UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH OF ONE APPLE IPHONE SMARTPHONE THAT IS CURRENTLY BEING CARRIED ON THE PERSON OF [redacted], UNDER RULE 41	**Case No. 21-sw-253 (ZMF)** **UNDER SEAL**

MEMORANDUM OPINION

The United States filed an application for a warrant to seize and search a specified cellphone located outside the District of Columbia in connection with the investigation into the January 6, 2021 United States Capitol Breach. *See* Appl. and Aff. for Search/Seizure Warrant under Rule 41, ECF No. 1 [hereinafter "Appl."]. Unlike most search warrant applications submitted to this Court—which rely on the Court's authority to issue warrants for property in the district—the instant Application relies on the Court's authority to issue an extraterritorial warrant for property (the "Target Device") in connection with a domestic terrorism investigation. *See* Appl. at 13.[1] For the reasons stated below, the Court granted the government's request. *See* Search and Seizure Warrant, ECF No. 4.

I. BACKGROUND

A. The Capitol Breach

Since January 6, 2021, the government has been investigating those involved in halting the congressional certification of the 2020 Presidential Election, including those who assaulted law enforcement officers during the attempts to restore order.

[1] All citations to documents on the Court's docket are to the pagination added by the electronic filing system.

B. Facts Specific to the Application and Probable Cause

In the instant Application, the affiant—an agent with the Federal Bureau of Investigation ("FBI") "assigned to a squad that is responsible for investigating Domestic Terrorism cases," Appl. at 11–12—proffered evidence that members of an organized group[2] ("the Group") engaged in significant planning prior to descending on Washington, D.C., and breaching the Capitol building, *see id.* at 6–23.

Specifically, the affiant stated that "there is probable cause to believe that violations of []18 U.S.C. §§ 371 (conspiracy); 231 (civil disorder); 1001 (false statements); 1361 (destruction of government property); 1512(c)(2) (obstruction of Congress); 1512(c)(1) (obstruction of justice – destruction of evidence); 1752(a) (unlawful entry on restricted buildings or grounds); 2384 (seditious conspiracy); and 40 U.S.C. § 5104(e)(2) (violent entry, disorderly conduct, and other offenses on Capitol grounds) ('the [Target] Offenses') have been committed by" the owner of the Target Device ("Device Owner"), other named individuals, "and others known and unknown." *Id.* at 12. The affiant further stated that "[t]here is also probable cause to believe that evidence of these crimes, to include the identities of co-conspirators, evidence of planning and coordinating these offenses, and communications in furtherance of the conspiracy discussed herein, is contained on the [Target Device]." *Id.*

Based on these and other facts, the affiant contended that such evidence "may include not only videos, photographs, geolocation data, and messages that constitute evidence of [the Device Owner's] involvement in the offenses under investigation, but it may also contain evidence sent by [the Device Owner's] coconspirators that are no longer available on their phones because of

[2] The name of the organized group is known to law enforcement and was included in the Application.

their efforts to destroy this evidence." *Id.* at 24. At the time the government submitted the Application, the Target Device was located in Texas, *see id.*, which feels like "a galaxy far, far away," Star Wars Series (Lucasfilm Ltd.), compared to the undersigned's typical purview of Washington, D.C.

II. DISCUSSION

A. Evaluating Venue Under Rule 41(b)

Rule 41(b) generally authorizes a judge "to 'issue a warrant to search for and seize a person or property located *within the district*,'" *United States v. Thorne*, 548 F. Supp. 3d 70, 116 (D.D.C. 2021) (citing Fed. R. Crim. P. 41(b)(1)) (emphasis added). However, Rule 41(b) also outlines five exceptions that expand a judge's authority to issue extraterritorial warrants.[3] *See id.* at 116–17. One such exception comes from the USA PATRIOT Act, which amended Rule 41. Section 219 of the USA PATRIOT Act of 2001, Pub. L. No. 107–56, 115 Stat 272, empowers a judge to issue an extraterritorial warrant "in an investigation of domestic terrorism or international terrorism" so long as "activities related to the terrorism may have occurred" in the issuing district. Fed. R. Crim. P. 41(b)(3).

Congress previously defined international terrorism. *See* 18 U.S.C. § 2331(1). And criminalized it. *See* 18 U.S.C. § 2332b.

