

**Trump on Trial:  
A Model Prosecution Memo  
for Federal Election Interference Crimes  
*Second Edition***

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## INTRODUCTION

This model prosecution memorandum (or “pros memo”) assesses federal charges Special Counsel Jack Smith may bring against former President Donald Trump for alleged criminal interference in the 2020 election. The authors have decades of experience as federal prosecutors, criminal defense lawyers, and other legal expertise. We conclude that the evidence likely now meets Department of Justice standards to commence a prosecution. We base that conclusion upon a stream of recent disclosures in court filings and in the press that have come on top of the findings of the House Select Committee to Investigate the January 6<sup>th</sup> Attack on the United States Capitol (the “Select Committee”).

Our memo follows a common DOJ practice. Prior to indicting a case, federal prosecutors prepare a pros memo that lays out admissible evidence, possible charges, and legal issues. This document provides a basis for prosecutors handling the case and their supervisors to assess whether the case meets the standard set forth in the Principles of Federal Prosecution, which permit charges only when there is “evidence sufficient to obtain and sustain a conviction.”

Here, we conclude there likely is sufficient evidence to obtain and sustain a conviction of Trump for his three-step plan to overturn the election:

1. Trump knew he lost the election but did not want to give up power, so he worked with his lawyers and others on a wide variety of schemes to change the outcome. Those schemes included creating fraudulent electoral certificates that were submitted to Congress, implicating statutes such as 18 U.S.C. § 371, which prohibits conspiracies to defraud the United States in the administration of elections.
2. When all the other schemes failed, Trump and his lawyers ultimately concentrated on using the false electoral slates to obstruct the constitutionally mandated congressional certification of the election on January 6, implicating statutes such as 18 U.S.C. § 1512, which prohibits obstruction of an official proceeding. Their primary objective was to have Vice President Mike Pence in his presiding role on that day either block Congress from recognizing Joe Biden’s win at all or at least to delay the electoral count.
3. When Pence refused, Trump went to his last resort: triggering an insurrection in the hope that it would throw Congress off course, delaying the transfer of power for the first time in American history. This implicated statutes such as 18 U.S.C. § 2383, which prohibits inciting an insurrection and giving aid or comfort to insurrectionists. (Section 2383 is rarely charged, and as we discuss below, this is a charge DOJ will use only with extreme caution. We believe there is sufficient evidence to pursue it—as did the Select Committee in making a criminal referral of Trump under that statute—but prosecutors may make different choices. Much will depend on the evidence the Special Counsel develops.)

Our own conclusions based upon the publicly available information are bolstered by the analysis of many other authorities:

- A federal judge has already found by a preponderance of the evidence that Trump and a co-conspirator (John Eastman) likely violated 18 U.S.C. § 371 and 18 U.S.C. § 1512.
- The Select Committee has made criminal referrals of Trump and his co-conspirators to DOJ under those and other statutes based upon voluminous and persuasive evidence summarized and cited in their report.
- Subsequent to that report's issuance, the Committee released a large body of additional evidence containing information that supports prosecution—some of which is publicly analyzed for the first time in this model pros memo.
- Evidentiary hurdles faced by the Select Committee have been overcome by Special Counsel Smith through the use of his more robust subpoena power and a series of court victories. He has now taken testimony from two of the most important witnesses in the case, former Vice President Pence<sup>1</sup> and Trump's former Chief of Staff Mark Meadows,<sup>2</sup> and recently interviewed a third, Trump's personal lawyer Rudy Giuliani.<sup>3</sup> Smith has also taken testimony from an array of other key witnesses including: former White House Counsel Pat Cipollone,<sup>4</sup> his former deputy Pat Philbin,<sup>5</sup> former White House Deputy Chief of Staff Dan Scavino,<sup>6</sup> former National Security Advisor Robert O'Brien,<sup>7</sup> former Senior Advisor Stephen Miller,<sup>8</sup> former Director of National Intelligence John Ratcliffe,<sup>9</sup> former

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<sup>1</sup> Maggie Haberman, Pence Appears Before Grand Jury on Trump's Efforts to Retain Power, THE NEW YORK TIMES (Apr. 27, 2023), <https://www.nytimes.com/2023/04/27/us/politics/pence-grand-jury-trump.html>.

<sup>2</sup> Kristen Holmes, Katelyn Polantz & Hannah Rabinowitz, Mark Meadows testified to federal grand jury in special counsel probe of Trump, CNN (June 7, 2023), <https://www.cnn.com/2023/06/06/politics/mark-meadows-grand-jury-trump-probe/index.html>.

<sup>3</sup> Ben Protess, Alan Feuer & Maggie Haberman, Giuliani Sat for Voluntary Interview in Jan. 6 Investigation, THE NEW YORK TIMES (June 28, 2023), <https://www.nytimes.com/2023/06/28/us/politics/giuliani-jan-6-investigation.html>.

<sup>4</sup> Alan Feuer & Glenn Thrush, Witness Testimony Helps Prosecutors Advance Trump Election Case, THE NEW YORK TIMES (Apr. 13, 2023), <https://www.nytimes.com/2023/04/13/us/politics/donald-trump-investigation.html>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Zachary Cohen, Exclusive: National security officials tell special counsel Trump was repeatedly warned he did not have the authority to seize voting machines, CNN (last updated Apr. 6, 2023), <https://www.cnn.com/2023/04/05/politics/election-voting-machines-trump-national-security/index.html>.

<sup>8</sup> Rebecca Shabad & Gary Grumbach, Former Trump adviser Stephen Miller spends six hours at federal court where Jan. 6 grand jury meets, NBC NEWS (Apr. 11, 2023), <https://www.nbcnews.com/politics/donald-trump/former-trump-adviser-stephen-miller-appears-dc-federal-court-jan-6-gra-rcna79143>.

<sup>9</sup> Kaitlan Collins, Former Director of National Intelligence John Ratcliffe testifies to grand jury in January 6 probe, CNN (Apr. 13, 2023), <https://www.cnn.com/2023/04/13/politics/john-ratcliffe-testifies-grand-jury/index.html>.

Acting Deputy Homeland Security Secretary Ken Cuccinelli,<sup>10</sup> former aide Nick Luna,<sup>11</sup> former White House Presidential Personnel Office Director John McEntee,<sup>12</sup> and Georgia Secretary of State Brad Raffensperger.<sup>13</sup> While we do not have the grand jury transcripts, we are able to assess the likely testimony based on publicly available information such as that contained in Pence's book, Meadows's contemporaneous texts, and prior hearsay evidence that may itself not be admissible at trial. The testimony in DOJ's possession is likely highly incriminating of Trump.

- A bipartisan expert consensus has emerged that charges here are merited and likely. Among the first and most persuasive to make the case was former U.S. Attorney Barbara McQuade, who published a model prosecution memo over a year ago on which we build.<sup>14</sup> Most recently, the consensus has been joined by Trump's own former attorney general and one-time defender, Bill Barr,<sup>15</sup> and eminent conservative jurist Judge Michael Luttig.<sup>16</sup>
- A series of rare convictions of some of the leading insurrectionists under the charge of seditious conspiracy have now laid the groundwork for closely related insurrection charges against Trump.

DOJ likely is now, or shortly will be, internally circulating a pros memo of its own assessing possible 2020 election interference charges against Trump and possible co-conspirators. That DOJ memo will, however, be highly confidential, in part because it will contain information derived through the grand jury and attorney work product. Since it may never be publicly available, we offer this analysis for use by the public, the press, policymakers, and other interested individuals. Our analysis adopts the format of a model pros memo on the Trump classified documents investigation, which some of the same authors released and which correctly anticipated

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<sup>10</sup> Katelyn Polantz, Kaitlan Collins & Casey Gannon, Former Trump DHS official Ken Cuccinelli testifying in grand jury investigation around 2020 election interference, CNN (Jan. 26, 2023), <https://www.cnn.com/2023/01/26/politics/ken-cuccinelli-grand-jury/index.html>.

<sup>11</sup> Maggie Haberman & Alan Feuer, Former Trump Officials Must Testify in 2020 Election Inquiry, Judge Says, THE NEW YORK TIMES (Mar. 24, 2023), <https://www.nytimes.com/2023/03/24/us/politics/trump-mark-meadows-executive-privilege-jan-6.html>.

<sup>12</sup> *Id.*

<sup>13</sup> Shannon McCaffrey, Raffensperger will talk to feds in Trump probe, THE ATLANTA JOURNAL-CONSTITUTION (June 27, 2023), <https://www.ajc.com/politics/raffensperger-will-talk-to-feds-in-trump-probe/Z3TJWQC32RCC3FULSGRLXIHQGE/>.

<sup>14</sup> Barbara McQuade, United States v. Donald Trump: A 'Model Prosecution Memo' on the Conspiracy to Pressure Vice President Pence, JUST SECURITY (Feb. 22, 2022), <https://www.justsecurity.org/80308/united-states-v-donald-trump-model-prosecution-memo/>.

<sup>15</sup> Transcript: Former Attorney General William Barr on 'Face the Nation,' June 18, 2023, CBS NEWS, <https://www.cbsnews.com/news/william-barr-former-attorney-general-face-the-nation-transcript-06-18-2023/>.

<sup>16</sup> J. Michael Luttig, It's Not Too Late for the Republican Party, THE NEW YORK TIMES (June 25, 2023), <https://www.nytimes.com/2023/06/25/opinion/trump-republican-party.html>.



charges in that case.<sup>17</sup> Our analysis also builds upon an earlier report<sup>18</sup> that some of the authors released before the commencement of the Select Committee hearings on possible 2020 election interference crimes. We also note that because this is a public-facing document written for both legal scholars and a broader audience (rather than an internal document directed at lawyers already steeped in the facts and the law), this memo includes more facts and more legal analysis than a typical pros memo would.

The Select Committee’s extraordinary work and final report are the foundation of our memo, but our analysis is distinct. Ours is the first in-depth application of the relevant criminal law to the facts, building on the more concise criminal referrals the committee offered in its report. We endeavor to look at that report with skeptical eyes as prosecutors do, to narrow the case to what can confidently be proven to a jury, and for the first time anywhere to consider at length, and of course in good faith, Trump’s defenses and how they will fare. Moreover, the public record has grown a great deal since the Select Committee report’s publication in December 2022, and we update it with the information released after the report. We consider the depositions and documents that the Committee itself released after the report came out, as well as a substantial amount of other reported new evidence.

Throughout this memo, we urge a focused approach to charging and trying the case that can be done using our three-part structure or another simplifying approach that would allow the case to come to trial within a year. (We diverge from a typical pros memo in extensively analyzing approaches and advocating for this relatively simple one.)

The classified documents indictment offers insight into Smith’s possible thinking here. Those charges include only one co-conspirator, a measured approach suggesting that the list of defendants in this case likewise might be a short one. It may include some or all of those mentioned by the Select Committee in their referrals for prosecution: Trump and associated attorneys John Eastman and Kenneth Chesebro. The Committee referred Mark Meadows, and he may be included as well, though some reports suggest he may be cooperating.<sup>19</sup> If true, that might make his inclusion in an indictment unlikely. Rudy Giuliani, who was also referred, has spoken to prosecutors and may also end up cooperating,<sup>20</sup> and, if so, his inclusion in an indictment could be similarly unlikely. Given the stature of both Meadows and Giuliani, and their apparent level of culpability in relation to the events described in this pros memo, however, we also think it unlikely that the special counsel would grant them any kind of immunity without concomitantly requiring

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<sup>17</sup> Certain portions of the language of this introduction are adapted from the introduction in that document. Andrew Weissmann, Ryan Goodman, Joyce Vance, Norman L. Eisen, Fred Wertheimer, Siven Watt, E. Danya Perry, Joshua Stanton & Joshua Kolb, Model Prosecution Memo for Trump Classified Documents, JUST SECURITY (June 2, 2023), <https://www.justsecurity.org/86771/model-prosecution-memo-for-trump-classified-documents/>.

<sup>18</sup> Norman Eisen, Donald Ayer, Joshua Perry, Noah Bookbinder & E. Danya Perry, Trump on Trial: A Guide to the January 6 Hearings and the Question of Criminality, GOVERNANCE STUDIES AT BROOKINGS (June 6, 2022), <https://www.brookings.edu/articles/trump-on-trial/> (hereinafter “Trump on Trial”).

<sup>19</sup> See, e.g., Ewan Palmer, Mark Meadows Flipping on Donald Trump Is ‘Game Over’—Legal Expert, NEWSWEEK (May 25, 2023), <https://www.newsweek.com/mark-meadows-trump-special-counsel-jan6-1802571>.

<sup>20</sup> Protess, Feuer & Haberman, *supra* note 3.

a plea agreement. It is possible one or more such agreements have already been made, although Meadows's attorney has flatly denied it with respect to his client.

By urging a disciplined approach that focuses on the false electoral slates and a short list of possible defendants, we are not, of course, suggesting that Smith should refrain from investigating or prosecuting other schemes or other defendants in the fullness of time if the evidence merits. Indeed, news reports indicate that prosecutors recently spoke to Georgia Secretary of State Brad Raffensperger, including about one aspect of the larger landscape—the effort to influence him to “find 11,780 votes.” As one of the authors has argued elsewhere,<sup>21</sup> that scheme alone and its related developments might give rise to federal offenses quite apart from the false electors, and Smith could well charge them.

But if he already has perfectly good charges relating to the essence of the three acts described, and can obtain and sustain a conviction, how much more broadly should he charge—or should he simply present the “11,780 votes” conversation as a part of the larger landscape of failed efforts to overthrow the election that set up the last resort to Pence? We will not presume to make that determination, since he and his colleagues have far more information. But we think it is telling that Smith did not interview Raffensperger until very recently,<sup>22</sup> suggesting that the special counsel may be engaged in the kind of narrowing process that we recommend.

What's more, the narrowing process we analyze and the charges we focus on are ones that would not require a jury to find that Trump knew that he had lost the election. Although we think the proof is overwhelming that Trump was well aware he had lost, avoiding such an argument as an element of the affirmative case will make trying any such case simpler. (Trump can and likely will, of course, endeavor to raise these issues as defenses but as we discuss below, they are most likely to fail.) With respect to each charge assessed herein, proof of criminal intent can be established either with proof that electoral certificates were false; that Pence did not have authority to override the will of voters or to pause the count of electors; or purposeful support for the rioters in the Capitol.

With the public interest in mind, the optimal window of time to bring charges is a factor in our analysis, and thus we should say a few words about that factor. We cannot with certainty say when any charges will be filed, but there is reason to anticipate it could be as soon as this summer. Smith is as aware as anyone of the political calendar. The primary season is already commencing and will take off in earnest after Labor Day. That favors an indictment this summer, as is also suggested by news reports that Smith did not permit witnesses scheduled for June 2023 grand jury testimony to delay their appearances. An indictment over the summer would also allow the possibility of the case being tried within a year and before the July 2024 Republican National Convention.

Another factor favoring an indictment this summer is that Fulton County District Attorney Fani Willis, who has been overseeing a special grand jury investigation of Trump's attempt to

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<sup>21</sup> Fred Wertheimer & Norman Eisen, The Jan. 6 hearings spotlight a Trump smoking gun in Georgia, MSNBC (June 21, 2022), <https://www.nbcnews.com/think/opinion/january-6-hearing-day-4-spotlights-trump-smoking-gun-georgia-rcna34417>.

<sup>22</sup> McCaffrey, *supra* note 13.

interfere with the 2020 election in Georgia, has announced her intention to make charging decisions in that case between the middle of July and September 1, with a narrower window expected in mid-August. Smith may wish to file charges before Willis does, since by doing so he can make his theory of the case public, minimizing the risk of a conflicting Fulton County indictment that could complicate the federal case.

To further simplify the case and facilitate an expeditious trial, it may be desirable to defer filing charges even if merited against others allegedly involved in the misconduct and/or referred by the Select Committee, such as Jeffrey Clark, the former DOJ official who allegedly conspired with Trump to misuse the Department to overturn the election, as well as other lawyers who assisted Trump in his fraudulent scheme to stay in power. They could be charged separately at a later time, given the general five-year statute of limitations. The American people are entitled to an adjudication of Trump's criminal liability now, before they decide on his fitness to return to office—and so that if he does return and attempt to pardon himself (or is pardoned by another) or use other means to thwart the rule of law, there is a judicial adjudication. That is also potentially in his interest, as acquittal if the evidence is insufficient will clear his name from criminal liability.<sup>23</sup> Note that by contrast, the Fulton County case, as a state prosecution, is beyond federal pardon powers; it can likely continue to proceed even if Trump is elected, and so the same time constraints and need to narrow the case do not apply in the same way. (We do not, however, address state proceedings or their scope in this report.)

We are not in possession of the full grand jury record and other evidence available to prosecutors, and for that reason we are only able to analyze the application of the law to the facts if court filings and public reports are accurate. Trump and others named herein have denied wrongdoing. We include those denials, and the asserted bases for them, in our discussion below. If Trump or others are charged, they must be considered innocent until proven guilty. Our assessment that the known evidence meets the federal standards for prosecution should not be mistaken for a finding of ultimate culpability. Nor should our exclusion of certain charges from this document be read as a negative assessment of the merits of other possible offenses—in this memo, we instead focus, based on the public record, on the charges that appear to be strongest.

Because the analysis in this report supporting those conclusions is lengthy, we follow this introduction with an executive summary of the full report.

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<sup>23</sup> Some of these authors work at organizations that have publicly committed to challenging Donald Trump's constitutional eligibility for office under Section Three of the Fourteenth Amendment. Relevant authorities may address such ineligibility without a determination on Trump's liability for involvement in insurrection in the separate criminal proceedings we here address.

## EXECUTIVE SUMMARY

### *Section I: Facts*

We start this model prosecution memo in Section I by examining the publicly available factual record that emerged on and since January 6, 2021. This includes facts that have emerged since the Select Committee released its report, such as reporting that senior officials from an outside research firm commissioned by Trump’s campaign briefed him and Meadows on findings that directly contradicted many of the conspiracy theories Trump was then publicly repeating. The record is vast—so vast that it risks confusing a jury and, if tried in full, delaying the case beyond the one-year timetable that we believe advisable. Accordingly, we organize our presentation of the facts around our recommended trial approach in three relatively simple courses of conduct:

**First, Trump knew that he lost but did not want to give up power, so he worked with his lawyers on a variety of schemes.** In this section, we begin with the indisputable fact that Trump lost the election and the overwhelming proof that he knew he lost and repeatedly admitted it. He was also certainly aware of all the adverse court judgments reaffirming the outcome of the election. We explain that nevertheless, he launched a disinformation campaign to hang onto power known as “the Big Lie” (Section I.A.1).

Before turning to the false electoral slate scheme, we look at other parallel schemes led by Trump including pressing his own DOJ (Section I.A.2) as well as state authorities across the nation (Section I.A.3) to help overturn the legitimate results.

We then turn to a deep dive into the false electoral slate scheme (Section I.A.4). We highlight those involved: Trump and Meadows, as the leaders in the White House, and the lawyers who guided and implemented the effort, including Eastman, Chesebro, and Giuliani. In several states Biden won, they plotted to organize meetings of Trump electors on December 14, the day the Electoral College met to cast and certify electoral votes. During those meetings the Trump electors would produce fraudulent certifications of Trump’s victory, instead of Biden’s. Beforehand, Trump, joined by Eastman, personally called the Republican National Committee Chairwoman to ask whether the RNC would help “gather these contingent electors.” And members of his campaign helped assemble these electors and stage their December 14 meetings, with one organizer instructing the electors to operate in “complete secrecy.” Meadows and Giuliani, despite being reportedly told by White House counsel that the plan was “not legally sound” were directly involved. Meadows responded to messages updating him on attempts to push legislators to send false slates by writing “I love it” and “Have a team on it.”

We explain how other schemes gradually failed over the course of the post-election period as Trump and his allies were rebuffed by state officials, the DOJ, and the courts—whose responses to Trump’s schemes varied from laughing at their flagrant departure from reality, calling them “bullshit,” and rejecting them outright as baseless. By the first days of 2021, the plan to push Pence to use the false electoral certificates on January 6 emerged as Trump’s last hope for a non-violent path to override the will of the voters and retain the presidency. Note that as a matter of trial strategy, we expect that prosecutors will foreshorten the valuable account the Select Committee has assembled, condensing it, reserving the many possible factual lines it contains involving

dozens of other individuals for other potential indictments, and using the narrative of this first act to present the context and set up the dramatic conflict of act two.

**Second, after everything else started to fail, Trump and his small group of lawyers ultimately concentrated on pressing Pence to use the false electoral slates either to block Congress from recognizing Biden’s win or to delay the vote count entirely on January 6.** Here, we describe the intense pressure applied directly on Pence and his advisors, principally Chief of Staff Marc Short and Counsel Greg Jacob, to adopt an unlawful approach to Pence’s ministerial role on January 6. That pressure included, for example, Trump issuing a categorically false statement on January 5 asserting that Pence’s views on the vice president’s authority over the vote count were aligned with his, after the *New York Times* reported that Pence had told Trump that he did not possess that authority.<sup>24</sup> In its most extreme form, on January 6, in the very midst of the insurrection, Trump tweeted to his followers that his vice president “didn’t have the courage to do what should have been done to protect our Country and our Constitution.”

What, exactly, did Trump think Pence should have done? He and Eastman pressed the vice president to follow through on one of two plans:

“First, the Vice President could unilaterally reject the certified electors from several States won by former Vice President Biden, thereby handing the presidency to President Trump. Or, according to Eastman, Vice President Pence could delay the joint session to give State legislatures the opportunity to certify new electors loyal to the President.”<sup>25</sup>

This was contrary to law—and Eastman and Trump knew it. Indeed, Eastman admitted as much to Jacob, conceding in one email that he was asking Pence to commit a “relatively minor violation” of federal election law. In another email, Eastman conceded that the vice president did not have the unilateral authority to refuse to count electoral votes; when Jacob asked Eastman if the president was aware that “the Vice President does not have the power to decide things unilaterally,” Eastman informed Jacob that Trump had “been so advised.” The tension was intense on January 6 in the hours leading up to the meeting of Congress: would Pence oblige Trump, or wouldn’t he?

**Third, when Pence refused, Trump turned to a last resort, which had been in the works for some time: inciting an insurrection and refusing to stop it for 187 minutes in the hope that that would throw Congress off course (which it did for the first time in American history).** After months of inflammatory remarks about the event on January 6, 2021, at a noon speech delivered before a rally of his followers that he had gathered at the Ellipse, Trump riled them up and directed them straight to Congress. He encouraged the audience at his speech to march to the Capitol, announcing that “we’re going to walk down [to the Capitol building], and I’ll be there with you.” Knowing members of this crowd were armed and that violence was possible,

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<sup>24</sup> Kathryn Watson, Trump claims he and Pence agree on VP’s election authority, CBS NEWS (Jan. 6, 2021), <https://www.cbsnews.com/news/trump-pence-vp-authority-electoral-college-vote-count/>.

<sup>25</sup> Select Comm. Report at 428.

Trump nonetheless implored them to “show strength,” stating that “you’ll never take back our country with weakness.” He also warned the audience: “We fight like hell and if you don’t fight like hell, you’re not going to have a country anymore.” Moreover, he ad-libbed several additions about Pence in his speech, saying for example, “If Mike Pence does the right thing, we win the election.”

Note that it need not be the case that at this point Trump necessarily envisioned the violence that ensued. He may simply have seen his remarks (and his long run-up of incendiary comments) as galvanizing thousands of his supporters to occupy the building and grounds of the Capitol, without violence. His Ellipse remarks did include an exhortation to remain peaceful. Of course, he was also reportedly aware that many in the mob were armed, and on notice about prior violence by militia members. On this model, his behavior was therefore at a minimum highly reckless.

Whatever specific form of action Trump may have intended, his supporters answered what they understood to be his direct call to them: they descended onto the Capitol. By 2:11 p.m., they breached the building. As he knew or should have foreseen, the mob was violent. They destroyed parts of the building and attacked police officers using physical force and weapons, including chemical sprays and flag poles. These violent individuals believed they were taking their cue directly from Trump. As Trump supporter Stephen Ayres—who later pleaded guilty to disorderly conduct—explained in his congressional testimony, he engaged in this conduct because “the President got everybody riled up and told everybody to head on down. So we basically was [sic] just following what he said.”<sup>26</sup>

Rather than send his supporters home once he became aware of the violence, Trump continued to fan the flame and let it rage on. He sent out a tweet egging on the violence at 2:24 p.m. blaming Pence for not doing what Trump wanted him to do, all while knowing that the mob was “literally calling for the vice president to be effing hung,” as one congressional witness testified. And for 187 minutes while the violence raged, Trump stood back and sat by, watching cable news in the White House—even as members of his team implored him to issue a statement calling the violence off and for the rioters to leave the building. Finally, at 4:17 p.m., Trump posted a video asking his supporters to go home, telling them “We love you. You’re very special...I know how you feel, but go home, and go home in peace.”

But by then, the damage had been done: the Capitol building had been defaced; police officers had been brutalized; and the meeting of Congress had been disrupted, with members hiding for their lives while law enforcement worked to quell the chaos and violence. It was not until 9:00 p.m. that the House was brought back in session for the counting to continue. At 3:42 a.m. the next morning, Pence certified Biden as the winner of the election.

Of course, history rarely if ever conforms to neat timelines or patterns of causation that can be easily delineated in retrospect. Though we have endeavored to present the events leading up to

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<sup>26</sup> Here’s every word from the seventh Jan. 6 committee hearing on its investigation, NPR (July 12, 2022), <https://www.npr.org/2022/07/12/1111123258/jan-6-committee-hearing-transcript> (hereinafter “Seventh Jan. 6 Hearing Transcript”).

and on January 6 in these three sequential acts, they are no exception to this general historical truth. The pressure campaign launched against Pence that we focus on in the second act, for example, originated as the several schemes articulated in the first act continued to unfold in early December. Similarly, the focus of the third act, Trump’s incitement of the insurrection, has its origins in September 2020 when Trump first instructed his extremist supporters during a presidential debate to “stand back and stand by”—or even before the election when he began circulating misinformation about the coming vote.

Nevertheless, we think it appropriate and useful to distinguish three separate acts as we have, because the inflection point of each coincides with the conclusion of the previous act: Trump began to ramp up pressure on Pence after members of the Electoral College—as well as a parallel group of fraudulent electors in seven states—convened across the country and cast their votes on December 14, the final scheme of the first act; and Trump offered his strongest words of incitement on January 6 at his Ellipse speech, after Pence had rejected Trump’s overtures multiple times and made clear he would not go along with Trump’s plan for interfering with congressional certification.

## *Section II: Application of Law to the Facts*

In Section II, we apply the law to the facts and argue for a relatively simple theory of the case. In II.A, we evaluate possible charges related to what we have described as act one of the conspiracy: the alleged creation of false electoral certificates and the submission of those false documents to Congress in violation of 18 U.S.C. §§ 371 and 1001. Section 371 creates a felony when “two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy.” Section 1001 broadly criminalizes the making of false statements or use of false documents in any matter “within the jurisdiction of a department or agency of the United States.”

We analyze the evidence indicating that Trump, Meadows, Eastman, Chesebro, Giuliani, and others may have conspired to arrange for the creation and submission of false electoral slates to Congress from seven states. Many of the electoral certificates falsely described the electors named therein as the “duly elected” electors, when in fact the principal orchestrators of the scheme were aware that Trump had lost in each of those states. As we explain, that fraud is likely more than enough to prove a violation of §§ 371 and 1001. Section 371 can be violated in two possible ways, and each applies to this scheme. First, under the “defraud” prong of the statute, a person commits a crime when he: (1) enters into an agreement with one or more others; (2) with specific intent to obstruct a lawful function of the government; (3) by deceitful or dishonest means. Second, under the “offense” prong of the statute, a person commits a crime when he does the same with the intent to commit an offense against the United States—in this case, using a document containing information he knows to be false in a matter within the jurisdiction of Congress. We begin with § 371 because the Special Counsel appears exceptionally focused on this scheme in bringing charges: false electors testified before the grand jury as recently as June 13, 2023, and the use of immunity to obtain their testimony suggests Smith is moving up the food chain.

In Section II.B, we analyze possible violations corresponding to what we have described as the second act of the conspiracy: the evidence that Trump and associated lawyers utilized the fraudulently obtained and submitted electoral certificates as part of the scheme to pressure Vice President Pence to stop or delay the congressional count of electoral vote certificates on January 6. Most obviously, these include violations of 18 U.S.C. § 1512, in which subsection (c)(2) forbids attempts to corruptly obstruct or impede an official proceeding, and subsection (k) forbids a conspiracy to obstruct or impede an official proceeding. We apply the law to the facts to look at the case that Trump and members of his circle may have violated § 1512(c)(2) and (k).

We also consider again 18 U.S.C. § 371. That statute criminalizes, among other things, a conspiracy that uses dishonest means to obstruct or impede the lawful function of the U.S. government. We analyze whether Trump and others used dishonest means by conspiring to obstruct the congressional count on January 6. (In an appendix, we also look at the evidence that Trump and Clark may have violated § 371 by conspiring to subvert the DOJ’s election protection function, seeking to weaponize the DOJ to help Trump retain power.)

Dozens of insurrectionists have been convicted under § 1512 for their attempted obstruction through violence and intrusion on Capitol grounds. The facts we assess suggest that Trump and others are also likely to be charged under this section. That is in part because there is no reason to treat their attempts to interfere with the proceeding through fraud (that helped create the conditions for the assault on the Capitol) any more favorably. And they were, after all, the main orchestrators of the attempt to overturn the results of the presidential election.

In Section II.C, we turn to the third act and consider 18 U.S.C. § 2383, which criminalizes insurrection. Under that statute, anyone who “incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto” may be liable for a felony. Here we consider the relevance of Trump’s tweet at 2:24 p.m. targeting Mike Pence and inflaming the insurrectionists, as well as Trump’s failure to take remedial measures for 187 minutes after the violence commenced. We assess the substantial evidence that Trump violated the elements of the statute in relation to those two actions, including whether he assisted in an insurrection, as well as whether he gave aid or comfort thereto. We also assess his incendiary statements culminating in the Ellipse on January 6 as to whether they amount to inciting an insurrection, as well as potential First Amendment concerns such a prosecution would bring—concerns that we think prosecutors would successfully address in court.

Although the statute has not been applied since the Civil War<sup>27</sup> and therefore the DOJ may be wary of using a less-tested prosecutorial route here, our country has experienced no serious attempt like using organized violence to overturn the lawful results of a presidential election since that time. It is not inappropriate to apply a rarely used, yet serious statute, to prosecute a uniquely egregious attempt to disrupt the fundamental democratic functioning of our nation. We point to the precedent of the recent convictions of militia leaders who responded on January 6 to Trump’s calls to action under a comparable and also little-used statute, seditious conspiracy. Whether the

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<sup>27</sup> Joshua Braver, The Justice Department Shouldn’t Open the Pandora’s Box of Seditious Conspiracy, *LAWFARE* (May 6, 2021), <https://www.lawfaremedia.org/article/justice-department-shouldnt-open-pandoras-box-seditious-conspiracy>.



special counsel opts to bring charges against the former president under the seditious conspiracy statute depends heavily on the facts he may have developed that are not yet public.

### *Section III: Defenses*

A careful analysis of possible crimes must also examine potential defenses. Because it is sometimes easiest to consider defenses in the context of discussing the elements of a potential charge, we discuss some of those defenses throughout Section II. We explain, for instance, that Trump’s inevitable defense of lack of criminal intent is unlikely to prevail given the overwhelming evidence that Trump was repeatedly informed the election was not fraudulent. We also show that § 1512(c) is not unconstitutionally vague—as many January 6 insurrectionist defendants have claimed—and that defendants cannot avoid culpability for obstructing an official proceeding merely because they did not directly tamper with documents. The statute is much broader than that single application.

Other defenses are better considered separately from the elements of the possible charges. Accordingly, in Section III, we turn to additional defenses, explaining how they might be developed and why they appear unavailing. Among other things, we explain why there is likely no absolute immunity, free speech, or other constitutional defense here; why Trump will probably fail if he seeks shelter behind an advice of counsel or “good faith belief” defense; and why Eastman and other attorneys will likely not succeed if they defend their behavior as mere zealous advocacy on behalf of a client.

### *Conclusion*

Throughout our analysis, we follow the same methodology used in the Trump classified documents model prosecution memo that some of us co-authored, namely by applying the standard articulated by Attorney General Merrick Garland: “Upholding the rule of law means applying the law evenly, without fear or favor.” As we stated there, “this case must be evaluated for prosecution like any other case with similar evidence would be, without regard to the fact that the case is focused on the conduct of a former president of the United States.” In our conclusion we return to that standard and summarize our review suggesting that charges are likely merited under DOJ standards and precedents. Finally, we discuss why holding the former president accountable for his actions to subvert our democratic system is important for the health of our democracy—that is, why prosecutors not only can charge under DOJ standards, but should do so.

## I. FACTS

### A. Act One: Trump's Rejection of the Truth and Embrace of Schemes

As we previewed in the executive summary, we believe the conduct by Trump and others in the period leading up to and on January 6 which exposes them to potential criminal liability may be best presented to jurors in three simple acts. We begin here in the first act with Trump himself, his associated lawyers, and how they enabled Trump to craft four interlocking schemes that would, they hoped, enable him to cling to power:

- In A.1, we cover the vast disinformation campaign Trump and these lawyers launched to persuade the American public that the 2020 election had been “stolen,” the reverberations of which we continue to see today.
- In A.2, we explain their plan to pressure DOJ officials to endorse false voter fraud claims and, when those officials refused, to install one of their own who would oblige.
- In A.3, we detail their efforts to pressure state and local officials to announce Trump as the winner of the 2020 election.
- Finally, in A.4, we examine how John Eastman and Ken Chesebro conceived the false electors scheme and how Trump and others put that plan into action.

These four interlocking schemes reflect Chapters One, Two, Four, and Five of the Select Committee's report, which detail how Trump and his allies, in the words of Rep. Liz Cheney, vice chair of the Select Committee: “Spread false and fraudulent information to convince huge portions of the U.S. population that fraud had stolen the election”; “Corruptly planned to replace the Attorney General of the United States so the U.S. Justice Department would spread his false stolen election claims”; “Corruptly pressured state legislators and election officials to change election results”; and “Instruct[ed] Republican officials in multiple states to create intentionally false electoral slates and transmit those slates to Congress, to the Vice President, and the National Archives, falsely certifying that Trump won states he actually lost.”<sup>28</sup>

We advocate in these pages for a simplified approach to any potential prosecution of the effort to overturn the 2020 election by focusing on the false electors scheme. Why, then, do we offer such an extended treatment of the other three schemes (not to mention two ancillary issues)? First, and foremost, we have elected to do a deep dive into the three main alternative schemes—spreading election lies, planning to corrupt the DOJ, and pressuring state officials—because they provide important context and run-up to the false electors scheme. That is particularly true of the section on the Big Lie, which is the predicate for all else that follows on our simplified model.

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<sup>28</sup> *Id.*; Here's every word of the first Jan. 6 committee hearing on its investigation, NPR (June 9, 2022), <https://www.npr.org/2022/06/10/1104156949/jan-6-committee-hearing-transcript> (hereinafter “First Jan. 6 Hearing Transcript”).

Second, though we think it would be prudent for the DOJ to follow our model, the special counsel may very well choose to take a different simplified path through the seven chapters laid out in the Committee’s report—or even a more complex one. In either of those cases, the more extended treatment of the evidence through a prosecutorial lens may be of use to readers.

With that, we turn to the first of Trump’s and his close associates’ schemes: “The Big Lie.”<sup>29</sup>

## 1. Spreading Election Lies

The first of the four interlocking schemes executed by Trump and his close associates to keep him in power is the disinformation campaign referred to as “The Big Lie.”<sup>30</sup> The publicly available evidence makes plain that Trump’s plan to retain the presidency regardless of the vote count was conceived well in advance of Election Day. In July 2020, he declined to agree that he would accept the results of the election, telling *Fox News* host Chris Wallace, “Look, you—I have to see. No, I’m not going to just say ‘yes.’ I’m not going to say ‘no.’ And I didn’t last time, either.”<sup>31</sup> In September 2020, he responded to a pointed question about the peaceful transfer of power by stating, “We’re going to have to see what happens.”<sup>32</sup> These statements were accompanied by many others in which he insisted that he could lose the election only through fraud. In August 2020, he asserted that “the only way we’re going to lose this election is if this election is rigged”<sup>33</sup>—and one week later, he stated that “the only way they can take this election away from us is if this is a rigged election.”<sup>34</sup>

Trump appears to have consulted with an outside adviser, Tom Fitton, on a plan to declare victory, no matter what, on Election Day, and on a draft statement for Trump to deliver. That draft, dated October 31, 2020, which the Select Committee obtained from the National Archives, said

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<sup>29</sup> Staff of the Select Comm. to Investigate the Jan. 6 Attack on the United States Capitol, Final Report, H.R. Rep. No. 117-663, at 8 (2022) (hereinafter “Select Comm. Report”).

<sup>30</sup> This and the following paragraphs are adapted from another report by some of the authors analyzing the former president’s potential criminal exposure under Georgia law for his alleged efforts to overturn the 2020 election results in that state. See Norman Eisen, Donald Ayer, Noah Bookbinder, Gwen Keyes Fleming, Colby Galliher, Joshua Matz, Debra Perlin & Jason Powell, Fulton County, Georgia’s Trump Investigation: An Analysis of the Reported Facts and Applicable Law (Second Ed.), GOVERNANCE STUDIES AT BROOKINGS (Nov. 14, 2022), <https://www.brookings.edu/articles/second-edition-fulton-county-georgias-trump-investigation/>.

<sup>31</sup> Felicia Sonmez, Trump declines to say whether he will accept November election results, THE WASHINGTON POST (July 19, 2020), [https://www.washingtonpost.com/politics/trump-declines-to-say-whether-he-will-accept-november-election-results/2020/07/19/40009804-c9c7-11ea-91f1-28aca4d833a0\\_story.html](https://www.washingtonpost.com/politics/trump-declines-to-say-whether-he-will-accept-november-election-results/2020/07/19/40009804-c9c7-11ea-91f1-28aca4d833a0_story.html).

<sup>32</sup> Allison Pecorin & Trish Turner, Unanimous Senate commits to peaceful transfer of power after Trump refuses, ABC NEWS (Sept. 24, 2020), <https://abcnews.go.com/Politics/unanimous-senate-commits-peaceful-transfer-power-trump-refuses/story?id=73216758>.

<sup>33</sup> Kevin Liptak, Trump warns of ‘rigged election’ as he uses conspiracy and fear to counter Biden’s convention week, CNN (Aug. 18, 2020), <https://www.cnn.com/2020/08/17/politics/donald-trump-campaign-swing/index.html>.

<sup>34</sup> Nick Niedzwiadek, The 9 most notable comments Trump has made about accepting the election results, POLITICO (Sept. 24, 2020), <https://www.politico.com/news/2020/09/24/trump-casts-doubt-2020-election-integrity-421280>.

“we had an election today—and I won.”<sup>35</sup> The statement goes on to say, “the Ballots counted by the Election Day deadline show the American people have bestowed on me the great honor of reelection to President of the United States.”<sup>36</sup> (It is worth noting here that there is, of course, no “Election Day deadline.”)

In a recorded deposition, Greg Jacob, former counsel to Vice President Mike Pence, testified about a conversation that he had with Pence’s chief of staff, Marc Short, prior to Election Day. Jacob said:

Marc had indicated to me that there was a possibility that there would be a declaration of victory within the White House that some might push for, and this is prior to the election results being known. And that he was trying to figure out a way of avoiding the Vice President sort of being thrust into a position of needing to opine on that when he might not have sufficient information to do so.<sup>37</sup>

Select Committee member Rep. Zoe Lofgren read from a memo, which the Committee obtained from the National Archives, that Jacob sent to Short on Election Day, apparently following up on their previous conversation. According to Rep. Lofgren, in the memo, Jacob said:

[I]t is essential that the Vice President not be perceived by the public as having decided questions concerning disputed electoral votes prior to the full development of all relevant facts.<sup>38</sup>

Jacob and Short appeared already very concerned on Election Day that Trump would make a declaration of victory, based on alleged fraud, without information to back up the claim.

On November 1, 2020, Trump reportedly told associates that he was going to declare victory no matter what if it looked like he was “ahead” on election night.<sup>39</sup> An audio recording from three days before the election appears to confirm that.<sup>40</sup> Trump advisor Steve Bannon told a group of associates:

[W]hat Trump's going to do is just declare victory, right? He's gonna declare victory, but that doesn't mean he's the winner, he's just gonna

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<sup>35</sup> Here’s every word of the ninth Jan. 6 committee hearing on its investigation, NPR (Oct. 13, 2022), <https://www.npr.org/2022/10/13/1125331584/jan-6-committee-hearing-transcript> (hereinafter “Ninth Jan. 6 Hearing Transcript”).

<sup>36</sup> Brandon Gage, Jan. 6 hearing reveals email exposing Trump’s ‘premeditated plan’ to subvert the election, SALON (Oct. 13, 2022), [https://www.salon.com/2022/10/13/jan-6-hearing-reveals-email-exposing-premeditated-plan-to-subvert-the\\_partner/](https://www.salon.com/2022/10/13/jan-6-hearing-reveals-email-exposing-premeditated-plan-to-subvert-the_partner/).

<sup>37</sup> Ninth Jan. 6 Hearing Transcript, *supra* note 35.

<sup>38</sup> *Id.*

<sup>39</sup> Jonathan Swan, Scoop: Trump's plan to declare premature victory, AXIOS (last updated Nov. 1, 2020), <https://www.axios.com/2020/11/01/trump-claim-election-victory-ballots>.

<sup>40</sup> Adam Gabbatt & Hugo Lowell, ‘Game over’: Steve Bannon audio reveals Trump planned to claim early victory, THE GUARDIAN (July 14, 2022), <https://www.theguardian.com/us-news/2022/jul/14/steve-bannon-audio-trump-declare-victory>.

say he's a winner. The Democrats—more of our people vote early that count. Theirs vote in mail, and so they're going to have a natural disadvantage and Trump's going to take advantage of it. That's our strategy. He's gonna declare himself a winner. So when you wake up Wednesday morning, it's going to be a firestorm. Also—also if Trump is—if Trump is losing by 10:00 or 11:00 at night, it's going to be even crazier, you know, because he's gonna sit right there and say they stole it.... I'm directing the Attorney General to shut down all ballot places in all 50 states. It's going to be no, he's not going out easier. If Biden is winning, Trump is going to do some crazy shit.<sup>41</sup>

In a video dated November 1, 2020, Trump's friend, former campaign advisor, and longtime ally Roger Stone said regarding the election:

Let's just hope we're celebrating. . . I suspect it'll be—I really do suspect it will still be up in the air. When that happens, the key thing to do is to claim victory. Possession is 9/10 of the law. No, we won. Fuck you. Sorry. Over. We won. You're wrong. Fuck you.<sup>42</sup>

On election night, Trump was told by multiple people, including his former campaign manager Bill Stepien and campaign senior advisor Jason Miller, that it was too early to declare victory because votes were still being counted.<sup>43</sup> Nonetheless, Trump rejected their counsel and instead, according to Miller, followed the advice of Rudy Giuliani to “go and declare victory and say that we won it outright” on election night.<sup>44</sup>

That night, after all votes had been cast but long before they had been fully counted, Trump made a late-night statement at the White House: “Millions and millions of people voted for us tonight, and a very sad group of people is trying to disenfranchise that group of people. And we won't stand for it.”<sup>45</sup> Trump then falsely claimed that the election “was just called off” while he was “winning everything.”<sup>46</sup> He insisted “we did win this election. . . They can't catch us.”<sup>47</sup>

Trump went on to wrongly describe the continued counting of lawfully cast ballots as “a fraud on the American public.”<sup>48</sup> He added, “We want all voting to stop. We don't want them to

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<sup>41</sup> Ninth Jan. 6 Hearing Transcript, *supra* note 35.

<sup>42</sup> *Id.*

<sup>43</sup> Here's every word of the second Jan. 6 committee hearing on its investigation, NPR (June 13, 2022), <https://www.npr.org/2022/06/13/1104690690/heres-every-word-of-the-second-jan-6-committee-hearing-on-its-investigation> (hereinafter “Second Jan. 6 Hearing Transcript”).

<sup>44</sup> *Id.*

<sup>45</sup> Daniel Dale, Fact check: Trump makes series of egregious false claims in Election Night address, CNN (Nov. 4, 2020), <https://www.cnn.com/2020/11/04/politics/fact-check-trump-election-night-speech/index.html>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

find any ballots at 4 o'clock in the morning and add them to the list, okay?"<sup>49</sup> When Trump made this remark, he had already been briefed by Stepien, who told him that it would take a long time to count all of the votes because mail-in ballots were counted later than in-person ballots.<sup>50</sup> According to the testimony of his attorney general at the time, Bill Barr, "Right out of the box on election night, the President claimed that there was major fraud underway...[T]his happened as far as I could tell before there was actually any potential of looking at evidence."<sup>51</sup>

The COVID-19 pandemic changed the way that people voted in 2020. The number of people voting early and by mail spiked significantly. This was expected. One study reviewing statewide elections held during the pandemic, published in October 2020, found that "in 44 of the 55 elections [reviewed]... at least 40 percent of the ballots cast were absentees... [a]nd 15 of the elections were almost entirely (95+ percent) conducted via absentee ballot."<sup>52</sup>

According to the U.S. Elections Project, more than 100 million Americans voted early in 2020, with more than 65 million voting by mail.<sup>53</sup> However, many states have laws prohibiting elections officials from counting, or even processing, those votes before Election Day.<sup>54</sup> Because of the sheer volume of lawfully cast mail-in and early in-person ballots, they could not be counted all at once on Election Day.<sup>55</sup> As a result, final vote tallies in 2020 were not known on November 3.

Even before election night, it was widely expected that day-of votes, which would likely be reported by the media on election night, would heavily favor Trump, while mail-in and early in-person votes, which would likely take longer to tabulate, would heavily favor Biden.<sup>56</sup> This expected trend was, indeed, reflected in the final results. As explained in a February 2021 *FiveThirtyEight* article:

Trump won the in-person vote even in deep-blue states like Hawaii (by 71 percent to 27 percent). He even won the Election Day vote in Biden's home state of Delaware, though it was extremely close there

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<sup>49</sup> *Id.*

<sup>50</sup> Second Jan. 6 Hearing Transcript, *supra* note 43.

<sup>51</sup> *Id.*

<sup>52</sup> Nathaniel Rakich, We've Had 56 Statewide Elections During the Pandemic. Here's What We Learned From Them, FIFTYTHREE (Oct. 1, 2020), <https://fivethirtyeight.com/features/weve-had-56-statewide-elections-during-the-pandemic-heres-what-we-learned-from-them/>.

<sup>53</sup> 2020 General Election Early Vote Statistics, U.S. Elections Project (last updated Nov. 23, 2020), <https://electproject.github.io/Early-Vote-2020G/index.html> ("Note: Some states do not differentiate between mail ballots and in-person votes.").

<sup>54</sup> National Conference of State Legislatures, Voting Outside the Polling Place tbl. 16 (last updated Jan. 18, 2023), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-16-when-absentee-mail-ballot-processing-and-counting-can-begin.aspx>.

<sup>55</sup> Georgia law stipulates that election workers may begin *processing* absentee ballots when they are received. In this case, processing refers to conducting a second signature check (the first occurs when voters apply for an absentee ballot) and preparing the ballot for eventual tabulation. Tabulation (*i.e.*, counting) of those ballots, however, cannot begin until 7 a.m. on Election Day. For the relevant Georgia law, *see* Ga. Code Ann. § 21-2-386 (2019).

<sup>56</sup> Gregory Krieg, Joe Biden becomes first Democrat in 28 years to win Georgia, CNN (Nov. 13, 2020), <https://www.cnn.com/2020/11/13/politics/joe-biden-wins-georgia/index.html>.

