UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	
	)	Case No. 1:21-mj-92
COUY GRIFFIN,	)	
	)	**District Judge Beryl A. Howell**
Defendant.	)	
	)	

DEFENDANT GRIFFIN'S MOTION TO REVOKE PRETRIAL DETENTION ORDER

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Defendant Couy Griffin, by his attorneys, respectfully requests that the Court revoke the pretrial detention order entered in this matter on February 1, 2021, pursuant to 18 U.S.C. § 3145(b). On January 17, 2021, Mr. Griffin was arrested on a criminal complaint charging him with a single count of violating 18 U.S.C. § 1752(a)(1), by knowingly entering or remaining in a restricted building or grounds without lawful authority, to wit, the west front of the Capitol Building steps on January 6.

This is a misdemeanor charge. The government does not allege Mr. Griffin entered the Capitol Building or that he committed, intended to commit, or planned any other illegal act. He has no relevant criminal history. Pretrial Services recommended release on standard conditions. However, the government moved for his pretrial detention, primarily on the ground that Mr. Griffin poses a "serious risk" of flight. 18 U.S.C. § 3142(f)(2)(A). Its argument was that Mr. Griffin "lacked ties" to Washington, D.C. That is frivolous.

In the event, the magistrate judge denied Mr. Griffin's bail motion for a reason not offered by the government. The magistrate judge found that because the defendant had questioned the legitimacy of the 2020 presidential election, and had made three inflammatory political remarks, he must also doubt the legitimacy of the Court. Therefore, he poses a "serious risk" of flight. The government did not proffer this information. It is not found in the charging instrument. The magistrate judge did not articulate why Mr. Griffin's perceived political beliefs would defy all combinations of conditions to assure his appearance, or what Pretrial Services missed. The magistrate judge did not address specific conditions. In any case, there is no factual basis for this conclusion. For that reason—and because detaining Mr. Griffin on this ground is barred by the First Amendment, *United States v. Lemon*, 723 F.2d 922, 938 n. 47 (D.C. Cir. 1983)—the Court should revoke the detention order.

Mr. Griffin will now remain incarcerated, on a misdemeanor charge, exposed to Covid-19, as he falls behind on mortgage payments and child support, based on no evidence of ordinary flight risk, much less serious risk. At present, he intends to exercise his right to a jury trial. Depending on the course of the pandemic, Mr. Griffin may not be able to have a trial within a year of his arrest. That means he occupies the extraordinary position of facing more incarcerated time in pretrial detention than the statutory maximum sentence on the charged misdemeanor offense.

FACTUAL BACKGROUND

Couy Griffin, 47, is a county commissioner for Otero County, New Mexico.[1] On January 6, 2021, he traveled to Washington, D.C., to participate in the rally near the Capitol. On the same day, a joint session of Congress convened at the Capitol to certify the vote count of the Electoral College for the 2020 presidential election. The session began at approximately 1:00 p.m. Vice President Mike Pence was present and presiding. According to the statement of facts attached to the criminal complaint, "temporary and permanent barricades were in place around the exterior of the U.S. Capitol building, and U.S. Capitol police were present, attempting to keep the crowd away from the Capitol building and the proceedings underway inside." Compl., p. 2. Shortly after 2 p.m., the crowd "forced entry into the U.S. Capitol, including by breaking windows and by assaulting members of the U.S. Capitol police." *Id.*

[1] In this misdemeanor trespassing case, the government's motion for pretrial detention dwells on Mr. Griffin's political views and activities, describing them as "inflammatory, racist, and at least borderline threatening advocacy." Gov't Mot., p. 2. Irrelevant though this information is to the detention factors in § 3142, candor requires admitting that it goes far in explaining the decision to charge Mr. Griffin and to detain him pretrial. Most of the protestors on the Capitol steps on January 6 were not federally charged—while many who entered the Capitol Building and committed offenses inside, unlike Mr. Griffin, have also not been charged or have been granted bail.

After receiving a tip that Mr. Griffin was present at the Capitol that day, Special Agents interviewed him on January 11. According to their notes, Mr. Griffin told the agents that he "walked down to the Capitol building, where there was already a large crowd around the barricades." FD-302, 1/11/21, attached hereto as Exh. 1. At that point, Mr. Griffin,

> got caught up in the crowd, which eventually pushed through the barricades. [He] saw many people scaling walls and scaffolding to get up to the Capitol's front patio. In his area, there were people flying flags, but no one violent. . .Neither [he] nor [his acquaintance] entered the capitol building. At one point, a man with a bullhorn gave it to [Griffin], who led a prayer on the steps. . .[Griffin] was never asked to leave the area by the police, and exited peacefully. He even encountered a former congressman on the way out and had a nice chat with him.

Exh. 1, p. 2.

The complaint attaches a photograph of Mr. Griffin standing on the west front of the Capitol building steps. Compl., p. 4. The complaint describes this position as "well within the restricted area." *Id.* The complaint does not allege that Mr. Griffin entered the Capitol Building. The complaint does not define "restricted area." It alleges as follows:

> On January 6, 2021, permanent and temporary security barriers were in place to separate areas where lawful first amendment activity could be conducted from areas restricted both to prevent any adverse impact on the legislative process and to safeguard and prevent and [sic] property damage directed at the U.S. Capitol and West Front Inaugural Platform.

Compl., p. 2.

The Complaint cites two postings indicating to the public that the area Mr. Griffin entered was "restricted": bike racks and green snow fencing; and signage stating, "Area Closed By order of the United States Capitol Police Board." Compl., p. 2.

Mr. Griffin was charged under 18 U.S.C. § 1752(a)(1). That section makes it a federal misdemeanor to "knowingly enter[] or remain[] in any restricted building or grounds without lawful authority to do so." 18 U.S.C. § 1752(a)(1). Section 1752 is not a general, all-purpose

trespass statute for federal property. Instead, "restricted buildings or grounds" is defined statutorily.[2] In Section 1752, that phrase means "any posted, cordoned off, or otherwise restricted area—

> (A) of the White House or its grounds, or the Vice President's official residence or its grounds;
>
> (B) of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting; or
>
> (C) of a building or grounds so restricted in conjunction with an event designated as a special event of national significance.

18 U.S.C. § 1752(c)(1).

To establish a Section 1752(a)(1) offense, the government must show that Mr. Griffin knew that the area in which he "enter[ed] or remain[ed]" was one of the areas described in Section 1752(c)(1). *United States v. Bursey*, 416 F.3d 301, 309 (4th Cir. 2005). The Complaint does not allege that either of subsections (A) or (C) in Section 1752(c)(1) is satisfied here.[3] It does not allege that Mr. Griffin knew that the area in which he "enter[ed] or remain[ed]" was "of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting." 18 U.S.C. § 1752(c)(1)(B). As alleged, the area Mr. Griffin "enter[ed] or remain[ed]" was not the Capitol Building, where the Vice President then presided, but instead the west front of the Capitol steps.

[2] This statutory framework is omitted from the criminal complaint.

[3] The joint session of Congress on January 6 was not designated by the Secret Service as a "special event of national significance." National Special Security Events, CRS, Jan. 11, 2021, available at: https://fas.org/sgp/crs/homesec/R43522.pdf.

Mr. Griffin was detained on January 17. He was not given a shower, and held in solitary confinement, for over a week. The toilet in his cell was broken, and when he requested a shower, was handed baby wipes.

THE MAGISTRATE JUDGE'S DETENTION DECISION

On February 1, Magistrate Judge Zia M. Faruqui held Mr. Griffin's initial appearance detention hearing. 2/1/21 Hr'g Tr., Exh. 2. Pretrial Services recommended release with standard conditions. Exh. 2, pp. 15-16. The government stated that the primary basis for its pretrial detention motion was 18 U.S.C. § 3142(f)(2)(A), i.e., that there is a "serious risk that [Mr. Griffin] will flee." *Id.*, p. 13:13. The government's evidence in support of this contention was that Mr. Griffin "lacks ties" to the Washington, D.C. area. Gov't Mem., p. 7. The argument that every defendant who is not a resident of this district is a serious risk of flight is frivolous, and the magistrate judge did not agree with that position.

Contrary to Pretrial Service's recommendation, the magistrate judge instead determined that Mr. Griffin is a "serious risk" of flight through the following chain of inferences. Exh. 2, p. 29:3-9. The criminal complaint alleges that Mr. Griffin questions the legitimacy of the 2020 presidential election, asserting it was stolen. Compl., p. 5. The magistrate judge found that if, as alleged, the defendant believes that the presidential election was stolen, he must necessarily believe that the entire government is illegitimate. The magistrate judge further reasoned that if Mr. Griffin believes the government is illegitimate, he poses a "serious risk" of flight under § 3142(f)(2)(A). Exh. 2, p. 52:8-22. Although the judiciary is not the same as the office of the president or other political offices, and although the government proffered no evidence concerning Mr. Griffin's opinions of the judiciary, the magistrate judge found that it was a reasonable inference to conflate the two for purposes of detention. Exh. 2, p. 51:12-52:22.

Under this logic, no accused person who questioned the 2020 presidential election may be released on bail.

The magistrate judge also determined that three isolated inflammatory statements made by Mr. Griffin showed he was a serious risk of flight. Exh. 2, p. 34:11-36:5. As discussed *infra*, these political remarks had no bearing on the question of flight risk. In addition, it is impermissible in this Circuit to denial bail on the basis of statements protected by the First Amendment to the Constitution. The statements comfortably fall within Supreme Court precedent.

The magistrate judge did not articulate how Mr. Griffin's political beliefs would frustrate all conditions of release. The judge did not address specific conditions of release, including those proposed by Pretrial Services.

ARGUMENT

The Court reviews the magistrate judge's detention decision *de novo*. *United States v. Sheffield*, 799 F. Supp. 2d 18, 20 (D.D.C. 2011). "The Court is free to use in its analysis any evidence or reasons relied on by the magistrate judge, but it may also hear additional evidence and rely on its own reasons." *Id.* (internal quotation marks omitted).

Mr. Griffin's detention is contrary to the Bail Reform Act (BRA), the Fifth Amendment's due process clause, and the First Amendment's free speech clause.

I. The BRA authorizes detention at the initial appearance only when one of the § 3142(f) factors is met

According to the plain language of § 3142(f), "the judicial officer shall hold a [detention] hearing" only "in a case that involves" one of the seven factors listed in § 3142(f)(1) & (f)(2).

None of the § 3142(f) factors are actually present in this case.[4] Ordinary "risk of flight" is not among the § 3142(f) factors.

A. Supreme Court precedent and the plain language of the BRA prohibit detention absent § 3142(f) factors

The Supreme Court's seminal opinion in *United States v. Salerno*, 481 U.S. 739 (1987), confirms that a detention hearing may only be held if one of the § 3142(f) factors is present. *See id*. at 747 ("Detention hearings [are] available if" and only if one of the seven § 3142(f) factors is present.). Held the Court, "[t]he Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U.S.C. § 3142(f)." *Id.* at 750; *see also id.* at 747 ("The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes," specifically the crimes enumerated in § 3142(f)). *Salerno* thus stands for the proposition that the factors listed in § 3142(f) serve as a gatekeeper, and only certain categories of defendants are eligible for detention in the first place. As the D.C. Circuit has held, "First, a [judge] must find one of [seven] circumstances triggering a detention hearing…. [under] § 3142(f). Absent one of these circumstances, detention is not an option." *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999).

If no § 3142(f) factor is met, several conclusions follow: the government is prohibited from seeking detention and there is no legal basis to detain the defendant at the initial

[4] This case does not meet any of the five factors discussed in § 3142(f)(1), as it does not involve: (1) a crime of violence under (f)(1)(A); (2) an offense for which the maximum sentence is life imprisonment or death under (f)(1)(B); (3) a qualifying drug offense under (f)(1)(C); (4) a felony after conviction for two or more offenses under the very rare circumstances described in (f)(1)(D); or (5) a felony involving a minor victim or the possession/use of a firearm under (f)(1)(E). The government has also presented no evidence to establish that this case meets either of the two additional factors discussed in § 3142(f)(2): (1) a "serious risk that [the defendant] will flee" under (f)(2)(A); or (2) a "serious risk" that the defendant will engage in obstruction or juror/witness tampering under (f)(2)(B), as shown *infra*.

appearance, jail the defendant, or hold a detention hearing. Instead, the court is required to release the defendant on personal recognizance under § 3142(b) or on conditions under § 3142(c). The strict limitations § 3142(f) places on pretrial detention are part of what led the Supreme Court to uphold the BRA as constitutional. It was the § 3142(f) limitations, among others, that led the Court to conclude that the Act was "regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause." *Salerno*, 481 U.S. at 748.[5] Throughout its substantive Due Process ruling, the *Salerno* Court emphasized that the only defendants for whom the government can seek detention are those who are "already indicted or held to answer for a *serious* crime." *Id*. (emphasis added); *see also United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) (discussing the BRA's legislative history).

