

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA CR Nos. 1:21-cr-00175-TJK-1  
1:21-cr-00175-TJK-2

v.

1-ETHAN NORDEAN Washington, D.C.  
2-JOSEPH RANDALL BIGGS, Tuesday, April 6, 2021  
11:30 a.m.

Defendants.

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TRANSCRIPT OF MOTION HEARING  
HELD BEFORE THE HONORABLE TIMOTHY J. KELLY  
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by machine shorthand; transcript  
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P R O C E E D I N G S

THE DEPUTY CLERK: We are on the record in criminal matter 21-175, United States of America v. Defendant 1, Ethan Nordean; Defendant 2, Joseph Randall Biggs.

Present for the Government are James Nelson, Jason McCullough and Luke Jones; present from Pretrial Services is John Copes; present for Defendant 1 are David Smith and Nicholas Smith; present for Defendant 2 is John Hull; and also present is Defendant 1, Mr. Nordean; and Defendant 2, Mr. Biggs.

THE COURT: All right. Well, welcome to everyone here.

And we are here for argument on the Government's motion to revoke release conditions for Mr. Nordean and Mr. Biggs. So without further ado, let me turn it over -- I don't know whether it will be Mr. Nelson arguing for the Government in both -- as to both defendants, but I'll go ahead and hear from you, Mr. Nelson, or whoever from the Government is going to take the lead.

MR. NELSON: Thank you, Your Honor. It will be Mr. McCullough.

THE COURT: Mr. McCullough?

MR. MCCULLOUGH: Thank you, Your Honor, and good morning.

1           As the Government has submitted in its papers, the  
2       defendant, Ethan Nordean -- we'll address Ethan Nordean  
3       first. The defendant, Ethan Nordean, is dangerous and poses  
4       a danger to the community.

5           The defendant, Ethan Nordean, planned, organized,  
6       fundraised and led others onto Capitol grounds on January  
7       6th. The purpose of that effort was to obstruct the  
8       certification that was taking place that day. And, in fact,  
9       he and his co-conspirators were successful in that effort.  
10      They did, in fact, obstruct the certification; they did, in  
11      fact, interfere with law enforcement that day; and they did  
12      so through a coordinated effort to move onto Capitol grounds  
13      and push past barriers and ultimately they did enter the  
14      Capitol.

15           THE COURT: Mr. McCullough, let me ask you to  
16      start with -- there was some back-and-forth at the very end  
17      -- actually, let me also just start by asking the  
18      Government, does the Government object -- I know the --  
19      Mr. Nordean's counsel filed something -- a motion to -- for  
20      leave to file a surreply. I think it was late last night.  
21      Is there -- does the Government object to me receiving that  
22      document? I mean, this isn't a civil case. I'm going to  
23      let all the parties say their piece on this, obviously. So  
24      does the Government object to that?

25           MR. MCCULLOUGH: Your Honor, the Government does

1 not object to it. The Government does not think that it was  
2 appropriate in the sense that it did not address new legal  
3 issues from the Government's perspective, and I -- I'm happy  
4 to start just on one point there. I don't believe that the  
5 Government or the defendant are in disagreement as to the  
6 issues that put us into a detention hearing setting.

7 THE COURT: Right. Well, what -- that's what I  
8 wanted to just refocus on first. So I'm going to just, for  
9 the record, grant that motion and I'll receive that  
10 surreply.

11 Yes, Mr. McCullough. I think starting there,  
12 because I did not see that issue percolating until really  
13 the very end there. It sounds like what the -- by the end  
14 of all the documents -- all the pleadings, it sounds like  
15 the defense was arguing that you haven't -- that the grand  
16 jury didn't charge felony destruction of property and so  
17 there is no presumption and, in fact, you all don't even  
18 have a basis to argue for detention. So you know, the best  
19 defense is a good offense. So why don't you address,  
20 Mr. McCullough, those arguments just before we get into,  
21 sort of, the factors and the, sort of, various  
22 considerations in play as far as the factors I have to  
23 consider.

24 MR. MCCULLOUGH: Sure.

25 So Your Honor, the grand jury has returned an

1 indictment. That indictment includes a conspiracy to  
2 obstruct and impede the administration of justice, the  
3 official proceeding that was taking place, as well as the  
4 second object of interfering with law enforcement. The --  
5 that conspiracy theory and the conspiracy indictment that  
6 was returned by the grand jury includes statements as to the  
7 destruction of property by co-conspirators that were  
8 indicted in separate proceedings. So there is a 371  
9 indictment as to the destruction of federal property. That  
10 is one basis on which the grand jury's returned an  
11 indictment as to destruction of government property.

12 Separately, as to 1361 itself, the grand jury  
13 returned a count that charges the substantive offense of  
14 destruction of government property as well as aiding and  
15 abetting the destruction of government property. In that  
16 indictment, it is specifically alleged that the damage  
17 amount was more than \$1,000, and that is in the count that's  
18 returned by the grand jury. And so the Government would  
19 basically point to that charge of 1361 as a -- basically, an  
20 offense that gets you into the detention hearing setting,  
21 and it does so in two ways.

22 One, it is an enumerated offense in Section  
23 2332b(g)(5)(B) which is identified as one of the bases for a  
24 detention hearing, and that's in -- so in 3142(f)(1)(A), it  
25 says that, On motion of the Government, in a case that

1 involves, and then any of the enumerated offenses in 2332b,  
2 one of those being a destruction of -- felony destruction of  
3 government property.

4 The other, though, Your Honor, is also the fact  
5 that there is a rebuttable presumption that applies with  
6 respect to that same charge, and so that same charge of 1361  
7 basically in 3142(e)(3)(C) states that someone is subject to  
8 the rebuttable presumption that detention is appropriate if  
9 they have committed one of these acts. And now, that -- as  
10 you know, Your Honor, that is slightly different language in  
11 the rebuttable presumption that refers to probable cause by  
12 -- a probable cause finding by Your Honor. It's well  
13 settled that the return of an indictment makes conclusive  
14 the existence of probable cause, but nonetheless the  
15 Government has proffered additional evidence as to the  
16 probable cause as to the destruction of that property.

17 So --

18 THE COURT: Yes, that's one -- Mr. McCullough,  
19 just to -- just if I could interrupt for a moment, that  
20 point, I thought, was interesting. I don't know if you're  
21 quoting from -- I mean, when Chief Judge Howell first had  
22 Mr. Nordean before her, she cited a case -- a 1973 Circuit  
23 case for that proposition. And I suppose that's the  
24 Government's -- it's -- that's the Government's position  
25 that if it -- particularly -- well, under, I guess, either

1       prong, if -- or either bases that you just laid out, I --  
2       under that case, I don't -- I can't look past that  
3       indictment -- I'm not saying I would in this case or in any  
4       other case, but just as a -- kind of, as a theoretical  
5       matter, that case seems to suggest I can't look past the  
6       indictment to, sort of, challenge the Government's evidence  
7       and say, Gee, I don't think you have enough here, even for  
8       the standard of probable cause. The indictment's been  
9       returned, and that case would seem to foreclose that. I  
10      suppose that -- is that the Government's position?

11               MR. MCCULLOUGH: That is correct, Your Honor. And  
12      in that -- and with respect to that question, that is a  
13      question under 3142(e)(3)(C) which is the question as to  
14      whether there is a rebuttable presumption. That is what  
15      that case does stand for. However, in (f)(1)(A), it's  
16      simply that the case involves --

17               THE COURT: Right.

18               MR. MCCULLOUGH: -- this criminal act.

19               THE COURT: Right.

20               MR. MCCULLOUGH: And so it's not even a  
21      probable --

22               THE COURT: Right.

23               MR. MCCULLOUGH: -- cause question. We're,  
24      frankly --

25               THE COURT: That's right.

1 MR. MCCULLOUGH: -- in -- we're in detention land  
2 and --

3 THE COURT: Yes.

4 MR. MCCULLOUGH: -- so that's where we are, and  
5 then it goes to the, kind of, four factors under -- the (g)  
6 factors of 3142(g). And so then, you know, it's  
7 certainly -- there's plenty of -- there's fertile ground for  
8 argument as to how those four factors stack up. The  
9 Government -- and that's where some questions as to the  
10 strength of the Government's evidence and those might come  
11 into play. But, Your Honor, in terms of whether it is  
12 appropriate to be having a detention hearing, that is -- we  
13 are in the appropriate setting here.

14 THE COURT: Right. The language about -- the case  
15 involves just -- if you were proceeding under that theory,  
16 and let's assume for the moment I could look past the  
17 indictment, the Government would lose the rebuttable  
18 presumption, but we would still be in detention land through  
19 that other provision. And with the language, just does the  
20 case involve it, it would seem to be not a question. Right  
21 or wrong, whatever, the grand jury has charged that offense.  
22 I don't know what the argument would be that it -- this case  
23 doesn't involve that offense; is that -- that's your  
24 position?

25 MR. MCCULLOUGH: That's correct, Your Honor.



1 THE COURT: All right. Yep.

2 All right. So let's talk about the factors.

3 MR. MCCULLOUGH: Sure.

4 And so, Your Honor, I think the question here is  
5 whether Ethan Nordean poses an identified and articulable  
6 threat. And, as the Government has set forth in its papers,  
7 the Government views this as Defendant Ethan Nordean having  
8 an unwavering commitment to defying lawful functions of the  
9 government. The -- Ethan Nordean stated as much in advance  
10 of January 6th; he then engaged in that conduct on January  
11 6th; and he has shown no remorse for that action.

12 And so the -- Your Honor, that, coupled with his  
13 ability to encourage, plan, organize and lead others to this  
14 kind of activity in the future, that poses the identified  
15 and articulable threat. And, Your Honor, the core feature  
16 here is that Ethan Nordean planned this from remote  
17 locations. He didn't plan this from the, you know -- the  
18 west alcove of the Capitol. The defendant planned these  
19 actions and made these communications from his home and from  
20 other locations. And so as a result, putting this defendant  
21 into home confinement does not adequately protect the public  
22 from the danger that it faces from someone like Ethan  
23 Nordean who is able to plan and organize and direct  
24 individuals to follow him into, kind of, invoking the spirit  
25 of 1776. He's very clear in his messages before January 6th

1       that, What people think is that these -- that they're just  
2       going to be complacent and they're just going to do -- issue  
3       Facebook posts, but, no, we're going to take action. That  
4       is the message that Ethan Nordean was broadcasting, and he  
5       has indicated no -- nothing to suggest that he would move  
6       away from that.

7               So when this case went before Chief Judge Howell  
8       on March 3rd, the Government had not returned this broader  
9       indictment. The Government had not pointed to the existence  
10      of and been able to discuss the existence of the messaging  
11      -- the Telegram messages in which Ethan Nordean and others  
12      in that group indicated that they were planning for some  
13      type of criminal activity. There's very clear discussion of  
14      the question that, Everyone stop what you're doing. We  
15      don't want to be subject to gang charges. There's another  
16      statement about, If we're -- if you're talking about playing  
17      Minecraft, you shouldn't have your phone anywhere near you.  
18      Minecraft being, kind of, a, you know, playful way to  
19      describe engaging in criminal activity.