(49.25 percent for Trump versus 49.19 percent for Biden). Conversely, Biden won the absentee vote even in reliably red states like Arkansas (61 percent to 37 percent) and South Carolina (60 percent to 39 percent). If we had data for all 50 states, we would likely see Trump winning the Election Day vote in almost all of them and Biden winning the absentee vote in almost all of them.<sup>57</sup>

Trump's former campaign manager Bill Stepien explained to Trump in advance that this would be the case, a phenomenon that was referred to as a "red mirage."<sup>58</sup> Attorney General Bill Barr also confirmed in congressional testimony that "everyone understood for weeks that that was going to be what happened on election night."<sup>59</sup> *Fox News* Politics Editor Chris Stirewalt explained the reason for the so called "red mirage":

[I]n the 40 or 50 years. . . that Americans have increasingly chosen to vote by mail or early or absentee Democrats prefer that method of voting more than Republicans do. So basically in every election, Republicans win Election Day and Democrats win the early vote, and then you wait and start counting. And it depends on which ones you count first, but usually it's Election Day votes that get counted first. And you see the Republicans shoot ahead. . . So in every election and certainly a national election, you expect to see the Republican with a lead, but it's not really a lead.<sup>60</sup>

Stirewalt continued: "[N]o candidate had ever tried to avail themselves of this quirk in the election counting system," but "the Trump campaign and the President had made it clear that they were going to try to exploit this anomaly."<sup>61</sup>

Trump's national electoral prospects were no brighter. Trump Campaign Senior Aide Jason Miller testified that, in the days after the election, Miller "was in the Oval Office and at some point in the conversation Matt Oczkowski, who was the lead data person was brought on and I remember he delivered to the President [in] pretty blunt terms that he was going to lose."<sup>62</sup> Stepien also held the view by November 7, 2020 that the chances of Trump winning the presidential election were "very, very, very bleak."<sup>63</sup>

Nevertheless, Trump and close allies made unsubstantiated allegations of fraud to support their claim that the election was being stolen from Trump. (See Box 1 on Election Fraud Conspiracy Theories.) Those allegations of fraud were refuted over and over again by federal and

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<sup>57</sup> Nathaniel Rakich & Jasmine Mithani, What Absentee Voting Looked Like In All 50 States, FIVETHIRTYEIGHT (Feb. 9, 2021), <https://fivethirtyeight.com/features/what-absentee-voting-looked-like-in-all-50-states/>.

<sup>58</sup> Second Jan. 6 Hearing Transcript, *supra* note 43.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> First Jan. 6 Hearing Transcript, *supra* note 28.

<sup>63</sup> Second Jan. 6 Hearing Transcript, *supra* note 43.

state officials as well as attorneys on Trump’s own campaign staff. Trump campaign lawyer Alex Cannon, who was tasked with “assess[ing] allegations of election fraud,” testified that he reported to Mark Meadows in “mid to late” November 2020 that he wasn’t “finding anything that would be sufficient to change the results in any of the key states,” and that Meadows appeared to accept his conclusion stating: “so there’s no there there.”<sup>64</sup> Trump Deputy Campaign Manager Justin Clark also confirmed that it was “fair” to say Giuliani never “produced evidence of election fraud.” And former campaign senior aide Jason Miller testified that “to say that [this so-called proof of election fraud] was thin is probably an understatement.”<sup>65</sup>

Despite all of this information, Trump publicly maintains that he truly believes that there was massive election fraud, that he won the 2020 presidential election, and that his “conviction became even stronger as time went by.”<sup>66</sup> He further claims that he is absolved from any potential criminal wrongdoing arising out of these statements and actions on the basis that being president gives him “complete and total immunity.”<sup>67</sup>

In describing Trump’s claims of fraud and attempts to overturn the election, Bill Stepien testified: “I didn’t think what was happening was honest or professional.”<sup>68</sup> Moreover, all the while, Trump was privately acknowledging he had lost the election, including in a conversation in which White House Communications Director Alyssa Farah Griffin recalls him saying, “Can you believe I lost to this effing guy?”<sup>69</sup>

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<sup>64</sup> First Jan. 6 Hearing Transcript, *supra* note 28.

<sup>65</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>66</sup> Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (Dec. 20, 2022, 9:01 p.m.), <https://truthsocial.com/@realDonaldTrump/posts/109546364801090314>.

<sup>67</sup> Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (Feb. 14, 2023, 4:55 p.m.), <https://truthsocial.com/@realDonaldTrump/posts/109865320421429478>. Trump made these remarks in a statement posted on his Truth Social account in February of 2023.

<sup>68</sup> Here’s every word from the fourth Jan. 6 committee hearing on its investigation, NPR (June 21, 2022), <https://www.npr.org/2022/06/21/1105848096/jan-6-committee-hearing-transcript> (hereinafter “Fourth Jan. 6 Hearing Transcript”).

<sup>69</sup> Maanvi Singh, Trump privately admitted he lost 2020 election, top aides testify, THE GUARDIAN (Oct. 13, 2022), <https://www.theguardian.com/us-news/2022/oct/13/trump-admission-election-aides-january-6-panel>.



### **Box 1: Election Fraud Conspiracy Theories Spread by Trump & Allies**

#### **Dead Voters**

Perhaps the most straightforward election fraud conspiracy theory put forth in the immediate aftermath of the 2020 election was the claim by Trump and his associates that there were thousands of deceased people who had cast ballots.<sup>70</sup> On November 19, 2020, Trump tweeted OAN's claim:

Evidence of voter fraud continues to grow, including 20,000 dead people on the Pennsylvania voters roll and many thousands all over the Country. Now, there has been an artificial number of votes in favor of Joe Biden.<sup>71</sup>

Trump claimed that “some unbelievably high number” of dead people—around 18,000—voted in Michigan.<sup>72</sup> On a call to Georgia Secretary of State Brad Raffensperger, Trump claimed that “all sorts of methods” including sorting through state obituaries had revealed that a “minimum” of 5,000 deceased people cast ballots in the state.<sup>73</sup> Audits in Georgia resulted in only four confirmed cases of deceased people voting.<sup>74</sup>

#### **Truckload of Ballots in Detroit**

On November 19, 2020, Giuliani held a press conference claiming there was evidence that “at 4:30 in the morning a truck pulled up to the Detroit center where they were counting ballots,” and that it delivered “thousands and thousands of ballots” after Republican inspectors left.<sup>75</sup> Judge Timothy Kenny of the Third Judicial Circuit Court of Michigan found this allegation to be baseless.<sup>76</sup>

#### **Dominion Systems Voting Machines Conspiracy Theory**

In the weeks following the election, top Trump surrogates—including attorneys Rudy Giuliani and Sidney Powell—spread versions of a theory on Twitter and *Fox News*<sup>77</sup> that voting machines produced by Dominion Systems automatically switched votes from Trump to Biden, or deleted Trump votes altogether.<sup>78</sup> Some accounts alleged that Dominion rigged its machines to give Biden the election because Dominion is purportedly controlled by Smartmatic, a voting-technology company founded in Florida by two Venezuelans who distributed their technology to Venezuela during the dictatorial reign of Hugo Chavez.<sup>79</sup> Smartmatic's technology was purportedly used by Chavez to rig elections in his favor in perpetuity and is allegedly still controlled by Chavez's family, even though Chavez himself died in 2013. Others with corporate ties to Dominion, according to the theory's subscribers, include George Soros and the Clinton Foundation.<sup>80</sup>

On November 13, 2020, Powell told *Fox Business Network*, “I can hardly wait to put forth all the evidence we have collected on Dominion.”<sup>81</sup> Trump himself tweeted a story about

the Dominion conspiracy theories on November 12.<sup>82</sup> This theory was a favorite of adherents of QAnon and other right-wing groups.

No credible evidence supports any of the theories that Dominion's voting machines were part of a plot to steal the election from Trump. Dominion has no connection to Smartmatic; George Soros and the Clinton Foundation are not controlling shareholders of the company; and a multitude of recounts, machine tests, and independent audits have affirmed the accuracy of the election.<sup>83</sup> Former Attorney General Bill Barr said he "saw absolutely zero basis for the allegations," and that he relayed that "it was crazy stuff and they were wasting their time on that. And it was doing a great, grave disservice to the country."<sup>84</sup> An internal Trump campaign memo that was prepared by the campaign's communications team and circulated on November 14 similarly found that several of the allegations against Dominion and Smartmatic were not true.<sup>85</sup>

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<sup>70</sup> Kelly Mena et al., Trump claims of dead voters continue to fall apart, CNN (Nov. 20, 2020), [https://www.cnn.com/business/live-news/election-2020-misinformation/h\\_a6f9f4db41324634af5cda8e5f252fab](https://www.cnn.com/business/live-news/election-2020-misinformation/h_a6f9f4db41324634af5cda8e5f252fab).

<sup>71</sup> *Id.*

<sup>72</sup> Martin Pengelly, Trump claims 5,000 dead people voted in Georgia – but the real number is four, THE GUARDIAN (Dec. 28, 2021), <https://www.theguardian.com/us-news/2021/dec/28/donald-trump-georgia-2020-election-dead-people>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Hyeyoon Alyssa Choi & Tara Subramaniam, Fact-checking Giuliani's claims that food trucks hauled fraudulent Biden ballots in Detroit, CNN (Nov. 20, 2020), [https://www.cnn.com/business/live-news/election-2020-misinformation/h\\_a6f9f4db41324634af5cda8e5f252fab](https://www.cnn.com/business/live-news/election-2020-misinformation/h_a6f9f4db41324634af5cda8e5f252fab).

<sup>76</sup> *Id.*

<sup>77</sup> JM Rieger, Analysis | The False Claims from Fox News and Trump Allies Cited in Dominion's \$1.6 Billion Lawsuit, THE WASHINGTON POST (Mar. 26, 2021), <https://www.washingtonpost.com/politics/2021/03/26/fox-trump-election-dominion/>.

<sup>78</sup> Camille Caldera, Fact Check: Dominion Voting Machines Didn't Delete Votes from Trump, Switch Them to Biden, USA TODAY (Nov. 17, 2020), <https://www.usatoday.com/story/news/factcheck/2020/11/14/fact-check-dominion-voting-machines-didnt-delete-switch-votes/6282157002/>.

<sup>79</sup> Facts First: Does the Dominion Voting Systems organization have ties to Venezuelan President Hugo Chavez, George Soros and the Clinton Foundation, CNN (last accessed July 11, 2023), [https://www.cnn.com/factsfirst/politics/factcheck\\_829bf37c-cbd5-4a5c-8d87-7e53504997cb](https://www.cnn.com/factsfirst/politics/factcheck_829bf37c-cbd5-4a5c-8d87-7e53504997cb).

<sup>80</sup> *Id.*

<sup>81</sup> Rieger, *supra* note 77.

<sup>82</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 12, 2020, 11:34:00 a.m.), <https://www.thetrumparchive.com/?searchbox=%22Report%3A+Dominion%22>.

<sup>83</sup> Ali Swenson, Smartmatic Does Not Own Dominion Voting Systems, AP NEWS (Nov. 17, 2020), <https://apnews.com/article/fact-checking-afs:Content:9740535009>; Facts First, *supra* note 72; Fourth Jan. 6 Hearing Transcript, *supra* note 61.

<sup>84</sup> First Jan. 6 Hearing Transcript, *supra* note 28; In April 2023, Fox ultimately agreed to a \$787 million settlement in Dominion's defamation case against the network. CTV News, Fox, Dominion reach \$787M settlement in defamation lawsuit | Dominion press conference, YOUTUBE (Apr. 18, 2023), [https://www.youtube.com/watch?v=eT\\_CtFf8OEI](https://www.youtube.com/watch?v=eT_CtFf8OEI).

<sup>85</sup> Alan Feuer, Trump Campaign Knew Lawyers' Voting Machine Claims Were Baseless, Memo Shows, THE NEW YORK TIMES (Sept. 21, 2021), <https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html>.

### “Suitcases” of Ballots Theory

One of the Trump campaign’s main allegations in Georgia was that poll workers in Atlanta’s State Farm Arena had hidden a “suitcase” full of ballots underneath a table. When poll watchers and cameras left, according to their claims, the poll workers pulled out Biden ballots and proceeded to run them through a scanner multiple times. Giuliani showed Georgia legislators a video clip of this alleged fraud.

This claim was investigated by FBI agents, Trump-appointed United States Attorney Byung J. (“BJay”) Pak, the DOJ, as well as Gabriel Sterling, the chief operating officer for the Georgia secretary of state’s office. The investigations found no irregularities or fraud, and confirmed that the “suitcase full of ballots” was simply a tamper-proof official ballot lockbox. And a New York court, in issuing an interim suspension of Giuliani’s law license in the state, found, “If, as [Giuliani] claims, he reviewed the entire video, he could not have reasonably reached a conclusion the illegal votes were being counted.”<sup>86</sup>

### Italygate Conspiracy Theory

As explained in a June 15, 2021 *Washington Post* article, the basic premise of this conspiracy theory promoted by Trump’s team is that “people connected to the Italian defense firm Leonardo used satellites to change the votes cast in the 2020 election from Trump to Biden.”<sup>87</sup> An individual named Bradley Johnson, claiming to be a retired CIA officer, recorded and posted a video advancing a version of the claim.<sup>88</sup> As explained during a June 23, 2022 Select Committee hearing, Rep. Scott Perry texted Chief of Staff Mark Meadows a link to that video.<sup>89</sup> Former Acting Attorney General Rosen testified that Meadows emailed him the video and then called him and asked him to meet with Johnson and Giuliani.<sup>90</sup> Rosen responded to Meadows telling him “if [Johnson] has real evidence which this video doesn’t show, he can walk into an FBI field office anywhere in the United States.”<sup>91</sup> When Rosen did not agree to meet with Johnson and Giuliani himself, the request to investigate was reportedly passed on to the Department of Defense.<sup>92</sup> Acting Secretary of Defense Christopher Miller called a defense official in Italy at the White House’s request to look into the matter. Rosen forwarded the email to former Acting Deputy Attorney General Richard Donoghue, to which Donoghue responded, “Pure insanity.”<sup>93</sup>

### DeKalb County Recount Errors

In November 2020, the Trump campaign retweeted a tweet from Chairman of the Georgia Republican Party David Shafer alleging a “9,626 vote error in the DeKalb County hand count.”<sup>94</sup> Shafer claimed in the tweet that DeKalb County had counted 10,707 votes for Biden instead of the accurate number of 1,081, giving Biden a significant advantage.<sup>95</sup> Georgia’s voting system implementation manager Gabriel Sterling acknowledged that there had been an error in the county’s recount that had been caught during the audit and was a “non-issue” that did not affect any reported counts.<sup>96</sup>

Up until his resignation on December 14, 2020, former Attorney General Bill Barr assessed the various claims of fraud brought to him by Trump and his allies and personally told the president that they were not credible.<sup>97</sup> After taking over at the DOJ following Barr's resignation, then-Acting Attorney General Jeffrey Rosen and then-Acting Deputy Attorney General Richard Donoghue told Trump on multiple occasions that his various claims of election fraud were incorrect or had already been debunked by the Department of Justice.<sup>98</sup>

We have long known that high-level Trump administration officials at the Department of Homeland Security,<sup>99</sup> the associations of state agencies,<sup>100</sup> and Republican state-elected officials<sup>101</sup> all told Trump the election was secure and that there was no fraud that would have affected the outcome of the election. In addition, the publicly available evidence establishes that Rudy Giuliani appeared to know his claims were without merit. A top member of his own legal team conceded that they could not find proof of voter fraud that would have affected the outcome of the election. In a December 28, 2020 email, Bernie Kerik, Giuliani's top investigator, informed Meadows that Trump's team could "do all the investigations we want later," but that "if the President plans on winning, it's the legislators that have to be moved."<sup>102</sup> In December 2021, Timothy Parlatore, a lawyer claiming to represent Kerik, wrote a letter to the Select Committee stating that "it was

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<sup>86</sup> In re Giuliani, No. 2021-00506, slip op. at 22 (N.Y. App. Div. May 3, 2021) (per curium); Josh Gerstein, Giuliani suspended from New York bar, POLITICO (June 24, 2021), <https://www.politico.com/news/2021/06/24/giuliani-new-york-bar-suspension-496001>.

<sup>87</sup> Aaron Blake, 'Pure insanity': Here's perhaps the craziest election fraud conspiracy the Trump team pushed, THE WASHINGTON POST (June 15, 2021), <https://www.washingtonpost.com/politics/2021/06/15/pure-insanity-heres-perhaps-craziest-election-fraud-conspiracy-trump-team-pushed/>.

<sup>88</sup> Zachary Cohen et al., Meadows' texts reveal new details about the key role a little-known GOP congressman played in efforts to overturn election, CNN (Apr. 26, 2022), <https://www.cnn.com/2022/04/26/politics/mark-meadows-texts-scott-perry-key-role-overturn-election/index.html>.

<sup>89</sup> Here's every word from the fifth Jan. 6 committee hearing on its investigation, NPR (June 23, 2022), <https://www.npr.org/2022/06/23/1106700800/jan-6-committee-hearing-transcript> (hereinafter "Fifth Jan. 6 Hearing Transcript").

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Blake, *supra* note 87.

<sup>94</sup> Holmes Lybrand & Tara Subramaniam, Fact checking misleading claims over the Georgia recount, CNN (Nov. 19, 2020), <https://www.cnn.com/2020/11/19/politics/georgia-gop-recount-dekalb-county-fact-check/index.html>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>98</sup> Second Jan. 6 Hearing Transcript, *supra* note 43.

<sup>99</sup> Jen Kirby, Trump's own officials say 2020 was America's most secure election in history, VOX (Nov. 13, 2020), <https://www.vox.com/2020/11/13/21563825/2020-elections-most-secure-dhs-cisa-krebs>.

<sup>100</sup> Press Release, Cybersecurity & Infrastructure Security Agency, Joint Statement From Election Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

<sup>101</sup> Amy Gardner & Paulina Firozi, Here's the Full Transcript and Audio of the Call Between Trump and Raffensperger, THE WASHINGTON POST (Jan. 5, 2021), [https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html).

<sup>102</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

impossible” for Kerik’s team “to determine conclusively whether there was widespread fraud or whether that widespread fraud would have altered the outcome of the election.”<sup>103</sup>

On November 30, Arizona Speaker of the House Rusty Bowers, Bowers’ counsel, and three others “in [his] group,” met with Giuliani, as well as Jenna Ellis and other attorneys on Giuliani’s team at the Hyatt Regency in Phoenix, Arizona following, as Rep. Schiff described it, a “purported legislative hearing.” Bowers said that during this meeting Giuliani made wide-ranging allegations of election fraud.<sup>104</sup> Bowers testified that Giuliani’s “initial comments were...the litany of groups of illegal individuals or people deceased” who voted in the election.<sup>105</sup> Bowers said “other members...aggressively questioned him, and then I proceeded to question him on the proof that he was going to bring me, etc.”<sup>106</sup> Bowers, testified that, when pressed, Giuliani deflected the question to Jenna Ellis, the other Trump team attorney who was working with him.<sup>107</sup> Bowers testified:

[Giuliani] did ask, do we have the proof to Jenna, Ms. Ellis, and she said yes. And I said I want the names. Do you have the names? Yes. Do you have how they voted? We have all the information. I said, can you get to me that information? Did you bring it with you? Just — she said no. Both Mr. Giuliani asked her and I asked generally if they had brought it with them. She said no, it’s not with me, but we can get it to you. And I said then you didn’t bring me the evidence...

Bowers testified “no one provided me, ever...[with] evidence” of fraud that could have affected the outcome of the presidential election in Arizona, despite several promises to do so by Giuliani and Ellis.<sup>108</sup> Bowers testified that Giuliani eventually admitted: “We’ve got lots of theories. We just don’t have the evidence” on election fraud.<sup>109</sup> According to Bowers’s testimony, at least three other witnesses in his group heard Giuliani say this.<sup>110</sup> This admission by Giuliani, who was advocating overturning the results of a presidential election based on conjecture, was so incredible that Bowers testified he and his counsel actually “laughed about it.”<sup>111</sup>

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<sup>103</sup> Letter from Timothy C. Parlatore to Rep. Bennie G. Thompson Re: Subpoena to Bernard B. Kerik (Dec. 31, 2021), <https://www.justsecurity.org/wp-content/uploads/2022/01/january-6-clearinghouse-bernard-kerik-parlatore-law-firm-letter-december-31-2021.pdf>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

## 2. Weaponizing the Department of Justice

In November and December 2020, Donald Trump enlisted the United States Department of Justice in his campaign to overturn the election outcome.<sup>112</sup> When DOJ leadership did not yield to Trump's pressure, as Vice Chair Cheney explained, Trump ultimately "corruptly planned to replace the Attorney General of the United States so the U.S. Justice Department would spread his false stolen election claims."<sup>113</sup>

Prosecutors may find Trump's actions vis-à-vis the DOJ relevant even in a case focusing on the false elector scheme because they illuminate his state of mind and confirm his willingness to use his power and position for personal political gain. (It may also be separately actionable, perhaps at a future date, as we explain in Appendix C.) After Election Day, testimony shows Attorney General Bill Barr—who had supported Trump throughout his presidency, including in ways that courts found questionable<sup>114</sup>—changed course. He now tried to protect the integrity of the Justice Department from Trump's attempts to use it as a tool to spread election misinformation and pressure state officials to change their state's Electoral College votes.

According to Barr's testimony before the Select Committee, he had three meetings with Trump where he made clear that he "did not agree with the idea of saying the election was stolen and putting out this stuff, which [he] told the president was bullshit" and insisted that the Department would not and should not "take sides in elections."<sup>115</sup> Instead, Barr repeatedly explained to Trump that the Department's only role was to investigate fraud and that they would "look at something if it's...specific, credible, and could have affected the outcome of the election."<sup>116</sup>

In fact, the DOJ did investigate allegations of fraud. As Barr explained, "when we received specific and credible allegations of fraud, [we] made an effort to look into these to satisfy ourselves that they were without merit."<sup>117</sup> However, according to Barr's testimony, "it was like playing

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<sup>112</sup> This section is largely adapted from another resource some of the authors produced on Donald Trump's possible criminal exposure under Georgia law. *See* Eisen et al., *supra* note 30.

<sup>113</sup> First Jan. 6 Hearing Transcript, *supra* note 28.

<sup>114</sup> *See, e.g.,* Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Just., 538 F. Supp. 3d 124 (D.D.C. 2021), *aff'd*, No. 21-5113, (D.C. Cir. 2022), [https://www.cadc.uscourts.gov/internet/opinions.nsf/70D90DE5A88EFF1B852588A30052E1B6/\\$file/21-5113-1959995.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/70D90DE5A88EFF1B852588A30052E1B6/$file/21-5113-1959995.pdf); Memorandum Opinion, Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Just., No. 19-1552-ABJ, (D.D.C. 2021), <https://context-cdn.washingtonpost.com/notes/prod/default/documents/40591227-65b2-461d-8245-5e5778f88996/note/6823b0c7-bb17-4a01-b555-f4049936f7a6.#page=1>; Memorandum Opinion, Electronic Privacy Information Center v. U.S. Dep't of Just., No. 19-810, (D.D.C. Mar. 5, 2020), [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2019cv0810-111](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019cv0810-111).

<sup>115</sup> First Jan. 6 Hearing Transcript, *supra* note 28; Select Comm. to Investigate the Jan. 6 Attack on the United States Capitol, Transcribed Interview of William Barr, (June 2, 2022), at 18.

<sup>116</sup> Second Jan. 6 Hearing Transcript, *supra* note 43.

<sup>117</sup> *Id.*

Whac-A-Mole, because something would come out one day and then the next day it would be another issue.”<sup>118</sup> Barr told the Select Committee:

I saw absolutely zero basis for the allegations, but they were made in such a sensational way that they obviously were influencing a lot of people, members of the public, that there was this systemic corruption in the system and that their votes didn’t count and that these machines controlled by somebody else were actually determining it, which was complete nonsense. And it was being laid out there, and I told them that it was—that it was crazy stuff and they were wasting their time on that. And it was doing a grave disservice to the country.<sup>119</sup>

On November 23, Barr informed Trump that his fraud claims were “not meritorious.”<sup>120</sup> Following that meeting, in response to Barr questioning Meadows and Jared Kushner about how far Trump would take his fraud claims, Meadows seemed to acknowledge the election claims were baseless, stating, “I think he [Trump] is becoming more realistic,”<sup>121</sup> according to Barr’s testimony. And, according to Barr, Kushner said, “Yeah, we’re working on this.”<sup>122</sup> Then, on December 1, 2020, Barr told an *Associated Press* reporter, “we have not seen fraud on a scale that could have effected a different outcome in the election.”<sup>123</sup> Upon seeing Barr’s quote in the news, Trump erupted, according to a White House staffer’s testimony, angrily throwing his lunch against the wall and shattering a dish in the White House dining room.<sup>124</sup> Barr was summoned to a meeting with Trump, who was “as mad as [Barr had] ever seen him.”<sup>125</sup> During the meeting, Barr “told [Trump] that the stuff that his people were shoveling out to the public was bullshit, I mean, that the claims of fraud were bullshit.” Trump, he added, “was indignant about that.” But Barr continued to “reiterate[] that they wasted a whole month on these claims on the Dominion voting machines and they were idiotic claims.”<sup>126</sup>

Nevertheless, Trump continued to repeat allegations of election fraud that were clearly false. In a recorded interview with the Select Committee, Barr explained why he and the Justice Department were in a position to refute Trump’s fraud claims. Barr said:

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<sup>118</sup> *Id.*

<sup>119</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>120</sup> Select Comm. to Investigate the Jan. 6 Attack on the United States Capitol, Transcribed Interview of William Barr, (June 2, 2022), at 18.

<sup>121</sup> *Id.* at 19.

<sup>122</sup> *Id.* at 20.

<sup>123</sup> Michael Balsamo, Disputing Trump, Barr says no widespread election fraud, AP NEWS (Dec. 1, 2020), <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d>.

<sup>124</sup> Here’s every word from the sixth Jan. 6 committee hearing on its investigation, NPR (June 28, 2022), <https://www.npr.org/2022/06/28/1108396692/jan-6-committee-hearing-transcript> (testimony of Cassidy Hutchinson) (hereinafter “Sixth Jan. 6 Hearing Transcript”).

<sup>125</sup> First Jan. 6 Hearing Transcript, *supra* note 28 (quoting recorded interview of William Barr).

<sup>126</sup> Select Comm. to Investigate the Jan. 6 Attack on the United States Capitol, Transcribed Interview of William Barr, (June 2, 2022), at 25.

I felt the responsible thing to do was to be—to be in a position to have a view as to whether or not there was fraud. And frankly, I think the fact that I put myself in the position that I could say that we had looked at this and didn't think there was fraud was really important to moving things forward.<sup>127</sup>

Barr continued:

I sort of shudder to think what the situation would have been if the— if the position of the department was we're not even looking at this until after Biden's in office. **I'm not sure we would have had a transition at all.**<sup>128</sup> (emphasis added)

In a recorded interview, Barr described his conversation with Trump refuting another prominent, but unfounded, claim of fraud. According to Barr, on December 14, 2020, Trump gave him a report on “Dominion machines...prepared by a...cybersecurity firm, which he identified as Allied Security Operations Group.” (See Box 1 for information on the Dominion Voting Machines conspiracy theory.) Barr said the report “looked very amateurish.” According to Barr, Trump told him: “The report means that I am going to have a second term.”<sup>129</sup> It is notable that the date of this conversation—December 14—was the day that individuals in the Electoral College were legally required to meet and cast their votes in their respective states, meaning that the election was, for all intents and purposes, over. Barr said that he “didn't see any supporting information for” Trump’s assertions about the Allied Security report. Barr told the Select Committee that he thought: “if [Trump] really believes this stuff ...he’s become detached from reality.”<sup>130</sup> Regarding his conversations with Trump, Barr said:

I went into this and would...tell him how crazy some of these allegations were. **There was never—there was never an indication of interest in what the actual facts were.** And my opinion then and my opinion now is that the election was not stolen by fraud and I haven't seen anything since the election that changes my mind on that...<sup>131</sup> (emphasis added)

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<sup>127</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 89.

<sup>128</sup> *Id.*

<sup>129</sup> Second Jan. 6 Hearing Transcript, *supra* note 43.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*



Barr also placed in context the significance of December 14—the date of the Electoral College vote. Barr explained in a recorded interview:

December 14th was the day that the states certified their votes and sent them to Congress. And in my view, that was the end of the matter.<sup>132</sup>

White House Counsel Pat Cipollone testified that he agreed with Barr’s conclusion that, as Rep. Stephanie Murphy summarized, “there was no evidence of fraud sufficient to change the outcome of the election” and that he believed Trump ought to concede apparently by that point as well. Cipollone told the Select Committee: “[I]f your question is did I believe he should concede the election at a point in time? Yes, I did. I believe Leader McConnell went on to the floor of the Senate, I believe in late December, and basically said, you know, the process is done.”<sup>133</sup>

Likewise, Trump’s former secretary of labor, Gene Scalia, shared Barr’s understanding and told the Select Committee that he relayed that to Trump. He said:

...I had to put a call into the President...We spoke, I believe, on the 14th in which I conveyed to him that I thought that it was time for him to acknowledge that President Biden had prevailed in the election. But I communicated to the President that when that legal process is exhausted and when the electors have voted, that that's the point at which that outcome needs to be expected. - I told him that I did believe yes, that once those legal processes were run, if fraud had not been established that had affected the outcome of the election, then unfortunately, I believed that what had to be done was concede the outcome.<sup>134</sup>

The former head of the Trump administration’s Office of Legal Counsel, Steve Engel, similarly testified to the Committee that the DOJ rejected Trump’s late-December request that the DOJ file a lawsuit at the Supreme Court challenging alleged election fraud, because the Electoral College meeting had closed the matter:

It—it was a meritless lawsuit that was not something that the Department could or—or would bring... The lawsuit would have been untimely. The states had chosen their electors. The electors had been certified. They'd cast their votes. They'd been sent to Washington, DC. Neither Georgia nor any of the other states on

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<sup>132</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

December 28th or whenever this was was [sic] in a position to change those votes. The—essentially the election had happened.<sup>135</sup>

Ultimately, Barr offered his resignation to Trump on December 14, 2020, apparently because Barr was aware Trump was dissatisfied with his unwillingness to have the Justice Department lend support to Trump’s claims of election fraud.<sup>136</sup> Barr recalled the conversation he had with Trump when he announced he would resign in his testimony to the Select Committee: “I said, look, I — I know that you're dissatisfied with me and I'm glad to offer my resignation. And he pounded the table very hard and everyone sort of jumped in, and he said, accepted.”<sup>137</sup> Barr’s resignation took effect on December 23,<sup>138</sup> the same day that Trump called Frances Watson, the chief investigator for the Georgia secretary of state and urged her to find “dishonesty” that would overturn the state’s election results, insisted that he had won the election, and said she would be praised if she found the “right answer” while spearheading Georgia’s audit of election results.<sup>139</sup> In Barr’s place, Trump appointed Jeffrey Rosen to serve as acting attorney general; Richard Donoghue was elevated to acting deputy attorney general.<sup>140</sup>

Starting on December 15, 2020, one day after Rosen’s appointment as acting attorney general was announced, Trump pressed him and Donoghue to throw the DOJ’s formidable weight behind lawsuits challenging Trump’s electoral defeat and raised multiple ways the Department could support or advance his unsupported allegations of fraud.<sup>141</sup> Rosen testified about the meeting with Trump. He said:

[T]he common element of all of this was President expressing his dissatisfaction that the Justice Department in his view had not done enough to investigate election fraud, but at different junctures other topics came up at different intervals. So at one point he had raised the question of having a special counsel for election fraud. At a number of points, he raised requests that I meet with his campaign counsel, Mr. Giuliani. At one point, he raised the—whether the Justice Department would file a lawsuit in the Supreme Court. At a couple of junctures, there were questions about making public statements or about holding a press conference. At one of the later junctures was this issue of sending a letter to state legislatures in Georgia or other states. And so there were different things raised at

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<sup>135</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 89.

<sup>136</sup> Sixth Jan. 6 Hearing Transcript, *supra* note 124; Kevin Breuninger & Christina Wilkie, Attorney General William Barr resigns, effective Dec. 23, CNBC (Dec. 14, 2020), <https://www.cnn.com/2020/12/14/attorney-general-william-barr-resigns-effective-dec-23.html>.

<sup>137</sup> *Id.*

<sup>138</sup> Alexander Mallin & William Mansell, Attorney General William Barr to resign, Trump tweets, ABC NEWS (Dec. 14, 2020), <https://abcnews.go.com/Politics/attorney-general-william-barr-resigning-trump-tweets/story?id=74725942>.

<sup>139</sup> Jason Morris & Sara Murray, Trump pressured Georgia investigator to find ‘the right answer’ in baseless fraud push, CNN (Mar. 11, 2021), <https://www.cnn.com/2021/03/10/politics/donald-trump-georgia-phone-call/index.html>.

<sup>140</sup> Betsy W. Swan, Brooklyn U.S. attorney heads to top DOJ role, POLITICO (July 2, 2020), <https://www.politico.com/news/2020/07/02/Richard-donoghue-heads-to-doj-348234>.

<sup>141</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 89.

different parts or different intervals with the common theme being his dissatisfaction about what the Justice Department had done to investigate election fraud.<sup>142</sup>

Rosen went on to say:

The Justice Department declined all of those requests ...because we did not think that they were appropriate based on the facts and the law as we understood them.<sup>143</sup>

Donoghue told Congress: “There were so many of these allegations that when you gave him a very direct answer on one of them, he wouldn’t fight us on it, but he would move to another allegation,”<sup>144</sup> a statement consistent with Barr’s testimony about Trump’s playing “Whac-a-Mole” in presenting these allegations.<sup>145</sup>

On December 18, 2020, Trump met privately with outside attorney Sidney Powell, former National Security Advisor Lt. Gen. Michael Flynn, Overstock.com CEO Patrick Byrne, and Giuliani (who joined the group later that evening).<sup>146</sup> According to testimony, White House staff joined the meeting a short time later.<sup>147</sup> Even though the Electoral College had voted at this point, the group appears to have broadly discussed strategies and steps aimed at challenging and overturning the election.<sup>148</sup> Among other ideas, at this meeting Trump discussed appointing a special counsel on election fraud issues to support his goal of overturning the election.<sup>149</sup> The outside group reportedly proposed that Trump issue an executive order appointing Sidney Powell to a vague special counsel role, a position that, among other things, would oversee the seizure of voting machines by the military.<sup>150</sup> The draft executive order, which was never signed, said:

I, Donald J. Trump, President of the United States, find that the forensic report of the Antrim County, Michigan voting machines, released December 13, 2020, and other evidence submitted to me in support of this order, provide probable cause sufficient to require action...because of evidence of international and foreign interference in the November 3, 2020, election. Dominion Voting Systems and related companies are owned or heavily controlled and influenced by foreign agents, countries, and interests. The forensic report prepared by experts found that "the Dominion Voting System

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Select Comm. to Investigate the Jan. 6 Attack on the United States Capitol, Transcribed Interview of Richard Peter Donoghue, (Oct. 21, 2021), at 60.

<sup>145</sup> Select Comm. to Investigate the Jan. 6 Attack on the United States Capitol, Transcribed Interview of William Barr, (June 2, 2022), at 34.

<sup>146</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

is intentionally and purposefully designed with inherent errors to create systemic fraud and influence election results.<sup>151</sup>

The draft document went on to order that: “Effective immediately, the Secretary of Defense...seize, collect, retain and analyze all [voting] machines, equipment, electronically stored information, and material records.”<sup>152</sup>

Responding to the idea of seizing voting machines, in a recorded interview, former White House Counsel Pat Cipollone stated:

To have the federal government seize voting machines? That’s a terrible idea for the country. That’s not how we do things in the United States. There’s no legal authority to do that. And there is a way to contest elections. You know, that—that happens all the time. But the idea that the federal government could come in and seize election machines, no. That—that’s—I don’t—I don’t understand why we even have to tell you why that’s a bad idea for the country. It’s a terrible idea.<sup>153</sup>

The draft executive order also provided for the “[t]he appointment of a Special Counsel to oversee this operation and institute all criminal and civil proceedings as appropriate.”<sup>154</sup> According to testimony, during the meeting Trump told Powell that she would be the special counsel. In a recorded deposition, Powell testified:

[Trump] asked Pat Cipollone if he had the authority to name a special counsel, and he said yes. And then he asked him if he had the authority to give me whatever security clearance I needed, and Pat Cipollone said yes. And then the president said, Ok, you know, I’m [] naming her that and I’m giving her security clearance.<sup>155</sup>

Ultimately, that appointment never took legal effect. From the testimony, it appears as though many of Trump’s extralegal strategies were not consummated because of resistance by White House attorneys, including Cipollone and another White House lawyer, Eric Herschmann.

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<sup>151</sup> Draft Exec. Order on Presidential Findings To Preserve Collect And Analyze National Security Information Regarding The 2020 General Election (Dec. 16, 2020), <https://s3.documentcloud.org/documents/21185950/never-filed-trump-executive-order-2020.pdf> (This executive order was never finalized, but the draft document is dated Dec. 16, 2020); Betsy Woodruff Swan, Read the never-issued Trump order that would have seized voting machines, POLITICO (Jan. 21, 2022), <https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572>.

<sup>152</sup> *Id.*

<sup>153</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>154</sup> Draft Exec. Order on Presidential Findings To Preserve Collect And Analyze National Security Information Regarding The 2020 General Election (Dec. 16, 2020), <https://s3.documentcloud.org/documents/21185950/never-filed-trump-executive-order-2020.pdf>.

<sup>155</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

In a recorded interview, Cipollone said: “In my view, she hadn’t been appointed to anything, and ultimately wasn’t appointed to anything, because there had to be other steps taken.”<sup>156</sup>

In the days following the December 18 meeting, Trump increased pressure on the Justice Department to support his efforts.<sup>157</sup> These efforts intensified through late December. Rosen testified, “between December 23rd and January 3rd, the president either called me or met with me virtually every day.”<sup>158</sup> On December 27, Rosen and Donoghue had a lengthy conversation with Trump.<sup>159</sup> Describing the totality of the conversation, Donoghue testified:

The December 27th conversation was in my mind an escalation of the earlier conversations...As we got later in the month of December, the president’s entreaties became more urgent. He became more adamant that we weren’t doing our job.<sup>160</sup>

According to Donoghue’s contemporaneous handwritten notes and testimony, Trump asked him directly for the Department of Justice to “just say the election was corrupt and leave the rest to me and the Republican congressmen.”<sup>161</sup> Trump was apparently asking for Donoghue to lie publicly, despite Donoghue telling Trump that the theories of fraud were not true.<sup>162</sup>

Former Assistant Attorney General Steven Engel testified that Trump made a highly “unusual request” that the Justice Department be the entity to file a lawsuit challenging the election. Despite being prepared and drafted by outside lawyers, Trump requested that this lawsuit “be styled as brought by the United States” rather than by the outside party or by the Trump campaign.<sup>163</sup> Additionally, he wanted it to be filed in the Supreme Court in the first instance, claiming to be an exercise of the Court’s original jurisdiction.<sup>164</sup> Engel said:

It was a meritless lawsuit that was not something that the Department could or—or would bring. You know, somebody obviously prepared it to the—handed it to the President and he—he forwarded it on for our review...The lawsuit would have been untimely. The states had chosen their electors. The electors had been certified. They’d cast their votes. They’d been sent to Washington, DC. Neither Georgia nor any of the other states on December 28th

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<sup>156</sup> *Id.*

<sup>157</sup> Katie Benner, Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General, *THE NEW YORK TIMES* (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html>.

<sup>158</sup> Fifth Jan 6. Hearing Transcript, *supra* note 89.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 89.

<sup>164</sup> *Id.*

or whenever this was was [sic] in a position to change those votes. The—essentially the election had happened.

The only thing that hadn't happened was the formal counting of the votes. And so obviously, you know, the person who drafted this lawsuit didn't really understand in my view, you know, the law and or how the Supreme Court works or the Department of Justice. So it was just not something we were going to do.<sup>165</sup>

On December 31, 2020, Engel prepared a memo, which he emailed to Donoghue to prepare him and Rosen to push back against Trump's requests. In the memo, he explained:

The United States, as a government, does not have any standing to challenge whether the States complied with their state electoral procedures. The Trump campaign or the candidate plainly does. A would-be presidential elector who wants to vote likely would. But the United States, as a government, does not have a legal stake in the winner of the presidential election or whether individual states comply with their own laws...There is no "parens patriae" basis for the lawsuit. The drafters of the complaint could not identify a single case—in the history of the Supreme Court—where the United States ever brought a case like this. There is no legal doctrine that says that the United States may bring a lawsuit whenever it believes there has been a legal violation by a State.<sup>166</sup>

Trump's allies and lawyers sought to persuade the Justice Department to align itself against certification of the election.<sup>167</sup> They pushed a dizzying array of conspiracy theories, evidently including the wild claim that an Italian aerospace engineer had worked with the CIA to switch tallies in voting machines via satellite.<sup>168</sup> (See Box 1 describing the "Italygate" conspiracy theory.) Meadows pursued these efforts by sending Rosen emails alleging election fraud without any

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*; See also Memorandum from Steven Engel to Richard Donoghue Evaluating the Potential Original Jurisdiction Suit in the Supreme Court (Dec. 31, 2020), <https://www.citizensforethics.org/wp-content/uploads/2022/02/Response-21-159-with-Enclosure-1.pdf>.

<sup>167</sup> Press Release, House Comm. on Oversight and Reform, Committee Obtains Key Evidence of President Trump's Attempts to Overturn the 2020 Election (July 30, 2021), <https://oversight.house.gov/news/press-releases/committee-obtains-key-evidence-of-president-trump-s-attempts-to-overturn-the>.

<sup>168</sup> Jon Swaine & Emma Brown, 'Italygate' election conspiracy theory was pushed by two firms led by woman who also falsely claimed \$30 million mansion was hers, THE WASHINGTON POST (June 19, 2021), [https://www.washingtonpost.com/investigations/italygate-michele-edwards-meadows-trump/2021/06/19/2f6314d2-d05f-11eb-8014-2f3926ca24d9\\_story.html](https://www.washingtonpost.com/investigations/italygate-michele-edwards-meadows-trump/2021/06/19/2f6314d2-d05f-11eb-8014-2f3926ca24d9_story.html); Blake, *supra* note 87.

evidence.<sup>169</sup> Rosen and Donoghue found the “Italygate” conspiracy to be “pure insanity” and “patently absurd,” according to Donoghue’s testimony and an email exchange between the two.<sup>170</sup>

Trump did not relent in pressuring Rosen and Donoghue, but by late December 2020, none of his appointees to fill the attorney general, acting attorney general, or acting deputy attorney general roles had yielded in the nearly two months since Election Day. Trump and members of his inner circle sought to identify and potentially elevate someone else who would support their agenda to overturn the election from within the Justice Department.

On December 28, Jeffrey Clark, the acting head of the Civil Division and head of the Environmental and Natural Resources Division at the Justice Department, emailed Acting Attorney General Rosen and Acting Deputy Attorney General Donoghue a draft letter to state officials in Georgia claiming that the department had discovered “significant concerns” bearing on multiple states’ election results.<sup>171</sup> Clark’s draft letter, if sent, would have recommended that the Georgia General Assembly convene a special session to “deliberate on the matter” and consider sending an alternate slate of electors to Congress.<sup>172</sup> The clear implication of the letter was that state lawmakers should nullify Biden’s win and would have federal backing to do so. (Clark denies wrongdoing, stating that he has not “harbored any scienter to act in a dishonest fashion for self-gain or to achieve an illicit objective for former President Trump.”)<sup>173</sup>

According to the Select Committee, Clark’s collaborator in drafting the letter was attorney Ken Klukowski, a lawyer who had worked for the Trump campaign before joining the Justice Department on December 15, 2020<sup>174</sup>—the day after the Electoral College met. According to Vice Chair Cheney and the Committee’s report, Klukowski worked under Clark, and they collaborated to draft the letter to Georgia officials.<sup>175</sup> Vice Chair Cheney noted that the draft contained “text... similar to what we have seen from John Eastman and Rudy Giuliani, both of whom were coordinating with President Trump to overturn the 2020 election,” indicating that they were all working together.<sup>176</sup> Based on an email obtained by the Select Committee, according to Cheney, “Mr. Klukowski was simultaneously working with Jeffrey Clark to draft the proposed letter to Georgia officials to overturn their certified election and working with Dr. Eastman to help pressure

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<sup>169</sup> Ali Breland, Emails Show Mark Meadows Pushed the DOJ to Investigate Election Fraud Conspiracy Theories, MOTHER JONES (June 5, 2021), <https://www.motherjones.com/politics/2021/06/emails-mark-meadows-jeffrey-rosen-donald-trump-election-conspiracies-italygate/>.

<sup>170</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 89; Blake, *supra* note 87.

<sup>171</sup> *Id.*

<sup>172</sup> Draft Letter from Jeffrey Clark to Georgia Officials on Proof of Concept (Dec. 28, 2020), <https://int.nyt.com/data/documenttools/jeffrey-clark-draft-letter/9a9ffa97a521729b/full.pdf>.

<sup>173</sup> Tierney Sneed & Katelyn Polantz, Jeffrey Clark told DC Bar that DOJ search of his home linked to false statements, conspiracy, obstruction investigation, CNN (Sept. 14, 2022), <https://www.cnn.com/2022/09/14/politics/jeffrey-clark-doj-false-statements-conspiracy-obstruction-investigation/index.html>.

<sup>174</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 89; Select Comm. Report at 156 (“As further discussed in Chapter 4 of this report, Klukowski, a lawyer, joined DOJ’s Civil Division with just weeks remaining in President Trump’s term and helped Clark on issues related to the 2020 election, despite the fact that ‘election-related matters are not part of the Civil portfolio.’.... Klukowski told the Select Committee that the Trump Campaign was his client before joining DOJ.”).

<sup>175</sup> Select Comm. Report at 50–51, 392, 418 n.207.

<sup>176</sup> *Id.*

the vice president to overturn the election.”<sup>177</sup> However, it should be noted that Klukowski has since disavowed any support of Eastman’s scheme and disputed the implication that he co-authored the letter to state officials, stating that he merely built out an outline and supplied legal citations “at the direction of my then-boss,” Clark.<sup>178</sup>

Regardless of the nature of Klukowski’s involvement, it was clear that Clark was willing to champion Trump’s agenda to use the Justice Department to challenge the election results. Trump had been introduced to Clark by Representative Scott Perry of Pennsylvania (whose phone has since been seized by federal authorities).<sup>179</sup> Giuliani testified in a congressional deposition that he recommended Clark be given election-related responsibilities within the Justice Department.<sup>180</sup> He specifically said: “[S]omebody should be put in charge of the Justice Department who isn’t frightened of what’s going to be done to their reputation.”<sup>181</sup>

On December 22, 2020, Rep. Perry, who had met with Trump in the Oval Office the previous day about unsubstantiated claims of voter fraud, went back to the White House and brought Clark with him.<sup>182</sup> Unbeknownst to Rosen and Donoghue, and despite Clark agreeing not to meet with Trump after being admonished for violating DOJ and White House policy limiting who at the Department can have contact with the president without prior authorization, Trump and Clark spoke several times in late December and early January.<sup>183</sup> Clark reportedly discussed the draft letter to state officials with both Trump and Perry before revealing it to Rosen and Donoghue, who rebuffed him.<sup>184</sup>

Donoghue testified that he responded to Clark’s email and draft letter on December 28, telling Clark:

This is not the Department’s role to suggest or dictate to state legislatures how they should select their electors. But more importantly, this was not based on fact. This was actually contrary

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<sup>177</sup> As discussed in Section I.A.4, *infra*, Eastman is the private attorney who wrote the memos outlining the strategy to have Vice President Pence unilaterally “determine[] on his own” which of the states’ electoral certificates “is valid” at the joint session of Congress on January 6. He is also the attorney, discussed below, who testified before the Georgia state legislature on December 3, 2020, at the same hearing where Giuliani appeared, and advocated for the legislature to intervene and appoint alternate electors. The Select Committee cited an email, dated December 18, 2020, recommending that Eastman and Klukowski brief Pence together.

<sup>178</sup> Response of Ken Klukowski to Select Comm. Hearing of June 23, 2022 (accessed Aug. 24, 2022), <https://ia601509.us.archive.org/9/items/ken-klukowski-public-statement-of-6-25-22/Ken%20Klukowski%20Public%20Statement%20of%206-25-22.pdf>.

<sup>179</sup> Alan Feuer, Luke Broadwater & Katie Benner, Seizure of Congressman’s Phone Is Latest Sign of Escalating Election Inquiry, *THE NEW YORK TIMES* (Aug. 10, 2022), <https://www.nytimes.com/2022/08/10/us/politics/scott-perry-phone-fbi.html>.

<sup>180</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 89.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Benner, *supra* note 157.

<sup>184</sup> Katie Benner & Catie Edmondson, Pennsylvania Lawmaker Played Key Role in Trump’s Plot to Oust Acting Attorney General, *THE NEW YORK TIMES* (Jan. 23, 2021), <https://www.nytimes.com/2021/01/23/us/politics/scott-perry-trump-justice-department-election.html?referringSource=articleShare>.



to the facts as developed by department investigations...And for the Department to insert itself into the political process this way, I think would have had grave consequences for the country. It may very well have spiraled us into a constitutional crisis.<sup>185</sup>

Donoghue said he later told Clark:

What you're proposing is nothing less than the United States Justice Department meddling in the outcome of a presidential election.<sup>186</sup>

At some point, White House lawyer Eric Herschmann spoke to Clark about the draft letter to state officials. Herschmann has since testified that he told Clark that sending the letter “would be committing a felony.”<sup>187</sup>

On New Year's Eve, Trump summoned Rosen and Donoghue to an Oval Office meeting. According to Donoghue's testimony, Trump was “very agitated” as they discussed “a variety of election matters.”<sup>188</sup> Trump pushed for the DOJ's leadership to support the appointment of a special counsel to investigate election fraud, as he had discussed with his group of outside advisors—Giuliani, Flynn, Powell, and Byrne—in his December 18, 2020 meeting.

