

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES \*  
vs. \* Case No.: 21-CR-28-APM  
THOMAS EDWARD CALDWELL \*

\* \* \* \* \*

**DEFENDANT’S REPLY TO GOVERNMENT’S OPPOSITION REGARDING  
REQUEST TO TRANSFER VENUE**

The Government’s breezy assertion that Caldwell’s request to transfer venue “can summarily be denied based on legal precedent” is incorrect. Caldwell is quite aware that requests to change venue typically occur within the context of *voir dire* and jury selection. The instant case, however, is the not the typical case—it’s an extreme case. The “extraordinary local prejudice” in the District “will prevent a fair trial” for Caldwell and his co-defendants. United States v. Skilling, 561 U.S. 358, 378 n.11 (2010). In fact, if the instant case doesn’t, as a matter of law, merit a Rule 21(a) transfer for presumed prejudice, it is hard to imagine a federally charged case that would qualify.

**A. January 6<sup>th</sup>: “A date which will live in infamy” for D.C. residents.**

Prejudice should be presumed because the events of January 6<sup>th</sup> (hereinafter “J6”) were so devastating, traumatic, impactful, and emotionally-triggering to District residents that it will be impossible to pick a fair and impartial jury. Notably, America’s political leaders agree that J6 is comparable to our greatest national tragedies. Our political leaders have compared J6 to, *inter alia*, the 1995 bombing of the federal building in Oklahoma City, the 9/11 attack, Pearl Harbor, and the Civil War. If J6 is on par with

America's most devastating tragedies, *a fortiori* the alleged perpetrators of J6 should be tried outside of the "zone of trauma and emotion" which is the District.

Attorney General Merrick Garland, for one, has repeatedly compared J6 to the Oklahoma City bombing case, alleging at his confirmation hearing that "there was a line that connected the January insurrection to the Oklahoma City bombing and back to the battles of the original Justice Department against the Ku Klux Klan."<sup>1</sup> In a June speech to DOJ officials, the Attorney General "compared the 1995 Oklahoma City bombing to the Capitol riot of January 6 when unveiling the Justice Department's response to the Biden Administration's new anti-domestic terrorism strategy."<sup>2</sup>

The Attorney General's repeated comparisons of the Oklahoma City bombing to J6 is particularly relevant to Caldwell's transfer motion as Garland, a senior DOJ official at the time, supervised the prosecution of Timothy McVeigh and his co-conspirators.<sup>3</sup>

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<sup>1</sup> Zoe Tillman, *Merrick Garland pledged to investigate the Capitol insurrection*, BuzzFeed (Jun. 15, 2021), <https://www.buzzfeednews.com/article/zoetillman/merrick-garland-investigate-capitol-riots-attorney-general>. See also (AG Garland speech on combatting domestic terrorism) (Jun. 15, 2021), [https://www.youtube.com/watch?v=6\\_loIzn5Bo](https://www.youtube.com/watch?v=6_loIzn5Bo) (Jun. 15, 2021).

<sup>2</sup> Jerry Dunleavy, *Merrick Garland ties Oklahoma City bombing to Capitol Riot*, Wash. Examiner (Jun. 15, 2021), <https://www.washingtonexaminer.com/news/garland-oklahoma-city-bombing-capitol-riot>.

<sup>3</sup> Wash. Post (Feb. 21, 2021) (video of testimony of AG confirmation hearing), [https://www.washingtonpost.com/video/politics/garland-we-are-facing-a-more-dangerous-period-than-we-faced-in-oklahoma-city-at-that-time/2021/02/22/ceebcd88-5d4c-4c01-b07e-6b937d75b3d8\\_video.html](https://www.washingtonpost.com/video/politics/garland-we-are-facing-a-more-dangerous-period-than-we-faced-in-oklahoma-city-at-that-time/2021/02/22/ceebcd88-5d4c-4c01-b07e-6b937d75b3d8_video.html). See also Dana Milbank, *Merrick Garland lets domestic terrorists know there's a new sheriff in town*, Wash. Post (Feb. 22, 2021) ("Garland . . . prosecuted the Oklahoma City bombing perpetrators before becoming a federal judge[.]").

Under Garland’s supervision, the McVeigh prosecution team agreed that the Eastern District of Oklahoma could not provide the Oklahoma City defendants a fair trial, and consented to a transfer of venue. United States v. McVeigh, 918 F. Supp. 1467, 1470 (W.D. Okla 1996) (“There is no disagreement among the parties with Judge Alley's concern about a trial in Oklahoma City. The effects of the explosion on that community are so profound and pervasive that no detailed discussion of the evidence is necessary.”).<sup>4</sup> *A priori*, if the events of J6 are comparable to the Oklahoma City case in the opinion of the Attorney General, who in 1995 agreed to a transfer of venue in the latter case, logically a comparable transfer of venue in the instant case would comport with consistent treatment of defendants.

In addition to Oklahoma City analogies, numerous officials have compared J6 to America’s Civil War, the bloodiest conflict in our Nation’s history. President Biden, in his speech before a joint session of Congress, called J6 “the worst attack on our democracy since the Civil War.”<sup>5</sup> Similarly, in a January 13<sup>th</sup> floor speech, House Majority Leader Steny Hoyer (D-MD), drawing comparisons to General Robert E. Lee’s Army of Northern Virginia, stated that J6 protesters, who were “carrying [ ] a rebel flag”

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<sup>4</sup> The Government’s suggestion that McVeigh prosecutors agreed to transfer the case from Oklahoma City because the “federal courthouse was itself damaged during the bombing” is not accurate. The McVeigh court clearly indicated that the Government agreed that McVeigh’s ability to receive a fair trial in Oklahoma City was “chancy.” McVeigh, 918 F. Supp. at 1470.