20             And so when Chief Judge Howell looked at this  
21      without any of that evidence, she said this is a close call.  
22      She said he -- Ethan Nordean is heavily involved in  
23      pre-planning. She said Ethan Nordean had lots of  
24      communications in advance about the stolen election and,  
25      kind of, motivating people to come to Washington, D.C. He

1 had solicited donations, and those donations ultimately in  
2 the amount of more than \$16,000. He had issued what Chief  
3 Judge Howell referred to as fighting words in which he said,  
4 you know, Fight now or lose everything, and also, pointed  
5 out his statements about invoking the spirit of 1776. And  
6 on ground -- on the ground, she pointed out that he was a  
7 ringleader of men who were prepared for violent  
8 confrontation and he planned -- he himself planned on coming  
9 here. And what Chief Judge Howell was asking was, what ties  
10 him to these other actions? What ties him to the  
11 destruction of property? What ties him to others under his  
12 command taking these actions in furtherance of the plan?  
13 And that was the question that Chief Judge Howell raised and  
14 the Government, at the time of the hearing on March 3rd, was  
15 unable to answer those questions because of the pending  
16 superseding indictment which indicated others' involvement.

17 And so here we are now with that additional  
18 evidence, and evidence, as I mentioned, that describes the  
19 Telegram messages in which individuals are discussing  
20 planning for January 6th, and not just planning a march  
21 because you don't -- one doesn't need this level of secrecy  
22 around planning a march. They're -- ultimately, in those  
23 Telegram messages, they're explicit about what conduct is  
24 taking place. There are people that say, contemporaneous  
25 with these actions, Storming the Capitol. Get there.

1 People are directing them to push inside. We just stormed  
2 the Capitol. That language is consistent with the language  
3 that the defendants in this case were using. Joseph Biggs,  
4 on the ground, says, We've just taken the Capitol. We just  
5 stormed that motherfucker and took it back. That is -- I  
6 mean, conspiracies are, kind of, formed with winks and nods.  
7 They're not often memorialized in writing. Here, we  
8 actually have the writing. We have contemporaneous  
9 communications and we have conduct that matches those  
10 communications. And after the fact, there is a celebration  
11 of, What we accomplished. We took the Capitol. We took it  
12 back, including statements by Ethan Nordean.

13 And in addition to that, Chief Judge Howell asked,  
14 Well, what did Ethan Nordean specifically do? How do we  
15 know that he was committed to this plan of destroying  
16 anything? And the answer is in the returned indictment  
17 which is that, as the crowd surged forward, Ethan Nordean  
18 took up an advanced position in the initial entry into the  
19 Capitol grounds and he and Joseph Biggs stood side by side  
20 and they shook a metal barrier to knock it down. Now, that  
21 is -- I mean, it's the maximum -- the, you know -- actions  
22 are louder than words. When your commanding officer is  
23 taking those actions, that speaks volumes as to what the  
24 expectation is of the men who are following you. We are  
25 here to advance. We are here to break things in the process

1 if we need to. And so, Your Honor, it demonstrates not only  
2 -- it puts the agreement and the plan to action and it shows  
3 that Ethan Nordean was fully committed to this effort to  
4 storm the Capitol; to push past law enforcement; and to  
5 break things, if necessary.

6 And so then the question becomes, well, what did  
7 we do with Dominic Pezzola and this -- and the question as  
8 to this destruction of government property as a result of  
9 Dominic Pezzola having stolen a riot shield and pushed into  
10 the Capitol? And, Your Honor, Dominic Pezzola is a  
11 co-conspirator who is simply charged in a different  
12 indictment. He arrives at the First Street pedestrian gate.  
13 He does so with -- he does so at the same time that Ethan  
14 Nordean, Joe Biggs and others are there. There are  
15 coordinated actions to move forward. Dominic Pezzola  
16 participated in the process of -- as barriers are removed,  
17 Dominic Pezzola is there at the front, much like his  
18 co-conspirators and the charged defendants in this case, and  
19 then Dominic Pezzola steals a riot shield. And one of the  
20 defendants in this case, Charles Donohoe, can later be seen  
21 carrying the shield with Dominic Pezzola. And Charles  
22 Donohoe reports back to the Telegram messaging group, Got a  
23 riot shield. This is effectively adopting Pezzola's actions  
24 as the work of the group. And, in fact, Dominic Pezzola --  
25 in his case, the 21-cr-52, Dominic Pezzola describes that

1 the objective was achieved; that stopping the certification  
2 was the objective or acknowledged that that was the  
3 objective. Now, he attributes that to, Well, that was on  
4 the orders of President Trump, but nonetheless the objective  
5 of Dominic Pezzola matches perfectly with the objective of  
6 this conspiracy. For that reason, he is simply a  
7 co-conspirator.

8 And so, Your Honor, when you go down the, you  
9 know, kind of -- the factors here -- the -- if you will, the  
10 Chrestman factors that have been discussed by Chief Judge  
11 Howell as to how we, kind of, sort through all of this  
12 evidence, the question is whether this -- he's been charged  
13 with felony or misdemeanor offenses. Clearly, felonies.  
14 There's a question as to whether he engaged in prior  
15 planning. He did. He fundraised over \$16,000. He engaged  
16 in planning to obtain communications devices. He obtained  
17 protective equipment. He came to Washington, D.C., with a  
18 tactical vest and protective headwear. He gave directives  
19 in advance, what to wear -- dress in plain clothes, not in  
20 the black and yellow -- where to go. And he met -- as the  
21 Telegram messages indicate, met with others the night before  
22 in an effort to come up with the plan.

23 Now, there's no indication that he carried a  
24 dangerous weapon during the riot, but the other factors all  
25 point heavily towards -- in favor of this being a serious

1 act. Did he coordinate with other participants? Yes, he  
2 did. The Telegram messages make clear that he was  
3 coordinating not just in ones and twos but with a large  
4 group. And when they marched, they marched not to the  
5 Ellipse to hear the speeches. They marched to the Capitol  
6 and only the Capitol. And during that march, as we point  
7 out in our briefing, he makes statements that are  
8 encouraging people to focus their attention on the police  
9 and those at the Capitol. We represent the spirit of 1776.  
10 Remind those who have forgotten. We're here to remind those  
11 who have forgotten what that oath is. He then says  
12 something to the effect of, You've got to prove it to us.  
13 Prove your shit to us, then, effectively pointing out that  
14 the law enforcement had arrested one of their brethren and  
15 now it was up to law enforcement to prove to them. And he  
16 said, We don't owe you anything. You're here to protect and  
17 serve the people, not property or bureaucrats, clearly  
18 pointing and discussing that, We are going to focus on law  
19 enforcement and what's happening inside that building.

20 As to whether he damaged federal property,  
21 threatened or confronted law enforcement, his movements to  
22 the front of the group clearly indicate that he is  
23 representing both a threat to law enforcement and engaging  
24 in damage to government property. He moves to the front of  
25 the group. There are law enforcement officers on the other

1 side. He takes action with Joseph Biggs to dismantle that  
2 barrier. And, as we've talked about, that action is a  
3 communication to those under his command that, This is what  
4 we're here to do.

5 So Your Honor, all the factors point heavily in  
6 favor of this being a, you know, very serious crime. The  
7 nature and circumstances of the events charged point heavily  
8 in favor of detention here for those reasons. The weight of  
9 the evidence against the person, particularly now with the  
10 additional evidence that the Government has put forward as  
11 to the returned indictment, the Telegram messages which  
12 plainly reference criminal activity, that also points  
13 heavily in favor of detention.

14 As to the history and characteristics of the  
15 person, Your Honor, the Government appreciates that  
16 Defendant Ethan Nordean does not have a criminal history,  
17 but the, kind of, nature and characteristics here should,  
18 and do, incorporate his statements as to the intent to storm  
19 the Capitol, the intent to take violent action, and given  
20 that he has shown absolutely no remorse for that action and  
21 no remorse for what took place, saying, in fact, the day  
22 after the event, If you feel bad for the police, you're part  
23 of the problem, I mean, that demonstrates a commitment and a  
24 total disregard for the mayhem that took place and the  
25 injuries that were done to law enforcement that day. So



1       that -- I think that speaks volumes to the history and  
2       characteristics of the person.

3               And, Your Honor, the nature and seriousness of the  
4       danger of this person to the community, quite simply, as  
5       we've set out in the papers, this planning -- this was not  
6       something that happened in an instant. This was a planned  
7       and coordinated effort and the conduct that took place was a  
8       success and Ethan Nordean has celebrated that success, and  
9       as a result that makes his potential to do something similar  
10      in the future all the more dangerous and all the more acute.  
11      The success of this action and the defendant's commitment to  
12      continuing such an action in the future or directing others  
13      to plan such an action in the future, that is the danger,  
14      and that's why the Government is here seeking to revoke  
15      detention. The Government does not do it -- the Government  
16      has made a careful and thoughtful decision as to why to do  
17      this, and the Government believes that Ethan Nordean does  
18      pose that danger to the community that these factors are  
19      intended to address.

20             THE COURT: All right. Before -- I have some  
21      follow-up questions even before I hear from the Government  
22      -- I mean, even before I hear from defense counsel. But,  
23      Mr. McCullough, why don't you -- I think it makes -- it's  
24      probably most efficient, since I think the arguments really  
25      overlap, for you to address Mr. Biggs, as well.

1 MR. MCCULLOUGH: Sure, Your Honor.

2 I think that many of the same --

3 THE COURT: Right.

4 MR. MCCULLOUGH: -- many of the same issues here  
5 go to Defendant Biggs. The -- Defendant Biggs was also  
6 involved -- directly involved in the planning and  
7 coordination of this event. He is involved in the  
8 communications as to when and where to meet, what to wear,  
9 etcetera. He is also involved in fundraising, though, to  
10 the Government's information, perhaps -- we don't have a  
11 specific dollar sum to offer to the Court. But, again, the  
12 same language in advance of January 6th, the same  
13 encouragement of this kind of violent action is present  
14 from, you know, as far back as November 5th when Joe Biggs  
15 says, It's time for fucking war if they steal this shit.  
16 That drumbeat of language as to a plan for violent  
17 confrontation on January 6th is there and it's present. He  
18 is involved in the planning of the January 6th effort. He  
19 had -- that marches and directs, much like Ethan Nordean,  
20 this group of men to the United States Capitol. They march  
21 around to the First Street gate. Joseph Biggs, as much like  
22 Ethan Nordean, pushes toward the front. As the Government  
23 points out in its briefing, Joseph Biggs makes  
24 contemporaneous statements as they are entering the Capitol  
25 that reflect the plan. We've just taken the Capitol. We

1 just stormed this -- the Capitol. The Government points out  
2 those quotes that Joseph Biggs states that are, kind of,  
3 contemporaneous with his actions. Much like Ethan Nordean,  
4 he pushes down this barrier which, again, that is an action  
5 that speaks volumes as to what is expected and what is to be  
6 done.