At the meeting with DOJ leadership on December 31, Trump was still focused on plans he had discussed with the same outside group. He asked Rosen and Donoghue to have the Justice Department seize voting machines, as his outside advisers had pushed. Not only had Trump considered accomplishing this by using the Department of Defense and military pursuant to the draft executive order discussed above, but according to Barr, Trump had also raised the idea with him of the Justice Department seizing voting machines prior to Barr's departure. According to Barr, he told Trump “absolutely not.”<sup>189</sup> Barr said that he explained to Trump: “There's no probable cause and I'm not going to seize any machines.”<sup>190</sup> Nevertheless, it appears that later that month, Trump was hopeful that his new DOJ leadership might do what Barr would not, despite the legal impediment Barr explained to him.

Regarding Trump's proposal to seize voting machines, Rosen testified that he responded:

That we [the Justice Department] had — we had seen nothing improper with regard to the voting machines. And I told him that the — the real experts that had been at DHS [the Department of Homeland Security] and they had briefed us, that they had looked at it and that there was nothing wrong with the — the voting machines.

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<sup>185</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 89.

<sup>186</sup> First Jan. 6 Hearing Transcript, *supra* note 28.

<sup>187</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 89. Clark also appeared before the Select Committee for a deposition. When asked by committee counsel if he had discussed the letter to state officials with President Trump, Clark invoked the Fifth Amendment. *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>190</sup> *Id.*

And so that was not something that was appropriate to do...I don't think there was legal authority either.<sup>191</sup>

Donoghue testified that Trump was “very agitated” by Rosen’s reply and immediately responded by getting then-Acting Deputy Secretary of Homeland Security Ken Cuccinelli on the phone.<sup>192</sup> According to Donoghue’s testimony, Trump said: “Ken, I'm sitting here with the acting attorney general. He just told me it’s your job to seize [voting] machines and you’re not doing your job.”<sup>193</sup> Rosen testified that he was “certainly not” suggesting that the Department of Homeland Security could seize voting machines.<sup>194</sup> Reportedly, Cuccinelli had previously explained to Giuliani that the Department of Homeland Security had no authority to assert control over voting machines.<sup>195</sup>

Ultimately, all of the president’s proposals were rebuffed, and Trump’s frustration with Rosen and Donoghue grew during the December 31 meeting. Donoghue testified:

Toward the end of the meeting the president... said people tell me I should just get rid of both of you. I should just remove you and make a change in the leadership. Put Jeff Clark in, maybe something will finally get done. And I responded as I think I had earlier in the December 27th call, Mr. President you should have the leadership that you want. But understand, the United States Justice Department functions on facts, evidence, and law, and those are not going to change. So you can have whatever leadership you want, but the department’s position is not going to change.<sup>196</sup>

After the meeting, Trump and Meadows continued to push the Justice Department for action in support of their effort to overturn the election. On New Year’s Day, according to the Select Committee, Meadows sent “a flurry of emails” to Rosen making new requests.<sup>197</sup> Rosen testified that he did “nothing” in response to those requests but said “Meadows’s email was something of a corroboration that there were discussions going on that I had been — not been informed about by Mr. Clark or anybody else.”<sup>198</sup>

Despite Trump’s threats to replace Rosen, he and Donoghue held firm. Rosen testified:

[I]t was really not our role to function as—as, you know, an arm of any campaign for any party or any campaign. That wasn’t our role.

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<sup>191</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 89.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Maggie Haberman & Zolan Kanno-Youngs, Trump Weighed Naming Election Conspiracy Theorist as Special Counsel, *THE NEW YORK TIMES* (last updated Jan. 18, 2021), <https://www.nytimes.com/2020/12/19/us/politics/trump-sidney-powell-voter-fraud.html>.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

And that's part of why I had been unwilling to meet with Mr. Giuliani or any of the — the campaign people before. And the other part was it was another one of these ones where lots of work had already been done. And I thought it was a rehash of things that had been debunked previously.<sup>199</sup>

On January 2, 2021, Clark met with Rosen and Donoghue and informed Rosen that he intended to discuss with Trump his plan to push state legislators to overturn the election results.<sup>200</sup> Clark told Rosen that Trump was prepared to fire him and had offered to install Clark as the acting attorney general—a step that would give Clark broad power to throw the Justice Department behind Trump's election interference claims. Clark again asked Rosen and Donoghue to sign the letter he had drafted and advocated sending to state officials recommending they consider sending an alternate slate of electors to Congress.<sup>201</sup> Rosen testified that Clark said he would turn down Trump's offer and thus allow Rosen to remain acting attorney general if Rosen agreed to sign the letter.<sup>202</sup> Rosen again refused to sign the letter.<sup>203</sup>

The next day, January 3, Clark informed Rosen that he was accepting Trump's offer to replace Rosen as acting attorney general.<sup>204</sup> Rosen testified that he “wasn't going to accept being fired by [his] subordinate” and “[he] wanted to talk to the President directly.”<sup>205</sup> Rosen called Meadows and requested a meeting with Trump, which Meadows arranged for that evening, which was attended by Rosen, Donoghue, and Engel from DOJ leadership.<sup>206</sup> By the time of that meeting, White House call logs “had already begun referring to Mr. Clark as the acting attorney general.”<sup>207</sup>

Rosen described the meeting with Trump in detail:

[T]he president turned to me and he said, well, one thing we know is you, Rosen, you aren't going to do anything. You don't even agree with the—the claims of election fraud, and this other guy at least might do something. And then I said, well, Mr. President, you're right that I'm not going to allow the Justice Department to do anything to try to overturn the election. That's true. But the reason for that is because that's what's consistent with the facts and the law, and that's what's required under the Constitution. So, that's the right answer and a good thing for the country, and therefore I submit it's the right thing for you, Mr. President.

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<sup>199</sup> *Id.*

<sup>200</sup> Benner, *supra* note 157; Fifth Jan. 6 Hearing Transcript, *supra* note 89.

<sup>201</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 89.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

And that kicked off another two hours of discussion, in which everyone in the room was in one way or another making different points but supportive of my approach for the Justice Department and critical of Mr. Clark.<sup>208</sup>

Donoghue told Trump that he would resign if Trump replaced Rosen with Clark, as would every single assistant attorney general. Donoghue testified that he told Trump: “within 24, 48, 72 hours, you could have hundreds and hundreds of resignations of the leadership of your entire Justice Department because of your actions.”<sup>209</sup> Associate Deputy Attorney General Patrick Hovakimian even went so far as drafting a letter, which *Politico* obtained and published, announcing his and Donoghue’s resignations. In the draft letter, which was dated January 3 but never sent, he offered context for the resignations, explained to his colleagues that “Acting Attorney General Jeff Rosen over the course of the last week repeatedly refused the President’s direct instructions to utilize the Department of Justice’s law enforcement powers for improper ends” and that as a consequence “the President removed Jeff [Rosen] from the Department.”<sup>210</sup>

Engel also testified about the meeting as well as the discussion of the letter to the Georgia legislature and whether to elevate Clark. Engel said:

[T]he president turned to me and said, Steve, you wouldn’t leave, would you, I said, Mr. President, I’ve been with you through four attorneys general, including two acting as attorney general, but I couldn’t be part of this...no one is going to read this letter.

**All anyone is going to think is that you went through two attorneys general in two weeks until you found the environmental guy to sign this thing.** And so, the story is not going to be that the Department of Justice has found massive corruption that would have changed the result of the election. It’s going to be the disaster of Jeff Clark...And I think at that point Pat Cipollone said, yeah, this is a murder suicide pact, this letter.<sup>211</sup> (emphasis added)

Based on that, Trump finally relented on elevating Clark, but he did not relent in his focus on claiming election fraud to support his continued effort to overturn the election. Donoghue testified that, not long after he got back to his apartment after the January 3 meeting at the White House, his “cell phone rang.” Donoghue said “[i]t was the president, and he had information about a truck supposedly full of shredded ballots in Georgia that was in the custody of an ICE agent.”<sup>212</sup>

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Besty Woodruff Swan & Nicholas Wu, Top DOJ official drafted resignation email amid Trump election pressure, *POLITICO* (Aug. 4, 2021), <https://www.politico.com/news/2021/08/04/doj-official-resignation-trump-election-pressure-502413>.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

Donoghue said that he merely passed along that information to DHS. However, this phone call shows that Trump was not planning to abandon his efforts to overturn the election results.

### 3. Pressuring State Officials

Even before January 6, 2021, evidence of the substantial and improper pressure Trump was exerting against state officials to remain in office was made public through the release of recordings of Trump's now infamous calls with Georgia officials during which Trump both threatened and pleaded with Georgia Secretary of State Raffensperger to "find 11,780 votes."<sup>213</sup> The Select Committee brought forth new information and testimony that demonstrate a concerted, coordinated, and methodical effort by Trump, his attorneys, allies, and campaign to "corruptly pressur[e] state legislators and election officials to change election results."<sup>214</sup> And recent reporting has brought forth even further evidence of Trump's direct involvement in the pressure campaign, including through a reported call to Arizona Governor Doug Ducey in late 2020 exhorting him to overturn the results in his state.<sup>215</sup>

The evidence shows that Trump engaged personally, and through his campaign, to organize grassroots pressure on state legislators around the country.<sup>216</sup> In an organized operation, Trump campaign staff directly contacted state legislators and pressured them to appoint new electors. Trump campaign staffers were given a script to use to call legislators in targeted states, which said:

Hard Sell: Support the resolution to appoint electors for Trump...  
You do have the power...[to send] a slate of Electors that will  
support President Trump and Vice President Pence."<sup>217</sup>

At the same time that campaign workers were using this script to contact legislators directly, the Trump campaign also spent millions of dollars running digital and television ads asking people to call their legislators to put additional pressure on state officials.<sup>218</sup> For example, one ad run by the Trump campaign repeated an election fraud conspiracy theory that had been examined and debunked by the FBI, and asked members of the public to call their legislators and the governor and "demand they inspect the [voting] machines and hear the evidence" regarding election fraud.<sup>219</sup>

Trump personally pressured state officials both publicly and privately. For example, in a November 21, 2020 tweet, Trump reacted to President-elect Biden preparing to assume the

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<sup>213</sup> Amy Gardner, 'I just want to find 11,780 votes': In extraordinary hour-long call, Trump pressures Georgia secretary of state to recalculate the vote in his favor, THE WASHINGTON POST (Jan. 3, 2021), [https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html).

<sup>214</sup> First Jan. 6 Hearing Transcript, *supra* note 28.

<sup>215</sup> Leigh Ann Caldwell, Josh Dawsey & Yvonne Wingett Sanchez, Trump pressured Arizona Gov. Doug Ducey to overturn 2020 election, THE WASHINGTON POST (July 1, 2023), <https://www.washingtonpost.com/nation/2023/07/01/trump-2020-election-arizona-governor-doug-ducey/>.

<sup>216</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> America's News Room, Fox News 6:00am-9:00amPST, INTERNET ARCHIVE (Dec. 29, 2020), [https://archive.org/details/FOXNEWSW\\_20201229\\_140000\\_Americas\\_Newsroom/start/9960/end/10020](https://archive.org/details/FOXNEWSW_20201229_140000_Americas_Newsroom/start/9960/end/10020).

presidency, and falsely argued that there were hundreds of thousands of fraudulent votes whose exclusion would change the results of the election. Trump’s tweet said:

Why is Joe Biden so quickly forming a Cabinet when my investigators have found hundreds of thousands of fraudulent votes, enough to “flip” at least four States, which in turn is more than enough to win the Election? Hopefully the Courts and/or Legislatures will have....<sup>220</sup>

In a subsequent tweet, he continued:

....the COURAGE to do what has to be done to maintain the integrity of our Elections, and the United States of America itself. THE WORLD IS WATCHING!!!<sup>221</sup>

On December 15, 2020, Trump retweeted attorney and supporter L. Lin Wood, who photoshopped pictures of Georgia Governor Brian Kemp and Georgia Secretary of State Brad Raffensperger wearing face masks with the Chinese flag on them. In the tweet, Wood said that the duo did not “get it right” when it came to delivering the election to Trump and would “soon be going to jail.”<sup>222</sup>

Trump posted contact information for state officials, including their cell phone numbers, on Facebook.<sup>223</sup> Trump told his supporters to contact those officials and “[d]emand a vote on decertification” of the state’s election results.<sup>224</sup> For instance, on January 1, 2021, Trump retweeted a message from his campaign that directed supporters to contact Georgia House Speaker David Ralston and Georgia Senate Majority Leader Mike Dugan to “[d]emand a vote on decertification” of electors, adding, “NOW.”<sup>225</sup> In another instance, Trump disclosed the personal phone number of the Republican Majority Leader of the Michigan State Senate, Mike Shirkey.<sup>226</sup> In a recorded interview, Shirkey told Select Committee staff that he received “just shy of 4,000 text messages over a short period of time calling [on him] to take action.”<sup>227</sup> He described the pressure being applied as “a loud noise, loud consistent cadence of, you know, we hear that — that

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> Brett Samuels, Trump retweets lawyer who said Republican officials in Georgia are ‘going to jail’, THE HILL (Dec. 15, 2020), <https://thehill.com/homenews/campaign/530250-trump-retweets-lawyer-who-says-republican-officials-in-georgia-are-going-to/>.

<sup>223</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68. The Committee explained: “President Trump tweeted quote, ‘Hopefully the courts and or legislatures will have the courage to do what has to be done to maintain the integrity of our elections and the United States of America itself. The world is watching.’ He posted multiple messages on Facebook, listing the contact information for state officials and urging his supporters to contact them to quote, ‘Demand a vote on decertification.’ In one of those posts, President Trump disclosed Mike Shirkey’s personal phone number to his millions of followers.”

<sup>224</sup> *Id.*

<sup>225</sup> Michael King, Trump encouraging Georgia voters to call state lawmakers and demand decertification, 11ALIVE (Jan. 1, 2021), <https://www.11alive.com/article/news/politics/elections/trump-encouraging-georgia-voters-to-call-state-lawmakers/85-c506eeb5-adb4-4097-a8bd-0375ceacec0f>.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

the Trump folks are calling and asking for changes in the electors and you guys can do this.” Shirkey continued: “you know they were—they were believing things that were untrue.”<sup>228</sup>

Trump’s allies applied pressure to state officials as well. In the last week of November 2020, two of Trump’s attorneys, Rudy Giuliani and Jenna Ellis, attempted to contact the speaker of the Pennsylvania House of Representatives, Republican Bryan Cutler, every day.<sup>229</sup> In voicemail messages, Giuliani attempted to appeal to Cutler as a “fellow Republican.” Despite the fact that Cutler, through his attorney, requested the Trump lawyers stop contacting him, Giuliani continued to leave messages.<sup>230</sup> According to the Select Committee, after Giuliani’s attempts to pressure him failed, Steve Bannon announced protests outside Cutler’s home and offices.<sup>231</sup> According to reports, on December 30, 2020, roughly 100 protesters gathered outside Cutler’s office and home with “‘Trump 2020’ flags and ‘It’s Not Over’ signs.”<sup>232</sup> In a recorded interview, Cutler said:

There were multiple protests. I actually don’t remember the exact number. There was at least three, I think, outside of either my district office or my home. And you’re correct, my son—my then 15 year old son was home by himself for the first one. All of my personal information was doxxed [released publicly] online. It was my personal email, my personal cell phone, my home phone number. In fact, we had to disconnect our home phone for about three days because it would ring all hours of the night and would fill up with messages.

Georgia Secretary of State Raffensperger similarly described how Trump supporters engaged in a string of threatening behaviors pressuring him to comply with Trump’s wishes or resign. Like Cutler and Shirkey, Raffensperger’s email and cell phone were also doxxed (made public on the internet), resulting in text messages from “all over the country.”<sup>233</sup> He said his wife also received “sexualized attacks” in the form of text messages, and “some people broke into” his widowed daughter-in-law’s home, where his grandchildren live.<sup>234</sup>

Giuliani and Ellis appeared to act as Trump’s surrogates, meeting with legislators in multiple states, in an organized effort to get state legislators to send slates of Trump electors to Congress. On November 25, 2020, Giuliani and Ellis met with Pennsylvania Republican legislators in the ballroom of the Wyndham Hotel in Gettysburg, Pennsylvania, with Trump joining the

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<sup>228</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Gillian McGoldrick, More than 100 pro-Trump protesters gather outside Pa. House Speaker Cutler’s home, office, LANCASTER ONLINE (Dec. 31, 2020), [https://lancasteronline.com/news/politics/more-than-100-pro-trump-protesters-gather-outside-pa-house-speaker-cutlers-home-office/article\\_1d0ba7ae-4b12-11eb-84a8-0b87cfbfd99a.html](https://lancasteronline.com/news/politics/more-than-100-pro-trump-protesters-gather-outside-pa-house-speaker-cutlers-home-office/article_1d0ba7ae-4b12-11eb-84a8-0b87cfbfd99a.html).

<sup>233</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>234</sup> *Id.*

meeting over the phone.<sup>235</sup> Trump told legislators at that meeting the “election has to be turned around.”<sup>236</sup> On November 30, Giuliani met with Arizona Republican state legislators at the Hyatt Regency hotel in Phoenix, at an event reportedly described as a “hearing” although it was “not an official legislative event.”<sup>237</sup> On December 3, Giuliani and Ellis appeared before Republicans on Georgia’s Senate Judiciary Subcommittee and recited a laundry list of conspiracy theories endorsed by Trump and his allies.<sup>238</sup> Giuliani implored the legislators to appoint an alternative slate of electors for Trump.<sup>239</sup> John Eastman also testified at that December 3 hearing in Georgia. However, he did not introduce himself as a member of Trump’s legal team, but instead as an expert witness introducing himself as “a professor of constitutional law and former dean at the Chapman University Fowler School of Law,” a “visiting scholar at the University of Colorado...Benson Center,” and a “fellow at the Claremont Institute.”<sup>240</sup> Eastman delivered the same message as Giuliani and Ellis, pushing legislators to appoint alternate electors.<sup>241</sup>

Trump personally went so far as to call state legislators to the White House in an apparent attempt to push them to take action to accomplish his goals.<sup>242</sup> Trump invited Michigan Republican legislators to meet with him at the White House on November 20, 2020, to discuss overturning the election results in that state.<sup>243</sup> Michigan legislators, including Michigan Senate Majority Leader Mike Shirkey and Michigan House Speaker Lee Chatfield, attended the meeting. Despite the public and private pressure placed upon them, following the meeting, Shirkey and Chatfield issued a joint public statement, which said: “We have not yet been made aware of any information that would change the outcome of the election in Michigan and as legislative leaders, we will follow the law and follow the normal process regarding Michigan’s electors, just as we have said throughout this election.”

The next week, Trump called Pennsylvania Republican legislators to the White House to meet with him on November 25, 2020.<sup>244</sup> Republican Leaders of the Pennsylvania legislature—Pennsylvania House Speaker Bryan Cutler, incoming Senate Majority Leader Kim Ward, House

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<sup>235</sup> Quint Forgey, Trump takes his fraud claims to a hotel ballroom — by phone, POLITICO (Nov. 25, 2020), <https://www.politico.com/news/2020/11/25/trump-giuliani-fraud-claims-pennsylvania-440628>.

<sup>236</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>237</sup> Ryan Randazzo & Maria Polletta, Arizona GOP lawmakers hold meeting on election outcome with Trump lawyer Rudy Giuliani, AZCENTRAL (Nov. 30, 2020), <https://www.azcentral.com/story/news/politics/elections/2020/11/30/republican-lawmakers-arizona-hold-meeting-rudy-giuliani/6468171002/>.

<sup>238</sup> Associated Press, Trump legal adviser ordered to testify in Ga. election probe, GEORGIA PUBLIC BROADCASTING (Aug. 12, 2022), <https://www.gpb.org/news/2022/08/17/trump-legal-adviser-ordered-testify-in-ga-election-probe>.

<sup>239</sup> Stephen Fowler, Fact Checking Rudy Giuliani’s Grandiose Georgia Election Fraud Claim, GEORGIA PUBLIC BROADCASTING (Dec. 4, 2020), <https://www.gpb.org/news/2020/12/04/fact-checking-rudy-giulianis-grandiose-georgia-election-fraud-claim>.

<sup>240</sup> Claremont Institute, John Eastman Testimony During Georgia Senate Election Hearing, YOUTUBE (Dec. 4, 2020), [https://www.youtube.com/watch?v=IHt6UEc\\_tQ8](https://www.youtube.com/watch?v=IHt6UEc_tQ8).

<sup>241</sup> *Id.*

<sup>242</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>243</sup> Annie Grayer, Jeremy Herb & Kevin Liptak, Trump courts Michigan GOP leaders in bid to overturn election he lost, CNN (Nov. 19, 2020), <https://www.cnn.com/2020/11/19/politics/gop-michigan-results-trump/index.html>.

<sup>244</sup> William Bender & Angela Coulombis, President Trump invited Pa. lawmakers to the White House. Then everyone went silent, SPOTLIGHT PA (Nov. 27, 2020), <https://www.spotlightpa.org/news/2020/11/trump-pennsylvania-lawmakers-invite-white-house-silence-election-2020>.



Majority Leader Kerry Benninghoff, and incoming Senate President Pro Tempore Jake Corman—all reportedly declined the invitation to attend the White House meeting. Those officials from Pennsylvania that did meet with Trump included then State Senator Doug Mastriano, who was outside the U.S. Capitol on January 6, and reportedly prayed that Trump’s supporters would “seize the power ... given to [them] by the Constitution, and ... for the leaders also in the federal government ... on the Sixth of January that they will rise up with boldness.”<sup>245</sup>

On December 5, 2020, Trump personally called Georgia Governor Brian Kemp, and solicited him to abet a scheme to overturn the state’s election results, insisting to Kemp that “you have a big election integrity problem in Georgia” and stating that “I hope you can help us out and call a special election,”<sup>246</sup> an action the governor has no authority to perform. At the time of this call, Georgia had already formally certified its election results two weeks earlier. Nonetheless, Trump wanted a special session so state lawmakers could override those certified election results and appoint electors for Trump.<sup>247</sup> Trump also reportedly entreated the governor to order a statewide audit of all signatures on mail-in ballots.<sup>248</sup> Kemp turned down both requests. Later that night, Trump personally attacked Kemp during a rally he held in support of Republican candidates for U.S. Senate David Perdue and Kelly Loeffler in Valdosta, Georgia: “Your governor could stop [the steal] very easily if he knew what the hell he was doing. He could stop it very easily ... so far we haven’t been able to find the people with the courage to do the right thing. And that is true in Georgia, certainly.”<sup>249</sup> At that rally on December 5, Trump seems to acknowledge his direct and personal outreach to Georgia state legislators in his effort to overturn the election, stating:

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<sup>245</sup> Tim Dickinson, Caught on Tape: Doug Mastriano Prayed for MAGA to ‘Seize the Power’ Ahead of Jan. 6, ROLLING STONE (Sept. 9, 2022), <https://www.rollingstone.com/politics/politics-features/doug-mastriano-donald-trump-christian-right-1234589455/>.

<sup>246</sup> Amy Gardner, Colby Itkowitz & Josh Dawsey, Trump calls Georgia governor to pressure him for help overturning Biden’s win in the state, THE WASHINGTON POST (Dec. 5, 2020), [https://www.washingtonpost.com/politics/trump-kemp-call-georgia/2020/12/05/fd8d677c-3721-11eb-8d38-6aea1adb3839\\_story.html](https://www.washingtonpost.com/politics/trump-kemp-call-georgia/2020/12/05/fd8d677c-3721-11eb-8d38-6aea1adb3839_story.html); On September 25, 2021, Trump confirmed that he asked Kemp to call a “special election” to decertify his loss in Georgia: “Remember we wanted to call a special election, so that we could go, Marjorie, into election integrity. What is wrong with that? And he said, ‘No, we won’t.’ And I think the governor is the only one that can call it. And he wouldn’t do it. He wouldn’t do it. So when these guys, they’re young and nice guys, they came back, they said. ‘He won’t do it.’ ... So I said, ‘Let me handle it. This is easy.’ I got this guy elected. One thing has nothing to do with the other. One thing has nothing... There’s no quid pro quo... ‘I’ll call them up.’ I said, ‘Brian, listen. you have a big election integrity problem in Georgia. I hope you can help us out and call a special election and let’s get to the bottom of it for the good of the country.’” Donald Trump, Perry, Georgia Rally Speech Transcript September 25, REV (Sept. 26, 2021), <https://www.rev.com/blog/transcripts/donald-trump-perry-georgia-rally-speech-transcript-september-25>.

<sup>247</sup> Kristen Holmes & Veronica Stracqualursi, Trump pressured Georgia governor in call to help overturn Biden’s win in state, CNN (Dec. 5, 2021), <https://www.cnn.com/2020/12/05/politics/trump-georgia-brian-kemp-phone-call/index.html>.

<sup>248</sup> Gardner, Itkowitz & Dawsey, *supra* note 246.

<sup>249</sup> *Id.*

I've become friendly with legislators that I didn't know four weeks ago.... In fact, in my pocket right here, we have a couple of them right here.<sup>250</sup>

Trump went on to name several individuals including Georgia State Senators Brandon Beach, Greg Dolezal, as well as then-state Senator, now Lieutenant Governor Burt Jones.<sup>251</sup>

Public reporting shows Trump's team continued to pressure Georgia legislators throughout the month of December, with Giuliani meeting again with the Georgia State Senate Judiciary Subcommittee on December 30, 2020. During this hearing Giuliani lambasted the actions of Secretary of State Raffensperger.<sup>252</sup> He called people who did not agree with his claims of fraud "moron[s]," "fool[s]," and "liar[s]" and that anyone willing to sign an affidavit indicating the certified results were correct could risk going to jail.<sup>253</sup> Specifically, Giuliani said the legislators had the responsibility and power to select Georgia's electors, and it was "ultimately a question of courage" as to whether they will "stand up to the obligation the Constitution of the United States put on [them] to save our people from fraud; to save the reputation of the State of Georgia from... certifying a phony vote."<sup>254</sup> Giuliani finally implored the committee members to "do the right thing" and hold a session to take action to change the outcome of the election.<sup>255</sup>

Republican Speaker of the Arizona House of Representatives Rusty Bowers testified about efforts by Trump and his attorneys to pressure him and other Arizona officials to take extralegal actions with the goal of changing the state's election results or sending an alternate slate of electors to Congress.<sup>256</sup> According to Bowers, he received multiple phone calls from Trump himself and his associates, including Giuliani and Eastman, during November and December 2020.<sup>257</sup> In those calls Trump and Giuliani claimed that Arizona's election results were tainted by fraud and that Bowers needed to adopt various outrageous (and likely illegal) schemes to override Biden's victory in Arizona.<sup>258</sup> Bowers testified that claims made by Trump that the election in Arizona had been rigged or tainted by fraud were false.<sup>259</sup>

In one call that took place sometime after the election, Bowers testified that Trump and Giuliani made two requests of him. First, they asked whether he "would allow an official committee at — at the Capitol so that they could hear this evidence [of alleged voter fraud] and that we could take action thereafter." Bowers refused, explaining that he did not think there was

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<sup>250</sup> Donald J. Trump, Remarks at a Campaign Rally Prior to the Georgia State Senate Election Runoff in Valdosta, Georgia (Dec. 5, 2020) (transcript available in The American Presidency Project at the University of California, Santa Barbara), <https://www.presidency.ucsb.edu/documents/remarks-campaign-rally-prior-the-georgia-state-senate-election-runoff-valdosta-georgia>.

<sup>251</sup> *Id.*

<sup>252</sup> Right Side Broadcasting Network, Georgia State Senate Meeting on 2020 Election Fraud, YOUTUBE (Dec. 30, 2020), [https://www.youtube.com/watch?v=u5ZP\\_HpBKos](https://www.youtube.com/watch?v=u5ZP_HpBKos).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

sufficient evidence to merit a hearing on the matter and did not “want to be used as a pawn” for “the circus.” Then, when Bowers inquired about why Trump and Giuliani wanted a hearing in the first place, they made their second request. Bowers explained that Giuliani posed their plan to him as follows:

I—I said to what end? To what end the hearing? He said, well, we have heard by an official high up in the Republican legislature that there is a legal theory or a legal ability in Arizona that you can remove the—the electors of President Biden and replace them. And we would—we would like to have the legitimate opportunity through the committee to come to that end and—and remove that.<sup>260</sup>

Bowers testified that he again refused their request, explaining to Trump and Giuliani “you are asking me to do something that is counter to my oath when I swore to the Constitution to uphold it, and I also swore to the Constitution and the laws of the state of Arizona.”<sup>261</sup>

In response to questioning from Select Committee member Rep. Adam Schiff, Bowers testified that he told Trump directly on the phone yet again that he would not break the law.<sup>262</sup> Here is an excerpt from the transcript of the June 21, 2022 Select Committee hearing:

ADAM SCHIFF: Speaker Bowers, did the president call you again in late — later in December?

RUSTY BOWERS: He did, sir.

ADAM SCHIFF: And did you tell the president in that second call that you supported him, that you voted for him, but that you were not going to do anything illegal for him?

RUSTY BOWERS: I did, sir.<sup>263</sup>

Even though Bowers told Giuliani and Ellis he needed proof, and even though he told Trump directly that he would not do anything illegal for him, Trump’s team continued to pressure him. Bowers said that, after “a few days had gone by” from that call, Eastman called him to ask him to have the Arizona legislature decertify Biden electors.<sup>264</sup> Bowers testified that Eastman asked him to call the legislature into a special session and “to take a vote to...decertify the electors, and that that — because we had plenary authority to do so.”<sup>265</sup> Bowers described his response to Eastman: “I can’t even call the legislature into session without a two-thirds majority vote.”<sup>266</sup>

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<sup>260</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>261</sup> *Id.*

<sup>262</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

Bowers said “there [was] no way that could happen.”<sup>267</sup> Bowers testified that he told Eastman that what Eastman and Trump were asking him to do would be “counter to [his] oath” to “uphold both in Constitution and in law.”<sup>268</sup> Bowers explained:

We have no legal pathway, both in state law nor to my knowledge in federal law, for us to execute such a request. And I am not allowed to walk or act beyond my authority if I'm not specifically authorized as a legislator—as a legislature, then I cannot act to the point of calling us into session. Some say that just a few legislators have plenary...authority...But—so to—to not have authority and be forbidden to act beyond my authority, on both counts, I'm not authorized to take such action, and that would deny my oath.<sup>269</sup>

Bowers told the Committee that he asked Eastman: “what would you have me do?”<sup>270</sup> In response, according to Bowers’ testimony, “[Eastman] said just do it and let the court sort it out.”<sup>271</sup>

The pressure on Bowers from Trump’s allies continued through January 6. Bowers testified that U.S. Rep. Andy Biggs called him the morning of January 6 and asked him to “sign on both to a letter that had been sent from [Arizona] and/or ...support the decertification of the electors” to which Bowers responded that he “would not.”<sup>272</sup>

Trump and his allies did not only pressure legislators. As mentioned above, in Georgia, he both privately called, and publicly pressured the governor and secretary of state. He also pressured Georgia’s attorney general, Chris Carr. In a December 8, 2020, phone call, Trump urged Carr not to oppose a lawsuit seeking to undo the election results.<sup>273</sup> That lawsuit was filed at the United States Supreme Court by Texas Attorney General Ken Paxton on December 7, which sought to influence the outcome of the election counts in Georgia, Michigan, Wisconsin, and Pennsylvania, and requested relief that would all but ensure Trump’s re-election.<sup>274</sup> Many Republican officeholders quickly jumped in to support Paxton by signing onto a multistate brief in support of the complaint,<sup>275</sup> but a number of other state officials were steadfast in their rejection of the filing. Those holdouts included Carr, who deemed the suit “constitutionally, legally, and factually

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> Marshall Cohen, Jason Morris & Christopher Hickey, Timeline: What Georgia prosecutors are looking at as they investigate Trump’s efforts to overturn the election, CNN (Aug. 5, 2021), <https://www.cnn.com/interactive/2021/08/politics/trump-georgia-2020-election/>.

<sup>274</sup> Emma Platoff, In new lawsuit, Texas contests election results in Georgia, Wisconsin, Michigan, Pennsylvania, THE TEXAS TRIBUNE (Dec. 8, 2020), <https://www.texastribune.org/2020/12/08/texas-ken-paxton-election-georgia/>.

<sup>275</sup> Emma Platoff, Trump, Republicans pin hopes on Texas lawsuit to overturn election results, but legal experts say it's a long shot, THE TEXAS TRIBUNE (Dec. 9, 2020), <https://www.texastribune.org/2020/12/09/texas-lawsuit-election-trump/>.

wrong.”<sup>276</sup> Trump reportedly responded to Carr’s statement by calling him on December 8 and warning him not interfere in the proceedings<sup>277</sup>—an unsubtle threat intended to interfere with his defense of the state’s election.<sup>278</sup>

Trump and his team also pressured election officials and investigators conducting “a signature match audit in Cobb County [Georgia] and an additional statewide signature match audit,” that Georgia Secretary of State Raffensperger initiated in response to claims, which were ultimately deemed baseless, of mismatched signatures on mail-in ballots.<sup>279</sup> On December 21, Trump posted a tweet criticizing state officials and suggesting that he still would win the state as a result. Trump tweeted:

Governor @BrianKempGA and his puppet @GeoffDuncanGA, together with the Secretary of State of Georgia, are very slow on Signature Verification, and won’t allow Fulton County to be examined. What are these RINOS hiding? We will easily win Presidential State race...<sup>280</sup>

The very next day, Meadows showed up in an unscheduled visit to the audit site.<sup>281</sup> Meadows was reportedly joined by an entourage of Secret Service agents as he asked questions and attempted to observe the review of absentee ballot envelope signatures.<sup>282</sup> While Meadows was reportedly not allowed in the room where the signatures were being examined, he met with Georgia Deputy Secretary of State Jordan Fuchs and the secretary of state’s chief investigator, Frances Watson, and collected their contact information, “including their cell phone numbers.”<sup>283</sup> Watson was directly overseeing the inquiry into the mismatched signatures on the mail-in ballots being audited.<sup>284</sup> According to Rep. Adam Schiff, text messages obtained by the Select Committee revealed that after Meadows’s site visit and meeting with Watson, “Meadows wanted to send some

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<sup>276</sup> Jim Rutenberg, Jo Becker, Eric Lipton, Maggie Haberman, Jonathan Martin, Matthew Rosenberg & Michael S. Schmidt, 77 Days: Trump’s Campaign to Subvert the Election, THE NEW YORK TIMES (last updated June 14, 2022), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html>.

<sup>277</sup> Cohen, Morris & Hickey, *supra* note 273.

<sup>278</sup> Greg Bluestein, Trump warns Georgia AG not to rally other Republicans against Texas lawsuit, THE ATLANTA JOURNAL-CONSTITUTION (Dec. 9, 2020), <https://www.ajc.com/politics/trump-warns-georgia-ag-not-to-rally-other-republicans-against-texas-lawsuit/37ASZD4PJNENHOLVIXZHRXCIIJ/>; Ariane de Vogue & Paul LeBlanc, Battleground states issue blistering rebukes to Texas’ lawsuit to invalidate millions of votes, CNN (Dec. 10, 2020), <https://www.cnn.com/2020/12/10/politics/2020-election-supreme-court-texas-trump/index.html>.

<sup>279</sup> Press Release, Georgia Office of the Secretary of State, Secretary Raffensperger Launches Cobb County and Statewide Signature Match Audits (Dec. 14, 2020), <https://sos.ga.gov/news/secretary-raffensperger-launches-cobb-county-and-statewide-signature-match-audits>; Office of Georgia Secretary of State Brad Raffensperger Brad Raffensperger, November 2020 General Election Results (last accessed Sept. 12, 2022), <https://results.enr.clarityelections.com/GA/107231/web.264614/#/summary>.

<sup>280</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Dec. 21, 2020, 10:30:09 a.m.), <https://www.thetrumparchive.com/?searchbox=%22%5C%22very+slow%5C%22%22>.

<sup>281</sup> Mark Niesse, Top Trump aide Mark Meadows visits Georgia ballot signature audit, THE ATLANTA JOURNAL-CONSTITUTION (Dec. 22, 2020), <https://www.ajc.com/politics/top-trump-aide-mark-meadows-visits-georgia-ballot-signature-audit/LC5HBS3AUVH4ZONJFSEL5RO2XA/>.

<sup>282</sup> *Id.*

<sup>283</sup> Gardner & Firozi, *supra* note 101.

<sup>284</sup> Office of Georgia Secretary of State Brad Raffensperger, November 2020 General Election Results, <https://results.enr.clarityelections.com/GA/107231/web.264614/#/summary>.

of the investigators in her office in the words of one White House aide a shitload of POTUS stuff, including coins, actual autographed MAGA hats, etc.,” but “White House staff intervened to make sure that didn’t happen.”<sup>285</sup>

On December 23, the day after meeting with Watson, Meadows coordinated a call between Trump and Watson.<sup>286</sup> The audio tape of this call, which was first obtained and published by the *Wall Street Journal*, reveals that Trump urged her to investigate Fulton County’s votes, indicating that she would find “dishonesty” that would overturn the state’s election results.<sup>287</sup> He also insisted that he had won the election, and said she would be praised if she found the “right answer” while spearheading Georgia’s audit of election results.<sup>288</sup> He told her that her role leading the audit meant that she had “the most important job in the country right now.”<sup>289</sup> He once again insisted that he had won Georgia and other states by “hundreds of thousands” of votes and that the contest in the state “wasn’t close.”<sup>290</sup>

Trump pushed Watson to depart from established audit procedures,<sup>291</sup> and implored her to continue the investigation past Christmas in order to ensure the audit’s conclusion before “the date, which is a very important date”—seemingly a reference to January 6, when Congress would certify Biden’s win.<sup>292</sup> He asked her to do “whatever [she] can do.”<sup>293</sup>

Perhaps the most well-known, well-documented and irrefutable example of Trump’s effort to pressure state officials to overturn the election was the recorded January 2, 2021 phone call between Trump and Georgia Secretary of State Brad Raffensperger. According to press reports, Trump had previously attempted to reach the Raffensperger at least 18 times since November 3.<sup>294</sup> On the January 2 call, Trump was joined by Meadows and some of his own lawyers (though no White House lawyers); Raffensperger was joined by his office’s general counsel, Ryan Germany, and deputy, Jordan Fuchs.<sup>295</sup> The full audio recording of the call was made public January 3, 2021.<sup>296</sup>

Everyone on the call knew that Congress would certify the election results just four days later at the Joint Session of Congress on January 6, 2021. On the call, Trump pressed Raffensperger and Germany to “find 11,780 votes, which is one more than we have. Because we [Trump] won

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<sup>285</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>286</sup> *Id.*; Amy Gardner, Recording reveals details of Trump call to Georgia’s chief elections investigator, THE WASHINGTON POST (Mar. 11, 2021), [https://www.washingtonpost.com/politics/trump-call-georgia-investigator/2021/03/11/c532ea2e-827a-11eb-ac37-4383f7709abe\\_story.html](https://www.washingtonpost.com/politics/trump-call-georgia-investigator/2021/03/11/c532ea2e-827a-11eb-ac37-4383f7709abe_story.html).

<sup>287</sup> *Id.*; Cameron McWhirter, Trump Call to Georgia Lead Investigator Reveals New Details, THE WALL STREET JOURNAL (Mar. 11, 2021), [https://www.wsj.com/articles/recording-of-trump-phone-call-to-georgia-lead-investigator-reveals-new-details-11615411561?reflink=desktopwebshare\\_twitter](https://www.wsj.com/articles/recording-of-trump-phone-call-to-georgia-lead-investigator-reveals-new-details-11615411561?reflink=desktopwebshare_twitter).

<sup>288</sup> Morris & Murray, *supra* note 139.

<sup>289</sup> Gardner, *supra* note 286.

<sup>290</sup> *Id.*

<sup>291</sup> Gardner, *supra* note 286.

<sup>292</sup> *Id.*

<sup>293</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>294</sup> Steven Harper, Insurrection Timeline – First the Coup and Then the Cover-Up, BILL MOYERS (Mar. 7, 2021), <https://billmoyers.com/story/insurrection-timeline-first-the-coup-and-then-the-cover-up-updated/>.

<sup>295</sup> Gardner & Firozi, *supra* note 101.

<sup>296</sup> Gardner, *supra* note 213.

the state.”<sup>297</sup> This number was the exact number of votes necessary to flip the state’s electoral votes from Biden to Trump. So, Trump’s telling Raffensperger to “find 11,780 votes” was nothing less than trying to get Raffensperger to alter the election outcome. Despite investigations that rebutted each claim Trump brought to Raffensperger and two recounts, Trump and members of his team continued to push. Interjecting throughout the call, Meadows sought to convince Raffensperger and Germany to “find some kind of agreement to look at this a little bit more fully.”<sup>298</sup>

At several points during the call, Trump threatened Raffensperger and his deputies, insinuating that they were opening themselves up to criminal charges by not uncovering the fraud Trump described. For instance, at one point he stated of alleged voter fraud, “you are going to find that they are—which is totally illegal—it is more illegal for you than it is for them because, you know what they did and you’re not reporting it.”<sup>299</sup> Trump told Raffensperger that not identifying this fraud was “a big risk to you and to Ryan, your lawyer,” and that it was “very dangerous” for Raffensperger to publicly insist that there was “no criminality” in the administration of Georgia’s election.<sup>300</sup> Raffensperger’s office had already conducted two recounts,<sup>301</sup> a statewide signature match audit, and a signature match audit in Cobb County.<sup>302</sup> In the end, Raffensperger and Germany refused to concede to any more of Trump’s assorted requests, solicitations, demands, and threats.<sup>303</sup> In his November 2021 book on the pressure he faced as secretary of state in the wake of the 2020 election, Raffensperger made clear that he felt Trump was “threatening” him and Germany, both with legal action and with potential physical force by Trump’s followers.<sup>304</sup>

#### **4. False Electoral Slates**

Trump’s plan to “instruct Republican officials in multiple states to create intentionally false electoral slates and transmit those slates to Congress, to the Vice President, and the National Archives, falsely certifying that Trump won states he actually lost” is referred to as the “false electors plan.”<sup>305</sup> We now turn to this orchestrated attempt to fabricate slates of electors and transmit them for use at the January 6 Joint Session of Congress.

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<sup>297</sup> *Id.*

<sup>298</sup> Gardner & Firozi, *supra* note 101.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> Kate Brumback, Georgia again certifies election results showing Biden won, AP NEWS (Dec. 7, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-georgia-elections-4eeea3b24f10de886bcddeab6c26b680a>.

<sup>302</sup> Press Release, Georgia Office of the Secretary of State, Secretary Raffensperger Launches Cobb County and Statewide Signature Match Audits (Dec. 14, 2020), <https://sos.ga.gov/news/secretary-raffensperger-launches-cobb-county-and-statewide-signature-match-audits>.

<sup>303</sup> Gardner, *supra* note 213.

<sup>304</sup> Brad Raffensperger, INTEGRITY COUNTS 190–191, 194 (2021).

<sup>305</sup> First Jan. 6 Hearing Transcript, *supra* note 28.

### a. The Origins of the False Electors Scheme

The false electors scheme, in contrast to the three other efforts by Trump and his associated lawyers to keep him in power described above, came closer to achieving the goal of actually overturning the election results.<sup>306</sup> As explained herein, they convinced dozens of party officials and Trump loyalists to abandon their commitment to the democratic process and to submit phony electoral certificates that could conceivably have been used by Congress to certify Trump as the winner of an election that he clearly lost. This scheme could have worked. As we have detailed in this first act, from the closing of the polls on November 3, 2020, through the attack on the Capitol on January 6, 2021, Trump and his allies went to extraordinary lengths in their efforts to overturn the presidential election. The public has now learned through live and recorded testimony from numerous witnesses presented at the Select Committee’s hearings that the efforts to overturn the election were not isolated incidents, or simply inartful expressions of frustration with the election results by Trump and his associates, but instead amounted to a thought-out and coordinated effort to change the outcome of the election after the fact.

Efforts to overturn the election in a number of states actually began months before Election Day. According to a court filing, on September 3, 2020, Trump campaign lawyer Cleta Mitchell requested that Eastman take part in an “Election Integrity Working Group” aimed at preparing for “anticipated post-election litigation.”<sup>307</sup> According to Eastman’s court filing, he “began conducting legal research and collaborating with academic advisors and other supporters of the President about the myriad number of factual and legal issues he anticipated might arise following the election.”<sup>308</sup> With the chances of vote tallies favoring Trump growing increasingly tenuous, Mitchell was solicited to pen a planning memo two days after the election.<sup>309</sup>

Eastman, then a Chapman University School of Law professor, began collaborating with Trump and his allies and ultimately produced two memoranda outlining an illegal scheme to keep Trump in office.<sup>310</sup> One Eastman memorandum, a two-page overview written just after Christmas

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<sup>306</sup> This section and the following section adapt some of the authors’ analysis on the origins of the false election scheme vis-à-vis Fulton County District Attorney Fani Willis’s investigation in Georgia. *See* Eisen et al., *supra* note 30.

<sup>307</sup> Plaintiff’s Brief in Support of Privilege Assertions, *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM, (C.D. Cal. Mar. 9, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.uscourts.cacd.841840.132.0.pdf>.

<sup>308</sup> *Id.* at 8.

<sup>309</sup> Email from Cleta Mitchell, Esq., to Dr. John C. Eastman (Nov. 5, 2020, 9:41 p.m.), Exhibit I, *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM, (C.D. Cal. May 26, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.uscourts.cacd.841840.350.10.pdf>.

<sup>310</sup> One of the authors, Norman Eisen, is a party to litigation involving John Eastman and other individuals and groups mentioned in this report. *See, e.g.*, Tom Hamburger & Jacqueline Alemany, Group files complaint with California bar association against John Eastman, lawyer who advised Trump on election challenges, *THE WASHINGTON POST* (Oct. 4, 2021), [https://www.washingtonpost.com/politics/eastman-trump-bar-complaint/2021/10/04/26dc7d50-2535-11ec-8831-a31e7b3de188\\_story.html](https://www.washingtonpost.com/politics/eastman-trump-bar-complaint/2021/10/04/26dc7d50-2535-11ec-8831-a31e7b3de188_story.html); Press Release, States United Democracy Center, D.C. AG Racine Files Lawsuit to Hold January 6 Insurrectionists Accountable & Stand Up for Harmed District Law Enforcement Officers (Dec. 12, 2021), <https://statesuniteddemocracy.org/jan6case/>; Press Release, Lawyers Defending American Democracy, LDAD Files Ethics Complaint Against Former Assistant AG Jeffrey Clark (Oct. 5, 2021), <https://ldad.org/letters-briefs/jeffrey-clark-ethics-complaint>.



2020,<sup>311</sup> recommended that Pence “refuse to count certified electoral votes from states contested by the Trump campaign” during the Joint Session of Congress. Eastman’s strategy required the vice president to cite “dual slates of electors”—one each for Biden and Trump—from key battleground states as grounds for him taking one of the following actions:

- Say that “no electors that can be deemed validly appointed” in any state where Trump and his campaign continued to challenge Biden’s win, then simply “gavel[] President Trump as re-elected,” claiming that he received more electoral votes;
- Argue that “no candidate has achieved the necessary majority” of electoral votes and force state delegations in the House to determine the election’s outcome, explaining that “Republicans... control[ed] 26 of the state delegations, the bare majority needed to win that vote;” or
- Leave room for a Member of Congress to object to a contested state’s electors and “demand normal [debate] rules” (including the filibuster, thereby “creat[ing] a stalemate that would give the state legislatures more time” to recognize “alternate slate[s] of electors” favoring Trump.<sup>312</sup>

As detailed in the next subsection, the Trump campaign organized groups of individuals in several battleground states, which Biden won, to sign and submit false certificates claiming that they were the authorized to cast votes, on behalf of their respective states, in the Electoral College for Donald Trump. Those individuals serving as fraudulent electors were the “alternate” slates of electors described in Eastman’s memo. As explained in detail below, it appears that the Trump team worked to ensure that there were groups of individuals they could point to as “dual slates of electors” to justify the strategy that Eastman proposed. Eastman later defended this strategy. He argued, through his lawyers in his disbarment proceedings, that it was no different than the 1960 Presidential Election in Hawaii (See Box 2). His lawyers argued, “at the time the memo was drafted, no other state authority had certified the Trump electors, just as no other state authority had certified the Kennedy electors at the time those electors met in December and cast their

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<sup>311</sup> Order Re Privilege of Documents Dated January 4-7, 2021 at 6, *Eastman v. Thompson*, No. 22-cv-99, (C.D. Cal. Mar. 28, 2022), ECF No. 260, <https://www.courthousenews.com/wp-content/uploads/2022/03/eastman-select-committee-order.pdf> (hereinafter “*Eastman v. Thompson*, Order Re Privilege of Docs”).