<sup>5</sup> J. Dunleavy, *FBI Director says Capitol Riot cannot compare to 9/11*, Yahoo! News (Jun. 10, 2021), <https://www.yahoo.com/now/fbi-director-wray-says-capitol-172900565.html>.

and “infected with white supremacists carrying a gallows structure with a noose,” were an “army of MAGA” ready to fight a “MAGA civil war” and launch a “Fort Sumpter” like attack.<sup>6</sup> The D.C.-based media has seared these images of J6 protesters as “Confederate turncoats” into the minds of potential jurors, routinely and falsely referring to J6 protesters as “insurrectionists” and “traitors,” highly insulting monikers, especially for Caldwell who is a decorated and disabled veteran.

Prominent members of Congress have also compared the events of J6 to the 9/11 attacks on New York and the Pentagon, as well as Pearl Harbor. Speaker Pelosi, the entire Democratic membership of Congress, and some Republicans, for example, called for “9/11 style hearings” to investigate J6.<sup>7</sup> Rep. Eric Swalwell (D-CA), a prominent Democrat on the Hill, compared January 6<sup>th</sup> to 9/11.<sup>8</sup> Rep. Adam Schiff (D-CA), the Chairman of the House Intelligence Committee, also compared J6 to 9/11.<sup>9</sup> Rep. Eleanor Holmes Norton (D-DC), in proposing the National Commission on the Insurrectionist Attack Upon the United States Capitol Act, argued that “[t]he country needed the 9/11

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<sup>6</sup> Floor remarks of Rep. Hoyer, RealClearPolitics.com (Jan. 13, 2021), [https://www.realclearpolitics.com/video/2021/01/13/steny\\_hoyer\\_maga\\_civil\\_war\\_on\\_jan\\_6\\_made\\_america\\_grieve\\_again\\_like\\_911\\_and\\_pearl\\_harbor.html](https://www.realclearpolitics.com/video/2021/01/13/steny_hoyer_maga_civil_war_on_jan_6_made_america_grieve_again_like_911_and_pearl_harbor.html).

<sup>7</sup> Kyle Cheney, *Pelosi reiterates call for 9/11-style commission on Jan. 6*, Politico (Feb. 15, 2021), <https://www.politico.com/news/2021/02/15/nancy-pelosi-commission-capitol-insurrection-469068>.

<sup>8</sup> Floor speech of Rep. Swalwell, RealClearPolitics.com (Jan. 13, 2021), [https://www.realclearpolitics.com/video/2021/01/13/eric\\_swalwell\\_compares\\_capitol\\_hill\\_riots\\_to\\_911\\_trump\\_to\\_bin\\_laden.html](https://www.realclearpolitics.com/video/2021/01/13/eric_swalwell_compares_capitol_hill_riots_to_911_trump_to_bin_laden.html).

<sup>9</sup> The Five, *‘The Five’ blasts Adam Schiff for ‘unnecessary’ Capitol Riot—9/11 comparison on hearing day*, Fox News (Jul. 26, 2021), <https://www.foxnews.com/media/the-five-blasts-adam-schiff-for-unnecessary-capitol-riot-9-11-comparison-on-hearing-day>.

bill when we were attacked by foreign enemies, my bill focusing on an attack from within – an insurrection – is just as necessary.”<sup>10</sup> In a floor speech, Senate Majority Leader Schumer (D-N.Y.), who typically is measured in his comments, declared that “[w]e can now add January 6th, 2021, to that very short list of dates in American history that will live, forever, in infamy,” likening the events of J6 to the attack on Pearl Harbor in 1941.<sup>11</sup>

As J6 was, according to America’s leaders, a traumatic, shocking, and emotionally-triggering event akin to the Civil War, Pearl Harbor, Oklahoma City, and 9/11, it seems obvious that the city that was attacked, impacted, and traumatized would be so infected with prejudice against the alleged assailants that a venue transfer is required. That the current Attorney General agreed to a venue transfer in the Oklahoma City case, and is now comparing J6 to that case, also significantly bolsters Caldwell’s request to transfer venue.

**B. The D.C. jury pool has been poisoned by incessant race-baiting.**

The Government failed to respond to Caldwell’s accurate and detailed evidence of systematic race-baiting to which Caldwell and other defendants have been subjected. The outrageous assertion by politicians and D.C.-based media that Caldwell and his co-defendants are “white supremacists,” “white nationalists,” “racists,” and other despicable

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<sup>10</sup> Statement of Rep. Holmes Norton (Jan. 21, 2021), <https://norton.house.gov/media-center/press-releases/norton-introduces-bill-to-create-national-commission-on-us-capitol>.

<sup>11</sup> April White, *Leave the Capitol damaged. It would remind us how fragile our democracy is*, Wash. Post (Feb. 10, 2021), <https://www.washingtonpost.com/outlook/2021/02/10/capital-damage-memorial/>.

monikers is disgusting and completely guarantees that a truly unbiased jury will be impossible to seat. These disgusting racial attacks are particularly prejudicial in the District, where just under half of residents are African American, and where a significant number of race-conscious “woke” Progressives reside.<sup>12</sup> While it would take a ream of paper to list all of the racially-charged attacks against Caldwell and J6 protesters, Caldwell will document additional representative samples.

In February, Rep. Bennie Thomas (D-MS) filed a lawsuit against President Trump regarding the events of J6. Subtly filed under the Ku Klux Klan Act, the lawsuit, an obvious political stunt, was widely cited as proof that J6 was about “white supremacy.”<sup>13</sup> Particularly prejudicial to Caldwell, the lawsuit, which was hyperlinked in the *Post* article, repeated the false rumor, which originated in the Government’s filings, that Caldwell was “hunting” members of Congress on J6. *Id.* A week before this lawsuit was filed, during President Trump’s impeachment trial, Rep. Jamie Raskin (D-MD) and other Democrat impeachment managers argued that the J6 events were carried out based on racist motivations.<sup>14</sup>

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<sup>12</sup> <https://www.census.gov/quickfacts/DC>.