7 And so for the same reasons, Joseph Biggs is  
8 committed to this common plan or scheme. He understands  
9 that destruction is a natural and foreseeable consequence of  
10 what this conspiracy has wrought. Defendant Biggs enters  
11 the Capitol within -- close -- within two minutes of Dominic  
12 Pezzola going through the window. Defendant Biggs then  
13 leaves the Capitol and 30 minutes later comes back in a  
14 second time. And so I mean, that just demonstrates his,  
15 kind of, commitment to interrupting, interfering with the  
16 official proceedings that were taking place inside as well  
17 as a disregard for any efforts by law enforcement to have  
18 cleared the building or keep the crowd away.

19 And, Your Honor, it's quite simply the same  
20 question with respect to Joseph Biggs. Joseph Biggs planned  
21 for these -- this conduct -- engaged in the planning,  
22 organization of this conduct from his home. He advised  
23 others where to go; what, you know -- what to wear; where to  
24 meet; and how we were going to move to execute the plan.  
25 And so the same question as to the Government -- the

1 Government's ability to protect the public goes to Defendant  
2 Biggs. It's simply the fact that Joseph Biggs, much like  
3 Ethan Nordean, has not indicated that he has any different  
4 view as to January 6th and the events of January 6th now  
5 than he did on January 5th. And so if Defendant Biggs is to  
6 be left at home under home detention, there is no way to  
7 effectively monitor his communications in a way that would  
8 protect the public.

9 THE COURT: Let me -- and I'm sure I'm previewing  
10 what I'm going to hear from defense counsel, but let me just  
11 play devil's advocate here in a variety of ways.

12 What we have to go on as far as defendants  
13 associated with the Capitol breach and defendants generally  
14 is what they do and what they say and other facts that are  
15 -- we can associate with the defendant. Here, we don't have  
16 any weapons. I think the Government has conceded that. Not  
17 only no weapons used that day at the Capitol, no weapons  
18 found at their homes or that have been associated with them  
19 in any other way, either defendant. No criminal history for  
20 either defendant. We have a situation where they've both --  
21 I don't weigh this too, too heavily, but I do have to weigh  
22 it, I think -- that they've been out now since their release  
23 in these cases initially. I'm not -- I understand the  
24 Government has new evidence, and I don't blame the  
25 Government for coming forward later when the case, as far as

1       you all -- as far as you -- if you -- in your all -- in the  
2       Government's view, changed when certain information came to  
3       light. That's fine. But they've been out now for the many  
4       weeks it's been without a problem. And I have a -- PSA  
5       reports from both of them that don't recommend changes in  
6       their conditions.

7               And then we get to the issue which is really the  
8       core issue which is, sort of, you know, dangerousness and  
9       violence. And, you know, the evidence of violence on that  
10      day is, you know, pretty muted. We have -- I take your  
11      point, Mr. McCullough. First of all, we have this fence --  
12      the shaking of the fence. Okay. It's something, but it's  
13      not directed at a person, certainly. We do have, as I  
14      think, Mr. McCullough, you mentioned, the -- both defendants  
15      moving toward the front of a group -- maybe, not at the very  
16      front -- in which case they would have had the opportunity  
17      to, sort of, more directly engage in violence. I -- so I  
18      weigh that. They're toward the front of a group of people  
19      who are advancing on the Capitol. Fair enough. But it's  
20      not, you know, violence through their -- directly through  
21      their hand, if you will. And then we have -- and then we go  
22      to the evidence -- so -- and that's where we were when the  
23      case first came in and the Government did not move to detain  
24      them.

25             The new -- the delta here -- the new evidence is

1 this issue of planning and what -- the messages the  
2 Government has put forth. I think, you know, look, they do  
3 show connectivity. They do show planning of some sort. And  
4 I'm not saying that at a future hypothetical trial, the  
5 Government's not going to be able to stitch together all of  
6 this and lay a lot of things that happened that day at these  
7 defendants' hands. Maybe they -- at their feet. Maybe you  
8 will. But in terms of weighing the question of  
9 dangerousness and detention, there is no -- we have -- we  
10 definitely have some invocations of fighting months  
11 beforehand. Okay. I don't -- they're -- locking up  
12 everybody who said, Gee, we've got to fight, clearly -- but  
13 as for the -- when we get down to the day in question, there  
14 isn't anything that is very clearly an invocation to  
15 violence at least as I see it.

16 Now, again, you know, I'm looking at the evidence  
17 you have as a snapshot right now and this doesn't, I don't  
18 think, say anything one way or the other about the -- I  
19 mean, it does say something about the strength of the case  
20 at this moment, but whether you're able to connect all that  
21 up, you may well be able to, but I don't know -- if I'm  
22 looking solely not at criminal liability here but I'm  
23 looking at dangerousness, how -- what's the best -- I'm  
24 going to ask a couple of questions. But in light of all of  
25 that, you know, what's the best evidence that the Government

1 has really that what they were -- and, look, I also  
2 understand the argument that, Judge, look at the context  
3 and, from what happened, you can infer that this was a plan  
4 to do violence. Okay. Maybe that gets you somewhere, but I  
5 think there were probably a lot of people showing up that  
6 day with a lot of -- it's possible, with a lot of different  
7 plans. Some went one way; some went the other way. In  
8 terms of connecting the planning to violence, it's not --  
9 it's -- these messages don't, you know -- don't move the  
10 needle that much.

11 The other piece I just want to mention while it's  
12 on my mind is, you know, and that's one of the things -- I  
13 mean, the other thing that has happened since -- the other  
14 development in the -- in this area that's happened since at  
15 least the Government filed its initial motion and since even  
16 a lot of the briefing has taken place here is the Circuit's  
17 decision in Munchel which, you know, suggests that I have to  
18 look at the uniqueness and the context of what happened on  
19 that day as part of a forward-going analysis of, is the  
20 person a threat?

21 And so I guess, if you would, Mr. McCullough,  
22 address those two things. I mean, the issue of violence and  
23 whether I can really infer -- what to make of the fact that  
24 clearly there was messaging about a plan. It's not at least  
25 overtly a plan that they -- that anybody mentioned violence

1 about. Now, you know, maybe, that's good operational  
2 security, but it is what it is. And then as far as Munchel  
3 goes, how does the Government reconcile, kind of, what the  
4 Circuit instructed me to do -- all courts to do going  
5 forward in terms of Munchel and whether we, kind of, meet  
6 the strictures that they laid out there?

7 MR. MCCULLOUGH: Sure. So Your Honor, the -- one  
8 quick thing on -- you mentioned, kind of, whether they had  
9 any weapons in their home. They did have weapons in their  
10 home, but we're not aware of any effort to bring those  
11 weapons to --

12 THE COURT: All right.

13 MR. MCCULLOUGH: -- Washington, D.C., but --

14 THE COURT: Thank you for that correction.

15 MR. MCCULLOUGH: -- I just wanted to point that  
16 out.

17 The -- Your Honor, the Telegram messages the  
18 morning of the event -- there are others in this small group  
19 of actors. It's fewer than 10 participants in this Telegram  
20 message group where plans were being discussed. They say, I  
21 want to see thousands of normies burn that city to ash  
22 today. I will settle with seeing them smash some pigs to  
23 dust. So this idea of preparing for some sort of violent  
24 confrontation, including violent confrontation against law  
25 enforcement, that is in the Telegram messages. It's not,



1 Oh, you know, yes, and I agree, that's what the plan is, but  
2 that is -- I mean, that's a pretty stark memorialization of  
3 where this group was in terms of its thought process as to  
4 January 6th. This is not, We're going to march, we're going  
5 to listen to the speech, and we're going to protect people.  
6 This is, I want to see thousands of normies burn that city  
7 to ash. I would settle with seeing them smash some pigs to  
8 dust. Now, these are not words spoken by Ethan Nordean  
9 or --

10 THE COURT: Right.

11 MR. MCCULLOUGH: -- Joseph Biggs, but these are  
12 the statements of others in that group. And when Ethan  
13 Nordean and Joe Biggs moved forward and they -- and there is  
14 a metal barrier separating this mob of people, that they  
15 have led to the Capitol, from law enforcement, they take  
16 action to rip it down. I mean, that is -- that's a violent  
17 action, Your Honor, and when you do that with -- when you --  
18 when I, you know, do that with one person behind me, it says  
19 one thing. When I do it with 100 people behind me that I  
20 led to the Capitol grounds, it says a different thing,  
21 especially in this context. And so --

22 THE COURT: Mr. McCullough, can I just jump in and  
23 ask you one question right there. You -- the -- at various  
24 times, the Government's motion references photos and videos  
25 and you've embedded photos in the motion. Do I have -- if

1 -- to the extent there are relevant video, do I have those  
2 video?

3 MR. MCCULLOUGH: You do not, Your Honor. The  
4 Government would be pleased to submit that video, the video  
5 of them tearing down the barrier, or other video of them  
6 marching to the Capitol.

7 THE COURT: Well, whatever you think -- I mean,  
8 you reference in the motion photos and video and there are  
9 some photos here. I just -- I wasn't aware that any -- I  
10 had received any video. So I would say, from the  
11 Government's perspective -- I mean, I'm -- I think I'm  
12 probably -- we're going to probably have to come back on  
13 very short notice for me to rule on this because I, you know  
14 -- I think it's -- I think, given the import of Munchel and  
15 the different decisions that all of us in this courthouse  
16 have to make with regard to defendants going forward, I, you  
17 know -- I want to take my time and make the right decision  
18 here. And so if you all want to submit that as, you know --  
19 obviously, provide a copy to the defense -- I think it makes  
20 sense for me to receive it. I don't know how you've been  
21 doing that in other cases. I've had other -- in some of my  
22 other cases, I've had the Government simply, sort of, refer  
23 to video that had been publicly posted. I don't know if  
24 this is that type of thing where you can point to a place on  
25 the Internet where it exists or whether it's something you

1 would need to submit separately, but however you want to do  
2 it I will receive it and consider it.

3 MR. HULL: If I may, Your Honor, Dan Hull for Joe  
4 Biggs. I would applaud and join in on the idea of getting  
5 that tape on the fence to you. I would very much like you  
6 to see that.

7 THE COURT: Okay. Good.

8 All right. So -- and anyway, Mr. McCullough, I'm  
9 sorry. I interrupted you, but I wanted to make that point  
10 about the video.

