

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)
)
) Case No. 1:21-cr-00263-TSC
)
v.)
)
RUSSELL DEAN ALFORD)

**RESPONSE TO GOVERNMENT’S MOTION IN LIMINE
REGARDING AUTHENTICATION OF VIDEO AND OTHER EVIDENCE**

The Defendant, Russell Dean Alford, hereby replies to the government’s motion in limine that seeks pretrial rulings on two disparate matters. Doc. 52. First, the government asks the Court to take judicial notice of a narrative describing select details of then-President Trump’s January 6, 2021, speech on the Ellipse to the south of the White House.¹ *Id.* at 6–7 (quoting *Trump v. Thompson*, 20 F.4th 10, 17–18 (2021)). Second, the government asks the Court to rule on the authenticity of videos recorded by third parties—one allegedly by a defendant in a different criminal prosecution arising from January 6, and one allegedly by an unknown person.

As this response explains, the Court should deny the first request because a particular court’s summary of selected details is not an appropriate subject of judicial

¹ The government describes this as a request for the Court to take “Judicial Notice of the Stop the Steal Rally,” though it does not claim that “Stop the Steal Rally” was the event’s actual name. Indeed, the speech was part of a larger event named the “March to Save America.” See Philip Bump, *When did the Jan. 6 rally become a march to the Capitol?*, WashingtonPost.com (Feb. 10, 2021), <https://www.washingtonpost.com/politics/2021/02/10/when-did-jan-6-rally-become-march-capitol/>.

Individuals, of course, might differ as to which denomination they use or consider a more accurate description for everyday purposes.

notice in a criminal jury trial. And the Court should deny the second request because the videos' authenticity is not apparent from the mere fact that they share some characteristics with other videos of known authenticity.

I. Judicial notice of select details in a speech of more than 70 minutes is an inappropriate manner to place facts before a jury in the guilt phase of a criminal trial.

On January 6, 2021, then-President Trump gave a speech at the Ellipse that lasted about 1 hour and 12 minutes. *Rally on Electoral College Vote Certification*, C-SPAN, at 3:31:00–4:43:00 <https://www.c-span.org/video/?507744-1/rally-electoral-college-vote-certification> (last accessed Aug. 16, 2022). In *Trump v. Thompson*, the D.C. Circuit summarized portions of the speech in a four-sentence paragraph:

Shortly before noon on January 6th, President Trump took the stage at a rally of his supporters on the Ellipse, just south of the White House. J.A. 180. During his more than hour-long speech, President Trump reiterated his claims that the election was “rigged” and “stolen,” and urged then-Vice President Pence, who would preside over the certification, to “do the right thing” by rejecting various States’ electoral votes and refusing to certify the election in favor of Mr. Biden. *See Donald J. Trump, Rally on Electoral College Vote Certification* at 3:33:05–3:33:10, 3:33:32–3:33:54, 3:37:19–3:37:29, C-SPAN (Jan. 6, 2021), <https://www.c-span.org/video/?507744-1/rally-electoral-college-vote-certification> (last accessed Dec. 7, 2021) (“January 6th Rally Speech”). Toward the end of the speech, President Trump announced to his supporters that “we’re going to walk down Pennsylvania Avenue * * * to the Capitol and * * * we’re going to try and give our Republicans * * * the kind of pride and boldness that they need to take back our country.” *Id.* at 4:42:00–4:42:32. Urging the crowd to “demand that Congress do the right thing and only count the electors who have been lawfully slated[,]” he warned that “you’ll never take back our country with weakness” and declared “[w]e fight like hell and if you don’t fight like hell, you’re not going to have a country anymore.” *Id.* at 3:47:20–3:47:42, 4:41:17–4:41:33.

20 F.4th at 17–18, *quoted in* Doc. 52 at 7.

In that case, the Court of Appeals judicially noticed recorded public statements by a party to the case, Mr. Trump. Here, though, the government asks the Court to take judicial notice of the same facts summary at Mr. Alford's jury trial because another judge in this District did so in written Findings of Fact and Conclusions of Law after a bench trial. *See id.* (citing *United States v. Rivera*, No. 1:21-cr-00060-CKK (D.D.C. June 17, 2022), ECF No. 62 at 7 n.14).