B. The courts of appeals agree that detention is prohibited when no § 3142(f) factor is present

Following the Supreme Court's guidance in *Salerno*, six courts of appeals agree that it is illegal to even hold a detention hearing unless the government invokes one of the factors listed in 18 U.S.C. § 3142(f). *See, e.g., United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988); *United States v. Friedman*, 837 F.2d 48, 48–49 (2d Cir. 1988); *Himler*, 797 F.2d at 160; *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992); *United States v. Twine*, 344 F.3d 987 (9th Cir. 2003);

[5] The *Salerno* Court further relied on the limitations in § 3142(f) in another component of its substantive Due Process ruling, its conclusion that "the government's interest in preventing crime by arrestees is both legitimate and compelling." *Id*. at 749. To reach this conclusion, the Court contrasted the Bail Reform Act with a statute that "permitted pretrial detention of any juvenile arrested on any charge" by pointing to the gatekeeping function of § 3142(f): "The Bail Reform Act, in contrast, narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates . . . *on individuals who have been arrested for a specific category of extremely serious offenses. 18 U.S.C. § 3142(f).*" *Id.* at 750 (emphasis added). The Court emphasized that Congress "specifically found that these individuals" arrested for offenses enumerated in § 3142(f) "are far more likely to be responsible for dangerous acts in the community after arrest." *Id.*

United States v. Singleton, 182 F.3d 7, 9 (D.C. Cir. 1999). For example, the First Circuit holds: "Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a detention hearing exists." *Ploof*, 851 F.2d at 11. The Fifth Circuit agrees. *See Byrd*, 969 F.2d at 109 ("A hearing can be held only if one of the . . . circumstances listed in (f)(1) and (2) is present," and "[d]etention can be ordered, therefore, only 'in a case that involves' one of the . . . circumstances listed in (f).") (quoting § 3142(f)).

Unfortunately, a practice has developed that results in defendants being detained in violation of the BRA, *Salerno*, and the Constitution. Specifically, it is common for the government to seek detention at the initial appearance on the ground that the defendant is either "a danger to the community," "a risk of flight," or both.[6] Because neither "danger to the community" nor ordinary "risk of flight" is a factor listed in § 3142(f), it is illegal to hold a detention hearing on either of these grounds at the initial appearance.

C. The government's burden to show a "serious risk" of flight is heavy

Where the government's only legitimate § 3142(f) ground for detention is "serious risk" of flight, the government bears the burden of presenting some evidence to support its allegation that a defendant poses a "serious risk" of flight rather than the ordinary risk attendant in any criminal case. A defendant "may be detained only if the record supports a finding that he presents a serious risk of flight." *Himler*, 797 F.2d at 160 (emphasis added); *see also United*

[6] *See, e.g., The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. (Nov. 14, 2019), Written Statement of Alison Siegler at 8, https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-Wstate-SieglerA-20191114.pdf (presenting Congress with court-watching data demonstrating that federal prosecutors regularly violate the BRA by requesting detention at the initial appearance on the impermissible ground of ordinary—not serious—risk of flight and by failing to provide any evidence to support the request).

States v. Robinson, 710 F. Supp. 2d 1065, 1088 (D. Neb. 2010) (criticizing the government for failing to present evidence of "serious risk" of flight at the initial appearance and saying "no information was offered to support [the] allegation"). After all, the statute only authorizes detention "in a case that involves" a "serious risk" that the person will flee. § 3142(f)(2)(A) (emphasis added). This contemplates a judicial finding about whether the case in fact involves a serious risk of flight.[7]

The BRA's legislative history makes clear that detention based on serious risk of flight is only appropriate under "extreme and unusual circumstances."[8] For example, the case relied on in the legislative history as extreme and unusual enough to justify detention on the grounds of serious risk of flight involved a defendant who was a fugitive and serial impersonator, had failed to appear in the past, and had recently transferred over a million dollars to Bermuda. *See*

[7] Had Congress intended to authorize detention hearings based on a mere certification by the government, Congress could have enacted such a regime, just as they have done in other contexts. *See, e.g.,* 18 U.S.C. § 5032 (creating exception to general rule regarding delinquency proceedings if "the Attorney General, after investigation, certifies to the appropriate district court of the United States" the existence of certain circumstances); 18 U.S.C. § 3731 (authorizing interlocutory appeals by the government "if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding").

[8] *See Bail Reform Act of 1983: Rep. of the Comm. on the Judiciary*, 98th Cong. 48 (1983) ("Under subsection f(2), a pretrial Detention Hearing may be held upon motion of the attorney for the government or upon the judicial officer's own motion in three types of cases….T]hose [types] involving…a serious risk that the defendant will flee…*reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases*.") (emphasis added) (citing *United States v. Abrahams*, 575 F.2d 3, 8 (1st Cir. 1978)—which held that only a "*rare case of extreme and unusual circumstances*…justifies pretrial detention"—as representing the "current case law"); *see also Gavino v. McMahon*, 499 F.2d 1191, 1995 (2d Cir. 1974) (holding that in a noncapital case the defendant is guaranteed the right to pretrial release except in "extreme and unusual circumstances"); *United States v. Kirk*, 534 F.2d 1262, 1281 (8th Cir. 1976) (holding that bail can only be denied "in the exceptional case").

Abrahams, 575 F.2d at 4. The government must demonstrate that the risk of flight in a particular case rises to the level of extreme or unusual.

In addition, a defendant should not be detained as a "serious risk" of flight when the risk of non-appearance can be mitigated by conditions of release. The only defendants who qualify for detention under § 3142(f)(2)(A) are those who are "[t]rue flight risks"—defendants the government can prove are likely to willfully flee the jurisdiction with the intention of thwarting the judicial process.[9]

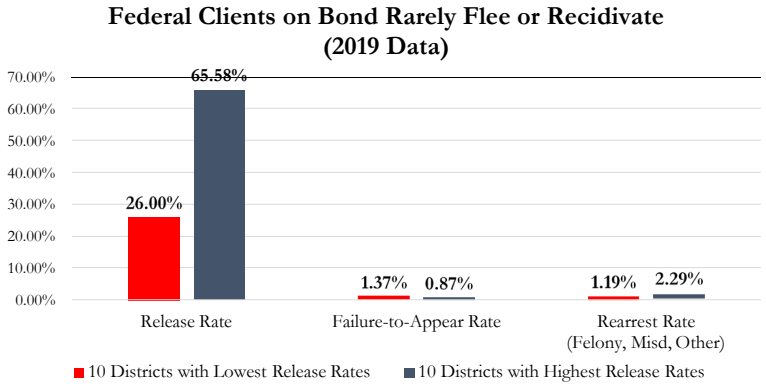
The government's own data show that when release increases, crime and flight do not. In this case, the Court should be guided by AO statistics showing that nearly everyone released pending trial appears in court and does not reoffend. In fact, in 2019, 99% of released federal defendants nationwide appeared for court as required and 98% did not commit new crimes on bond.[10] Significantly, this near-perfect compliance rate is seen equally in federal districts with very high release rates and those with very low release rates.[11] Even in districts that release two-

[9] *See, e.g.,* Lauryn Gouldyn*, Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 724 (2017). This rule is sound policy, as the risk of a defendant becoming either a "local absconder" (who intentionally fails to appear but remains in the jurisdiction), or a "low-cost non-appearance" (who unintentionally fails to appear), can be addressed by imposing conditions of release like electronic monitoring, GPS monitoring, and support from pretrial services. Gouldyn, 85 U. Chi. L. Rev. at 724.

[10] Mot. for Bond, *United States v. Rodriguez*, No. 19-CR-77 (E.D. Wis. Apr. 2, 2020), ECF No. 41, Ex. 1, archived at https://perma.cc/LYG4-AX4H (showing a nationwide failure-to-appear rate of 1.2% and a rearrest rate of 1.9%).

[11] The data showing near-perfect compliance on bond is illustrated in the chart, "Federal Clients on Bond Rarely Flee or Recidivate." The districts with the highest and lowest release rates were identified using the version of AO Table H-14A for the 12-month period ending December 31, 2019. *See* AO Table H-14A (Dec. 31, 2019), https://perma.cc/32XF-2S42.

thirds of all federal defendants on bond, fewer than 1% fail to appear in court.[12] The below chart reflects this data:



Yet despite the statistically low risk of flight that defendants like Mr. Griffin pose, the government recommends detention in 77% of cases nationwide. *See* AO Table H-3. The government's detention requests are not tailored to the low risk of flight and recidivism that defendants pose.

II. The government has not met its burden of proving that Griffin poses a *"serious"* risk of flight under § 3142(f)(2)(A)

Mr. Griffin is a publicly elected official for Otero County, New Mexico. He has been gainfully employed continuously since the 1990s. The only conviction in his criminal history is a DUI almost 25 year ago. He is part of a large and loving family, including a sister and brothers and seven-year-old son, who are deeply concerned for his welfare, familiar with his case, and steeped in respect for law enforcement. As further discussed below, in the same public statements cited by the government to insinuate he is a threat to the public, Mr. Griffin praises at length the law enforcement efforts of the FBI and local D.C. police.

[12] *See* AO Tables H-14A and H-15.

In multiple conversations with the FBI, Mr. Griffin has abjured violence, lawbreaking, and disrespect to law enforcement. In the aforementioned January 11 interview, he told agents "he expected the [January 6] rally to be peaceful and it largely was [based on what he witnessed]." Exh. 1, p. 1. Mr. Griffin "stated he would inform the FBI if he encountered any individuals attempting to organize violence at the [inauguration] protest. . ." *Id.* He "asked the FBI to contact him if they believed his comments may be a violation of law so he can avoid jail." *Id.* Matt Struck, an associate of Mr. Griffin's who traveled to the January 6 rally with him, explained that he and Mr. Griffin "stay away from Proud Boys and militia-types, preferring to support law enforcement." FD-302, 1/11/21, Exh. 3, p. 2.

On January 16, Special Agents called Mr. Griffin as he traveled back to Washington, D.C., for the inauguration. FD-302, 1/16/21, Exh. 4, p. 1. Mr. Griffin candidly informed the agents of his plan to attend the inauguration and even gave the agents permission to enter his office in New Mexico and gather information about threats made against him and his family. *Id.*

These are not the actions of someone who is a serious risk of flight—in the face of a misdemeanor offense carrying less potential prison time than a sentence for skipping bail. The only argument offered by the government is Mr. Griffin's "lack of ties . . . to Washington, D.C." Gov't Mem., p. 7. It cites no authority, and there is none for the frivolous and unconstitutional proposition that every non-D.C. resident must be detained pretrial.

The magistrate judge's determination that Mr. Griffin must be a "serious risk" of flight because of his statements about the 2020 presidential election being stolen is erroneous. The government neither alleged in the charging instrument nor proffered to the magistrate judge that the judiciary—to which Mr. Griffin would be held accountable for skipping bail—is illegitimate in the eyes of Mr. Griffin. Exh. 2, p. 47. The magistrate judge assumed this was the case. But a

detention decision must be made on the basis of evidence in the record. *Himler*, 797 F.2d at 160. If the magistrate judge's logic were correct, every accused person who has quarreled with the 2020 presidential election outcome is subject to automatic pretrial detention, no matter their individual characteristics. That is not consistent with the plain language of the BRA.

Similarly, the magistrate judge predicated his decision on "the government's proffer . . . that this was an organized attempt to stop the lawful administration of the democratic process." Exh. 2, p. 32:2. But the government has not alleged or proffered that about Mr. Griffin himself and the court cannot make a detention decision about the defendant based on public speculation about the mindset of other individuals who could be charged with other crimes not at issue here. *Id.*, pp. 47-48.

Equally, the magistrate judge did not articulate how or why Mr. Griffin's political beliefs would frustrate any combination of conditions to assure his appearance. Indeed, the magistrate judge did not address any specific conditions, including those recommended by Pretrial Services. This was in error, and there is no factual basis for a finding that the defendant's political beliefs would somehow frustrate any and all of the traditional conditions—such as the standard ones recommended by Pretrial Services. The incident at the Capitol on January 6 involved individuals who committed significant crimes, including ones much more serious than Mr. Griffin's misdemeanor trespassing charge, but it is no reason to abandon regular procedure.

III. There is no evidence showing a serious risk Griffin will obstruct or attempt to obstruct justice or threaten, injure, or intimidate a prospective witness or juror

It is not clear whether the government also contends that Mr. Griffin should be detained pretrial on the basis of "a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective

witness or juror." 18 U.S.C. § 3142(f)(2)(B). In any case, the government has offered no evidence in support of this argument.

Mr. Griffin is not a mafia member. He is an elected official on the governing body of Otero County, New Mexico and a former pastor. He is a well-known figure in his home state, where he was born and lived his entire life. Again, he has no relevant criminal history.

The government cites in support of its position three isolated, inflammatory statements of Mr. Griffin's. First, the government states that, "at one gathering involving [Mr. Griffin's political] group, the defendant stated, "the only good democrat is a dead democrat." Gov't Br., p. 2. In the following sentence, the government itself acknowledges why this statement has no bearing on detention. Mr. Griffin added "he did not intend that physically, only politically." *Id.* Although that caveat might fall short ethically or politically, the government does not contend Mr. Griffin, who has no criminal history, has ever planned or intended to commit an act of violence in his life, which is what counts under § 3142(f)(2)(B).

