Sentencing Guideline offense. But delving deeper, 18 U.S.C. § 1752 is not strictly about trespassing.

18 U.S.C. § 1752 is a statute that prohibits knowingly entering or remaining into a *temporarily* restricted building or grounds because of the nature of the *person* momentarily present in that area – a Secret Service protectee.

The Sentencing Guideline section relied upon is §2B2.3(b)(1)(A)(vii). Regardless of the narrative in paragraph 39, that section is plainly focused on a *permanently* "secure government facility" such as a "nuclear energy facility."

Thus, Gianos is being sentenced from a *temporary* restriction whose nature is the person who is being guarded by the Secret Service.

Specifically a "restricted building or grounds" regulated under 18 U.S.C. § 1752 may exist one day, say Tuesday, but not the following day, say Wednesday, based on the presence or absence of the Secret Service protectee.

The kind of "restricted building or grounds" covered by 18 U.S.C. § 1752 could be a hotel, a baseball game, an ice cream parlor, a fast food restaurant, a park, a local city cemetery, the dedication of a statue, the christening of a ship, a speech at the site of a tornado's damage, a campaign appearance at the State Fair, etc., etc. driven by the presence for a few hours perhaps of a Secret Service protectee.

The following day that restricted area would no longer exist and 18 U.S.C. § 1752 would no longer apply. The statute applies to a restriction which may exist one day and be gone the next.

The kind of facility addressed under the enhancement of §2B2.3(b)(1)(A)(vii) – though wanting better definition – concerns the facility, not the person. Under the doctrine of *esjudem generis*, all of the terms of that enhancement relate to the nature of the physical facility.

The temporary restriction of an area in which a protectee of the Secret Service is or will soon be present is not the kind of facility to which the enhancement applies.

Defendant disagrees with most of the narrative of paragraph 39. The U.S. Capitol

is *guarded* 24 hours a day much as the Smithsonian Institution, Library of Congress, or National Air and Space Museum are guarded. But the Capitol is presumptively open to the public. No authorization of any kind is required for a person to enter the U.S. Capitol. An architecture student from, say, Indonesia, would be free to enter the Capitol and admire its art and construction. No appointment is necessary with any Congressional office. One can enter simply to try to get in line into a Congressional hearing. There are no permanent security barriers, or at least there were not prior to January 6, 2021. Not only are the exterior grounds a national park open to the public, but the U.S. Capitol Police issued six (6) different permits in December 2020 for political rallies and demonstrations scheduled on the U.S. Capitol Grounds for the afternoon of January 6, 2021. The U.S. Capitol has viewing galleries physically built in to the building to allow the public to watch their elected representatives conducting their business. Those balcony galleries involve no physical separation with the House or Senate floor. No authorization is required to sit in the galleries except that the large quantity of interested citizens has required rationing of available seats for short periods of time.

Therefore, the Court should restrain the counter-factual portrayal of the highly-public U.S. Capitol as some secret facility.

In this courthouse, the public and journalists are free to enter the E. Barrett Prettyman courthouse without telling the security guards where they want to go and can enter any courtroom that is not in closed session and listen to the conduct of the Court's business. They do not need an appointment or authorization to observe the District Court in action.

Therefore, the offense under 18 U.S.C. 1752 seems to overlap with the asserted "special offense characteristic" so as to be the same thing.

B. GOVERNMENT'S INADVISBLE INTEREST IN DONATION ACCOUNTS

While reciting what financial information the Probation Office was able to obtain, what they were not able to obtain, what that Office thinks might need to be compelled, etc., that office repeats a recent but disturbing trend of attention to donation services such as GiveSendGo. (See paragraph 87.)

