

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

UNITED STATES OF AMERICA

Complainant,

v.

KELLY MEGGS

*(Styled as USA v. Thomas Edward Caldwell
incorporating cases against multiple Defendants)*

Defendant

Criminal Case No.

1:21-cr-28-8-APM

Assigned to the Honorable
Amit Mehta, District
Court Judge

**KELLY MEGGS' RECONSIDERATION OF MOTION TO REMOVE THE
SENSITIVE DESIGNATION OF CERTAIN VIDEO**

COMES NOW the Defendant Mr. Kelly Meggs, by counsel, and moves the court to reconsider its Minute Order of November 24, 2021, upon his motion pursuant to Paragraph 9 of the Protective Order for an order directing the Government to remove sensitivity designations to publicly release one or more video(s) produced under a Protective Order.

First, the Court must have failed to notice in the Defendant's Motion by Kelly Meggs' counsel:

CERTIFICATION OF CONSULTATION I hereby certify that – even though the matter has been before the Government in USA v. Ryan Nichols since November 1, 2021, I sent a copy of the Memorandum of Law to the counsel in both USA v. Caldwell and USA v. Ryan Nichols this morning on November 23, 2021

Unfortunately, the Government declined to discuss the matter throughout the entire day on November 23, 2021, even though the prosecution has been fully aware of this issue since November 1, 2021, when Ryan Nichols filed his motion for release from detention largely based

upon the video being withheld from the arched tunnel entrance to the Capitol.¹

The Court stated that:

The motion filed is entirely silent as to whether counsel made any "good faith" effort to resolve the dispute now presented

But this is clearly a mis-statement of the record. The motion is not silent on this point. Thus on the basis stated by the Court, the Court should consider, hear, and decide the motion.

Secondly, the Court has not seemed to notice that the rampant flood of publicity from the Government and the Congress – the Congress being the actual complaining witness of this prosecution along with the U.S. Capitol Police – will require a transfer of venue of this case from the affected jury pool of the District of Columbia and likely the recusal of all judges who have made public condemnations of January 6 protestors while other Defendants are still awaiting trial with cases unresolved.

Third, the Court determined by Minute Order that:

The security footage described has no apparent relevance to the charges against Mr. Harrelson or Mr. Meggs,

However, lacking in candor, the U.S. Attorney for the District of Columbia has steadfastly failed and refused to identify what exactly are the charges against Mr. Harrelson and/or Mr. Meggs or identify what is actually relevant to the threadbare, ambiguous, poorly-worded Counts against them.

Third, on the contrary, the Government is telling the public through the news media, such

¹ Ryan Nichols is also filing the same motion for removal of the designation within the case of USA v. Ryan Nichols.

as CNN, that the conduct of the Oath Keepers and the Proud Boys

See, “Dramatic Capitol riot videos used in court tell a harrowing story ,” video embedded in CNN’s website report, Tierney Sneed, US Capitol riot judges step up as the conscience of democracy while lawmakers squabble, CNN, August 13, 2021, accessible at: <https://www.cnn.com/2021/08/13/politics/judges-riot-court-describe-january-6-chilling-disgrace-tyranny/index.html>

Therein, CNN reports "The Justice Department is using this video evidence to help show that the groups worked together." The video is publicly released. And it portrays Oath Keepers in their distinctive vests yet falsely calls them Proud Boys. (That is, the Justice Department, according to CNN, not CNN, is calling Oath Keepers wearing their signature vests Proud Boys, in order to claim that everyone was working together on January 6, 2021.)

Thus the Government is polluting the jury pool with claims that what the Oath Keepers did (though this is not alleged in the Indictment) *IS RELEVANT* – contrary to the Court’s conclusion in the Minute Order – to the confrontation at the arched entrance portrayed in the video in question.

If the Government were not playing hide and seek with what the Oath Keepers are being charged with, then perhaps we could share the Court’s determination that

The security footage described has no apparent relevance to the charges against Mr. Harrelson or Mr. Meggs,

But since we do not know what the Government thinks is relevant or not, we cannot merely assume the Court’s evaluation to be what the Government has in mind.

On the other hand, Third, if the Court has ruled that by its Minute Order that:

The security footage described has no apparent relevance to the charges against Mr. Harrelson or Mr. Meggs,

then Kelly Meggs will certainly stand on that ruling for a motion in limine at trial.

Fourth, the Fifth Superseding Indictment is completely devoid of any crime committed by Harrelson or Meggs. That is because the Oath Keepers in this case are being accused entirely of what other people did whom they do not know and did not know of until after the events of January 6, 2021, were over and they observed news media reports.