Second, the government cites a January 14 meeting of the Otero County Commission, on which Mr. Griffin sits, in which he spoke for approximately 17 minutes. The government writes:

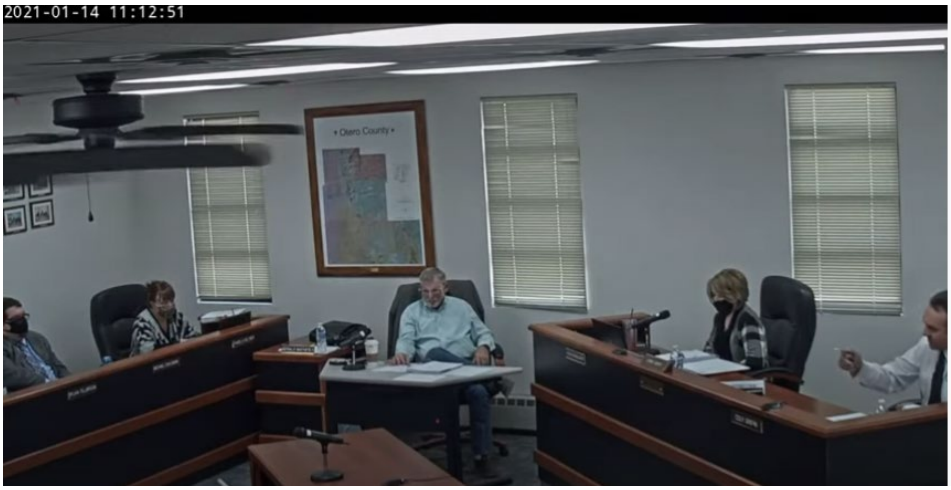
> [T]he defendant spoke at the commission meeting about his plans to return to Washington, D.C. to protest President-Elect Biden's inauguration on January 20, 2021. The defendant stated that he intended to bring his firearms with him when he traveled to Washington, D.C. Specifically, the defendant stated: "I am going to leave either tonight or tomorrow. I've got a .357 Henry big boy rifle . . . that I got in the trunk of my car, and I've got a .357 single action revolver . . . that I will have underneath the front seat on my right side. And I will embrace my Second Amendment, I will keep my right to bear arms, my vehicle is an extension of my home in regard to the constitution law, and I have a right to have those firearms in my car."

Gov't Mem., p. 5.

This passage is intended to lead the Court to believe that Mr. Griffin may have planned violence in this district during the inauguration. However, the government omits Mr. Griffin's

very next words which refute that impression. After stating, "I have a right to have those firearms in my car," Mr. Griffin then immediately adds the following explanation:

> As everybody here that works in the County [knows], I can see it on your faces and it breaks my heart how tired you are from the harassment. Whenever I walk through the front door, I see the sweetest lady that works in this building, Diane, sitting there and she can't even hardly look up at me because she's been getting the threats all day long. It infuriates me. But what am I to do? . . . It is unfortunate that there are so many hateful people on the left that treat people so horribly as to just attack somebody that they don't know. But I appreciate those people too . . . because they have been calling the FBI repeatedly.
>
> Which I am thankful for, because the FBI contacted me about two days ago, and I was able to have a fantastic conversation with them. Great agents: they still understand what the Constitution is about, they still understand what freedom of speech is about, they still understand what rights are about. And I believe those men I talked to out of that FBI office in Las Cruces are true patriots. So, I believe that the FBI is going to defend my rights to be able to carry firearms in my car. What else was beautiful about it is I was able to speak about the threats I was receiving and they were aware of them. . . The threats since I started this have been horrible and the FBI should have been contacted by somebody.
>
> When I received pictures of me and my family all with crosshairs on our heads, and my baby's about five months old in the picture and he's got a crosshair on his head, and I've got to read the most vile stuff and the death threats that are sent to an elected official in county email. . . Now the FBI is going to start investigating all of these threats that have been made to me personally as well as made to others in the county. And that's the only way we're going to be able to stop this going forward. . . I am turning all of my access to all of my county emails over to the FBI, I am turning all of my Facebook page and all my Facebook inbox messages over to the FBI, and I am also going to turn all the hate mail I have received over to the FBI.



Screenshot from Otero County Commission Meeting of Jan. 14, 2021, available at: https://youtu.be/dyOklmYmvr4?t=4411.

Mr. Griffin's remarks on January 14 show that he believed he needed to carry firearms to protect himself and his family—not to harm people in Washington, D.C. This explanation was publicly available on the internet when the government selectively quoted his January 14 statement to detain Mr. Griffin pretrial. Also omitted from the government's motion are similar mitigating statements made by Mr. Griffin to Special Agents during interviews before the inauguration. Exh. 1,3,4.

Third, the government quotes from a video posted on Facebook in which Mr. Griffin apparently said the following concerning the January 6 incident at the Capitol:

> You want to say that that was a mob? You want to say that was violence? No sir. No Ma'am. No, we *could* have a 2nd Amendment rally on those same steps that we had that rally yesterday. You know, and *if we do*, then it's gonna be a sad day, because there's gonna be blood running out of that building. But at the end of the day, you mark my word, we will plant our flag on the desk of Nancy Pelosi and Chuck Schumer and Donald J. Trump if it boils down to it.

Gov't Mem., pp. 3-4 (emphasis added).

This statement yields no support for pretrial detention, for several reasons. First, although it suggests Mr. Griffin intended to bring firearms to Washington, D.C., during the inauguration, the government neglected to inform the magistrate judge that Mr. Griffin decided not to bring them, as it would be unwise, a fact corroborated by the FBI. FD-302, 1/17/21, p. 4. Second, inflammatory though this isolated statement may be, it is patently within the bounds of constitutionally protected speech. As such, the Court may not deny the defendant pretrial release on account of it. *Lemon*, 723 F.2d at 938 n. 47. To repeat, there is no evidence Mr. Griffin has ever planned or intended to commit an act of violence in his life.

Saying "*If* we had a 2nd Amendment rally, there's gonna be blood running"—when there was no such firearms rally planned as of January 6— is constitutionally protected speech because (1) it is not speech directed to or inciting "imminent lawless action" and (2) the government has not offered any evidence it was likely to produce such action. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (applying *Brandenburg*, finding First Amendment protected protestor's statement, "We'll take the fucking street again, later," as the speech "amounted to nothing more than advocacy of illegal action at some indefinite future time").

The magistrate judge rejected this argument, finding that the reason Mr. Griffin's Second Amendment rally did not take place is that National Guard troops were stationed around the city. Exh. 2, p. 59:1-11. That misses the point. The government offered no evidence that the "rally" hypothesized by the defendant in the quoted sound bite was *planned* or *intended in the first place*. This evidence does not exist. Accordingly, there is simply no basis for finding that Mr. Griffin's comment is not protected under *Brandenburg* and its progeny, which the magistrate judge did not address.

In *Lemon*, the D.C. Court of Appeals observed that "appellate courts have seriously limited the extent to which protected political speech and association may be the basis for revoking or denying bail." 723 F.3d at 938 n. 47. Among other cases, the *Lemon* court relied on *Williamson v. United States*, 184 F.2d 280 (2d Cir. 1950).

Williamson concerned Communist Party leaders convicted under the Smith Act. Before it was deemed unconstitutional, the Act was used to prosecute members of the Communist Party for "conspiring to advocate and teach the violent overthrow of the United States Government." 184 F.2d at 280. Sitting as a judge on the Second Circuit, Justice Jackson addressed the

defendants' appeal for bail pending the Supreme Court's decision on their petition for certiorari. The Communist Party members had already been convicted and the government wanted bail revoked on account of the defendants' speeches, which were "crudely intemperate, contain[ed] falsehoods obvious to the informed, and all are plainly designed to embroil different elements of our society and embarrass those who are presently conducting the Government." *Id.* at 283.

Nevertheless, Justice Jackson affirmed bail. He reasoned as follows:

> It is not contended that these utterances, in themselves, are criminal. . . If the Government cannot get at these utterances by direct prosecution, it is hard to see how courts can justifiably reach and stop them by indirection. I think courts should not utilize their discretionary powers to coerce men to forgo conduct as to which the Bill of Rights leaves them free . . .
>
> If the courts embark upon the practice of granting or withholding discretionary privileges or procedural advantages because of expressions or attitudes of a political nature, it is not difficult to see that within the limits of its logic the precedent could be carried to extremities to suppress or disadvantage political opposition . . .

Id. at 284.

If Justice Jackson's logic covers bail-seeking defendants already convicted of conspiring to advocate and teach the violent overthrow of the United States Government, it is not clear why Mr. Griffin's isolated, protected statement about a hypothetical Second Amendment rally at some indefinite date would serve as the basis for his detention *before he has even been tried for a misdemeanor offense unrelated to the statement.*

IV. Defendants who entered the Capitol Building and committed additional crimes have been released on bail

At least one of the reasons Pretrial Services recommended release on standard conditions is that other defendants charged with offenses relating to the January 6 incident at the Capitol have been granted bail—in cases far more serious than Mr. Griffin's. Recently, Riley June Williams was not detained pretrial. *See Speaker at Jan. 5 pro-Trump rally charged with*

encouraging mob, *impeding police during Capitol breach*, Wash. Post, Jan. 25, 2021, available at: https://www.washingtonpost.com/local/legal-issues/brandon-straka-arrested-capitol-riot/2021/01/25/e359ec3a-5f45-11eb-9430-e7c77b5b0297_story.html. Not only did Williams allegedly enter the Capitol Building, unlike Mr. Griffin, she may have stolen a laptop from the office of the Speaker of the House and attempted to sell it to Russians. In addition, the government contended that Ms. Williams may have attempted to destroy evidence. *Id.*

Other defendants who secured bail include a man who entered the Capitol Building carrying a Confederate battle flag (as well as his co-defendant son), a woman who entered the legislative chamber with zip ties, and the son of a judge who appeared in the Capitol wearing a fur pelt costume, to name a few. *NYC man arrested on Capitol riot charges freed on $100,000 bond*, AP News, Jan. 12, 2021, available at: https://apnews.com/article/aaron-mostofsky-100k-bond-capitol-riots-be62a48e605c8916c5183e70bd6e3a25.

All of these defendants face charges more serious than Mr. Griffin's.

CONCLUSION

For all of the foregoing reasons, Mr. Griffin respectfully requests that his detention order be revoked and that he be released on the standard conditions recommended by Pretrial Services, or such other conditions as the Court deems necessary to assure his appearance, so that he does not remain incarcerated pretrial for a period of time longer than the statutory maximum sentence should he be convicted.

Dated: February 3, 2021

Respectfully submitted.

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Certificate of Service

I hereby certify that on the 3rd day of February, 2021, I filed the foregoing motion with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following CM/ECF user(s):

JANANI IYENGAR
Assistant United States Attorney
555 4th Street, N.W., Room 4408
Washington, D.C. 20530
(202) 252-7846

And I hereby certify that I have mailed the document by United States mail, first class postage prepaid, to the following non-CM/ECF participant(s), addressed as follows: [none].

/s/ David B. Smith
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Appointed by the Court

FD-302 (Rev. 5-8-10)

FEDERAL BUREAU OF INVESTIGATION

Date of entry 01/12/2021

On 11 January 2021, SA David Gabriel and SSRA Ryan Jackson interviewed Otero County Commissioner Couy Griffin, telephone number 505-235-9239, by telephone. After being advised of the identities of the interview Agents and the nature of the interview, Griffin provided the following information:

Couy [pronounced like "koi"] attended the Trump rally in Washington, D.C. on 6 January 2021. Couy began his journey to DC on 28 December in El Paso, traveling with the Women for America 1st organization. He drove a rented car. They made a number of stops along the way to DC. He traveled with Matt Struck, phone number 303-875-8926, who runs media for the group Couy founded, Cowboys 4 Trump (variant Cowboys For Trump.) They stayed at a Homewood Suites near a Hampton Inn about 15 minutes away from the rally. The purpose of the trip was to protest the results of the presidential election. He did not wear protective equipment. He was not aware of advance plans for violence.

Couy is an "American to the bone" and passionate about exercising his 1st and 2nd Amendment rights. Couy noted that he expected the rally to be peaceful and that it largely was. Most of the people in the crowd were angry and wanted justice regarding the US presidential election.

After the President's speech, Couy and others walked down to the Capitol building, where there was already a large crowd around the barricades. Couy got caught up in the crowd, which eventually pushed through the barricades. Couy saw many people scaling walls and scaffolding to get up on to the Capitol's front patio. In his area, there were people flying flags, but no one violent. He did see people breaking windows from a distance, but did not get close enough to identify them. However, he thinks they were Antifa. Neither Couy nor Matt entered the capitol building. At one point a man with a bullhorn gave it to Couy, who led a prayer on the steps.

Investigation on 01/11/2021 at Las Cruces, New Mexico, United States (Phone)

File # 9E-AQ-3369565, 176-WF-3366759, 820I-WF-3271673 Date drafted 01/11/2021

by DAVID S. GABRIEL, JACKSON RYAN LOUIS

Griffin was proud of the turnout and commented that seeing the "patriots" claiming control of the Capitol "by God it felt pretty damn good." Couy was never asked to leave the area by police, and exited peacefully. He even encountered a former congressman on the way out and had a nice chat with him. Couy and Matt left DC after the rally and drove to California to pay their respects to Ashli Babbitt's family.

The crowd's general sentiment about the Capitol was "this is our house." Couy believes the FBI should be investigating Antifa that he believes were in the crowd inciting violence and the Capitol Police for shooting Ashli Babbitt. Couy thinks the shooting was planned because he saw another Capitol Police officer in the shooting video give a thumbs up after Babbitt was shot, which to him suggested a plan had been executed.