Direct or indirect actions or intimidation which have the effect of depriving a criminal Defendant of the right to counsel rise to a very serious concern under the Sixth Amendment to the U.S. Constitution. There has been a hostility by the U.S. Attorney's Office toward the very few attorneys willing to step forward and provide a defense to January 6 Defendants often with little or no hope of ever being paid for their work. Most of these Defendants were of limited means to start with, lost their jobs from negative publicity, being unavailable to work while facing prosecution or technical limits on their employment, and are being sued or are likely to be made part of on-going civil lawsuits. The chance of ever paying their legal bills is slim.[1]

Counsel is not suggesting that donations are *per se* immunized from any actual evidence that a Defendant's family might be abusing the process of trying to pay for attorneys through donations. Counsel argues that this new intimidation of donations is being done in the complete absence of any information by the Government that

[1] In *United States v. Krysten Niemela*, the Court ordered payment of $1,000 out of Ms. Niemela's roughly $3,500 raised at that point on GiveSendGo because it was unclear if the $3,500 would be strictly limited to paying her attorneys, the undersigned law firm. One problem is that such off-the-shelf donation services make it appear that all funds ever raised are still on deposit unspent. Thus, the Government is viewing donations as a pot of money still available.

donations to a particular Defendant will ever cover more than a fraction of the actual costs of their legal defense, legal expenses, and expenses created only "but for" the criminal prosecution. Unless or until a very high burden is met of some actual, legitimate reason, the Government should not be impinging directly or indirectly or even only in terms of worry or anxiety upon the right to counsel.

C. RESTITUTION

The Government asserts that the Capitol suffered $2,881,360.20 of damages of all kinds from the actions of everyone present on January 6, 2021 (about 10,000 people).

As mentioned, any rational person would prefer even an onerous fine to being sentenced to imprisonment, and Defendant recognizes and welcomes the Court's ability to impose a mixture of community service, fines, restitution, probation, and imprisonment in the hope that incarceration might be thereby reduced.

Gianos would rather pay a larger fine whether characterized as a fine or restitution and a lesser term of imprisonment as any normal person would. Nevertheless, it would seem that payment of a fine would be more correct than restitution. Moreover, a record of paying restitution might imply to distant observers or progeny that Gianos had in fact damaged the Capitol, which he would dispute.

Nevertheless, the statute used to authorize restitution explicitly enables an order of restitution of (a) actual damage (b) from the offense. That which is not damage is not within the restitution statute. Damage caused by someone else is not part of the restitution statute. Here, the Government's photographs made public and news photographs show a disturbing and highly extensive amount of debris in and around the Capitol following the January 6, 2021, events. These photographs are hard to

look at. Yet even a prodigious amount of trash removal is not really damage.

In the Proud Boys trial *United States v. Enrique Tarrio, et al.*, a representative of the Architect of the Capitol[2] testified that each side, left half and right half, of a very large, full size window (not a door window) cost about $770 on each side to replace including all manpower and overhead costs. Thus replacing an entire broken window would be unlikely to exceed $1,500 to $2,000. If there were 10 such windows that needed to be replaced, based on the Architect Office's testimony, the total cost of replacing even 10 large windows would be unlikely to exceed $25,000 to $30,000. Again, the Architect Office's testimony concerned all costs including labor and administrative overhead.

That same witness testified that a long black metal fence would cost about $36,000 to replace and that it was disassembled by some rioters. He testified that that fence was designed to be disassembled, stored away, and re-established as needed. But he did testify that for some unclear reason he would recommend replacing the entire $36,000 fence. In some cases, entire doors may have been deformed enough to justify replacing the entire door, although these were the less-sturdy doors.

Although apparently nothing of the Capitol's artwork, statues or national treasures were touched in any way, there was some talk of removing some graffiti from some masonry walls.

Nevertheless, it seems hard to understand how other than the cleaning and trash removal bill this could add up to $2,881,360.20 of damages, spread across the

[2] Where a typical architect may be involved only in designing a building and then no longer be involved the Office of the Architect of the U.S. Capitol is a permanent office responsible for all manner of building maintenance and upkeep.

estimated 10,000 persons present at or around the Capitol on January 6, 2021.

In short, it might be more correct to think in terms of a fine than restitituion.

D. DEFENDANT MUST BE SENTENCED ONLY ON WHAT HE DID – NOT WHAT OTHER PEOPLE DID

Defendant objects to as improper and a violation of his individual Due Process rights the extensive recitation of what other people or unidentified crowds did. The Defendant Michael Gianos is being sentenced, not crowds, co-Defendants, other persons, or unidentified random people. The Court must not consider and the PSR should not mention what other people are alleged to have done. That is both confusing to the issues and included purely to emotionally inflame the reader and to distract from a lawful and rational application of the sentencing guidelines.