<sup>312</sup> First Memorandum from John C. Eastman on Jan. 6 Scenario (Dec. 23, 2020), <https://www.govinfo.gov/content/pkg/GPO-J6-DOC-Chapman053476/pdf/GPO-J6-DOC-Chapman053476.pdf>; As the details surrounding the events of and prior to January 6 became clearer in the months following the joint session, Eastman offered various explanations for his actions. For example, in his resignation letter from Chapman University, Eastman claimed that “every statement I have made is backed up with documentary and/or expert evidence, and solidly grounded in law.” After claiming state legislatures “ignored existing state laws in the conduct of the election” and citing debunked claims about voting machines switching votes and other conspiracies, Eastman insisted that “it is patently untrue that my statements ‘have no basis in fact or law.’” See John C. Eastman, John Eastman’s Statement on His Retirement from Chapman University’s Fowler School of Law, *AMERICAN MIND* (Jan. 14, 2021), <https://americanmind.org/salvo/john-eastmans-statement-on-his-retirement-from-chapman-university-fowler-school-of-law/>. For a full analysis of the weaknesses of Eastman’s claims in his own defense, see Scott Cummings, The Lawyer Behind Trump’s Infamous Jan. 6 Memo Has a Galling New Defense, *SLATE* (Oct. 20, 2021), <https://slate.com/news-and-politics/2021/10/eastman-jan-6-trump-memo-defense.html>.

electoral votes.”<sup>313</sup> Eastman also later claimed that, behind closed doors, “he *orally* counseled Pence to follow the law” and certify the electoral votes.<sup>314</sup>

On January 3, 2021, Eastman composed a second, six-page memorandum.<sup>315</sup> In this piece, Eastman listed supposedly illegal actions that officials took in states that Biden won, as justification for the “alternate” electors scheme.<sup>316</sup>

The Electoral Count Act (codified at 3 U.S.C. §§ 1-21)<sup>317</sup> and the Twelfth Amendment to the U.S. Constitution outline the procedure that states and Congress must follow when selecting presidential electors and certifying a president-elect’s win, respectively.<sup>318</sup> Under the Electoral Count Act, on Election Day, citizens in each state select their delegates to the Electoral College through popular vote. After tallying every ballot and declaring the winning candidate, each respective state’s electors convene to cast their votes for the offices of president and vice president; the electors then transmit signed certificates of these votes to the President of the Senate.<sup>319</sup> Subsequent processes are dictated by the Twelfth Amendment: “The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; The person having the greatest number of votes for President, shall be the President.”<sup>320</sup> Neither the Constitution nor the Electoral Count Act makes any provision for delay. The proceeding where Congress and the vice president open and count these electoral certificates must occur every four years on January 6.<sup>321</sup> And while the act allows congressional representatives to object in writing to electoral slates, and sets out a process for resolving objections, there is no suggestion that the vice president can unilaterally reject electoral votes.<sup>322</sup> Nevertheless, the Eastman scheme called for Vice President Pence to unilaterally “determine[] on his own” which of the states’ electoral certificates “is valid, asserting that the authority to make that determination...is his alone.”<sup>323</sup> Though Eastman would later concede the illegality of parts

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<sup>313</sup> Respondent John Charles Eastman’s Answer to Notice of Disciplinary Charges at 18, In re: John Eastman, No. SBC-23-O-30029, (Feb. 15, 2023).

<sup>314</sup> Cummings, *supra* note 312.

<sup>315</sup> Eastman v. Thompson, Order Re Privilege of Docs at 6; Second Memorandum from John C. Eastman on Jan. 6 Scenario (Jan. 3, 2021), <https://www.washingtonpost.com/context/john-eastman-s-second-memo-on-january-6-scenario/b3fd2b0a-f931-4e0c-8bac-c82f13c2dd6f/>.

<sup>316</sup> For an in-depth explainer on the constitutional and legal procedures governing the Joint Session of Congress on January 6, see Joshua Matz, Norman Eisen & Harmann Singh, Guide to Counting Electoral College Votes and The January 6, 2021 Meeting of Congress, STATES UNITED DEMOCRACY CENTER (Jan. 4, 2021), <https://tinyurl.com/4yurv36r>.

<sup>317</sup> This memorandum analyzes the Electoral Count Act procedures in effect as of January 6, 2021. The Act has since been revised to account for the gaps exposed in Eastman’s plan, including by clarifying that the vice president plays a purely ministerial role in the counting of electoral votes. See S. Res. 4573, 117th Cong. (2022) (enacted).

<sup>318</sup> See Matz, Eisen & Singh, *supra* note 301.

<sup>319</sup> 3 U.S.C. §§ 7–11.

<sup>320</sup> U.S. Const. amend. XII.

<sup>321</sup> *Id.*; 3 U.S.C. § 15.

<sup>322</sup> See 3 U.S.C. §§ 5–6, 15.

<sup>323</sup> Second Memorandum from John C. Eastman on Jan. 6 Scenario (Jan. 3, 2021), <https://tinyurl.com/2p453yhf>.

of his plan, he now maintains in his disbarment proceedings that he had a First Amendment right to “question illegality and fraud.”<sup>324</sup>

Ensuring that there were grounds either to claim victory for Trump, or at the very least to highlight uncertainty about Biden’s actual victory on January 6, was an essential part of the scheme.<sup>325</sup>

## **b. Putting the Plan into Action**

Starting after the election, Trump campaign lawyer Kenneth Chesebro wrote a series of memos arguing that the Trump campaign should organize its own electors in the swing states that Trump had lost.<sup>326</sup> Chesebro has denied any wrongdoing, specifically disclaiming responsibility for “identifying possible strategic options” in these memos because, as he describes it, “this is what lawyers do.”<sup>327</sup> But emails among people associated with the Trump campaign articulated a less benign purpose of this false elector scheme. Specifically, in a December 8, 2020 email, Jack Wilenchik, an Arizona lawyer who helped organize a slate of false Trump electors in that state, wrote:

[Chesebro’s] idea is basically that all of us (GA, WI, AZ, PA, etc.) have our electors send in their votes (even though the votes aren’t legal under federal law — because they’re not signed by the Governor); so that members of Congress can fight about whether they should be counted on January 6<sup>th</sup>...Kind of wild/creative ...My comment to him was that I guess there’s no harm in it, (legally at least) — i.e. we would just be sending in ‘fake’ electoral votes to Pence so that ‘someone’ in Congress can make an objection when

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<sup>324</sup> Here’s every word of the third Jan. 6 committee hearing on its investigation, NPR (June 16, 2022), <https://www.npr.org/2022/06/16/1105683634/transcript-jan-6-committee> (hereinafter “Third Jan. 6 Hearing Transcript”); Respondent John Charles Eastman’s Answer to Notice of Disciplinary Charges at 19–20, In re: John Eastman, No. SBC-23-O-30029, (Feb. 15, 2023), <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/roYJ.nA25g7g/v0>.

<sup>325</sup> Eastman v. Thompson, Order Re Privilege of Docs at 37 (“There is strong circumstantial evidence to show that there was likely an agreement between President Trump and Dr. Eastman to enact the plan articulated in Dr. Eastman’s memo. In the days leading up to January 6, Dr. Eastman and President Trump had two meetings with high-ranking officials to advance the plan. On January 4, President Trump and Dr. Eastman hosted a meeting in the Oval Office to persuade Vice President Pence to carry out the plan. The next day, President Trump sent Dr. Eastman to continue discussions with the vice president’s staff, in which Vice President Pence’s counsel perceived Dr. Eastman as the president’s representative. Leading small meetings in the heart of the White House implies an agreement between the president and Dr. Eastman and a shared goal of advancing the electoral count plan.”).

<sup>326</sup> Alan Feuer, Maggie Haberman & Luke Broadwater, Memos Show Roots of Trump’s Focus on Jan. 6 and Alternate Electors, THE NEW YORK TIMES (Feb. 2, 2022), <https://www.nytimes.com/2022/02/02/us/politics/trump-jan-6-memos.html>.

<sup>327</sup> Josh Kovensky, Exclusive: Trump Lawyer Kenneth Chesebro Talks About His Role In The Runup to Jan. 6, TALKING POINTS MEMO (June 16, 2022), <https://talkingpointsmemo.com/feature/exclusive-trump-lawyer-kenneth-chesebro-talks-about-his-role-in-the-runup-to-jan-6>.

they start counting votes, and start arguing that the ‘fake’ votes should be counted.<sup>328</sup>

Wilenchik used the term “fake” to characterize electors he and the Trump team were working to organize. Possibly realizing the legal implications of organizing “fake” electoral votes, Wilenchik later followed up and said “‘alternative’ votes is probably a better term than ‘fake’ votes.”<sup>329</sup>

As explained by Eastman in an email: “The fact that we have multiple slate[s] of electors demonstrates the uncertainty of either. That should be enough.”<sup>330</sup> This email demonstrates that the Trump team was working to manufacture the very uncertainty it needed in order to create the opportunity to overturn the election.

Trump, joined by Eastman, personally called Republican National Committee (RNC) Chairwoman Ronna Romney McDaniel to enlist her to help with their effort. On that call, Eastman requested that the RNC help “gather these contingent electors,” stressing to her the importance of the RNC’s collaboration.<sup>331</sup> In a transcript and recorded interview presented by the Select Committee, McDaniel told Congress that after her call with Trump and Eastman, McDaniel called Trump campaign staff and learned that the campaign was “already ... working on it [the false electors plot].” She then relayed that news to Trump on an additional phone call.<sup>332</sup> The RNC ultimately supported the campaign’s efforts by “helping them reach out [to contingent electors] and assemble them.”<sup>333</sup>

The evidence suggests that Trump’s chief of staff, Mark Meadows, also engaged in initial discussions regarding the plan to organize alternate electors and was heavily involved in the plan’s implementation. Arizona Congressman Andy Biggs and Donald Trump Jr. appear to have been among the first to discuss this plan with Meadows.<sup>334</sup> Text messages to and from Meadows show that discussions about overturning the election results began even before the presidential election had been called in several states. On November 4, 2020, Meadows received a text message, reportedly from Trump’s former secretary of energy, Rick Perry, proposing to have the Georgia

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<sup>328</sup> Maggie Haberman & Luke Broadwater, ‘Kind of Wild/Creative’: Emails Shed Light on Trump Fake Electors Plan, THE NEW YORK TIMES (July 26, 2022), <https://www.nytimes.com/2022/07/26/us/politics/trump-fake-electors-emails.html>.

<sup>329</sup> *Id.*

<sup>330</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>331</sup> *Id.*

<sup>332</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Ronna Romney McDaniel, (June 1, 2022), at 10.

<sup>333</sup> *Id.*

<sup>334</sup> Ryan Goodman, Timeline: False Alternate Slate of Electors Scheme, Donald Trump and His Close Associates, JUST SECURITY (July 18, 2022), <https://www.justsecurity.org/81939/timeline-false-alternate-slate-of-electors-scheme-donald-trump-and-his-close-associates/>.

legislature send supportive electors to Congress and the National Archives regardless of the election's outcome.<sup>335</sup> The text said:

'HERE's an AGRESSIVE (sic) STRATEGY: Why can t (sic) the states of GA NC PENN and other R controlled state houses declare this is BS (where conflicts and election not called that night) and just send their own electors to vote and have it go to the SCOTUS.'<sup>336</sup>

According to findings released by the Select Committee: "Meadows received text messages and emails regarding apparent efforts to encourage Republican legislators in certain States to send alternate slates of electors to Congress, a plan which one member of Congress acknowledged was 'highly controversial' and to which Mr. Meadows responded, 'I love it.' Mr. Meadows responded to a similar message by saying... 'Yes. Have a team on it.'<sup>337</sup>

According to the *Washington Post*, that text exchange occurred on November 6, 2020—just a few days after Election Day.<sup>338</sup> Documents appear to confirm that Meadows was indeed working to implement this plan. For example, in a December 6, 2020, email from Meadows to Trump campaign senior aide Jason Miller, Meadows tells Miller, "[w]e just need to have someone coordinating the electors for states."<sup>339</sup> Meadows's aide Cassidy Hutchinson told the Select Committee that Meadows closely tracked the progress of the false electors plan and "remember[ed] him frequently having calls, meetings, and outreach with individuals and this just being a prominent topic of discussion in our office."<sup>340</sup> Hutchinson recalled that the false electors came up in "[d]ozens" of Meadows's calls and meetings.<sup>341</sup> In his memoir *The Chief's Chief*, Meadows effectively denies any wrongdoing during this period. He defends his and his associates' conduct, for example, by explaining that "we had lawyers ready to file suits or challenge results" because "[i]f our analysts did find fraud" "[w]e would take legal action right away." He also defends

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<sup>335</sup> Ryan Nobles, Zachary Cohen & Annie Grayer, CNN Exclusive: 'We control them all': Donald Trump Jr. texted Meadows ideas for overturning 2020 election before it was called, CNN (Apr. 9, 2022), <https://www.cnn.com/2022/04/08/politics/donald-trump-jr-meadows-text/index.html> ("A spokesman for Perry told CNN at the time that the former energy secretary denies being the author of the text. However, multiple people who know Rick Perry previously confirmed to CNN that the phone number the committee has associated with that text message is Perry's number.").

<sup>336</sup> *Id.*

<sup>337</sup> Select Comm. to Investigate the Jan. 6<sup>th</sup> Attack on the United States Capitol, Resolution Recommending That the House of Representatives Find Mark Randall Meadows in Contempt of Congress for Refusal to Comply With a Subpoena Duly Issued by the Select Committee to Investigate the January 6th Attack on the United States Capitol, H. Rep. 117-216, (2021), <https://tinyurl.com/8wmya3hx>.

<sup>338</sup> Aaron Blake, Timeline: The Trump team's 'fake elector' plot, THE WASHINGTON POST (June 20, 2022), <https://www.washingtonpost.com/politics/2022/06/20/trump-fake-electors-timeline/>.

<sup>339</sup> Goodman, *supra* note 334.

<sup>340</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Continued Interview of Cassidy Hutchinson, (Mar. 7, 2022).

<sup>341</sup> *Id.*

Trump’s election fraud claims by pointing to “the numerous credible allegations of fraud that have been unearthed since Joe Biden was sworn in.”<sup>342</sup>

Trump and his campaign and allies aggressively moved forward with their plan. Chesebro’s December 9, 2020 memo took his earlier theory about the false electors a step further, implying that Congress could validate the false electors in the absence of court action doing so. He wrote:

[E]ven though **none** of the Trump-Pence electors are currently certified as having been elected by the voters of their State, most of the electors (with the possible exception of the Nevada electors) will be able to take the essential steps needed to validly cast and transmit their votes, so that the votes might be eligible to be counted **if later recognized** (by a court, the state legislature, or Congress) as the valid ones that actually count in the presidential election....It is important that the Trump-Pence Campaign focus carefully on these details, as soon as possible, if the aim is to ensure that all 79 electoral votes are properly cast and transmitted—each electoral vote being potentially important if the election ultimately extends to, and perhaps past, January 6 in Congress.<sup>343</sup> (emphasis added)

Nevertheless, Trump’s team pushed forward in multiple states to gather phony electors. After an unfavorable Supreme Court ruling narrowed Trump’s legal options for overturning the election, his campaign legal team on December 11 stepped back from the false electors plot, while Giuliani stepped up to spearhead the effort at the behest of Trump. The Select Committee heard testimony that Giuliani “was executing what he [Trump] wanted” and that the decision to proceed with the false electors effort came from Trump.<sup>344</sup> Giuliani reportedly “coordinated the nuts-and-bolts of the process on a state-by-state level” and, in the words of one campaign staffer, was “calling the shots” along with other “misfit characters.”<sup>345</sup> Others’ testimony appears to corroborate the reporting on Giuliani’s role. For his part, Giuliani has said that he truly believed that there was election fraud, and that, in his opinion, clears him of criminal intent.<sup>346</sup>

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<sup>342</sup> Mark Meadows, THE CHIEF’S CHIEF 224, 39 (2021).

<sup>343</sup> Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-december-9-2020.pdf>.

<sup>344</sup> Select Comm. Report at 349–350.

<sup>345</sup> Marshall Cohen, Zachary Cohen & Dan Merica, Trump campaign officials, led by Rudy Giuliani, oversaw fake electors plot in 7 states, CNN (Jan. 20, 2022), <https://www.cnn.com/2022/01/20/politics/trump-campaign-officials-rudy-giuliani-fake-electors/index.html>; Beth Reinhard, Amy Gardner, Josh Dawsey, Emma Brown & Rosalind S. Helderman, As Giuliani coordinated plan for Trump electoral votes in states Biden won, some electors balked, THE WASHINGTON POST (Jan. 20, 2022), [https://www.washingtonpost.com/investigations/electors-giuliani-trump-electoral-college/2022/01/20/687e3698-7587-11ec-8b0a-bcfab800c430\\_story.html](https://www.washingtonpost.com/investigations/electors-giuliani-trump-electoral-college/2022/01/20/687e3698-7587-11ec-8b0a-bcfab800c430_story.html); Goodman, *supra* note 317.

<sup>346</sup> Hugo Lowell, Rudy Giuliani stonewalls Capitol attack investigators during lengthy deposition, THE GUARDIAN (May 24, 2022), <https://www.theguardian.com/us-news/2022/may/24/rudy-giuliani-capitol-attack-committee-testimony>.

Trump’s deputy campaign manager, Justin Clark, recalled that based on his understanding, “Mayor Giuliani and his team” were “driving the process.”<sup>347</sup> That included, according to anonymous sources who spoke to CNN, at least one planning call “between Trump campaign officials and GOP state operatives.”<sup>348</sup> It also included participating in a phone call with Trump and Arizona Republican Speaker of the House Rusty Bowers, which is discussed in greater detail in Section I.A.3, during which Giuliani told Bowers that he and Trump had “heard by an official high up in the Republican legislature that there is a legal theory or a legal ability in Arizona that you can remove the—the electors of President Biden and replace them,” and that they “would like to have the legitimate opportunity through the [Arizona legislative] committee to come to that end and — and remove that.”<sup>349</sup> That “legal theory” appears to have been the subject of a brief that Arizona State Rep. Mark Finchem sent to Christina Bobb, a former anchor for One America News who began volunteering on Trump’s legal team in November 2020 and officially working for the former president in March 2022, and former Chief Justice of the Supreme Court of North Carolina Mark Martin and, in his recollection, “potentially others” on November 21.<sup>350</sup> According to Finchem’s testimony before the Select Committee, the brief, drafted by himself and others, analyzed whether the “Arizona legislature was bound by the state constitution [and] state statutes to call a special session.”<sup>351</sup> Finchem testified that he didn’t remember the content of any specific conversations with Bobb on the memo or on the issue of plenary authority, though he recalled that he “might have” asked Giuliani about the brief in preparing it.<sup>352</sup>

The reporting and testimony that speak to Giuliani’s leadership in executing this scheme appear to be bolstered by correspondence from Chesebro, including one December 10, 2020 email in which he wrote “spoke this evening with Mayor Guiliani [sic], who is focused on doing everything possible to ensure that that [sic] all the Trump-Pence electors vote on Dec. 14,”<sup>353</sup> as well as a December 13 email to Giuliani containing “some quick notes on strategy” (in lieu of one of the aforementioned memos, which he explained had been lost), which Chesebro noted someone had requested on Giuliani’s behalf.<sup>354</sup>

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<sup>347</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Justin Clark, (May 17, 2022), at 125.

<sup>348</sup> Marshall Cohen et al., Trump campaign officials, led by Rudy Giuliani, oversaw fake electors plot in 7 states, CNN (Jan. 20, 2022), <https://www.cnn.com/2022/01/20/politics/trump-campaign-officials-rudy-giuliani-fake-electors/index.html>.

<sup>349</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>350</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Mark Finchem, (Apr. 22, 2022), at 43:11-13, 49:3-5; Sophia Ankel, Meet Christina Bobb — former OAN presenter, 2020 election denier, and Trump’s latest attorney to face legal trouble, BUSINESS INSIDER (Sept. 22, 2022), <https://www.businessinsider.com/christina-bobb-profile-trump-lawyer-former-oan-presenter-2022-9>; About the Founding Dean, Chief Justice Mark Martin, HIGH POINT UNIVERSITY (accessed July 10, 2023), <https://www.highpoint.edu/law/mark-martin/>.

<sup>351</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Mark Finchem, (Apr. 22, 2022), at 39:13-14.

<sup>352</sup> *Id.* at 34:16-22, 39:15.

<sup>353</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (David Shafer Production), 108751.0001 000004 (December 10, 2020, Kenneth Chesebro email to David Shafer).

<sup>354</sup> Goodman, *supra* note 334.

Trump Campaign Director of Election Day Operations Michael Roman (who reportedly entered a proffer agreement with prosecutors) also played a major role.<sup>355</sup> When Trump Campaign Associate General Counsel Joshua Findlay circulated an email passing off responsibility to “Rudy’s team,” he stated that Roman had been designated as “the lead for executing the voting” on December 14, 2020.<sup>356</sup> Roman proceeded to lead what he called the “Electors Whip Operation,”<sup>357</sup> emailing a number of officials to track phony electors in Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin.<sup>358</sup> Christina Bobb—then a cable news host on One America News Network<sup>359</sup>—also appears to have actively assisted Roman’s efforts by participating in calls with him and tracking the progress of the scheme to recruit phony electors.<sup>360</sup> Roman appears to also have worked alongside Strategic Advisor to the Trump Campaign Boris Epshteyn, whom the *New York Times* identified as a “coordinator for people inside and outside the Trump campaign and the White House.”<sup>361</sup> Epshteyn’s involvement is apparent in a series of email exchanges that were obtained by the *New York Times* in July 2022. In one such email, Jack Wilenchik (a lawyer from Phoenix who participated in arranging the false electors in Arizona) wrote to Epshteyn: “We would just be sending in ‘fake’ electoral votes to Pence so that ‘someone’ in Congress can make an objection when they start counting votes, and start arguing that the ‘fake’ votes should be counted.”<sup>362</sup> Epshteyn, however, has asserted that his actions were legal, stating that “everything was done legally by the Trump legal team ... under the leadership of Rudy Giuliani,” while also explaining that the electors were “alternate” rather than “fraudulent electors” and citing the 1960 presidential election as precedent for his actions.<sup>363</sup> (See Box 2 for an analysis of the inapplicability here of that 1960 precedent.)

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<sup>355</sup> C. Ryan Barber & Sadie Gurman, Jack Smith Probe of 2020 Election Challenges Focuses on Trump Lawyers, *The Wall Street Journal* (last updated July 3, 2023), <https://www.wsj.com/articles/jack-smith-probe-of-2020-election-challenges-focuses-on-trump-lawyers-9fdea5e4?ns=prod/accounts-wsj>. (Roman reportedly spoke with prosecutors “under a so-called proffer agreement ... known colloquially as a ‘queen for a day’ deal—in which a witness provides information to prosecutors, who in turn promise not to use it against them in potential criminal proceedings”); Zachary Cohen & Kaitlin Collins, Former Trump campaign official cooperating with special counsel in 2020 election interference probe, *CNN* (June 29, 2023), <https://www.cnn.com/2023/06/29/politics/mike-roman-trump-campaign-cooperate-special-counsel-probe/index.html>.

<sup>356</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Joshua Findlay Production), JF052.

<sup>357</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Robert Sinners Production), CTRL0000083897, CTRL0000083898.

<sup>358</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Robert Sinners Production), CTRL0000083897.

<sup>359</sup> Asawin Suebsaeng, Maxwell Tani & Sam Stein, An OAN Host Has Been Helping Rudy With Trump’s Legal Efforts, *THE DAILY BEAST* (Nov. 23, 2020), <https://www.thedailybeast.com/oan-host-christina-bobb-has-been-helping-rudy-giuliani-with-trumps-legal-efforts>.

<sup>360</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Robert Sinners Production), CTRL0000083897, CTRL0000083898.

<sup>361</sup> Haberman & Broadwater, *supra* note 328.

<sup>362</sup> *Id.*

<sup>363</sup> Sonnet Swire, Former Trump campaign adviser acknowledges being part of 2020 ‘alternate electors’ plot, *CNN* (Jan. 22, 2022), <https://www.cnn.com/2022/01/22/politics/boris-epshteyn-trump-campaign-fake-electors/index.html>.



In Wisconsin, state Republican leaders appear to have started reaching out to would-be fraudulent electors by early December.<sup>364</sup> Kelly Ruh testified that she received a text message from the executive director of the Republican Party of Wisconsin that informed her, as she recalled, that she may “need to attend the meeting on December 14th.”<sup>365</sup>

In Michigan, according to the testimony of Laura Cox, the former leader of Michigan’s Republican Party, an individual who claimed “he was working with the [Trump] campaign” was coordinating with so-called electors.<sup>366</sup> These fraudulent electors had a plan, which Cox described as “insane and inappropriate,” to meet the day before the Electoral College was scheduled to meet and hide in Michigan’s Capitol building overnight so they could later bolster their claim that their electoral ballot certificates were legitimate because they had fulfilled the requirement under Michigan law that electoral votes be cast in that building.<sup>367</sup> Describing her conversation with an individual who told her he was working with Trump’s campaign, Cox testified:

He told me that the Michigan Republican electors were planning to meet in the Capitol and hide overnight so that they could fulfill the role of casting their vote in—per law in the Michigan chambers. And I told him in no uncertain terms that that was insane and inappropriate.<sup>368</sup>

Despite being told of the legal requirements, Cox recalled having another call on December 12 (which she believed happened sometime after the one described above) with Mike Roman and Shawn Flynn from the Trump campaign, as well as Mike Ambrosini from the RNC.<sup>369</sup> Cox recalled that the conversation was “a call to facilitate using the [GOP] headquarters for the ceremony” to certify electors in favor of Trump.<sup>370</sup>

Other states had similar legal requirements to Michigan requiring electors to convene in particular locations described by statute. The Select Committee obtained evidence that Michigan was not the only state where the Trump campaign collaborated with the fraudulent electors to find ways to surreptitiously enter a state capitol building to meet those requirements and lend legitimacy to future arguments that those false electoral votes for Trump be counted.<sup>371</sup> As proof,

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<sup>364</sup> See Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Deposition of Kelly Ruh, (Feb. 28, 2022), at 13:17–25.

<sup>365</sup> See *id.* at 13:23, 14:16–18.

<sup>366</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> See Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Laura Cox, (May 3, 2022), at 60:7-15.

<sup>370</sup> See *id.* at 61:8-9, 64:20-23.

<sup>371</sup> *Id.*; Amy Gardner, Beth Reinhard, Rosalind S. Helderman & Jacqueline Alemany, Fake Trump electors in Ga. Told to shroud plans in ‘secrecy,’ email shows, THE WASHINGTON POST (June 6, 2022), <https://www.washingtonpost.com/politics/2022/06/06/fake-trump-electors-ga-told-shroud-plans-secrecy-email-shows/>.

the Select Committee presented, as an exhibit, an example of the instructions the Trump campaign gave fraudulent electors.<sup>372</sup>

On December 14, 2020, while legitimate electors met in each state across the country to cast their Electoral College votes as required under the Electoral Count Act, individuals organized by the Trump campaign met and signed certificates falsely certifying that they were authorized to cast each of their respective so-called “ballots” for Trump.<sup>373</sup> There is considerable public information about what specifically transpired during these meetings—and how they were choreographed ahead of time. On December 13, 2020, the day before the false electors were to meet, the Georgia election operations director for the Trump campaign, Robert Sinners, also provided the state’s false electors with specific instructions for how their meeting should proceed. In an email reported by the *Washington Post*, Sinners wrote to the false electors, “I must ask for your complete discretion in this process...Your duties...will be hampered unless we have complete secrecy and discretion.”<sup>374</sup> He continued to lay out a plan for their meeting, asking them to let the security guards at the Georgia Capitol building know when they arrived that they had scheduled a meeting with either Georgia State Senator Burt Jones, who himself served as a false elector, or State Senator Brandon Beach.<sup>375</sup> In bold font, he added a telling warning: “Please, at no point should you mention anything to do with Presidential Electors or speak to the media.”<sup>376</sup>

The Georgia false electors did as they were told. On December 14, while the Democratic electors gathered on the Georgia Senate floor and cast their votes for Biden and certified that they were the duly elected and qualified electors, the false Trump electors met Jones in a conference room at the Georgia State Capitol building.<sup>377</sup> Once they arrived at their meeting location, they gathered around a U-shaped table and also signed certificates stating that they were the “duly elected and qualified electors.”<sup>378</sup> Their false certificates were sent to the National Archives for transmission to Congress that same day.<sup>379</sup>

The false electors in Michigan ultimately did not go through with the plan to camp out in the Michigan State Capitol building overnight in order to ensure their access to the building. Instead, on December 14, the Trump electors attempted to enter the building just ahead of their meeting and were denied entry by law enforcement. The false electors were undeterred. They nonetheless executed their plan in another location and created false certificates which they signed stating that they were the “duly elected and qualified electors.” Ian Northon, a lawyer representing

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<sup>372</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>373</sup> The fabricated certificates from New Mexico and Pennsylvania included conditional language that indicated they would only be valid in the event the election results were legally overturned. *See* National Archives, 2020 Presidential Election Unofficial Certificates submitted to The Office of the Federal Register (Feb. 25, 2022), <https://www.archives.gov/foia/2020-presidential-election-unofficial-certificates>.

<sup>374</sup> Gardner et al., *supra* note 371.

<sup>375</sup> Eisen et al., *supra* note 30, at 49–50.

<sup>376</sup> Gardner et al., *supra* note 371.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*; Eisen et al., *supra* note 30, at 50.

<sup>379</sup> Eisen et al., *supra* note 30, at 50–51.

the conservative Amistad Project,<sup>380</sup> told the Select Committee that Trump campaign operatives Shawn Flynn and Mark Foster were “inside” the room where the false electors were meeting “probably doing the paperwork,” as he testified.<sup>381</sup> The false electors then sent the certificates directly to Mike Pence’s office, as well as to “the Michigan Secretary of State, the National Archivist, and the chief judge of the Western District of Michigan.”<sup>382</sup>

Thanks to a video taken during the meeting of these false Trump electors in Arizona that was posted online by the Arizona Republican Committee, we know a Trump campaign affiliate was present.<sup>383</sup> The video captured Thomas Lane, an RNC staffer who assisted the Trump campaign there and in New Mexico, handing out papers to the false electors on which they signed and certified that they were the state’s “duly elected and qualified electors.”<sup>384</sup> Lane wore in the video “a zippered jacket with Trump’s campaign logo on the right sleeve” and Lane’s last name on it. Lane was subpoenaed by the DOJ in June 2022 and is reported to have complied.<sup>385</sup>

We also know that in the lead-up to the meeting of the false electors in Nevada, Trump campaign lawyer Jesse Binnall assisted false electors Michael McDonald, the GOP chairman, and Jim DeGraffenreid, an RNC committeeman, in making a plan to transmit their false electoral certificates to Congress, sharing with them various memos and documents with instructions.<sup>386</sup> Both McDonald and DeGraffenreid were reportedly offered limited immunity deals in exchange for providing testimony before a federal grand jury, which they gave in mid-June 2023.<sup>387</sup> In addition to testifying about Binnall’s role in the scheme, McDonald and DeGraffenreid also reportedly answered questions about the role of Adam Laxalt, the former Nevada attorney general.<sup>388</sup> After the election in November 2020, Laxalt and Binnall spoke at a press conference where they propagated claims of election fraud.<sup>389</sup>

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<sup>380</sup> Dennis Aftergut & Melanie Sloane, Is DOJ Investigating the Forged Documents Trump Used in His Coup Attempt?, SLATE (Jan. 19, 2022), <https://slate.com/news-and-politics/2022/01/doj-trump-coup-investigation-forged-documents.html>.

<sup>381</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Ian Northon, (Apr. 27, 2022), at 90:18-23.

<sup>382</sup> Clara Hendrickson & Dave Boucher, Michigan GOP co-chair says Trump campaign directed fake electors, per CNN audio, USA TODAY (Jan. 20, 2022), <https://www.usatoday.com/story/news/politics/2022/01/20/michigan-donald-trump-fake-electors/6601412001/>.

<sup>383</sup> Richard Ruelas, Trump campaign official subpoenaed by FBI appears to be at meeting of fake Arizona electors, ARIZONA CENTRAL (June 23, 2022), <https://www.azcentral.com/story/news/politics/arizona/2022/06/23/fbi-subpoenas-thomas-lane-trump-campaign-arizona/7708133001/>.

<sup>384</sup> *Id.*

<sup>385</sup> Heidi Przybyla & Zach Montellaro, Former Trump campaign staffer subpoenaed by DOJ is now working for House committee on elections, POLITICO (May 5, 2023), <https://www.politico.com/news/2023/05/05/former-trump-staffer-elections-committee-00095490>.

<sup>386</sup> Katelyn Polantz, Sara Murray, Zachary Cohen & Casey Gannon, Exclusive: Special counsel trades immunity for fake elector testimony as Jan 6 probe heats up, CNN (June 23, 2023), <https://www.cnn.com/2023/06/23/politics/special-counsel-fake-electors-immunity-testimony-jan-6/index.html>; Gabby Birenbaum, NV GOP leaders offered 'limited immunity' in fake electors probe, testified about Laxalt, THE NEVADA INDEPENDENT (June 23, 2023), <https://thenevadaindependent.com/article/nv-gop-leaders-offered-limited-immunity-in-fake-electors-probe-testified-about-laxalt>.

<sup>387</sup> Polantz et al., *supra* note 386.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

In Wisconsin, the false electors likewise went to great lengths to ensure that their meeting took place at the Capitol building in a “super-secret” manner, as one false elector described it.<sup>390</sup> The group met earlier that day at what that same false elector later referred to as “a secret meeting place in Madison” prior to arriving at the Capitol building, where former Wisconsin State Senate Majority Leader Scott Fitzgerald had arranged a meeting room for them to use in advance, in part to satisfy precautionary requirements imposed at the Capitol during the Covid-19 pandemic.<sup>391</sup> Before the false electors were able to execute their plan, however, the Wisconsin Supreme Court handed down a ruling that affirmed Biden’s victory. Though the news of this ruling was “a deflating moment” according to one false elector, the group carried on with their mission.<sup>392</sup> In the room reserved for them at the Capitol building by Fitzgerald, they signed documents certifying that they were the “duly elected and qualified electors” of Wisconsin.<sup>393</sup>

Ultimately, the false electors in each of these states executed their plan successfully. McDaniel updated Trump as to the status of the false electoral certificates on December 14. In an email with a subject line, “FWD: Electors Recap—Final,” McDaniel emailed Trump’s executive assistant that electors had voted both in the “states he won” as well as in six “contested states” (Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin).<sup>394</sup> It is notable that the fraudulent electors in Pennsylvania added conditional language when they signed certificates certifying their votes for Trump and Pence “if, as a result of a final non-appealable Court Order or other proceeding prescribed by law, we are recognized as being duly elected and qualified.”<sup>395</sup> Similarly, the false electors in New Mexico also included language stating that they were certifying their votes for Trump and Pence “on the understanding that it might be later determined that we are the duly elected and qualified Electors.”<sup>396</sup>

The caveats added by the fraudulent electors in Pennsylvania and New Mexico may not be completely legally exculpatory for those individuals, or for others who later misused those certificates, but it is significant to note the distinction that the false electors in other states included no such reservation in their document. Rather, they signed and submitted an unconditional certification that they were “duly elected and qualified.”<sup>397</sup> Furthermore, the Pennsylvania and New Mexico fraudulent electors, by inserting language limiting the use of their signed certificates,

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<sup>390</sup> Gretchen Knaut & Shan Wu, Wisconsin Case Study: The Potential for State Prosecutions of False Electors 16–17 (2022), <https://www.docdroid.net/skR9WXg/wisconsin-case-study-the-potential-for-state-prosecutions-of-false-electors-docx>.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (National Archives Production), 076P-R000009527\_0001 (December 14, 2020, forwarded email from Ronna McDaniel to Molly Michael with the subject line: “FWD: Electors Recap—Final”).

<sup>395</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (National Archives Production), CTRL0000037948 (December 14, 2020, memorandum from purported electors in Pennsylvania).

<sup>396</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (National Archives Production), CTRL0000037946 (December 14, 2020, memorandum from purported electors in New Mexico).

<sup>397</sup> American Oversight, American Oversight Obtains Seven Phony Certificates Of Pro-Trump Electors, AMERICAN OVERSIGHT (Mar. 2, 2021), <https://www.americanoversight.org/american-oversight-obtains-seven-phony-certificates-of-pro-trump-electors>.

presumably made the Trump campaign aware of the legal issues with how these documents would be used. The Pennsylvania false electors in particular clashed with the Trump campaign by insisting on the inclusion of that language.<sup>398</sup> As another example of the apparent understanding of the illegality of the scheme, as explained by a Select Committee counsel, the false electors in one state asked the Trump campaign to pay their legal fees in the event that they were charged with a crime or sued.<sup>399</sup>

According to recorded deposition testimony from former Wisconsin Republican Party Chair Andrew Hitt, the fraudulent electors in Wisconsin were told that their Electoral College votes “would only count if a court ruled” in favor of Trump.<sup>400</sup> Otherwise, Hitt testified, “it would have been using our electors in ways that we weren’t told about and we wouldn’t have supported.”<sup>401</sup> Nevertheless, fabricated elector certificates were submitted to the National Archives, and an attempt was made to submit them to Pence as president of the Senate even though there was no such court ruling.<sup>402</sup>

A copy of the envelopes in which the false elector certificates were transmitted shows that fraudulent certificates from Arizona, Georgia, Michigan, New Mexico, Nevada, Pennsylvania, and Wisconsin were all sent to the National Archives by registered mail by December 16, 2020, within two days of the Electoral College meeting on December 14.<sup>403</sup> The Trump campaign appears to have arranged, however, for the false certificates to be hand-delivered to Congress. Trump campaign Deputy Director for Election Day Operations G. Michael Brown (who recently testified before the grand jury) sent text messages on January 5, 2021—as well as a selfie outside the Capitol—indicating that he had made the delivery as instructed by Roman.<sup>404</sup>

Throughout the effort to organize false electors, Trump campaign staff and White House staff knew that the plan to recruit or convene alternate electors, except as an outcome of litigation, was potentially illegal. In a recorded interview, Trump campaign lawyer Justin Clark told the Select Committee that he argued with Chesebro about this plan and told him that it was inappropriate to organize alternate electors if there was no litigation pending in the state and refused to participate in the scheme.<sup>405</sup> Trump campaign lawyer Matt Morgan told Congress that he objected and took action to ensure he had “zero” responsibility for this effort.<sup>406</sup> Morgan told the Select Committee that he “had [Trump campaign lawyer] Josh Finley email Mr. Chesebro

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<sup>398</sup> Goodman, *supra* note 334.

<sup>399</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>400</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Deposition of Andrew Hitt, (Feb. 28., 2022), at 50–51.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> National Archives, 2020 Presidential Election Unofficial Certificates submitted to The Office of the Federal Register (Feb. 25, 2022), <https://www.archives.gov/foia/2020-presidential-election-unofficial-certificates>.

<sup>404</sup> Cohen & Collins, *supra* note 355; Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Angela McCallum Production), McCallum\_01\_001576, McCallum\_01\_001577 (Michael Brown text message to Angela McCallum at undetermined time); Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Deposition of Angela McCallum, (Dec. 8, 2021), at 122.

<sup>405</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>406</sup> *Id.*

politely to say this is your task. You are responsible for the Electoral College issues moving forward. And this was my way of taking that responsibility to zero.”<sup>407</sup>

Meadows’s aide Cassidy Hutchinson heard a member of the White House counsel’s office tell Meadows, Giuliani, and a few of Giuliani’s associates that the scheme to organize alternate electors “was not legally sound.”<sup>408</sup> Sinners, the campaign staffer who communicated instructions to the false electors, told the Select Committee that he now feels like he and his colleagues were “useful idiots” and said that he “absolutely would not have” participated in the effort to organize alternate electors had he been aware that the Trump campaign’s “three main lawyers” were not in favor of the plan.<sup>409</sup>

## **B. Act Two: Pressuring the Vice President to Refuse to Count Electoral Votes**

As the schemes in the first act began to unravel in early December, Trump and his lawyers focused their attention on pressuring Vice President Pence. The vice president would have played a key role in what appeared to be their only viable option to keep Trump in power—using the false electoral slates to block Congress from recognizing Biden’s win or to delay the vote count entirely on January 6 in violation of the law.<sup>410</sup> This part of the scheme, as articulated in John Eastman’s aforementioned memos, called for Vice President Pence to unilaterally “determine[] on his own” which of the states’ electoral certificates are “valid, asserting that the authority to make that determination ... is his alone.”<sup>411</sup> If Pence discounted enough certificates from Biden-voting states, Eastman explained, Trump would win a majority of the electors who *were* counted, and would thus be reelected. If anyone protested, Pence would send the dispute to the House of Representatives, where votes would be taken by state delegation. As Eastman noted in his memo, “Republicans currently control 26 of the state delegations, the bare majority needed to win that vote. President Trump is re-elected there as well.”<sup>412</sup> In the alternative, Eastman proposed that Pence could adjourn the January 6 session without finalizing the count, which might throw the election back to (presumably Trump-friendly) state legislatures.<sup>413</sup>

Vice President Pence’s counsel, Greg Jacob, testified about his conversations with Pence which began “in early December, around December 7th,” regarding the vice president’s role and authority with respect to finalizing the outcome of the election. He said:

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<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> First Jan. 6 Hearing Transcript, *supra* note 28.

<sup>411</sup> Second Memorandum from John C. Eastman on Jan. 6 Scenario (Jan. 3, 2021), <https://www.washingtonpost.com/context/john-eastman-s-second-memo-on-january-6-scenario/b3fd2b0a-f931-4e0c-8bac-c82f13c2dd6f/>.

<sup>412</sup> First Memorandum from John C. Eastman on Jan. 6 Scenario (Dec. 23, 2020), <https://www.govinfo.gov/content/pkg/GPO-J6-DOC-Chapman053476/pdf/GPO-J6-DOC-Chapman053476.pdf>.

<sup>413</sup> *Id.*

The Vice President...told me that he had been seeing and reading things that suggested that he had a significant role to play on January 6th in announcing the outcome of the election.

... And he asked me, mechanically how does this work at the joint session? ...And I told the Vice President that I could put a memo together for him overnight that would explain the applicable rules.<sup>414</sup>

Jacob continued:

[W]e concluded that what you have is a sentence in the Constitution that is inartfully [ph] drafted. But the Vice President's — first instinct when he heard this theory was that there was no way that our framers, who [abhorred] concentrated power, who had broken away from the tyranny of George III, would ever have put one person, particularly not a person who had a direct interest in the outcome because they were on the ticket for the election, in a role to have decisive impact on the outcome of the election. And our review of text, history, and frankly just common sense all confirmed the Vice President's first instinct on that point. There is no justifiable basis to conclude that the Vice President has that kind of authority.<sup>415</sup>

Nevertheless, Trump, his campaign, and allies moved forward with plans to set the stage for Pence to execute the scheme articulated by Eastman to reject legitimate electoral votes on January 6. According to Select Committee member Rep. Pete Aguilar, "President Trump launched a multi-week campaign, of both public and private pressure, to get [] Vice President Mike Pence to violate the Constitution."<sup>416</sup>

This pressure campaign appears to have extended even beyond Trump in the White House. According to the Select Committee, Meadows also pressured Pence to overturn the legitimate Electoral College results.<sup>417</sup> For instance, he sent an email to Pence's staff containing a memo written by Jenna Ellis,<sup>418</sup> an attorney affiliated with Mr. Trump's re-election campaign,<sup>419</sup> and

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<sup>414</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> Select Comm. to Investigate the Jan. 6<sup>th</sup> Attack on the United States Capitol, Resolution Recommending That the House of Representatives Find Mark Randall Meadows in Contempt of Congress for Refusal to Comply With a Subpoena Duly Issued by the Select Committee to Investigate the January 6<sup>th</sup> Attack on the United States Capitol, H. Rep. 117-216, at 11 (2021), <https://tinyurl.com/8wmya3hx>.

<sup>418</sup> The States United Democracy Center, for which one of the authors serves as executive co-chair, has filed a complaint against Jenna Ellis for her role in the attempt to overturn the 2020 election. *See* Letter from Aaron Scherzer, Christine Sun, & Colin McDonnell to Jessica E. Yates, Attorney Regulation Counsel, Ralph L. Carr Judicial Center, Colorado Supreme Court (May 4, 2022), <https://statesuniteddemocracy.org/wp-content/uploads/2022/05/2022.05.04-Jenna-Ellis-complaint-cover-letter.pdf>.

<sup>419</sup> *Id.*

requested that the memo “be shared with the vice president.”<sup>420</sup> The memo “argued that the Vice President could declare electoral votes in six States in dispute when they came up for a vote during the Joint Session of Congress on January 6, 2021.”<sup>421</sup>

On December 13, 2020, Trump campaign lawyer Kenneth Chesebro wrote an email to Giuliani. The subject line of the email was “Brief notes on ‘President of the Senate’ strategy.” Chesebro wrote:

The bottom line is I think having the President of the Senate firmly take the position that he, and he alone, is charged with the constitutional responsibility not just to open the votes, but to count them — including making judgments about what to do if there are conflicting votes — represents the best way to ensure: (1) that the mass media and social media platforms, and therefore the public, will focus intently on the evidence of abuses in the election and canvassing; and (2) that there will be additional scrutiny in the courts and/or state legislatures, with an eye toward determining which electoral slates are the valid ones.<sup>422</sup>

Chesebro went on to describe this strategy as “having leverage on Jan. 6 to force a closer reexamination of what happened in this election.”<sup>423</sup> He suggested that “a defensible interpretation may be all that’s needed, because the Supreme Court might decline to reverse [the actions taken by Pence, or whoever was acting in the role of the President of the Senate], based on the ‘political question’ doctrine, and even if it did reverse, that would come only significant number of days of delay, which itself was valuable to the Trump team to create additional opportunity for maneuvers to highlight arguments of election fraud to support their objective of overturning the legitimate election results.”<sup>424</sup>

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<sup>420</sup> Marc Short, Pence’s chief of staff, said in an interview that “I have no doubt that Mark was aware that our office position was that the vice president did not have extraordinary powers and that instead we interpreted the constitutional role of the vice president as pretty straightforward.” Nonetheless, Meadows persisted in sending the Ellis memo to Short. *See* Michael Kranish, Inside Mark Meadows’s Final Push to Keep Trump in Power, THE WASHINGTON POST (May 9, 2022), <https://www.washingtonpost.com/politics/2022/05/09/inside-mark-meadowss-final-push-keep-trump-power/>.

<sup>421</sup> Select Comm. to Investigate the Jan. 6<sup>th</sup> Attack on the United States Capitol, Resolution Recommending That the House of Representatives Find Mark Randall Meadows in Contempt of Congress for Refusal to Comply With a Subpoena Duly Issued by the Select Committee to Investigate the January 6<sup>th</sup> Attack on the United States Capitol, H. Rep. 117-216, at 11 (2021), <https://tinyurl.com/8wmya3hx>.

<sup>422</sup> Exhibit A, *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM, (C.D. Cal. May 26, 2022) (Dec. 13, 2020 Email from Kenneth Chesebro to Rudy Giuliani).

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*; “The political question doctrine limits the ability of the federal courts to hear constitutional questions....[T]he term political question expresses the principle that some issues are either entrusted solely to another branch of government or are beyond the competence of the judiciary to review. Finding that a matter qualifies as a political question divests federal courts of jurisdiction, meaning they lack the power to rule on the matter.” U.S. Const. art. III, § 2, cl. 9.1 (Overview of Political Question Doctrine, Constitution Annotated), <https://constitution.congress.gov/browse/essay/artIII->



On Dec. 23, 2020, Trump publicly indicated his support for Pence to act in general accordance with this plan when he retweeted a memo, entitled “Operation Pence Card,” by Ivan Raiklin, a person who worked with former National Security Advisor Michael Flynn to spread conspiracy theories about the election.<sup>425</sup> That memo suggested substantially the same idea as the Eastman memo and sketched a theory that Pence could act on January 6 to stop the election from being finalized.<sup>426</sup>

On January 4, 2021, Trump and Eastman met with Pence and his team at the Oval Office, pressing Pence “to reject electors or delay the count.”<sup>427</sup> Trump and Eastman invited Pence to the meeting, which also included Pence’s chief of staff, Marc Short, and Pence’s counsel, Greg Jacob. According to Jacob, Meadows was also briefly in attendance. Jacob testified:

During the meeting on January 4th, Mr. Eastman was opining that there were two legally viable arguments as to authorities that the Vice President could exercise two days later on January 6th. One of them was that he could reject electoral votes outright. The other was that he could use his capacity as presiding officer to suspend the proceedings and declare essentially a 10-day recess during which states that he deemed to be disputed—there was a list of five to seven states that—the exact number changed from conversation to conversation. But that the Vice President could sort of issue a demand to the state legislatures in those states to reexamine the election and declare who had won each of those states. So he said that both of those were legally viable options. He said that he did not recommend—upon questioning he did not recommend what he called the more aggressive option, which was reject outright, because he thought that that would be less politically palatable.<sup>428</sup>

Jacob continued:

The imprimatur of state legislature authority would be necessary to ultimately have public acceptance of an outcome in favor of President Trump. And so he advocated that the preferred course of action would be the procedural route of suspending the joint session and sending the election back to the States.<sup>429</sup>

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S2-C1-8-1/ALDE\_00001283/#ALDF\_00015766 (citing *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (holding that courts lack authority to decide political questions when there is a commitment of the issue to another department or where there is a lack of judicially discoverable and manageable standards for resolving them.)).