Couy is planning to return to DC for the rally on the 20th using his own personal truck. He is not planning to attend the Santa Fe, NM rally scheduled for 17 January 2021. Couy hopes the protests will be non-violent and that a change can be effected "without a single shot being fired." Couy believes his statements have been misinterpreted and is adamant that he does not want anyone to be hurt. However, he noted that there is "no option that's off the table for the sake of freedom."

Couy has not been contacted by any extremist group like "the skinheads" to speak on their behalf, and does not support those groups. He stated he would inform the FBI if he encountered any individuals attempting to organize violence at the protest because it would hurt the movement's goals and he did not want anyone to get injured.

Couy has a firearm that he keeps with him, although he does not have a concealed carry permit. Couy believes that in New Mexico, you do not need a concealed carry permit to keep a weapon in your vehicle because it is an extension of one's person.

Couy and the Otero County Government have received a number of threats related to Couy's political activity. SAs encouraged Couy to report threats to the FBI. Couy is aware of where the legal line is between making threats and protected first Amendment speech, and does not believe he is threatening anyone. He appreciated the Agents advising him to be cautious and asked that

9E-AQ-3369565

Continuation of FD-302 of (U) Interview of Otero County Commissioner and Cowboys 4 Trump Founder Couy Griffin, On 01/11/2021, Page 3 of 3

FBI contact him if they believed his comments may be a violation of law so that he can avoid jail.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * * * * *	)	
UNITED STATES OF AMERICA,	)	Criminal Action
	)	No. 21-MJ-00092
Plaintiff,	)	
	)	
vs.	)	
	)	
COUY GRIFFIN,	)	Washington, DC
	)	February 1, 2021
Defendant.	)	3:43 p.m.
	)	
* * * * * * * * * * * * * * * * * *	)	

TRANSCRIPT OF INITIAL APPEARANCE/DETENTION HEARING
CONDUCTED VIA ZOOM
BEFORE THE HONORABLE ZIA M. FARUQUI,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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UNITED STATES ATTORNEY'S OFFICE
FOR THE DISTRICT OF COLUMBIA
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FOR PRETRIAL SERVICES: CHRISTINE SCHUCK

REPORTED BY: LISA EDWARDS, RDR, CRR
Official Court Reporter
United States District Court for the
District of Columbia
333 Constitution Avenue, NW
Room 6706
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THE COURTROOM DEPUTY: This is Magistrate Case 21-92, the United States versus Couy Griffin.

The Defendant is present by video.

Janani Iyengar representing the Government; David Smith and Nicholas Smith representing the Defendant.

Pretrial Services is Christine Schuck.

This matter is set for an initial appearance and detention hearing.

Mr. Griffin? Can you hear me, Mr. Griffin?

THE DEFENDANT: Yes, ma'am.

THE COURTROOM DEPUTY: Perfect. Please raise your right hand.

(Whereupon, the Defendant was duly sworn.)

THE COURTROOM DEPUTY: Thank you. You may put your hand down.

THE COURT: Thanks so much, Mr. Griffin. Can you see me? This is Judge Faruqui right here.

THE DEFENDANT: Yes, sir. I see you, your Honor.

THE COURT: Great. Thank you so much.

So I am going to start by speaking to you first. I'm going to ask you a few questions. We'll kind of get things situated for the proceeding today.

One of the things that's obviously tremendously important is to have counsel formally appointed. I know both Mr. Smiths have been working diligently on your case

already. I think they deserve to be recognized for what they're doing. Right now, they have not yet been formally appointed. That's something I'm going to do today, one of the reasons this proceeding is really important. But once he is formally appointed, then I'm going to shift over and talk to him. I'll always give you an opportunity to speak in these proceedings and make sure that you're being heard and that, if you have questions, they'll be answered.

To that end, we're going to go ahead with the procedure. We've been doing them with video and audio. It allows us to do it more quickly, due to the ongoing pandemic. We've not had in-person hearings since, I suspect, April of 2020, so it's been a while. But I want to make sure that you're able to hear what's going on, that you're comfortable. Obviously, it's always better to be in person. Just right now, things aren't safe, so we've been doing this remotely. I just want to make sure you've had a chance to speak to Mr. Smith and you're comfortable going forward today.

THE DEFENDANT: Yes, sir.

THE COURT: Great. Thanks so much, Mr. Griffin.

So I'm going to start. You know, you've been sworn in. So Ms. Lavigne-Rhodes has done that. It's really important. I'm going to ask you some basic background questions, very straightforward stuff. But if for any

reason you feel like you're unsure or confused about something I said or if you don't know if you can answer truthfully, that's not a problem. It only becomes a problem if for some reason you can't honestly answer that question and you still go forward.

And I understand. It's the natural -- human nature is to just answer questions put to you. But that is not something that is a good idea today. Here, if you can't answer something or you need a minute to think about it, just let me know, because we have to be very careful. We don't want you to have separate perjury charges or contempt charges in this proceeding. So it's important that if you don't understand something, if you're unsure, you say, "I need a minute, Judge." Okay?

THE DEFENDANT: Sure. Yes, sir.

THE COURT: Great.

THE DEFENDANT: I understand.

THE COURT: And an incredibly important thing is that I need a promise from you, which is that if we were in the courtroom and you were unsure about something, you could lean over to Mr. Smith and say, "Hey, I don't understand what the Judge is doing" or, you know, you need to speak up and say, "Judge, I've got a question" or "I need to speak to my lawyer. Can we step back or can" -- and we can clear the courtroom. All these things we would normally do, but we

can't do now. Just because we're proceeding remotely doesn't mean your rights are any less important or that your questions are any less important.

So I need you to promise me that if you don't understand what's going on or if you need to speak to your lawyer, let me know. We'll put you in a breakout room or we'll make sure we slow down and make sure everything that's going on is something that you understand. Okay?

THE DEFENDANT: Thank you. I understand that.

THE COURT: Great.

So I'm going to begin by asking, as I said, some very basic background questions. These are questions I ask everybody who appears before me. It's to make sure the proceedings as they go forward are ones that you are able to understand what's going on and that I feel like -- I feel comfortable that we can go forward.

So I'll start with: Could you please state your name for the record.

THE DEFENDANT: Yes, sir. It's Couy Griffin.

THE COURT: Thank you.

How old are you?

THE DEFENDANT: 47 years old.

THE COURT: Great.

How far did you get in school?

THE DEFENDANT: Some college.

THE COURT: Great.

And have you taken any drugs, medicine or pills or drank any alcohol in the last 24 hours that would make it difficult for you to understand what's going on today?

THE DEFENDANT: No, sir.

THE COURT: Thank you.

So what we're going to do is I'm going to notify you of the charges. Then we're going to talk about your rights; and part of that will be a right to counsel, so then we'll talk to Mr. Smith. And then the Government has asked that you be detained pending trial, so we'll see if the parties are ready for a detention hearing today.

If that is the case, then we'll have the detention hearing. It goes by what's called proffer, which means that the parties don't put on witnesses. They state what they as officers of the Court believe the facts to be true and make argument. And you'll hear from the Government, Ms. Iyengar; you'll hear from Mr. Smith; and you'll hear from as well Pretrial Services. It's the part of the court that makes determinations about whether or not a person is -- whether there are conditions or a combination of conditions that will permit for their release. So we'll start by going over the charges.

So you've been charged by a criminal complaint with one count of entering or remaining in a restricted

building in violation of 18 USC 1752(a)(1). If you're convicted of this, you can face a term of imprisonment of not more than one year, a fine of $100,000 or both. In addition, the Court may impose a term of supervised release of not more than one year.

The purpose of this hearing is to advise you of this charge and your rights in relation to that. The Court will also determine, as I said, custody issues.

So let's start with your rights. We have two rights for today. The first is the right to remain silent. This means you're not required to make any statements or give any statements to any law enforcement officer about the offense for which you have been charged. If you've said something to them already, you need say no more today. Anything you do say to a law enforcement officer can be used against you in this proceeding or in future proceedings.

Does that make sense?

THE DEFENDANT: Yes, sir.

THE COURT: You also have the right to assistance of an attorney to represent you in this case. You may, if you wish, hire your own lawyer; or if you cannot afford to hire your own lawyer, I will appoint an attorney to represent you at the government's expense.

Do you understand that right?

THE DEFENDANT: Yes, sir.

THE COURT: Great.

Do you wish to hire counsel on your own or do you wish to have me appoint Mr. Smith to be your counsel?

THE DEFENDANT: I would like Mr. Smith to be my counsel.

THE COURT: Okay. Now, sometimes people fill out a financial affidavit. Other times, more typically what we do is ask some questions. And so I'm mindful of the fact that there's a public line, and I don't want to get too in-depth into your personal finances.

Mr. Smith, I'm sure you can follow up, should there be any confusion or things like that, if there's anything that comes to light.

But I'll just ask you, Mr. Griffin, do you feel like you are able to financially afford at this time -- that you have legal funds that would allow you to afford a counsel of your choice in this matter? Or do you think that you require the assistance of the Court in appointing counsel?

THE DEFENDANT: No. I'm sure I need the Court to appoint counsel. I can't afford counsel right now.

THE COURT: Okay. I find that based on your statement -- and I will always expect the parties -- they have a continuing obligation to inform the Court if it's not the case -- I will appoint counsel for you in this matter.

Mr. Smith is -- both Mr. Smiths are defense counsels. Normally, you'd see federal public defenders. There are so many, frankly, cases right know, the federal public defender is doing a phenomenal job of really managing all of its cases. We're also lucky to have in the District of Columbia CJA-panel lawyers, so defense lawyers like both Mr. Smiths, who work in your traditional criminal defense firms who also as part of their service to the Bar and our community act as appointed counsel.

So in this instance, Mr. Smith and Mr. Smith have been identified by the Federal Public Defender's Office as CJA lawyers who may be available. So I'm going to ask them now if they're available. Does that make sense, kind of the distinction between the Public Defender's Office and how they fit into the system, Mr. Griffin?

THE DEFENDANT: Yes.

THE COURT: Great.

So I'll speak with the Mr. Smith that I know better, Mr. David Smith. But I'm happy to hear from Mr. Nicholas Smith. Jump in. I see David Smith is unmuted, so I will go to him.

Mr. Smith, I want to first confirm that you are available to be appointed in this matter and that, if so, you would like to be.

MR. DAVID SMITH: I am. I would like to be.

THE COURT: Thank you.

So we will go ahead and appoint you as counsel in this matter to represent the Defendant. The Court is very appreciative of your service and all the CJA panel, all the work they're continuing to do with all the cases that are coming in.

So, Mr. Griffin, after this point forward, I'll likely be speaking mostly to Mr. Smith. That doesn't mean that you can't speak; it just means that you have the right to remain silent. It's in your best interest if we have Mr. Smith do the talking, because the things that he says can't be used against you in future proceedings, whereas what you say can.

You'll find that, like any person -- again, it's human nature -- you want to respond when someone is saying something. But it may not be in your best interest. So let's make sure we let him do the talking; and we'll always give you time to speak to him separately, if that's all right.

THE DEFENDANT: I understand. Thank you.

THE COURT: Just so we can avoid feedback, if you're able to mute your monitor, you should see on the bottom of the screen a mute option. If you can do that, that will allow the court reporter to make sure she can get a good record.

Great. Thank you.

Mr. Smith, before the detention hearing, the last right I want to cover is the Defendant's right to full evidence in this case, what's commonly described as exculpatory evidence. Congress amended Rule 5 recently and stated that the Government must produce all that evidence. And so pursuant to Rule 5(f), I'm ordering the United States to produce all exculpatory evidence as that term is defined in the case of *Brady versus Maryland* and its related cases. Not doing so in a timely manner may result in sanctions, including exclusion of evidence, adverse jury instructions, dismissal of charges and contempt proceedings.

Ms. Iyengar, I'll turn to you next. I wanted to see if you are prepared to go forward with the detention hearing today, if you continue to ask for detention and, if so, under what basis, and if we should plan to go ahead by proffer.

Oh, I think you're on mute, Ms. Iyengar.

MS. IYENGAR: Yes, your Honor. The Government is asking to go forward with the detention hearing. We're seeking detention under 3142(f)(2)(A). And the Government submitted a [indiscernible] as part of its request for detention, and so we would be asking to proceed by proffer at this point.

THE COURT: Thank you.

Mr. Smith, are you prepared to go forward as well?

MR. DAVID SMITH: Yes.

THE COURT: Thank you.

And we received extensive briefing from both parties on this matter, which has been put on the docket. I am appreciative from both parties, the Government and the defense side, that you all have briefed the issues so thoroughly.

Please, Ms. Iyengar, why don't you proceed.

MS. IYENGAR: Yes, your Honor.

So I think, as the Government laid out in the motion that it submitted in favor of detention, the Government believes the Defendant is a flight risk at this point and therefore needs to be detained. As we stated in our -- the motion that we submitted, the Defendant does not have any ties to the District of Columbia that the Government is aware of. He did cross state lines in order to commit this offense.

And I understand the argument that the defense made in the response to the Government's motion that the Defendant did not actually breach the inside of the Capitol that day; but the evidence that the Government has that was laid out in the motion that was submitted clearly shows that the Defendant did go past barriers that were set up, that it was clear that the area that he was in, which was an area

that was restricted, and he was aware that that was an area that was restricted.