<sup>13</sup> Jennifer Rubin, *A congressman used the Ku Klux Klan Act to sue Trump*, Wash. Post (Feb. 17, 2021), <https://www.washingtonpost.com/opinions/2021/02/17kkk-lawsuit-first-many-against-disgraced-former-president/>.

<sup>14</sup> Glenn Thrush, *Impeachment managers raise the role of racism in Capitol riot*, N.Y. Times (Feb. 10, 2021), <https://www.nytimes.com/2021/02/10/us/politics/racism-capitol-riot.html> (“The impeachment managers opened their argument for convicting former President Donald J. Trump on Wednesday with a blunt charge that the pro-Trump mob responsible for storming the Capitol was, in part, motivated by racism.”).

Referring to J6, Chairman of the Joint Chiefs of Staff General Mark Milley publicly claimed that President Trump was planning a “coup,” describing the events of J6 as a “Reichstag moment . . . The gospel of the Führer.”<sup>15</sup> News reports also trumpeted Milley’s claim that Trump supporters were the “modern American equivalent of brownshirts in the streets.” *Id.* More troubling, Milley saturated several news cycles with racially incendiary statements, for example claiming that J6 was the result of “white rage”: “[Milley] described the attack on the Capitol as partly an outgrowth of ‘white rage’ . . . [essentially claiming that] white supremacy, or racial nationalism, or fear of multiracial democracy, played some role in it.”<sup>16</sup>

Attorney General Garland has repeatedly tied the J6 events to “white supremacy” and “hate crimes,” including the Tulsa “massacre” of 1921, Charlottesville, and the 2015 mass murder of congregants at a black church in Charleston, South Carolina. Summarizing Garland’s speech to law enforcement officials, CNN trumpeted his claim that the J6 investigation found that “many of those charged belong to White supremacy groups that include the Proud Boys, Oath Keepers and Three Percenters.”<sup>17</sup> At his

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<sup>15</sup> K. Wong, *Gen. Milley allegedly had fears of Trump Coup*, Breitbart News (Jul. 15, 2021), <https://www.breitbart.com/politics/2021/07/15/gen-mark-milley-allegedly-fears-trump-coup-reichstag-moment/>.

<sup>16</sup> Greg Sargent, *Pelosi’s new Jan. 6 select committee is about to collide with ‘white rage,’* Wash. Post (June 29, 2021), <https://www.washingtonpost.com/opinions/2021/06/29/pelosi-jan-6-white-rage-mark-milley/>.

<sup>17</sup> Kate Sullivan, *Garland announces national strategy to combat domestic terrorism*, CNN (Jun. 15, 2021), <https://www.cnn.com/2021/06/15/politics/white-house-strategy-domestic-terrorism/index.html>.

February confirmation hearing, Garland “drew parallels” between KKK violence, Oklahoma City, and the events of J6.<sup>18</sup>

In June, the Congressional Black Caucus released a widely reported statement alleging that the J6 events were an “unprecedented attack on the seat of our Democracy by racist, white domestic terrorists.”<sup>19</sup> At a congressional hearing, Rep. Cori Bush (D-MO) chastised Republican members of Congress who compared the J6 events with violent BLM protests, stating that “[e]quating a movement for justice with white nationalism is ignorant and dangerous on your part.”<sup>20</sup> Texas Rep. Sheila Jackson Lee, a prominent member of the Congressional Black Caucus, made similar racially incendiary comments while holding up a picture of a lone protester holding a “noose.”<sup>21</sup> *Id.* Rep. Anthony Brown (D-MD) claimed that the “attack on our Capitol was an insurrection fueled in large part by the Proud Boys, Oath Keepers, and Three Percenters, all of which

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<sup>18</sup> Matt Zapotosky, *Merrick Garland tells senators Capitol riot investigation will be his first priority*, Wash. Post (Feb. 22, 2021), [https://www.washingtonpost.com/national-security/merrick-garland-confirmation-hearing/2021/02/21/b4725878-7474-11eb-9537-496158cc5fd9\\_story.html](https://www.washingtonpost.com/national-security/merrick-garland-confirmation-hearing/2021/02/21/b4725878-7474-11eb-9537-496158cc5fd9_story.html).

<sup>19</sup> Statement of CBC regarding creation of J6 commission (June 24, 2021), <https://cbc.house.gov/news/documentsingle.aspx?DocumentID=2334>.

<sup>20</sup> Alex Woodward, *House Democrats strike back at GOP ‘false equivalencies’ during domestic terror hearing*, The Independent (Feb. 25, 2021), <https://www.independent.co.uk/news/world/americas/us-politics/house-judiciary-domestic-terror-hearing-b1807045.html>.

<sup>21</sup> The “noose” was actually a “hangman’s gallows,” apparently one protester’s way of expressing his belief that certain members of Congress are traitors. While tasteless, the “noose” obviously had no racial connotations.

espouse extreme white-supremacist views.”<sup>22</sup> Senator Corey Booker (D-NJ), a former presidential candidate, alleged in a floor speech and press release that “white supremacists attacked our nation’s capital.”<sup>23</sup>

To throw fuel on the race-baiting inferno, Congress recently conducted largely partisan hearings regarding J6 wherein four police officers testified about the events, two of whom did so in starkly racial terms. Capitol Hill Officer Harry Dunn, alleging that J6 protesters were “insurrectionists,” claimed to have been called the “N” word more than a dozen times.<sup>24</sup> Officer Aquilio Gonell, who repeatedly referred to Trump supporters as “terrorists,” claimed that J6 protesters disparaged his Dominican heritage. *Id.* These racially-charged claims received wall-to-wall coverage on local and national television.

