

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

-v-

Case No. 1:21-cr-000052 (TJK)

WILLIAM PEPE,

Defendant.

**DEFENDANT’S REPLY TO GOVERNMENT’S OPPOSITION TO DEFENDANT’S
MOTION FOR TRANSFER**

Defendant, William Pepe, by and through his counsel, tenders this Reply to the Government’s Opposition to Mr. Pepe’s Motion to Transfer Venue. The Government primarily relies on *United States v. Haldeman*, to argue that Mr. Pepe’s motion is premature, and that the circumstances are also not so extreme to warrant a change of venue. 559 F.2d 31 (D.C. Cir. 1976).

The Government mischaracterizes the standard by which the Court may grant Mr. Pepe’s motion to transfer venue. While transfer of venue before voir dire is only mandated in the most extreme cases, like *Rideau*, the Court has broad discretion to rule on a transfer of venue motion based “solely on the subjective reaction of the judge who reaches it.” *Haldeman*, 559 F.2d 31, 62 (D.C. Cir. 1976). Mr. Pepe’s case is ripe for immediate transfer, as the media, as well as social media has already widely circulated highly prejudicial evidence to the DC jury pool which is especially ripe to be tainted thereby infringing on Mr. Pepe’s right to an impartial jury.

I. The Government Failed to Address the Unique Impact the Events of January 6 Has on DC Residents.

The Government failed to address the fact that the events of January 6 had a profound impact on the residents of the entire District of Columbia. There was a curfew set that night for 6 PM¹ which restricted residents of the District from travel and the residents witnessed a significant

¹ “Mayor Bowser Orders Citywide Curfew Beginning at 6PM Today.” *Mayorb*, 6 Jan. 2021, mayor.dc.gov/release/mayor-bowser-orders-citywide-curfew-beginning-6pm-today.

military presence in their city during that day.² Despite what the Government claims about the National Guard leaving the area soon (*See* Dckt. 52 at 18), there have been increased calls to make this presence permanent.³ Additionally, the fact that a third of all DC residents are employed by the federal government⁴ and this event, as characterized by the Government, was an alleged attack on the federal government itself, the DC jury pool is uniquely tainted. Following the events of January 6, residents reported feeling like they were being punished⁵, treated like criminals⁶, like their lives had been disrupted; this will all lead to jury bias against Mr. Pepe. One DC resident stated that there is a “misconception in D.C. that “these types of disruptions don’t have an impact or an effect on individual residents”.⁷ The Government’s Opposition to Mr. Pepe’s Motion has played into that misconception, implying that DC’s residents were not affected by National Guard’s presence. Govt Opp. To Transfer at 14.

In contrast, residents of the Eastern District of New York did not receive the disruption to their daily lives that residents of the District of Columbia experienced. Residents of the Eastern District of New York were not subject to a curfew, they were not subject to school and road closures, they were not eye witnesses to the events of January 6. Residents of the Eastern District of New York are far less likely to be federal government workers, to be exposed to the constant media coverage of the January 6 incident, based on population numbers alone, and are significantly

² Wamsley, Laurel. “What We Know So Far: A Timeline Of Security Response At The Capitol On Jan. 6.” *NPR*, NPR, 15 Jan. 2021, www.npr.org/2021/01/15/956842958/what-we-know-so-far-a-timeline-of-security-at-the-capitol-on-january-6.

³ Beynon, Steve. “Task Force Calls for Permanent National Guard Force to Protect DC.” *Military.com*, 8 Mar. 2021, www.military.com/daily-news/2021/03/08/task-force-calls-permanent-national-guard-force-protect-dc.html.

⁴ *District of Columbia*, Urban Institute (2021), <https://www.urban.org/policy-centers/cross-center-initiatives/state-37-and-local-finance-initiative/projects/state-fiscal-briefs/washington-dc> (last visited Mar. 22, 2021).

⁵ *Residents Resistant To Permanent Capitol Security Fence*, NPR (2021), <https://www.npr.org/2021/02/13/967704469/residents-resistant-to-permanent-capitol-security-fence> (last visited Mar. 22, 2021).