Not to mention the fact that he then subsequently went to the area where the Inauguration was held on January 20th during the course of the riot at the Capitol.

The other concern that the Government has in terms of releasing the Defendant at this point is that he made a statement during a public county council meeting that he was going to return to the District of Columbia for the Presidential Inauguration, that he was going to hold basically a second rally and that he was bringing firearms with him for that purpose.

And it is -- statements like that just are very concerning to the Government about whether it's a good idea to release the Defendant back into the community at this point.

So I think, based on all of that information, the Defendant's conduct in this case and the fact that he doesn't have ties to the District, we don't believe it's a good risk for release at this point.

THE COURT: Thank you, Ms. Iyengar.

So as I understood it, in the Government's detention memorandum you also made some requests with the same facts, but also under the prong of the obstruction of justice. Is that right? Or --

MS. IYENGAR: Yes, your Honor. We did also make the same arguments, basically, with respect to the obstruction issue as well.

THE COURT: Thank you.

I'll go to Pretrial Services. I believe Ms. Schuck is the phone. Ms. Schuck, are you there?

THE PRETRIAL SERVICES OFFICER: Yes, your Honor. Christine Schuck, Pretrial Services.

THE COURT: Thank you, Ms. Schuck. Again, as always, I'll just take a moment to thank Pretrial Services for the incredible work that they are doing right now with the enormous filing of cases, the professionalism. It is always appreciated. I've received a lot of emails in other cases from you late over the weekend. So thank you for your continued hard work.

I'd like to hear on this matter Pretrial's recommendation in terms of -- is it release or detention? And putting it on the record.

THE PRETRIAL SERVICES OFFICER: Based on the Defendant's criminal history, Pretrial's recommendation is to -- that he may be -- should the Court decide it's appropriate, he may be released with the following conditions: that he report to Pretrial Services weekly by phone; that he verify his address with Pretrial Services; that he notify Pretrial Services in advance of all travel

within the continental United States, and the Court is to approve all other travel.

He's not to possess any firearms. He is to contact Pretrial Services probably -- we would say by February 4th for him to be interviewed by telephone because we do not have any residential or personal, you know, history on him.

Also, report as soon as possible to Pretrial Services any contact with law enforcement, to include arrests, questioning or traffic stops; not to obtain a passport or other international travel document; surrender any passports he may have to the Pretrial Services Agency for the District of Columbia; to stay out of the District of Columbia except for court or pretrial business or meetings with his attorney; and not to illegally possess or use a narcotic drug or other controlled substance.

Again, this recommendation is solely based on his criminal history.

THE COURT: Thank you, Ms. Schuck.

Mr. Smith, I'm happy to hear from you.

MR. DAVID SMITH: Yes, your Honor.

First, I'd like to clear up some things that sort of have arisen in this case and that I think are important to clear up:

First of all, I want you to know that he took his

COVID test at the jail, and he's now in population rather than in isolation.

We've already -- through the whole issue of whether he should be present here, he's obviously present and willingly present.

Here's an important thing: You know, during the prior hearing, you thought that he had refused to speak with you on the cell phone. But actually, he has explained to us that he misunderstood what the jail guards were telling him when they brought the cell phone into the cell for him to use. Like me, he's hard of hearing. And the guards were -- the two guards were both wearing their masks, and he had difficulty understanding what they were saying because of the hearing problem and the guards' masks. And he thought that they were telling him there was a call from a lawyer who wished to represent him. And that's why he said, "I don't want to talk to him" and, you know, "I want to talk to my son," his 7-year-old son.

THE COURT: Mr. Smith, I don't want to interrupt, because I appreciate, as I said, your thoroughness and your diligence.

You don't need to explain to me, frankly, if -- well, as a preliminary matter, I'm happy to hear that the Defendant has been able to take the steps that were under his control to get out of isolation, because I think that,

as you describe, it was a very challenging and difficult situation he was in. Obviously, I think the jail staff is limited in what they can do when someone may have COVID that comes in. They have to protect the other folks in the prison as well as themselves.

But it's -- I'm happy to hear the Defendant is out, I mean, in the general population now and that he has been tested. That in my mind makes a lot of sense.

And I certainly do not hold against him anything that happened in the previous hearings. I think it's very easy, frankly, to be confused as to what's going on or confronted; and that at the end of the day, as long as the Defendant's respectful now, which he has demonstrated clearly that he is, that is for the past and of no matter at the moment.

So I certainly [indiscernible] from that. I would not be at my best in those circumstances. So I do not expect anyone else. I hold everyone to at least the minimum standard of: What can I do or what would I do walking in the Defendant's shoes? So there's no concern on my end for that at all. I am solely focused on the arguments that the Government has made today.

MR. DAVID SMITH: Thank you very much, your Honor.

So turning now to the detention issues: As you know, we filed a pretty comprehensive 22-page brief on

January 27. And I'm sure the Court has read it, so I don't need to repeat everything I said in that memo.

THE COURT: One second, Mr. Smith.

Ms. Schuck, can you mute your line? We're just getting some feedback from your line.

THE PRETRIAL SERVICES OFFICER: I was muted, your Honor.

THE COURT: It's still coming over to you, saying that there's background noise there. If you could just try again, I'd appreciate it. If not, no worries.

Mr. Smith, continue.

MR. DAVID SMITH: Thank you, your Honor.

And I would note that the Government has not responded to our brief in writing. They haven't filed a reply, although there was time to do so.

So mainly our arguments really stand completely unrebutted. And I just wanted to note that for the record, I'm not going to waste time. I'm just going to briefly summarize why the Government's request for detention clearly fails the test.

So first, let's talk about a few facts here. Unlike many of the other people who have received a lot of media attention, which I've been able to read in the newspapers, Mr. Griffin is only charged with a single misdemeanor offense, whereas in other cases the Defendants

have been charged with multiple offenses that are much more serious than the offense he's charged with.

And I have read in the *Washington Post* -- and I think we cited this article in our brief -- the Defendants who have been charged with the misdemeanor offense that Mr. Griffin has been charged with have on a number of occasions been given pretrial diversion or, if they pled guilty or were convicted after trial, they received a very short sentence, sometimes shorter than the amount of time Mr. Griffin has already been in custody at the DC Jail.

So why is any of that important? Well, for one thing, it certainly suggests that he would be very foolhardy if he were to flee, as the Government says there's a serious risk of him fleeing. I think that's completely unsupported by the facts in the case.

As Probation just said, he has no criminal record except for a very old DUI. He's lived his entire life in Southern New Mexico. He has a loving family. He is an elected official of the county in which he lives. In other words, he's part of the county government. He's been gainfully employed since the 1990s without any break that I'm aware of.

And, I mean, luckily, you've had a chance to see and speak with him. He's not a crazy person, even though he has made some, you know, unfortunate statements, which

without making those statements he probably wouldn't be here.

[Unidentified voice coming over the video feed.]

MR. DAVID SMITH: So -- I don't know who's speaking.

But we cited the *Lemon* case from the DC Circuit, a 1983 decision, saying that statements such as the one that Mr. Griffin made, which the Government is rightly concerned about, cannot be considered for purposes of determining whether to grant someone pretrial release.

And it's interesting: The *Lemon* case cites another case, *Williamson versus United States*. It's a 1950 Second Circuit decision, which is a very interesting decision. The decision is by Supreme Court Justice Robert Jackson, considered one of the greatest of all Supreme Court justices. He was on the Supreme Court at the time. And Mr. Williamson was -- had already been convicted in a Smith Act case, where he was accused of seeking to overthrow the United States government. And he was -- he had petitioned for cert to the Supreme Court.

And so Justice Jackson as part of the Second Circuit panel, strangely, was writing an opinion on whether he should get bail. And in that opinion, which is cited by the DC Circuit, Justice Jackson said that statements made by the Defendant, which are similar or worse, perhaps, than

what Mr. Griffin said during a council -- during a meeting of the Otero County government -- should not be considered, must not be considered in deciding whether to grant bail. In that case, it was bail pending a petition for certiorari. The Defendant, Mr. Williamson, had already been convicted of a serious offense under the Smith Act for which he could have been imprisoned for decades, unlike Mr. Griffin, who's facing a misdemeanor charge.

So I think that the decision in *Williamson* by Justice Jackson is striking, I think, for the light it sheds on this case because the Government, even though they're rightfully concerned about the statement that he made in the council, they are overreacting to it. And I doubt that they've read *Lemon* or *Williamson*, because they certainly should discourage the Government from even seeking detention in this case based on his statement, because that's really all they have.

The fact that he doesn't live in the District of Columbia is really insignificant. And there really is no other basis for detaining him. There's no basis for finding that he would be a risk of flight whatsoever.

And there's even, I mean, just as weak a case for the second theory, which is that he would obstruct or interfere with a witness against him or a juror. I mean, the Government made no effort to support that. I note that

the Government didn't even mention that second theory until you prompted them as to whether they were still relying on that second theory. The only thing that Ms. Iyengar mentioned initially was the argument that Mr. Griffin is a serious flight risk. And he certainly is not a serious flight risk. There's really no support for that either.

So let's see. There's really no factual or legal basis for the Government's contentions. And moreover, even if there was concern that he could be a risk of flight, that concern can certainly be eliminated by the conditions that the Court is free to impose.

And we would suggest that the conditions that were just proposed by the pretrial services officer, Ms. Schuck, are sufficient, more than sufficient, to assure his appearance in court whenever it's required.

And the statute, 3142(c), says conditions that will reasonably assure his appearance. You can never in any case guarantee that a person will show up; and we made that point in the brief. Studies have shown that something like 1 to 1 and a half percent of individuals granted pretrial release fail to show up. And Mr. Griffin is certainly not going to be one of that 1 percent or 1 and a half percent that don't show up.

I just wanted to mention another thing: If he was to be denied release, he would fall behind on his mortgage

payments and his child support payments for his 7-year-old son and he would not be able to continue to serve his constituents in Otero County, New Mexico. Those are additional reasons to grant him pretrial release.

And if the Court has any questions about any of this, I or Mr. Griffin will be happy to answer those questions.

Thank you very much for hearing me out.

THE COURT: Thank you, Mr. Smith. I appreciate both the depth of your research and pulling cases from quite a long time ago. I appreciate your advocacy. I think it's helpful to think about those things. These are important issues; and we have to dig deep into them to make sure we're making the right decision ultimately, that I am.

That is also about the collateral consequences. This is the most difficult part of a detention decision, is that -- what happens to family members, what happens to making mortgage payments, these things that make this such a hard thing to do for magistrate judges as we sit here and try to make the right decision about whether there are conditions or a combination of conditions that can assure the appearance of the Defendant and in this instance preclude any obstruction of justice. There's no easy answer, because on all paths there are pitfalls and dangers.

And so I'll hear from Ms. Iyengar and see if

there's anything else she wants to add.

Ms. Iyengar, I will note that I didn't think [indiscernible] was necessary in this. I think the defense has stated their basis for release and the Government has stated their basis for detention. I think that they are [indiscernible]. I don't know that there is really much of a factual dispute. I think it's just: How should the facts be applied? But I'm happy to hear -- please don't feel obligated. But if there's anything you'd like to add, I'm happy to hear it.

MS. IYENGAR: Yes, your Honor.

I don't think there's anything that I'd like to add in terms of any argument to be made for detention. I think at this point we're just resting on the papers.

THE COURT: Thanks so much, Ms. Iyengar.

Mr. Griffin, I spent a lot of time reading your documents, reading the Government's, looking at the cases that are similarly situated. I think that's one thing that we'll touch upon here.

You know, there's essentially two things normally in a detention hearing we look at: Normally we look at dangerousness to the community. Here, that's not something that we're considering because of the charges that have been brought. The Government has not requested that you be detained by that standard.

Rather, they ask that I find that there's no condition or combination of conditions that will reasonably assure your appearance in a future proceeding because you are a serious risk of flight. Not a risk of flight, not an ordinary risk of flight, but a serious risk of flight.

In addition, they say that you pose an obstruction-of-justice threat in this matter. For those reasons, they say that we should go through the four factors of the Bail Reform Act, which is: the history and characteristics of the Defendant; the nature and circumstances of the offense; the weight of the evidence; and the danger to the community/the general flight risk. So we'll go through those there. And I'll go through and explain why I rule ultimately the way that I do rule and, you know, as I go through that, how that factors into my analysis.

Ultimately, my decision is not the final decision. Chief Judge Howell remains in waiting if for any reason either the Government or Mr. Smith -- if you do not approve of my findings. You have the opportunity to appeal to the Chief Judge and seek her guidance. She will review it; I think she will take into consideration what I have to say, but she will ultimately make her decision based on the law and the facts as she sees fit. She has had a few of these recently, and I think she is always available to hear from

defendants, be it today, tomorrow, or from the Government, whenever it is that they want to have a decision reconsidered.

One thing I'll note before I go into the four factors is in looking at similarly situated cases -- I think Mr. Smith makes a compelling argument that we've looked -- we have to look at similarly situated cases. We look at similarly situated cases not just as to this one instance, of a riot, what the Government has described in its pleadings as an insurrection, what the defense describes as the exercise of First Amendment rights.

There are those similarly situated cases. There are cases that came before me prior to these cases, which my colleagues and I looked at, that involve people trying to enter the premises of the White House, usually making it to the Ellipse, not even past there, where they're stopped by Secret Service officers. So I looked to those cases and looked overall at the panoply of criminal cases that have come before me.