The USA PATRIOT Act amended § 2331 to define domestic terrorism as activities that:

> (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
>
> (B) appear to be intended—

[3] Section 2703 of the Stored Communications Act provides a sixth exception, allowing "a court of competent jurisdiction" to issue an extraterritorial search warrant for wire or electronic communication stored in an electronic communications system or remote computing system. 18 U.S.C. § 2703(a), (b). A "court of competent jurisdiction" includes any district court that "has jurisdiction over the offense being investigated." 18 U.S.C. § 2711(3)(A)(i).

> (i) to intimidate or coerce a civilian population;
> (ii) to influence the policy of a government by intimidation or coercion; or
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
>
> (C) occur primarily within the territorial jurisdiction of the United States.

18 U.S.C. § 2331(5). However, "there is no federal criminal provision expressly prohibiting 'domestic terrorism,' as the terms defining domestic terrorism are not elements of criminal offenses." *See* Peter G. Berris et al., Cong. Rsch. Serv., R46829, *Domestic Terrorism: Overview of Federal Criminal Law and Constitutional Issues* 1 (July 2, 2021). This left a Lard Lad sized donut hole in the statute. The government can obtain search warrants in an investigation of something that is not a crime. This is anathema to Rule 41, which is couched in terms of seeking "evidence of a crime," not intelligence gathering. Fed. R. Crim. 41(c)(1). Yet Congress chose to so fashion the law. The question then is what facts the government must establish to justify a search for which there is no crime and what limits—if any—exist in such searches.

1. Reason to Believe Standard

In a case of first impression, Chief Judge Howell considered what the standard of proof was to establish venue for extraterritorial searches pursuant to Rule 41(b)(2). *Thorne*, 548 F. Supp. 3d at 127. Chief Judge Howell concluded that the government must establish venue under a "reason to believe" standard. *Id.* "[T]he background constitutional policies that motivate the Rule, the legislative history of amendments to the Federal Rules of Criminal Procedure, and case law interpreting various provisions of Rule 41 all suggest that a flexible approach to interpreting this Rule is appropriate." *Id.* at 122. Chief Judge Howell rejected the actual knowledge and probable cause standards in favor of the lesser "reason to believe" standard because "Rule 41(b) is a venue

provision that imposes a procedural rather than a substantive, and a rule-based rather than a constitutional, requirement for obtaining a warrant." *Id.* at 125.

Chief Judge Howell's analysis of Rule 41(b)(2) applies equally to Rule 41(b)(3). There is no suggestion that the drafters intended Rule 41(b)(3) to require a different standard than Rule 41(b)(2). "Courts have a 'duty to construe statutes, not isolated provisions.'" *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)). And "[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984). Thus, the government must proffer sufficient facts to establish a "reason to believe" both that there is (1) "an investigation of domestic terrorism or international terrorism"; and (2) that the Court is in a district "in which activities related to the terrorism may have occurred." Fed. R. Crim. P. 41(b)(3). As explained below, the text of Rule 41(b)(3) suggests that the government need not carry a heavy burden in meeting these two requirements.

i. Investigation of domestic terrorism

First, there must be an "investigation of domestic terrorism." Fed. R. Crim. P. 41(b)(3). Neither statute nor case law defines this provision. However, guidance from the Attorney General notes that the FBI can open domestic terrorism investigations "if there is an articulable factual basis for the investigation that reasonably indicates that the group or organization may have engaged or may be engaged in, or may have or may be engaged in planning or preparation or provision of support for . . . domestic terrorism as defined in 18 U.S.C. [§] 2331(5) involving a violation of federal criminal law." U.S. Dep't of Justice, The Attorney General's Guidelines for Domestic FBI Operations 23 (2008), https://www.justice.gov/archive/opa/docs/guidelines.pdf.

ii. District in which activities related to the terrorism occurred

Second, Rule 41(b)(3) does not require that a terrorist attack or specific crime occur in the district in which a warrant is sought. Instead, it only requires that "*activities related to* the terrorism *may have*" taken place in the district. Rule 41(b)(3) (emphasis added).