The *Post* has run dozens of articles—with no journalistic skepticism--highlighting claims by politicians and others that the J6 defendants were motivated by white supremacy. Referring to J6 protesters as “white supremacists and other domestic extremists,” a *Post* “journalist” claimed that President-elect Biden would face the “acute

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<sup>22</sup> Anthony Brown, *Lloyd Austin is the Black leadership the Defense Dept. needs*, Wash. Post (Jan. 21, 2021), <https://www.washingtonpost.com/opinions/2021/01/21/lloyd-austin-defense-waiver-anthony-brown/>.

<sup>23</sup> Statement by Sen. Booker (Jan. 20, 2021), <https://www.booker.senate.gov/news/press/senator-booker-delivers-remarks-on-the-senate-floor-honoring-capitol-police-officer-brian-sicknick>.

<sup>24</sup> Gina Harkins, *A Black police officer said Capitol rioters called him the n-word. Tucker Carlson said he’s an angry activist*, Wash. Post (Jul. 22, 2021), <https://www.washingtonpost.com/nation/2021/07/22/tucker-carlson-harry-dunn-capitol/>.

challenge” of stopping “hate crimes” like J6.<sup>25</sup> In the same article, the *Post* reporter managed to use nine(!) incendiary racial terms-- “slavery,” “domestic extremism,” “neo-Nazi,” “white supremacist,” “violent extremism,” “hate crimes,” “Charlottesville,” “white nationalist,” and “Oklahoma City”--in a piece alleging that the “challenge [President Biden] will face was crystallized . . . when a mob of Trump supporters stormed the Capitol.” *Id.*

The *Post* has gone out of its way to paint military members as racist and, in turn, characterize Caldwell and other ex-military co-defendants as racists. Claiming that “military leaders” have known about a problem with “white extremism in the ranks,” the *Post* reported as fact that “it’s already clear that the extremist views of the Capitol rioters are shared by some active-duty forces.”<sup>26</sup> Falsely labelling the “Oath Keepers” as “probably the best example of an insurrectionist group,” and falsely tying them to white supremacy and white nationalist ideologies, the *Post* singled out Caldwell as an example of ex-military extremists. *Id.* One *Post* columnist has claimed that J6 defendants for months have been “concealing their true identity as white supremacists[.]”<sup>27</sup>

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<sup>25</sup> Matt Zapotosky, *Trump’s recognition of white nationalists will loom as Biden confronts surge in hate crime*, Wash. Post (Jan. 11, 2021), <https://www.washingtonpost.com/politics/2021/01/11/biden-hate-crimes-extremism/>.

<sup>26</sup> David Ignatius, *How the Pentagon is campaigning against white extremism in its ranks*, Wash. Post (Mar. 9, 2021), [https://www.washingtonpost.com/opinions/how-the-pentagon-is-campaigning-against-white-extremism-in-its-ranks/2021/03/09/00e0715e-811d-11eb-ac37-4383f7709abe\\_story.html](https://www.washingtonpost.com/opinions/how-the-pentagon-is-campaigning-against-white-extremism-in-its-ranks/2021/03/09/00e0715e-811d-11eb-ac37-4383f7709abe_story.html).

<sup>27</sup> Jennifer Rubin, *Four takeaways from the first sentencing of a Jan. 6 insurrectionist*, Wash. Post (Jul. 20, 2021), <https://www.washingtonpost.com/opinions/2021/07/20/what-sentencing-jan-6-insurrections-portends/>.

The inflammatory and prejudicial rhetoric aimed at the J6 defendants has not, and will not, stop. In fact, just recently Rep. Ocasio-Cortez, probably the most influential progressive politician in Washington, managed to race-bait and gender-bait Caldwell and his co-defendants in one interview, telling CNN that J6 protesters were motivated by “racism and misogyny,” and claiming that she feared being raped by J6 protesters:

**AOC:** I think one of the reasons why that impact [of J6] was so doubled that day is because of the misogyny and the racism that is so deeply rooted and animated that attack on Capitol. You know white supremacy and patriarchy are very linked in a lot of ways. There is a lot of sexualizing of that violence. I didn't think that I was just going to be killed. I thought other things were going to happen to me as well.

**CNN REPORTER:** So it sounds like what you're telling me is that you didn't only think that you were going to die, you thought you were going to be raped?

**AOC:** Yeah, I thought I was.<sup>28</sup>

Caldwell and his co-defendants vehemently deny that they are white supremacists, white nationalists, racists, rapists, or any of the ugly slurs that have been hurled at them by officials in Washington and the D.C.-based media.<sup>29</sup>

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<sup>28</sup> Gregory Krieg, *'I didn't think I was just going to be killed': Ocasio-Cortez on her fears of Jan. 6*, CNN (Aug. 9, 2021), <https://www.cnn.com/2021/08/09/politics/alexandria-ocasio-cortez-january-6-cnntv/index.html>.

<sup>29</sup> The Government argues that “given the sheer number of people involved in the attack on the Capitol, it is unlikely that more than a handful of District residents could identify any of the defendants by name.” Govt. Op. at 11. The Government's claim is without merit. The defendants have been lumped into a mass of 500 plus defendants who have been collectively and repeatedly referred to as “racists,” “white supremacists,” “white nationalists,” “seditionists,” “insurrections,” and “domestic terrorists.” These defendants have been dehumanized with sweeping, inaccurate generalizations. While some members of the jury pool will be unfamiliar with the defendants' names, they will be entirely familiar with the racially-tinged and biased characterizations tied to the “Oath Keeper defendants” in general.