In Paragraph 19, recitation of what "certain individuals in the crowd" did cannot be considered in this process and must be stricken from the PSR. Moreover, there could have been, should have been, but was not any evidence on the question of whether members of the crowd were "lawfully authorized to enter or remain in the building." The Government routinely neglects to prove these factors but merely assumes them. The claim that the crowd did not submit to security screenings wrongly presupposes that this is a responsibility of civilian visitors which it is not. None of this even as to irrelevant third parties has been proven beyond a reasonable doubt or in most cases by any evidence other than mere assertion.

E. DEFENDANT OBJECTS TO CRIMINALIZATION OF HIS POLITICAL SPEECH AND VIEWS

In paragraphs 22 through 24, the Government continues its tendency to present political opinions or protected speech as evidence that the Defendant is a criminal.

The Government passes this off as tangentially related to proving the elements of a crime, but spills over quite extensively into pure free speech issues. For example, in paragraph 22, the PSR accuses of Gianos "For instance, on November 16, 2020, Mr. Gianos sent Mr. Myers a tweet from Rudy Guliani in which Mr. Guiliani was claiming to have evidence of election fraud." No fig leaf would seem to cover up this item of pure political speech as justified by making a criminal prosecution case. Even if both Gianos and Guiliani's tweet were flat wrong it would still be within Giano's constitutional rights to make such statements (or forward them). There is no redeeming value in terms of what is necessary for prosecution of any actual crime.

Similarly, the right to travel such as to visit the nation's Capitol is not properly infringed upon by any need for proving that Gianos committed any crime. Each year, millions of people travel to Washington, D.C., upon which the economy of the city depends. Assertions legitimately needed to prove a crime would not include merely doing what millions of other people do every year.

For example, in paragraph 27, Gianos is alleged to have admitted that he "stormed Nancy office" when the evidence shows that in fact he did not. (He is seen in a hallway, not in any office much less Nancy Pelosi's office.) That is, the Government fails to account for the human reality that people exaggerate for attention and effect.

IV. OBJECTIONS

A. BIOGRAPHICAL INFORMATION

Defendant agrees with the summary under "Identifying Data" of Gianos' biographical information.

B. CURRENT STATUS AND PROCEDURAL HISTORY

Defendant agrees with the summary of the Offense and Release Status and lack of Detainers specified, and PART A THE OFFENSE paragraphs 1, 2, 3, 4, 5, 6, 7, 12, 13,[3] and 14.

Defendant objects to the relevance or propriety but agrees with PART A THE OFFENSE under "The Offense Conduct" paragraphs 17, 18, 19.

In Paragraph 32, the Probation Officer correctly analyzes and applies the Sentencing Guidelines in determining whether Gianos "exercised managerial authority over any other participant." In many January 6 cases, the analysis is wrong. Whether a Defendant planned *himself* or herself is confused with planning *the crime* overall. Planning to wake up and have breakfast and get dressed does not qualify for the enhancement of extensive planning such as under USSG §§ 3B1.1 or 3B1.2. One must be extensively involved in planning *the crime* and/or group committing the crime to be considered for the enhancement. Merely planning what shoes to wear or what roads to drive or where to stop for lunch for oneself is an incorrect view. Here, the PSR gets this right.

Defendant must point out that paragraph 20 of PART A THE OFFENSE under "The Offense Conduct" is largely inaccurate. The U.S. Capitol Police ("USCP") never closed, for example, the 10 ton, solid bronze, 17 foot high Columbus Doors which would have prevented entrance into the East central entrance of the U.S. Capitol. The U.S. Capitol Police issued six (6) different permits in December 2020 for demonstrations on the U.S. Capitol Grounds, based on applications for those permits which fully informed the USCP and Congress that there would be large-scale demonstrations on January 6, 2021. Other information made it overwhelmingly clear as well. Yet, Congress and the USCP knowingly and consciously refused to prepare for the large

[3] There appears to be an inevitable typo in a name included in paragraph 13, as is part of life.

demonstrations expected.