<sup>425</sup> Third Jan. 6 Hearing Transcript, *supra* note 324; Zachary Cohen, What we know about Ivan Raiklin and the ‘Pence Card’, CNN (June 16, 2022, 2:34 p.m. ET), [https://www.cnn.com/politics/live-news/january-6-hearings-june-16/h\\_35ab271697e07c2bc2974d334ed03683](https://www.cnn.com/politics/live-news/january-6-hearings-june-16/h_35ab271697e07c2bc2974d334ed03683).

<sup>426</sup> Cohen, *supra* note 425.

<sup>427</sup> Eastman v. Thompson, Order Re Privilege of Docs at 7.

<sup>428</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

<sup>429</sup> *Id.*

Jacob testified that, at the end of the January 4 meeting, “the President had asked...that our office meet with Mr. Eastman the next day to hear more about the positions he had expressed,” so Jacob met privately with Eastman again on January 5, 2021, joined by Short for most of the meeting. Jacob testified:

What most surprised me about that meeting was that when Mr. Eastman came in he said I’m here to request that you reject the electors. So on the fourth that had been the path that he had said I’m not recommending that you do that. But on the fifth, he came in and expressly requested that. And I grabbed a notebook as I was heading into the meeting. I didn’t hear much new from him to record, but that was the first thing I recorded in my notes was request that the VP reject.<sup>430</sup>

Jacob’s testimony raises the obvious question: Was it a result of further private discussions with Trump that Eastman changed his request between the January 4 and January 5 meetings to then definitively ask that Pence take the “more aggressive” action, which according to Jacob’s testimony “[Eastman] had recommended against...the evening before?”

Jacob said Eastman acknowledged that other vice presidents did not and should not have the authority to take the actions Trump and Eastman were advocating that Pence take. Jacob said he told Eastman:

I mean, John, back in 2000, you weren’t jumping up and saying Al Gore had this authority to do that. You would not want Kamala Harris to be able to exercise that kind of authority in 2024 when I hope Republicans will win the election. And I know you hope that too, John. And he said, absolutely. Al Gore did not have a basis to do it in 2000, Kamala Harris shouldn’t be able to do it in 2024, but I think you should do it today.<sup>431</sup>

Jacob said he challenged Eastman, questioning him as to whether the Supreme Court would support his legal argument. Jacob testified that Eastman “ultimately acknowledged that...we would lose nine zero” in the Supreme Court, and “[n]o judge would support his argument.”<sup>432</sup> During his disbarment proceedings in California, Eastman denied that he asked Pence to “simply reject the electors,” and claimed that though “he is aware of testimony by Messers. Jacob and Short to that effect,” he “has no recollection of making such a statement.”<sup>433</sup>

Following that meeting on January 5, Jacob said: “We felt like we had sort of defeated Mr. Eastman. He was sort of acknowledging that there was no there there.” However, later that same

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<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> Respondent John Charles Eastman’s Answer to Notice of Disciplinary Charges at 35–36, In re: John Eastman, No. SBC-23-O-30029, (Feb. 15, 2023), <https://assets.bwbx.io/documents/users/ijjWHBFdfxIU/roYJ.nA25g7g/v0>.

day, January 5, Trump and Eastman met again in the Oval Office with Pence, himself. Trump reportedly pressed hard: “That is all I want you to do, Mike. Let the House decide the election... What do you think, Mike?”<sup>434</sup> And Pence pushed back: “Look, I’ve read this, and I don’t see a way to do it. We’ve exhausted every option. I’ve done everything I could and then some to find a way around this. It’s simply not possible. My interpretation is: No.”<sup>435</sup>

Despite being rebuffed by Pence and his staff twice already on January 5 alone, Trump and Eastman pressed Pence yet again on a phone call around 5 p.m. on January 5. Jacob and Short participated in that call along with Pence. According to Jacob, Eastman made another request of Pence. Jacob testified:

Mr. Eastman stated that he had heard us loud and clear that morning. We were not going to be rejecting electors. But would we be open to considering the other course that we had discussed on the 4th, which would be to suspend the joint session and request that state legislatures reexamine certification of the electoral votes?<sup>436</sup>

The next day, as the riot was unfolding, Eastman confirmed to Jacob in an email that on their 5 p.m. call the previous evening, Eastman had advised Trump that Pence did not possess the power to unilaterally reject electors. “But,” he noted to Jacob in the email, “you know him—once he gets something in his head, it is hard to get him to change course.”<sup>437</sup> As far as we know, Eastman’s characterization of this exchange has not been fully corroborated by other witnesses.

Jacob testified, generally, about the conversations between the president and the vice president:

The Vice President never budged from the position that I have described as his first instinct, which was that it just made no sense from everything that he knew and had studied about our Constitution that one person would have that kind of authority.<sup>438</sup>

Jacob also testified that Pence “did not” waver in his position that he did not have the power to delay certification of the election or refer the matter back to the states.<sup>439</sup> Short also confirmed in deposition testimony to the Committee that Pence was “very consistent,” and told Trump “many times” that he lacked the constitutional and legal authority to do what Trump was demanding.<sup>440</sup>

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<sup>434</sup> Bob Woodward & Robert Costa, PERIL 214–215 (2021).

<sup>435</sup> *Id.*

<sup>436</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

<sup>437</sup> Aaron Blake, The heated Jan. 6 email exchange between Trump’s and Pence’s lawyers, annotated, THE WASHINGTON POST (Mar. 3, 2022), <https://www.washingtonpost.com/politics/2022/03/03/heated-jan-6-email-exchange-between-trumps-pences-lawyers-annotated/>.

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

Nevertheless, on January 5, 2021, in an apparent attempt to pressure Pence, Trump issued a false statement to the press in response to a *New York Times* article, which had accurately characterized Pence’s view that he had no authority to stop the final certification by Congress of Joe Biden’s victory. In his statement, Trump falsely said:

The New York Times report regarding comments Vice President Pence supposedly made to me today is fake news. He never said that. The Vice President and I are in total agreement that the Vice President has the power to act...Our Vice President has several options under the U.S. Constitution. He can decertify the results or send them back to the states for change and certification. He can also decertify the illegal and corrupt results and send them to the House of Representatives for the one vote for one state tabulation.<sup>441</sup>

This statement came after Trump and Eastman had been thrice rebuffed by Pence and his staff on January 5 alone. Jacob testified that the vice president’s team was “shocked and disappointed” by the statement and that “it was categorically untrue.”<sup>442</sup> Short testified that it “misrepresented the vice president’s viewpoint without consultation.”<sup>443</sup> In deposition testimony, Trump campaign senior advisor Jason Miller stated that Trump “dictated most of [that statement].”<sup>444</sup> Miller said, “I know...specifically on this one that it was me and him on the phone talking through it, and ultimately the way this came out was the way that he wanted to.”<sup>445</sup>

Later that evening, at 11:13 p.m., Arizona State Rep. Mark Finchem sent Giuliani, Christina Bobb, and Katherine Friess, a D.C.-based lobbyist and attorney who identified herself as “staff attorney on the personal legal team of President Donald J. Trump” between November 2020 to January 2021,” a draft letter to Vice President Pence along with a forwarded email chain between himself and U.S. Rep. Paul Gosar (R-AZ) that featured several documents he referred to as an “evidence book” with the “best of the best” of evidence allegedly indicating election irregularities.<sup>446</sup> In Finchem’s testimony before the Select Committee, he said that Giuliani, Bobb, and Friess did not actually help in drafting the letter to Pence or the documents in his exchange with Gosar. But he testified that they included Giuliani’s “work product,” attributing this fact as the reason he shared the draft letter and so-called “evidence book” with that group.<sup>447</sup>

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<sup>441</sup> Kathryn Watson, Trump claims he and Pence agree on VP’s election authority, CBS NEWS (Jan. 6, 2021), <https://www.cbsnews.com/news/trump-pence-vp-authority-electoral-college-vote-count/>.

<sup>442</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

<sup>446</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Mark Finchem, (Apr. 22, 2022), at 130–133; Alexander Mallin & Benjamin Siegel, Attorney who aided Trump’s election efforts sues Jan. 6 committee over phone records, ABC NEWS (Feb. 24, 2022), <https://abcnews.go.com/US/attorney-aided-trumps-election-efforts-sues-jan-committee/story?id=83085316>.

<sup>447</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Mark Finchem, (Apr. 22, 2022), at 130–133.

Trump, like his associates, did not relent. He continued to press Pence through public tweets and a phone call on January 6 where he mocked Pence for “not [being] tough enough.”<sup>448</sup> When Trump spoke on the phone to Pence on January 6, some of Trump’s family members, including Donald Trump Jr. and Ivanka Trump, were in the Oval Office along with Meadows, and White House attorney Eric Herschmann.<sup>449</sup> Speaking to the Select Committee, Ivanka and Herschmann described the call as “heated.”<sup>450</sup> According to White House staffer Nicholas Luna, Trump called Pence a wimp.<sup>451</sup> In a recorded interview, Ivanka Trump’s former chief of staff, Julia Radford, said that Ivanka told her that her father called Pence “the p-word.”<sup>452</sup> Ivanka Trump testified, “It was a different tone than I’d heard him take with the Vice President before.”<sup>453</sup> In her testimony, however, Ivanka stated that she did not remember Trump using any specific words during this conversation.<sup>454</sup> According to a *New York Times* article citing two anonymous sources reporting on that call, Trump told Pence: “You can either go down in history as a patriot...or you can go down in history as a pussy.”<sup>455</sup>

Pence refused to bend to Trump’s bullying. If Trump was going to maintain his grip on power, he needed to either up his coercion tactics on Pence, or find another way to get the job done. In the third and final act, we will examine how Trump did both.

### **C. Act Three: Summoning a Violent Mob and Doing Nothing to Disperse It**

After Pence rejected Trump’s plan for the fourth and final time, Trump resorted to his last option to cling to power and prevent the certification of Biden’s win: unleashing his followers on his vice president and Congress. As we will detail in this third act, Trump’s incendiary calls to his supporters—both on social media and in public remarks—did not stop with calling out Pence. Indeed, on the evening of January 5, Trump went all in on the Plan C he had been slowly nurturing even before the election: riling up his followers so that they would do his bidding for him in placing direct pressure on his targets. On January 6, Trump helped incite an insurrection among his supporters. And he sat by and did nothing to effectively disperse them for 187 minutes of violence, not to mention spurring it on with his 2:24 p.m. tweet targeting Pence. We begin our presentation of this third act by examining Trump’s embrace of Plan C before turning to a look at the roots of this plan.

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<sup>448</sup> Eastman v. Thompson, Order Re Privilege of Docs at 8; *And see* Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 1:00 a.m.), <https://tinyurl.com/yfc843a5> (“Mike can send it back!”); Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 8:17 a.m.), <https://tinyurl.com/yfc843a5> (“States want to correct their votes . . . All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!”).

<sup>449</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Ivanka Trump, (Apr. 5, 2022), at 40.

<sup>455</sup> Peter Baker, Maggie Haberman & Annie Karni, Pence Reached His Limit With Trump. It Wasn’t Pretty, THE NEW YORK TIMES (last updated Jan. 13, 2021), <https://www.nytimes.com/2021/01/12/us/politics/mike-pence-trump.html>.

## 1. Using the Mob on January 6 to Increase the Pressure on Pence

Following his call with Pence on the morning of January 6, Trump decided to take his pressuring of the vice president to the next level. He spoke to his speechwriter and made last-minute edits to his prepared speech for the “Stop the Steal” rally his team had organized at the Ellipse. Trump’s last-minute changes to the speech included inserting the following language to pressure Pence to go along with his plan:

[W]e will see whether Mike Pence enters history as a truly great and courageous leader. All he has to do is refer the illegally submitted electoral votes back to the states that were given false and fraudulent information where they want to recertify.<sup>456</sup>

While delivering his remarks at the rally on the Ellipse later that day, Trump ad-libbed seven additional references to Pence in an apparent effort to continue to publicly pressure the vice president to participate in the scheme. Trump also ad-libbed language about fighting and marching to the Capitol, which were not in the written script.<sup>457</sup>

On January 6, Eastman spoke directly before Trump at the rally before the Capitol invasion, again trying to sell his plan: “And all we are demanding of Vice President Pence is this afternoon at 1:00 he let the legislators of the state look into this so we get to the bottom of it, and the American people know whether we have control of the direction of our government, or not.”<sup>458</sup> Trump, taking the microphone, then endorsed Eastman and his plan: “Thank you very much, John. . . . John is one of the most brilliant lawyers in the country and he looked at this and he said what an absolute disgrace that this can be happening to our Constitution.... Because if Mike Pence does the right thing, we win the election. All he has to do—all this is—this is from the number one or certainly one of the top constitutional lawyers in our country. He has the absolute right to do it.”<sup>459</sup>

While Trump was speaking, Pence tweeted out a letter refusing to unilaterally throw out slates of electors: “It is my considered judgment,” he wrote, “that my oath to support and defend the Constitution constrains me from claiming unilateral authority to determine which electoral votes should be counted and which should not.”<sup>460</sup> But Trump and Eastman did not let up, continuing to push their scheme even during the Capitol invasion. At 2:24 p.m. on January 6, 1 hour and 27 minutes after the Capitol Police barricades had first been breached, Trump tweeted: “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!”<sup>461</sup> One minute later, Eastman was reported to have emailed Jacob: “The ‘siege’ is because YOU and your

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<sup>456</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>457</sup> *Id.*

<sup>458</sup> John Eastman, Speech to the ‘Save America March’ and Rally, C-SPAN (Jan. 6, 2021), [perma.cc/3C8Y-GRK3](https://perma.cc/3C8Y-GRK3).

<sup>459</sup> President Donald J. Trump, Speech to the ‘Save America March’ and Rally (Jan. 6, 2021), [perma.cc/2YNN-9JR3](https://perma.cc/2YNN-9JR3).

<sup>460</sup> Mike Pence (@Mike\_Pence), TWITTER (Jan. 6, 2021, 1:02 p.m.), <https://tinyurl.com/4j4b93f9>.

<sup>461</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 2:24 p.m.), <https://www.thetrumparchive.com/>.

boss did not do what was necessary to allow this to be aired in a public way so the American people can see for themselves what happened.”<sup>462</sup>

Eastman and Trump both knew that their legal theory was unavailing, and that it could be illegal for Pence to unilaterally throw out electoral certificates or delay the count *even if* the election somehow had been tainted by fraud. As Judge Carter found, Eastman explicitly admitted that his plan broke from consistent historical practice since the founding of the Republic.<sup>463</sup> He admitted that the Supreme Court would unanimously reject it.<sup>464</sup> He admitted that it “violated the Electoral Count Act on four separate grounds.”<sup>465</sup>

According to Jacob’s testimony before the Select Committee, Eastman even admitted in front of Trump that the plan was not legal. Jacob testified:

[D]uring that meeting on [January] fourth, I think I raised the problem that both of Mr. Eastman’s proposals would violate several provisions of the Electoral Count Act. Mr. Eastman acknowledged that that was the case, that even what he viewed as the more politically palatable option would violate several provisions. But he thought that we could do so because in his view the Electoral [Count] Act was unconstitutional. And when I raised concerns that that position would likely lose in court his view was that the court simply wouldn’t get involved. They would invoke the political question doctrine and therefore we could have some comfort proceeding with that path.<sup>466</sup>

Eastman admitted that it was inimical to his own purported convictions as a conservative.<sup>467</sup> He even admitted his plan was entirely aimed at partisan advantage, since he didn’t think a Democratic vice president should have the same powers that he claimed for Pence.<sup>468</sup>

In an email on January 6, Eastman acknowledged that he was calling on Pence to commit a “relatively minor violation” of the Electoral Count Act.<sup>469</sup> And, in another email, he acknowledged that he told Trump directly that “the Vice President does not have the power to decide things unilaterally.”<sup>470</sup> So Trump could not hide behind the claim that he did not know he

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<sup>462</sup> Aaron Blake, The Heated Jan. 6 Email Exchange Between Trump’s and Pence’s Lawyers, Annotated, THE WASHINGTON POST (Mar. 3, 2022), <https://tinyurl.com/tfyzhxk9>.

<sup>463</sup> Eastman v. Thompson, Order Re Privilege of Docs at 7.

<sup>464</sup> *Id.*

<sup>465</sup> *Id.*

<sup>466</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

<sup>467</sup> Eastman v. Thompson, Order Re Privilege of Docs at 39.

<sup>468</sup> *Id.*

<sup>469</sup> Exhibit N at 2, Eastman v. Thompson, No. 22-cv-99, (C.D. Cal. Mar. 2, 2022), ECF No. 160-16.

<sup>470</sup> Exhibit M at 2, Eastman v. Thompson, No. 22-cv-99, (C.D. Cal. Mar. 2, 2022), ECF No. 160-15.

was pressing Pence to do something against the law. The architect of the plan—Trump’s own lawyer—told him so.<sup>471</sup>

President Trump’s former White House Counsel Pat Cipollone told the Select Committee: “I thought that the vice president did not have the authority to do what was being suggested under a proper reading of the law. I conveyed that.”<sup>472</sup>

According to Jacob’s testimony, Eastman even admitted that the historical precedent he cited in his memo to pressure Pence to act was, in fact, misleading. In his memo, Eastman inaccurately said: “There is very solid legal authority, and historical precedent, for the view that the President of the Senate does the counting, including the resolution of disputed electoral votes (as Adams and Jefferson did while Vice President, regarding their own election as President), and all the Members of Congress can do is watch.” Jacob testified:

Mr. Eastman...claim[ed] that Jefferson supported his position in a historical example of Jefferson. In fact, he conceded in that meeting [on January 5] Jefferson did not at all support his position that in the election of 1800 there had been some small technical defect with the certificate in Georgia. It was absolutely undisputed that Jefferson had won Georgia. Jefferson did not assert that he had any authority to reject electors. He did not assert that he had any authority to resolve any issue during the course of that. And so [Eastman] acknowledged by the end that there was no historical practice whatsoever that supported his position. He had initially tried to — to push examples of Jefferson and Adams. He ultimately acknowledged they did not work.<sup>473</sup>

Perhaps the strongest piece of evidence indicating the intensity of the pressure Pence faced from Trump, Eastman, and others was the fact that Pence’s team became concerned for Pence’s safety. Short testified that, on January 5, out of “[c]oncern... for the vice president’s security, ...I wanted to make sure the head of the vice president’s Secret Service was aware that — that likely, as these disagreements became [m]ore public, that the president would lash out in some way.”<sup>474</sup>

When insurrectionists breached the Capitol building at around 2:00 p.m. on January 6, the Secret Service moved Pence to a secure location. Although Trump now disputes<sup>475</sup> what he was

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<sup>471</sup> Trump’s attempts to use illegal means to reverse the election and remove the duly-elected president did not stop with January 6. *See* Luke Broadwater & Shane Goldmacher, House Republican Says Trump Asked Him to Illegally ‘Rescind’ 2020 Election, THE NEW YORK TIMES (Mar. 23, 2022), <https://tinyurl.com/4wmw3476> (“Representative Mo Brooks...claimed on Wednesday that the former president had asked him repeatedly in the months since to illegally ‘rescind’ the election, remove President Biden and force a new special election.”).

<sup>472</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>473</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

<sup>474</sup> *Id.*

<sup>475</sup> Maggie Haberman, CONFIDENCE MAN: THE MAKING OF DONALD TRUMP AND THE BREAKING OF AMERICA (2022) (“‘I didn’t usually have the television on. I’d have it on if there was something. I then later turned it on and I saw what



aware of and when, according to evidence obtained by the Select Committee, Trump was watching cable news in the White House and was aware that the Capitol had been breached.<sup>476</sup> Nevertheless, instead of calling for calm and demanding that his supporters leave the Capitol, Trump continued to air his grievances, tweeting at 2:24 p.m. about Pence’s refusal to implement the scheme pushed by Trump and Eastman: “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!”<sup>477</sup>

To place this in context, the Select Committee showed a video of Trump supporters marching to the Capitol describing how they interpreted what they heard from Trump, and what they planned to do. One Trump supporter said: “I’m telling you what, I’m hearing that Pence — hearing that Pence just caved. ...I’m telling you, if Pence caved, we’re going to drag motherfuckers through the streets. You fucking politicians are going to get fucking drug through the streets.”<sup>478</sup> In another clip, someone in the riot said “I guess the hope is that there’s such a show of force here that Pence will decide to – Just do his job. Do the right thing, according to Trump.”<sup>479</sup> Another clip showed rioters chanting “Bring him out. Bring out Pence. Bring him out. Bring out Pence. Bring him out. Bring out Pence. Bring him out. Bring out Pence.”<sup>480</sup> And yet another segment of video used as evidence by the Select Committee featured rioters chanting “Hang Mike Pence. Hang Mike Pence. Hang Mike Pence. Hang Mike Pence.”<sup>481</sup>

According to a *New York Times* article, “[h]ours after President Donald J. Trump announced a ‘wild’ rally in Washington on Jan. 6, 2021, his supporters began discussing building a gallows in front of the Capitol.”<sup>482</sup> The article quoted a user on “a pro-Trump online forum,” who stated: “We will be building a gallows right in front of the Capitol, so the traitors know the stakes.”<sup>483</sup> A hangman’s gallows, complete with a rope noose was, in fact, erected in front of the Capitol and was just one of the disturbing images of the insurrection captured that day.<sup>484</sup>

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was happening’ [Trump] said. He lied throughout that bit of our interview: ‘I had heard that afterward and actually on the late side. I was having meetings. I was also with [then-chief of staff] Mark Meadows and others. I was not watching television.”).

<sup>476</sup> Cong. Defs. Opp. to Pl. Eastman’s Privilege Assertions at 13 (“The evidence obtained by the Select Committee indicates that President Trump was aware that the violent crowd had breached security and was assaulting the Capitol when Mr. Trump tweeted.”).

<sup>477</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 2:24 p.m.), <https://www.thetrumparchive.com/>.

<sup>478</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

<sup>479</sup> *Id.*

<sup>480</sup> *Id.*

<sup>481</sup> *Id.*

<sup>482</sup> Catie Edmondson, ‘So the Traitors Know the Stakes’: The Meaning of the Jan. 6 Gallows, THE NEW YORK TIMES (June 16, 2022), <https://www.nytimes.com/2022/06/16/us/politics/jan-6-gallows.html>.

<sup>483</sup> *Id.*

<sup>484</sup> *Id.*

The Select Committee presented an affidavit from an FBI confidential informant with the Proud Boys, in which the source claimed that members of the group would have killed Mike Pence (or Nancy Pelosi and other representatives) if given the chance.<sup>485</sup>

One of the rioters was Jacob Chansley, who prosecutors later called the “public face of the Capitol riot” and who has also been referred to in the media as the “QAnon Shaman” (images of him carrying a flagpole fashioned as a spear and a bullhorn while donning red, white, and blue face paint, along with a fur hat and no shirt went viral). He wrote a note for Pence that he left on the vice president’s desk in the Senate chamber with an ominous threat. The note read: “It’s only a matter of time, justice is coming.”<sup>486</sup> Chansley ultimately pleaded guilty to obstructing an official proceeding.<sup>487</sup>

According to Rep. Aguilar, the Select Committee found that “immediately after the President’s 2:24 p.m. tweet, the crowds both outside and inside the Capitol surged. The crowds inside the Capitol were able to overwhelm the law enforcement presence, and the Vice President was quickly evacuated from his ceremonial Senate office to a secure location within the Capitol complex.”<sup>488</sup>

White House Deputy Press Secretary Sarah Matthews discussed Trump’s 2:24 p.m. tweet in a transcribed interview. She said:

So then when that tweet—the Mike Pence tweet was sent out I remember us saying that that was the last thing that needed to be tweeted at that moment. The situation was already bad, and so it felt like he [Trump] was pouring gasoline on the fire by tweeting that.<sup>489</sup>

Publicly available evidence reveals details of discussions between Pence and his security as to whether Pence and his staff would leave the Capitol after evading the insurrectionists and arriving at the secure location within the complex. Jacob, who was with Pence at the Capitol on January 6, testified:

When we got down to the secure location, Secret Service directed us to get into the cars...[T]he Vice President...refused to get into the car.<sup>490</sup>

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<sup>485</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

<sup>486</sup> Teo Armus & Rachel Weiner, ‘QAnon Shaman’s’ note to Pence cited as evidence of ‘assassination’ plot before prosecutors walk back claim, THE WASHINGTON POST (Jan. 15, 2021), <https://www.washingtonpost.com/nation/2021/01/15/qanon-shaman-trump-kill-pardon/>.

<sup>487</sup> Jacques Billeaud, Jan. 6 rioter who carried spear, wore horns, draws 41 months, AP NEWS (Nov. 17, 2021), <https://apnews.com/article/prisons-arizona-capitol-siege-5c9ebf384bf936403d42e1a453c89153>.

<sup>488</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

Jacob continued:

The head of [Pence's] Secret Service detail, Tim, had said, I assure you we're not going to drive out of the building without your permission. And the Vice President had said something to the effect of, Tim, I know you, I trust you, but you're not the one behind the wheel. And the Vice President did not want to take any chance that the world would see the Vice President of the United States [f]leeing the United States Capitol. He was determined that we would complete the work that we had set out to do that day, that it was his constitutional duty to see through. And the rioters who had breached the Capitol would not have the satisfaction of disrupting the proceedings beyond the day on which they were supposed to be completed.<sup>491</sup>

Even after the January 6 attack, when the joint session of Congress resumed, Eastman continued to push for Pence to act. Jacob testified:

Late that evening, after the joint session had been reconvened, the Vice President had given a statement to the nation saying that violence was not going to win, freedom wins and that the people were going to get back to doing their work. Later that evening, Mr. Eastman emailed me to point out, that in his view, the Vice President's speech to the nation violated the Electoral Count Act—that the Electoral Count Act had been violated because the debate on Arizona had not been completed in two hours. **Of course, it couldn't be since there was an intervening riot of several hours.** And that the speeches that the majority and minority leaders had been allowed to make also violated the Electoral Count Act because they hadn't been counted against the debate time. And then he implored me, now that we have established that the Electoral Count Act isn't so sacrosanct as you have made it out to be, **I implore you one last time, can the Vice President please do what we have been asking him to do these last two days? Suspend the joint session, send it back to the states.**<sup>492</sup> (emphasis added)

Jacob sat on this email for a few days before eventually showing it to Pence, explaining that he did not do so immediately because “the Vice President was completing the work that it was his duty to do.” When he did eventually show Pence Eastman's message, the former vice president

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<sup>491</sup> *Id.*; While not explored by the Select Committee at its public hearing, prosecutors should explore (and may have done so in Pence's grand jury appearance) whether Pence's refusal to get into a Secret Service vehicle raises the obvious question of whether Pence understood that Trump may have had the ability to order the Secret Service driver to leave the Capitol complex with Pence inside the car, thus taking him away from the joint session and accomplishing the Trump team's apparent goal of delaying the final certification of the vote by the joint session of Congress.

<sup>492</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

remarked that it was “rubber room stuff,” meaning in Jacob’s words “that that [email] was certifiably crazy.”<sup>493</sup>

In a recorded interview, Cipollone emphatically suggested that Pence acted correctly and lawfully. Cipollone said:

I think the vice president did the right thing. I think he did the courageous thing. I have a great deal of respect for Vice President Pence. ... I think he understood my opinion. I think he understood my opinion afterwards as well. I think he did a great service to this country. And I think I suggested to somebody that he should be get—given the Presidential Medal of Freedom for—for his actions.<sup>494</sup>

There is substantial evidence that well before the violent events of January 6 unfolded, administration officials, the Secret Service, and individuals close to Trump had begun to receive detailed security reports that should have drawn significant concern. Rep. Schiff explained:

By the morning of January 6th, it was clear that the Secret Service anticipated violence.... By 9:09 that morning, the Secret Service could also see that many rally goers were assembled outside the security perimeter [at the rally at the Ellipse]....One agent emailed, possibly because they have stuff that couldn't come through would probably be an issue with this crowd....By 9:30 that morning, agents reported more than 25,000 people outside the rally site. An hour later, the Secret Service reported that the crowd was on the mall watching, but not in line.<sup>495</sup>

According to Rep. Schiff, the Select Committee found evidence that:

The head of the President's Secret Service protective detail, Robert Engel, was specifically aware of the large crowds outside the magnetometers. He passed that information along to Tony Ornato who worked for Mark Meadows in the chief of staff's office. The documents we obtained from the Secret Service make clear that the crowd outside the magnetometers was armed and the agents knew it. ...One report from the rally site at 7:58 a.m. said, some members of the crowd are wearing ballistic helmets, body armor, carrying radio equipment and military grade backpacks. Another from 9:30 a.m. said that there were possibly OC spray, meaning pepper spray,

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<sup>493</sup> *Id.*

<sup>494</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>495</sup> *Id.*

and/or plastic riot shields. At 11:23 a.m., agents also reported possible armed individuals, one with a glock, one with a rifle.<sup>496</sup>

However, the evidence and testimony appear to confirm that none of these reports swayed Trump from proceeding with his plans for the day. In fact, there appears to be nothing to suggest that the circumstances coalescing that day were not what Trump intended.

According to Hutchinson, prior to taking the stage on January 6, Trump understood that the crowd was armed, and that was the reason why so many assembled outside of the security perimeter. But he did not care. Hutchinson testified:

[Trump] wanted [the rally site at the Ellipse] full, and he was angry that we weren't letting people through the mags [referring to magnetometers / metal detectors] with weapons, what the Secret Service deemed as weapons and...are weapons. I was in the vicinity of a conversation where **I overheard the president say something to the effect of, you know, I don't f'ing care that they have weapons. They're not here to hurt me. Take the f'ing mags away. Let my people in. They can march to the Capitol from here. Let the people in. Take that f'ing mags away.**<sup>497</sup> (emphasis added.)

Hutchinson also testified that, within this discussion about the crowd being armed, and about whom they were there “to hurt,” Trump went on to say:

They can march to the Capitol after the rallies are over. They can march from — they can march from the ellipse. Take the effing mags away. Then they can march to the Capitol.<sup>498</sup>

At noon on January 6, Trump addressed his supporters at the rally at the Ellipse. Hutchinson's testimony appears to be corroborated by Trump's own words when he took the stage to speak, and asked law enforcement to allow the armed crowd into the Ellipse. Trump said:

I'd love to have, if those tens of thousands of people would be allowed, the military, the Secret Service—and we want to thank you, and the police, law enforcement, great. You're doing a great job. ...But I'd love it if they could be allowed to come up here with us. Is that possible? Can you just let them come up, please?<sup>499</sup>

The Select Committee's investigation revealed substantial information about the groups and individuals that Trump and members of his team knew to be in the crowd on January 6. Yet

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<sup>496</sup> *Id.*

<sup>497</sup> *Id.*

<sup>498</sup> Sixth Jan. 6 Hearing Transcript, *supra* note 124.

<sup>499</sup> Ninth Jan. 6 Hearing Transcript, *supra* note 35.

despite knowing that the individuals in the crowd were armed and dangerous, Trump still told them to “fight like hell.”<sup>500</sup> He spoke for more than an hour, and he promised to join them in a march to the Capitol. He said:

Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we’re going to walk down, and I’ll be there with you, we’re going to walk down, we’re going to walk down.... Because you’ll never take back our country with weakness. You have to show strength and you have to be strong.<sup>501</sup>

According to the *Washington Post*, the Secret Service had learned at least two weeks earlier that Trump wanted to go to the Capitol with the mob.<sup>502</sup> In a recorded interview with the Select Committee, a White House security official, whose identity was withheld for their protection, described how security officials reacted to Trump’s plan. They said:

To be completely honest, we were all in a state of shock. Because why? Because—because we just—one, I think the actual physical feasibility of doing it, and then also we all knew what that indicated and what that meant, that this was no longer a rally, that this was going to move to something else if he physically walked to the Capitol.... **I don't know if you want to use the word insurrection, coup, whatever. We all knew that this would move from a normal democratic, you know, public event into something else.** Why were we...alarmed?...The President wanted to lead tens of thousands of people to the Capitol. I think that was enough grounds for us to be alarmed.<sup>503</sup> (emphasis added)

Nonetheless, multiple witnesses provided information that confirms that Trump did, in fact, want to accompany the mob to the Capitol on January 6.<sup>504</sup> And, although details of accounts may differ, statements and testimony appear to show that Trump was very upset when he encountered resistance from the Secret Service and other officials.<sup>505</sup> A retired D.C. Metropolitan Police officer, Sergeant Mark Robinson, who was assigned to Trump’s motorcade on January 6, 2021 and who “sat in the lead vehicle with the Secret Service agent responsible for the motorcade, also called the

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<sup>500</sup> Brian Naylor, Read Trump’s Jan. 6 Speech, A Key Part Of Impeachment Trial, NPR (Feb. 10, 2021), <https://tinyurl.com/5xyverkr>.

<sup>501</sup> *Id.*

<sup>502</sup> Carol D. Leonnig, Josh Dawsey, Peter Hermann & Jacqueline Alemany, Trump call Jan. 6 to ‘walk down to the Capitol’ prompted Secret Service scramble, THE WASHINGTON POST (June 7, 2022), <https://www.washingtonpost.com/politics/2022/06/07/trump-pressed-secret-service-for-plan-to-join-march-to-capitol/>.

<sup>503</sup> Ninth Jan. 6 Hearing Transcript, *supra* note 35.

<sup>504</sup> Here’s every word from the eighth Jan. 6 committee hearing on its investigation, NPR (July 22, 2022), <https://www.npr.org/2022/07/22/1112138665/jan-6-committee-hearing-transcript> (hereinafter “Eighth Jan. 6 Hearing Transcript”).

<sup>505</sup> *Id.*

TS agent” provided information to the Select Committee.<sup>506</sup> He said that he was told “that the President was upset and was adamant about going to the Capitol and there was a heated discussion about that.”<sup>507</sup> He said that “heated” was the “word described by the TS agent, meaning that the President was upset and he was saying there was a heated argument or discussion about going to the Capitol.”<sup>508</sup> According to Sergeant Robinson, he had been part of a presidential motorcade “probably over 100 times,” yet had never before witnessed another argument or the president contradicting where the Secret Service thought it was safe to go.<sup>509</sup>

Hutchinson relayed to the Select Committee an account she heard of what occurred in the motorcade, from Deputy Chief of Staff Tony Ornato and the head of the President’s protective detail Robert Engel, whom Hutchinson referred to as Bobby. Hutchinson testified that Mr. Ornato told her that “[Trump] was under the impression from Mr. Meadows that the off the record movement to the Capitol was still possible and likely to happen.”<sup>510</sup> However, according to Hutchinson, she was told “once the president had gotten into the vehicle with Bobby,... Bobby had relayed to him we’re not [going to the Capitol], we don’t have the assets to do it, it’s not secure, we’re going back to the West Wing, the president had a very strong, a very angry response to that.”<sup>511</sup> Hutchinson said “Tony [Ornato] described [Trump] as being irate” and she said “[t]he president said something to the effect of ‘I’m the f’ing president, take me up to the Capitol now,’ to which Bobby responded, ‘Sir, we have to go back to the West Wing.’”<sup>512</sup>

Stephen Ayres, a former Trump supporter who attended the January 6 rally and pleaded guilty to “disorderly and disruptive conduct at the Capitol,” testified before the Select Committee. He said that he marched to the Capitol on January 6 because, “the President got everybody riled up and told everybody to head on down. So we basically was [sic] just following what he said.”<sup>513</sup> In an interview with the Committee, another participant in the riot, Robert Schornack, who was sentenced to 36 months of probation for his actions at the Capitol, said: “[Trump] asked me for my vote and he asked me to come on January 6th.” Numerous members of the January 6 mob have said something along the same lines, that they came to D.C. because “Trump asked us to come” to stop the election from being stolen.<sup>514</sup>

## **2. The Roots of Insurrection**

The evidence shows Trump had long before laid the groundwork for what ultimately culminated in a violent group of his supporters attacking law enforcement and invading the Capitol Building on January 6.

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<sup>506</sup> *Id.*

<sup>507</sup> *Id.*

<sup>508</sup> *Id.*

<sup>509</sup> *Id.*

<sup>510</sup> Sixth Jan. 6 Hearing Transcript, *supra* note 124.

<sup>511</sup> *Id.*

<sup>512</sup> *Id.*

<sup>513</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>514</sup> ‘We were invited by the president of the United States’: Jan. 6 hearing ends with rioters’ own words, YAHOO! NEWS (June 9, 2022), <https://www.yahoo.com/news/were-invited-president-united-states-021553627.html>.

During a presidential debate in September 2020, Trump was asked whether he would condemn the violent right-wing group known as the Proud Boys.<sup>515</sup> Instead of condemning this well-known anti-Semitic, racist, violent group, Trump told them to “stand back and stand by.”<sup>516</sup> Jeremy Bertino, a former leader of the Proud Boys who was charged with, and pleaded guilty to, seditious conspiracy for his role in the January 6 attack, testified that membership in the Proud Boys increased “[e]xponentially...tripled probably” after Trump’s comments.<sup>517</sup> Another Proud Boy leader, Enrique Tarrio, who was recently convicted at trial of seditious conspiracy in relation to the January 6 attack,<sup>518</sup> testified that a vendor on his webpage sold “stand back and stand by” merchandise.<sup>519</sup>

Multiple members of the Proud Boys have been charged “with seditious conspiracy and other charges for their actions before and during the breach of the U.S. Capitol on Jan. 6, 2021,”<sup>520</sup> and many have already been convicted.<sup>521</sup> According to the Department of Justice, they “conspired to prevent, hinder and delay the certification of the Electoral College vote, and to oppose by force the authority of the government of the United States.”<sup>522</sup> Specifically, as explained by the Department of Justice, they “directed, mobilized, and led a group of Proud Boys and other members of the crowd onto the Capitol grounds, leading to dismantling of metal barricades, destruction of property, breaching of the Capitol building, and assaults on law enforcement.”<sup>523</sup> Those members of the Proud Boys and others were called to Washington, D.C. that day—January 6, 2021—by Donald Trump.

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<sup>515</sup> See, e.g., Ryan Lucas, Proud Boy Leader Pleads Guilty to Jan. 6 Conspiracy, Agrees to Cooperate with DOJ, NPR (Apr. 8, 2022), <https://www.npr.org/2022/04/08/1091693738/proud-boy-leader-pleads-guilty-to-jan-6-conspiracy-agrees-to-cooperate-with-doj>.

<sup>516</sup> Adam Gabbatt, Trump’s Refusal to Condemn White Supremacy Fits Pattern of Extremist Rhetoric, THE GUARDIAN (Sept. 30, 2020), <https://www.theguardian.com/us-news/2020/sep/30/trump-white-supremacy-extremist-rhetoric>; Kathleen Ronayne & Michael Kunzelman, Trump to Far Right Extremists: Stand Back and Stand By, AP NEWS (Sept. 30, 2020), <https://apnews.com/article/election-2020-joe-biden-race-and-ethnicity-donald-trump-chris-wallace-0b32339da25fbc9e8b7c7c7066a1db0f>.

<sup>517</sup> First Jan. 6 Hearing Transcript, *supra* note 28.

<sup>518</sup> Press Release, U.S. Dep’t of Just., Leader of Proud Boys and Four Other Members Indicted in Federal Court For Seditious Conspiracy and Other Offenses Related to U.S. Capitol Breach (June 6, 2022), <https://www.justice.gov/opa/pr/leader-proud-boys-and-four-other-members-indicted-federal-court-seditious-conspiracy-and>.

<sup>519</sup> Michael Kunzelman, Lindsay Whitehurst & Alanna Durkin Rucher, Proud Boys’ Tarrio guilty of Jan. 6 seditious conspiracy, AP NEWS (May 4, 2023), <https://apnews.com/article/jan-6-enrique-tarrio-seditious-conspiracy-trial-f8738f17552cda21eef6d89504da2a0e>.

<sup>520</sup> Press Release, U.S. Dep’t of Just., Leader of Proud Boys and Four Other Members Indicted in Federal Court For Seditious Conspiracy and Other Offenses Related to U.S. Capitol Breach (June 6, 2022), <https://www.justice.gov/opa/pr/leader-proud-boys-and-four-other-members-indicted-federal-court-seditious-conspiracy-and>.

<sup>521</sup> Kunzelman, Whitehurst & Durkin, *supra* note 519.

<sup>522</sup> Press Release, U.S. Dep’t of Just., Leader of Proud Boys and Four Other Members Indicted in Federal Court For Seditious Conspiracy and Other Offenses Related to U.S. Capitol Breach (June 6, 2022), <https://www.justice.gov/opa/pr/leader-proud-boys-and-four-other-members-indicted-federal-court-seditious-conspiracy-and>.

<sup>523</sup> *Id.*



On December 19, 2020, five days after the Electoral College voted to elect Biden the 46th President of the United States, and roughly two and a half weeks before the U.S. Congress would certify that result, Trump tweeted a message to his followers: “Big protest in D.C. on January 6th. Be there, will be wild!”<sup>524</sup> Notably, Trump sent this at 1:42 a.m. on December 19, right after a lengthy meeting, discussed in Section I.A.2 above, with Flynn, Powell, Giuliani, and Overstock.com CEO Patrick Byrne during which they discussed a plan, rebuffed by White House Counsel, to have the military seize voting machines across the country.

Within hours of Trump’s tweet, several extremist groups organized to attend and support the January 6 protest in Washington, D.C. On December 19, Women for America First rescheduled an upcoming rally and the associated permit so that it would take place on January 6.<sup>525</sup> Also that same day, less than 12 hours after Trump’s tweet, Kelly Meggs, head of the Florida Oath Keepers, a far-right, militaristic, antigovernment extremist group,<sup>526</sup> posted on Facebook a declaration of an alliance among three rightwing antigovernment militia groups, the Oath Keepers, the Proud Boys, and the Florida Three Percenters. Meggs’ Facebook post said:

Well we are ready for the rioters, this week I organized an alliance between Oath Keepers, Florida 3%ers, and Proud Boys. We have decided to work together and shut this shit down.<sup>527</sup>

Three days later, on December 22, 2020, Meggs messaged another individual on Facebook:

Trump said It's gonna be wild!!!!!! It's gonna be wild!!!!!! He wants us to make it WILD that's what he's saying. He called us all to the Capitol and wants us to make it wild!!! Sir Yes Sir!!! Gentlemen we are heading to DC pack your shit!!<sup>528</sup>

Ali Alexander, “leader of the Stop the Steal organization and a key mobilizer of Trump supporters,” created the website “Wildprotest.com,” the day after Trump’s tweet.<sup>529</sup> The website declared prominently that “Trump wants to see you in DC.”<sup>530</sup> It also “included event times, places, speakers, and details on transportation to Washington, DC.”<sup>531</sup>

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<sup>524</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Dec. 19, 2020, 1:42 a.m.), <https://www.thetrumparchive.com/>.

<sup>525</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>526</sup> Oath Keepers, Southern Poverty Law Center (last accessed Oct. 19, 2022), <https://www.splcenter.org/fighting-hate/extremist-files/group/oath-keepers>.

<sup>527</sup> Government’s Opposition to Defendant’s Renewed Request for Pretrial Release, United States v. Kelly Meggs, No. 1:21-cr-00028-APM, (D.C. Cir. Mar. 3, 2021), <https://www.politico.com/f/?id=00000178-6431-d985-abf9-edfdc63b0000>.

<sup>528</sup> Second Superseding Indictment, United States v. Kelly Meggs, No. 1:21-cr-00028-APM, (D.C. Cir. Mar. 12, 2021).

<sup>529</sup> *Id.*

<sup>530</sup> Luke Broadwater & Alan Feuer, Trump Sought to Conceal Plans for March to Capitol, Panel Says, THE NEW YORK TIMES (July 12, 2022), <https://www.nytimes.com/2022/07/12/us/jan-6-panel-trump.html>.

<sup>531</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

There was a prompt response from other individuals and groups amplifying Trump's call for supporters to descend on Washington, D.C. on January 6.<sup>532</sup> Kelly O'Brien of Pennsylvania, who was charged and pleaded guilty for her actions during the attack, posted on the same day as Trump's tweet:

CALLING ALL PATRIOTS! Be in Washington D.C. January 6th.  
This wasn't organized by any group. DJT has invited us and it's  
going to be 'wild.'"

The Committee showed tweets and online posts confirming that Trump's supporters understood his tweet as a call for violence. Select Committee member, Rep. Jamie Raskin, described how some Trump supporters reacted online to Trump's tweet:

Trump's followers took to social media to declare that they were ready to answer Trump's call. One user asked 'Is the 6th D-Day? Is that why Trump wants everyone there?' Another asserted 'Trump just told us all to come armed. Fucking A, this is happening.' A third took it even further. 'It will be wild means we need volunteers for the firing squad.'<sup>533</sup>

As Rep. Raskin highlighted:

Some of the online rhetoric turned openly homicidal and white nationalist, such as why don't we just kill them, every last Democrat, down to the last man, woman, and child, and it's time for the day of the rope. White revolution is the only solution. Others realized that police would be standing in the way of their effort to overturn the election, so one wrote 'I'm ready to die for my beliefs. Are you ready to die, police?' Another wrote on thedonald.win, 'cops don't have standing if they're laying on the ground in a pool of their own blood.'<sup>534</sup>

Numerous individuals posted messages on an online forum called thedonald.win. In a recorded deposition the website's founder, Jody Williams, testified that Trump's tweet coalesced all of the activities of Trump's supporters around the January 6, 2021 date. Williams said, "after it was announced that ... he was going to be there on the 6th to talk ... then anything else was kind of shut out."<sup>535</sup>

Former Chief of Homeland Security and Intelligence for Washington, D.C., Dr. Donell Harvin, said of the information his office was receiving:

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<sup>532</sup> *Id.*

<sup>533</sup> *Id.*

<sup>534</sup> *Id.*

<sup>535</sup> *Id.*

We got derogatory information...suggesting that some very, very violent individuals were organizing to come to DC, and not only were they organized to come to DC, but they were—these groups, these nonaligned groups were aligning. ...[A]ll the red flags went up at that point. You know, when you have armed militia collaborating with white supremacy groups collaborating with conspiracy theory groups online all toward a common goal, you start seeing what we call in... terrorism, a blended ideology. And that's a very, very bad sign. Then when they were clearly across—not just across one platform, but across multiple platforms of these groups coordinating, not just like chatting, hey, how's it going? You know what's the weather like where you're at? But like, what are you bringing? What are you wearing? You know, where—where—where do we meet up? Do you have plans for the Capitol? That operational—that's like pre operational intelligence, right? And that—that is something that's clearly alarming.<sup>536</sup>

Despite the concerning information authorities were beginning to see, over the following weeks, Trump continued to encourage followers to amass on January 6. On December 26, 2020, he tweeted: “The ‘Justice’ Department and the FBI have done nothing about the 2020 Presidential Election Voter Fraud, the biggest SCAM in our nation’s history, despite overwhelming evidence. They should be ashamed. History will remember. Never give up. See everyone in D.C. on January 6th.”<sup>537</sup> And on January 1, 2021: “The BIG Protest Rally in Washington, D.C., will take place at 11.00 A.M. on January 6th ... Stop-The-Steal!”<sup>538</sup> The Trump campaign reportedly helped fund the rally, though the full extent of its involvement is as yet unknown.<sup>539</sup> According to the Select Committee, Trump created an entity called the Save America PAC to collect funds that he and his allies raised through his election fraud claims.<sup>540</sup> The Select Committee found that Trump’s PAC gave more than \$5 million to a different entity, Event Strategies Inc, which ran Trump’s January 6 rally at location adjacent to the White House known as the Ellipse.

One of the rally organizers was Katrina Pierson, Trump’s former campaign spokesperson. Documents show that Pierson was in direct communication with Trump’s White House Chief of Staff Mark Meadows about the planning of the rally as well individuals and groups the rally organizers were reaching out to secure their appearance and share details.<sup>541</sup> The Select Committee obtained text messages between Pierson and other rally organizers.<sup>542</sup> In one set of messages

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<sup>536</sup> *Id.*

<sup>537</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Dec. 26, 2020, 8:14 a.m.), <https://www.thetrumparchive.com/>.

<sup>538</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Jan. 1, 2021, 2:53 p.m.), <https://www.thetrumparchive.com/>.

<sup>539</sup> Alex J. Rouhandeh, Trump Campaign Paid More Than \$4.3 Million to Jan. 6 Event Organizers, NEWSWEEK (Aug. 30, 2021), <https://www.newsweek.com/trump-campaign-paid-more-43-million-jan-6-event-organizers-1624359>.