⁶ Gathright, Jenny, and Rachel Kurzius. “What It Feels Like To Live Under DC's State Of Emergency.” *DCist*, WAMU 88.5 - American University Radio, 13 Jan. 2021, [dcist.com/story/21/01/13/dc-state-of-emergency-residents/](https://www.dcist.com/story/21/01/13/dc-state-of-emergency-residents/).

⁷ *Id.*

more likely to give Mr. Pepe a chance at a fair trial. In contrast, in the District of Columbia, even with voir dire, the jury pool is so limited, and the taint so extensive, that transfer of venue is immediately warranted.

II. Mr. Pepe’s Case Involves Highly Inflammatory Evidence and a Modern Political Tinderbox Distinguishable from *Halderman*.

The Government’s attempted analogizing of Mr. Pepe’s case to that of *Halderman* ignores two key distinguishing factors, the different character of evidence displayed to the public in this case, and the changed political environment in the modern United States of America. *See* 559 F.2d 31, 62. The Government claims that the Capitol cases are not more notorious than Watergate, which is a question only time will be able to tell, but certainly the Capitol cases are far more dramatic, graphic, violent, and shocking in imagery, character, and nature than Watergate. Further the presence and availability of cellphones and social media to immediately transmit photo and video evidence of the event only exacerbates the drama in a way that was impossible when the Watergate scandal occurred.

The evidence widely distributed to the DC jury pool in this case is distinguished from the evidence considered in *Halderman* due to both its emotional weight to the jury pool and its character, as comparable to an alleged confession of the defendant. The Court in *Halderman* stated “the overwhelming bulk of the material submitted, however, consists of straightforward, unemotional factual accounts of events and of the progress of official and unofficial investigations”. *Id.* at 61. Dry factual accounting will not have the inherently prejudicial effect that triggers juror’s emotions and invalidates the safeguards of voir dire. However, the reporting on the Capitol has included sensational scenes full of violence, chaos, and even death.⁸ These stories,

⁸ AP World News “Scenes of Violence at US Capitol Shock World” <https://apnews.com/article/joe-biden-donald-trump-electoral-college-elections-de812995a8c7cbea5c1de56a3d1aa007>
CNN, “US Capitol secured, 4 dead after rioters stormed the halls of Congress to block Biden's win”, <https://www.cnn.com/2021/01/06/politics/us-capitol-lockdown/index.html>

particularly stories of violence against Capitol Police and property damage on January 6 are supercharged with emotion and outrage laying severe incurable prejudice on Mr. Pepe, who stands accused of conspiring with and will be tried alongside codefendants accused of attacking police officers.

In *Rideau* the Court found pretrial transfer of venue before voir dire was mandated when the jury pool witnessed the defendant confess to the crime before law enforcement officers without a lawyer present. *Rideau v. State of La.*, 373 U.S. 723, 727 (1963). *Halderman* distinguished itself from *Rideau* holding “We have carefully reviewed the ‘Watergate’ articles submitted by appellants, and we find that the pretrial publicity in this case, although massive, was neither as inherently prejudicial nor as unforgettable as the spectacle of Rideau's dramatically staged and broadcast confession.” *Haldeman*, 559 F.2d at 361–62. The pretrial publicity in Mr. Pepe’s case is that of a great spectacle like in *Rideau*, including a photograph of Mr. Pepe appearing to inside Capitol grounds on January 6.

The country and the DC community in particular has been glued to the story of the events of January 6th. CNN recorded its highest ratings ever in the history of its network on the day of January 6.⁹ *Halderman* characterized a confession as a “statement against interest is the paradigm” of “facts that strongly implicate an accused.” *Halderman citing Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1332-33, 96 S. Ct. 251, 255, 46 L.Ed.2d 237 (1975) (Blackmun, Circuit Justice). The picture of Mr. Pepe inside the Capitol building on January 6 constitutes a “statement against

<https://www.cnn.com/2021/01/07/us/capitol-mob-deaths/index.html>

New York Magazine, “Mob of Trump Supporters Seize Capitol in Stunning Attack on Democracy”,

<https://nymag.com/intelligencer/2021/01/trump-supporters-storm-u-s-capitol.html>