Unfortunately, the iron-clad proof that Caldwell and the Oath Keepers had no racist motivations on J6 has been suppressed by the media, politicians, and others, which have known for months that the alleged on-the-ground “operations leader” of the Oath Keepers on J6, i.e., “PERSON TEN,” was a Black man. On July 26, 2021 *Mother Jones* magazine published an extensive interview with this African American Oath Keeper, a.k.a. “the J6 Operations Leader of the Oath Keepers,” who freely and publicly outed himself as PERSON TEN.<sup>30</sup> In other words, the “white supremacist,” “white nationalist,” and “racist” Oath Keepers, who numerous elected officials, the Attorney General, the *Post*, and others have claimed were motivated by racism, hate, and fear of minorities, were being led by a Black man on January 6<sup>th</sup>.<sup>31</sup> It is unclear why the Government has not charged PERSON TEN.<sup>32</sup> What is clear, however, is that Oath Keeper defendants and Caldwell have been unfairly smeared as racists and other ugly monikers while the

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<sup>30</sup> Dan Friedman, *We’ve unmasked the Oath Keepers’ Jan. 6 “Operations Leader,”* *Mother Jones* (Jul. 26, 2021), <https://www.motherjones.com/politics/2021/07/oath-keepers-january-6-capitol-insurrection-michael-simmons-person-ten/>.

<sup>31</sup> According to the Indictment, PERSON TEN was the Oath Keeper named by Stewart Rhodes to be his group’s “operations leader” in Washington, D.C. on J6. ECF No. 328, ¶14. PERSON TEN was an integral part of the initial virtual conference wherein the J6 “operation” was planned. Id., ¶39. Additionally, PERSON TEN was a party to the Oath Keepers “invitation-only” encrypted “Leadership Signal Chat” titled “DC OP: Jan 6 21.” Id., ¶59. PERSON TEN was in contact with co-defendant Joshua James during the riot. Id., ¶¶113-14. Shortly after the J6 riot ended, PERSON TEN, along with multiple Oath Keeper defendants, “gathered together . . . approximately 100 feet from the Capitol[.]” Id., ¶177.

<sup>32</sup> Caldwell, in fact, believes that PERSON TEN and PERSON ONE, as well as all Oath Keeper co-defendants, are innocent as to the conspiracy and related charges.

media, politicians, and others have deliberately hidden the fact that the group’s alleged on-the-ground “J6 Operations Leader” was Black.

The despicable, race-baiting attacks against Caldwell have poisoned the jury pool in the District, which is nearly 50% African American, two-thirds minority, and has a large population of “woke,” racially-conscious Progressives. There is absolutely zero chance that Caldwell can be judged fairly and impartially in this atmosphere.

**C. The Government did not dispute that it helped poison the well.**

Caldwell alleged in his transfer motion that “the Government[] [made] incendiary—and highly inaccurate—suggestion[s] in previous charging documents that Caldwell and Oath Keepers were chasing down Members of Congress, trying to trap and kill them in the hallways of the Capitol.” ECF No. 273 at 6-7. Caldwell cited numerous news articles that amplified these allegations to the potential District jury pool. Id. Tellingly, the Government did not dispute Caldwell’s characterization that the Government’s previous charging documents misled the press and public vis-à-vis claims that Caldwell and his co-defendants were trying to execute members of Congress.

The Government likewise did not dispute Caldwell’s claim that it inaccurately claimed in multiple charging documents that Caldwell masterminded a plan to specifically attack the Capitol. Based on the Government’s inaccurate claim, the Court publicly branded Caldwell a danger “not just to the community but actually to the fundamental fabric of democracy we also cherish” who joined with others “to plan a

potential military-like incursion on the Capitol[.]”<sup>33</sup> The Court’s inaccurate characterization of Caldwell—the by-product of misinformation provided by the Government—appeared in the first line of a front page article in the *Post*. *Id.* The *Post* likewise was misinformed by the Government’s charging documents, reporting that Caldwell “help[ed] to mastermind a violent plan to stop lawmakers from certifying Joe Biden’s presidential victory.”<sup>34</sup>

Accordingly, cases cited by the Government, such as Haldeman and Tsarnaev,<sup>35</sup> are distinguishable as those courts emphasized that negative pretrial publicity regarding those defendants was essentially “factual reporting.” United States v. Haldeman, 559 F.2d 31, 61 (D.C. Cir. 1976) (en banc) (per curiam) (“The overwhelming bulk of [pretrial publicity] consists of straightforward, unemotional factual accounts of the events and of the progress of official and unofficial investigations.”); In re Tsarnaev, 780 F.3d 14, 20-

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<sup>33</sup> Tom Jackman, *Virginia man ordered jailed until trial on charges of planning for Jan. 6 attack*, Wash. Post (Feb. 12, 2021), [https://www.washingtonpost.com/local/legal-issues/virginia-man-ordered-jailed-until-trial-on-charges-of-planning-for-jan-6-attack/2021/02/12/e06307d4-6d71-11eb-9f80-3d7646ce1bc0\\_story.html](https://www.washingtonpost.com/local/legal-issues/virginia-man-ordered-jailed-until-trial-on-charges-of-planning-for-jan-6-attack/2021/02/12/e06307d4-6d71-11eb-9f80-3d7646ce1bc0_story.html).

<sup>34</sup> Katie Shepherd, *The feds say he’s an extremist leader who directed rioters*, Wash. Post (Feb. 9, 2021), <https://www.washingtonpost.com/nation/2021/02/09/capitol-riot-oath-keeper-fbi/>.

<sup>35</sup> The Government’s reliance on the Boston Marathon bombing case is misplaced. In Tsarnaev, the issue of venue transfer was appealed in the middle of jury selection via a writ of mandamus. The standard of review for a writ of mandamus followed by the First Circuit was extremely high, “ha[ving] customarily been granted only when the lower court . . . [has] exceeded its discretion to such a degree that its actions amount to a usurpation of power.” In re Tsarnaev, 780 F.3d 14, 19 (1<sup>st</sup> Cir. 2015). Interestingly, one judge on the Tsarnaev panel believed that the defendant had satisfied the extraordinarily high standard of review and believed a transfer of venue was required as a matter of law. *Id.* at 30-49 (J. Tourrella, dissenting).