While "activities" is not defined in Rule 41(b)(3), it is defined in the Racketeer Influenced and Corrupt Organization Act ("RICO"). RICO criminalizes "racketeering activities," which are defined "broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248–49 (1989) (discussing 18 U.S.C. § 1961(1)). Congress drafted the RICO statute broadly because its predecessor "was no longer satisfactory because criminal activity had expanded into legitimate enterprises." *Id.* at 248 (citing *United States v. Turkette*, 452 U.S. 576, 590–591 (1981)). Congress's "very generous definition of 'racketeering activity[]' acknowledges the breakdown of the traditional conception of organized crime, and responds to a new situation in which persons engaged in long-term criminal activity often operate *wholly* within legitimate enterprises." *Id.*

The scope of the term "activities" in Rule 41(b)(3) should be harmonized with the broad interpretation of the same term in RICO. First, the USA PATRIOT Act amended both Rule 41(b)(3) and RICO. Second, many of RICO's predicate activities are also crimes of terrorism and the statutes share similar goals. *See Eur. Cmty. v. RJR Nabisco, Inc.*, 783 F.3d 123, 124 (2d Cir. 2015) (The USA PATRIOT Act "amended RICO by adding to its list of predicates nearly 20 antiterrorism statutes . . . by adding those statutes to RICO's definition of 'racketeering activity[.]'" Thereafter, Congress added additional crimes to RICO, "nearly all of them relating to international terrorism[.]") (citation omitted). *Id.* Considering the statutes' shared goals, Congress's

amendment to Rule 41(b)(3) targeting "activities" related to terrorism should be read like RICO to cover both criminal and non-criminal activities.

The limitation to the broad expanse of "activities" is that they must be "related to" domestic terrorism. Thus, lawful activities occurring in district may be the basis for venue, but such lawful activities must have been related to domestic terrorism. For example, purchasing a phone is a lawful activity. Yet that could be a basis for venue if the phone was used in the planning or execution of domestic terrorism as defined by 18 U.S.C. § 2331(5).

Lastly, Congress required that the terrorism activities "*may have* occurred" in the district. Fed. R. Crim. P. 41(b)(3) (emphasis added). Thus, the government need not show that the activity actually occurred in district. *See id.* This last prong is a seemingly low threshold.

2. Reason to Believe Standard Met

A magistrate judge does not engage in an investigation of her own to determine if the government's claims are true. Rather, a magistrate judge "[i]s certainly entitled to rely on the agent's official status, his personal observation of the agent, and the oath administered to him by the magistrate in concluding that the affiant's assertions . . . were credible." *United States v. Harris*, 403 U.S. 573, 587 (1971) (Harlan, J., dissenting). For example, if an affiant asserts that bank records reveal a transfer of money between Account 1 and Account 2, the court—absent information to the contrary—will believe that the money was so transferred. Still, the Court is tasked with evaluating legal assertions made by the affiant. The affiant may assert that the money transferred between Account 1 and Account 2 support probable cause that the crime of money laundering occurred, but the judge herself must weigh the facts in the affidavit to decide whether she agrees with that conclusion. "[W]holly conclusory statement[s] . . . fail[] to meet [the Rule 41] requirement." *Illinois v. Gates*, 462 U.S. 213, 239 (1983).

The phrase "an investigation of domestic terrorism" requires a two-prong analysis. First, the Court must assess whether the government has opened and is engaged in an investigation of domestic terrorism. Here, the affiant who swore to the instant Application is "assigned to a squad that is responsible for investigating Domestic Terrorism cases." Appl. at 11–12. Further, the government indicated, including by invoking Rule 41(b)(3), that it is in fact investigating domestic terrorism here. *See* Government's Legal Mem. in Supp. of Appl. for Search Warrant, at 1, ECF No. 3 [hereinafter "Gov't's Mem."].

The analysis does not stop there. "It is axiomatic that federal courts are courts of limited jurisdiction, and as such are under a continuing duty to satisfy themselves of their jurisdiction before proceeding to the merits of any case." *Packard v. Provident Nat. Bank*, 994 F.2d 1039, 1049 (3d Cir. 1993). Thus, as to the legal conclusion that such investigation exists, the Court cannot simply take the affiant at her word. *See Gates*, 462 U.S. at 239. To determine whether the Application contains sufficient facts for the Court to conclude that there is "an investigation of domestic terrorism," the Court must evaluate the evidence proffered in the affidavit to determine whether there is "reason to believe" that the activities under investigation fall within the § 2331(5) definition of "domestic terrorism."

