

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

UNITED STATES OF AMERICA	:	
	:	
v.	:	CASE NO. 21-cr-40-9 (TNM)
	:	
FEDERICO KLEIN,	:	
	:	
Defendant.	:	

**GOVERNMENT’S OPPOSITION TO DEFENDANT KLEIN’S
MOTION TO TRANSFER VENUE**

Defendant Federico Klein, who is charged in connection with events at the U.S. Capitol on January 6, 2021, has moved to adopt Defendant David Judd’s motion to transfer venue (ECF No. 257 and 307), and now supplements that motion. ECF No. 309. Klein now proposes transferring venue in this case to the Eastern District of Virginia. Klein fails to establish that he “cannot obtain a fair and impartial trial” in this district, Fed. R. Crim. P. 21(a), and this Court should deny his motion.¹

BACKGROUND

The government incorporates its response to Defendant Judd’s motion here and will not repeat the background and arguments laid out therein. ECF No. 292. Klein has focused his motion

¹ Every judge on this Court to have ruled on a motion for change of venue in a January 6 prosecution has denied the motion. *See United States v. Williams*, No. 21-cr-377 (June 10, 2022) (Minute Entry) (BAH); *United States v. McHugh*, No. 21-cr-453 (May 4, 2022) (Minute Entry) (JDB); *United States v. Webster*, No. 21-cr-208, ECF No. 78 (D.D.C. Apr. 18, 2022) (APM); *United States v. Alford*, 21-cr-263, ECF No. 46 (D.D.C. Apr. 18, 2022) (TSC); *United States v. Brooks*, No. 21-cr-503, ECF No. 31 (D.D.C. Jan. 24, 2022) (RCL); *United States v. Boche*, No. 21-cr-418-RDM, 2022 WL 123893 (D.D.C. Jan. 12, 2022) (RDM); *United States v. Fitzsimons*, No. 21-cr-158 (D.D.C. Dec. 14, 2021) (Minute Order) (RC); *United States v. Reffitt*, No. 21-cr-32 (D.D.C. Oct. 15, 2021) (Minute Order) (DLF); *United States v. Caldwell*, 21-cr-28, ECF No. 415 (D.D.C. Sept. 14, 2021) (APM).

primarily on two new issues: a) proposing the Eastern District of Virginia as the transfer jurisdiction for this case, in light of a poll conducted by In Lux Research (“ILR”) at the request of defendants charged in another case; and b) arguing that the recent televised hearings of the House Select Committee and statements of various political leaders add to the juror prejudice.² Each of Klein’s arguments is without merit, and the motion should be denied.

ARGUMENT

I. Klein’s Reliance on the In Lux Research Poll Fails to Show That Transfer to the Alexandria Division of the Eastern District of Virginia Would Provide a Significantly Different Venire.

Klein contends that venue is appropriate in the Eastern District of Virginia because that district “offers potential jurors shown to be significantly less biased” and “would result in very little inconvenience for the Court” since the Alexandria courthouse “is just over 8 miles away from the federal courthouse in D.C.” ECF No. 309, at 14. Klein relies primarily on the poll conducted by In Lux Research (“ILR”) to make this claim. ECF No. 309, at 5, and 309-1. ILR conducted a telephone poll of potential jurors in the District of Columbia and in four other jurisdictions: the Ocala Division of the Middle District of Florida, the Eastern District of North Carolina, and the Eastern District of Virginia. But the ILR poll does not support a change of venue.

First, as explained in the government’s response to Judd’s motion, courts have repeatedly declined to presume prejudice based on pretrial polling alone. ECF No. 292, at 6-9. Instead, the more appropriate way to address claims of bias based on pretrial publicity is to proceed to voir dire before resolving the prejudice question.

Second, the ILR poll does not establish that a fair jury cannot be obtained in this District.

² Klein also discusses the *Skilling* factors this Court should consider (ECF No. 309, at 4, 14). The government has already addressed the *Skilling* factors (ECF No. 292, at 19-22) in its original opposition, and therefore incorporates those arguments here.