The D.C. Circuit's summary is not appropriate for judicial notice in a criminal jury trial, because it plucks particular bits from a lengthy speech. If the Court were to do so in Mr. Alford's trial, then the jury would hear that the Court had taken judicial notice of those particular bits, according them special significance. And although the Court would be required to "instruct the jury that it may or may not accept the noticed fact as conclusive," Fed. R. Evid. 201(f), the jury would unavoidably perceive the Court's imprimatur upon the selection of specific details from the speech. The Court would involve itself directly in the presentation of facts to the jury, departing from the judicial role of gatekeeper for *the parties'* presentation of facts. *Rivera* provides a poor analogy because it was a bench trial; the trier of fact (there, the judge) decided that those selected quotes were a fitting summary of the speech. The government's request in this case, by contrast, would not leave that judgment to the trier of fact.

Certainly, the government can present facts about then-President Trump's speech to the extent that it can establish their relevance. It might play video of the full speech, or of only selected portions—but in either instance, the jury would clearly

see that the messenger was the government, not the Court. And if only particular portions were presented, the jury would see that the government had made the selections. The government's motion, however, seeks something different. It asks *the Court* to adopt the editorial judgments embodied in a summary that *the government* selected. The government cites no precedent approving anything equivalent in a criminal jury trial, and acceding to its request in these proceedings would not befit the Court's neutral role at trial.

II. Even if some aspects of the third-party videos could support their authenticity, nothing supports the authenticity of other images and sounds depicted alongside those aspects.

The Court also should reject the government's claim that it has authenticated videos evidently recorded and edited by persons who will not testify about them, including one person whose identity is unknown. In responding here, Mr. Alford's counsel understands the government's motion to concern only authentication, not to request a ruling on admissibility itself, so this pleading does not address issues such as relevance and prejudice that would go to admissibility but not authenticity.² Even on that narrower matter, though, the government's motion should be denied because it does not show that the proffered third-party videos are authentic in important respects.

The government has given the defense copies of the videos, and both have plainly been edited in some respects. Both include cuts between separate video clips.

² Consistent with the Court's scheduling order, Doc. 48, objections to the admissibility of exhibits are presented in a separate pleading this date.

Computer graphics and audio have been added, and graphic logos have been overlaid and appear throughout both videos. Those edits are immediately obvious, but there is no way to know how else the videos have been edited, and the government does not offer to present testimony from anyone who could answer questions on that point.

Simply put, there is no way to know which contents of the videos are authentic recordings from January 6 and which might have been mapped onto an original recording, or somehow enhanced, or recorded at other times or places and spliced in among other clips. When a talking cat in a Zoom hearing declares “I’m not a cat,” a viewer can quickly discern that the cat is a computer animation:



See Guardian News, *‘I’m not a cat’: lawyer gets stuck on Zoom kitten filter during court case*, YouTube (Feb. 9, 2021), <https://www.youtube.com/watch?v=lGOofzZOy18>. But not every computer animation is so candid.

The government anticipates this argument and seeks to head it off by noting that both videos contain some “distinctive characteristics they share in common with . . . other video” that is concededly authentic. Doc. 52 at 12. That’s true, but it only goes so far. To the extent the third-party videos’ depictions of persons and events are consistent with authenticated videos, there is no reason to doubt *those* depictions’

authenticity. For the very same reason, though, those depictions are cumulative. Mr. Alford's counsel cannot say exactly why the government wants to present these videos, but presumably the purpose is not simply to prove facts that are clear from other videos. The government's motion, however, only makes a case for the authenticity of cumulative details. *Id.* at 7–12. The distinctive characteristics it points to can establish those characteristics' authenticity, but in videos that have been edited in some obvious ways, with software that appears capable of making less-obvious edits as well, the corroborated details cannot bootstrap all other details over the authenticity hurdle.

III. Conclusion

Both requests in the government's motion should fail. The Court should not involve itself in the selective presentation of facts by judicially noticing the D.C. Circuit's summary, in a different case addressing different issues, of then-President Trump's Ellipse speech. And the Court should not find that the government has proved the authenticity of third-party videos beyond details that are apparent from, and cumulative of, other videos that both parties agree are authenticated and admissible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2022, I electronically filed the foregoing via this Court's CM/ECF system, which will send notice of such filing to all counsel of record.

Respectfully submitted,

/s/ Tobie J. Smith

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