The affiant proffered evidence that members of the Group conspired to come to Washington, D.C., during the election certification process and encouraged others to do so. Appl. at 16–23. Indeed, the affiant stated that after the Presidential Election, the leader of the Group "began telling [the leader's] followers that the election was 'stolen' and that [the leader's] followers should not let this result stand." *Id.* at 21. The Device Owner also attended a meeting for the Group during which the leader of the Group stated, "[y]ou're from [the Group]. You got a responsibility and duty. You raised your freaking right hand. You swore that oath . . . you got to

fight." *Id.* Then, on January 6, 2021, members or associates of the Group invaded the Capitol building and proceeded through the halls of Congress, "travel[ing] north out of the Rotunda and attempt[ing] to enter the Senate wing of Congress, [until] they ran into a line of riot police who were guarding the Senate." *Id.* at 18. One of the Group members who breached the Capitol building stated "[w]e looked forward her" in response to a text from an acquittance stating he "[w]as hoping to see [Speaker Nancy Pelosi]'s head rolling down the front steps[.]" *Id.* at 18. In addition, while some members of the Group were forcing their way through the Capitol building, others were waiting outside of the District, ready to support those on the inside. *See id.* at 19. One member of the Group noted that the members of the Group outside of Washington, D.C., would "have all the firepower if things go massively sideways." *Id.*

Based on these facts, the Court concluded there was "reason to believe" that the "activities" under investigation fell within the § 2331(5) definition of "domestic terrorism." First, the storming of the U.S. Capitol "involve[d] acts dangerous to human life that are a violation of the criminal laws of the United States or of any State" in accordance with 18 U.S.C. § 2331(5)(A). An angry mob invaded the U.S. Capitol and injured/assaulted over 100 law enforcement officials. *See United States v. Pezzola*, 531 F. Supp. 3d 139, 143 (D.D.C. 2021). The mob contained thousands of "[c]rowd members [who] eventually forced their way through, up, and over Capitol Police barricades and . . . forced entry into the Capitol building by breaking windows, ramming open doors, and assaulting Capitol Police officers." *United States v. Caldwell*, No. 21-cr-28, 2021 WL 6062718, at *1 (D.D.C. Dec. 20, 2021) (citing Indictment, ECF No. 513). The government subsequently charged members and associates of the Group with "violation[s] of the criminal laws of the United States" related to these acts, including violations of 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 231 (civil disorder); 18 U.S.C. § 1001 (false statements); 18 U.S.C.

§ 1361 (destruction of government property); 18 U.S.C. § 1512(c)(1) (obstruction of evidence); 18 U.S.C. § 1752(a) (unlawful entry on restricted buildings or grounds); 18 U.S.C. § 2384 (seditious conspiracy); and 40 U.S.C. § 5104(e)(2) (violent entry, disorderly conduct, and other offenses on Capitol grounds). *See* 18 U.S.C. § 2331(5)(A) (domestic terrorism involves violations of criminal law).

Second, the actions of the Group "appear[ed] to be intended . . . to influence the policy of a government by intimidation or coercion." 18 U.S.C. § 2331(5)(B)(ii). As the joint session convened to certify the vote of the 2020 U.S. Presidential Election around 1:00 p.m. on January 6, 2021, members of the Group, amongst others, descended upon the U.S. Capitol to "create[ ] mayhem on Capitol grounds and interfer[e] with the Capitol Police, all in furtherance of the goal of disrupting Congress's fulfillment of its constitutional duty to certify the vote count of the Electoral College and thus interfering with—or even preventing—the peaceful transition of power." *United States v. Chrestman*, 525 F. Supp. 3d 14, 28 (D.D.C. 2021). Shortly after 2:00 p.m., as they forced their way into the Capitol building, "mayhem broke out inside the building, putting an hours-long halt to the electoral vote count while elected representatives, congressional staff, and members of the press hid in terror from the mob." *Id.* at 19 (citation omitted). Consequently, "[t]he joint session, and thus the constitutional ritual of confirming the results of the 2020 Presidential Election," was suspended until after 8:00 p.m. *Id.* "It cannot be gainsaid that the violent breach of the Capitol on January 6 was a grave danger to our democracy." *United States v. Munchel*, 991 F.3d 1273, 1284 (D.C. Cir. 2021).