11 MR. MCCULLOUGH: Sure.

12 And so, Your Honor, with respect to the -- how  
13 Munchel changes this, it fundamentally does not change the  
14 question as to whether these defendants pose an identifiable  
15 threat to the community. And the question is whether --  
16 prior to January 6th, whether there was a, you know -- a  
17 leadership plan in place and these men led a group to attack  
18 the Capitol. That is the Government -- that's the  
19 Government's evidence that they led this attack on the  
20 Capitol and --

21 THE COURT: I mean, it's clearly your strongest  
22 point, I think, no doubt. Your strongest argument is a  
23 leadership argument. What that says -- what, exactly, they  
24 were leading and how connected that is to violence and how  
25 connected that is to, sort of, forward-looking violence, I

1 think, is, kind of, the core of the question. Go ahead.

2 MR. MCCULLOUGH: That's certainly right, Your  
3 Honor. I mean -- but I think the question here is whether  
4 that effort to lead and direct a group, to fundraise for a  
5 group can still be accomplished and whether the Government  
6 has a -- sorry, whether Your Honor has a basis to believe  
7 that any strictures put in place as to their home  
8 confinement will be strictly followed. And now, the  
9 defendants have not -- there have been no identified issues  
10 with their home detention and their release conditions thus  
11 far, but, Your Honor, the Government would submit that there  
12 -- we don't know what the communications have looked like.  
13 And so it's certainly commendable and appropriate to point  
14 out that there have been no identified instances, but that  
15 doesn't answer the question, and one that was -- and one  
16 that's posed, as to whether they can launch another similar  
17 event from their homes and whether the release conditions  
18 provide any comfort that we can protect the public from that  
19 effort.

20 And so, again, it's -- it, you know -- the -- if  
21 we look at, you know, kind of, the breaking of the barrier  
22 and the leadership forward in isolation, right, if we say,  
23 well, it's a, you know -- it's a breaking of a barrier;  
24 right? Big, you know -- big deal; right? Come on. It's  
25 like, how is that violent? It's violent when you have --

1       when you're, you know -- it's the difference between opening  
2       a bottle of wine and opening a bottle of champagne. When  
3       you've got 100 people behind you and that -- and you unleash  
4       that force, what does it mean; right? What does it mean?  
5       And what is the -- and what does that act really tell those  
6       people who are following you? That we are here to advance;  
7       we are here to --

8               THE COURT: I think that exact question has always  
9       been at the heart of these cases and why, you know --  
10      viewing the individual act and looking at the context, but  
11      then also trying to consider it was -- I mean, on, you  
12      know -- on the record as being -- as recognizing the  
13      unique -- the uniquely bad and pernicious -- how uniquely  
14      bad and pernicious that effort was that day to interrupt the  
15      peaceful transfer of power. I think, in some ways, the  
16      Circuit has flipped that a little bit and -- at least in the  
17      detention context and, I think, appropriately made -- has  
18      instructed us to look closely at, you know, that's a unique  
19      -- that was a uniquely bad situation. Well, what is the  
20      risk of danger going forward? And I think, you know, that's  
21      the question. You've mentioned Pezzola a few times.  
22      There's a defendant who had weapons-making and bomb-making  
23      equipment in his house. He had -- or instructions, not  
24      equipment. Instructions. He -- and there were several  
25      statements of people that were close to him indicating a

1 future -- that they could be a future -- a vector for future  
2 violence. We don't have those direct similar statements  
3 here, but we do have a leadership role that is clearly  
4 different and more advanced.

5 Let me turn to whoever wants to address this --  
6 whichever Mr. Smith will be addressing this question for  
7 Mr. Nordean.

8 MR. NICHOLAS SMITH: Thank you, Your Honor. It  
9 will be Nick Smith, and good afternoon.

10 THE COURT: Good afternoon.

11 MR. NICHOLAS SMITH: We'd like to say at the  
12 outset thank you to Your Honor for accepting the surreply  
13 brief. We understand that Your Honor is correct that that's  
14 normally a civil litigation tool, but thank you nonetheless.

15 And going on that point to begin with, we  
16 understand that the Court is likely to rule -- or already  
17 has ruled that the Government has satisfied a detention  
18 hearing predicate under 3142(f), but with Your Honor's  
19 indulgence I'd just like to make a few points on that in  
20 response to the Government, if that's okay with the Court.

21 THE COURT: Absolutely. I mean, look, I -- for  
22 this -- on this point and on the other -- on the earlier  
23 point about the surreply and letting the Government -- look,  
24 I -- and letting the Government submit some of this video  
25 they want me to see, you know, this isn't -- I'm happy to

1       enforce the civil rules and try to get civil cases as  
2       streamlined as possible. Criminal cases have to move  
3       quickly, too. But when someone's liberty is at stake, I'm  
4       going to hear your arguments. I'm going to receive whatever  
5       both sides want me to hear and see. So please, Mr. Smith.

6               MR. NICHOLAS SMITH: Okay. Thank you, Your Honor.

7               So to follow up on that point, Your Honor noted  
8       correctly that the Court -- it's not the Court's role at  
9       this point to look past an indictment, and Mr. Nordean would  
10      agree with that point. I think the argument that we were  
11      trying to make in the surreply -- and I think it was alluded  
12      to in some of the earlier briefs -- is that even though the  
13      Court doesn't second-guess the grand jury, the Government  
14      still has a burden of pleading the elements of a defense  
15      [sic], and I think I heard Mr. McCullough here say this  
16      morning that the Government agrees that its sole predicate  
17      for detention here today, notwithstanding the conversation  
18      about the new conspiracy charge, is destruction of federal  
19      property under 1361. And, Your Honor, our briefs are  
20      pointing out that the indictment -- the superseding  
21      indictment does not actually allege any specific destruction  
22      of property. There's a reference that the parties have been  
23      making to shaking a metal barricade. That appears in  
24      Paragraph 58 of Government's indictment. And if Your Honor  
25      carefully reads Paragraph 58, you'll see that it says,

1 quote, Nordean and Biggs shook a metal barricade with  
2 Capitol Police on either side of the barricade until Nordean  
3 and Biggs and others in the crowd were able to knock it  
4 down. The crowd, including Nordean, Biggs, Rehl and  
5 Donohoe, advanced past the trampled barricade.

6 Now, the Government doesn't allege destruction in  
7 this paragraph, and in other Capitol cases it has. When  
8 there's damage exceeding \$1,000 to satisfy the 3142  
9 predicate, the Government knows how to plead it and does,  
10 and this isn't just a pleading issue. I understand this  
11 isn't Twombly and Iqbal, Your Honor. We -- this is not  
12 pleading with, you know -- but nevertheless, there is a  
13 burden to plead the elements of an offense. There is no  
14 destruction of property pled here. And there's a reason,  
15 Your Honor, and it goes to the video that Your Honor hasn't  
16 seen, because there isn't destruction of property in that  
17 video, Your Honor.

18 Now, if Your Honor would scroll down to Count 3 --

19 THE COURT: Well, Mr. Smith -- all right. All  
20 right. I'll -- I -- let me just ask this question while  
21 it's on my mind, then. Well, if all of that is true, why do  
22 you concede -- I mean, you're pointing all this out because  
23 it -- number one, obviously, in the various factors I have  
24 to consider, strength of the Government's evidence is one of  
25 them, and this would go to that, for sure. But is there --



1 are you making a residual or a predicate argument -- an  
2 argument before that that if they haven't pled it, even if  
3 the grand jury has returned -- and the -- clearly, the grand  
4 jury has charged them with that offense -- we're still  
5 properly in detention land even if the grand jury has --  
6 even -- I would argue, even if the -- I mean, as I discussed  
7 with the Government earlier, the language, I think it's  
8 whether the case involves a particular charge. I think  
9 that's right. Maybe something slightly different. But it's  
10 hard to get away from that language if -- even if there's a  
11 count on here that charges felony destruction of property,  
12 even if that might be subject to challenge by a pretrial  
13 motion or whatnot, I mean, isn't it fair to say the case  
14 involves that if that's the quote?

15 MR. NICHOLAS SMITH: I think Your Honor is putting  
16 your finger on the verb, "involves," and -- but what we're  
17 countering with here is we're saying the case involves an  
18 offense of government -- destruction of government property  
19 if it's pleaded. Now, there's one reference in the  
20 indictment to destruction of property. You've read that  
21 paragraph, Your Honor, and it doesn't allege destruction of  
22 property because the Government's video doesn't show that,  
23 but I'll get to that in a second.

24 But then if Your Honor scrolls down to Count 4 of  
25 the indictment which --

1 THE COURT: I --

2 MR. NICHOLAS SMITH: -- is the charging count --

3 THE COURT: I'm there.

4 MR. NICHOLAS SMITH: -- and if Your Honor sees  
5 this, it says, quote, They aided and abetted others known  
6 and unknown to forcibly enter the Capitol and thereby cause  
7 damage to the building in an amount more than \$1,000, Your  
8 Honor. There is no allegation of damage to the building  
9 from the co-conspirators in this case in this indictment.  
10 What it alleges is that there's damage to a barricade at  
11 some stage outside of the Capitol. So Your Honor, we're  
12 making the point that it -- our argument is actually that  
13 3142(f) is not satisfied. And we don't think it's a  
14 technicality either, Your Honor, because if Your Honor looks  
15 at the 3142(f)(1) offenses, they're not just all felony  
16 offenses. They're all -- there's large parts of the Federal  
17 Criminal Code that are not included in 3142(f) because, as  
18 the D.C. Circuit pointed out in the Singleton case citing  
19 Salerno, Your Honor, this is supposed to be -- detention is  
20 supposed to be reserved for the most serious felony  
21 offenses.

22 Now, we're hearing a lot about conspiracy charges  
23 and obstruction of justice and civil disorder, but none of  
24 those offenses are actually listed in 3142(f). Okay? So  
25 we're in a very unusual scenario where the gravamen of the

1 Government's case is not the legal basis for its detention  
2 request. The tail is wagging the dog here with the -- there  
3 is some -- there is a misdemeanor offense -- there's two  
4 misdemeanor offenses they've pled, trespass which doesn't  
5 distinguish these defendants from hundreds of others and  
6 destruction of property, but destruction of property is not  
7 pleaded in this indictment.

8 So Your Honor --

9 THE COURT: So --

10 MR. NICHOLAS SMITH: Yeah. So --

11 THE COURT: I mean, I'll just point you to  
12 Paragraph 23 that talks about the Capitol suffering millions  
13 in damage, broken windows, doors, graffiti, blah, blah,  
14 blah, blah, blah. Is it not fair to read that and read --  
15 indictment along with that to plead a factual basis for the  
16 conspiracy that they were engaged in to tag them or at least  
17 to charge them with -- well, to lay that at the feet of  
18 their conspiracy that at least some of that damage that's  
19 set forth in Paragraph 23 can be linked back to their --  
20 the, sort of, organization and the conspiracy that they  
21 allegedly engaged in?