In paragraph 20, Defendant objects to discussion of what unidentified "individuals in the crowd" did or what "others in the crowd encouraged or assisted."

In Paragraph 20, Defendant objects to describing those charged under 18 U.S.C. 111(a) for whomever "assaults, *resists, opposes, impedes, intimidates, or interferes with* . It is in correct to describe those who "resisted," "opposed," "impeded," or "interfered with" law enforcement under the inaccurate summary of "assaulting" officers.

In paragraph 21, the timeline is inaccurate. According to the testimony by then Parliamentarian of the House of Representatives Thomas Wickham delivered on October 19, 2022, *United States v. Stewart Rhodes, et al.*, Case No. 1:22-cr-00028, that the USCP began removing Speaker of the House Nancy Pelosi at 2:13 PM. The gavel was handed to Representative McGovern who then communicated the order to evacuate the House Chamber.

However, the Affidavit of Facts used to support an arrest warrant filed at ECF Dkt. #1-1 establishes that Gianos entered the U.S. Capitol at about 2:21 PM. Thus by the Government's own admission, the Joint Session of Congress had already recessed before Gianos reached the Rotunda at around 2:31 PM.

In paragraph 21, the Government has offered no evidence but pure unsupported opinion that "Congressional proceedings could not resume until after every unauthorized occupant had left the U.S. Capitol." The Government has never identified when it thinks every unauthorized occupant had left nor identified what was involved in securing the building. This becomes important because the Defendant arrived after 2:13 PM, after the Joint Session had already recessed, and left voluntarily hours before Congress resumed. Therefore, Giano had no impact on the Congressional proceeding.

C. PARTIES' AGREEMENT

The U.S. Probation Office seems to be proposing what the parties might agree to from this draft PSR. In some cases, the statements of the PSR do not seem to be what the parties agreed to as opposed to what the Probation Office is proposing that the parties would like to agree to.

D. GIANOS IS GUILTY ONLY OF 18 U.S.C. 1752(a)(1)

The U.S. Capitol Police, by its then Deputy Chief Yoganada Pittman, estimates that around 10,000[4] of the people in the District of Columbia on January 6, 2021, were present at or around the U.S. Capitol. The overwhelming majority of these 10,000 stood quietly and peacefully and watched, observed, or demonstrated with signs on the Capitol Grounds.

A very small number of those demonstrators – remember that statutes are multi-pronged inappropriately combining such disparate topics as "assaulted" with "interfered with" police officers tangled with police officers. Thus those charged only with "interfering" with officers are co-mingled with those very few charged with battering

Some of the 10,000 demonstrators present entered the U.S. Capitol building. For simplicity, this is often referred to as trespassing. For sentencing purposes entering the building and/or grounds without authorization is best analogized to trespassing.

However, the Defendant is not charged technically with trespassing *per se* but with violating 18 U.S.C. 1752(a)(1). This is a very specific statute concerning the Secret Service guarding a designated Secret Service protectee.

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[4] In a statement by Acting Chief of the U.S. Capitol Police, found at **https://twitter.com/MikevWUSA/status/1354104955553067010/photo/1,** Yogananda D. Pittman documents during a topic otherwise *not* relevant to this motion nor adopted by the Accused that the U.S. Capitol Police estimated that "tens of thousands" of demonstrators were at the U.S. Capitol. Elsewhere Pittman estimates the crowd at 10,000.

That is, Gianos is not charged with ignoring warning signs, or seeing other people engage in violence, or hearing alarms, etc.

The sentencing must be geared to the actual offense.

Dated: July 8, 2023

RESPECTFULLY SUBMITTED
MICHAEL GIANOS, *By Counsel*

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CERTIFICATE OF SERVICE

I hereby certify that this document is being filed on this July 8, 2023, with the Clerk of the Court by using the U.S. District Court for the District of Columbia's CM/ECF system, which will send an electronic copy of to the following CM/ECF participants. From my review of the PACER account for this case the following attorneys are enrolled to receive notice and a copy through the ECF system.

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