Third, these acts "occur[red] primarily within the territorial jurisdiction of the United States" in accordance with 18 U.S.C. § 2331(5)(C). The Court thus "satisf[ied] [itself]," *Packard*,

994 F.2d at 1049, that this Application was brought pursuant to "an investigation of domestic terrorism," Appl. at 13.

B. Permissible Offenses and Scope of Search

1. Nexus between Crime and Scope of Search

Courts may only issue warrant to search for or seize:

> (1) evidence of a crime;
> (2) contraband, fruits of crime, or other items illegally possessed;
> (3) property designed for use, intended for use, or used in committing a crime; or
> (4) a person to be arrested or a person who is unlawfully restrained.

Fed. R. Crim. P. 41(c)(1)-(4). Most warrant applications relate to Rule 41(c)(1)-(3) (collectively "Evidence"). Typical search warrant applications establish by probable cause the existence of criminal activity (e.g., firearms and narcotics trafficking) and how the items the government is requesting to search (e.g., a home) and seize (e.g., guns and narcotics) are connected to that criminal activity. "General warrants of course, are prohibited by the Fourth Amendment." *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). Thus, there must be a nexus between the predicate crime and the scope of the warrant. *See id.* at 481–82 (warrant only authorized a search for evidence relevant to the crime in question, not other crimes); *United States v. Carey,* 172 F.3d 1268, 1272–73 (10th Cir. 1999). "[T]he scope of the search [or seizure is] thus circumscribed to evidence pertaining to [the predicate crime]." *Carey,* 172 F.3d at 1273. For example, a search warrant in a drug trafficking case would not allow for the seizure of child pornography. *See, e.g., id.* (seizure of child pornography outside scope of warrant); *United States v. Turner*, 169 F.3d 84, 88 (1st Cir. 1999).

The question is what limits—if any—Rule 41(b)(3) imposes on searching for Evidence of domestic terrorism for which there is no underlying crime. There are three possible answers. The

Court could authorize searches for Evidence of: (1) terrorism crimes that occur domestically; (2) any non-terrorism crime that relates to the acts of domestic terrorism; or (3) any crime, even if there was no relationship to the act of domestic terrorism. Option 1 is the most limiting, while Option 3 is the least limiting.

2. Option 1: Federal Crimes of Terrorism that Occur Domestically

Although domestic terrorism is not itself a crime, Congress has identified 57 "federal crime[s] of terrorism." 18 U.S.C. § 2332b(g)(5)(B). "Of those, 51 can be brought in both international and domestic terrorism cases (the remaining six are applicable only to international terrorism)." Eric Halliday & Rachael Hanna, *How the Federal Government Investigates and Prosecutes Domestic Terrorism*, Lawfare (Feb. 16, 2021), https://www.lawfareblog.com/how-federal-government-investigates-and-prosecutes-domestic-terrorism. The following is a brief description of those most utilized to prosecute domestic terrorists, *see id.*:

- 18 U.S.C. § 2332a criminalizes the unlawful use of or threat, attempt, or conspiracy to use a weapon of mass destruction against any person or property *within* the United States. Under this offense, the government prosecuted Timothy McVeigh for the Oklahoma City bombing, *see United States v. McVeigh*, 940 F. Supp. 1571, 1575 (D. Colo. 1996), and Glendon Crawford for conspiring to attack Muslim Americans with a radiation device, *see United States v. Crawford*, 714 F. App'x 27, 32 (2d Cir. 2017).
- 18 U.S.C. § 844(f)(2) criminalizes the use of or attempted use of "fire or an explosive" against the property of the "United States, or any department or agency thereof, or any institution or organization receiving Federal financial assistance," § 844(f)(1), that "directly or proximately causes personal injury or creates a substantial risk of injury to any person." § 844(f)(2).

- 18 U.S.C. § 1361 criminalizes the willful attack on or destruction of any United States property, or any of its departments or agencies. The government has charged numerous defendants in the Capitol Breach under this provision, *see, e.g.*, *United States v. Watkins*, No. 21-cr-0028, ECF No. 1; and sought pre-trial detention for such defendants based on § 1361 being a federal crime of terrorism under § 2332b(g)(5)(B), *see, e.g.*, *Watkins*, No. 21-cr-0028, ECF No. 42; *see also Pezzola*, 531 F. Supp. 3d at 148 (same); *Chrestman,* 525 F. Supp. 3d at 22 n.4 (D.D.C. 2021) (same).

