September 2021

Chief Judge Rejects Government's Security Argument in Request for Capitol Riot Videos

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PUBLISHED IN: MediaLawLetter September 2021

TOPICS : Access / FOIA

A coalition of 16 news media organizations has now litigated the release of more than 100 exhibits of video evidence submitted in the prosecutions of the participants in the January 6 riot at the U.S. Capitol. Most recently, the Chief Judge of the U.S. District Court for the District of Columbia, Beryl A. Howell, granted the coalition's application, over the government's objection, to footage captured by CCTV surveillance cameras inside the Capitol building. *United States v. Torrens*, 21-cr-204-BAH, 2021 U.S. Dist. LEXIS 174997 (D.D.C. Sept. 15, 2021).

The Press Coalition

Following the violent breach of the U.S. Capitol on January 6, the Department of Justice charged more than 500 defendants in federal court in Washington, D.C. with crimes allegedly committed on the Capitol grounds. The January 6 events were well documented by Capitol security cameras, police body-worn cameras, and even participants who shared videos themselves on Parler. The government and the defendants regularly submit or show videos to the court in connection with these cases, yet the public is not able to view them in real-time as the only public access to remote hearings is a telephone line. These videos are also not publicly accessible on the online dockets.

At the initiative of CNN, a coalition of 16 newsrooms came together to begin the regular pursuit of videos submitted or shown to the court. In May 2021, the press coalition asked Chief Judge Howell to issue a standing order facilitating access across all of the prosecutions. The chief judge issued Standing Order No. 21-28, but rather than streamlining the process, she instead required the coalition and other credentialed members of the media to apply to each judge in the individual cases, and left it to the individual judges to seek the parties' positions and determine whether to release the videos. The standing order also prohibited copying or republishing the videos "unless such permission is granted by the presiding judge."

The press coalition began filing applications for video in select cases, then filed additional applications as certain cases and video exhibits began to emerge as more newsworthy than others. So far, the coalition has filed applications in nearly 40 of the cases, including the prosecutions of:

- Jack Wade Whitton of Georgia and Jeffrey Sabol of New York, two of several defendants charged for attacks on officers who entered the crowd – to aid a protester who they heard was being trampled – and were then dragged to the ground and beaten by the mob;
- Federico Klein of the District of Columbia, a former Trump State Department appointee accused of fighting a line of police and using a police riot shield to wedge open an entrance for rioters; and
- Joseph Padilla of Tennessee, also charged with assaulting officers, who is allegedly seen in footage verbally berating officers.

United States v. Tanios and the Struggle for Capitol Surveillance Video

The press coalition's first motion, in *U.S. v. Tanios,* 21-cr-222-TFH-2 (D.D.C.), sought videos submitted by the government at a detention hearing in West Virginia. George Tanios, a 39-year-old from Morgantown, was charged with assaulting law enforcement officers who were defending the Capitol. The videos shown during the detention hearing included footage from Officer Brian Sicknick's body-worn camera allegedly showing Tanios spraying the officer – who died the following day – with bear spray.

The government initially objected to release of videos submitted in Tanios's detention hearing that were captured on the CCTV security surveillance system, then withdrew its objection after the coalition filed its reply brief. The court released those videos, which the government said show Officer Sicknick grabbing his head and leaning forward following the bear spray attack.

Since then, with little consistency across the cases, the government in some instances has conceded the release of videos. When objecting to release of surveillance videos, the Department of Justice has relied on a declaration from Thomas DiBiase, general counsel for U.S. Capitol Police. The DiBiase declaration asserts that under the "mosaic theory," the release of "a significant volume of footage provides a road-map for those who may seek to repeat the events of January 6th."

Notably, Judge Rudolph Contreras put the government to task for objecting on security grounds in *United States v. Anderson*, 21-cr-215-RC (D.D.C.). There, the defendant challenged the "Highly Sensitive" designation of a CCTV video clip and the government had previously released footage from the same Capitol security camera. Judge Contreras described the DiBiase declaration as "very, very generalized," concluded that when the government has already released footage from the same camera, "the already thin reed snaps," and ordered the government to remove its "Highly Sensitive" designation in that case so that the defendant could share the CCTV video clip with the press.