WUSA9, “Capitol chaos: Pro-Trump rallies turn to insurrection leaving 4 dead”

<https://www.wusa9.com/article/news/national/capitol-riots/pro-trump-protectors-capitol-police-face-off-break-barriers/65-769a51a2-bb58-4a55-bec5-e3651159b213>

⁹ Joyella, Mark. “Attack On Capitol Pushes CNN To Its Most-Watched Day In History.” *Forbes*, Forbes Magazine, 8 Jan. 2021, www.forbes.com/sites/markjoyella/2021/01/07/attack-on-capitol-pushes-cnn-to-its-most-watched-day-in-history/?sh=5624c35c3121.

interest” that “strongly implicates the accused,” placing Mr. Pepe in the same category as the defendant in *Rideau*.

A picture is worth 1000 words. The Government incorrectly states “it is unlikely that more than a small share of D.C. residents could identify Pepe by name, much less know the particulars of his case, the crimes with which he has been charged, or the evidence against him.” Govt Opp. To Transfer at 7. Mr. Pepe’s picture has been widely broadcast with the flurry of stories about his case, even appearing as the face of the Capitol rioters in the New York Times’ story on the event published on January 6.¹⁰



¹⁰ Frenkel, Sheera. “The Storming of Capitol Hill Was Organized on Social Media.” *The New York Times*, The New York Times, 6 Jan. 2021, www.nytimes.com/2021/01/06/us/politics/protesters-storm-capitol-hill-building.html.

Specifically, the media time and time again use a picture of Mr. Pepe appearing to be inside the Capitol in the midst of the riot.¹¹ This picture appears to display Mr. Pepe inside the Capitol functioning akin to a confession or “blatantly prejudicial” evidence, the type described in *Skilling*, 561 U.S. at 382. Where the Government’s only real evidence of Mr. Pepe’s alleged crime is the photographs and videos being spread around online, it is reasonable to believe that many D.C. jurors will see this image and amount it to a confession on the part of Mr. Pepe, rendering Mr. Pepe unjustly prejudiced even before voir dire can begin.

Furthermore, the Government has failed to acknowledge the fact that the *Halderman* decision is, as the Government points out, nearly 45 years old. In 45 years, the effects of political bias and the divisive nature of politics have substantially increased, warranting a presumption of prejudice. Since the early 1970’s, the political divide and political divisiveness in the United States have substantially increased.¹² The political divide is at its worst since immediately preceding the Civil War.¹³ This political divide will have an effect on the protentional jury, regardless of voir

¹¹ <https://www.fox5ny.com/news/mta-fires-worker-accused-of-breaching-capitol>; <https://nypost.com/2021/01/30/capitol-riot-mta-worker-idd-as-proud-boy-faces-conspiracy-charge/>; <https://www.recordonline.com/in-depth/news/2021/04/18/nine-hudson-valley-charged-roles-jan-6-capitol-riot/7224875002/>

¹² DeSilver, Drew. “The Polarized Congress of Today Has Its Roots in the 1970s.” *Pew Research Center*, Pew Research Center, 30 May 2020, www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/.

Paisley, Laura. “Political Polarization at Its Worst since the Civil War.” *USC News*, 8 Nov. 2016, news.usc.edu/110124/political-polarization-at-its-worst-since-the-civil-war-2/.

Parker, Kristen. “Democrat/Republican Divide Is Worst It's Ever Been.” *MSUToday*, 1 Oct. 2018, msutoday.msu.edu/news/2018/democrat-republican-divide-is-worst-its-ever-been.

Aschwanden, Christie. “Why Hatred and 'Othering' of Political Foes Has Spiked to Extreme Levels.” *Scientific American*, Scientific American, 29 Oct. 2020, www.scientificamerican.com/article/why-hatred-and-othering-of-political-foes-has-spiked-to-extreme-levels/.