As presented in both the Indictment and the evidence, no doors or windows were damaged or broken anywhere in the vicinity of where the Oath Keepers Defendants were pushed through open doors by the crowd behind them. No such damage is alleged by the Grand Jury. No such damage is revealed in the Government's discovery disclosures.

Video recordings produced by the Government, and known to the Government, show that a police officer allowed the Oath Keepers to peaceably enter, making no attempt to dissuade them, as shown in the video evidence. There were no verbal instructions or commands denying entrance, only that the crowds should be careful not to harm anything, which they did not.

Since the U.S. Capitol is an overwhelmingly and unavoidably public building – with gift shops, public cafeterias² and coffee shops / grills and public galleries for the viewing by the public of the House and Senate while in session, the acceptance by U.S. Capitol Police of peaceful visitors peaceably visiting the U.S. Capitol with no discouragement by USCP officers cannot sustain the prosecution.

² “Eat with the staffers who run Congress (Review of **Longworth Building Cafeteria**),” TRIP ADVISOR, August 23, 2016, (“Unlike the Senate cafeterias and dining rooms where your rank and title gain admittance, anyone is welcome at the Longworth. Democracy in action!”), https://www.tripadvisor.com/ShowUserReviews-g28970-d4168517-r409328710-Longworth_Building_Cafeteria-Washington_DC_District_of_Columbia.html (In fact, while the Senate Dining Room may at times require a minimal invite, the House and Senate cafeterias are all open to the public.)

See, *USA v Theodore F. Stevens*, No. 1:08-CR-00231-EGS, U.S. District Court for the District of Columbia, Memorandum and Opinion by Judge Emmet Sullivan, (Docket No. 257, December 22, 2008); Anna Stolley Persky, "A Cautionary Tale: The Ted Stevens Prosecution," *Washington Lawyer* [publication of the D.C. Bar.], October 2009.³

Lacking in candor, the Government asserts that the Capitol is “secured” – not closed—24 hours a day. The National Air and Space Museum is “secured 24 hours a day” yet welcomed 4.5 million visitors from around the world in 2019.⁴ The repeated assertion seeking to induce the reader to believe that the Capitol is not a public building is simply dishonest. The Capitol is not a top-secret missile base.

Therefore, the only way that this case can be maintained at this point is if the Oath Keepers’ peaceful conduct in walking in a line – dishonestly called a “military formation” or “stack,” that is just people walking in a line – **IS** related to the violent conduct of others at the arched tunnel as viewed in the video in question.

IT MATTERS if the alarming scenes of around 100 protestors running amok at other places out of a 751 foot building the size of a small ocean-going cruise ship will be falsely and dishonestly used against the Oath Keepers who did not commit any such violence.

Yes, it is like suggesting that on a 751 foot long cruise ship a drunken brawl in the afterdeck bar somehow implicates dining room passengers 600 feet away several decks above. **Yet that is the Government’s case against Kelly Meggs.** Judge Emmet Sullivan’s words ring

³ <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/october-2009-ted-stevens.cfm>

⁴ Media Fact Sheet, National Air and Space Museum, <https://www.si.edu/newsdesk/factsheets/national-air-and-space-museum>

down the years from the bungled prosecution of U.S. Senator Ted Stevens. The prosecution has an affirmative, immediate, present-tense (not later) duty to dismiss the case – NOW.

If the Oath Keepers being pushed into an open door by the crowd behind them is NOT related to any of the violence perpetrated by others, than this case must be dismissed – now – and the Defendants immediately released from custody.

See, *USA v Theodore F. Stevens*, No. 1:08-CR-00231-EGS, U.S. District Court for the District of Columbia, Memorandum and Opinion by Judge Emmet Sullivan, (Docket No. 257, December 22, 2008); Anna Stolley Persky, "A Cautionary Tale: The Ted Stevens Prosecution," *Washington Lawyer* [publication of the D.C. Bar.], October 2009.⁵ ⁶

Yet based on this determination by the Court's Minute Order, the charges against Kelly Meggs and Kenneth Harrelson must be dismissed and the case closed, and Kelly Meggs and Kenneth Harrelson must be ordered immediately released from custody.

The complaining witnesses (agencies) in this case are the U.S. Capitol Police and the Congress. However, the Chief of the U.S. Capitol Police has already sworn in testimony under oath before the U.S. Senate Rules Committee and Senate Homeland Security and Governmental Affairs Committee, February 23, 2021.