21 (1<sup>st</sup> Cir. 2015) (Noting that the reporting surrounding the Boston Marathon bombing case “has largely been factual.”). By contrast, Caldwell has been slandered with media coverage that is sensationalized fiction smothered in race-baiting sauce. The *Post* and other outlets have inaccurately reported that: 1) Caldwell was a member of the Oath Keepers; 2) that Caldwell was a leader of the Oath Keepers; 3) that Caldwell forcibly entered the Capitol; 4) that Caldwell masterminded a specific plot to specifically attack the Capitol; 5) that Caldwell tried to hunt down and execute members of Congress; and 6) that Caldwell intended to commit sedition. In addition to this slander, multiple officials, including the President and the Attorney General, have falsely referred to Caldwell and his co-defendants as “white supremacists,” “domestic terrorists,” “extremists,” “insurrectionists,” and other prejudicial labels. H.R. Haldeman did not begin his Watergate trial with the entire jury pool believing he was a white supremacist. Unlike Haldeman, “the population of Washington, D.C. [is] so aroused against [the defendants] and so unlikely to be able to objectively judge their guilt or innocence on the basis of evidence presented at trial” that a venue transfer is required before *voir dire*. Haldeman, 559 F.2d at 62.<sup>36</sup>

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<sup>36</sup> The Government’s reliance on Yousef and Mussaoui is also misplaced. In Yousef, the Second Circuit ruled that the trial judge did not abuse his discretion by denying a request to transfer venue, but did so largely because the defendant “did not renew [his] motion for a change of venue after the *voir dire*—an indication that counsel was satisfied that the *voir dire* resulted in a jury that had not been tainted by publicity.” United States v. Yousef, 327 F.3d 56, 155 (2d Cir. 2003). The Yousef trial also took place five years after the 1993 World Trade Center bombing, and “there was minimal publicity in the months immediately preceding the trial.” Id.

**D. The Instant case is far more prejudicial than cases cited by the Government.**

The Government’s citation to trials involving H.R. Haldeman, Oliver North, John Poindexter, and Scooter Libby is unpersuasive. First, Haldeman, North, and Poindexter were tried more than 30 years ago, when the District was far less hostile to those on the Right.<sup>37</sup> Libby, moreover, was a D.C. insider who was charged with low-level process crimes, hardly a figure that would *per se* draw the ire of partisans.

Second, while politically-interested people followed the Haldeman, North, Poindexter, and Libby matters intensely, the general public did not. In other words, the jurors who were picked for those trials were largely unaware of the facts of those cases. As *Post* columnist Richard Cohen observed in 1989 regarding the North and Haldeman trials:

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In Moussaoui, the Fourth Circuit “affirmed the denial of pre-trial prejudice motions,” but did so on the grounds that the *pro se* defendant’s interlocutory appeal was not within the jurisdiction of the appellate court. United States v. Moussaoui, 43 Fed. Appx. 612, 614 (4<sup>th</sup> Cir. 2002) (finding that “none of the orders challenged by Moussaoui are final decisions” ripe for appeal).

<sup>37</sup> The ACLU actually assisted North in his successful appeal to overturn his conviction, something that would be unthinkable in today’s political climate. Philip Shenon, *Civil Liberties Union asks court to quash Iran-Contra Indictment*, N.Y. Times (Jul. 21, 1988). By contrast, the *New York Times* reported that at a recent ACLU event, “[a] law professor argued that the free-speech rights of the far right were not worthy of defense by the ACLU ... [and] an ACLU official said it was perfectly legitimate for his lawyers to decline to defend hate speech.” Michael Powell, *Once a bastion of free speech, the ACLU faces an identity crisis*, N.Y. Times (Jun. 6, 2021) (noting that the ACLU has morphed from an organization that defends the disfavored to one that promotes Progressive causes).

The search has commenced for the human Stealth bomber, people who weave through the information society and manage to duck the news. We want 50 of them. From that group will come the 12 jurors who will decide the fate of Oliver North. They cannot have read about the Iran-contra hearings in the newspaper or seen them on television. They read the funnies and not the news. . . . Something like this was done once before. During Watergate, jurors who had never heard of the scandal were selected. . . . Like Japanese soldiers who never learned the war was over, they hide out somewhere where the news never touches them.<sup>38</sup>

By contrast, the J6 events were so highly publicized, so traumatic, and resulted in so much disruption to the ordinary lives of District residents, it is impossible for potential jurors to be ignorant of the allegations and prejudicial media coverage.

Next, Haldeman, North, Poindexter, and Libby were not continuously, day after day, labelled by the local press as “white supremacists,” “white nationalists,” “racists,” and “insurrectionists.” Their alleged misdeeds were non-violent process crimes that did not traumatize District residents with alerts about members of Congress potentially being gassed, claims by the Speaker of the House and others that “white supremacists” were targeting members of Congress, a curfew, five months of National Guard presence, a giant fence around the Capitol until July, and other disruptions of normal life in the District. These defendants did not begin their trials with the entire jury pool believing that they were “domestic terrorists” and “white supremacists.”

Another distinction between the Haldeman, North, Poindexter, and Libby cases is that news coverage in the District has radically changed in subsequent years. Unlike the

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<sup>38</sup> Richard Cohen, *A jury of his peers*, Wash. Post (Feb. 2, 1989), <https://www.washingtonpost.com/archive/opinions/1989/02/02/a-jury-of-his-peers-for-oliver-north/847f915d-67db-4376-ace>.