<sup>540</sup> Second Jan. 6 Hearing Transcript, *supra* note 43.

<sup>541</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>542</sup> *Id.*

exchanged on December 30, 2020, one key rally organizer, Kylie Kremer, questioned why speakers like Alex Jones and Ali Alexander were being suggested as speakers on January 6.<sup>543</sup> Alex Jones, a far-right wing radio host and founder of the website Infowars, is known for circulating antigovernment conspiracies theories<sup>544</sup> and false information,<sup>545</sup> and Alexander is another far-right wing conspiracy theorist with an online presence and two prior felony convictions in 2007 and 2008.<sup>546</sup> Pierson responded to Kremer, “POTUS... likes the crazies.”<sup>547</sup>

Pierson explained further that Trump “loved people who viciously defended him in public,” such as Jones and Alexander. It is notable that Jones and Alexander had entered the Georgia State Capitol Building in November 2020 to protest the election. Pierson said that she contacted Meadows to raise “red flags” that “there were a bunch of entities coming in” and “[s]ome were very suspect.”<sup>548</sup> Pierson clarified:

I did briefly go over some of the concerns that I had raised to everybody with Alex Jones or Ali Alexander and some of the rhetoric that they were doing. I probably mentioned to him that they had already caused trouble at other capitols...And I just had a concern about it.<sup>549</sup>

The Select Committee obtained an email from Pierson to fellow rally organizers, sent on January 2, 2021—four days before the January 6 attack—in which Pierson explained “POTUS expectations are ... [to] call on everyone to march to the Capitol.”<sup>550</sup> This appears to be definitive evidence showing that the march to the Capitol was not spontaneous, but instead planned in advance and kept close hold possibly to maximize the disruptive effect it would have on the count of electoral votes at the joint session of Congress.

The Select Committee presented additional evidence appearing to corroborate a premeditated internal plan to direct the assembled crowd to the Capitol.<sup>551</sup> The evidence also shows that an intent to conceal their efforts so that there would be little or no warning that the amassed crowd was coming, again, the intent of which clearly appears to be to maximize the impact of the crowd’s arrival on the occupants of the Capitol Building.<sup>552</sup> Specifically, the Committee presented as evidence a January 4, 2021 text message from one of the “Stop the Steal” rally organizers Kylie Kremer to MyPillow CEO and Trump ally Mike Lindell.<sup>553</sup> The message said that Trump planned

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<sup>543</sup> *Id.*

<sup>544</sup> About Alex Jones, Southern Poverty Law Center (accessed July 11, 2023), <https://www.splcenter.org/fighting-hate/extremist-files/individual/alex-jones>.

<sup>545</sup> Alex Jones, POLITIFACT (accessed Oct. 18, 2022), <https://www.politifact.com/personalities/alex-jones/>.

<sup>546</sup> Ali Breland, Meet the Right-Wing Trolls Behind ‘Stop The Steal’, MOTHER JONES (Nov. 7, 2020), <https://www.motherjones.com/politics/2020/11/stop-the-steal/>.

<sup>547</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>548</sup> *Id.*

<sup>549</sup> *Id.*

<sup>550</sup> *Id.*

<sup>551</sup> *Id.*

<sup>552</sup> *Id.*

<sup>553</sup> *Id.*

to call for the crowd to go to the Capitol “unexpectedly” and said that “it can also not get out” that that was happening.<sup>554</sup>

White House Chief of Staff Mark Meadows’s aide, Cassidy Hutchinson, testified that Giuliani informed her on January 2 of plans for Trump himself to go to the Capitol on January 6. Hutchinson said:

[Giuliani] looked at me and said something to the effect of, ‘Cass, are you excited for the 6th? It’s going to be a great day.’ I remember looking at him saying, ‘Rudy, could you explain what’s happening on the 6th?’ He had responded something to the effect of, ‘[W]e’re going to the Capitol. ...It’s going to be great. The President’s going to be there. He’s going to look powerful.’<sup>555</sup>

Hutchinson also testified:

I remember hearing a few different ideas discussed with—between Mark [Meadows] and Scott Perry, Mark [Meadows] and Rudy Giuliani. I don’t know which conversations were elevated to the president...I know that there were discussions about him having another speech outside of the Capitol before going in.<sup>556</sup>

The Select Committee presented troubling evidence which arguably established direct connections between Trump and far-right extremist groups, including the Proud Boys and the Oath Keepers, in an apparent effort to marshal vigilante force to advance their election subversion scheme. According to Rep. Jamie Raskin:

The committee obtained hundreds of...messages, which show strategic and tactical planning about January the 6th, including maps of Washington, D.C. that pinpoint the location of police. In the weeks leading up to the attack, leaders in both the Proud Boys and the Oath Keepers worked with Trump allies.<sup>557</sup>

Hutchinson told the Select Committee in a recorded interview:

I recall hearing the word Oath Keeper and hearing the word Proud Boys closer to the planning of the January 6th rally when Mr. Giuliani would be around.<sup>558</sup>

Trump’s former National Security Advisor, Lt. Gen. Michael Flynn, and Trump’s former

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<sup>554</sup> *Id.*

<sup>555</sup> Sixth Jan. 6 Hearing Transcript, *supra* note 124.

<sup>556</sup> *Id.*

<sup>557</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>558</sup> Sixth Jan. 6 Hearing Transcript, *supra* note 124.

campaign advisor, Roger Stone—both long-time loyal allies of Donald Trump—appear to have been in direct communication with the Proud Boys and the Oath Keepers in the lead-up to the January 6 attack.<sup>559</sup>

Photographs obtained by the Select Committee, which were taken on December 12, 2020, show Flynn and Patrick Byrne “guarded by indicted Oath Keeper Roberto Minuta” with “Oath Keepers leader Stewart Rhodes” visible in another picture. As noted above, Flynn and Byrne, along with attorney Sidney Powell, had a lengthy strategy meeting with Trump at the White House just six days later, on December 18. It was immediately following that meeting that Trump sent out his first tweet calling supporters to a “Big protest in D.C. on January 6<sup>th</sup>.”<sup>560</sup>

The Select Committee also presented photographic evidence of Roger Stone being guarded by two Oath Keepers who “have since been criminally indicted for seditious conspiracy,” and one of whom “pleaded guilty and, according to the Department of Justice, admitted that the Oath Keepers were ready to use, quote, lethal force if necessary against anyone who tried to remove President Trump from the White House.”<sup>561</sup> Additionally, the Select Committee presented video of Stone taking the “so-called fraternity creed required for the first level of initiation to the [Proud Boys].” According to the Select Committee, “Stone communicated with both the Proud Boys and the Oath Keepers regularly” and there was even an “encrypted...group chat” called “Friends of Stone, FOS, which included Stone, [Oath Keepers leader Stewart] Rhodes, [Proud Boys leader Enrique Tarrio] and Ali Alexander.” Rhodes used this group chat to communicate with the others during the attack.<sup>562</sup> According to Rep. Zoe Lofgren, “Roger Stone’s connection with Enrique Tarrio and the Proud Boys is well documented by video evidence, with phone records the Select Committee has obtained.”<sup>563</sup>

Kellye SoRelle, an attorney identified by the Select Committee as the Oath Keepers’ General Counsel and a volunteer lawyer for the Trump campaign, described Stone as one of the individuals at “the center point for everything” when it came to the Stop the Steal rallies.<sup>564</sup>

Rep. Zoe Lofgren provided additional context with regard to Stone’s connections to the Oath Keepers and the Proud Boys during an October 13, 2022 Select Committee hearing. She said:

Joshua James, the leader of the Alabama Oath Keepers, provided security for Roger Stone and was with him on January 5th...James

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<sup>559</sup> Will Steakin, Matthew Mosk, James Gordon Meek & Ali Dukakis, Longtime Trump advisers connected to groups behind rally that led to Capitol attack, ABC NEWS (Jan. 15, 2021), <https://abcnews.go.com/US/longtime-trump-advisers-connected-groups-rally-led-capitol/story?id=75261028>.

<sup>560</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Dec. 19, 2020, 1:42 a.m.), <https://www.thetrumparchive.com/>.

<sup>561</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>562</sup> Rachel Weiner & Spencer S. Hsu, In middle of Jan. 6 riot, Oath Keepers chief reached out to Proud Boys, THE WASHINGTON POST (Oct. 22, 2022), <https://www.washingtonpost.com/dc-md-va/2022/10/22/oathkeepers-trial-rhodes/>.

<sup>563</sup> Ninth Jan. 6 Hearing Transcript, *supra* note 35.

<sup>564</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26; January 6th Committee, 07/12/2022 Select Committee Hearing, YOUTUBE (July 22, 2022), <https://www.youtube.com/watch?v=rrUa0hfG6Lo>.

entered the Capitol on January 6th. He assaulted a police officer....Earlier this year, he pled guilty to seditious conspiracy and—and obstruction of Congress. Another example, is the married couple, Kelly and Connie Meggs. Kelly Meggs was the leader of the Florida chapter of the Oath Keepers. Both he and his wife provided security for Roger Stone, and both are charged with leading a military style stack attack of Oath Keepers attacking the Capitol on January 6th. Perhaps even more disturbing is Roger Stone’s close association with Enrique Tarrio, the national chairman of the Proud Boys. Roger Stone’s connection with Enrique Tarrio and the Proud Boys is well documented by video evidence, with phone records the Select Committee has obtained.<sup>565</sup>

Stone, who according to his own statement, spoke with Trump during this time period leading up to January 6, made numerous comments captured on video and online which give insight into his thinking, mindset, intent, and perhaps, by extension, the advice that he was providing Trump. In a video obtained and presented as evidence by the Select Committee, labeled as recorded on November 2, 2020, Roger Stone said “I said, fuck the voting, let’s get right to the violence .... We’ll have to start smashing pumpkins if you know what I mean.”

Testimony obtained by the Select Committee appears to corroborate that Stone was advising Trump, or otherwise fulfilling some role for the Trump team, in the immediate lead-up to January 6. Trump’s allies set up a so-called “war room” or “command center” in “a set of rooms and suites in the ... Willard hotel a block from the White House.”<sup>566</sup> According to testimony from Cassidy Hutchinson, Trump asked Meadows to speak with Stone and Flynn on the evening of January 5. Here is Hutchinson’s public testimony in response to questions from Select Committee Vice Chair Cheney:

REP. CHENEY: ...Ms. Hutchinson, Is it your understanding that President Trump asked Mark Meadows to speak with Roger Stone and General Flynn on January 5th?

CASSIDY HUTCHINSON: That’s correct. That is my understanding.

REP. CHENEY: And Ms. Hutchinson, is it your understanding that Mr. Meadows called Mr. Stone on the 5th?

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<sup>565</sup> Ninth Jan. 6 Hearing Transcript, *supra* note 35.

<sup>566</sup> Jacqueline Alemany, Emma Brown, Tom Hamburger & Jon Swaine, Ahead of Jan. 6, Willard Hotel in Downtown DC was a Trump Team ‘Command Center’ for Effort To Deny Trump the Presidency, THE WASHINGTON POST (Oct. 23, 2021), [https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff\\_story.html](https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html).

CASSIDY HUTCHINSON: I'm under the impression that Mr. Meadows did complete both a call to Mr. Stone and General Flynn the evening of the 5th.

REP. CHENEY: And do you know what they talked about that evening, Ms. Hutchinson?

CASSIDY HUTCHINSON: I'm not sure.

Hutchinson also testified:

Mr. Meadows had a conversation with me where he wanted me to work with Secret Service on a movement from the White House to the Willard Hotel so he could attend the meeting or meetings with Mr. Giuliani and his associates in the war room. ...I had made it clear to Mr. Meadows that I didn't believe it was a smart idea for him to go to the Willard Hotel that night. I wasn't sure everything that was going on at the Willard Hotel, although I knew enough about what Mr. Giuliani and his associates were pushing during this period. I didn't think that it was something appropriate for the White House Chief of Staff to attend or to consider involvement in, and made that clear to Mr. Meadows. Throughout the afternoon, he mentioned a few more times going up to the Willard Hotel that evening, and then eventually dropped the subject the night of the 5th and said that he would dial in instead.<sup>567</sup>

A few days earlier, on the evening of January 2, 2021, according to Hutchinson's testimony, Meadows told her that "things might get real, real bad on January 6" after she inquired about the White House's plans for that day. On January 5, 2021, Steve Bannon demonstrated the same apparent foreknowledge as Meadows of what was to come. The Select Committee presented a video of Bannon as evidence in which he said:

All hell is going to break loose tomorrow. It's all converging and now we're on, as they say, the point of attack...I'll tell you this: It's not going to happen like you think it's going to happen...It's going to be quite extraordinarily different. And all I can say is strap in.<sup>568</sup>

According to the Select Committee, White House phone logs show that Trump "spoke to Steve Bannon...at least twice on January 5." It was after Bannon's first call with Trump, which

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<sup>567</sup> Sixth Jan. 6 Hearing Transcript, *supra* note 124.

<sup>568</sup> Ninth Jan. 6 Hearing Transcript, *supra* note 35.



according to the Select Committee lasted 11 minutes, that Bannon made his prediction about January 6 on his public podcast.<sup>569</sup>

These preparations were happening at the same time that administration officials had substantial information about the threat posed by the mob Trump called to assemble. Rep. Schiff said:

[The] FBI...received an intelligence summary that...noted online calls to occupy federal buildings, rhetoric about invading the Capitol building, and plans to arm themselves and to engage in political violence at the event...Deputy Secretary of Defense David Norquist had warned about the potential that the Capitol would be the target of the attack...[T]he Secret Service field office relayed a tip that...the Proud Boys plan[ned] to march armed into DC...The source went on to say their plan is to literally kill people...The source also made clear that the Proud Boys had detailed their plans on multiple websites like thedonald.win.<sup>570</sup>

Rep. Schiff also said:

Later on the evening of January 5th, the Secret Service learned during an FBI briefing that right-wing groups were establishing armed QRFs or quick reaction forces readying to deploy for January 6th. Groups like the Oath Keepers were standing by at the ready should POTUS request assistance by invoking the Insurrection Act....<sup>571</sup>

### **3. Failing to Take Action to Stop the Violence and Targeting Pence**

As the Select Committee has posited, the final component of Trump's apparent scheme to retain the presidency was "fail[ing] to take immediate action to stop the violence and instruct his supporters to leave the Capitol" when he learned "the violence was underway."<sup>572</sup> Going beyond potentially culpable inaction, Trump also targeted Vice President Pence in his now infamous 2:24 p.m. tweet.

While Trump spoke at the Ellipse, the initial wave of insurrectionists crossed police barriers around the Capitol. During a hearing, the Select Committee presented a video with a general timeline of the breach of the Capitol. As detailed in that video:

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<sup>569</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>570</sup> Ninth Jan. 6 Hearing Transcript, *supra* note 35.

<sup>571</sup> *Id.*

<sup>572</sup> Politico Staff, Read: Liz Cheney's opening statement at Jan. 6 select committee hearing, POLITICO (June 9, 2022), <https://www.politico.com/news/2022/06/09/liz-cheney-jan-6-committee-full-statement-00038730>.

[I]ndividuals associated with the Proud Boys...instigated the initial breach at the peace circle at 12:53 p.m....Within 10 minutes, rioters had already filled the Lower West Plaza. By 2:00, rioters had reached the doors on the west and the east plazas. And by 2:13 rioters had actually broken through the Senate wing door and got into the Capitol building. ...A series of breaches followed. At 2:25 pm, rioters breached the East Side doors to the rotunda. And then right after 2:40 pm, rioters breached the east side doors near the Ways and Means Room...Once the rioters infiltrated the Capitol, they moved to the crypt, the rotunda, the hallways leading to the House chambers, and even inside the Senate chambers.<sup>573</sup>

Despite the escalating situation outside the building, Speaker Pelosi had gavelled the joint session of Congress to order at 1:05 p.m.<sup>574</sup> Around 2:00 p.m., the Secret Service removed Pence to a secure location. Pelosi was also moved to a secure location around this time. House and Senate proceedings were stopped around 2:20 p.m.<sup>575</sup>

Rep. Elaine Luria described Trump's activities following his speech at the Ellipse based on the evidence and testimony collected by the Select Committee. She explained:

After the Secret Service refused to take President Trump to the Capitol, he returned to the White House...A White House employee informed the President as soon as he returned to the Oval about the riot at the Capitol. Let me repeat that. Within 15 minutes of leaving the stage, President Trump knew that the Capitol was besieged and under attack. At 1:25, President Trump went to the private dining room off the Oval Office. From 1:25 until 4:00, the President stayed in his dining room. The dining room is connected to the Oval Office by a short hallway. Witnesses told us that on January 6th President Trump sat in his usual spot at the head of the table facing a television hanging on the wall. We know from the employee that the TV was tuned to Fox News all afternoon. ... Other witnesses confirm that President Trump was in the dining room with the TV on for more than two and a half hours. There was no official record of what President Trump did while in the dining room.<sup>576</sup>

Rep. Luria also explained that based on "the Presidential call log from January 6<sup>th</sup>... there's no official record of President Trump receiving or placing any calls between 11:06 and 6:54 pm." She said:

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<sup>573</sup> First Jan. 6 Hearing Transcript, *supra* note 28.

<sup>574</sup> Kat Lonsdorf et al., A Timeline of How the Jan. 6 Attack Unfolded — Including Who Said What and When, NPR (Jan. 5, 2022), <https://tinyurl.com/y8v8ftjc>.

<sup>575</sup> *Id.*

<sup>576</sup> Eighth Jan. 6 Hearing Transcript, *supra* note 504.

As to what the President was doing that afternoon, the Presidential Daily Diary is also silent. It contains no information from the period between 1:21 pm. and 4:03 pm. There are also no photos of President Trump during this critical period between 1:21 in the Oval Office and when he went outside to the Rose Garden after 4:00. The chief White House photographer wanted to take pictures because it was in her words, very important for his archives and for history, but she was told quote, “no photographs.” Despite the lack of photos or an official record, we’ve learned what President Trump was doing while he was watching TV in the dining room.<sup>577</sup>

Trump was apparently watching from the White House and was aware that the Capitol had been breached.<sup>578</sup> Through the course of its investigation, the Select Committee collected evidence, statements, and testimony that appear to be very clear and consistent on one point: Trump did not take immediate appropriate action to respond to the violence, the breach of the Capitol building, and the peril faced by his vice president, members of Congress, executive branch and congressional staff, law enforcement, and the public on January 6. Nor did he take immediate and appropriate action to ensure that Congress and the vice president could execute their responsibilities under the Constitution and the law at the official proceeding of the joint session of Congress on that day.

The Select Committee’s investigation “confirmed in numerous interviews with senior law enforcement and military leaders, Vice President Pence’s staff and D.C. government officials, none of them ... heard from President Trump that day,” as explained by Rep. Luria.<sup>579</sup> She further explained the Committee found that Trump “did not call to issue orders” or “to offer assistance.”<sup>580</sup> However, according to Rep. Luria, on January 6, Trump “call[ed] Senators to encourage them to delay or object to the [election] certification.”<sup>581</sup> Referring to corroborating notes, Trump’s former White House Press Secretary Kayleigh McEnany testified in a deposition that Trump “wanted a list of the Senators” to apparently call.<sup>582</sup> Rep. Luria said that the Select Committee “do[es] not yet know precisely which Senators President Trump was calling” because his phone log is empty.<sup>583</sup> However, “from Rudy Giuliani’s phone records,” the Select Committee knows that Trump “called him at 1:39 after he had been told that the riot was underway at the Capitol,” and that “call lasted approximately four minutes.”<sup>584</sup>

According to Select Committee member Rep. Adam Kinzinger, later in the day, following the attack on the Capitol, “Giuliani called several of President Trump’s closest political allies in

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<sup>577</sup> Sixth Jan. 6 Hearing Transcript, *supra* note 124.

<sup>578</sup> Cong. Defs. Opp. to Pl. Eastman’s Privilege Assertions at 12 (“The evidence obtained by the Select Committee indicates that President Trump was aware that the violent crowd had breached security and was assaulting the Capitol when Mr. Trump tweeted.”).

<sup>579</sup> Eighth Jan. 6 Hearing Transcript, *supra* note 504.

<sup>580</sup> *Id.*

<sup>581</sup> *Id.*

<sup>582</sup> *Id.*

<sup>583</sup> *Id.*

<sup>584</sup> *Id.*

the hour before the joint session resumed: Representative Jim Jordan and Senators Marsha Blackburn, Tommy Tuberville, Bill Haggerty, Lindsey Graham, Josh Hawley, and Ted Cruz.” Giuliani left a voicemail for Senator Tuberville at 7:02 p.m. On it, Giuliani said:

Hello. Senator Tuberville? Or I should say Coach Tuberville. This is Rudy Giuliani, President's lawyer. I'm calling you because I want to discuss with you how they're trying to rush this hearing and how we need you, our Republican friends, to try to just slow it down so we can get these legislatures to get more information to you.<sup>585</sup>

The Select Committee presented recorded interviews and depositions from former White House Counsel Pat Cipollone, former National Security Advisor Keith Kellogg, and former assistant to President Trump, Nicholas Luna, all stating that they were not aware of any phone calls, or requests, from Trump to the secretary of defense, the attorney general, or the secretary of homeland security on January 6.<sup>586</sup> Kellogg confirmed that, by virtue of his position, he would have been aware of a request to the National Guard or for “troops present or called up for a rally in Washington, D.C.”<sup>587</sup>

Members of Trump’s staff were emphatic that there needed to be, at the very least, an immediate and forceful public statement. Judd Deere, the White House deputy press secretary on January 6, described his reaction when he saw the Capitol attack unfolding. Deere testified:

Well, I mean, it appears that individuals are storming the U.S. Capitol building. They also appear to be supporters of Donald Trump, who may have been in attendance at the rally. We're going to need to say something...If I recall, I told Kayleigh that I thought that we needed to encourage individuals to stop, to respect law enforcement, and to go home.<sup>588</sup>

The testimony and evidence indicate a consensus among senior individuals within the White House that Trump could and should make a statement to the crowd telling them to leave the Capitol and go home. In response to questioning from Reps. Cheney and Schiff during a recorded interview with the Select Committee, Cipollone listed off several staffers, including Kayleigh, McEnany, Pat Philbin, Eric Herschmann, Dan Scavino, Ivanka Trump, and General Kellogg who believed “more should be done or th[ought] that the President needed to tell people to go home.”<sup>589</sup> Former White House Deputy Press Secretary Sarah Matthews testified before the Select Committee. She said:

[I]t would take probably less than 60 seconds from the Oval Office dining room over to the press briefing room...And there's a camera

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<sup>585</sup> Eighth Jan. 6 Hearing Transcript, *supra* note 504.

<sup>586</sup> *Id.*

<sup>587</sup> *Id.*

<sup>588</sup> *Id.*

<sup>589</sup> *Id.*

that is on in there at all times. And so, if the president had wanted to make a statement and address the American people, he could have been on camera almost instantly. And conversely, the White House press corps has offices that are located directly behind the briefing room. And so, if he had wanted to make an address from the Oval Office, we could have assembled the White House press corps probably in a matter of minutes to get them into the Oval for him to do an on-camera address.<sup>590</sup>

In a recorded interview, without describing his specific conversations with Trump due to privilege concerns because of his role as White House counsel, Cipollone told the Select Committee, upon finding out people were “getting into the Capitol or approaching the Capitol,” he expressed a strong viewpoint within the White House. He said:

I think I was pretty clear. There needed to be an immediate and forceful response statement—public statement that people need to leave the Capitol now...I can generically say that I said, you know, people need to be told, there needs to be a public announcement fast that they need to leave the Capitol.<sup>591</sup>

According to Rep. Luria, “by 2:00 multiple staff members in the White House recognized that a serious situation was underway at the Capitol.” Matthews testified about her conversation with Meadows’s aide and former acting Director of Communications, Ben Williamson, around that time. Matthews said:

Ben and I were watching the coverage unfold from one of the offices in the West Wing. And we both recognized that the situation was escalating and it was escalating quickly, and that the president needed to be out there immediately to tell these people to go home and condemn the violence that we were seeing. So, I told him that I was going to make that recommendation to [White House Press Secretary] Kayleigh [McEnany], and he said he was going to make the same recommendation to the chief of staff, Mark Meadows.<sup>592</sup>

In a deposition, Williamson confirmed what he told Meadows, and he said that Meadows immediately headed toward the Oval Office. Williamson testified:

I believe I had sent him a text saying that we may want to put out some sort of statement because the situation was—was getting a little hairy over at the Capitol. And then it was common for after I

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<sup>590</sup> *Id.*

<sup>591</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Pasquale Anthony “Pat” Cipollone, (July 8, 2022), at 152.

<sup>592</sup> Eighth Jan. 6 Hearing Transcript, *supra* note 508.

would text him I would just go down and—and see him in person...I went down and told him the same thing I have in the text that I can recall. And I—I don't remember anything that was said between us other than I told him that and to my recollection he immediately got up and—and left his office.<sup>593</sup>

Williamson testified that he followed Meadows “down the hallway... into the outer Oval corridor, which is the hallway between the Oval Office hallway and the outer Oval section of the Oval Office,” near where the Oval Office dining room is located.

Around the same timeframe, “likely around between 2:15 [to] 2:25,” Hutchinson testified that she “heard conversations in the Oval Dining Room ... talking about the hang Mike Pence chants.”<sup>594</sup> Hutchinson testified:

So, I probably was two feet from Mark [Meadows]. He was standing in the doorway going into the Oval Office dining room...I heard briefly, like, what they were talking about, but in the background I had heard conversations in the Oval Dining Room with the—at that point talking about the hang Mike Pence chants.<sup>595</sup>

In a recorded interview, Hutchinson said she overheard a conversation between Meadows and Cipollone, with White House attorney Herschmann likely also present. Hutchinson said:

I remember Pat saying something to the effect of, ‘Mark, we need to do something more. They’re literally calling for the vice president to be f’ing hung.’ And Mark had responded something to the effect of, ‘[Y]ou heard him, Pat. **He thinks Mike deserves it.** He doesn’t think they’re doing anything wrong,’ to which Pat said something, ‘[T]his is f’ing crazy, we need to be doing something more.’<sup>596</sup> (emphasis added)

In apparent disregard for the safety of his vice president and his own duty to “preserve, protect, and defend the Constitution of the United States,” at 2:24 p.m., Trump sent out a tweet lashing out at Pence for his refusal to implement the scheme that Trump and other members of his inner circle had pushed for months. Trump’s tweet said:

Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or

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<sup>593</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

<sup>594</sup> Sixth Jan. 6 Hearing Transcript, *supra* note 124.

<sup>595</sup> *Id.*

<sup>596</sup> *Id.*

inaccurate ones which they were asked to previously certify. USA demands the truth!<sup>597</sup>

As Rep. Aguilar explained, the Select Committee “investigation found that immediately after the President’s 2:24 p.m. tweet, the crowds both outside the Capitol and inside the Capitol surged. The crowds inside the Capitol were able to overwhelm the law enforcement presence, and the Vice President was quickly evacuated from his ceremonial Senate office to a secure location within the Capitol complex.”<sup>598</sup>

Several of the individuals who the Select Committee interviewed helped place Trump’s 2:24 p.m. tweet in context to what was happening contemporaneously. Former Deputy National Security Advisor Matthew Pottinger, who resigned in response to Trump’s tweet, testified that, with the “chaos that was unfolding at the Capitol” seeing that the “President was attacking Vice President Pence for doing his constitutional duty” was “the opposite of what — what we really needed at that moment, which was a de-escalation.” Pottinger’s assessment was that “it looked like fuel being poured on the fire.”<sup>599</sup>

Deputy Press Secretary Matthews was of the same opinion as Pottinger. She testified:

So, it was obvious that the situation at the Capitol was violent and escalating quickly. And so I thought that the tweet about the Vice President was the last thing that was needed in that moment. And **I—I remember thinking that this was going to be bad for him to tweet this because it was essentially him giving the green light to these people, telling them that what they were doing at the steps of the Capitol and entering the Capitol was Ok, that they were justified in their anger.** And he shouldn’t have been doing that. He should have been telling these people to go home and to leave and to condemn the violence that we were seeing...And I’ve seen the impact that his words have on his supporters...they truly latch on to every word and every tweet that he says. **And so I think that in that moment for him to tweet out the message about Mike Pence, it was him pouring gasoline on the fire and making it much worse.**<sup>600</sup> (emphasis added)

White House staff interviewed by, or testifying before, the Select Committee appear consistent in their view of Trump’s tweet. Cipollone told the Select Committee:

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<sup>597</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 2:24 p.m.), <https://www.thetrumparchive.com/>.

<sup>598</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

<sup>599</sup> Eighth Jan. 6 Hearing Transcript, *supra* note 504.

<sup>600</sup> *Id.*

I don't remember when exactly I heard about that tweet, but my reaction to it is that's a—terrible tweet. And I disagreed with the sentiment and I thought it was wrong.<sup>601</sup>

Regarding the tweet, former Deputy Press Secretary Judd Deere, likewise, testified:

It...wasn't the message that we needed at—at that time...[T]he scenes at the US Capitol were only getting worse at that point. This was not going to help that.<sup>602</sup>

As explained by Rep Luria, at 2:24 p.m.—the time of Trump's tweet directed at Pence—White House security personnel documented that “the Secret Service agents at the Capitol did not ‘sound good right now.’”<sup>603</sup> A “White House Security Official,” whose identity was protected by the Select Committee, provided context.<sup>604</sup> That individual explained:

[M]embers of the VP detail at this time were starting to fear for their own lives. There were a lot of—there was a lot of yelling, a lot of—a lot of very personal calls over the radio, so it was disturbing...[T]here were calls to say goodbye to family members.... [F]or whatever the reason was on the ground, the VP detail thought that this was about to get very ugly. ... They were running out of options and they were getting nervous. It—it sounds like we're—that we came very close to either service having to use lethal options or—or worse. Like, at—at that point I don't know. Is the VP compromised? Is the detail comp—like, I—I don't know. Like, we didn't have visibility, but it doesn't—if they're screaming and—and saying things like say goodbye to the family, like, the floor needs to know this is going to on a whole nother[Ph] [sic] level soon.<sup>605</sup>

Influential Republicans, including Donald Trump, Jr., texted Chief of Staff Meadows calling for Trump to intervene to stop the invasion.<sup>606</sup> Matthews testified:

After the tweet about the vice president, I found Kayleigh and told her that I thought the president needed to immediately send out a tweet that condemned the violence that we were seeing, and that there needed to be a call to action to tell these people to leave the Capitol. And she agreed and walked over to the Oval Dining Room

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<sup>601</sup> *Id.*

<sup>602</sup> *Id.*

<sup>603</sup> *Id.*

<sup>604</sup> *Id.*

<sup>605</sup> *Id.*

<sup>606</sup> See Dareh Gregorian & Dartunorro Clark, Jan. 6 Committee Recommends Mark Meadows Face Contempt Charge, MSNBC (Dec. 13, 2021), <https://tinyurl.com/3ahcryb5>.



to find the president...When she got back, she told me that a tweet had been sent out.

At 2:38 p.m., Trump tweeted: “Please support our Capitol Police and Law Enforcement. They are truly on the side of our Country. Stay peaceful!” Matthews told the Select Committee that McEnany relayed to her that it was difficult to get Trump to even send that tweet. Matthews testified:

I told her that I thought the tweet did not go far enough, that I thought there needed to be a call to action and he needed to condemn the violence...**And so, she looked directly at me and, in a hushed tone, shared with me that the president did not want to include any sort of mention of peace in that tweet** ...it wasn't until Ivanka Trump suggested the phrase stay peaceful that he finally agreed to include it.<sup>607</sup> (emphasis added)

At 3:36 p.m., White House Press Secretary Kayleigh McEnany tweeted that Trump had called up the National Guard.<sup>608</sup> The testimony and evidence collected by the Select Committee, however, does not support that. As discussed above, Trump did not engage the military or law enforcement to respond to the violence. This is in stark contrast to his persistent efforts over the preceding weeks to engage the Department of Justice to bolster his claims of election fraud, and his discussion of engaging the Department of Defense and the military to seize voting machines. Vice Chair Cheney explained that the Select Committee found that Trump “made no effort to work with the Department of Justice to coordinate ... and deploy law enforcement assets. But Vice President Pence did each of those things.” In a recorded deposition, Chairman of the Joint Chiefs of Staff General Mark Milley testified:

There were two—two or three calls with Vice President Pence. He was very animated and he issued very explicit, very direct, unambiguous orders. There was no question about that. ... [H]e was very animated, very direct, very firm. And to Secretary Miller, get the military down here. Get the Guard down here, put down this situation, etc.<sup>609</sup>

Gen. Milley testified that he also spoke to Meadows on January 6. According to Gen. Milley, Meadows seemed to be focused on the “narrative” of what was going on, rather than stopping the attack. Gen. Milley testified:

[Meadows] said we have—we have to kill the narrative that the Vice President is making all the decisions. We need to establish the narrative that, you know, that the President is still in charge and that things are steady or stable or words to that effect. I immediately

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<sup>607</sup> Eighth Jan. 6 Hearing Transcript, *supra* note 504.

<sup>608</sup> Lonsdorf et al., *supra* note 574.

<sup>609</sup> First Jan. 6 Hearing Transcript, *supra* note 28.

interpret that as politics, politics, politics. Red flag for me personally, no action. But I remember it distinctly.”<sup>610</sup>

Referring to Trump in a recorded interview, Gen. Kellogg said: “[T]here’s a constitutional duty ... he’s the Commander in Chief. And...that was my biggest issue with him as National Security Advisor.”<sup>611</sup>

At 4:17 p.m., 187 minutes after the invasion began, Trump finally tweeted a video directed to his supporters: “I know your pain. I know you’re hurt,” he said. “We love you. You’re very special. You’ve seen what happens. You see the way others are treated...I know how you feel. But go home and go home in peace.”<sup>612</sup> At 6:01 p.m., he posted a tweet that read: “These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long.”<sup>613</sup> It had taken Trump over three hours to tell the rioters to stop.

Trump’s staff prepared a script for this message, which was obtained by the Select Committee. According to Rep. Luria, the script said: “I’m asking you to leave the Capitol region NOW and go home in a peaceful way.”<sup>614</sup> Nicholas Luna testified that Trump decided not to use the script and instead spoke “off the cuff.”<sup>615</sup> Trump did not ask the insurrectionists to leave the Capitol area right away.<sup>616</sup> Instead, he continued to push the narrative of a stolen election before telling them to “go home.”<sup>617</sup>

Ayres testified about Trump’s 4:17 p.m. tweet. He said: “[A]s soon as that come out, everybody started talking about it. And that’s—it seemed like it started to disperse.”<sup>618</sup> According to Ayres testimony, and other accounts examined by the Select Committee, the mob began to leave the Capitol almost as soon as Trump called for them to do so.

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<sup>610</sup> *Id.*

<sup>611</sup> Eighth Jan. 6 Hearing Transcript, *supra* note 504.

<sup>612</sup> *Id.*

<sup>601</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 6:01 p.m.).

<sup>614</sup> *Id.*

<sup>615</sup> *Id.*

<sup>616</sup> *Id.*

<sup>617</sup> *Id.*

<sup>618</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

## II. POTENTIAL CRIMES

In this Section, we assess the potential charges that may be brought against Trump and others for the three stages of possible criminal activity related to January 6.

In subpart A, we analyze the alleged crimes associated with the apparent conspiracy to submit false electoral slates to Congress under 18 U.S.C. §§ 371 and 1001.

In subpart B, we examine the application of 18 U.S.C. § 1512 to Trump and others pressing Pence either to use the false electoral certificates or to delay the electoral count on January 6.

In subpart C, we do a deep dive into the possible charge associated with Trump's response when Pence refused to comply: inciting an insurrection and giving aid or comfort to his supporters as they stormed the Capitol under 18 U.S.C. § 2383.

### A. 18 U.S.C. §§ 371 and 1001: The Conspiracy to Submit Fabricated Electoral Slates to Congress

The record of publicly disclosed facts shows that former President Donald Trump and members of his circle—including, at a minimum, Chief of Staff Mark Meadows and outside attorneys Ken Chesebro, John Eastman, and Rudy Giuliani—appear to have attempted to interfere with Congress' electoral count on January 6, 2021. Among other things, they allegedly coordinated to create, submit to Congress, and have Vice President Mike Pence recognize false electoral certificates from seven states, attempting to deny Joe Biden the electoral college majority that he legitimately won in a fair and secure election.

There is substantial evidence supporting the conclusion that those schemes amount to one or more violations of 18 U.S.C. § 371. Section 371 creates an offense “[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy.”<sup>619</sup>

The statute has two prongs. The first, the “offense prong,” prohibits conspiracies to commit acts that are otherwise defined as criminal under federal law. The second, the “defraud prong,” prohibits conspiracies to obstruct a lawful function of the government by deceitful means.<sup>620</sup> The Select Committee made criminal referrals under each prong.

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<sup>619</sup> See Project, Tenth Annual Survey of White Collar Crime, 32 AM. CRIM. L. REV. 137, 379-406 (1995) (generally discussing § 371). Note that many of the individuals described in this section concerning § 371 could also be appropriately considered for investigation, and possibly prosecution, for a conspiracy charge under § 1512(k). The threshold question for prosecutors will be whether those individuals were sufficiently aware that the false electoral certificates were to be submitted to Congress, and that they could interfere with Pence's official duties. As discussed in Section I.A.4., Eastman, Giuliani, and Chesebro have denied wrongdoing.

<sup>620</sup> See generally Gretchen C. F. Shappert & Christopher J. Costantini, Klein Conspiracy: Conspiracy to Defraud the United States, UNITED STATES ATTORNEYS' BULLETIN 1 (July 2013) (describing the two prongs of § 371).

**In an offense prong prosecution**, the Government must prove three elements<sup>621</sup> beyond a reasonable doubt:

A conspirator must...

- (1) enter into an agreement with one or more others;
- (2) to commit an offense against the United States; and
- (3) make at least one overt act in furtherance of the conspiracy.

**In a defraud prong prosecution**, the Government must prove four similar elements<sup>622</sup> beyond a reasonable doubt:

A conspirator must...

- (1) enter into an agreement with one or more others;
- (2) with specific intent to obstruct a lawful function of the government;
- (3) by deceitful or dishonest means; and
- (4) make at least one overt act in furtherance of the conspiracy.

The following well-established principles are relevant to interpreting these requirements and the statute's reach:

*The conspiracy need not succeed.* Once the conspiracy is properly formed and the overt act occurs, "it is not necessary that the object of the conspiracy be achieved."<sup>623</sup> To prevail, the Government need not prove that it was actually injured, influenced, or deceived by the conspirators' dishonesty.<sup>624</sup>

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<sup>621</sup> See, e.g., *United States v. Ingles*, 445 F.3d 830, 838 (5th Cir. 2006) ("To prove conspiracy to commit wire fraud under 18 U.S.C. § 371, the government must show '(1) an agreement between appellant[ ] and others (2) to commit the crime of [wire fraud], and (3) an overt act committed by one of the conspirators in furtherance of that agreement.'" (quoting *United States v. Garza*, 429 F.3d 165, 168 (5th Cir. 2005))).

<sup>622</sup> See, e.g., *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924); *United States v. Boone*, 951 F.2d 1526, 1543 (9th Cir. 1991); *United States v. Meredith*, 685 F.3d 814, 822 (9th Cir. 2012) (citation omitted); *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996) ("Moreover, so long as deceitful or dishonest means are employed to obstruct governmental functions, the impairment need not involve the violation of a separate statute.... We thus agree with the Ninth Circuit's summary of the four elements of a section 371 conspiracy-to-defraud offense: "[T]he government need only show (1) [that defendant] entered into an agreement (2) to obstruct a lawful function of the government (3) by deceitful or dishonest means and (4) at least one overt act in furtherance of the conspiracy." (internal quotation marks omitted)).

<sup>623</sup> *United States v. Thompson*, 275 F. Supp. 3d 107, 111 (D.D.C. 2017).

<sup>624</sup> See, e.g., *United States v. Dean*, 55 F.3d 640, 647 (D.C. Cir. 1995) ("[N]o other form of injury to the Federal Government need be established for the conspiracy to fall under § 371."); *United States v. Smith*, 891 F.2d 703, 713

*The actual misconduct engaged in need not directly impact the federal government.* The prosecution need not prove that a § 371 defendant directly lied to the federal government, or directly contacted the federal government at all—as, by the “making of misrepresentations” to federal officials or the “submitting of false information” to a federal agency.<sup>625</sup> A defendant may, for instance, use a third party to reach and defraud the Government,<sup>626</sup> and may be convicted even though “he did not contact agency personnel or submit documents to the agency.”<sup>627</sup>

*“Neither the conspiracy’s goal nor the means used to achieve it need to be independently illegal.”*<sup>628</sup> Notably, if a conviction for defrauding the government required independent illegality, there would be significant redundancy between § 371’s two prongs.<sup>629</sup>

*The criminal prohibition goes beyond pecuniary loss to protect the integrity and continuity of U.S. government functions.*<sup>630</sup> To violate the defraud clause, conspirators need not aim to deprive the government of property or money.<sup>631</sup> While § 371’s predecessor statute had its origin in an

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(9th Cir. 1989), amended, 906 F.2d 385 (9th Cir. 1990) (citing *Kay v. United States*, 303 U.S. 1, 6 (1938) (“It is not necessary to prove that the deceived agency was actually influenced. The one who is seeking to deceive by means of a false statement may not claim that his statements were not influential or the information not important.”)).

<sup>625</sup> *Ballistrea*, 101 F.3d at 832.

<sup>626</sup> *Tanner v. United States*, 483 U.S. 107, 129 (1987).

<sup>627</sup> *Ballistrea*, 101 F.3d at 829. Thus, for instance, a defendant was convicted under § 371 for conspiring to structure bank transactions to fall below the \$10,000 reporting threshold, even though they did not make any misrepresentations directly to the IRS. *United States v. Nersesian*, 824 F.2d 1294, 1309-16 (2d Cir. 1987). Another was convicted for selling phony invoices that a third party cited in its tax returns, on the theory that the false information obstructed the IRS – even though the defendant never directly gave false information to the IRS. *United States v. Gurary*, 860 F.2d 521, 525 (2d Cir.1988).

<sup>628</sup> *United States v. Caldwell*, 989 F.2d 1056, 1059 (9th Cir. 1993) (citing *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989)); *And see, e.g.*, *United States v. North*, 708 F. Supp. 375, 379 (D.D.C. 1988) (“These orders form part of the framework of laws and regulations which North is alleged to have conspired to circumvent and impair. That they themselves do not carry criminal penalties is of no consequence. These are counts alleging conspiracy to defraud the United States and defeat its lawful governmental functions.”); *See generally* Madeleine Cane, Sephora Grey & Katherine Hirtle, *Federal Criminal Conspiracy*, 58 AM. CRIM. L. REV. 925, 932 (2021) (“The fraud must be aimed at the United States, but the conspiracy’s acts are not required to otherwise be illegal.”).

<sup>629</sup> Section 371 is not inapplicable merely because Congress has adopted other statutes that touch on illegal conduct covered by the conspiracy. *See, e.g.*, *United States v. Minarik*, 875 F.2d 1186, 1195–96 (6th Cir. 1989) (“We do nothing to disturb the well-settled principle that modern criminal statutes defining new offenses do not necessarily erode or displace § 371 conspiracy liability in general... And of course numerous cases have recognized that more detailed statutes criminalizing substantive acts, enacted after § 371, do not impliedly repeal or preempt the prohibition on conspiracy to commit those acts contained in § 371.”).

<sup>630</sup> *Dennis v. United States*, 384 U.S. 855, 861 (1966) (“It has long been established that this statutory language is not confined to fraud as that term has been defined in the common law. It reaches any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.”) (internal quotation marks omitted); *And see, e.g.*, *United States v. Burgin*, 621 F.2d 1352, 1356 (5th Cir. 1980) (“It is now clear that the term ‘defraud’ as used in § 371 not only reaches financial or property loss through employment of a deceptive scheme, but also is designed and intended to protect the integrity of the United States and its agencies, programs and policies.”).

<sup>631</sup> *Haas v. Henkel*, 216 U.S. 462, 479 (1910); *And see, e.g.*, *United States v. Conover*, 772 F.2d 765 (11th Cir. 1985), *aff’d in part, sub. nom. Tanner v. United States*, 483 U.S. 107, 128 (1987) (“Therefore, if petitioners’ actions constituted a conspiracy to impair the functioning of the REA, no other form of injury to the Federal Government need be established for the conspiracy to fall under § 371.”).

1867 law initially intended at least in part to combat tax fraud, the courts have long held that § 371, by its plain meaning, extends to “any fraud” against the federal government.<sup>632</sup> And for more than 100 years, courts have been clear that “fraud,” in the § 371 context, is not limited to its common-law sense.<sup>633</sup> In 1924, the Supreme Court put it definitively in *Hammerschmidt v. United States*: “To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.”<sup>634</sup>

We analyze the conduct of Trump under both prongs in subsections 1 and 2 respectively. In subsection 3, we turn to discussing the potential defendants and witnesses in a prosecution under either prong.

### 1. The “Offense Prong”: Conspiracy to Make a False Statement

The Select Committee Report referred “Trump and others” for possible prosecution for Conspiracy to Make a False Statement under 18 U.S.C. §§ 371 and 1001.<sup>635</sup> As previously explained, a conviction under the offense prong of § 371 does not require the crime that is the object of the conspiracy to have been committed.<sup>636</sup> In addition to being prosecuted for the substantive offense of Conspiracy, a person charged under § 371 may also be prosecuted “for any completed offense which is the object of the conspiracy,” as well as for any offenses that are “foreseeable ... in furtherance of the conspiracy.”<sup>637</sup> Here, there is substantial evidence indicating

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Nevertheless: Even if it were necessary to allege some loss of property under § 371, that requirement would be satisfied by a scheme to secure the emoluments of office for a candidate whom the people did not elect. *See United States v. Aczel*, 219 F. 917, 938 (D. Ind. 1915) (“It is perfectly plain that a conspiracy which is calculated to obstruct and impair, corrupt, and debauch an election where Senators and Representatives in Congress are to be elected, would be to defraud the United States by depriving the government itself of its lawful right to have such Senators and Representatives elected fairly and in accordance with the law. But if the averment of a property loss to the government were essential, this count of the indictment alleges that one of the objects of the conspiracy was to secure for a person not duly elected a member of the House of Representatives, the annual salary of \$7,500 provided as compensation for a duly elected member of such House.”).

<sup>632</sup> *United States v. Hirsch*, 100 U.S. 33, 35 (1879); *See generally* Lance Cole & Ross Nabatoff, *Prosecutorial Misuse of the Federal Conspiracy Statute in Election Law Cases*, 18 *YALE L. & POL’Y REV.* 225, 230 (2000) (giving condensed history of § 371’s application).

<sup>633</sup> *See, e.g., Hyde v. Shine*, 199 U.S. 62, 82 (1905) (explaining that the law punishes not the wrongful taking of land but instead “the false practices by which the lands were obtained”); *See generally* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 *YALE L.J.* 405, 422 (1959) (providing a definitive overview of § 371’s early application by the courts).

<sup>634</sup> *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

<sup>635</sup> Select Comm. Report at 107–09.

<sup>636</sup> Trump on Trial at 43.

<sup>637</sup> Federal Conspiracy Law: A Brief Overview at 14, Congressional Research Service (Apr. 3, 2020) (citing *Callahan v. United States*, 364 U.S. 587, 594–94 (1961) (a defendant may be charged, prosecuted, and sentenced for both conspiracy and the underlying substantive offense); *Iannelli v. United States*, 420 U.S. 770, 777–78 (1975) (“Thus, it is well recognized that in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end.”); *United States v. George*, 886 F.3d 31, 41 (1st Cir. 2018); *Pinkerton v. United States*, 328 U.S. 640, 646–47 (1946); *Smith v. United States*, 568 U.S. 106, 111 (2013); *United States v. Mathis*, 932 F.3d 242, 262 (4th Cir. 2019); *United States v. Baker*, 923 F.3d 390, 406 (5th Cir. 2019)).

that Trump and others meet DOJ standards for prosecution of 18 U.S.C. § 1001 as an object of a conspiracy.

Section 1001 broadly criminalizes a large array of false statements. The statute reads:

Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry ....<sup>638</sup>

It also includes a caveat for matters “within the jurisdiction of the legislative branch”:

With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.<sup>639</sup>

The facts suggest that, at a minimum, Trump and the others can be prosecuted under DOJ standards for Conspiracy under 18 U.S.C. § 371 and Making a False Statement under 18 U.S.C. § 1001 for their role in conspiring to submit false slates of electors to Congress, and potentially also under § 1001 as a standalone offense. They may be potentially liable both for the false slates of electors actually submitted to Congress, as well as foreseeable false statements within the ambit of the statute made along the way. This section begins with the historical background of 18 U.S.C. § 1001. Next, this section outlines the elements of an offense under § 1001, with an explanation of how those elements apply to the facts we know about Trump and his collaborators.

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<sup>638</sup> 18 U.S.C. § 1001(a).