United States v. Torrens

In *United States v. Torrens,* 21-cr-204-BAH (D.D.C.), 28-year-old Eric Torrens from Gallatin, Tennessee was charged with misdemeanors related to unlawfully entering and engaging in disorderly conduct in the Capitol building. Ahead of a plea hearing, Chief Judge Howell directed the government to submit to the court the videos providing "the factual basis for the plea." The chief judge also directed the parties "to provide their positions . . . whether this video evidence may be made publicly available without restriction."

The government submitted nine videos to the court, five of which were Capitol security camera footage. Torrens initially objected on prejudice grounds, and the government objected to release of five surveillance videos on security grounds. The government also argued that the videos were not judicial records because it had submitted the videos to the court to comply with its order, "not to convince the Court of its position on some issue or controversy brought to the court for adjudication," and they would only become judicial records "if the Court chooses to rely on the Videos to find a sufficient factual basis for the plea."

At the plea agreement hearing on August 19, the court accepted Torrens' guilty plea. Chief Judge Howell also stated she had requested that the government submit the videos because of "accusations" that the government was "cherry-picking excerpts from videotapes" when submitting exhibits in the Capitol riot prosecutions. The court also reminded the parties of the "strong presumption in favor of public access to judicial proceedings, including judicial records." Given the public interest in the prosecutions of the riots that were "broadcast on television — not just in the United States, but globally — and into the homes of millions of Americans," Chief Judge Howell stated that "it behooves the Government to explain its prosecutorial decisions in how different kinds of conduct are being charged and resolved, and support those decisions with the evidence at hand."

The Arguments For And Against Access

After reviewing the press coalition's application for these video exhibits, the court asked the government and Torrens to respond to the coalition's application. Torrens promptly informed the court that he no longer opposed release of the video exhibits. The government, however, responded that it continues to object to release of the CCTV videos, relying on the DiBiase declaration and a mosaic-theory argument. The government also represented (1) that the CCTV Videos "show an entrance into the Capitol building and entry and exit points into and out of the Crypt" (the room underneath the rotunda) and "when combined with other footage from nearby cameras, could be used to track individual rioters moving through the building thereby creating a visual pathway which other bad-actors could use in planning their breach point and pathway for future attacks;" (2) the videos reveal "how law enforcement responded to the attack," and future rioters could piece together "combat and crowd control techniques;" and (3) the cameras "have different technological capabilities," meaning some may be pan-tilt-zoom ("PTZ") cameras whereas some may be fixed cameras, and disclosure of this information would implicate security concerns.

The press coalition responded that these national security concerns failed to overcome the First Amendment and common-law presumptions of public right of access to judicial records. The coalition pointed to many examples of the already-public nature of the information the government claimed the videos would unveil, including that videos shot by the rioters documented their journey into and through the Capitol, and even through the Crypt, as well as law enforcements' actions that day. The coalition also submitted a declaration from Mickey Osterreicher,

General Counsel of the National Press Photographers Association and a photojournalist with more than forty years' experience. He attested to the commonplace nature of these camera technologies and their PTZ capabilities.

The Ruling

On September 15, 2021, Chief Judge Howell granted the press coalition's application in the *Torrens* case in its entirety, ordering the government to provide the coalition with access to all of the video exhibits with no restrictions on republication. The court held the videos were judicial records because the court "did in fact view and rely upon the video exhibits in accepting defendant's guilty plea" and they therefore were subject to the "strong presumption in favor of public access" under the common law. The court opted to not reach the First Amendment right of access argument "as only that basis for public release need be addressed to grant petitioners their requested relief."

The court then walked through the six-factor test from *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), and determined the government's objections were insufficient to block disclosure of the surveillance videos. The Chief Judge noted the need for public access "is very strong, as evidenced by the extraordinary public interest surrounding the events that took place at the U.S. Capitol on January 6." The court stated that while the government's "interest in maintaining the security of the U.S. Capitol is indisputably very strong," the asserted risk of prejudice from release of the videos "is speculative and attenuated," and in particular, the DiBiase declaration was "simply too generalized to show a risk of prejudice from disclosure of the five videos at issue in this case." The court was convinced that "[a]s petitioners persuasively argue, the asserted security risk is undercut by the already extensive release of CC[T]V footage from the Capitol."

Coalition member ProPublica has made the video evidence from *Torrens*, as well as video released to the coalition pursuant to its other applications, available at the following link: https://projects.propublica.org/jan-6-video-evidence/.

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