The poll demonstrates that respondents in all four jurisdictions surveyed were aware of the events of January 6 at similar rates. ECF No. 309-1, at 24 (Question 1) (93.12% of D.C. respondents “aware of” the demonstration at the U.S. Capitol, compared to 94.07% in Middle Florida, 91.60% in Eastern North Carolina, and 94.27% in Eastern Virginia). The survey also shows that respondents’ media or conversational exposure to the events of January 6 did not vary significantly between jurisdictions. The survey asked respondents how often they “see, read or hear about the events of January 6th from either the Media, Local Leaders or the people around you.” ECF No. 309-1, at 21 (Question 4). The percentage of respondents reporting “[a]t least 10 times a week” was only slightly higher in D.C., with a response rate of 32.02%, compared to rates between 25% and 28% in the other three jurisdictions. ECF No. 309-1, at 24. And the percentage of D.C. respondents answering “[s]everal times a week” or “[o]nce or twice a week” were generally within one or two percentage points of respondents from other jurisdictions. *Id.* (41.09% of D.C. respondents reported exposure “[s]everal times a week,” compared to 39.82%, 39.30%, and 34.58% in the other jurisdictions, and 22.05% of D.C. respondents reporting exposure “[o]nce or twice a week,” compared to 20.66%, 22.68%, and 23.99% in the other jurisdictions). The survey thus confirms that exposure to reports of the events of January 6 is not confined to D.C., and the relatively small difference does not suggest that news coverage has made it impossible to pick an impartial jury in Washington, D.C.

The ILR survey’s summary focuses on responses to “prejudicial prejudgment” questions. ECF No. 309-1, at 2. But those questions do not show that an impartial jury cannot be selected in this District. The questions categorized as “prejudgment questions” were:

- (1) “Are you more likely to find a defendant charged with crimes for activities on January 6th guilty or not guilty? Or is it too early to decide?” (72% of D.C. respondents

answered “Guilty.”)

- (2) “In your opinion, which of the following terms best characterizes the Events of January 6th? 1) An insurrection, 2) An attack, 3) A riot, 4) A protest that got out of control, 5) A rally.” (82% of D.C. respondents chose insurrection, attack, or riot.)
- (3) “Do you believe that the individuals who entered the Capitol on January 6th planned to do it in advance or decided to do it that day?” (71% of D.C. respondents selected “planned in advance.”)
- (4) “Do you believe The Events of January 6th were racially motivated?” (40% of D.C. respondents answered in the affirmative.)

ECF No. 309-1, at 2-3, 8, 21-22. The last three of these questions do not support a presumption of prejudice because they have little relevance to the potential issues at trial. The trial in this case would not require jurors to determine whether the events of January 6 were an “insurrection,” an “attack,” a “riot,” or a “protest that got out of control.” Indeed, no defendant has been charged with the offense of insurrection, 18 U.S.C. § 2383, or of violating the Anti-Riot Act, 18 U.S.C. § 2101, in connection with the events of January 6.

Nor would the charges in this case require the jurors to determine whether the defendant “planned in advance” to enter the Capitol or whether the crimes were “racially motivated.” The fact that some D.C. respondents have formed “prejudgments” on those questions does not demonstrate that they cannot follow this court’s instructions and decide this case based on the law and the evidence. And even if it did, the solution would be to exclude prospective jurors who indicated “prejudgments” during voir dire. The ILR survey shows that some percentage of respondents in *all* surveyed jurisdictions expressed these so-called “prejudgments.” ECF No. 309-1, at 25 (Questions 6 and 9) (between 39% and 49% of respondents in other surveyed jurisdictions

thought entry into the Capitol was planned in advance, and between 11% and 20% believed the events of January 6 were racially motivated). This demonstrates that a careful voir dire would be necessary in any jurisdiction, and it fails to show that voir dire would be inadequate to weed out biased jurors in the District of Columbia.

Nor do the responses to the first “prejudicial prejudgment” question support a presumption of prejudice. That question asked respondents whether, in the abstract, they were “more likely” to find a defendant charged in connection with January 6 “guilty or not guilty.” The question failed to ask about any specific crimes. And it failed to ask respondents whether they could keep an open mind and decide a case based on the law and the evidence if selected as a juror. Yet the Supreme Court has made clear that the key question in jury selection is whether a prospective juror could “lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Irvin*, 366 U.S. at 722-23.

When focusing on whether prospective jurors could set aside their “prejudgments” and decide a case fairly, the ILR survey’s responses actually undermine Klein’s claim that prejudice should be presumed in this district. When asked whether it would be “possible for [them] to be a fair and unbiased juror for a January 6th Defendant,” ECF No. 309-1, at 23, a full 70.13% of D.C. respondents said that they “could,” *id.* at 26. This number was actually *higher* than the affirmative responses in the other three jurisdictions: Middle Florida (61.29%), Eastern North Carolina (65.38%), and Eastern Virginia (69.52%). *Id.*