Therefore, Defendant Kelly Meggs nor Kenneth Harrelson did not obstruct, delay, or hinder the official proceeding of the Joint Session of Congress for hearing disputes about and counting Electoral College votes, nor in any way contribute to or cause the same.

⁵ <https://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/october-2009-ted-stevens.cfm>

⁶ Note: According to the Internet archive "Way Back Machine" the D.C. Bar deleted this article from the internet in July 2020.

And neither did Kelly Meggs nor Kenneth Harrelson damage or attempt to damage any property pursuant to 18 U.S.C. 1361.

“So the assault on the Capitol is not what caused the evacuations of those buildings? The discovery of those pipe bombs is what caused the evacuations of those?” asked Republican Oklahoma Sen. James Lankford.

“That is correct, Sir,” said [then U.S. Capitol Police Chief] Sund.

<https://www.youtube.com/watch?v=vtzwYAh1o30&t=2510s> starting at time 41:45

The Defendants cannot be convicted under the standard of guilty beyond a reasonable doubt when the head of the complaining agency has testified sworn under oath, subject to the penalty of lying to Congress, that **“So the assault on the Capitol is not what caused the evacuations of those buildings?” “That is correct, Sir,” said Sund.**⁷

⁷ Kevin Johnson, "Pipe bombs placed at RNC, DNC night before Capitol riot; feds up reward to \$100,000," USA TODAY, January 29, 2021, accessible at: <https://www.usatoday.com/story/news/politics/2021/01/29/fbi-increases-reward-info-capitol-pipe-bombs-100-000/4309766001/> It was the Discovery of Pipe Bombs “[t]hat resulted in the evacuation of two congressional buildings, the Cannon House Office Building, as well as one of the Library of Congress buildings. So it took extensive resources,” then-Capitol Police Chief Steven Sund said in a joint hearing before the Senate Rules Committee and Senate Homeland Security and Governmental Affairs Committee, February 23, 2021.

“So the assault on the Capitol is not what caused the evacuations of those buildings? The discovery of those pipe bombs is what caused the evacuations of those?” asked Republican Oklahoma Sen. James Lankford.

“That is correct, Sir,” said Sund.

<https://www.youtube.com/watch?v=vtzwYAh1o30&t=2510s> starting at time 41:45

This is not merely sworn testimony under oath. It is the testimony of the complaining witness (agency) the U.S. Capitol Police.

It is also “reasonable doubt.”

It is also public testimony broadcast to the public over C-SPAN.

While the Government pours its misleading arguments on the public and especially the D.C. jury pool like Niagra Falls, they are withholding the evidence that they know destroys their prosecution case. (Remember that Congress is the complaining witness, and the torrent of outright lies from Members of Congress directly taint this prosecution to the jury pool.)

At 12:52 PM, on January 6, 2021, pipe bombs – apparently actual, live, dangerous bombs, not models – were discovered outside of the headquarters of the Republican National Committee, which is the block diagonally from the Cannon House Office Building and across from the Capitol South subway station, and at 1:50 PM at the headquarters of the Democrat National Committee, which is about 2 blocks further to the South at 430 South Capitol Street.



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That was at 1:19 PM. “LOC” refers to the Library of Congress which is across the street from the U.S. Capitol grounds. The Madison building is to the South side of the Capitol across Independence Avenue. It is next door to the House Cannon Office Building also across

⁸ https://twitter.com/SecretsBedard/status/1346884057276305411?ref_src=twsrc%5Etfw

Independence Avenue from the U.S. Capitol and its grounds. The GOP Capitol Hill Club, an office townhouse, is directly attached to and next door to the Republican National Committee headquarters townhouse. Paul Bedard is a veteran mainstream journalist.



Chris Marquette ✓
@ChrisMarquette_

...

Capitol Police alert: EVACUATE: Madison due to Police Activity.

- * Remain calm and move in a safe manner to the exits.
- * If nearby, take annunciators on the way out.
- * Close doors behind you but do not lock.
- * Proceed immediately to your designated assembly area

1:17 PM · Jan 6, 2021 · Twitter Web App

33 Retweets 3 Quote Tweets 31 Likes

9

Before the tweet at 1:19 PM, buildings were already being evacuated because of reports *of pipe bombs*. Those reports of pipe bombs -- primarily -- caused the ultimate evacuation of the U.S. Capitol at 2:18 PM.

The U.S. Capitol Police and the Congress are in effect the complaining agencies or complaining victims whom the U.S. Attorney's Office represents in these criminal prosecutions. However, it is admitted by then-Capitol Police Chief Steven Sund that the pipe bombs -- not the Defendants here -- were the primary factor triggering the U.S. Capitol Police to advise the presiding officers of the House and Senate to recess.