¹³ Paisley, Laura. “Political Polarization at Its Worst since the Civil War.” *USC News*, 8 Nov. 2016, news.usc.edu/110124/political-polarization-at-its-worst-since-the-civil-war-2/.

dire safeguards. Even the American Bar Association recently published a piece recognizing that political affiliation has an effect on juror verdicts, at least in the personal injury context.¹⁴

Similarly, the *American University Law Review* study “*On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*” noted, “jurors' awareness and willingness to report bias is imperfect.” Kerr, N L, et al., *Am. University Law Review*, vol. 40, no. 2, 1991, pp. 665–701.¹⁵ Moreover, liberals are less aware of their personal biases.¹⁶ This matters in jury selection, where counsel and the Court rely, to a large extent, on juror self-reporting. These studies indicate that Mr. Pepe’s motion is neither premature nor unwarranted. Mr. Pepe is likely to suffer from juror bias in the District of Columbia and for that reason he asks for a transfer to the Middle District of Florida.

The Government does not refute that politics will play a large role in this case. Understandably it strains imagination how the Government would intend to explain to a jury the circumstances leading to January 6, the day of January 6, Mr. Pepe’s alleged motivations and alleged intents for being there and participating in the “mob” or “riots” on January 6 without engaging in at least some discussion of politics which are necessary to prove the elements of many of the offenses charged, especially those relating to Civil Disorder and Disrupting an Official Proceeding of Congress. These discussions will have a prejudicial effect against Mr. Pepe who is a known Trump supporter in a District that is overwhelmingly comprised of Democrats.

¹⁴ “Political Affiliation and Jurors' Verdict Orientation in Personal Injury Cases.” *American Bar Association*, www.americanbar.org/groups/litigation/committees/trial-practice/articles/2019/fall2019-political-affiliation-and-jurors-verdicts-personal-injury-cases/.

¹⁵ <https://www.ojp.gov/library/abstracts/effectiveness-voir-dire-criminal-cases-prejudicial-pretrial-publicity-empirical>.

¹⁶ *re Liberals Really More Egalitarian*, *Psychology Today* (2021), <https://www.psychologytoday.com/us/blog/the-63-antisocial-psychologist/202102/are-liberals-really-more-egalitarian> (last visited Mar. 22, 2021); Winegard, Bo, et al, *Equalitarianism: A Source of Liberal Bias*, *supra*.

III. The Government Erroneously Implies Mr. Pepe's Trial Will be so Distant in the Future that all Tempers will have Cooled

The Government's Opposition to the Motion to Transfer repeatedly implies that Mr. Pepe's trial will be at some distant point in the future. *See* Govt Opp to Transfer at 11. The Government states that the military presence in DC is subsided and will be long gone by the time of trial, despite the above calls to make this presence permanent. The Government erroneously bases part of its argument on the belief that any bias created by the media storm around January 6 will be subsided by the time Mr. Pepe goes to trial. Mr. Pepe's trial will not take place so distant in the future that the overwhelming prejudice against him in DC will have been cured. Sources across the nation have recognized the events of January 6 as unprecedented and indisputably historic, burned into the mind of every American. Those living in DC, working for the federal government, and supporters of President Biden will likely never forget their strong feelings towards the events, and certainty not in a matter of months. The Government's primary reason for believing the trial may be delayed is because of COVID-19 backlogs, but DC restrictions due to COVID-19 are set to begin lifting this week and are unlikely to cause any substantial delays in trial.

Further, these images and videos of the Capitol, along with the curfews, military presence, road closures, and other inconveniences will not likely be forgotten quickly by the residents of D.C. They were graphic, shocking, and dramatic examples of political divisiveness in America. Especially with a January 6 Commission expected to form in Congress, media coverage will not subside any time soon either.

IV. CONCLUSION

For the forgoing reasons, the Court should reject the arguments presented in the Government's Opposition to Mr. Pepe's Motion to Transfer Venue and transfer Mr. Pepe's trial to the Eastern District of New York where he will be more likely to receive a fair and impartial trial.

Date: June 1, 2021

Respectfully submitted,

/s/ John M. Pierce

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CERTIFICATE OF SERVICE

I hereby certify that, on June 1, 2021, the forgoing document was filed via the Court's electronic filing system, which constitutes service upon all counsel of record.

/s/ John M. Pierce

John M. Pierce