I think it's worth noting for the record that, as Mr. Smith notes, in most cases -- his statistic is 77 percent of cases -- the Government asks for detention. And I think that his argument is that it's overkill, that essentially the Government is always asking for it, so they lose credibility because in fact only in 1 percent of cases

people do not appear or fail to appear.

I think it's important that we look at these factors of these cases. In these cases, the Government has been taking a very measured approach. I think there are many people, particularly people who, maybe until recently -- you know, it's interesting to see sort of how people change their minds about things. Until recently, there was not quite the same feelings about detention and incarceration as there are today.

But I stand today, you know, looking at the literature and cases before me, and I see that the Government is quite judicious in whether they're asking for detention. And that has to inure to their credit. Where they rarely ask for detention, in the instances that they do, I really have to dig deep and think that: Is this something that we're taking the Government as -- they're going by proffer, so we take them at their word -- that they think there are conditions here that are unique? And that's what the Government is saying.

So, far from the 77 percent, from my just rough estimate, it's certainly far less than 50 percent of cases, maybe even less than a quarter of cases where the Government has asked for detention in these matters. So when they do ask for detention, I think they're making a more powerful claim.

I will now go through the four factors. Before I do, I think one thing I will note is, to me, the Government's argument is that you have to boil it down. Right? What is it? And at bottom, to me, is that this is what the Government says: On Page 7 of their brief, they say: If the Defendant denies the authority of the lawfully elected President of the United States, whose election was certified by the Congress of the United States, certainly he would deny the authority of judicial officers.

So that, to me, appears to be the Government's argument, is they believe that the Defendant does not --

[Unidentified voice coming over the video feed.]

THE COURTROOM DEPUTY: Your Honor, I'm not sure where that is coming from.

THE COURT: We have your box lighting up, Ms. Schuck, but I don't know if that's you there.

THE COURTROOM DEPUTY: I don't think that's her. I don't know where that's coming from.

THE COURT: I see everyone else is muted.

Ms. Schuck, are you there? Did you hear that?

THE PRETRIAL SERVICES OFFICER: I didn't hear anything, your Honor. And I'm muted.

THE COURT: Got it. I don't know why it's going back to you.

Ms. Lavigne-Rhodes, can you just go ahead and

mute? And perhaps her line is getting crossed. If we need to, we'll just unmute Ms. Schuck.

THE COURTROOM DEPUTY: Yes. We'll see if that helps.

THE COURT: Okay. We'll continue.

So, as I said, it appears to me that the Government's main argument is that they believe that the Defendant does not believe essentially in the legitimacy of the current democratic government and that, because of that, how can I fashion conditions or a combination of conditions of release that I can reasonably believe that he will follow if he does not believe in the authority of the people who are in fact the duly elected and lawfully authorized government? So that seems to me to be their argument.

You know, they say the Defendant has no ties to the Washington, DC, community; they make the other arguments that we frequently see. But that is not -- I don't think that is what distinguishes, as it appears to me, this case from the other Capitol riot cases.

What it appears to me to be is that -- Ms. Iyengar, is that a fair statement, do you think? I mean, it's in your brief. But that is perhaps your argument. Is that fair?

MS. IYENGAR: Yeah. Well, I think that's definitely a big part of the heart of our argument. I think

that in addition to, you know, the statements that were made and then the fact that he was subsequently arrested outside of the Capitol Building when he returned to the District. All of that taken together is really the heart of our argument.

THE COURT: Thank you, Ms. Iyengar.

So those are the four factors.

Mr. Griffin, I don't like to -- my colleagues and everyone does think differently. I will tell you up front that, unfortunately, I don't find that release is appropriate in this instance. And I will describe why. I'll make a record. And you have the opportunity after you hear my findings, as I said, to speak to your lawyer and consider how you want to go forward in terms of seeking any reconsideration either now, with me, or at times later with the Chief Judge.

And so I will start with the nature and circumstances of the offense. The Chief Judge in the *Barnett* case described what I think I have mentioned in previous hearings, is that it's difficult to square the title of these offenses and the punishment with the nature of the offense.

The nature of the offense, you know, is something that is quite [indiscernible]. It is what appears to be, based on, again, the Government's proffer -- that's all I

can go by here -- is that this was an organized attempt to stop the lawful administration of the democratic process.

The Defendant states in his opposition that he believes that in fact even the elements of the crime might not be met, because he states that there's no indication, on Page 4 into Page 5 -- there's no indication that the Defendant knew that the Capitol grounds was where a person protected by the Secret Service was or would be temporarily visiting.

I think that that of many things is beyond implausible. The Defendant and the people who came to march on the Capitol on January 6th were well aware. They did not choose that date randomly. It was because it was when the Electoral College was being certified and when the transition of power was at its crescendo. The Vice President was there and members of Congress were there, all of whom certainly are known to be protected by the Secret Service.

So the nature of this offense is not a simple misdemeanor offense. This is an offense that at bottom was an attempt to stop democracy from moving forward because people were unhappy about the results of an election.

Now, that -- they have a right to be unhappy. They have First Amendment rights. And Mr. Smith, I think, has provided compelling reasons we have to consider and

protect those First Amendment rights. That's absolutely the case.

However, what is not the case is that people can forcibly enter grounds where that process is ongoing and attempt to stop it.

I think Ms. Iyengar is right that we do look to the Defendant's statements, not the dangerousness or not to limit his First Amendment rights. We would never want to chill that. However, we do have to try to understand his state of mind and understand if he's in a state of mind where he could respect conditions or a combination of conditions that I would impose.

Mr. Griffin states -- his counsel states on Mr. Griffin's behalf he was never asked to leave the area by police and he exited peacefully.

This is not a crime in which you get to enter as far into the Capitol grounds as you like until you're told not to. And if you're doing it politely, that makes it no less of a crime. That is a crime. It's not the means by which you enter; it's the very fact that you entered. These are sacred institution of our nation, and they are not ones in which people can just come either in a mob or singularly go in and enter those areas without permission.

The statements in particular I think are concerning because -- and I will discount -- the Government

in its detention memorandum raises what they describe as inflammatory, racist advocacy. I don't think that's relevant, frankly, at all here. The Defendant is entirely within his rights to think any of those things that he wants to.

However, where I have to then focus is on the nature of the charged offense, which is the entering unlawfully of the Capitol. And then I look at the language that the Defendant used previously and afterwards. There is evidence proffered by the Government that the Defendant stated, quote, "The only good Democrat is a dead Democrat," unquote, before then saying afterwards that he didn't intend that physically.

I don't give credit to that "I'm just saying that, is all." You don't get to say something and then say, "But I didn't really mean it," because why did you say it, then? Words do matter. Words matter; facts matter. Here we are, and we have to measure the Defendant by the statements that he says.

He did say -- I think that Mr. Smith provided some context as to why he said he was going to exercise his Second Amendment rights and carry his firearms back here, because his life feels threatened. In no way is that acceptable. People need to -- mobs are not okay on either end. People should never be threatened. Their families

should never be threatened. People should not be in a situation where they feel they have to turn to firearms because they're not safe. That is unacceptable.

And so I understand and empathize, I think, why the Defendant felt that way. However, that is not the statements that are of primary concern to me. My primary concern is that the Defendant said in a video that he posted after the incident on January 6th that if the Second Amendment rally on those same steps -- if that happened, that's going to be, quote, "a sad day, because there's going to be blood running out of that building. But at the end of the day, you mark my word, we will plant our flag on the desk of Nancy Pelosi."

So I see again statements that to me indicate what the Government has said, is that the Defendant's statements show that he does not believe that this in fact was a lawful government that's been in place.

You know, he makes statements about the election being stolen by Chinese entities. I don't know what that means. I know that [indiscernible] the Ellipse cases, when someone makes statements like this that are demonstrably false and that are in no way accurate that what happens is we consider whether or not a person needs a mental health evaluation. And this is no different than people not believing facts or science. Simply, I have to evaluate

whether or not that person's competent.

Here, I believe the Defendant is competent. Unfortunately, this is a prevailing, apparently, idea, although false. And so I don't think that he has competency issues. Of course, if there were any, I know the Government and Mr. Smith would explore it.

But I go back to the nature and circumstances of the offense. Given those statements about the lack of belief or faith that the Defendant has in this -- in the United States government as it sits today, I don't believe -- I look at essentially the nature of that offense. And I think the nature of that offense is that he's demonstrated that he believes that violence is on the table and that the nature of the offense is exactly what it says it was: This was an attempt to overthrow the government because he did not believe it was legitimate.

The next factor is the weight of the evidence. The weight of the evidence in this case is strong. Mr. Smith makes what I think is fair arguments to mitigate the seriousness of it: that there's no evidence that he did go into the building, that he did not harm any police officers. There's no indication of that and the Government has not proffered that. So I can only go by what the Government says.

But the Government did proffer that there's video,

and he also made admissions, that he went past the barricade. This is not an optional sort of thing. When there is a barricade up, you are not permitted to go forward. That is not for the Defendant's choice; that's not for anyone's choice; it's not for my choice. We all live in a system of rules where we have to follow them. And if we don't, there are consequences. Here, there's a consequence. It is quite clear.

I don't think any reasonable person could believe that, frankly, climbing up on the steps of the Capitol Building and getting where the Defendant did was in any way lawfully permissible. I think the Defendant even understood that it wasn't, but he felt that he was justified because he thought that what he was doing was for a greater good. Unfortunately, that is not the way that our democracy works. You do not get to take things into your own hands. You have to follow the lawful process, just like everyone else. People have lost elections before and we did not have this sort of response.

So I think the weight of the evidence is strong in favor of detention as to the first factor.

I think the history and characteristics of the Defendant -- I've already covered it -- his statements demonstrate to me a lack of faith and belief in the legitimacy of this government. Therefore, while his lack of

criminal history, or very minimal, you know, really minor offenses that aren't ones one would normally consider, I think those things inure to his benefit.

And it inures to his benefit the fact that he is an elected representative. He of all people understands the beauty of the American democracy, the beauty of citizens getting together and choosing who they want to represent them and then living by the consequences of those elections. He knows better than anybody.

And I credit him for his public service, and it's something that should be commended. However, in this instance, the flip side, or these statements that he makes about blood running out of the Capitol, threats to members of Congress, stating that the only good Democrat is a dead Democrat, all of those things demonstrate to me a history and characteristics that warrant in favor of detention.

That is -- and the circumstances of this offense, the unlawful entry into the Capitol Building, all of those things demonstrate to me that his history and characteristics are one where detention is required, because there's no combination of conditions that will cause him to follow through on my orders. I don't believe that he will believe that those orders are to be respected or followed.

Finally, as to dangerousness, I think I've already covered that. It's dangerousness of flight risk. I think

that the reason is that which we've already stated, that there is a real risk of flight. You know, I don't think the Defendant will follow through on my conditions if he believes that I am part of this machine of the democratic process or for whatever reason. I don't know. I can't fathom what it is, because these are not logical thoughts based in fact. I don't know.

But all I can do is go on the facts of what his actions have been, what his statements have been afterwards. And, far from remorse, he doubled down and continued to believe that what happened on January 6th was appropriate and in fact that another rally was needed, and a rally that only exponentially increased in terms of violence: his Second Amendment rights.

Defense counsel says: Well, that rally never happened. But the rally never happened because of the intervention of the National Guard. I mean, Washington, DC, was clearly a fortress, so it could not happen. It was a factual impossibility. But that does not mean that the Defendant did not still make statements that that was what he wanted to do. So for those reasons, I think there is a danger.

I would note for the record I believe obstruction of justice is -- rarely is appropriate. But here, it is also again a basis for detention, where a Defendant does not

believe in the rule of law and makes threats to people who are inside the Capitol Building, presumably, or victims of his crime. I don't see how there is anything other than obstruction. Presumably, the people in the building that he tried and cajole people to invade could be witnesses in this matter. And after, he was -- after the event happened, he continued to make threats against them. That sounds to me like a classic threatening of a witness.

So I think obstruction -- I don't need to fall back on that, but I do think for the record that that is a basis for detention.

So for all of those reasons, I believe detention is appropriate, as I stated. You have the opportunity to appeal that to Chief Judge Howell, that finding.

Ms. Iyengar, do we have a date for a preliminary hearing in this matter?

MS. IYENGAR: We have not agreed upon a date yet.

THE COURT: Do you want to just -- the Defendant was -- do you want to say the date that he was let go, by the arrest date, or the initial appearance? What date do you want to go by, Ms. Iyengar? Why don't we start with that.

MS. IYENGAR: If we can go by the initial appearance date, that would be our preference.

THE COURT: Mr. Smith, you tell me. Do you

plan -- where do you believe we should go by? And when are you hoping to have the preliminary hearing, if you are seeking to have one now or if you're seeking to continue this and speak to the Government? Why don't you let me know what you want to do.

MR. DAVID SMITH: I mean, your Honor, are you prepared to have the preliminary hearing right now? Is that what you're saying?

THE COURT: No. The Government has asked for the 14 days, so I'm happy to give the Government 14 days. The Defendant was arrested --

Ms. Iyengar, when was the Defendant arrested?

MS. IYENGAR: On --

THE DEFENDANT: On the 17th.

MS. IYENGAR: On the 17th.