“liberal but fair” newspaper of record for the District that covered those cases, the *Post* is currently a politically-correct caricature of its former self. Every article printed that pertains to Trump or his supporters is saturated with opinions and biased statements, hardly the “Ben Bradlee way.” On any given day, the *Post*’s coverage of Republican politicians—except a handful who are “anti-Trumpers”—is 100% negative. The bias of the *Post* is so shocking that a federal appellate judge in the D.C. Circuit took the unusual step of calling out the paper’s coverage, calling it a “Democratic Party broadsheet[ ].” Tah v. Global Witness Publ., Inc., 991 F.3d 231, 254 (D.C. Cir. 2021) (J. Silberman, dissenting in part). The *Post* has falsely referred to Caldwell and his co-defendants hundreds of times as an “insurrectionists,” which is akin to labelling murder defendants “the murderers.”<sup>39</sup> In short, by typecasting Caldwell as an “insurrectionist,” the *Post* has falsely editorialized to its District readership that he is guilty.

The Government’s citation to the Roger Stone case actually strengthens Caldwell’s transfer argument. After Stone’s verdict, internet sleuths discovered that the jury foreperson, contrary to her *voir dire* answers, was an obvious left-wing partisan who hid her disdain of Trump and his associates behind vague, misleading answers on her jury questionnaire. This “fair and impartial” jury foreperson once “referred to the President with a hashtag of ‘klanpresident’ and spoke out against ‘Trump and the white

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<sup>39</sup> A search of the *Post* archives reveals hundreds of references to J6 as an “insurrection” and the J6 defendants as “insurrectionists.” With due respect to the *Post*, it is not a “fact” that the events of J6 constituted an “insurrection.”

supremacist racists.”<sup>40</sup> Despite the fact that this juror was obviously “a Democratic activist and critic of the Trump administration” who failed to disclose “that she denounce[ed] all of the associates of Trump as a virtual criminal enterprise,” *id.*, Stone’s trial judge denied a request for new trial, finding that this deceptive juror, an attorney, had technically not “lied” during the *voir dire* process. United States v. Stone, No. 19-cr-0018 (ABJ), ECF No. 362.<sup>41</sup>

That the District’s jury pool will be loaded with anti-Trump partisans like Juror 1261 in the Stone case is simply a fact, as the District is heavily populated with anti-Trump partisans. Like Mr. Stone’s attorneys, defense counsel will be forced to use up valuable peremptory strikes on anti-Trump partisans in the jury pool who purport to be “fair and impartial,” while the Government has no reciprocal concerns as the District has very few right-of-center partisans. It is simply unfair to Caldwell for the Government to have a stacked deck of anti-Trump jurors, while politicians and hostile local media, with their false, race-baiting assertions about “white supremacists” and “domestic terrorists,” effectively add race cards to the bottom of the deck. Caldwell is entitled to an impartial jury, not a jury of the 12 least hostile District residents.

**E. The Court should consider the well-being of the victims.**

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<sup>40</sup> Prof. Jonathan Turley, *Juror 1261 in Roger Stone’s case: Was justice undone?*, The Hill (Feb. 15, 2020), <https://thehill.com/opinion/criminal-justice/483210-juror-1261-in-roger-stones-case-was-justice-undone>.

<sup>41</sup> The trial judge also ruled that Stone’s lawyers could have uncovered the foreperson’s social media postings via an internet search, which they failed to do. *Id.*

The Government did not address Caldwell's argument regarding security and similar issues surrounding a potential trial in the District. One issue that the Court should consider is victim impact and safety.<sup>42</sup> Multitudes of elected officials, congressional staffers, police officers, and others have publicly claimed to have suffered emotional and physical trauma as a result of J6. Rep. Dale Kildee (D-MI) publicly announced that he suffered PTSD as a result of J6 and is currently undergoing treatment.<sup>43</sup> Reps. Ocasio-Cortez (D-NY), Tlaib (D-MI), Pressley (D-MA) and dozens of other members of Congress have all publicly claimed to have suffered psychological harm. Reps. Kinzinger (R-IL), Schiff (D-CA), Cheney (R-WY), and police officer witnesses all cried during recently televised J6 hearings, confirming the great emotional toll and psychological impact on these victims.

*Slate* magazine detailed the emotional and mental trauma claimed by multiple members of Congress.<sup>44</sup> Reps. Frankel (D-FL), Jacobs (D-CA), DeLauro (D-CT), Meng (D-NY), Jayapal (D-WA), Kuster (D-NH), and others acknowledged psychological issues dealing with the aftermath of J6 and have participated in therapy and counseling sessions. Id. Rep. Jason Crow (D-CO), a former Army Ranger, claimed that he was still suffering

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<sup>42</sup> As Caldwell committed no crimes on J6, he feels no shame in expressing his concerns about the well-being of the scores of representatives, senators, police officers and others who have claimed psychological trauma and other harms.

<sup>43</sup> *Rep. Dan Kildee says Capitol riot left him with post-traumatic stress*, Axios (Apr. 12, 2021), <https://www.axios.com/rep-dan-kildee-capitol-riot-post-traumatic-stress-bf24921d-cb8c-4ed6-9a90-afdc05571042.html>.

<sup>44</sup> Christina Cuaterucci, *After the attack*, Slate (Feb. 1, 2021), <https://slate.com/news-and-politics/2021/02/capitol-riot-january-6-trauma-terror-attack.html>.

from anxiety. *Id.* Rep. Jacobs’s psychological issues were exacerbated by her belief that Republican members of Congress assisted J6 protesters: “[They] were helping the very people who were trying to take our lives,” Jacobs said. *Id.*

Speaker Pelosi and other members “attended a session on trauma hosted by the Office of the Attending Physician and Office of Employee Assistance” for Congress.<sup>45</sup> “Several of [Rep.] Axne’s aides have used the counseling services provided by the House.” *Id.* Black members of Congress and their staffs have claimed mental trauma because one J6 protester carried “a Confederate flag” into the Capitol. *Id.* Rep. Ocasio-Cortez revealed in May that she was still in counseling over the events of J6.<sup>46</sup> Rep. Tlaib (D-MI) has claimed great “emotional trauma” and fears for her safety daily.<sup>47</sup>

Elected officials are not the only victims of J6. In the days after J6, a psychologist “led group therapy sessions for the 850 D.C. officers who responded to the Capitol, meeting every day for a week.”<sup>48</sup> Officers told the therapist “that they were anxious,

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<sup>45</sup> Katherine Tulley-McManus, *Insurrection aftermath: Staffers struggle with trauma, guilt, and fear*, Roll Call (Feb. 28, 2021), <https://www.rollcall.com/2021/01/28/insurrection-aftermath-staffers-struggle-with-trauma-guilt-and-fear/>.