Undoubtedly, Rule 41(b)(3) allows for searches related to these crimes of terrorism that occur domestically. To find otherwise would read Rule 41(b)(3) out of existence, as it would permit no searches. And "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, at 181–86 (rev. 6th ed. 2000)).

The Target Offenses include one crime of terrorism: 18 U.S.C. § 1361. Thus, Rule 41(b)(3) permits the extraterritorial search and seizure of Evidence related to this offense.

Given there was venue and authority for the Court to issue a warrant pursuant to this offense, the next question was probable cause. The government proffered evidence that during the Capitol Breach, "the Capitol suffered millions of dollars in damage," and that "the particular Capitol doors through which this [specific set of members or associates of the Group] (and other members of the crowd) breached were significantly damaged." Appl. at 15, 17. In addition, the Device Owner posted videos of the Capitol Breach on a social media account linked to the phone number for the Target Device. *See id.* at 25-26. Thus, there was probable cause to believe the

Target Device contained Evidence of an alleged willful attack on or destruction of United States property in violation of 18 U.S.C. § 1361.

3. Option 2: Crimes that Relate to the Domestic Terrorism Activities

Because domestic terrorism is not itself a crime, the government investigates and prosecutes domestic terrorism through a variety of non-terrorism statutes. *See* Berris et al., Cong. Rsch. Serv., R46829, Domestic Terrorism: Overview of Federal Criminal Law and Constitutional Issues 14–16 (July 2, 2021). For example, "[d]epending on where they occur and what they target, acts of domestic terrorism could conceivably run afoul of various federal criminal statutes that prohibit illicit conduct with respect to certain infrastructure or property." *Id.* at 26. As relevant here, these criminal statutes include violations of 18 U.S.C. § 1752 for certain conduct at restricted buildings or grounds and 40 U.S.C. § 5104 for unlawful activities at U.S. Capitol buildings and grounds. *See id.* at 26–27.

The question is whether Rule 41(b)(3) allows for these non-terrorism offenses to be the basis for an extraterritorial search. The answer—to quote Daniel Bryan—is "Yes! Yes! Yes!"

The House Committee on the Judiciary held a hearing on the draft USA PATRIOT Act. The record of that hearing includes a consultation draft with section-by-section analysis which provides, in pertinent part, as follows:

> Sec. 219. Single-jurisdiction search warrants for terrorism. Both the House and Senate bills included this provision to amend Federal Rule of Criminal Procedure 41(a) to provide that warrants *relating to the investigation of terrorist activities* may be obtained in any district in which the activities related to the terrorism may have occurred.

147 Cong. Rec. S11007 (2001) (emphasis added). As with the amended language in Rule 41, the legislative history demonstrates congressional focus on terroristic "activities" as opposed to "crimes."

Senator Patrick Leahy, chairman of Senate Judiciary Committee, explained the basis for broadening this authority:

> Section 220 of this bill authorizes nationwide service of search warrants in terrorism investigations. This will allow the judge who is most familiar with the developments in a fast-breaking and complex terrorism investigation to make determinations of probable cause, no matter where the property to be searched is located. This will not only save time by avoiding having to bring up-to-speed another judge in another jurisdiction where the property is located, but also serves privacy and Fourth Amendment interests in ensuring that the most knowledgeable judge makes the determination of probable cause.

147 Cong. Rec. S10998 (2001).[4] Congress's intent was to make searches more efficient in terrorism "*investigations*." *Id.* This justified having one magistrate judge with familiarity of the investigation to process all warrants. *See id.* It would slow down the overall terrorism *investigation*—in contravention of congressional intent—if searches for non-terrorism crimes had to go to magistrate judges in other districts. Indeed, this is a real possibility given the government's statement that "[t]errorist activities commonly involve multiple overlapping crimes, which are not themselves 'terrorism offenses,' such as obstructing justice, money laundering, or conspiracy to defraud." Gov't's Mem. at 11. Moreover, the repeated avoidance of using the term "crime" in the statute and legislative history supports a reading of Rule 41(b)(3) that applies to more than the enumerated federal crimes of terrorism. Thus, venue may lie in this district for non-terrorism crimes which are related to the terroristic activities under investigation.