THE COURT: Thank you, Mr. Griffin.

So he was not able to have his initial appearance until this date. I've made a record as to the reasons why. The Government has asked for its 14 days from today, so they've asked to go to the 15th, Mr. Smith. Can you let me know if you want to do the preliminary hearing then or if you're asking for before then? Obviously, you'll need time to get discovery and things like that together.

Mr. Griffin, the next hearing will be a preliminary hearing. That's where the Government has to

actually put on witnesses. They can't just go by proffer. They have to come and you get to put them to their paces, cross-examine their witnesses.

And throughout all of this, I want to remind you that the Constitution guarantees you a right to innocence, which you do have, which means that myself and any district judge who takes this matter believes you're innocent, because the law states that. Nothing that comes today -- those are simply detention decisions. That's nothing a jury would ever know and that's nothing that ever factors into a judge's analysis as to whether or not you are guilty or innocent, because we believe you are innocent. The law says that.

Mr. Smith, when can we have the preliminary hearing, should you seek to have it? Would you like additional time to get discovery and/or time to speak to Ms. Iyengar about the facts of the case?

MR. DAVID SMITH: Well, could I ask that Mr. Griffin be heard right now to let me and yourself know what --

THE COURT: Why don't we put you in a breakout room so that you can speak to him, because I think that would be better. I don't want to put him on the spot and then get him implicated in his right to silence.

So, Ms. Lavigne-Rhodes, can you put the Defendant

and both Mr. Smiths into a breakout room?

THE COURTROOM DEPUTY: Absolutely, your Honor.

THE COURT: So we'll be here, Mr. Smith. We'll have our camera off. But you let us know when you're ready.

MR. DAVID SMITH: Thank you, your Honor.

(Thereupon a recess was taken, after which the following proceedings were had:)

THE COURTROOM DEPUTY: Re-calling Magistrate Case 21-92, the United States of America versus Couy Griffin.

THE COURT: Mr. Smith, I take it that hopefully it was helpful for you to have an opportunity to speak with your client.

Rule 5.1 indicates that it's 14 days from the initial appearance. So 14 days the Government has by right. So the earliest we could have our preliminary hearing is February 15th. Obviously, we could set a status hearing for that day and a preliminary hearing, jointly, and then you can decide, you know, as to that date if that's what you want or if you'd like to go longer.

So I'd like to hear from you what the Defendant would like to do.

MR. NICHOLAS SMITH: Yes, your Honor. This is Nicholas Smith. I'll address both questions. Good afternoon.

THE COURT: Good afternoon, Mr. Smith.

MR. NICHOLAS SMITH: Okay. So we'd like February 8th, actually, seven days, for the preliminary hearing. And --

MR. DAVID SMITH: Excuse me a second.

The Judge just informed us that the Government has 14 days as a right.

MR. NICHOLAS SMITH: I understand.

So our request after having met with Mr. Griffin is to ask for this.

And the second thing we'd like to note are a couple of -- we'd like to address some of the bases for today's decision, just to make --

THE COURT: Absolutely. Yes. Can we work backwards and first talk about the date? And then let's come back to that.

MR. NICHOLAS SMITH: Sure.

THE COURT: As I understand it, Ms. Iyengar, I'm looking at -- I'll go back to you. It states under Rule 5.1 that the magistrate judge must hold the preliminary hearing within a reasonable time but no later than 14 days after the initial appearance if the Defendant is in custody. So I understand the law to indicate that by right you can go up to 14 days. That does not mean you have to.

I want to confirm. I understand the Defendant's request. He is in custody. He's been in custody for a

little while. I want to confirm whether or not you can have a preliminary hearing on the 8th.

Additionally, I want to know if there's any indication that you have a grand jury to indict the case before then, in which case this might moot all of this. So any information you can share with us would be helpful.

MS. IYENGAR: Sure.

So I think we don't have any issue with having the hearing on the 8th. Because this is a misdemeanor and we would just have to file an information, I think we can most likely get that done before the 8th.

THE COURT: Great. Let's start with that. Let's set the preliminary hearing. Mr. Nicholas Smith has made the request on behalf of the Defendant.

Ms. Lavigne-Rhodes, can you put on my calendar for February 8th a preliminary hearing?

And let's set it for, should we say, Mr. Smith, if it's all right with you, how about 1:30? Is that good?

MR. NICHOLAS SMITH: Yes. That's good.

MR. DAVID SMITH: That's fine. Yes.

THE COURT: So that works for both Mr. Smiths.

Ms. Iyengar, does that work for you?

MS. IYENGAR: Yes, your Honor.

THE COURT: So, Mr. Griffin, we're going to go ahead, as we talked about, with that preliminary hearing.

That's the hearing where you get to -- your lawyers get to examine witnesses from the Government. They have to prove probable cause that you committed the crimes that they've alleged. They cannot simply rest on an affidavit from an affiant who does not appear by facts that the Government states. They actually have to get up there and do the work that the Constitution requires them to do.

And so now you've heard also from the Government that they can charge your case before that. If they do, then the case will be assigned to a district judge. That's who you would go to before in a trial, likely. Because it is a misdemeanor, it can go to the magistrate judges by consent. In fact, many of them may do that. Just because I am presiding today does not mean it will go to me. It will go to any one judge of the magistrate judges randomly assigned. That ultimately is something you will speak to your counsel about and make those decisions. But if they formally charge the case, there will be no preliminary hearing.

So, Mr. Nicholas Smith, now I'm happy to come back to hear anything that you want to add regarding my findings as to detention.

MR. NICHOLAS SMITH: Yes. Thank you, your Honor.

And we understand that the Court has made its decision. But we thought it might still be useful to the

Court not just for the sake of the record, but just to address a couple of the points, because this whole process has been pretty quick. There was no reply brief.

So the first point is that your Honor mentioned that, to boil down the Government's position for detention, it's that Mr. Griffin has a fundamental belief that -- in the illegitimacy of the current government. And there is some support in the Government's proffer and its papers that Mr. Griffin questioned the outcome of the election.

We think the relevant question here is whether there's any evidence or proffer that Mr. Griffin has no respect for or does not believe in the legitimacy of you, your Honor, in the Court. There is nothing in the record, if your Honor searches it, and in the Government's proffer to suggest that he does not have respect for the Court, that he wouldn't return at the appropriate opportunity. There's nothing in the record to suggest that he doesn't have respect for the judiciary. I think, if anything, it might be the opposite in the record.

The second point your Honor made is that this is not merely a trespass case, this is not merely a misdemeanor case, but that this is an organized attempt to overthrow the government.

Your Honor, there's no charge or allegation in the charging statement that this was an organized attempt to

overthrow the government on the part of this Defendant's behalf. So our position would be that that sort of surmises based on public statements or the public record and would not be a part of the Government's proffer or a part of the Government's charging statement and would not be a basis for denying detention.

Your Honor pointed out that in our bail submission, the Defendant suggests that he may have not had the relevant *mens rea* to commit the crime. And your Honor suggested that that does not seem to be the case, based on the Government's proffer.

Mr. Griffin pointed out in his bail submission of what the relevant elements of the offense are under 1752(c). And those include knowledge that the area, the restricted area in which he entered, was one of three very narrowly defined restricted areas, including the White House, which is not present; the Vice President residence, which is not present here; and some area that's designated as an area containing an event of special significance.

The Government has alleged that the area that Mr. Griffin entered on July 6th was an area of special significance or was so designated by any governmental entity. So what the Government [indiscernible] is an area in which the Defendant knew that a person with Secret Service protection would be at the time he entered the area.

It's not a statement of fact. The charging statement does not make this allegation, your Honor. So it's not an evidence of the Defendant's contempt of Court or belief in the illegitimacy of government to point out what the elements of the offense are. And they haven't been fully alleged.

As for the statement that there would be blood coming out of the Capitol, I'm glad your Honor brought this up, because this is a very important point in the Government's brief. The Government does accurately quote Mr. Griffin's statement at one point that if there was a Second Amendment rally at some indefinite time, there would be blood from the Capitol.

We have no reason to believe right now that that statement is inaccurate.

But, your Honor, the Government then strings that statement together with a promise that Mr. Griffin is returning to the Capitol to pursue that end. And there's just no evidence in the record to support that. And I think, your Honor, it's a little bit of an inappropriate insinuation without any evidence to suggest that Mr. Griffin is making a vow to return to the Capitol to shed blood when there is no evidence to support that.

Your Honor, there's one more point that I think is really important here, which is the *Lemon* case. We raised

the DC Circuit case of *United States versus Lemon*. I don't have the citation right here handy. But the DC Circuit is pretty clear that statements that are First Amendment-protected speech and especially core political speech simply can't be the basis for the denial of bail. The statement's pretty unequivocal.

And if we look at the law and citation and the First Amendment protections for incitement, the statement about blood or the caveated statements about Democrats are -- they just clearly fall within First Amendment protection.

So, you know, if we're kind of left without anything in the record to suggest [indiscernible] apart from those statements, there really isn't any element of the Government's proffer that would suggest Mr. Griffin is not going to show up.

And so, you know, if it's possible, we'd like to discuss those points with your Honor, because we don't think they're included in the Government's proffer. But we recognize that your Honor's made a decision.

THE COURT: Thank you, Mr. Smith.

I think, again, you and your co-counsel have really put a lot of thought into these issues and I think you have put together both a legally interesting, but also a factually compelling, case.

I'll respond to them. I think that at this point my decision remains the same; and I think that the appropriate remedy, if you feel that this record reflects that you want to have another person make a decision on this, is to take it up with the Chief Judge.

I think I'll start with your first point, that the Court is different than the executive branch and that the Defendant respects the judiciary.

You know, I have to go by the proffer. And so I take what you say as fact and I take what the Government says as fact as well.

What they do is you look at a symptom. If there are enough symptoms, it's part of a disease. So here, in this instance, they're saying there is one strong indication that the Defendant does not believe in the legitimacy of the government. Right? Not just narrowly the executive. Right? It is difficult to parse out there.

In addition to which, the fact that the Defendant, they allege, went to the Capitol indicates at least from my perspective -- I have to make logical inferences from the facts -- that two-thirds of the government the Defendant does not have -- does not believe is acting lawfully or legitimately.

And so the Government states that their conclusion is: Why would the Defendant then, to the third branch of

the government, once it starts doing things that the Defendant does not agree with or believe in, come to any different conclusion than he did with the first two branches of the government, that when they do not listen or do what he views to be right that he unilaterally gets to decide what is and is not right and go forward and make his own decisions?

So I agree that he has not stated anything explicitly that he has no lack of faith or belief in the judiciary. But implicitly, I think a logical inference is that when someone tries to participate in what the Government describes as an insurrection, that he does not believe in the legitimacy of the government. I think that it's hard to believe how parts of the government can be quarantined from that disease. It's hard for me to understand how the Defendant would not view that we are just -- we, the Court, aren't part and parcel of the problem -- that does not exist, for the record, again -- but that in his mind does.

So for that reason, I think that still applies in my mind, that how can I believe that there are conditions or a combination of conditions that will function when he does not believe in the people that are creating and promulgating those rules?

You indicated there's no evidence that this was an

organized attempt to overthrow the government.

I think that in this case, the Defendant's statements are quite clear. You know, I don't have to look to the simple reality of what occurred on January 6th. I can carve out what is the noise that the Defendant might feel like and people have said about it and look only to his statements.

His statement indicates that he was dissatisfied with what happened on January 6th, that that was an attempt to stop the stealing of the election, which is demonstrably false, not something that occurred and not something the Court has considered, has not found that that has occurred; yet he was so upset still on January 6th that he said he was going to come back for a second bite at the apple.

So in my mind, it was very much an organized attempt to overthrow the government, based on his statements.

I look only to the facts as they are before me. And as I see them, he was part of a concerted effort. You know, he took a bullhorn. Now, granted, he took it to give a prayer, which -- there's nothing wrong with that. However, when there is a mob and you are part of that mob and you get a bullhorn, it's hard to say you're not part of what was going on. You were not some wallflower in an otherwise large event. You were in the thick of things.

And that's where he was: He was truly in the thick of things.

You know, that goes to the third point. You said that knowledge -- that the Government's proved knowledge that [indiscernible] is of special significance. It's not related to the legitimacy of the government.

I certainly agree that whether or not he believes the government is legitimate is totally irrelevant as to whether or not the Government has pled the elements of the offense.

Now, I will note that this is not a hearing to determine whether or not the Government has established probable cause. You certainly can move to dismiss the complaint. And that's something that could happen at the preliminary hearing, is that you could demonstrate there was not a sufficient basis to find by probable cause that the crime occurred.

Yet it's of no matter; we should still consider it if the Defendant is unlawfully held. Absolutely. Always. We don't wait to do that. We do that now, because that is the right thing to do, because it is always wrong to hold someone inappropriately or detain them if justice does not militate towards that, because it is so offensive to our system of justice and our system of democracy, our legal justice system, to detain people pretrial. It is only in

the most extraordinary of circumstances.

So I very much [indiscernible] when you say that the Government has not met its elements of the crime. I find this frankly to be the weakest argument that you've made, Mr. Smith. I think the other ones, some of them, are quite compelling, thinking about the *Lemon* decision in particular and your first argument. Here, I just can't get my arms around it, Mr. Smith.