The ILR survey’s administrator asserts that “this representation may actually indicate a failure to recognize or admit threats to fairness and impartiality.” ECF No. 309-1, at 5. But the survey’s findings do not justify that assertion. The administrator claims that because D.C. residents were more likely to characterize the events of January 6 as an “insurrection,” “attack,”

or “riot,” or to believe they were criminal, pre-planned, or racially motivated, *id.* at 22, 25, those residents “demonstrate[d] an inability to identify or unwillingness to report previously disclosed bias when asked if they could be a fair and impartial juror,” *id.* at 5. But this assumes, contrary to clear decisions from the Supreme Court, that any knowledge of or preconceived opinions about a case make a juror unable to be impartial. *See Reynolds*, 98 U.S. at 155-56; *Irvin*, 366 U.S. at 723. It also assumes that these jurors would fail to report these views to a judge during voir dire. Particularly because the ILR survey had already asked respondents specific questions that the survey claims showed “prejudicial prejudgment,” there is no reason to believe that D.C. respondents were somehow unable or “unwilling[]” to report their own biases when asked if they could be impartial.

Moreover, when asked if their “neighbors would be fair and unbiased jurors for a January 6th Defendant,” D.C. respondents still answered “Yes” at a higher rate than the other surveyed districts. ECF No. 309-1, at 26 (53.25% in D.C., compared to 36.57% in Middle Florida, 45.10% in Eastern North Carolina, and 40.89% in Eastern Virginia). Thus, even when controlling for respondents’ potential inability to discern their own biases, the survey does not indicate that D.C. residents are substantially less able to be fair than prospective jurors from other jurisdictions. Nor were D.C. respondents significantly more likely to worry about negative consequences to their career or friendships if they were to “find[] a January 6th defendant Not Guilty.” *Id.* at 22, 26 (19.29% in D.C., compared to 17.68% in Middle Florida, 19.66% in Eastern North Carolina, and 18.56% in Eastern Virginia). The ILR survey does not support the conclusion that an impartial jury cannot be found in Washington, D.C.

Klein argues that the Eastern District of Virginia would be a more appropriate venue because the Alexandria courthouse is “just eight (8) miles from this Court.” ECF No. 309, at 14.

But Klein’s argument fails to account for the fact that a jury selected in the Alexandria Division of the Eastern District of Virginia would be drawn only from seven counties in northern Virginia. *See* United States District Court for the Eastern District of Virginia, Plan for the Random Selection of Grand and Petit Jurors at 6-7, available at <https://www.vaed.uscourts.gov/sites/vaed/files/JuryPlanOrder.pdf>; Eastern District of Virginia Jurisdiction, available at, <https://www.vaed.uscourts.gov/eastern-district-virginia-jurisdiction>. The ILR survey, by contrast, surveyed respondents from the entire Eastern District of Virginia, which is a much larger area. ECF No. 309-1, at 1 n.2. The survey responses from the entire district cannot be presumed to be representative of the Alexandria Division, which embraces counties close to Washington, D.C., where residents are exposed to many of the same media sources as D.C. residents. Indeed, even without limiting its focus to the Alexandria Division, the ILR survey shows similar levels of media exposure in this district and the Eastern District of Virginia. *See* ECF No. 309-1, at 24 (32.02% of D.C. respondents exposed to coverage of January 6 at least ten times per week, compared to 28.04% of respondents in Eastern Virginia). In short, Klein cannot show he would obtain a significantly different venire in the Alexandria Division of the Eastern District of Virginia, and he has not requested to be tried in any of that district’s other divisions.

In any U.S. jurisdiction, most prospective jurors will have heard about the events of January 6, and many will have various disqualifying biases. But the appropriate way to identify and address those biases is through a careful voir dire, rather than a change of venue based solely on pretrial polling and media analyses. As in *Haldeman*, there is “no reason for concluding that the population of Washington, D. C. [i]s so aroused against [the defendant] and so unlikely to be able objectively to judge [his] guilt or innocence on the basis of the evidence presented at trial” that a change of venue is required. *Haldeman*, 559 F.2d at 62. A transfer of venue is unwarranted.

II. The Pretrial Publicity Related to January 6, Including the January 6 Select Committee Televised Hearings, Does Not Support a Presumption of Prejudice in This District.

The government addressed the concern that pretrial publicity supports a presumption of prejudice in this District in its original opposition. ECF No. 292, at 17-22. Klein now argues that requiring a jury trial in the District of Columbia “in the shadow of the public prime-time hearings scheduled by the House Select Committee would be highly prejudicial” (ECF No. 309, at 10) and that “incendiary statements made by Attorney General Merrick Garland have tainted the District of Columbia’s jury pool.” ECF No. 309, at 12.