[4] Senator Leahy referred to Section 220, but likely meant Section 219. His comments were about extraterritorial warrants in "terrorism investigations," which is exclusively the subject of Section 219. *See* 147 Cong. Rec. S11007 (2001). Section 220 relates to service of electronic surveillance warrants, with no specific terrorism discussion. *See id.* Regardless, his comments support the Court's conclusion here, as his focus was on the need for rapid decision making by a judge familiar with a terrorism investigation.

There is reason to believe each of the remaining Target Offenses relates to the acts of domestic terrorism under investigation. The same facts support the violations of 18 U.S.C. § 1361 and the remaining Target Offenses. This is one investigation into one incident based on one set of facts. This Court "is most familiar with the developments in [this] fast-breaking and complex terrorism investigation." 147 Cong. Rec. S10998 (2001). Waiting to "bring up-to-speed another judge in another jurisdiction where the [Target Device] is located" would unnecessarily slow such investigation in violation of Congress's intent. *Id.*

The next question as to the remaining Target Offenses is probable cause. The government proffered evidence that members or associates of the Group worked together to facilitate and execute the Capitol Breach. *See* Appl. at 16. The government further proffered evidence that members of the Group breached the Capitol building and violently engaged with law enforcement. *See id.* at 15. Because of this conduct, "members of the House and Senate (including Vice President Pence)—who had withdrawn to separate chambers to resolve an objection—were evacuated from their respective chambers." *Id.* As a result, "the entire official proceeding of the Congress was halted while Capitol Police and other law-enforcement officers worked to restore order and clear the Capitol of the unlawful occupants." *Id.* Based on these facts, there is probable cause to believe that the Device Owner violated: 18 U.S.C. § 371; 18 U.S.C. § 2384; and 18 U.S.C. § 231(a)(3).

When interviewed by the FBI, the Device Owner "denied that there was any advanced planning to breach the Capitol by [the Device Owner, the leader of the Group,] or any of the [the Group] members and affiliates." Appl. at 25. Yet the government proffered facts to the contrary. *Id.* The Device Owner also "told law enforcement that by the time they had gotten to the Capitol on January 6, 2021, there were no longer any barricades visible in any way that would indicate to

[the Device Owner] and [the leader of the Group] that they should not enter the Capitol grounds." *Id.* However, the government proffered video evidence of the Device Owner stating that "'[j]ust so you can see, they had barricades up—keeping us away from the building was the goal.'" *Id.* at 26. The Device Owner further stated on video that "[t]hey broke the barrier, they got up there, they may end up inside before it's all said and done." *Id.* Photos from the Device Owner's social media account showed the Device Owner "getting right up to the edge of the Capitol building." *Id.* The government explained that "[a] number of coconspirators . . . have been charged with violations . . . for deleting content from their cellular telephones," in an attempt to delete inculpatory videos such as the ones described here. *See id.* at 34. Based on these facts, there is probable cause to believe that the Device Owner violated: 18 U.S.C. § 1001; 18 U.S.C. § 1512(c)(1), (2); 18 U.S.C. § 1752(a); and 40 U.S.C. § 5104(e)(2).

Finally, there is probable cause to believe that Evidence of these violations will be on the Target Device. The government proffered evidence showing that the Device Owner posted inculpatory content to a social media platform that was connected to the phone number of the Target Device. Appl. at 25–26. Moreover, the FBI agent explained the role of cell phones in the Capitol Breach and why based on her training and experience the Target Device would reveal evidence of the Target Offenses.[5] *Id.* at 35–36.

[5] Because each of the Target Offenses are covered under Options 1 and 2, there is no reason for the Court to consider Option 3—whether a search for Evidence unrelated to the Capitol Breach by the Group is permissible.

III. CONCLUSION

The government established that its investigation into the Group was an investigation of domestic terrorism and that the Group had engaged in activities related to the terrorism in Washington, D.C., on January 6th. Thus, the Court approved the government's request to search.[6]

Date: September 6, 2022

ZIA M. FARUQUI
United States Magistrate Judge

[6] At the Court's request, the government included limitations in their search protocols. Attachment A to the Appl. restricted the search to occuring within the United States and precluded the government from entering properties or residences to search for the Target Device. *See* Appl.