22 MR. NICHOLAS SMITH: Well, Your Honor, I think  
23 that would be their best argument. I agree with Your Honor  
24 that that's the best hook they've got, but if that's the  
25 case there's a problem here, because this paragraph is in

1 virtually every indictment they've filed in the Capitol  
2 cases.

3 THE COURT: Yeah.

4 MR. NICHOLAS SMITH: So if it were --

5 THE COURT: I don't know that that's a problem. I  
6 mean, is it? Why is that a problem?

7 MR. NICHOLAS SMITH: It's a problem because, Your  
8 Honor, the charge that's the hook under 3142(f) has to be  
9 pleaded in connection with specific property damage. If it  
10 were sufficient to just cite all of the damage to the  
11 Capitol in one paragraph and plead no facts linking the  
12 specific charge in the indictment to it, then this would be  
13 -- then really there is no reason why 360 people have not  
14 automatically satisfied 3142(f) and, Your Honor, we would  
15 argue that's contrary to Salerno. This is about -- bail  
16 determinations are about individualized analysis based on  
17 the specific crimes that are pleaded -- properly pleaded  
18 against the defendant in front of the Court. And so we  
19 agree with the Court that that's probably the only hook in  
20 the indictment to connect damage to the defendants, but that  
21 that's -- forget about Iqbal and Twombly. That doesn't  
22 satisfy, you know, basic pleading requirements because  
23 there's no causation alleged here, Your Honor.

24 But, you know, we appreciate that the Court has  
25 thought about this issue already and it would -- thinks that

1       there's more important issues to discuss here. So getting  
2       to Munchel, Your Honor, the Munchel decision, we argue, is  
3       actually a fortiori of everything that the Government has --  
4       we've heard this morning as the most powerful argument the  
5       Government has for detention. And in Munchel, Your Honor,  
6       the court emphasized that a couple of arguments that the  
7       Government has made here today just simply don't work; don't  
8       satisfy dangerousness. Judge Katsas, dissenting in Munchel,  
9       pointed out that he would not just have sent the case back  
10      for a do-over; he would have reversed outright. And one of  
11      the arguments Judge Katsas zeroed in on was the contention  
12      that bravado about patriotism and a stolen election and  
13      comments of a political nature that don't identify a  
14      specific articulable threat to anyone simply don't even  
15      sound under 3142(g)(4). That's what Judge Katsas's point  
16      was. And I think the kinds of arguments you're hearing  
17      today are, sort of, as though this decision doesn't exist or  
18      that what Judge Katsas says didn't happen. These are the  
19      types of arguments the D.C. Circuit is saying don't work.  
20      They're infringements on people's liberties and free speech  
21      rights to put people in prison -- in jail pretrial because  
22      of their political beliefs or because they think that  
23      something wrong happened in the election. The court is  
24      saying that can't happen, Your Honor.

25               The next best argument the Government comes up

1 with is to cherry-pick messages, Your Honor, from a Telegram  
2 chat in which 60 participants were in there. There's no  
3 allegation the defendant even knows them. And, Your Honor,  
4 we'll point out that one individual in these Telegram chats  
5 is cited repeatedly over and over and over. He's an  
6 unindicted co-conspirator in this case, Your Honor. There's  
7 no allegation that the defendant knows this person. Okay?  
8 So if the Government's right that it can just put together a  
9 chat window of 60 people where some people make vague but  
10 alarming remarks and then jail a defendant on the basis of  
11 those remarks that a defendant might not even know, Your  
12 Honor, then consider the implications of that. Why limit it  
13 to a Telegram chat window with 60 people? Why not say the  
14 defendant was on a Twitter thread online where there was 150  
15 people and way down -- the defendant himself might not have  
16 made any violent comments, but way down in the Twitter  
17 thread there's someone who says, This politician should be  
18 killed or dead. Your Honor, that's -- so the --

19 THE COURT: Mr. Smith, I'll just say -- I mean,  
20 the -- Twitter, you know -- anybody can jump into a Twitter  
21 thread; right? But people are generally not randomly  
22 connected on the kinds of messaging systems that we're  
23 talking about here. It's a -- Twitter's a -- much more of  
24 an open forum; isn't that fair to say?

25 MR. NICHOLAS SMITH: It is fair to say, Your

1 Honor, and -- but that goes to how these people --  
2 individuals -- the 60 individuals got into this Telegram  
3 message, and this connects up to a larger point about  
4 basically a series of claims the Government has had -- made  
5 in this case, ever-shifting claims to detain Nordean which  
6 it's been -- through all right after, and I'll explain how  
7 this connects to the Telegram chat.

8 At first, the Government was representing to the  
9 Court that these are encrypted communications --

10 THE COURT: Right.

11 MR. NICHOLAS SMITH: -- encrypted -- end-to-end  
12 encrypted. And the -- and that's actually a manner and  
13 means of the conspiracy, Your Honor. It turned out the  
14 Government was wrong factually. These messages are not  
15 end-to-end encrypted. Telegram doesn't encrypt messages for  
16 group chats, Your Honor. So there is no -- that whole  
17 species of the means of the conspiracy was based on a  
18 premise that could have been verified on Google in 30  
19 seconds, Your Honor.

20 So there's a second point here, Your Honor. The  
21 Government has said, basically, it comes down to this video  
22 that, you know -- Munchel says that the Government has to  
23 identify a specific and articulable threat to an individual  
24 or the community and vague comments don't suffice about  
25 politics, much less comments of other people. So they say

1       there's a video of a destruction of a barricade. The  
2       Government's brief represents, quote -- it's the video that  
3       Your Honor hasn't seen -- quote, Personally dismantled a  
4       barricade. Your Honor, the video you're going to see does  
5       not show the defendant touching a barricade, much less  
6       physically dismantling it, Your Honor. It doesn't show him  
7       trampling on a barricade, and it doesn't show the  
8       destruction of the barricade. It shows a barricade sideways  
9       on the ground, Your Honor. And the reason this is important  
10      is because in the first two attempts to detain Nordean  
11      pretrial, there were different explanations for why he  
12      needed to be detained pretrial. They had nothing to do with  
13      a barricade, Your Honor. At first, he was a risk of flight  
14      because there was a fake passport in his home. That claim  
15      is --

16               THE COURT: Mr. Smith, I -- let me just interrupt  
17      you on one point just before you -- you've set this up as,  
18      Gee, the, you know -- you've set up the video to knock it  
19      down, and I'm not so sure that's -- I mean, I asked to see  
20      the video today. They didn't provide it to me. So I don't  
21      think we can -- I don't think it's fair to say, The  
22      Government has said it's all about this video, because I  
23      don't -- I mean, they reference it. I understand they do.  
24      But I take their argument now at least, and I don't -- I  
25      mean, those -- what you're pointing out happened before I



1 was assigned to the case, and not that it's not relevant.  
2 I'm going to let you complete your point. But I see their  
3 argument or at least -- and at least as I interpret the  
4 strongest point of their argument not necessarily a thing  
5 about the video, although I think the video's relevant, but  
6 it -- I think the planning aspect is -- I mean, put aside  
7 the -- I mean, I know you don't want to and I'm not going  
8 to, but regardless of what the specifics of these messages  
9 say, the thrust of the Government's argument, it seems to  
10 me, is the, kind of, leadership/planning aspect of this.  
11 Maybe their evidence isn't as strong as in other cases about  
12 that, but that seems to me to be at least conceptually what  
13 they're arguing.

14 Anyway, continue. I'm sorry to have taken you  
15 away from the thrust of your argument, but I just wanted to  
16 make -- you, kind of, set up this video as -- I mean,  
17 obviously, Mr. Hull had said he wants me to see it, you  
18 know? I -- now, I really can't wait to see it. But I don't  
19 know that the whole -- the detention decision is going to  
20 turn on that, but --

21 MR. NICHOLAS SMITH: Okay. Your Honor, fair  
22 enough. The reason we brought up the video is because I  
23 believe that Mr. McCullough is using the video to show -- to  
24 try to reach for some sort of element of potential  
25 violence --

1 THE COURT: Sure.

2 MR. NICHOLAS SMITH: -- because in the Munchel  
3 decision -- I'm looking at it now and it says that what was  
4 important to the court was the absence of evidence that,  
5 quote, Munchel or his wife -- or his mother committed any  
6 violence on January 6th, the absence of evidence that  
7 Munchel or the co-defendant assaulted a person on January  
8 6th, and in light -- if -- and what the court said -- that's  
9 the end of the quote -- if, in light of the lack of evidence  
10 that, quote, Munchel or the co-defendant committed violence  
11 on January 6th, the District Court finds that they do not  
12 pose a threat of committing violence in the future, the  
13 District Court should consider this finding in making its  
14 dangerous [sic] determination. So I think, Your Honor, that  
15 the video seems to be what the Court [sic] is using to show  
16 potential violence here, but I think Your Honor pointed out  
17 something at the beginning of -- before throwing it to the  
18 defense that it almost doesn't matter what the video shows  
19 about the barricade because, as Judge Katsas pointed out,  
20 this determination of the 3142(g) is not backward-looking.  
21 It's forward-looking. So -- and Judge Katsas also pointed  
22 out that, The transition has come and gone and that the  
23 threat has long passed.

24 So what the Government is trying to do here is to  
25 force the Court, notwithstanding Munchel, to look backwards

1 to look at what happened to a barricade on January 6th  
2 rather than looking forwards. And the reason this is so  
3 much stronger than Munchel from the defendants' perspective  
4 is that Munchel, unlike Mr. Biggs and Mr. Nordean, didn't  
5 have a history of perfect compliance with the strictest  
6 conditions of confinement that you can imagine that Judge  
7 Howell imposed in this case. We have a record now of the  
8 defendants not making mistakes. They're limited to the  
9 Districts in which they live. They have to wear ankle  
10 bracelets. It becomes very difficult to find work, as Your  
11 Honor knows, when you're confined to your home; when you  
12 have a child, like the defendant does, to raise. He's  
13 limited to his home. He has a third-party custodian in the  
14 form of his wife who has guaranteed his appearance in these  
15 cases. He's made exemplary efforts to not just get rid of  
16 any firearms that could possibly be in his constructive  
17 possession, but to get rid of all of his wife's owned --  
18 legally owned firearms. They're gone as well, Your Honor.  
19 What you haven't seen is any articulation of what -- how  
20 this threat is supposed to materialize. Judge Katsas says,  
21 The transition has come and gone and the threat has long  
22 passed. The Government responds, Well, he's still a danger.  
23 These aren't facts. A danger how? Where?

24 THE COURT: Well, their argument is that he's a --  
25 he -- it stems from the planning point I was making before.

1 And I'll read you another quote from Munchel. In our view,  
2 those who actually assaulted police officers and broke  
3 through windows, doors and barricades, and those who aided,  
4 conspired with, planned or coordinated such actions, are in  
5 a different category of dangerousness than those who cheered  
6 on the violence or entered the Capitol after others cleared  
7 the way. My only point is they -- that the Circuit also put  
8 planners in a category along with other folks who, you know,  
9 did display clear violence that day, etcetera. I'm not  
10 saying that means that carries the day for the Government  
11 here at all, but they -- there is that language in the  
12 opinion.