<sup>639</sup> 18 U.S.C. § 1001(c).

### **a. Conspiracy**

“The essence” of a conspiracy “is an agreement to commit an unlawful act.”<sup>640</sup> To be convicted, a defendant must know “the scheme’s criminal purpose and specifically intend[] to further that objective.”<sup>641</sup> The defendant need only know “the essential nature of the plan”—the core wrong to be committed—not every detail.<sup>642</sup> And agreement “need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case.”<sup>643</sup> Tacit agreement, inferred from “concert of action” in furtherance of shared objectives, can be enough.<sup>644</sup>

Here, as we explain below, we believe there is substantial evidence that Trump, Eastman, Chesebro, Giuliani, and Meadows all entered an agreement to submit fabricated slates of electors to Congress. As we detail, that likely meets DOJ standards to merit charges for this group of defendants.

### **b. Offense Against the United States**

Although there are perhaps other offenses that could be considered as predicates to satisfy this element of the statute,<sup>645</sup> here, we analyze the offense specifically referred by the Select Committee—and the one we believe most appropriate for the facts of this case—Making a False Statement in violation of 18 U.S.C. § 1001.

#### **i. Background on 18 U.S.C. § 1001**

Like the criminal insurrection statute described below in Section II.C, 18 U.S.C. § 1001 also has its roots in the Civil War. Now codified in the False Statements Accountability Act of 1996,<sup>646</sup> the original version of the statute was passed in 1863.<sup>647</sup> Originally codified as “An Act to prevent and punish Frauds upon the Government of the United States,” that statute was passed

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<sup>640</sup> Iannelli, 420 U.S. at 777; *And see* United States v. U.S. Gypsum Co., 438 U.S. 422, 443 n.20 (1978) (“In a conspiracy, two different types of intent are generally required – the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy.”). The agreement, per § 371, must be between two or more persons. On its face, the statute extends to all “persons” — including federal elected officers. Neither the plain text nor the history of § 371 suggest any reason why a federal government official—even the head of the executive branch—could not be a “person” convicted of conspiracy to defraud the federal government. In *United States v. Johnson*, for instance, the Court seemed to take it for granted that the government could legitimately prosecute a Congressman who took a bribe in exchange for influencing the DOJ to drop charges. 383 U.S. 169, 172 (1966).

<sup>641</sup> Cane, Grey & Hirtle, *supra* note 628; *And see, e.g.*, United States v. John-Baptiste, 747 F.3d 186, 204–05 (3d Cir. 2014) (“The government must prove beyond a reasonable doubt (1) a shared unity of purpose; (2) an intent to achieve a common illegal goal; and (3) an agreement to work toward that goal.”).

<sup>642</sup> *See, e.g.*, United States v. Salameh, 152 F.3d 88 (2d Cir. 1998).

<sup>643</sup> Iannelli v. United States, 420 U.S. 770, 777 n.10 (1975); *And see, e.g.*, United States v. Fullmer, 584 F.3d 132, 160 (3d Cir. 2009); United States v. McKee, 506 F.3d 225, 238 (3d Cir. 2007).

<sup>644</sup> United States v. Mann, 161 F.3d 840, 847 (5th Cir. 1998).

<sup>645</sup> For example, some commentators have suggested that the so-called “Big Rip Off” apparently committed by the Trump Campaign might constitute mail and wire fraud. *See, e.g.*, Elie Mystal, Trump’s ‘Big Lie’ Was Also a Big Grift, THE NATION (June 16, 2022), <https://www.thenation.com/article/politics/trump-mail-fraud/>.

<sup>646</sup> Pub. L. No. 104-292, § 1001, 110 Stat. 3459 (1996).

<sup>647</sup> Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863).



“in the wake of a spate of frauds upon the Government.”<sup>648</sup> The statute made it a criminal offense for:

any person in the land or naval forces of the United States ... [to] make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent  
....<sup>649</sup>

This provision of the statute covered “the presentation of false claims against any component of the Government to any officer of the Government.”<sup>650</sup> Although the prohibitions in the statute were “broad,” “its application was limited to military personnel.”<sup>651</sup>

Between 1863 and 1934, “the coverage of the statute was at various times extended.”<sup>652</sup> Perhaps the most significant revision occurred in 1934,<sup>653</sup> when Congress broadened the statute “so as to reach not only false papers presented in connection with a claim against the Government, but also nonmonetary frauds.”<sup>654</sup> That revision clarified that “there was no restriction to cases involving pecuniary or property loss to the government.”<sup>655</sup>

Following 1934, “only slight changes” were made to the False Statements Act.<sup>656</sup> In 1948, “the false claims and false statements provisions” were separated.<sup>657</sup> And in 1996, the statute was revised nearly to its current form, adding an exception to statements made in the course of judicial proceedings.<sup>658</sup> The 1996 revision also explicitly made materiality an element of a prosecution for making a false statement,<sup>659</sup> which had been a matter of dispute among the Courts of Appeals at the time—some Courts of Appeals required a finding of materiality, while others did not.<sup>660</sup> The

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<sup>648</sup> *United States v. Bramblett*, 348 U.S. 503, 504–505 (1955), overruled by *Hubbard v. United States*, 514 U.S. 695 (1995).

<sup>649</sup> Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863).

<sup>650</sup> *Bramblett*, 348 U.S. at 505.

<sup>651</sup> *Id.*

<sup>652</sup> *Id.* at 506.

<sup>653</sup> 48 Stat. 996.

<sup>654</sup> *United States v. Bramblett*, 348 U.S. 503, 507 (1955).

<sup>655</sup> *United States v. Gilliland*, 312 U.S. 86, 93 (1941).

<sup>656</sup> Michael Gomez, Re-Examining the False Statements Accountability Act, 37 HOUS. L. REV. 515, 520 (2000).

<sup>657</sup> *Id.* (citing Act of June 25, 1948, ch. 645, § 285, Pub. L. No. 772, 62 Stat. 698 (1949) (delineating that whoever takes or uses papers relating to a claim against the United States subjects himself to a fine or imprisonment); § 1001, 62 Stat. 749 (noting that whoever makes fraudulent statements to an agency or United States department subjects herself to penalties)).

<sup>658</sup> False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459.

<sup>659</sup> *Id.*

<sup>660</sup> The 1948 version of the statute did not reference materiality with respect to false statements; materiality was only referenced in the clause of the statute concerning tricks, schemes, or devices: “Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up

only subsequent revisions enhanced the penalties of the statute for violations relating to offenses involving terrorism<sup>661</sup> and sex offenses.<sup>662</sup>

## **ii. Elements of 18 U.S.C. § 1001**

The Fifth and Sixth Amendments to the United States Constitution “require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged..., beyond a reasonable doubt.”<sup>663</sup> It is therefore necessary to detail the elements of any offense that might be charged—though it is also worth knowing that to prove conspiracy to commit the offense, it is not necessary to prove a completed offense and therefore to prove every element. At issue for any potential future prosecution of Trump or his close associates related to the events of January 6 within 18 U.S.C. § 1001 are subsections (a)(2) and (a)(3). Those subsections have elements that nearly entirely overlap, with the sole difference relating to whether the prosecution is for a statement that was made, or for having made or used a document containing a false statement.<sup>664</sup> Those elements (with alternatives for the subsections stated in brackets) are as follows:

- (1) the Defendant [made the statement] [made or used the document], as charged;
- (2) the [statement] [document] was false;
- (3) the falsity concerned a material matter;
- (4) the Defendant acted willfully, knowing that the [statement] [document] was false; and
- (5) the [false statement] [false document] was made or used for a matter within the jurisdiction of a department or agency of the United States.<sup>665</sup>

A sixth element also applies here where the false statements or documents were submitted to the legislative branch: that the statements or documents concerned “administrative matters, including a claim for payment, a matter related to the procurement of property or services,

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by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.” Act of June 25, 1948, ch. 645, § 285, 62 Stat. 698 (1949). The lack of explicit reference to materiality as to false statements in the 1948 version led some courts to find it was not required. *E.g.*, *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984). Others, however, “inferred” that it was appropriate to read such a requirement into the statute. *E.g.*, *United States v. Corsino*, 812 F.2d 26, 30 (1st Cir. 1987).

<sup>661</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

<sup>662</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

<sup>663</sup> *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

<sup>664</sup> See 11th Cir. Form Criminal Pattern Jury Instructions § O36 (Mar. 2022), <https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsRevisedMAR2022.pdf>.

<sup>665</sup> *Id.*

personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch.”<sup>666</sup>

Individuals in seven states that Biden won submitted documents purporting to contain slates of presidential electors to Congress and to the National Archives in favor of a Trump presidency.<sup>667</sup> A staggering number of people were involved in that effort, including Trump, members of his various legal teams, state and national Republican Party officials, and individuals who falsely represented themselves to be electors. As explained below, the submission of at least five of the slates of electors both to Congress and to the National Archives likely violated 18 U.S.C. § 1001. Moreover, each can be prosecuted as a separate offense.<sup>668</sup>

#### **(a) Made the Statement, or Made or Used the Document**

The “sweeping generality” of the language in 18 U.S.C. § 1001 means that it captures all manner of statements and documents.<sup>669</sup> That includes “all statements or omissions, whether oral or written, sworn or unsworn, voluntary or required by law.”<sup>670</sup> The statute also captures “affirmative acts of concealment” even in circumstances where no statement has even been made when the speaker (or author of a document at issue) “has a duty” to disclose.<sup>671</sup>

With respect to using a document containing false facts, it is no defense to argue that someone else actually submitted the document—so long as the person who procured the document intended it to be submitted to the government. A Fifth Circuit case is instructive in this regard. In *United States v. Lake*, the defendant appealed his conviction on the basis that it was his attorney that submitted false documents to the Internal Revenue Service, and that his attorney did not have the authority to do so.<sup>672</sup> The court shot down this argument and affirmed the conviction, explaining that there was “ample evidence in this record from which the jury could have concluded

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<sup>666</sup> 18 U.S.C. § 1001(c)(1); *United States v. Pickett*, 353 F.3d 62, 68 (D.C. Cir. 2004) (“[T]he requirements of § 1001(c) are elements of the offense of making a false statement in the legislative branch.”).

<sup>667</sup> American Oversight, *supra* note 397.

<sup>668</sup> *E.g.*, *United States v. Bettenhausen*, 499 F.2d 1223, 1234 (10th Cir. 1974) (“We feel the statute aims at the making or using of each ‘false writing or document’ and intends the wrong connected with each to be a separate offense.”); *United States v. Crop Growers Corp.*, 954 F. Supp. 335, 351 (D.D.C. 1997) (“The language of Section 1001 itself leads the Court to the conclusion that Congress intended to make each use of a false writing or statement a separate offense.”); *United States v. Lanier*, 604 F.2d 1157, 1159 (8th Cir. 1979); *United States v. UCO Oil Co.*, 546 F.2d 833, 838 (9th Cir. 1976).

<sup>669</sup> *See Brogan v. United States*, 522 U.S. 398, 416 (1998) (Souter, J., concurring).

<sup>670</sup> Michael Nagelberg, Jesse Lee, Dominique Rioux & Meghan Strong, False Statements and False Claims, 54 AM. CRIM. L. REV. 1273, 1277 (2017) (citing *United States v. Rowland*, 826 F.3d 100, 107 (2d Cir. 2016) (affirming conviction under § 1001 for omitting payments in disclosures to the Federal Elections Commission); *Brogan*, 522 U.S. at 417–18 (Souter, J., concurring) (discussing distinctions among oral, written, sworn, and unsworn statements)).

<sup>671</sup> Nagelberg et al., *supra* note 670, at 1279 (citing *United States v. Shipley*, 546 F. App’x 450, 455 (5th Cir. 2013) (affirming defendant’s conviction under § 1001 for defendant’s failure to provide federal agents with all firearm transaction records in his possession)); *United States v. Shenandoah*, 595 F.3d 151, 157 (3d Cir. 2010) (affirming defendant’s conviction under § 1001 for failing to register as a sex offender), abrogated on other grounds by *Reynolds v. United States*, 132 S. Ct. 975 (2012); *United States v. Mattox*, 689 F.2d 531, 532 (5th Cir. 1982) (finding that filling in “N/A” in a government form when defendant in fact had relevant information violates § 1001).

<sup>672</sup> *United States v. Lake*, 592 F.2d 260, 261 (5th Cir. 1979) (per curiam).

that [the defendant] knowingly procured the false [documents] for the express purpose of tendering them to the Service, furnished them to his attorney for that purpose, and intended that they be so used.”<sup>673</sup> The court found that was sufficient to sustain a conviction because “the fact that his written authorization to his attorney did not expressly authorize such actions is of no moment.”<sup>674</sup> It was enough that the defendant procured the false document with the purpose that it be submitted to the government.<sup>675</sup>

The evidence indicates that Trump, with the help of his inner circle, procured false slates of electors, with the purpose that those electors be submitted to Congress and the National Archives, and that the false slates of electors were in fact submitted to Congress.<sup>676</sup> Trump Campaign Associate General Counsel Joshua Findlay told the Select Committee that on December 7 or 8, 2020, he was told by the campaign’s general counsel, Matthew Morgan, that Trump had directed the campaign’s lawyers to “look into electors in these potential litigation States.”<sup>677</sup> Testimony to the Select Committee also indicates that when Giuliani took the reins of the false electors effort on December 11, he “was executing what he [Trump] wanted.”<sup>678</sup>

According to Republican National Committee Chair Ronna Romney McDaniel, Trump had further direct involvement in the scheme in the ensuing days. Shortly before December 14, 2020, Trump called McDaniel and introduced her to John Eastman. McDaniel told the Select Committee that on that call with Trump, Eastman talked “about the importance of the RNC helping the campaign gather these contingent electors in case any of the legal challenges that were ongoing changed the result of any of the States.”<sup>679</sup> McDaniel then called Justin Clark, who she said gave her the impression that “they were already aware of it and that they were working on it.”<sup>680</sup> Immediately after that call, McDaniel said she followed up with a call directly to Trump and told him “that the campaign was working on this already.”<sup>681</sup> If the offense is charged as a conspiracy to commit a violation of this statute, the link to Donald Trump is even more clearly sufficient.

The evidence also indicates that Trump knew that false slates of electors had been successfully compiled. On December 14, 2020, false electors met in seven states. Five of the seven states (Arizona, Georgia, Michigan, Nevada, and Wisconsin) prepared certificates that declared the signatories to be “the duly elected and qualified Electors” from their state.<sup>682</sup> On the other hand,

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<sup>673</sup> *Id.*

<sup>674</sup> *Id.*

<sup>675</sup> *Id.*

<sup>676</sup> *See* Select Comm. Report at 341–59.

<sup>677</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Joshua Findlay, (May 25, 2022), at 86–87.

<sup>678</sup> Select Comm. Report at 349–350.

<sup>679</sup> Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Transcribed Interview of Ronna Romney McDaniel, (June 1, 2022), at 9:10–12.

<sup>680</sup> *Id.* at 10:18–20.

<sup>681</sup> *Id.* at 10:22–24.

<sup>682</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (National Archives Production), CTRL0000037568, CTRL0000037944, CTRL0000037945, CTRL0000037946, CTRL0000037947, CTRL0000037948, CTRL0000037949 (December 14, 2020, memoranda from slates of purported electors in Arizona, Georgia, Michigan, Nevada, and Wisconsin).

the fraudulent electors in New Mexico and Pennsylvania signed onto certificates with caveats, stating that the certificates were signed “on the understanding that” they might later be recognized as duly elected and qualified electors.<sup>683</sup> McDaniel updated Trump as to the status of the false electoral certificates that same day. In an email with a subject line, “FWD: Electors Recap—Final,” McDaniel emailed Trump’s executive assistant that electors had voted both in the “states he won” as well as in six “contested states” (Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin).<sup>684</sup> Trump’s executive assistant responded that the document was “in front of him.”<sup>685</sup> The Special Counsel may also have more evidence as to Trump’s direct involvement after his team’s reported examination of dozens of those having contact with him, such as those in his White House and “at least one Republican official who linked the former president to efforts to seat alternate slates of electors in some states he lost,” as well as grand jury subpoenas for documents that were issued and sent to election officials in six of the seven states.<sup>686</sup>

In addition to Trump, members of the former president’s inner circle appear to have facilitated the creation of the false electors scheme and its implementation. As detailed above, Eastman led the legal push by devising a baseless legal theory to justify the scheme. Chesebro helped to build the legal architecture and worked with the Trump campaign on its implementation in the states. Meadows acted as a logistical point man for the scheme, fielding ideas and comments from allies and helping coordinate campaign staff activities in service of the plot. The evidence also suggests that after the Trump campaign legal team stepped back from the false electors operation on December 11, Giuliani came in to lead the renewed effort.

All seven of the false electoral certificates were also “used” within the meaning of 18 U.S.C. § 1001(a)(3). Five of the seven false slates of electors were mailed and received by the National Archives and Congress,<sup>687</sup> which is legally sufficient for a finding that those five

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<sup>683</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (National Archives Production), CTRL0000037946 (December 14, 2020, memorandum from purported electors in New Mexico), CTRL0000037948 (December 14, 2020, memorandum from purported electors in Pennsylvania).

<sup>684</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (National Archives Production), 076P-R000009527\_0001 (December 14, 2020, forwarded email from Ronna McDaniel to Molly Michael with the subject line: “FWD: Electors Recap—Final”).

<sup>685</sup> *Id.*

<sup>686</sup> Arpan Lobo, Special Counsel investigating Trump subpoenaed Benson: Here’s what he wanted, DETROIT FREE PRESS (Jan. 6, 2023), <https://www.freep.com/story/news/politics/2023/01/06/doj-subpoenaed-michigan-secretary-of-state-for-trump-records/69782444007/>; Amy Gardner, Isaac Stanley-Becker, Yvonne Wingett Sanchez & Patrick Marley, Justice Dept. subpoenas Ariz., Mich., Wis. officials in Trump Jan. 6 probe, THE WASHINGTON POST (Dec. 6, 2022), <https://www.washingtonpost.com/politics/2022/12/06/jack-smith-trump-communications-subpoenas/>; Chris Strohm & Zoe Tillman, Trump’s Troubles Mount as Special Counsel Gets New 2020 Evidence, BLOOMBERG (Jan. 5, 2023), <https://www.bloomberg.com/news/articles/2023-01-05/donald-trump-s-troubles-mount-as-special-counsel-gets-new-jan-6-evidence#xj4y7vzkg>.

<sup>687</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (National Archives Production), VP-R0000417\_0001, VP-R0000418\_0001 (January 3, 2021 email and attachment from Senate Parliamentarian to Office of the Vice President); Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Chris Hodgson Production), 00094 (additional copy of same attachment sent from Senate Parliamentarian to Office of the Vice President).

documents had been “used.”<sup>688</sup> The false electoral certificates from Michigan and Wisconsin, however, did not arrive by mail in advance of January 6, 2021. The evidence indicates that the Trump team arranged instead to have those false certificates flown into Washington for them to be hand-delivered.<sup>689</sup> By January 6, those two false electoral certificates appear to have made their way to Congress by way of Senator Ron Johnson’s office. That morning, Senator Ron Johnson’s Chief of Staff, Sean Riley texted Chris Hodgson (an aide to the Vice President), that “Johnson needs to hand something to VPOTUS please advise.”<sup>690</sup> When Hodgson asked what it was, Riley responded, “Alternate slate of electors for MI and WI because archivist didn’t receive them.”<sup>691</sup> That is sufficient for those remaining false electoral certificates to be “used.”<sup>692</sup>

### (b) The Statement or Document Was False

“In run-of-the-mill cases where there is no dispute over the meaning of the question or reporting requirement to which a defendant responded, proving falsity is straightforward: A statement is false if it is ‘untrue.’”<sup>693</sup> Less “run-of-the-mill” cases involve circumstances where a person either concealed a material fact or even where a statement or document was “literally true” yet was made with the intent to mislead federal agents.<sup>694</sup> Some Circuit Courts of Appeals, however, have held that the literal truth of a statement is a complete defense to a prosecution under 18 U.S.C. § 1001.<sup>695</sup>

The question of whether the electoral certificates were “false” within the meaning of the statute hinges on the statements therein. As previously noted, five of the signed certificates stated affirmatively that the signatories were “the duly elected and qualified Electors” from their state.<sup>696</sup> That statement is false with respect to each of them. The executive of each of those five states had

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<sup>688</sup> See *United States v. DeLoach*, 654 F.2d 763, 764 (D.C. Cir. 1980) (affirming conviction under 18 U.S.C. § 1001 where document with false statement was mailed to the government).

<sup>689</sup> See Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Andrew Hitt Production), Hitt000089 (January 4, 2021, Andrew Hitt text message to Mark Jefferson at 9:02 p.m.).

<sup>690</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Chris Hodgson Production), CTRL0000056548\_00035 (January 6, 2021, Sean Riley text message to Chris Hodgson at 12:37 p.m.).

<sup>691</sup> *Id.*

<sup>692</sup> See *United States v. Meuli*, 8 F.3d 1481, 1485 (10th Cir. 1993) (upholding conviction under 18 U.S.C. § 1001 in which defendant had sent false tax forms to bank officers even though bank officers were under no obligation to forward such forms to the IRS).

<sup>693</sup> *United States v. Harra*, 985 F.3d 196, 209 (3d Cir. Jan. 12, 2021) (quoting *United States v. Castro*, 704 F.3d 125, 139 (3d Cir. 2013)).

<sup>694</sup> See, e.g., *United States v. Woodward*, 469 U.S. 105, 108 n.5 (1985) (noting that concealing a material fact violates 18 U.S.C. § 1001); *United States v. Stephenson*, 895 F.2d 867, 874 (2d Cir. 1990) (upholding conviction under 18 U.S.C. § 1001 where even though statement at issue may have been “literally true,” the “jury still could have found that he misrepresented and concealed what had occurred”).

<sup>695</sup> E.g., *United States v. Good*, 326 F.3d 589, 592 (4th Cir. 2003) (reversing conviction because defendant’s statements were “literally true”); *United States v. Milton*, 8 F.3d 39, 45 (D.C. Cir. 1993) (“The defense of literal truth applies to section 1001 prosecutions ....”).

<sup>696</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (National Archives Production), CTRL0000037568, CTRL0000037944, CTRL0000037945, CTRL0000037946, CTRL0000037947, CTRL0000037948, CTRL0000037949 (December 14, 2020, memoranda from slates of purported electors in Arizona, Georgia, Michigan, Nevada, and Wisconsin).

issued certificates of ascertainment, consistent with the requirements of 3 U.S.C. § 5, appointing the Electors of President and Vice President for their respective states.<sup>697</sup> Those certificates of ascertainment specified the duly elected and qualified electors of each state, namely, electors supporting Joe Biden and Kamala Harris.<sup>698</sup> Whatever argument of electoral malfeasance the false slates of electors may have had (albeit categorically baseless), it was still false to assert that they were “duly elected and qualified Electors.”

The fabricated electoral certificates from New Mexico and Pennsylvania, however, are arguably “literally true” and therefore potentially not legally false—even if the *submission* of the certificates may have been in violation of other laws.<sup>699</sup> The false electoral certificate from New Mexico stated that they were participating “on the understanding that it might later be determined that we are the duly elected and qualified Electors.”<sup>700</sup> That is arguably literally true. The same is true of the Pennsylvania false electoral certificate, which stated the signatories were participating “on the understanding that if, as a result of a final non-appealable Court Order or other proceeding prescribed by law, we are ultimately recognized as being the duly elected and qualified Electors.”<sup>701</sup> We would not recommend charging signatories of those certificates—although those who sought to mischaracterize or abuse their existence might be legally liable.

### (c) Materiality

The purpose of the materiality requirement is “to exclude trivial falsehoods from the purview of the statute.”<sup>702</sup> Accordingly, a statement—or fact in a document—is material “if it has a natural tendency to influence, or is capable of influencing, either a discrete decision or any other function of the agency to which it was addressed.”<sup>703</sup> The test for materiality is not whether the statement actually influenced a discrete decision; instead, the question is whether a statement or fact in a document “might affect in any way the functioning of the government agency to which it was addressed.”<sup>704</sup>

Of course, as has been well-documented, then-Vice President Pence did not attempt to use the phony electoral certificates.<sup>705</sup> Nor ultimately did Congress when Biden was officially declared the President-elect on January 7, 2021.<sup>706</sup> The question then, for the materiality of the phony

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<sup>697</sup> 2020 Electoral College Results, National Archives, <https://www.archives.gov/electoral-college/2020>.

<sup>698</sup> *Id.*

<sup>699</sup> *See* Trump on Trial at 40–83.

<sup>700</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (National Archives Production), CTRL0000037946 (December 14, 2020, memorandum from purported electors in New Mexico).

<sup>701</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (National Archives Production), CTRL0000037948 (December 14, 2020, memorandum from purported electors in Pennsylvania).

<sup>702</sup> *United States v. Steele*, 933 F.2d 1313, 1318 (6th Cir. 1991).

<sup>703</sup> *United States v. Moore*, 612 F.3d 698, 701 (D.C. Cir. 2010) (collecting cases).

<sup>704</sup> *Id.*

<sup>705</sup> John Wagner et al., Pence declares Biden winner of the presidential election after Congress finally counts electoral votes, *THE WASHINGTON POST* (Jan. 7, 2021), <https://www.washingtonpost.com/politics/2021/01/06/congress-electoral-college-vote-live-updates/>.

<sup>706</sup> *Id.*

certificates, is whether they might have affected the process, or, in other words, whether they were “capable of influencing” the process.<sup>707</sup>

Even though the phony certificates did not ultimately influence the decisions of either Pence or Congress in the legal selection of the President of the United States, they very clearly were “capable” of doing so. Indeed, that was the whole point of the submission to Congress—to try to overturn the results of a lawful election.<sup>708</sup> Although Pence was not persuaded, numerous Members of Congress at least initially were, as evidenced by a December 21, 2020, meeting between members of the House Freedom Caucus, Trump, and Pence, in which the Representatives urged Pence to support their effort to overturn the election.<sup>709</sup> A number of legislators went on to vote against certifying the results even after the events of January 6.<sup>710</sup> That the country narrowly averted disaster due to Pence’s refusal to bend does not render the phony certificates immaterial. These are not “trivial falsehoods” the materiality requirement was designed to exclude. The falsehoods had the capacity to upset the very democratic core of American government and are therefore unquestionably material.

#### **(d) Knowingly and Willfully**

All but a handful of criminal offenses require proof of some kind of criminal intent.<sup>711</sup> 18 U.S.C. § 1001 requires proof that the statute was violated “knowingly and willfully.”

The term “knowingly” means that a person acted with knowledge of the statement’s or document’s falsity (or acted with a “conscious purpose of avoiding the truth”).<sup>712</sup> A person cannot avoid a finding of knowledge if he consciously avoids learning the truth of the statement or document; rather, a person still is considered to have knowledge if he “acted with reckless disregard of whether the statements made were true and with a conscious purpose to avoid learning the truth.”<sup>713</sup>

Less clear, however, is what is required to prove that a person acts “willfully” for the purposes of § 1001. The Department of Justice has taken the position since 2014 that willfulness

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<sup>707</sup> See Moore, 612 F.3d at 701.

<sup>708</sup> Order Re Privilege of 599 Documents Dated November 3, 2020–January 20, 2021, at 23, *Eastman v. Thompson*, No. 8:22-cv-99, (C.D. Cal. June 7, 2022), ECF No. 356 (finding that the initiative to “certify alternate slates of electors for President Trump” constituted a “critical objective of the January 6 plan”), [https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.uscourts.cacd.841840.356.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.uscourts.cacd.841840.356.0_1.pdf).

<sup>709</sup> Melanie Zanona, House Republicans meet with Trump to discuss overturning election results, *POLITICO* (Dec. 21, 2020), <https://www.politico.com/news/2020/12/21/trump-house-overturn-election-449787>.

<sup>710</sup> Karen Yourish, Larry Buchanan & Denise Lu, The 147 Republicans Who Voted to Overturn Election Results, *THE NEW YORK TIMES* (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html>.

<sup>711</sup> See *Staples v. United States*, 511 U.S. 600, 605 (1994) (noting that “[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo–American criminal jurisprudence” (internal quotation marks omitted)).

<sup>712</sup> *United States v. Dick*, 744 F.2d 546, 553 (7th Cir. 1984) (“The government bore the burden of proof that each appellant acted with the knowledge that each statement charged was false or with the conscious purpose of avoiding the truth.”).

<sup>713</sup> *United States v. Abrams*, 427 F.2d 86, 91 (2d Cir. 1970).



under § 1001 requires proof that a person knew that making the relevant statement—or using the relevant document—was unlawful.<sup>714</sup> A number of Circuit Courts of Appeals have articulated that this is the correct standard.<sup>715</sup> However, others have held that “willfulness relates to the making of the false statement, not to knowledge that the statement would violate a law.”<sup>716</sup> Although it remains an open question how the Supreme Court would rule on such a question,<sup>717</sup> it is unthinkable that the Department of Justice would reverse course on its now long-standing position in any of the high-profile prosecutions that could be at play here. Accordingly, this element functionally will require proof of knowledge that making the statement or using the relevant document was unlawful. That does not require proof, however, that such a person knew the specific statute that would be violated by the making of a false statement or use of a false document; instead, it requires proof that the person was “aware of the generally unlawful nature of his conduct.”<sup>718</sup>

The evidence strongly suggests that Trump and members of his inner circle knew the fabricated electoral certificates were false. As was explained in Section I of this report, Trump knew that he had lost the election, and that there was no fraud: Trump’s own campaign told him there was no fraud; the intelligence community told Trump there was no fraud; the DOJ told Trump there was no fraud; state-level Republicans told Trump there was no fraud; and Trump and his allies lost more than 60 legal challenges to the election results.<sup>719</sup> Moreover, Trump himself privately acknowledged that he had lost the election.<sup>720</sup> He can in no way credibly claim that he actually believed he had won in any of the seven states that submitted false electoral certificates. Even if he could credibly claim such a belief, it is still patently implausible that he believed the assertion that the signatories of the phony certificates were “the duly elected and qualified Electors” from their respective states. At a minimum, Trump knew that those states had submitted

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<sup>714</sup> Brief for the United States in Opp’n, *Ajoku v. United States*, 572 U.S. 1056 (2014), No. 13-7264, 2014 WL 1571930, at \*10 (“To find that a defendant ‘willfully’ made a false statement in violation of Section 1035, a jury must conclude that he acted with knowledge that his conduct was unlawful. The same interpretation should apply to 18 U.S.C. 1001’s materially identical prohibition on ‘knowingly and willfully’ making a false statement in a matter within the jurisdiction of the federal government.” (internal citations and quotations omitted)); *See also* Criminal Resource Manual § 910, *Knowingly and Willfully* (Jan. 1, 2020), <https://www.justice.gov/archives/jm/criminal-resource-manual-910-knowingly-and-willfully>.

<sup>715</sup> *United States v. Salther*, 955 F.3d 666, 668 (8th Cir. 2020); *United States v. Solis*, 651 F. App’x 290, 291 (5th Cir. 2016) (quoting Fifth Circuit Pattern Jury Instructions (Criminal) § 1.38 (2012)); *United States v. Clay*, 832 F.3d 1259, 1308 (11th Cir. 2016); *United States v. Starnes*, 583 F.3d 196, 211 (3d Cir. 2009).

<sup>716</sup> *United States v. Carrasquillo*, 239 F. App’x 634, 636 (2d Cir. 2007); *United States v. Hsia*, 176 F.3d 517, 522 (D.C. Cir. 1999).

<sup>717</sup> As a then-D.C. Circuit Judge, Justice Kavanaugh at least has signaled that he believes the statute requires knowledge that making the statement was unlawful. *See United States v. Moore*, 612 F.3d 698, 704 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

<sup>718</sup> *United States v. Whab*, 355 F.3d 155, 162 (2d Cir. 2004); *United States v. Starnes*, 583 F.3d 196, 211 (3d Cir. 2009) (quoting *Bryan v. United States*, 524 U.S. 184, 196 (1998) (explaining that “requiring only knowledge that the conduct is unlawful,” as opposed to specific “knowledge of the law,” is “fully consistent” with protecting “law-abiding citizens who might inadvertently violate the law” and “individuals engaged in apparently innocent activity”)).

<sup>719</sup> *See also* Trump on Trial at 11–18.

<sup>720</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Continued Interview of Cassidy Hutchinson, (Sept. 14, 2022), at 113:2–6 (describing conversation with Mark Meadows in which Meadows told Hutchinson, “A lot of times he’ll tell me that he lost” and “he pretty much has acknowledged that he’s lost.”).

duly elected and qualified electors for Biden according to their own laws, regardless of whether he thought there was fraud. That fact is evinced, for example, at least by the multiple phone calls Trump made to election officials in Arizona, Georgia, Michigan, and Pennsylvania to pressure them to overturn their election results.<sup>721</sup>

It is also apparent that Trump and several of his closest associates were aware of the generally unlawful nature of submitting the fraudulent certificates to Congress. As explained in detail in Section I, the purpose of the phony elector scheme was to overturn the lawful results of the 2020 election, which Trump knew that he lost. “Every American—and certainly the President of the United States—knows that in a democracy, leaders are elected, not installed.”<sup>722</sup> Trump was aware that it would be “generally unlawful” to submit false slates of electors to Congress in an effort to overturn an election that he knew he lost. Eastman acknowledged that the use of the fraudulent certificates by Vice President Pence, discussed further below, would amount to a violation of the Electoral Count Act.<sup>723</sup> Select Committee evidence indicates that Chesebro knew the electors and the certificates they would submit would be invalid, while Giuliani was reportedly told by White House Counsel staff that the theory upon which the false electors plan rested was not legally sound. Meadows was allegedly told the same.

**(e) Made or Used for a Matter Within the Jurisdiction of a Department or Agency of the United States**

The Supreme Court has repeatedly held that this element is to be interpreted broadly, stressing that “the term ‘jurisdiction’ should not be given a narrow or technical meaning for purposes of § 1001.”<sup>724</sup> According to the Court, “the phrase ‘within the jurisdiction’ merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body.”<sup>725</sup>

An opinion of the D.C. Circuit is instructive as to the broad scope of this element, indicating that there need not be a specific statute describing the government function at issue. In *United States v. Cisneros*, Henry G. Cisneros moved to dismiss the indictment against him in part because he argued that the statements at issue “did not concern a matter ‘within the jurisdiction of a federal department or agency.’”<sup>726</sup> As background, in 1992, then-President-elect Bill Clinton had announced his plan to nominate Cisneros for Secretary of the United States Department of Housing and Urban Development.<sup>727</sup> As part of the presidential transition process, Cisneros completed a form that asked whether there were any elements of his private life that could be used by someone for coercion or blackmail. Cisneros answered no, and subsequently affirmed that denial to the FBI,

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<sup>721</sup> Trump on Trial at 20–21.

<sup>722</sup> Eastman v. Thompson, Order Re Privilege of Docs at 36.

<sup>723</sup> Hugo Lowell, Trump lawyer knew plan to delay Biden certification was unlawful, emails show, THE GUARDIAN (Mar. 10, 2022), <https://www.theguardian.com/us-news/2022/mar/10/trump-lawyer-plan-john-eastman-mike-pence>.

<sup>724</sup> *United States v. Rodgers*, 466 U.S. 475, 480 (1984) (quoting *Bryson v. United States*, 396 U.S. 64, 70 (1969)).

<sup>725</sup> *Rodgers*, 466 U.S. at 479.

<sup>726</sup> *United States v. Cisneros*, 26 F. Supp. 2d 24, 37 (D.D.C. 1998).

<sup>727</sup> *Cisneros*, 26 F. Supp. 2d at 31.

despite being involved in an extramarital affair with a woman whom he financially supported.<sup>728</sup> The background investigation was performed pursuant to a Memorandum of Understanding, which was signed by the Attorney General, between the FBI and the Clinton-Gore transition team.<sup>729</sup> Cisneros argued that because there was no statute that specifically authorized such an investigation, the charges against him were not within the jurisdiction of a federal department or agency.<sup>730</sup> The District Court disagreed, noting both that the Attorney General had broad authority to conduct investigations, and that “[a]lthough there is no independent statute that explicitly authorizes the process of vetting potential nominees, § 1001 does not require that such a statutory basis exist.”<sup>731</sup>

The seven phony electoral certificates submitted to Congress were plainly “made or used” for a “matter within the jurisdiction of the United States.” The Twelfth Amendment states that the “President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.” The Electoral Count Act of 1887, as amended, further specifies that “certificates and papers purporting to be the certificates of the votes of electors appointed pursuant to a certificate of ascertainment” are to be counted by the President of the Senate.<sup>732</sup> So long as one person receives a majority, the Twelfth Amendment dictates that the “person having the greatest number of votes for President, shall be the President.” Pursuant to binding Supreme Court precedent, the Twelfth Amendment and the Electoral Count Act of 1887 render such certificates clearly “within the jurisdiction of the executive, legislative, or judicial branch of the Government of United States” for the purposes of § 1001. As previously noted, the key inquiry is whether the function at issue is an “authorized function[] of an agency or department” rather than “peripheral to the business of that body.”<sup>733</sup> The function at issue here, namely, electing the President of the United States, is “authorized” by the Constitution as well as by federal statute.

#### (f) Document Required by Law

The sixth element of a prosecution for making a false statement or submitting a false document concerning “any matter within the jurisdiction of the legislative branch” is met if the

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<sup>728</sup> *Id.*

<sup>729</sup> *Id.* at 31 n.2.

<sup>730</sup> *Id.* at 37.

<sup>731</sup> *Id.* Relevant here, the Court also went on to note that Cisneros’ argument would undermine an important element of the democratic process:

The Defendants’ argument would effectively undermine the very important transition process, which has ensured the effective and smooth changeover from one administration to another. The ability of this nation to have peaceful changes in administrations is the envy of the nations of the world. The procedures used by the Clinton/Gore Transition Team are those that have been used for many years, and have proven to be extremely effective. The FBI must have honest responses to its questions, and if they are not forthcoming, the Government must be able to take appropriate action. Accordingly, Cisneros’ motion will be denied.

*Id.* at 38.

<sup>732</sup> 3 U.S.C. § 15(d)(1)(A).

<sup>733</sup> *United States v. Rodgers*, 466 U.S. 475, 479 (1984).

statement or document concerns “a document required by law.”<sup>734</sup> This element is met here because electoral certificates are required both by the Twelfth Amendment<sup>735</sup> and the Electoral Count Act of 1887.<sup>736</sup>

### c. Overt Acts

To satisfy the final element of § 371, prosecutors will need to demonstrate that at least one of the conspiracy’s participants executed an overt act in furtherance of said conspiracy.<sup>737</sup> It is not necessary that the overt act be illegal, but rather that it moves the conspiracy from thought into action.<sup>738</sup>

The facts detailed in Section I above reveal several instances in which Trump, Eastman, Giuliani, Meadows, and Chesebro appear to have taken such overt acts. Trump and Eastman, for example, called RNC Chairwoman McDaniel to request help from the RNC in executing the false electors scheme, with Eastman specifically asking that the RNC help “gather these contingent electors.”<sup>739</sup> Giuliani, for his part, participated in at least a handful of calls in furtherance of that scheme as well. In one such call, in which Trump participated, Giuliani asked Speaker Bowers, in Bowers’ recollection, to provide him and Trump with “the legitimate opportunity through the [Arizona legislative] committee” to “remove the—the electors of President Biden and replace them.”<sup>740</sup> A series of texts and emails indicate that Meadows likewise took active steps to implement the false electors scheme, including one he sent just after election day stating, “Yes. Have a team on it,” in response to a message detailing attempts to pressure Republican legislatures to submit fraudulent elector slates to Congress.<sup>741</sup> And Chesebro’s December 13 email to Giuliani, with “some quick notes on strategy” based off of his memo, presumably for Giuliani to put into action, likely also constitutes an overt act.<sup>742</sup>

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<sup>734</sup> 18 U.S.C. § 1001(c)(1).

<sup>735</sup> U.S. Const. amend. XII (“The Electors shall ... make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate ....”).

<sup>736</sup> 3 U.S.C. § 11 (“The electors shall immediately transmit at the same time and by the most expeditious method available the certificates of votes so made by them, together with the annexed certificates of ascertainment of appointment of electors, as follows: (1) One set shall be sent to the President of the Senate at the seat of government.”).

<sup>737</sup> *Cane, Grey & Hirtle*, *supra* note 628, at 934–35; *Braverman v. United States*, 317 U.S. 49, 53 (1942) (“The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime.”).

<sup>738</sup> *Yates v. United States*, 354 U.S. 298, 334 (1957) (“It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy...Nor, indeed, need such an act, taken by itself, even be criminal in character. The function of the overt act in a conspiracy prosecution is simply to manifest ‘that the conspiracy is at work.’”).

<sup>739</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68.

<sup>740</sup> *Id.*

<sup>741</sup> Select Comm. to Investigate the Jan. 6<sup>th</sup> Attack on the United States Capitol, Resolution Recommending That the House of Representatives Find Mark Randall Meadows in Contempt of Congress for Refusal to Comply With a Subpoena Duly Issued by the Select Committee to Investigate the January 6<sup>th</sup> Attack on the United States Capitol, H. Rep. 117-216, (2021), <https://tinyurl.com/8wmya3hx>.

<sup>742</sup> Exhibit A, *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM, (C.D. Cal. May 26, 2022) (Dec. 13, 2020, email from Kenneth Chesebro to Rudy Giuliani).

Trump claims he is protected by presidential immunity and denies any wrongdoing (as discussed in Section I.A.1). Chesebro, Giuliani, and Eastman have all also denied wrongdoing (as discussed in Section I.A.4).

## 2. The “Defraud Prong”: Conspiracy to Defraud the United States

The “defraud prong”<sup>743</sup> of § 371 criminalizes conspiracies “for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government”<sup>744</sup> through “deceit, craft or trickery, or at least by means that are dishonest.”<sup>745</sup> As long ago as 1909, a federal court explained the purpose of this second prong: “As used in this statute, the word ‘defraud’ has a significance applicable, not only for the protection of the government in its property rights and interests, but...also for the protection of the government in securing the wholesome administration of its laws and affairs in the interests of the governed.”<sup>746</sup> The defraud prong responds to violations of the public trust—as the Supreme Court has taught, it punishes illegal “overreaching of those charged with carrying out the governmental intention.”<sup>747</sup>

### a. Conspiracy

The “conspiracy” element for a prosecution under the “defraud prong” is analyzed the same as in an “offense prong” prosecution.<sup>748</sup> As we explain above in Section II.A.1.a, “[t]he essence”

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<sup>743</sup> “To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention.” *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924); *And see, e.g.*, *United States v. Atilla*, 966 F.3d 118, 130 (2d Cir. 2020); *United States v. Meredith*, 685 F.3d 814, 822 (9th Cir. 2012); *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996); *United States v. Nersesian*, 824 F.2d 1294, 1313 (2d Cir. 1987) (“It is well established that the term ‘defraud’ as used in § 371 not only reaches schemes which deprive the government of money or property, but also is designed to protect the integrity of the United States and its agencies...[T]o be held liable under the broad sweep of the fraud prong of § 371, defendants need not have agreed to commit, or have actually committed, a specific substantive offense. They merely must have agreed to interfere with or to obstruct one of the government’s lawful functions.”).

<sup>744</sup> *Nersesian*, 824 F.2d at 1313.

<sup>745</sup> “The gist of the crime is an agreement to defraud the United States by interfering or obstructing lawful government functions through ‘deceit, craft or trickery, [and] by means that are dishonest.’” *United States v. Caldwell*, 989 F.2d 1056, 1058 (9th Cir. 1993) (quoting *Hammerschmidt*, 265 U.S. at 188). As the Sixth Circuit has observed: “Section 371 prohibits two types of conspiracy: (1) conspiracy to commit a specific offense (‘offense clause conspiracy’); and (2) conspiracy to defraud the United States (‘defraud clause conspiracy’). The distinction is important because a conspiracy charged under the defraud clause does not require that the Government prove that the conspirators were aware of the criminality of their objective.” *United States v. Tipton*, 269 F. App’x 551, 555 (6th Cir. 2008).

<sup>746</sup> *United States v. Moore*, 173 F. 122, 131 (D. Or. 1909); *And see, e.g.*, *Atilla*, 966 F.3d at 130 (“[T]he defraud clause has been applied to conspiracies to obstruct the functions of a variety of government agencies and has not been limited to the IRS.”); *United States v. Conover*, 772 F.2d 765, 771 (11th Cir. 1985) (“The statute is designed to protect the integrity of the United States and its agencies, programs, and policies. Moreover, [t]he United States has a fundamental interest in the manner in which projects receiving its aid are conducted. This interest is not limited strictly to accounting for United States Government funds invested in the project, but extends to seeing that the entire project is administered honestly and efficiently and without corruption and waste.” (internal quotation marks omitted)).

<sup>747</sup> *Hammerschmidt*, 265 U.S. at 188.

<sup>748</sup> *See United States v. Whiteford*, 676 F.3d 348, 356 (3d Cir. 2012).

of a conspiracy “is an agreement to commit an unlawful act.”<sup>749</sup> A defendant must know “the scheme’s criminal purpose and specifically intend[] to further that objective”<sup>750</sup>; that is, the defendant need only know “the essential nature of the plan”—the core wrong to be committed—not every detail.<sup>751</sup> Further, the agreement “need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case.”<sup>752</sup> As we also explain above, tacit agreement, inferred from “concert of action” in furtherance of shared objectives, can be enough.<sup>753</sup>

As to the “defraud prong” of § 371, we believe there is strong evidence that Trump and others agreed—tacitly or explicitly—on the end goals of obstructing the electoral count and interfering with the DOJ’s election enforcement work. We describe the potential charges and co-conspirators in Section II.A.3, below.

### **b. Obstructing a Lawful Function of the Federal Government**

To convict under § 371’s defraud prong, a prosecutor must show that a defendant had specific intent to obstruct or impede a lawful government function.<sup>754</sup> Here, one lawful function that was targeted was the congressional certification of the election.<sup>755</sup> So long as that was a target of the conspiracy, stopping the count and manipulating the DOJ need not have been the defendants’ ultimate objective.<sup>756</sup> Also importantly, provided the conspirators specifically intended to obstruct or impede a lawful government function, the Government need not prove that they “were aware of

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<sup>749</sup> *Iannelli v. United States*, 420 U.S. 770, 777 (1975); *And see* *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978) (“In a conspiracy, two different types of intent are generally required – the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy.”). The agreement, per § 371, must be between two or more persons. On its face, the statute extends to all “persons” – including federal elected officers. Neither the plain text nor the history of § 371 suggest any reason why a federal government official—even the head of the executive branch—could not be a “person” convicted of conspiracy to defraud the federal government. In *United States v. Johnson*, for instance, the Court seemed to take it for granted that the government could legitimately prosecute a congressman who took a bribe in exchange for influencing the D.O.J. to drop charges. 383 U.S. 169, 172 (1966).

<sup>750</sup> *Cane, Grey & Hirtle, supra* note 628, at 933–34 (2021); *And see, e.g., United States v. John-Baptiste*, 747 F.3d 186, 204–05 (3d Cir. 2014) (“The government must prove beyond a reasonable doubt (1) a shared unity of purpose; (2) an intent to achieve a common illegal goal; and (3) an agreement to work toward that goal.”).

<sup>751</sup> *See, e.g., United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998).

<sup>752</sup> *Iannelli*, 420 U.S. at 777 n.10; *And see, e.g., United States v. Fuller*, 584 F.3d 132, 160 (3d Cir. 2009); *United States v. McKee*, 506 F.3d 225, 238 (3d Cir. 2007).

<sup>753</sup> *United States v. Mann*, 161 F.3d 840, 847 (5th Cir. 1998).

<sup>754</sup> *See, e.g., United States v. Gurary*, 860 F.2d 521, 523 (2d Cir.1988).

<sup>755</sup> *See United States v. Concord Mgmt. & Consulting LLC*, 347 F. Supp. 3d 38 (D.D.C. 2018).