“The mere existence of intense pretrial publicity is not enough to make a trial unfair, nor is the fact that potential jurors have been exposed to this publicity.” *United States v. Childress*, 58 F.3d 693, 706 (D.C. Cir. 1995); *see Murphy v. Florida*, 421 U.S. 794, 799 (1975) (juror exposure to “news accounts of the crime with which [a defendant] is charged” does not “alone presumptively deprive[] the defendant of due process”). Indeed, “every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.” *Reynolds v. United States*, 98 U.S. 145, 155-56 (1878). Thus, the “mere existence of any preconceived notion as to the guilt or innocence of an accused, without more,” is insufficient to establish prejudice. *Irvin*, 366 U.S. at 723. “It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Id.*.

Klein contends that the “prime-time hearings” of the House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol (Select Committee) support a change of venue. ECF No 309, at 10-12. But exposure to the hearings was not limited

to D.C. Indeed, the hearings were carried on national networks around the country and approximately 20 million people nationwide watched the televised coverage of the first hearing on June 9, 2022. *See*, <https://www.nytimes.com/2022/06/10/business/media/jan-6-hearing-ratings.html> (last accessed Jul. 13, 2022). In similar circumstances, the D.C. Circuit affirmed the denial of a change of venue where the defendants—who were high-ranking members of the Nixon administration—complained that they were prejudiced by news coverage of the Watergate-related hearings. *Haldeman*, 559 F.2d at 62-64 & nn.35, 43. The court of appeals observed that “a change of venue would have been of only doubtful value” where the “network news programs and legislative hearings” related to Watergate were “national in their reach.” *Id.* at n.43.

Moreover, the 20 million viewers of the June 9, 2022 hearing represent only about 6% of the total U.S. population. Klein has not pointed to any evidence that D.C. residents were more likely to have watched that hearing than citizens in other parts of the country. And even if D.C. residents tuned in at a higher rate, it is still likely that a majority of D.C. residents did not watch the hearings. Moreover, those hearings have focused on the events of January 6 as a whole, not on the actions of Klein himself. There is no reason to believe that coverage of the hearings will create in D.C. such a degree of bias against this particular defendant that an impartial jury cannot be selected.

Relatedly, Klein argues that prejudice should be presumed based on statements by the Attorney General of the United States, and other political leaders.³ ECF No. 309, at 12-13. But

³ Klein attributes to the Attorney General the statement that “there was a line that connected the January insurrection to the Oklahoma City bombing and back to the battles of the original Justice Department against the Ku Klux Klan.” ECF No. 309, at 12. In fact, this statement came not from the Attorney General, but from a news article characterizing the now-Attorney General’s testimony at his confirmation hearing. *See* BuzzFeedNews, “Merrick Garland Pledged to Investigate the Capitol Insurrection from the Rioters on ‘Up’ as Attorney General,” (Feb. 22, 2021), available at, <https://www.buzzfeednews.com/article/zoetillman/merrick-garland-investigate-capitol-riots->

harsh condemnation of a defendant's actions is not uncommon in high-profile criminal cases, and it does not suffice to establish prejudice. In *Skilling*, the news stories about the defendant's involvement in Enron's collapse "were not kind," but they "contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Skilling*, 561 U.S. at 382. And in *Haldeman*, although some of the coverage of the Watergate scandal was "hostile in tone and accusatory in content," the bulk of the coverage "consist[ed] of straightforward, unemotional factual accounts of events and of the progress of official and unofficial investigations." *Haldeman*, 559 F.2d at 61. The D.C. Circuit concluded that the coverage "was neither as inherently prejudicial nor as unforgettable as the spectacle of Rideau's dramatically staged and broadcast confession." *Id.* The same is true here, where news coverage has not reported on any confession or other blatantly prejudicial information about Klein. And, again, statements by the Attorney General are ordinarily reported across the entire country, and exposure to these statements is hardly unique to Washington, D.C.

A careful voir dire—rather than a change of venue—is the appropriate way to address potential prejudice from the Select Committee hearings or statements by political leaders. "[V]oir dire has long been recognized as an effective method of routing out [publicity-based] bias, especially when conducted in a careful and thoroughgoing manner." *In re Nat'l Broadcasting Co.*, 653 F.2d 609, 617 (D.C. Cir. 1981). After a careful voir dire, this Court can select a jury from those residents who either did not watch the hearings or who, despite having watched the hearing, give adequate assurances of their impartiality. *See Haldeman*, 559 F.3d at 62 n.35 (rejecting claim

attorney-general; *compare* Statements of Merrick Brian Garland, Hearing Before the U.S. Senate Committee on the Judiciary (Feb. 22, 2021), available at <https://www.judiciary.senate.gov/imo/media/doc/SJC%20Testimony.final1.pdf>.

of prejudice even though “several jurors” had “seen portions of the televised Senate hearings” related to Watergate).