13 MR. NICHOLAS SMITH: And, Your Honor, I thought  
14 Your Honor would ask me about this. So I have a canned  
15 response. I am sorry.

16 THE COURT: Good.

17 MR. NICHOLAS SMITH: But what the Circuit was  
18 saying, Your Honor, is that if the evidence fits. The  
19 Circuit was not saying if this case falls into a category of  
20 offenses regardless of how many times the Government's  
21 explanation for its detention decision has shifted --

22 THE COURT: Sure.

23 MR. NICHOLAS SMITH: -- no matter what the facts  
24 are. Your Honor, so I think what the court was saying there  
25 is that if there's an element of a conspiracy that's

1 factually established that so -- indicates violence in the  
2 future at some articulable moment in time, then, of course,  
3 the Circuit's saying, you know, we would -- that -- the  
4 outcome would be different than in Munchel.

5 But, Your Honor, to go to Your Honor's next --  
6 second point which was leadership, leadership per se, of  
7 course, is not criminal. I think, Your Honor -- so -- and  
8 plans per se are not criminal. And I think the Court did a  
9 very fine job pointing out that these references to plans  
10 and leadership are very equivocal. I think that's the best  
11 way of putting it; that a reference to coming to D.C. to do  
12 a plan can't be sufficient to jail somebody for what could  
13 be longer than a year when we don't know what -- the  
14 Government hasn't shown what that plan is.

15 But, Your Honor, it's worse than that. Whatever  
16 Your Honor might think of the evidence we've put together to  
17 try to rebut this plan notion being a conspiracy, Your  
18 Honor, I think it's significant that the Court has not  
19 contested the veracity of affidavits we've filed showing  
20 that Nordean and Mr. Biggs actually did have a plan on  
21 January 6th and it was -- involved a musician coming to an  
22 Airbnb house they rented in Washington, D.C., around 3:00 to  
23 4:00 o'clock. Now, the Government might come back and say,  
24 There is a -- there's a possible conspiracy to assume  
25 control of Congress -- one of the most grave offenses you

1 can imagine -- that is not inconsistent with having a music  
2 party in D.C. blocks away from the scene of this notorious  
3 offense within a number of hours. The Court -- the  
4 Government might say that, Your Honor, but we think at the  
5 very least at this stage when an affidavit has not been  
6 rebutted and its veracity is not questioned that that  
7 serious doubt should have some effect on the weight of the  
8 Government -- the weight of the evidence analysis to the  
9 extent that conspiracy is -- to the extent that conspiracy  
10 is a basis for detention, Your Honor. So we think that the  
11 Court should seriously consider the implications of a plan  
12 to hold a music party at 3:00 to 4:00 in the afternoon when  
13 the Government is alleging a multi-month, long-planned,  
14 intricate conspiracy to assume control of Congress. We  
15 think that's a relevant point, Your Honor. And so we don't  
16 think leadership per se is a basis for detention.

17 And, Your Honor, there's a couple of other points  
18 that Mr. McCullough didn't hit on that are relevant here.  
19 So as the Court knows, we're still in the pandemic. The  
20 trial calendar is very congested. The Government might say  
21 that's the fault of the defendants, not their charging  
22 decisions, but nevertheless there's a very congested  
23 calendar from the Capitol cases. There is still a prison  
24 pandemic in -- it is well known, and Your Honor could almost  
25 take judicial notice at this point, that there is a much

1 higher incidence of COVID-19 in jails and prisons than out  
2 in the outside world. And as a result of that, you're  
3 seeing hundreds and thousands of prisoners who have been  
4 convicted of crimes that are beyond, you know, comparison  
5 with what's alleged in this case -- you're talking about  
6 leaders of mafia families being released; you're talking  
7 about importers of tens of thousands of, you know -- dozens  
8 of kilos of cocaine being released; armed violent felonies  
9 of criminals being released, having their sentences reduced.  
10 The other day, Your Honor, I saw one where a double life  
11 sentence was reduced to time served because of COVID-19.

12 So this is -- this context is important, Your  
13 Honor, because you have the Government saying, although two  
14 federal judges have found that there -- that 3142(g) is not  
15 satisfied, there are conditions of confinement. Although  
16 they're complying with their conditions; although the  
17 conspiracy charge is based on things that might not be a  
18 criminal conspiracy, Your Honor, they should go to prison --  
19 jail for possibly up to a year or longer in the middle of a  
20 pandemic, Your Honor, when there are people who have been  
21 convicted of more serious crimes -- not alleged,  
22 convicted -- who are being released.

23 So Your Honor, I don't understand the Government's  
24 position with how those two things are reconcilable, Your  
25 Honor. So we think that if a defendant is complying with

1 his strict conditions, to jeopardize their lives and put  
2 them in jail when people who are convicted are being  
3 released, Your Honor, is not appropriate, and we think  
4 that's why the Government doesn't have a response to that  
5 point, Your Honor.

6 And the last point I'll make, Your Honor, is these  
7 -- the Government's motions are based on proffers. This  
8 isn't like a trial where the evidence -- there's a fact  
9 finder who's had an opportunity to weigh the evidence and  
10 decide the claims. These are -- these cases are based on  
11 the Government's proffers basically saying, you know, the  
12 Government's credible, they're putting forward this  
13 evidence, and the Court should trust it. But, Your Honor,  
14 there's this. I don't think that the history of the efforts  
15 to detain Nordean should be disregarded here as though they  
16 didn't happen.

17 The Court will see in our papers that they -- the  
18 Government initially claimed that Nordean was a flight risk  
19 because of a passport that looked like him. It turned out  
20 that was not accurate. But it also -- the Government  
21 represented this passport had been found next to Nordean's  
22 bed. The purpose of that representation, Your Honor, was to  
23 show that he's a flight risk. But it actually wasn't found  
24 next to his bed. It was found in his wife's jewelry box,  
25 and this is significant because it's a falsehood, Your



1 Honor. It's a falsehood that's put forward in an attempt to  
2 detain someone pretrial. The claim has been abandoned, Your  
3 Honor.

4 But there's something more significant, and this  
5 is the last point. In front of Judge Howell, the Government  
6 represented that Nordean used, quote, Encrypted  
7 communications on January 6th to lead a multi-point invasion  
8 of the Capitol. Okay? At the same time it made that  
9 representation, it had Nordean's phone. It had seized his  
10 phone. The phone showed that his -- the record showed his  
11 phone was off during January -- the January 6th events, Your  
12 Honor. So why is the Government saying that Nordean used  
13 encrypted communications on January 6th to lead a  
14 multi-point invasion if his phone is off? But it's worse,  
15 Your Honor. The Government also said he used a BaoFeng  
16 radio which is a ham radio, an amateur radio, to lead people  
17 into the Capitol if his phone didn't. It turned out, Your  
18 Honor, that he didn't receive that radio until after January  
19 6th. Then the Government comes back and says, Actually, the  
20 radio we seized from his home is not the one that he got  
21 after the 6th. But it turns out it was, Your Honor. So the  
22 larger point is not -- it's not the minutia of these points,  
23 but at what point do the shifting explanations and  
24 rationales for detention mean something, Your Honor?

25 THE COURT: All right. Very well, Mr. Smith. I

1 read your papers on that latter point.

2 As to the point about COVID, you mentioned a case  
3 in which someone -- a defendant's two lifetime sentences  
4 were reduced to time served; is that --

5 MR. NICHOLAS SMITH: Correct, Your Honor.

6 THE COURT: That was not one of my cases, was it?

7 MR. NICHOLAS SMITH: No.

8 THE COURT: No, I didn't think so.

9 All right. Let's -- let me hear, Mr. Hull, from  
10 you, please.

11 MR. HULL: Good afternoon, Your Honor.

12 And let me, first of all, say that I support  
13 almost everything that Mr. Smith said, but let me make some  
14 points that are related, supportive of his arguments and, I  
15 think, very important.

16 I want to step back a little bit. All of -- we're  
17 all lawyers. Most people in this room or this discussion  
18 are lawyers. We like theories. And the Government has had  
19 a number of rolling theories in this case about how this all  
20 occurred, and I made a list of them that I'm not going to go  
21 through in graphic detail, but they, kind of, go like this.  
22 The Proud Boys were responsible for this. The second theory  
23 was that there was multiple small conspiracies of people and  
24 groups of people who did this and the rest of it was  
25 spontaneous and, kind of, attributable to the madness of

1 crowds, if you will. The third is Oath Keeper, Three  
2 Percent. The fourth theory was -- and my favorite -- Alex  
3 Jones, Roger Stone; then, about three weeks ago, it was back  
4 to an alliance between Proud Boys and Oath Keepers probably  
5 in Central Florida, although I guess both the indictments  
6 and the news media had problems putting those two together.  
7 So that was abandoned for a while. Now, we're back to Oath  
8 Keeper. And I'm not sure what it will be next week, but I  
9 just gave you six.

10 I like theories. That's one of the reasons I  
11 became a lawyer. I like ideas. But I think we need to  
12 really be thinking about all of this as, you know, officers  
13 of the court, me for my client, Joe Biggs. Why are we  
14 rolling theories and, at the same time which is just as  
15 important, having accumulating or snowballing discovery  
16 going at the same time? We've got new theories that are  
17 being put forth in large part arising out of certain  
18 indictments, and that's fine. They can, you know, plead  
19 alternatively. They can be inconsistent. But we have  
20 accumulating discovery at the same time. And from what I  
21 understand -- I went through a lot of the discovery. I had  
22 a little bit of a delay but finally finished the discovery  
23 I'd been given -- which is voluminous -- over the weekend.  
24 And I understand from talking to Mr. McCullough there will  
25 be a lot more discovery. The discovery in this -- there

1 will be discovery that I can possibly get from other  
2 defendants, but certainly I will get from the Government. I  
3 appreciate the discovery has not -- I appreciate that it is  
4 trickling in, if you will, but that tricking in is, from  
5 what I understand, at some point, likely to be from time to  
6 time a snowball. We've got -- a snowballing, if you will.  
7 So we've got all these shifting theories and discovery that,  
8 you know, keeps building up and, at the same time, I have a  
9 client who is here today, I think, because, in fact, we are  
10 in detention land. We're talking about, is he dangerous?  
11 And we're also talking about whether he's a flight risk,  
12 whether he would flee. So I would hope that the Court  
13 could, kind of, look at all of this through the lens of  
14 shifting theories and more discovery to come, because  
15 there's quite a bit. And Mr. Smith's right. There's a  
16 tendency here a little bit, maybe, by everyone on both sides  
17 to cherry-pick about what's there, but I understand a lot  
18 more is coming.