⁹ https://twitter.com/ChrisMarquette_/status/1346883510045466626?ref_src=twsrc%5Etfw

Because Rule I, Clause 12(b) was invoked to recess the Joint Session through the U.S. Capitol Police advising the presiding officer to recess, Chief Sund's statement is authoritative, conclusive, and final as to why he advised the presiding officer to recess the official proceeding.

Therefore, if as the Court determined by Minute Order that:

The security footage described has no apparent relevance to the charges against Mr. Harrelson or Mr. Meggs,

Then the case must be immediately dismissed. There are no allegations against the Defendants that constitute any crime, except possibly the same trespassing charge for which anti-Kavanaugh protestors who disrupted the U.S. Senate Judiciary Committee confirmation hearings in 2018 were fined \$35 and released within 5 hours.

Yet the jury pool has already been told that these Defendants are guilty. See:

<https://www.cnn.com/2021/08/13/politics/judges-riot-court-describe-january-6-chilling-disgrace-tyranny/index.html>, attached as Exhibit A but imperfectly presented by website.

See, <https://www.cnn.com/2021/10/28/politics/dc-federal-judge-january-6-cases/index.html>, attached as Exhibit B but imperfectly presented by website.

See, also, Alex Pappas, "Kavanaugh protesters arrested at Capitol, after thousands march on Supreme Court," Fox News, October 4, 2018, attached as Exhibit C, accessible at:

<https://www.foxnews.com/politics/kavanaugh-protesters-arrested-at-capitol-after-thousands-march-on-supreme-court>

Thousands of liberal protesters, fired up by Massachusetts Democratic Sen. Elizabeth Warren, marched up Capitol Hill on Thursday to protest Brett Kavanaugh's nomination to the Supreme Court and put pressure on the handful of undecided senators who will determine whether Kavanaugh gets confirmed in the coming days.

By Thursday afternoon, Capitol Police began arresting hundreds of protesters inside the Hart Senate Office Building who raised their fists

and loudly started chanting “Kavanaugh has got to go.” Arrests were made after protesters began sitting down in the building's atrium, refusing to cooperate with law enforcement.

In all, some 302 protesters were arrested and charged with unlawfully demonstrating in Senate office buildings Thursday, police said.

See also Exhibit D and E, attached.

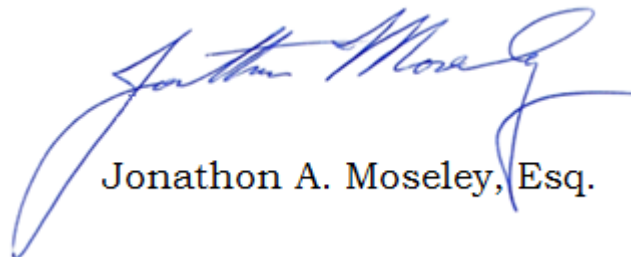
The Defendants are not alleged to have committed any other crime, unless the standards are so loose and due process so old school as to allow the Defendants to be considered guilty of what other people did on the other side of the 751 foot building.¹⁰

CONCLUSION

WHEREFORE, the Court should order the designation of videos from within the compilation of the Ryan Nichols’ defense counsel removed and the video publicly released, and order the case to be dismissed.

Dated: November 25, 2021

RESPECTFULLY SUBMITTED
KELLY MEGGS, *By Counsel*



Jonathon A. Moseley, Esq.

USDCDC Bar No. VA005
Virginia State Bar No. 41058

¹⁰ "Thousands storm Capitol as GOP takes action," Wisconsin State Journal, March 10, 2011, updated February 19, 2015, (“Thousands of protesters rushed to the state Capitol Wednesday night, forcing their way through doors, crawling through windows and jamming corridors”), accessible at: https://madison.com/wsj/news/local/govt-and-politics/thousands-storm-capitol-as-gop-takes-action/article_260247e0-4ac4-11e0-bfa9-001cc4c03286.html

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2021, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following CM/ECF participants. From my review of the PACER / ECF docket records for this case that the following attorneys will receive notice through the ECF system of the U.S. District Court for the District of Columbia.

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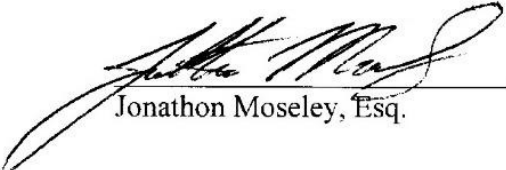
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