And so I don't want to go through a back-and-forth. I'll just tell you how I ruled, and you're welcome to file on the papers with me or with Chief Judge Howell how, if anything else, he had knowledge that this area is of special significance. That was the reason they were there on January 6th at the very hour that the Electoral College --

MR. NICHOLAS SMITH: Your Honor, I hate to interrupt you; but just to be clear, the designation of "special significance" under 1752 has to be made. And I think it's a stipulation that has been made in this case. So "special significance" is not colloquial; it's actually a designation that's been made by some government entity. And I think there's actually been reporting that there was some [indiscernible] or anger that these events on the 6th had not been so designated an event of special significance.

So that's the reason we're pointing that out, your

Honor, not to show that the Defendant had knowledge that this was an event of special significance, generally speaking, but that the government in fact had not designated this event as an event of special significance; and therefore, 1752(c)(1)(C) does not apply here on its face.

So I think that's the argument we're making, your Honor.

So it appears that for the status of 1752(c) in this case, the Government has to allege that Mr. Griffin had the knowledge when he entered this area that an individual protected by the Secret Service, who I understand is not members of Congress, was present in the area where he entered, your Honor.

So I don't think this --

THE COURT: I understood your argument.

MR. NICHOLAS SMITH: This is an issue that's not really [indiscernible] on in the general allegations of either the complaint or, you know, general understanding or knowledge of the event that took place. I've never seen the Government's position on how they [indiscernible] by the statute. This is not a general argument about whether it's appropriate to cross a barricade or whether there might be some other infraction of DC law. This is a question about whether or not 1752(c) has been satisfied.

And it's clear, I think, if your Honor looks at

the charging statement, that there is no allegation that the Defendant knew he entered an area that was covered by 1752(c)(1)(A), (B) or (C).

So just to be absolutely clear, your Honor, that's the argument we're making.

THE COURT: Understood.

I think, as I stated before, I'm not going to --

Ms. Iyengar, I don't need to hear from you.

I think if you want to brief these issues for the preliminary hearing, that's totally fine. I think that there's not case law that indicates the definition or, you know, whether or not this is covered.

I understand you're saying it was not invoked as a special event. I think the argument could be made by the Government -- arguably, it's constructive -- but it is irrelevant to me because, as I've indicated, I think that there is no doubt in my mind, in fact, in anyone's mind, that there was a person protected by the Secret Service who was in that building, which is the Vice President of the United States of America. It is well-known. In fact, again, the reason for the protest was to disturb and stop the Vice President from certifying the results of the Electoral College.

So this is not something which normally is relegated to a civics class that few people would know. In

fact, it was an international news story.

So I think that there is a simple-enough basis in fact from just mere common knowledge, let alone the knowledge of, again, why was the Defendant there at that date and time? It was by his own words to stop the Chinese theft of the election. Again, I'm not sure what that means. But as I understand from the Government it's his statements, his words.

And so how would that stop [indiscernible] from the Vice President, which again, it's true that there was no inquiry upon the Defendant if he knew the Vice President was protected by the Secret Service. But I think that is a reasonable inference that can be made. The Government can ask that, and I can order that, that there be judicial notice taken of that. So I think that answers that.

In terms of the blood coming out of the Capitol, I think you make the argument that that didn't happen. Right? And that's great. I think we all agree that he did not return. That is certainly something everyone agrees is to his benefit.

However, I don't credit him for that. He said it after. If before January 6th he said those things, it would still be incredibly troubling during January 6th. But after January 6th, he continued to make statements about what would happen and how what happened on the 6th was -- you

know, that the job was left undone. Right?

So in my mind, when he made those statements, as inflammatory as they are, and considering the previous statements he makes, to me the only reason he did not return, I can infer -- and that's all I can ever do, is infer from the facts -- is because the National Guard was invoked, the Mayor brought and called for support from the National Guard and it was then placed around the Capitol.

The reason that there was no Second Amendment rally, as he indicated, was because it was physically impossible. Half the bridges to Washington, DC, were literally closed. People could not get in. The Metro was shut down. This was a war zone. As such, the fortification by the National Guard and by the government precluded any such event from happening.

But I don't give him credit for that. He said that he was going to do it. And again, that just demonstrates a propensity for violence, because I'm not only looking at violence; I'm looking at whether or not he believes essentially in the rule of law. And my concern is that, based on his statements and his actions, he's not [indiscernible] the *Lemon* case. I'll leave it for the pleadings.

I understand that you believe that this is core political speech, being able to say the things that he said.

I think Ms. Iyengar would [indiscernible] and certainly plenty of people, that saying the only good Democrat is a dead Democrat or the blood running out of the Capitol Building, that that is not. There are limits on all rights, on the First through the Tenth of the Amendments and all that are in the Constitution, as many others.

That's in addition to his actions. So this is not speech alone. Speech here motivates my understanding of what his intent was. What was he trying to do on January 6th? And the Government alleges that this was an attempt to overthrow the government, to stop the lawful progress of the democratic process of which the founders had established.

And his statements seem to corroborate that he viewed this as an illegitimate government that he had to take by any means necessary, including violence, to stop, which means to me, I believe, as there continue to be conditions of release that require him to come and show up before me, that he won't listen to those conditions because he may ultimately decide that those conditions are part of a flawed system that he must go by any means to overthrow and disrupt.

And so for those reasons, I don't think this is political speech. It is far from it. These are actions that were taken that are far outside his First Amendment rights.

For those reasons, I would say I find that detention is appropriate and we will have a preliminary hearing on January 8th -- I'm sorry -- February 8th, as discussed. And at that time, if you want to move to dismiss, I would ask that you file pleadings beforehand in terms of why you think the elements have not been met. I think it would be helpful, frankly. Those are not well-trod areas of law. There is a dearth of case law on much of this. And I think that both Mr. Smiths make very [indiscernible] legal arguments. And so it's an opportunity to hear more about those.

And perhaps there will not be a finding of probable cause. I don't know. We'll have to wait until we get there.

Ms. Iyengar, anything from the Government's perspective?

MS. IYENGAR: No, your Honor.

THE COURT: Thank you.

Mr. -- I'll go back to Mr. Nicholas Smith, although it looks like Mr. David Smith is going to speak. Either one.

MR. DAVID SMITH: Judge, I just have a question for you.

THE COURT: Sure.

MR. DAVID SMITH: I've never done a Zoom hearing

before, believe it or not, in the court. I'd like to order the transcript of this hearing. Can you --

THE COURT: Ms. Lavigne-Rhodes will follow up with you offline. She can help you. Is that right, Ms. Lavigne-Rhodes?

THE COURTROOM DEPUTY: Absolutely.

THE COURT: She's the best. She can do anything. She'll follow up with you via email to confirm your ability to get the rush transcript.

MR. DAVID SMITH: Is that your courtroom deputy?

THE COURT: She's my boss, my inspiration. But yes. She's also my courtroom deputy.

MR. DAVID SMITH: Great. Okay. Should we call her or email her?

THE COURT: She'll email you, if that's all right, Mr. Smith.

MR. DAVID SMITH: Yes. We'd like to order it as soon as possible in order to have it available for any future court proceeding.

THE COURT: I see the court reporter furiously typing away. So I'll know that she will -- they'll be able to coordinate your getting that, if not today, immediately.

MR. DAVID SMITH: Thank you so much.

THE COURT: Mr. Nicholas Smith, anything else from your end?

MR. NICHOLAS SMITH: Nothing else. Thank you for the explanation, your Honor. Thank you.

THE COURT: Of course. Yes. Thank you both.

Thank you, everyone.

Mr. Griffin, as I said, I know this is obviously not the result you were hoping to hear. But the legal process will continue. You'll have your appeal. You'll have the hearing upcoming. So we'll go forward with this case and you'll continue, as I said, to be viewed to be innocent because that is what you are under the eyes of the law.

So thank you all. To the parties, thank you for your briefing. Have a good evening.

MR. DAVID SMITH: Thank you.

(Proceedings concluded.)

CERTIFICATE

I, LISA EDWARDS, RDR, CRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings produced to the best of my ability.

Dated this 2nd day of February, 2021.

/s/ Lisa Edwards, RDR, CRR
Official Court Reporter
United States District Court for the
District of Columbia
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FD-302 (Rev. 5-8-10)

FEDERAL BUREAU OF INVESTIGATION

Date of entry 01/12/2021

On 11 January 2021, SAs David Gabriel and Matthew Warren Ray interviewed Matt Struck, phone number 303-875-8926, by telephone. After being advised of the identities of the interviewing Agents and the nature of the interview, Struck provided the following information:

Struck does media work for Cowboys 4 Trump (variant Cowboys For Trump) and traveled to Washington, D.C. with Couy Griffin (Couy) for the 6 January 2021 rally. Struck met Couy at a previous rally in support of Mike Flynn, but Struck actually resides in Colorado. For their trip to Washington D.C., Struck drove down and linked up with Couy in New Mexico. They then traveled to DC by road with the Women for America First group.

The men believed there would be an opportunity for Couy to lead a prayer in DC based on a vision another individual had told them about at a rally. The purpose of the rally was to express dissatisfaction with the 2020 U.S. Presidential Election results. The mood of the crowd was more of calm disappointment than violent anger. Many in the crowd were disappointed in Vice President Mike Pence in particular.

After the rally, the men moved towards the Capitol and saw people "where they shouldn't be," pushing past barriers and up onto the platform/deck out in front of the Capitol. They saw a man up on a wall "speaking the gospel" with a loudspeaker and believed he was saying to "step on the mic," which aligned with Couy's reason for being there. However, the individual was actually saying "step on the bike" encouraging people to use a bike to summit the wall and get closer to the building. Struck and Couy climbed up the wall and onto the patio. There were barriers and fences and scaffolding that many people were climbing over.

Closer to the Capitol was a man on a megaphone telling people to "move forward patriots." The mood still felt like a protest, and they did not feel

Investigation on 01/11/2021 at Las Cruces, New Mexico, United States (Phone)

File # 9E-AQ-3369565, 176-WF-3366759 Date drafted 01/12/2021

by DAVID S. GABRIEL, Matthew Warren Ray

like the crowd would "terrorize" people. People around them were scaling additional walls, but Couy decided they would not do that. Then, a door opened which gave them access to the top of the stairs and the outside deck of the Capitol via a temporary staircase. Couy got on the wall to face the crowd and had a good vantage point. Someone gave him a bullhorn and he was able to lead a prayer. They were completely unaware of what was going on inside the building, and stayed up on the deck for about 1.5 hours. They left unprompted and smelled pepper spray in the air.

Most of the crowd seemed like normal "Trump rally crowd" but closer into the Capitol were guys with gear and backpacks who looked like they were "ready for something" and were fit like "stunt men" or "veterans." Struck did not see these kinds of people at the initial rally. Struck has footage from the outside of the building, but since he and Couy did not enter, they could not provide any footage of the interior. While on the deck, Struck could hear people yelling "that's Antifa" and encountered a guy who he claimed had stolen a police officer's gas mask. This individual is also on the footage.

Struck looked back at the door and saw a big mob scene pulling police shields out. At one point a two-story ladder materialized in the crowd, and a big gallon-sized tear gas container was also encountered.

Struck and Couy have not encountered any outreach from radicals. Their only real contact has been Annie Cramer (variant Andy Cramer) from March for Trump. They stay away from Proud Boys and militia-types, preferring to support law enforcement.

Struck is not planning to go to DC with Couy and is not attending the Santa Fe rally. Struck is aware of where the line between free speech and threats are, and was concerned that some of Couy's recent comments were borderline inappropriate. Facebook has frozen the Cowboys 4 Trump Facebook account for "spamming." Struck's phone GPS was on for the duration of the trip and can show where they were during the riot. They did not have malicious intent, and might have only committed some "minor trespassing" onto the steps of the Capitol. Struck offered to provide all video footage he had taken.

9E-AQ-3369565

(U) Interview of Cowboys 4 Trump

[Agent Note: Struck provided a drop box link to this media later on 11 January 2021. This media will be serialized separately.]

FD-302 (Rev. 5-8-10)

FEDERAL BUREAU OF INVESTIGATION

Date of entry 01/16/2021

On 16 January 2021, SA David Gabriel and SSRA Ryan Jackson conducted a telephonic interview with Couy Griffin, telephone 505-235-9239. After being advised of the identities of the interviewing agents and the nature of the interview, Griffin provided the following information:

Griffin is currently traveling by road to Washington, D.C., and has left the state of New Mexico. Griffin did not provide a current location. Griffin believes he will return to New Mexico on the 23rd or the 24th of January.

Griffin does not know Facebook user Murray Zuritsky, who made online threats against him. Griffin and Otero County have been inundated with threats, and part of Griffin's reason for traveling is because of the threats made against him. Griffin's home address, 52 Dusty Lane, has been released on the Internet many times. Griffin is the only current resident at this address, so there is no immediate physical danger from threatening parties to anyone at his home while he travels.

Griffin recommended SAs contact Pamela Heltner, the Otero County Manager, for more information on the threats. Griffin has some threat information printed out in his office, and gave agents verbal consent to enter his office with assistance from Heltner to gather this information.

Investigation on 01/16/2021 at Las Cruces, New Mexico, United States (Phone)

File # 266H-AQ-3369565, 176-WF-3366759-GRIFFIN, 176-WF-3366759 Date drafted 01/16/2021

by DAVID S. GABRIEL