19 Now, on Mr. Biggs himself, Mr. Biggs was  
20 arrested -- and I say that in quotations -- turned himself  
21 over on January 20th, Inauguration Day. He did that to the  
22 care of two FBI agents that he knew. One in particular,  
23 he'd known for a long time. He has been on home detention  
24 for -- I wrote this down -- 11 weeks or 77 days or 2 months  
25 and a week. There's different ways of, you know, putting

1 it. And the day that -- two days after the Government filed  
2 its motion -- they filed it on a Saturday. On Monday, I got  
3 in touch with Mr. Biggs's probation officer or Pretrial  
4 Services person and there is in Document No. -- I filed two  
5 versions of it, one proofread -- better proofread and the  
6 other was the original, 42 and 47. And you will see at the  
7 end of that one exhibit is where the Pretrial Services,  
8 Mr. Sweatt, in Orlando says he -- that, I have no concerns  
9 about his compliance with his conditions of release or his  
10 location monitoring equipment.

11 Now, what's really interesting -- and I did not  
12 notice this until really about a week ago -- is that the  
13 same day or the day afterwards, there was also a Pretrial  
14 Services report, I think, that His Honor had ordered from  
15 D.C. And D.C., of course, has had Orlando be the Pretrial  
16 Services point people. That would be Charles Sweet --  
17 excuse me, Charles Sweatt, not Sweet. And there is a  
18 comment in there that was given to Christine Schuck -- I  
19 might be mispronouncing her name -- who's with Pretrial  
20 Services in D.C., and that is that Mr. Biggs has been super  
21 compliant. Super compliant since January 20th. Your Honor,  
22 you've probably seen more reports than I have. I've seen a  
23 lot of these. Maybe Mr. McCullough's seen more. But I have  
24 never seen the nomenclature "super compliant" be used in a  
25 Pretrial Services assessment of someone who was a defendant

1 in a case, and I wanted to bring that to your attention.

2 As, I think, the Court knows from my filing which  
3 is hopefully short and sweet, the primary thing in  
4 Mr. Biggs's life is a young daughter who's --

5 (Brief interruption.)

6 Excuse me. I'll get rid of that. I apologize.

7 (Brief pause.)

8 My apologies.

9 The primary thing in Mr. Biggs's life and has been  
10 for three or four years under this -- excuse me, under --  
11 three years under this regime is a daughter who he  
12 extricated for a lot of different reasons from Austin,  
13 Texas, when he moved in 2018 to the Ormond Beach area. When  
14 he is at home during the day, he has primary care for his  
15 daughter. She will turn four this month. And there are  
16 other people that can help, but that is the primary thing in  
17 his life, and it may be the reason why he's been speaking  
18 almost daily -- pretty close to daily, maybe, about four or  
19 five days -- would be an exception to his Pretrial Services  
20 person, Mr. Sweatt, in Orlando. He has been -- as I've  
21 mentioned in other hearings, he's been a model pretrial  
22 defendant.

23 I don't know -- I could go on about certain  
24 aspects of Mr. Biggs not being dangerous and not being a  
25 risk, but I'm not sure that -- I think, maybe, if the Court

1 would ask me some questions, I'd be happy to field them.

2 But I'm not sure that I need to say much more than what's in  
3 the record about his compliance so far. Is he dangerous?

4 Is he a risk? The answer to both is clearly no. We can  
5 nitpick on some things. It happened with respect to the  
6 fence; what planning is; what fundraising is; and what  
7 certain comments are that were made, sort of, right after  
8 this event, but I would like to focus on the things I just  
9 mentioned about Mr. Biggs's home detention so far.

10 He has, by the way, also been --

11 (Brief interruption.)

12 MR. NICHOLAS SMITH: Your Honor, if I may, I think  
13 I --

14 MR. HULL: I'm sorry?

15 THE COURT: Go ahead, Mr. Hull.

16 MR. HULL: I would be more than happy to answer  
17 questions that His Honor had. There is a number of things  
18 that I wrote down when Mr. McCullough was talking, a few  
19 points when Mr. Smith was talking, and I'm not sure all of  
20 them need to be addressed today, but this has been a model  
21 pretrial defendant, and the evidence that's been used so far  
22 has been somewhat vague and flimsy and, I think,  
23 cherry-picking would be the word that I would use, as well.  
24 I was surprised this was filed and, to be honest with you, I  
25 asked that it be withdrawn and it was not, and I was

1 surprised at that, too.

2 THE COURT: No, Mr. Hull. I don't have any  
3 specific questions. I think you've made the point about  
4 your client and his both lack of a record and compliance  
5 while on supervised -- while on release in this case.

6 Mr. McCullough, why don't I give you -- before we  
7 -- so what I plan to do is, then, just pick a very quick  
8 turnaround date, have the Government -- Mr. McCullough, I  
9 assume -- how quickly do you think you'll be able to get me  
10 whatever you -- whatever video you want to get me or --

11 MR. MCCULLOUGH: Before the close of business  
12 today.

13 THE COURT: Okay.

14 MR. MCCULLOUGH: Before 5:00 p.m. today.

15 THE COURT: All right. Great.

16 So before we pick a quick turnaround time, and  
17 I'll rule when we come back, I want to allow you,  
18 Mr. McCullough, to address anything either Mr. Smith or  
19 Mr. Hull has raised in their argument.

20 MR. MCCULLOUGH: I appreciate that, Your Honor.

21 A couple things that Mr. Smith raised.

22 And so Mr. Smith refers to a series of arguments  
23 that the Government made and then had to withdraw or --  
24 that's just factually untrue. The Government made  
25 statements as to the use of encrypted messages to lead this



1 group of men. Now, the -- these messages -- these Telegram  
2 messages are encrypted messages, and that is just a fact.  
3 And Mr. Smith can shake his head as to what "encrypted"  
4 means, but there is a difference between end-to-end  
5 encryption and end-to-server encryption, and Mr. Smith can  
6 basically make these, kind of, windup arguments as though  
7 the Government has changed course. The Government has put  
8 forward Telegram messages in which planning was occurring  
9 and there was an understanding at least -- well, the -- I  
10 will say this; that these messages could be, you know, kind  
11 of, shielded from public view by nuking them and otherwise.  
12 So the Government has not withdrawn its claim as to the use  
13 of this Telegram messaging application from which Telegram  
14 proudly declares they've never answered service of process  
15 on. So I think that's pretty stark that that's where this  
16 planning was going on and that's where they're talking about  
17 the use of -- sorry, they're talking about, kind of, you  
18 know, Let's all, you know -- every -- all the planning stops  
19 now unless we're going to be, you know, brought up on gang  
20 charges. So I think that's pretty significant.

21 Second, this question about the passport. Your  
22 Honor, you can see Mr. Nordean on the video today. You can  
23 look at other pictures. Mr. Smith concocted a distorted  
24 picture of Ethan Nordean's face and said, Doesn't look  
25 anything like him. Your Honor, it looks exactly like him.

1 And so, you know, Your Honor can make that comparison as  
2 well and we can put that in front of you. Now, the  
3 Government did not press forward with the passport argument  
4 as to Ethan Nordean and flight risk because he has been home  
5 for 30 days and he has not fled. And I'll point out two  
6 things. Mr. Smith says exemplary compliance with Pretrial.  
7 Perhaps true; however, the, you know -- two points in the  
8 Pretrial report, one being the do-not-possess-firearms. In  
9 the Pretrial report, On March 31st, 2021, the supervising  
10 officer reported that defendant informed him he was missing  
11 a firearm and he hadn't reported it stolen. The firearm was  
12 reportedly stolen in late December or early January. Just  
13 went missing, as it does. You know what else is missing?  
14 His passport. The defendant reported to the Western  
15 District of Washington that he lost his passport. PSA has  
16 no additional information to report. So you know, this idea  
17 about exemplary compliance, I think there's -- there are  
18 some issues there, you know?

19 Finally, you know, with respect to, kind of, this  
20 idea that there's no future dangerousness, the leadership  
21 point that Your Honor pointed to from the Munchel decision  
22 is important. It is critical. There are specific and  
23 articulable issues that can arise with someone like  
24 Defendant Ethan Nordean and Defendant Joe Biggs who are able  
25 to plan and organize a group of men to take a violent and

1 criminal action. Mr. Smith referred to this idea that this  
2 is, you know -- that the ransacking of the Capitol would be  
3 this kind of a grave crime. Well, it -- the defendants did,  
4 in fact, carry that crime out. That is what they are  
5 charged with. They are charged with committing a grave act  
6 against an institution of democracy. And the idea that  
7 someone walks away from that and says, If you feel bad for  
8 law enforcement, you're part of the problem, and, you know,  
9 I can't quit this, you know -- I'll lose my family; I'll  
10 lose my marriage; I can't quit this, I think that that poses  
11 a danger. And as to what that danger may be, correct, there  
12 will not be another counting of the Electoral College vote.  
13 But will there be another meeting of Congress, whether it be  
14 the State of the Union? Will there be another meeting of a  
15 state or local legislature? Yes, there will be. And so  
16 that's the issue, is what will this conspiracy wrought in  
17 the future? And I think that there -- for someone that is  
18 capable of moving this group of men and to commit these  
19 acts, I think that is an important point for Your Honor to  
20 consider.

21 So that -- those were the primary points that I  
22 wanted to make and, Your Honor, thank you very much.

23 MR. NICHOLAS SMITH: Your Honor, since the  
24 Government referenced the quality of the evidence we  
25 submitted, I'd just like to quickly respond to --

1 THE COURT: I'll give you a minute, Mr. Smith.

2 MR. NICHOLAS SMITH: Thank you, Your Honor.

3 So Mr. McCullough just said that the defense  
4 concocted the passport photo of Mr. Nordean that we  
5 submitted in our briefs. We didn't concoct it. It was  
6 taken right from the Government's briefs.

7 On the second point, the stolen firearm point,  
8 Mr. Nordean has already cleared this up with his probation  
9 officer. The fact is, it took him several steps under a  
10 state procedure to track down the firearm to accurately  
11 represent to the probation officer that it had been stolen  
12 and the context and the facts in which it had been stolen.  
13 It was left in a vehicle in December or January before a  
14 get-together in Seattle. The doors were left unlocked. The  
15 gun was taken out. And the reason Mr. Nordean explained  
16 this to the probation officer in March was he had to verify  
17 his facts to get them represented accurately to the  
18 probation officer. And, Your Honor, the probation officer,  
19 Mr. Beetham, now acknowledges that there's nothing untoward  
20 about the stolen firearm claim.

21 The one last point, Your Honor, is that you'll  
22 notice that Mr. McCullough did not respond to my point about  
23 the phone being off during the day or Mr. Nordean supposedly  
24 using BaoFeng radios, although he didn't possess them on  
25 January 6th. There's no response to that point and it's

1 significant, Your Honor.