<sup>46</sup> Sophia Ankel, *AOC reveals she is attending therapy*, Business Insider (May 22, 2021), <https://www.businessinsider.com/aoc-reveals-shes-attending-therapy-after-january-6-capitol-riot-2021-5>.

<sup>47</sup> Floor speech of Rep. Tlaib, <https://www.nbcdfw.com/news/national-international/i-worry-every-day-rep-rashida-tlaib-on-death-threats-capitol-riot/2542955/>.

<sup>48</sup> Peter Herman, *‘Some are still suffering’: Months after Capitol riot, police who fought mob contend with physical, psychological pain*, Wash. Post (Jul. 24, 2021), <https://www.washingtonpost.com/local/public-safety/capitol-riot-police-injuries-trauma/2021/07/23/e008f0f0-d8d8-11eb-9bbb-37c30d>.

forgetful or had moments of confusion.” Id. The D.C. Police were so traumatized as a group that the department “has created an office director of employee well-being in support to help officers recovering from the riot.” Id. The Capitol Police were so traumatized by J6 that the department “brought in therapy dogs[.]” Id. The *Post* has suggested that four officers have committed suicide as a result of J6, and at least one Capitol Police officer “surrendered her weapon, fearing she might use it on herself[.]” Id. Capitol Hill Officer Harry Dunn was allegedly “scarred by racist invectives hurled at him . . . [and] is undergoing therapy[.]” Id. Capitol Hill Officer Aquilino Gonell is “seeing a therapist for PTSD” he claims was a result of J6. Id.

A trial at the Prettyman Courthouse would take place in the shadow of Capitol Hill. Basically, the Court would be summoning the defendants, their families, and their like-minded supporters to the very area of the District where traumatized victims work, live, and congregate. Additionally, security in the area will be provided mainly by Capitol Hill and D.C. Metro officers, including officers who were psychologically harmed on J6. The very notion that a group of defendants who allegedly caused psychological harm to hundreds in and around Capitol Hill will be ordered back to the “scene of the crime,” running the risk of triggering additional trauma to the victims, seems insensitive.

In addition to their psychological well-being, the Court should also consider the physical safety of the victims. The Government, prominent officials, and the *Post* have made the following claims at various times: 1) that members of Congress were targets

for execution by Caldwell and others; 2) that J6 participants were seeking to make citizen's arrests of members of Congress; 3) that Caldwell and his co-defendants are "domestic terrorists"; 4) that, Caldwell, et. al. are "white supremacists" whose J6 purpose was to enforce racial hegemony over the government; 5) that the Oath Keepers planned for weeks a military-style attack to take the Capitol; and 6) that Caldwell and the Oath Keepers were trying to overthrow the government. And the Government is taking the position that it is perfectly acceptable to host these manifestly dangerous defendants—most of whom are not incarcerated—in the shadow of the Capitol Hill? In an area saturated with traumatized victims?

Caldwell has significant safety concerns as well. Trump supporters have been gratuitously attacked while in the District at events prior to J6. Caldwell and his co-defendants have received numerous death threats, many emanating from the District. Caldwell has undergone multiple back fusion surgeries and is at serious risk of paralysis if he is assaulted. If past is prologue, many District residents will organize protests outside of the courthouse, which could become violent, especially with supporters of the defendants in town. These anticipated protests will jeopardize everyone's safety and Caldwell's right to a fair trial. The Court can protect both the victims and the defendants, and prevent a circus-like atmosphere outside the courthouse, by granting Caldwell's motion to transfer.

F. **Caldwell can receive a fair trial in the WDVA.**

Unlike the District, which is a political town saturated with politically-obsessed residents, the Western District of Virginia (WDVA) contains far less partisans. The WDVA is largely outside of the D.C. media market, with print news being supplied from local newspapers, and television news emanating from Harrisonburg, Va., Winchester, Va., Richmond, Va., Charlottesville, Va., and Hagerstown, Md.<sup>49</sup> Potential jurors in the WDVA have not been exposed to the daily barrage of prejudicial coverage and race-baiting attacks that have taken place in and around the District. By transferring the instant case to the WDVA, the Court will assure Caldwell a fair and impartial jury.<sup>50</sup>

**G. Conclusion.**

As Caldwell has outlined and detailed the extreme and presumptive prejudice of a potential jury pool in the District, it is respectfully requested that the instant case be transferred to the WDVA (Harrisonburg Division) or to the District of Maryland, Northern Division (Baltimore) for trial.

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<sup>49</sup> <https://www.shenandoahvalleyweb.com/media.html>.

<sup>50</sup> If the Court agrees that a transfer of venue is appropriate, but is concerned about inconvenience to the Court, counsel, defendants, and witnesses by moving the case to Harrisonburg, Va., Caldwell is also amenable to having the matter transferred to the District of Maryland, Northern Division, which sits in downtown Baltimore. Baltimore is accessible by MARC train from the District, is a short drive away via the Baltimore-Washington Parkway, is outside of the District's media market, is a diverse city, and would offer a jury pool guaranteed to be free of partiality.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 18<sup>th</sup> day of August, 2021, a copy of the foregoing Defendant's Reply to Government's Opposition to Transfer Venue was electronically filed with the Clerk of the United States District Court using CM/ECF, with a notice of said filing to the following:

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