III. Since The Government’s Initial Opposition, Additional Voir Dires in January 6 Jury Trials Has Demonstrated the Availability of a Significant Number of Fair, Impartial Jurors in the D.C. Venire.

At this point, six January 6 cases have proceeded to jury trials, and the Court in each of those cases has been able to select a jury without undue expenditure of time or effort. The government discussed the first three at length in its original pleading. ECF No. 292, at 26-30. Since that filing on May 27, 2022, the government now has the transcripts for the voir dire in *United States v. Thompson*, 21-cr-161 (RBW) (D.D.C. Apr. 11, 2022) and *United States v. Timothy Hale-Cusanelli*, 21-cr-37 (TNM) (D.D.C. May 23, 2022), and a sixth jury trial has been completed in *United States v. Anthony Williams*, No. 21-cr-377 (June 10, 2022) (Minute Entry) (BAH).⁴

In *Thompson*, the Court individually examined 34 prospective jurors, and qualified 25 of them (or 73%). See *Thompson* 4-11-22 Tr. 169, 171, 180, 189, 192. The court asked the entire venire 47 standard questions, and then followed up on their affirmative answers during individual voir dire. *Id.* at 3-4, 34. Of the nine prospective jurors struck for cause, only three (or about 9% of those examined) were stricken based on an inability to be impartial, as opposed to some other cause.⁵

In *Hale-Cusanelli*, this Court individually examined 47 prospective jurors and qualified 32 of them (or 68%). *Hale-Cusanelli* Trial Tr. 226, 231. The Court asked prospective jurors questions similar to those asked in the other trials. See *id.* at 72-74 (Questions 16, 20). Of the 15 prospective

⁴ The transcripts from the voir dire proceedings in *Thompson* and *Hale-Cusanelli* are being submitted under separate cover to the Court and counsel.

⁵ For the three stricken for bias, see *Thompson* 4-11-22 Tr. 52 (Juror 1242), 85 (Juror 328), 158 (Juror 999). For the six stricken for hardship or inability to focus, see *id.* at 43 (Juror 1513), 44 (Juror 1267), 49 (Juror 503), 40 (Juror 1290), 92 (Juror 229), 109 (Juror 1266).

jurors struck for cause, 11 (or 23% of those examined) were stricken based on a connection to the events of January 6 or a professed inability to be impartial.⁶

In these first five jury trials, the percentage of prospective jurors stricken for cause based on partiality is far lower than in *Irvin*, where the Supreme Court said that “statement[s] of impartiality” by some prospective jurors could be given “little weight” based on the number of other prospective jurors who “admitted prejudice.” *Irvin*, 366 U.S. at 728. In *Irvin*, 268 of 430 prospective jurors (or 62%) were stricken for cause based on “fixed opinions as to the guilt of petitioner.” *Id.* at 727. The percentage of partiality-based strikes in these first five January 6-related jury trials—between 9% and 23% of those examined—is far lower than the 62% in *Irvin*. The percentage in these cases is lower even than in *Murphy*, where 20 of 78 prospective jurors (25%) were “excused because they indicated an opinion as to petitioner’s guilt.” *Murphy*, 421 U.S. at 803. *Murphy* said that this percentage “by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.” *Id.* As in *Murphy*, the number of prospective jurors indicating bias does not call into question the qualifications of others whose statements of impartiality the Court has credited.

Far from showing that “an impartial jury actually cannot be selected,” *Haldeman*, 559 F.2d at 63, the first five January 6-related jury trials have confirmed that voir dire can adequately screen out prospective jurors who cannot be fair and impartial, while leaving more than sufficient qualified jurors to hear the case. The Court should deny Klein’s request for a venue transfer and should instead rely on a thorough voir dire to protect the defendant’s right to an impartial jury.

⁶ See *Hale-Cusanelli* Trial Tr. 62 (Juror 499), 67-68 (Juror 872), 84-85 (Juror 206), 92-93 (Juror 653), 124-25 (Juror 1129), 152 (Juror 182), 156 (Juror 176), 182 (Juror 890), 197-98 (Juror 870), 217 (Juror 1111), 224 (Juror 1412). For the four jurors excused for hardship, see *id.* at 77-79 (Juror 1524), 99 (Juror 1094), 132 (Juror 1014), 151 (Juror 899).