2 And finally, Your Honor, the thrust of the  
3 Government's argument here is that there's some sort of  
4 danger that's possible even though he's locked up in his  
5 home. They've seized his phone, but let's say there was  
6 some theoretical way in which he could communicate  
7 inappropriately with others from within the confines of his  
8 phone [sic]. That's, sort of, where the Government has  
9 retreated to at this point; that there could be  
10 communications within a home. So Your Honor, as Your Honor  
11 knows, there are --

12 THE COURT: But, Mr. Smith, when you say within a  
13 home, you mean using a computer.

14 MR. NICHOLAS SMITH: Well, within the place in  
15 which he's now -- his strict conditions of release now  
16 include home confinement.

17 THE COURT: Right. No, I understand that --

18 MR. NICHOLAS SMITH: So with --

19 THE COURT: -- but my point is --

20 MR. NICHOLAS SMITH: With a computer --

21 THE COURT: Right.

22 MR. NICHOLAS SMITH: -- and I think Your Honor  
23 knows that it's not unusual at all, if that is the  
24 Government's argument, to impose a separate special  
25 condition that would prevent those -- exactly the sorts of

1 communications the Government is discussing. And, in fact,  
2 some judges in the Capitol cases have imposed that  
3 condition.

4 THE COURT: Well, I -- you were going to -- that's  
5 where I was about to wind up in this whole thing. That was  
6 a -- something I was going to raise, but continue.

7 MR. NICHOLAS SMITH: And so, Your Honor, we think  
8 that if -- a condition -- if the Court is inclined to  
9 subscribe to the Government's theory of risk in this case  
10 which is virtual risk, the Court could simply impose a  
11 condition that would prevent the defendant from not just  
12 discussing the case except through lawyers with defendants  
13 but from any Proud Boy, period. And in that case, there is  
14 no -- then that leaves no articulable risk that the  
15 Government has identified to anyone in society.

16 THE COURT: Well, you have -- you -- the question  
17 is whether he would comply, but -- so --

18 MR. NICHOLAS SMITH: Well, and he -- I -- we would  
19 argue his perfect compliance to date would -- is indicative  
20 of his compliance with a special condition. But, Your  
21 Honor, the last point that Mr. McCullough made was that the  
22 future risk is not concerning January 6th. Judge Katsas  
23 said we have to look forward, not backward. So the Court --  
24 so the Government has pointed to future meetings of  
25 Congress, Your Honor, but that's exactly the point that

1 Judge Katsas addressed in his dissent. He said that the  
2 Government in that case -- in the Munchel case had said,  
3 What about March 4th? There was a threat to the Capitol on  
4 March 4th. Your Honor probably knows the city was on  
5 lockdown, and then this threat didn't materialize. And what  
6 Judge Katsas said is the Government cannot keep coming back  
7 with threats that don't materialize when they're not  
8 connected to the defendant in the case.

9 THE COURT: All right. I've heard enough on  
10 Munchel. I mean, I would just say the fact that a threat  
11 doesn't materialize doesn't mean there is no threat going  
12 forward, you know? The absence of evidence is not the -- is  
13 not evidence of absence -- whatever that old saying is.

14 All right. So --

15 MR. HULL: Your Honor, may I have two minutes?

16 THE COURT: Who -- Mr. --

17 MR. HULL: Two minutes?

18 THE COURT: What -- I -- yes, you can have one  
19 minute. How's that?

20 MR. HULL: I -- thank you, Your Honor.

21 I wanted to make a couple of comments about --  
22 responses quickly to what Mr. McCullough had said about  
23 planning, fundraising -- which we're not too worried --  
24 these kinds of things, and I would also ask that all the  
25 parties be allowed to supplement somehow, if they did it

1 within 24 hours, what's been done here today.

2 THE COURT: Mr. Hull, you --

3 MR. HULL: Yes?

4 THE COURT: This isn't -- Mr. McCullough had made  
5 these points before and you had an opportunity to respond to  
6 them.

7 MR. HULL: No, no, no, no, these -- well, he did,  
8 and I could do them by way of supplement, but I think  
9 they're important to raise here.

10 Mr. Biggs -- and I didn't want to belabor Mr. --  
11 my argument on Mr. Biggs that it would be just to have him  
12 remain free. What -- Mr. Biggs has been a planner and a  
13 coordinator his whole life. He planned two events like  
14 this. They always go to the Capitol. And he's also done  
15 them in Portland. Fundraising is always important and it  
16 usually goes to, you know, Airbnb. The -- what to wear and  
17 what not to wear was because of a stabbing that happened on  
18 December 12th in the Harrington Hotel and wanted to make  
19 sure that Antifa could not easily locate Proud Boys. There  
20 are --

21 THE COURT: Mr. Hull, all these --

22 MR. HULL: Yes?

23 THE COURT: -- arguments you could have made --

24 MR. HULL: I agree, Your Honor. I'm done.

25 THE COURT: This is -- and so if you want to file



1 something, I -- if -- because I'm giving -- because I'm  
2 letting the Government go ahead and --

3 MR. HULL: I would like to. I was trying to cut  
4 this short and let you ask me questions. That didn't  
5 happen. But I agree. I will just do it by supplement.

6 THE COURT: All right. If -- let me say this. If  
7 any party wants to file a supplement by the -- by today,  
8 you're given permission to file something today -- something  
9 responding to our discussion here today. And we'll come  
10 back shortly and I'll make a decision.

11 But, Mr. Hull, I didn't mean to cut you off. It's  
12 just that -- you could have made -- those are all points you  
13 could have made when I called on you to make your argument.  
14 So you know, I --

15 MR. HULL: You're exactly correct, Your Honor. I  
16 stand corrected. I appreciate your comments.

17 THE COURT: All right. So let me ask the parties  
18 if they're available -- just looking at -- I have quite a  
19 full week. How does 3:00 o'clock on Thursday work or 2:00  
20 o'clock on Friday?

21 Mr. McCullough, for you first.

22 MR. MCCULLOUGH: Both of those times work for the  
23 Government, Your Honor. Thank you.

24 THE COURT: All right. Mr. Smith?

25 MR. NICHOLAS SMITH: Your Honor, we would prefer

1 the earlier hearing, if --

2 THE COURT: Thursday?

3 MR. NICHOLAS SMITH: Yes.

4 THE COURT: Thursday at 3:00 o'clock. All right.

5 MR. DAVID SMITH: Excuse me, Your Honor. I have  
6 to butt in here. David Smith here.

7 THE COURT: Yes.

8 MR. DAVID SMITH: I can't make it on Thursday. My  
9 partner doesn't realize that because I just -- I -- he  
10 doesn't have my calendar. I can do it on Friday at 2:00  
11 o'clock, though.

12 THE COURT: All right. Mr. Hull, can you do it  
13 at -- Friday at 2:00 o'clock?

14 MR. HULL: Yes, sir.

15 THE COURT: All right. So I'll receive whatever  
16 additional -- whatever supplements the parties want to file  
17 today; and, Mr. McCullough, I'll receive that -- you'll send  
18 someone over with the video; and then we'll be back here  
19 Friday at 2:00 o'clock in which -- at which time I will  
20 rule.

21 Right now -- let me just ask -- I guess,  
22 Mr. McCullough, you're the best person to ask. I know --  
23 what is the -- had we tolled the speedy trial clock until we  
24 were -- until our last scheduled hearing on the 8th?

25 MR. MCCULLOUGH: That -- our last scheduled

1 hearing on the --

2 THE COURT: I'm sorry, the 1st.

3 MR. MCCULLOUGH: -- 2nd -- the 1st --

4 THE COURT: On the --

5 MR. MCCULLOUGH: On Thursday --

6 THE COURT: The 1st.

7 MR. MCCULLOUGH: -- the 1st. Correct.

8 THE COURT: The 1st.

9 MR. MCCULLOUGH: So we were tolled through April  
10 1st. I think these -- I think we should -- the Government  
11 would propose to continue tolling from the 1st and through  
12 this date and until Your Honor renders a decision on this  
13 motion. The efforts to provide discovery to the defendants  
14 is ongoing. As you -- as Your Honor has pointed out, the  
15 discovery is quite voluminous; will give the defendants an  
16 opportunity to receive and review that discovery. So the  
17 Government would submit that tolling is in the interests of  
18 justice at least through the time of Your Honor rendering a  
19 decision. The Government would also submit that there --  
20 that that time should continue to toll afterwards. The  
21 Government has not obtained Mr. Smith or Mr. Hull's view on  
22 that.

23 THE COURT: All right. Mr. -- let me ask  
24 Mr. Smith and Mr. Hull. I'm not going to ask you to toll it  
25 or suggest that we toll it until I -- I mean, at -- to some

1 indeterminate time in the future. My thought is we could do  
2 it nunc pro tunc to the 1st which is where, I think, we left  
3 off and then simply to Friday, the 9th. So it would be nunc  
4 pro tunc from the 1st to the 9th and for the reasons the  
5 Government laid out in terms of voluminous discovery. I'll  
6 rule when we come back on the 9th, and then we'll figure out  
7 where we go from here with regard to speedy trial.

8 MR. NICHOLAS SMITH: No objection, Your Honor.

9 MR. HULL: No objection.

10 THE COURT: All right. So that's what I will do.

11 I will find that the time nunc pro tunc to April  
12 1st through our next hearing April 9th is excludable under  
13 the Speedy Trial Act because the ends of justice that are  
14 served by taking such action outweigh the best interests of  
15 the public and this -- and the defendant -- both defendants  
16 in a speedy trial. I'm doing so here to give the defendant  
17 -- both defendants a continuing opportunity to receive the  
18 very voluminous discovery in this case. And we will further  
19 address that, then, on the 9th.

20 Is there anything further, Mr. McCullough?

21 MR. MCCULLOUGH: No, Your Honor. Thank you.

22 THE COURT: All right. Is there anything further,  
23 Mr. Smith?

24 MR. NICHOLAS SMITH: No. Thank you, Your Honor.

25 THE COURT: Anything further, Mr. Hull?

1 MR. HULL: No, sir.

2 THE COURT: All right. Very well. I will see  
3 everyone on Friday and we will go from there.

4 Counsel are dismissed.

5 (Proceedings concluded at 1:25 p.m.)

6 \* \* \* \* \*

7 CERTIFICATE OF OFFICIAL COURT REPORTER

8 I, TIMOTHY R. MILLER, RPR, CRR, NJ-CCR, do hereby certify  
9 that the above and foregoing constitutes a true and accurate  
10 transcript of my stenographic notes and is a full, true and  
11 complete transcript of the proceedings to the best of my  
12 ability, dated this 14th day of April 2021.

13 /s/Timothy R. Miller, RPR, CRR, NJ-CCR  
14 Official Court Reporter  
15 United States Courthouse  
16 Room 6722  
17 333 Constitution Avenue, NW  
18 Washington, DC 20001  
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