<sup>756</sup> *United States v. Harmas*, 974 F.2d 1262, 1268 (11th Cir. 1992) (“Thus, while the government must prove that the United States was the ultimate target of the conspiracy under the defraud clause of § 371, the government is not required to allege that the United States was the intended victim of a conspiracy under the offense clause of § 371.”). While impeding the government must be an objective of the conspiracy, it “need not be the sole or even a major objective.” *United States v. Grizzo*, 277 F.3d 339, 348 (3d Cir. 2002).

the criminality of their objective.”<sup>757</sup> For this element, they need only know of the government function and intend to obstruct it.<sup>758</sup>

A government function does not lose its “lawful” status just because a defendant refuses to accept that it is legitimate or wishes to challenge its legality in court. In *United States v. North*, for instance, the defendant Oliver North, prosecuted for his role in the Iran Contra scandal, was charged with several crimes, including violating 18 U.S.C § 371. North contended that he could not have interfered with or obstructed a “lawful government function” because the federal law that he violated was unconstitutional, since (in his telling) it infringed on the President’s power to conduct foreign affairs.<sup>759</sup> But the District Court ruled that North’s own legal theories and putative concerns about constitutionality notwithstanding, the law was still the law. North was obligated to comply with it until it was overturned by a court or changed by Congress. As the court put it, North’s “understanding as to the constitutionality...in no way affords an excuse for his alleged misconduct or entitled him to obstruct the way the government was, in fact, functioning.”<sup>760</sup>

In *United States v. Elkins*, the Eleventh Circuit upheld the § 371 conviction of a defendant who conspired to export planes to Libya, which was then subject to strict export controls. The government “function” that Elkins obstructed, the court explained, was not a specific enforcement process but instead the more general “right to implement its foreign policy.”<sup>761</sup>

Similarly, in the fallout from Watergate, a clutch of Richard Nixon’s close advisors was prosecuted for a range of crimes—including violating § 371. The indictment alleged that H.R. Haldeman and others defrauded the United States by impeding the work of the CIA, FBI, and DOJ. Specifically, the conspirators deprived the government and people of the “right to have the officials of these Departments and Agencies transact their official business honestly and impartially, free from corruption, fraud, improper and undue influence, dishonesty, unlawful impairment and

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<sup>757</sup> *Ingram v. United States*, 360 U.S. 672, 678 (1959); *See also United States v. Concord Mgmt. & Consulting LLC*, 347 F. Supp. 3d 38 (D.D.C. 2018); *United States v. Tipton*, 269 F. App’x 551, 555 (6th Cir. 2008).

<sup>758</sup> *Tipton*, 269 F. App’x at 555 (citing *United States v. Collins*, 78 F.3d 1021, 1038 (6th Cir. 1996)).

<sup>759</sup> *United States v. North*, 708 F. Supp. 375, 377 (D.D.C. 1988).

<sup>760</sup> *Id.* at 378. In *United States v. Klein*, No. 11-CR-401, 2013 WL 147323, at 3 (N.D. Ill. Jan. 14, 2013), a chaplain was accused of conspiring to helping an incarcerated mobster circumvent protocols limiting his communication with his collaborators on the outside. The chaplain sought dismissal of the indictment, arguing that the protocols—called “SAMs”—were themselves overbroad and illegal. The District Court did not agree: “Klein is precluded from advancing the argument that Count One of the indictment must be dismissed because the SAMs are overbroad. Klein cannot attack the legality of the SAMs that created his alleged unlawful conduct.” Klein relied on the Supreme Court’s holding in *Dennis v. United States*, 384 U.S. 855, 857–58 (1966). At issue there were alleged violations of the Taft-Hartley Act requiring the filing of “non-Communist” affidavits. When the Dennis petitioners were convicted of filing false affidavits, they responded by challenging the constitutionality of the applicable Taft-Harley provision. But the Supreme Court held that the time to challenge the lawfulness of the government function was before they broke the law, not after: “It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective.” *Dennis*, 384 U.S. at 866; *And see, e.g., United States v. Sattar*, 314 F. Supp. 2d 279, 309 (S.D.N.Y. 2004), *aff’d sub nom. United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009) (“Stewart cannot defeat the charges against her by attacking the legality or constitutionality of the statute or requirement that prompted her alleged deceit.”).

<sup>761</sup> *United States v. Elkins*, 885 F.2d 775, 782 (11th Cir. 1989).

obstruction.”<sup>762</sup> One of the three theories of liability under § 371 was that the conspirators “attempt[ed] to get the CIA to interfere with the Watergate investigation being conducted by the FBI.”<sup>763</sup>

The analogy to the contemporary conspiracy is clear. Congress is responsible, through the Twelfth Amendment<sup>764</sup> and the Electoral Count Act of 1887, as amended,<sup>765</sup> for counting electors and certifying the results of a presidential election. Based upon the currently available evidence, and as discussed above, it appears that Trump and Eastman specifically intended to interfere with that critically important federal role both with the submission of false electors to Congress and in their pressure campaign against Pence. The evidence also suggests that Meadows may have done so, as well as the numerous others involved in the fraudulent electors scheme.<sup>766</sup> (Similarly, Trump’s coordination through Clark to disrupt DOJ’s commitment to disinterested, ethical, and nonpartisan enforcement of the nation’s voting laws detailed in Section I.A.2 and Appendix B amount to obstruction of a lawful function of the federal government; as we have stated, however, a prosecution of any for that conduct may reasonably be brought at a later date.)

### **c. Deceitful or Dishonest Means**

For conviction under the defraud prong of § 371, “[n]either the conspiracy’s goal nor the means used to achieve it need to be independently illegal.”<sup>767</sup> But § 371 does not criminalize every

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<sup>762</sup> *United States v. Haldeman*, 559 F.2d 31, 120 (D.C. Cir. 1976).

<sup>763</sup> *Haldeman*, 559 F.2d at 121–22.

<sup>764</sup> U.S. Const. amend. XII (“The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.”).

<sup>765</sup> *See, e.g.*, 3 U.S.C. § 15 (“Congress shall be in session on the sixth day of January succeeding every meeting of the electors...the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.”).

<sup>766</sup> Trump has denied any wrongdoing and claims he is protected by presidential immunity (as discussed in Section I.A.1). Chesebro, Giuliani, and Eastman have all publicly disclaimed criminal responsibility for this scheme (as discussed in Section I.A.4). Meadows has in effect denied wrongdoing (as discussed in Section I.A.4).

<sup>767</sup> *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993) (citing *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989)); *And see, e.g.*, *United States v. Cueto*, 151 F.3d 620, 635 (7th Cir. 1998) (citing *United States v. Jackson*, 33 F.3d 866, 870 (7th Cir. 1994)); *United States v. Sans*, 731 F.2d 1521, 1534 (11th Cir. 1984); *United States v. Boone*, 951 F.2d 1526, 1559 (9th Cir. 1991); *United States v. North*, 708 F. Supp. 375, 379 (D.D.C. 1988) (“These orders form part of the framework of laws and regulations which North is alleged to have conspired to circumvent and impair. That they themselves do not carry criminal penalties is of no consequence. These are counts alleging conspiracy to defraud the United States and defeat its lawful governmental functions.”); *United States v. Concord Mgmt. & Consulting LLC*, 347 F. Supp. 3d 38, 51 (D.D.C. 2018) (the defendant “cannot escape the fact that the course of deceptive conduct alleged *is* illegal because § 371 makes it illegal. The indictment need not allege a violation of any other statute.”); *United States v. Morosco*, 822 F.3d 1, 6 (1st Cir. 2016) (“[T]he statute’s aim is to protect the government, and deceit can impair the workings of government.” (quoting *Curley v. United States*, 130 F. 1, 6–10 (1st Cir. 1904))). *See generally* Cane, Grey & Hirtle, *supra* note 628, at 932 (“The fraud must be aimed at the United States, but the conspiracy’s acts are not required to otherwise be illegal.”).



agreement to intentionally disrupt government functions.<sup>768</sup> Instead, it only extends to conspiracies that use “deceit, craft or trickery, or at least [] means that are dishonest.”<sup>769</sup>

This is why courts have largely brushed aside defendants’ claims that § 371 is “unconstitutionally vague” as applied for failure to give adequate notice that the charged conduct is illegal.<sup>770</sup> The statutory standard for criminal intent—specific intent to obstruct or impede—and the requirement of deceit or dishonesty narrow the statute’s reach and protect against prosecution for innocuous conduct.<sup>771</sup> A great deal of caselaw has given clarity to the statutory language and explained which government functions will—and which will not—be covered.<sup>772</sup>

Criminal intent would likely be the critical and most hotly contested element of a § 371 prosecution against Trump and other members of his circle. In his litigation resisting a subpoena from the Select Committee to turn over his email correspondence related to the assault on the U.S. Capitol, Eastman claimed that he and Trump did not deploy dishonest means because “[i]t is not ‘deceit, craft or trickery’ for the President, based on counsel from trusted advisors, to have arrived

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A case in point is *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), which gave the Klein conspiracy its name. There, defendants were convicted of violating § 371 for conspiring to hide their tax liability from the Treasury—even though, it was determined, they actually had no tax liability, and even though there was no statute or regulation requiring disclosure. As one of the defendants’ lawyers later explained it: “The defendants were on trial for conspiring to throw sand in the government’s eyes. Liability could exist even if the Government was not looking at the time the sand was thrown and even if it turned out that, because there was no tax liability, there was nothing to hide.” Goldstein, *supra* note 633, at 436 (internal quotation marks omitted).

<sup>768</sup> Caldwell, 989 F.2d at 1060 (“The federal government does lots of things, more and more every year, and many things private parties do can get in the government’s way. It can’t be that each such action is automatically a felony.”).

<sup>769</sup> *Id.* at 1059 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). An official acts dishonestly under § 371 if she breaches a duty to the public in search of some private gain, even if she does not tell a specific falsehood. Thus, for instance, in *United States v. Johnson*, 383 U.S. 169, 172 (1966), the Supreme Court seemed to take it for granted that § 371 properly applied to a congressman who took a payment in exchange for influencing the DOJ to drop prosecutions, even though there was no allegation of any false statement, misrepresentation or deceit. And in *United States v. Peltz*, the Second Circuit upheld the conviction of an SEC employee who disclosed insider information: “Public confidence essential to the effective functioning of government would be seriously impaired by any arrangement that would enable a few individuals to profit from advance knowledge of governmental action. The very making of a plan whereby a government employee will divulge material information which he knows he should not is ‘dishonest.’” 433 F.2d 48, 52 (2d Cir. 1970). As the Second Circuit articulated the rule: “An agreement whereby a federal employee will act to promote private benefit in breach of his duty thus comes within the statute if the proper functioning of the Government is significantly affected thereby.” *Id.* And see, e.g., *United States v. Podell*, 436 F. Supp. 1039, 1041 n.2 (S.D.N.Y. 1977), *aff’d*, 572 F.2d 31 (2d Cir. 1978) (Congressman who illegally received funds in violation of federal conflict of interest laws pled guilty to obstructing or impairing the “lawful governmental functions” of Congress by serving as a congressman while under a conflict of interest (citing an indictment charging the Congressman for “obstructing, hindering and impairing said departments, agencies and branches in connection with the performance of their lawful governmental functions, including; the lawful governmental functions of the United States Congress and the legitimate representation by its Members of the interests of the United States and their constituents.”)).

<sup>770</sup> See, e.g., Cueto, 151 F.3d at 635 (dispensing with vagueness challenge).

<sup>771</sup> *Concord*, 347 F. Supp. 3d at 59 (collecting cases) (“[C]ourts have repeatedly rejected vagueness challenges to § 371 as applied to conspiracies, like this one, to impair lawful government functions.”).

<sup>772</sup> See *id.*

at conclusions on various factual matters which the Select Committee does not share.”<sup>773</sup> The argument was that the attempts to obstruct and impede Congress and the DOJ could not have been dishonest if Trump and his collaborators honestly believed their cause was just.

But—as Judge Carter found in the *Eastman v. Thompson* litigation, in deciding that Trump and Eastman more than likely violated § 371—that argument cannot withstand scrutiny. There is strong circumstantial evidence showing that Trump and his co-conspirators subjectively knew that Trump lost a secure and fair election—and were told so by the courts. Regardless of their beliefs about the election outcome, these individuals also knew that the means by which they pursued their objective were deceptive and inconsistent with established law. And there is no end-justifies-the-means safe harbor under § 371 for conspirators who deceitfully obstruct a lawful government function, even if they subjectively believe that their cause is justified.

### **i. Trump and His Allies Knew That Trump Lost a Secure and Fair Election**

Donald Trump and his supporters defend his post-election schemes by pointing to his obsessively repeated claims of fraud, as though they are validated by repetition. In their telling, Trump was not trying to steal an election that he lost. He was simply trying to defend against a rigged electoral process and preserve a victory that he rightly won. He had, his defenders say, a legitimately held—even if incorrect—interpretation of the facts surrounding the election. Trump lawyer John Eastman claimed as much in a legal filing.<sup>774</sup>

To the contrary, the factual record, laid out in detail above, provides substantial basis to believe that Trump did know the truth; and he was also certainly aware of all the adverse court judgments reaffirming the outcome of the election.

*First*, as detailed in Section I, Trump was told repeatedly by numerous of his closest advisors—as well as outside consulting firms that his campaign hired at great cost—that he had lost. Attorney General Bill Barr, up until his resignation on December 14, 2020, told Trump that none of the claims of fraud were credible.<sup>775</sup> Barr’s replacement, Acting Attorney General Jeffrey Rosen similarly told him on multiple occasions that the claims of fraud had been debunked by the DOJ.<sup>776</sup> And even outside research firms that conducted thorough analyses (at least one of which reportedly briefed Trump), found there was no basis to question the election results.<sup>777</sup>

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<sup>773</sup> Plaintiff’s Reply Brief in Support of Privilege Assertions at 22, *Eastman v. Thompson*, No. 22-CV-99, (C.D. Cal. Mar. 7, 2022), ECF No. 185 (hereinafter “Pl.’s Reply Brief in Support of Privilege Assertions”).

<sup>774</sup> *Id.* (“The [January 6] Committee has presumably concluded that those who advised the President that no material fraud or illegality existed were correct and that those who offered the opposite advice were incorrect. The fact that former President Trump reached a different conclusion does not show ‘consciousness of wrongdoing.’ It merely shows that the President arrived at a view of various factual questions which the...Committee does not share.”).

<sup>775</sup> Lybrand & Subramaniam, *supra* note 94.

<sup>776</sup> Second Jan. 6 Hearing Transcript, *supra* note 43.

<sup>777</sup> Josh Dawsey, Trump campaign paid researchers to prove 2020 fraud but kept findings secret, THE WASHINGTON POST (Feb. 11, 2023), <https://www.washingtonpost.com/politics/2023/02/11/trump-campaign-report-electoral-fraud/>.

*Second*, as shown above, Trump started claiming fraud even before Election Day. For many months before the election—without any evidence to back it up—he made such claims as “[t]he only way we’re going to lose this election is if this election is rigged.”<sup>778</sup> These claims were not reasonable responses to real-world events surrounding the 2020 election. They were pretexts, not justifications. Trump did not, in other words, “reach” a “conclusion” based on observed facts. Rather, he arrived at a pre-determined argument based on ideology and self-interest. Trump’s baseless, pre-election predictions of actual fraud would surely be admitted into evidence at trial, because they are inextricably intertwined with his claims of fraud in the election itself.<sup>779</sup>

*Third*, Trump’s post-Election Day fraud pretext just continued a pattern from previous elections whose outcomes he did not like. As noted, he claimed fraud in both the 2016 primaries and the general election, baselessly claiming to have won the popular vote “if you deduct the millions of people who voted illegally.”<sup>780</sup> This history of adapting an old allegation to new contexts supports the inference that the fraud contention was not a conclusion honestly drawn from real-world facts but an oft-repeated claim in Trump’s rhetorical arsenal. This pattern of disproven fraud claims is relevant here, and would likely be admissible to rebut any defense that Trump sincerely believed that he won the 2020 election. The prosecution would not offer the 2016 statements merely to prove that Trump is chronically dishonest, but instead to demonstrate a pattern of strategic lies about fraud to prove his intent, knowledge, plan, and absence of mistake under Rule 404(b) of the Federal Rules of Evidence.<sup>781</sup>

*Fourth*, the argument that Trump subjectively believed the election was stolen from him is also belied by the fact that none of the election fraud theories ever stood up to scrutiny in court,<sup>782</sup>

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<sup>778</sup> Donald Trump Speech Transcript Wisconsin August 17, REV (Aug. 17, 2020), <https://www.rev.com/blog/transcripts/donald-trump-speech-transcript-wisconsin-august-17>.

<sup>779</sup> Most federal appellate courts liberally allow the introduction of evidence that “explains the circumstances” or “completes the story” of a charged crime; while the District of Columbia applies a more exacting standard, it nevertheless admits evidence that is “part of the charged offense.” *United States v. Wilkins*, 538 F. Supp. 3d 49, 70 (D.D.C. 2021).

<sup>780</sup> Terrance Smith, Trump Has Longstanding History of Calling Elections ‘Rigged’ if He Doesn’t Like the Results, ABC NEWS (Nov. 11, 2020), <https://abcnews.go.com/Politics/trump-longstanding-history-calling-elections-rigged-doesnt-results/story?id=74126926>.

<sup>781</sup> See, e.g., *United States v. Long*, 328 F.3d 655, 661 (D.C. Cir. 2003) (evidence is “relevant to show a pattern of operation that would suggest intent and that tends to undermine the defendant’s innocent explanation” (internal quotations and citation omitted)); *United States v. Semaan*, 594 F.2d 1215 (8th Cir. 1979) (allowing evidence of a defendant’s previous engagement in a fraudulent double-recovery scheme); *United States v. Sparkman*, 500 F.3d 678 (8th Cir. 2007) (allowing evidence of defendant’s prior fraudulent conduct to show scheme, pattern, or plan); And see generally *Andresen v. Maryland*, 427 U.S. 463 (1976) (proof of similar acts is admissible to show intent or the absence of mistake).

<sup>782</sup> Trump’s multiple, internally inconsistent and flatly incredible fraud claims suggest that Trump was looking for an excuse to overturn the election, not that he sincerely believed fraud had been perpetrated against his candidacy. For example, look at Trump’s attempts to overturn the election outcome in Georgia, where he demanded that Secretary of State Raffensperger “find” just enough votes to fabricate a Trump victory. There, he has falsely claimed at various times that chain of custody issues required throwing out 43,000 ballots; that 5,000 dead people voted; that almost 5,000 out-of-state voters cast illegal ballots; and that election workers procured and illegally counted suitcases full of fraudulent ballots. Compare Phillip Bump, This Is How Embarrassing Trump’s ‘Fraud’ Claims Have Gotten, THE WASHINGTON POST (Sept. 17, 2021), <https://www.washingtonpost.com/politics/2021/09/17/this-is-how-embarrassing->

and that the advice that “no fraud or illegality” existed was endorsed by a number of Trump’s closest advisors, who delivered that message to Trump himself.<sup>783</sup> This is powerful direct and circumstantial evidence that Trump’s collaborators knew that<sup>784</sup>—or chose to be willfully blind to it.<sup>785</sup>

*Fifth*, Trump’s own words, in moments of frustration and desperation, betray that he used claims of fraud cynically and instrumentally, not sincerely. On December 27, when Rosen told Trump that the DOJ “can’t and won’t just flip a switch and change the election,” Trump responded by telling him to “just say the election was corrupt and leave the rest to me and the [Republican] Congressmen.”<sup>786</sup> The point was not that fraud actually existed: it was that the DOJ’s endorsement of election fraud, even without basis, would serve Trump’s goal of retaining power. As Rosen remembered it, Trump told him that the DOJ should “just have a press conference.”<sup>787</sup> Similarly, Trump’s admonishment to Raffensperger “to find 11,780 votes” was not a call to uncover fraud, of whatever scale: it was a call to reverse the election, by whatever device.<sup>788</sup>

*Sixth*, as shown above, reporting suggests that there is a real question as to whether Trump and his closest advisors may have acted to conceal or destroy evidence of Trump’s involvement in attempts to overturn the election. We examine in detail the potential obstruction of such evidence by Secret Service personnel in an appendix below. A key piece of evidence here may well be the silence in the White House call log on January 6, 2021, taken together with evidence that Trump lacked candor when he said that he did not know what a “burner phone” is.<sup>789</sup> Especially given

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trumps-fraud-claims-have-gotten/, with Martin Pengelly, Trump Claims 5,000 Dead People Voted in Georgia – but the Real Number Is Four, *THE GUARDIAN* (Dec. 28, 2021), <https://www.theguardian.com/us-news/2021/dec/28/donald-trump-georgia-2020-election-dead-people>, and Noah Kim, Fact-Check: Did 4,925 People Improperly Vote in Georgia?, *POLITIFACT* (Jan. 6, 2021), <https://www.statesman.com/story/news/politics/politifact/2021/01/06/no-evidence-4-925-voters-out-state-voted-georgia-presidential-election/6565409002/>, and Bill McCarthy, Trump Rehashes Debunked Claim about ‘Suitcases’ of Ballots in Georgia Phone Call, *POLITIFACT* (Jan. 4, 2021), <https://www.politifact.com/factchecks/2021/jan/04/donald-trump/trump-rehashes-debunked-claim-about-suitcases-ball/>. These internally inconsistent claims matter for more than Trump’s credibility as a potential witness. Because they suggest pretextual motives, shifting rationales are a classic indicator of culpability.

<sup>783</sup> Luke Broadwater, Pressing for Evidence, Jan. 6 Panel Argues That Trump Committed Fraud, *THE NEW YORK TIMES* (Mar. 8, 2022), <https://www.nytimes.com/2022/03/08/us/politics/jan-6-panel-trump-fraud.html>.

<sup>784</sup> See *Eastman v. Thompson*, Order Re Privilege of Docs at 38 (“The Court discussed above how the evidence shows that President Trump likely knew that the electoral count plan was illegal. President Trump continuing to push that plan despite being aware of its illegality constituted obstruction by ‘dishonest’ means under § 371. The evidence also demonstrates that Dr. Eastman likely knew that the plan was unlawful.”).

<sup>785</sup> See *United States v. Hoffman*, 918 F.2d 44, 46 (6th Cir. 1990) (allowing a jury instruction that “a defendant’s knowledge of a fact may be inferred from willful blindness to the existence of the fact”).

<sup>786</sup> Staff of S. Comm. on the Judiciary, 117th Cong., *Subverting Justice: How the Former President and His Allies Pressured DOJ to Overturn the 2020 Election* at 16 (2021), <https://www.judiciary.senate.gov/imo/media/doc/Interim%20Staff%20Report%20FINAL.pdf> (hereinafter “Senate Report”).

<sup>787</sup> *Id.*

<sup>788</sup> Gardner & Firozi, *supra* note 101.

<sup>789</sup> See Amy B. Wang, Gap in Trump Call Logs on Jan. 6 ‘Suspiciously Tailored,’ Raskin Says, *THE WASHINGTON POST* (Apr. 3, 2022), <https://www.washingtonpost.com/politics/2022/04/03/jan-6-committee-raskin-trump-7-hour-gap/> (quoting U.S. Rep. Jamie Raskin, a member of the Select Committee) (“It’s a very unusual thing for us to find that suddenly everything goes dark for a seven-hour period in terms of tracking the movements and the conversations of the president.”).

Trump’s affirmative duty to preserve presidential records,<sup>790</sup> the absence of a record here suggests that Trump—or others on his behalf—may have taken steps to ensure that there was no evidence of their activities. And, should further factual investigation bear out Trump’s involvement, proof of destruction of evidence—like other indicia of a defendant’s attempt to conceal his participation in a crime—can be probative of consciousness of guilt.<sup>791</sup>

## **ii. Trump and Team Used Dishonest Means**

Even if they had sincerely believed the election was stolen, frustration with the courts would not have entitled Trump and his allies to deploy dishonest and illegal means to overturn the outcome. Again, § 371 nowhere preconditions prosecution on a defendant’s knowledge that he is in the wrong. It only requires that he intentionally obstruct a lawful function of the government by deceitful or dishonest means. Trump and his collaborators appear to have done that, whether or not they honestly believed their own fraud claims.

There is also reason to believe that Eastman, Chesebro, Meadows, Giuliani, and others knew that the false elector scheme was dishonest. In one of Eastman’s widely circulated memos,<sup>792</sup> which was edited by Chesebro, he acknowledged that the plan if effectuated would violate the Electoral Count Act of 1887, as amended.<sup>793</sup> Separately, in an email Chesebro sent to Giuliani, he acknowledged that perhaps the most important precedent for his argument was based on factual circumstances that differed in substantial and material ways—specifically, as it pertained to Hawaii in 1960, that there was an ongoing state-authorized recount that was ongoing on the date that federal law otherwise required electoral votes to occur. Evidence indicates that Meadows and Giuliani were both told by White House Counsel that the scheme was not on sound legal footing.<sup>794</sup>

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<sup>790</sup> See 44 U.S.C. § 2203.

<sup>791</sup> *United States v. Mendez-Ortiz*, 810 F.2d 76, 79 (6th Cir. 1986) (“Spoliation evidence, including evidence that defendant attempted to bribe and threatened a witness, is admissible to show consciousness of guilt.”); *United States v. Van Metre*, 150 F.3d 339, 352 (4th Cir. 1998) (same); *United States v. Howard*, 729 F. App’x 181, 188 (3d Cir. 2018) (“Here, there was adequate evidence of Howard’s consciousness of guilt, including testimony from the prosecution’s forensic scientist that Howard’s finger or palm prints—and not Arrington’s—were found on cups and containers that contained the stamp bags or heroin residue as well as testimony from a drug-trafficking expert that Howard’s behavior was consistent with an attempt to destroy evidence.”); *And see* Dennis Aftergut, *The Clearest Evidence Yet of Donald Trump’s Criminal Intent on Jan. 6*, SLATE (Mar. 29, 2022), <https://slate.com/news-and-politics/2022/03/trump-phone-records-gap-criminal-intent.html> (analyzing the legal significance of the 457-minute gap in phone records) (“Hiding one’s calls and conduct on Jan. 6, 2021, as it appears Trump did, rebuts his potential defense that he thought he was acting righteously. People who believe that their behavior is law-abiding do not cover it up in this way.”).

<sup>792</sup> First Memorandum from Dr. John C. Eastman on Jan. 6 Scenario (Dec. 23, 2020), <https://www.govinfo.gov/content/pkg/GPO-J6-DOC-Chapman053476/pdf/GPO-J6-DOC-Chapman053476.pdf>.

<sup>793</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Chapman University Production), Chapman053475 (December 23, 2020, John Eastman email to Boris Epshteyn and Kenneth Chesebro).

<sup>794</sup> See Maggie Haberman & Luke Broadwater, *Arizona Officials Warned Fake Electors Plan Could ‘Appear Treasonous’*, THE NEW YORK TIMES (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/us/politics/arizona-trump-fake-electors.html>.

### **Box 2: The Hawaii “Precedent” For False Electors**

The electors’ comparison to the 1960 Hawaii example is specious for several reasons.<sup>795</sup> There, the Kennedy electors cast their votes on December 19, 1960, amid an ongoing court-ordered recount of Nixon’s slim preliminary victory. The ceremony was public, and the Democratic certificate was ultimately approved by the governor as required by law. Under the circumstances of the Hawaii case, the court-ordered recount created reasonable uncertainty surrounding the vote total, giving the Kennedy electors a justifiable basis for their production of a Kennedy certificate. The false Trump electors, on the other hand, met and signed their fraudulent certificates on December 14, without any reasonable uncertainty as to the outcome of the election. The governors—including Republicans—never approved. Furthermore, Nixon’s initial Hawaii victory (pre-recount) was by a margin of only 141 votes, well within the realm of possibility for a recount to change; Biden’s total, on the other hand, was a much larger advantage unlikely to be overturned by a recount in any of the seven states at that generated fabricated electoral certificates.<sup>796</sup>

This dishonesty of the collective efforts to interfere with the election are borne out more generally by Trump’s own endorsement of violence and abusive conduct as tools to overturn the election. That endorsement was a continuation of Trump’s conduct during the period leading up to November 3, which had included his pointed refusal to condemn the Proud Boys during the 2020 election—directing them to “stand back and stand by”—and thus inviting their conduct in showing up at the Capitol on January 6.<sup>797</sup> Trump’s speech on January 6 was well calculated to encourage people to “fight like hell,” and when they did just that, Trump’s statements<sup>798</sup> referring to them as “very special” “patriots” whom he professed to “love”<sup>799</sup> showed his endorsement of what had gone on. So did his knowing failure to intervene for several hours once the Capitol was breached—despite the entreaties of several members of his inner circle.<sup>800</sup> Beyond this invocation and acquiescence in acts of violence by his supporters, Trump and his allies also explored, threatened, or actually engaged in other abusive acts in an effort to prevail. These included the

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<sup>795</sup> This paragraph is adapted from another report by one of the authors analyzing the former president’s potential criminal exposure in Fulton County, Georgia. *See* Eisen et al., *supra* note 30.

<sup>796</sup> For more, *see* Matz, Eisen & Singh, *supra* note 316.

<sup>797</sup> Adam Gabbatt, Trump’s Refusal to Condemn White Supremacy Fits Pattern of Extremist Rhetoric, *THE GUARDIAN* (Sept. 30, 2020), <https://www.theguardian.com/us-news/2020/sep/30/trump-white-supremacy-extremist-rhetoric>.

<sup>798</sup> Naylor, *supra* note 500; Eliza Relman, Oma Seddiq & Jake Lahut, Trump Tells His Violent Supporters Who Stormed the Capitol ‘You’re Very Special,’ but Asks Them ‘to Go Home’, *BUSINESS INSIDER* (Jan. 6, 2021), <https://www.businessinsider.com/trump-video-statement-capitol-rioters-we-love-you-very-special-2021-1>.

<sup>799</sup> Relman, Seddiq & Lahut, *supra* note 798; Shant Shahrigian, Trump Praises Jan. 6 Rioters as ‘Patriots’ and ‘Peaceful People’, *NEW YORK DAILY NEWS* (July 11, 2021), <https://news.yahoo.com/trump-praises-jan-6-rioters-211400473.html>; *And see* Memorandum Opinion and Order at 35, *Thompson v. Trump*, No. 21-CV-400, 2022 WL 503384, (D.D.C. Feb. 18, 2022), ECF No. 66 (noting that “a reasonable observer could read that tweet as ratifying the violence and other illegal acts that took place that day”).

<sup>800</sup> Jim Acosta, Trump Did Not Want to Tweet ‘Stay Peaceful’ During January 6 Riot, Key Former Aide Says, *CNN* (Jan. 6, 2022), <https://www.cnn.com/2022/01/06/politics/trump-tweet-january-6/index.html>.

possibility of misusing national security powers to seize voting machines;<sup>801</sup> launching a pressure campaign against state officials that may well have violated state laws;<sup>802</sup> collaborating with battleground state electors to sign and submit phony electoral certificates;<sup>803</sup> and filing endless, meritless litigation—including litigation that the D.C. Bar Committee, in recommending that Giuliani be disbarred this July, described as “carefully calibrated to blend into a nationwide cascade of litigation intended to overturn the presidential election.”<sup>804</sup>

We believe that all of this evidence supports the legal conclusion that Trump and his allies utilized deceitful or dishonest means in order to overturn the election.

#### **d. Overt Acts**

Section 371’s fourth element is the performance of at least one overt act by one of the participants in furtherance of the conspiracy.<sup>805</sup> The overt act shows that the conspiracy progressed from thought into action, but the act need not itself be criminal or even illegal.<sup>806</sup>

The public record reflects numerous instances of overt acts in furtherance of the alleged conspiracies detailed here. Among many other acts, Eastman and Trump met with Pence and sought to coerce him into doing their bidding.<sup>807</sup> Meadows repeatedly emailed DOJ officials, demanding that they investigate nonexistent fraud.<sup>808</sup> Giuliani and his legal team shared responsibility for the overall effort, which included placing calls to false electors and encouraging

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<sup>801</sup> Reuters Staff, *Trump Directly Involved in Plans to Seize Voting Machines – Reports*, REUTERS (Feb. 1, 2022), <https://www.reuters.com/world/us/trump-directly-involved-plans-seize-voting-machines-reports-2022-02-01/>.

<sup>802</sup> Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to ‘Find’ Votes to Overturn Election*, THE NEW YORK TIMES (May 26, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html>.

<sup>803</sup> Terry Gross, *How Trump Sought to Use Fake Electors, Conspiracy Theories to Remain in Power*, NPR (Feb. 10, 2022), <https://www.npr.org/2022/02/10/1079835695/how-trump-sought-to-use-fake-electors-conspiracy-theories-to-remain-in-power>.

<sup>804</sup> William Cummings, Joey Garrison & Jim Sargent, *By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>; Report and Recommendation of Ad Hoc Hearing Committee, *In re Giuliani*, D.C. App. No. 2020-D253, at 36 (July 7, 2023), <https://s3.documentcloud.org/documents/23868881/dc-bar-report-and-recommendation-on-rudy-giuliani.pdf>.

<sup>805</sup> See generally Cane, Grey & Hirtle, *supra* note 628, at 934–35; *Braverman v. United States*, 317 U.S. 49, 53 (1942) (“The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime.”).

<sup>806</sup> *Yates v. United States*, 354 U.S. 298, 334 (1957) (“It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy...Nor, indeed, need such an act, taken by itself, even be criminal in character. The function of the overt act in a conspiracy prosecution is simply to manifest ‘that the conspiracy is at work.’”).

<sup>807</sup> See, e.g., Select Comm. Report at 35.

<sup>808</sup> Veronica Stracqualursi, Daniella Diaz, Marshall Cohen & Manu Raju, *Trump’s chief of staff Mark Meadows pushed DOJ to investigate baseless election fraud claims*, CNN (June 5, 2021), <https://www.cnn.com/2021/06/05/politics/mark-meadows-doj-2020-election-fraud/index.html>.

them to convene on December 14. And Chesebro sent his November 18 memo detailing the initial plans for the false electors scheme to James Troupis, a Trump campaign lawyer in Wisconsin.<sup>809</sup>

### 3. Potential Targets, Subjects, or Witnesses Under § 371

In order to bring a case to trial in a reasonably expeditious manner, it must be as narrow as reasonable. We join the Select Committee in analyzing that the most potentially culpable individuals are Trump, his principal inside collaborator Meadows, and three associated lawyers Giuliani, Eastman, and Chesebro. (The Committee also noted Clark’s potential liability; but, because that is ancillary to the prosecutorial focus on the false electors scheme that we urge, we address that in Appendix B.)

For the Special Counsel to establish and sustain a conviction under § 371, he will need to show that Trump and any codefendants acted in concert to (a) submit false statements to Congress (the “offense prong”) or (b) to defraud the United States (the “defraud prong”). In this section we summarize the evidence that Trump led a vast national effort to do both, by foisting false electoral certificates on Congress, and defrauding the United States through the submission of those same certificates and pressuring Pence to acknowledge them. In addition to analyzing Trump’s contacts with four others whom the Select Committee noted were principally responsible—his White House colleague Meadows and associated lawyers Giuliani, Eastman, and Chesebro—we address the concerted activity of a vast array of national, state, and local actors whom prosecutors might view, as targets, subjects, or, at a minimum, witnesses. Because, unlike state prosecutors, Smith is operating on a time frame occasioned by the prospect a reelected Trump might shut down his investigation, we urge a short list of defendants. But in the fullness of time, prosecutors might consider others here for further investigation and, if appropriate, prosecution.

**The legal architects of the plan.** As we have noted, the initial conception of the plan appears to have come from Kenneth Chesebro, an outside legal advisor to the Trump campaign. He drafted and circulated two memos outlining the strategy. The second, drafted on December 9, 2020, articulated that part of the strategy with the phony electoral certificates would be to submit them to Congress, even if they were never legitimized by any state or court in advance of January 6.<sup>810</sup> He also took steps consistent with a tacit agreement with others, including communicating with Republican Party officials in Arizona and Nevada to explain that the purpose of sending phony certificates would be so Congress could act on them.<sup>811</sup> Chesebro emailed Giuliani about the plan, stating that Pence was “charged with the constitutional responsibility not just to **open** the votes, but to **count** them” and “mak[e] judgments about what to do if there are conflicting

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<sup>809</sup> Alan Feuer et al., *Memos Show Roots of Trump’s Focus on Jan. 6 and Alternate Electors*, THE NEW YORK TIMES (Feb. 2, 2022), <https://www.nytimes.com/2022/02/02/us/politics/trump-jan-6-memos.html>.

<sup>810</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Joshua Findlay Production), JF044 (December 9, 2020, memo from Kenneth Chesebro titled “Statutory Requirements for December 14 Electoral Votes”) (stating, “the votes might be eligible to be counted if later recognized (by a court, the state legislature, *or Congress*) as the valid ones that actually count in the presidential election” (emphasis added)).

<sup>811</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (James DeGraffenreid Production), DEGRAFFENREID 000778 (December 11, 2020, email from Jim DeGraffenreid to Kenneth Chesebro with subject “URGENT—Trump-Pence campaign asked me to contact you to coordinate Dec. 14 voting by Nevada electors”); Haberman & Broadwater, *supra* note 794.



votes.”<sup>812</sup> He also composed and disseminated documents to be used by the phony electors in all seven of the states that ultimately submitted fabricated electoral certificates.<sup>813</sup>

Rudy Giuliani soon joined in as a legal architect of the plan along with Trump attorney Boris Epshteyn.<sup>814</sup> According to Trump Deputy Campaign Manager and senior counsel Justin Clark, his “understanding of who was driving the process ... was Mayor Giuliani and his team.”<sup>815</sup> That is corroborated by a December 10, 2020, email from Chesebro stating that he “spoke this evening with Mayor Giuliani [sic], who is focused on doing everything possible to ensure that that [sic] all the Trump-Pence electors vote on Dec. 14.”<sup>816</sup> And after Trump campaign lawyers made clear they no longer wished to participate in the effort, one of the lawyers emailed officials in six of the seven states to let them know that responsibility for the scheme was being passed on to “Rudy’s team.”<sup>817</sup> As described in greater detail in Section I.A.4.b, Epshteyn also appears to have had a prominent role in the effort. According to a *New York Times* review of dozens of emails that were not provided to the Select Committee, Epshteyn was apparently a “coordinator for people inside and outside the Trump campaign and the White House.”<sup>818</sup>

John Eastman, a law professor and apparent advisor to Trump, also joined in short order as one of the leading legal strategists in effecting the plan. The evidence strongly suggests that Trump and Eastman agreed, tacitly or explicitly, to work in concert toward the common goal of obstructing the congressional count on January 6, 2021.<sup>819</sup> Eastman drafted a memo on December 23, 2020, which was edited by Chesebro, that detailed a process by which the phony electors from

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<sup>812</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Chapman University Production), Chapman004708 (January 4, 2021, email from Kenneth Chesebro to John Eastman titled “Fwd: Draft 2, with edits”, which includes in the chain a Dec. 13, 2020, email from Kenneth Chesebro to Rudy Giuliani titled “PRIVILEGED AND CONFIDENTIAL—Brief Notes on “President of the Senate” strategy” (emphasis in original)).

<sup>813</sup> Select Comm. Report at 350 nn.64–70.

<sup>814</sup> Sonnet Swire, Former Trump campaign adviser acknowledges being part of 2020 ‘alternate electors’ plot, CNN (Jan. 22, 2022), <https://www.cnn.com/2022/01/22/politics/boris-epshteyn-trump-campaign-fake-electors/index.html&lang=en>.

<sup>815</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Justin Clark, (May 17, 2022), at 125.

<sup>816</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (James DeGraffenreid Production), CTRL0000044010\_00031 (Dec. 10, 2020 email from Kenneth Chesebro to James DeGraffenreid and others).

<sup>817</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Joshua Findlay Production), JF052.

<sup>818</sup> Haberman & Broadwater, *supra* note 328.

<sup>819</sup> Eastman v. Thompson, Order Re Privilege of Docs at 37 (“There is strong circumstantial evidence to show that there was likely an agreement between President Trump and Dr. Eastman to enact the plan articulated in Dr. Eastman’s memo. In the days leading up to January 6, Dr. Eastman and President Trump had two meetings with high-ranking officials to advance the plan. On January 4, President Trump and Dr. Eastman hosted a meeting in the Oval Office to persuade Vice President Pence to carry out the plan. The next day, President Trump sent Dr. Eastman to continue discussions with the Vice President’s staff, in which Vice President Pence’s counsel perceived Dr. Eastman as the President’s representative. Leading small meetings in the heart of the White House implies an agreement between the President and Dr. Eastman and a shared goal of advancing the electoral count plan.”).

the seven states could be used by Pence to overturn the election.<sup>820</sup> Eastman followed up with a second memo expanding on these arguments on January 3, 2021.<sup>821</sup> The first memo calls for Vice President Pence to “determine[] on his own” which of the states’ electoral certificates “is valid, asserting that the authority to make that determination under the 12th Amendment, and the Adams and Jefferson precedents, is his alone.”<sup>822</sup>

In public and in closed-door meetings, Trump repeatedly and forcefully backed Eastman’s scheme.<sup>823</sup> Their apparently close partnership in pitching the scheme to policymakers, and ultimately to the public, is indicative of a commonality of purpose. As shown in greater detail above: On January 2, they participated together in a call to convince state legislators to overturn the election.<sup>824</sup> Then, with the two Eastman memos in hand as a purported (albeit bogus) legal justification, Eastman and Trump met with Pence on January 4, 2021, in an effort to convince Pence to participate in the plan.<sup>825</sup> Once again, Pence declined.<sup>826</sup>

So with Eastman there is what amounts to explicit communication; coordination on substance, messaging, and timing; complete consonance of not just goals but also strategies; and lockstep actions. Trump and Eastman appear to have worked together—sometimes in the same room, sometimes consecutively, and consistently. They promoted a single objective—overturning the election—through common means: pressuring Pence to throw out electoral certificates or to adjourn Congress, both in contravention of established law.

As we have noted, the conduct of at least Chesebro, Giuliani, and Eastman appears to meet DOJ standards for prosecution for Conspiracy to Make a False Statement. They each agreed (at least tacitly) to participate in the plan to submit the phony electoral certificates to Congress in an effort to overturn the election. There were multiple overt acts in furtherance of the scheme. And they all had the requisite criminal intent for the object of the conspiracy, namely, 18 U.S.C. § 1001. They all knew it was generally unlawful—Eastman’s memo (which Chesebro edited, and which

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<sup>820</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Chapman University Production), Chapman053476 (Word Document, “PRIVILEGED AND CONFIDENTIAL January 6 Scenario,” attached in Dec. 23, 2020, John Eastman email to Boris Epshteyn and Ken Chesebro).

<sup>821</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Public Source), CTRL0000923050 (Jan. 3, 2021, John Eastman 6-page memo).

<sup>822</sup> Second Memorandum from Dr. John C. Eastman on Jan. 6 Scenario (Jan. 3, 2021), <https://www.washingtonpost.com/context/john-eastman-s-second-memo-on-january-6-scenario/b3fd2b0a-f931-4e0c-8bac-c82f13c2dd6f/>.

<sup>823</sup> Jacqueline Alemany, Emma Brown, Tom Hamburger & Jon Swaine, Ahead of Jan. 6, Willard Hotel in Downtown DC was a Trump Team ‘Command Center’ for Effort to Deny Biden the Presidency, THE WASHINGTON POST (Oct. 23, 2021), [https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff\\_story.html](https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html).

<sup>824</sup> *Id.*

<sup>825</sup> See Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Deposition of Greg Jacob, (Feb. 1, 2022).

<sup>826</sup> *Id.*

Epshteyn sent to Giuliani) specifically stated that the effort would violate the Electoral Count Act.<sup>827</sup>

**Senior White House official(s).** At least one senior White House official also appears to have actively participated in the scheme such that they can also be charged with Conspiracy.<sup>828</sup> The public record amply reflects Trump’s Chief of Staff Mark Meadows’ intimate involvement with Trump’s campaign to overturn the election—and a lockstep concert of action, consistent through multiple strategies toward a common goal,<sup>829</sup> that rises to strong circumstantial evidence of conspiracy.<sup>830</sup> At a minimum, Meadows became involved in the effort as early as December 6, 2020, when he forwarded a copy of Chesebro’s November 18, 2020, memo to Trump Campaign Senior Advisor Jason Miller, stating, “We just need to have someone coordinating the electors for states.”<sup>831</sup> Miller sent Meadows a spreadsheet later that week listing contact information for nearly all pro-Trump electors in six of the seven states that ultimately submitted phony certificates.<sup>832</sup> The Select Committee has released findings showing that “Mr. Meadows received text messages and emails regarding apparent efforts to encourage Republican legislators in certain States to send alternate slates of electors to Congress, a plan which one Member of Congress acknowledged was ‘highly controversial’ and to which Mr. Meadows responded, ‘I love it.’”<sup>833</sup> Meadows’ extensive involvement was also confirmed by Cassidy Hutchinson, Special Assistant to the President and an Assistant to Meadows. Hutchinson stated in her interview with the Select Committee that Meadows had “[d]ozens of calls on the subject and ‘remember[ed] him frequently having calls, meetings, and outreach with individuals and this just being a prominent topic of discussion in our office.”<sup>834</sup>

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<sup>827</sup> Second Memorandum from Dr. John C. Eastman on Jan. 6 Scenario (Jan. 3, 2021), <https://www.washingtonpost.com/context/john-eastman-s-second-memo-on-january-6-scenario/b3fd2b0a-f931-4e0c-8bac-c82f13c2dd6f/>.

<sup>828</sup> See Select Comm. Report at 345–46.

<sup>829</sup> At least one member of the Select Committee, Rep. Jamie Raskin, has spoken directly to Meadows’ involvement: “Meadows was someone obviously central to the operations of the Trump White House and deeply implicated in Trump’s specific attempts to strip Biden of his electoral college victory after the election. He was above all a loyal servant to Donald Trump regardless of the dictates of the law and the Constitution.” See Kranish, *supra* note 420.

<sup>830</sup> See, e.g., *United States v. Boykin*, 794 F.3d 939, 948 (8th Cir. 2015) (“[T]he crime of conspiracy requires a concert of action among two or more persons for a common purpose.” (internal quotation marks omitted)).

<sup>831</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Mark Meadows Production), MM003771.

<sup>832</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Mark Meadows Production), MM010783, MM010784. Unlike other potential defendants like Trump, Giuliani, Chesebro, or Eastman, our search did not turn up any public justification made by Miller for his actions.

<sup>833</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Resolution Recommending That the House of Representatives Find Mark Randall Meadows in Contempt of Congress for Refusal to Comply With a Subpoena Duly Issued by the Select Committee to Investigate the January 6th Attack on the United States Capitol, H. Rep. 117-216, (2021), <https://tinyurl.com/8wmya3hx>.

<sup>834</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Continued Interview of Cassidy Hutchinson, (Mar. 7, 2022), at 54–55.

Meadows may be cooperating, and for that reason may also avoid being included as a named defendant in an indictment.<sup>835</sup>

**Trump campaign officials.** Numerous Trump campaign officials were instrumental in executing the scheme. As noted above, Trump Campaign Senior Advisor Jason Miller coordinated with Meadows to compile contact information for the phony electors in the seven states that submitted false certificates.<sup>836</sup> Trump Campaign Director of Election Day Operations Michael Roman (who reportedly entered a proffer agreement with prosecutors) also played a major role.<sup>837</sup> When Trump Campaign Associate General Counsel Joshua Findlay circulated an email passing off responsibility to “Rudy’s team,” he stated that Roman had been designated as “the lead for executing the voting” on December 14, 2020.<sup>838</sup> Roman proceeded to lead what he called the “Electors Whip Operation,” emailing a number of officials to track phony electors in Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin.<sup>839</sup> Christina Bobb—then a cable news host on One America News Network<sup>840</sup>—also appears to have actively assisted Roman’s efforts by participating in calls with him and tracking the progress of the scheme to recruit phony electors.<sup>841</sup> Additionally, many campaign officials on the ground in the seven states worked to enlist the fraudulent electors and coordinated their efforts with higher level officials.<sup>842</sup> And Trump Campaign Deputy Director of Election Day Operations G. Michael Brown (who has testified before the grand jury) appears to have delivered fabricated electoral certificates to Congress.<sup>843</sup>

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<sup>835</sup> See Jonathan Swan, Michael S. Schmidt & Maggie Haberman, Mark Meadows Testified to Grand Jury in Special Counsel Investigation of Trump, *THE NEW YORK TIMES* (June 6, 2023), <https://www.nytimes.com/2023/06/06/us/politics/mark-meadows-testified-trump-grand-jury.html>.

<sup>836</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Mark Meadows Production), MM003771.

<sup>837</sup> C. Ryan Barber & Sadie Gurman, Jack Smith Probe of 2020 Election Challenges Focuses on Trump Lawyers, *THE WALL STREET JOURNAL* (last updated July 3, 2023), <https://www.wsj.com/articles/jack-smith-probe-of-2020-election-challenges-focuses-on-trump-lawyers-9fdea5e4?ns=prod/accounts-wsj> (Roman reportedly spoke with prosecutors “under a so-called proffer agreement...known colloquially as a ‘queen for a day’ deal—in which a witness provides information to prosecutors, who in turn promise not to use it against them in potential criminal proceedings.”); Cohen & Collins, *supra* note 355.

<sup>838</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Joshua Findlay Production), JF052.

<sup>839</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Robert Sinners Production), CTRL0000083897, CTRL0000083898.

<sup>840</sup> Asawin Suebsaeng, Maxwell Tani & Sam Stein, An OAN Host Has Been Helping Rudy With Trump’s Legal Efforts, *THE DAILY BEAST* (Nov. 23, 2020), <https://www.thedailybeast.com/oan-host-christina-bobb-has-been-helping-rudy-giuliani-with-trumps-legal-efforts>.

<sup>841</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Robert Sinners Production), CTRL0000083897, CTRL0000083898.

<sup>842</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Robert Sinners Production), CTRL0000083897, CTRL0000083898.

<sup>843</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Angela McCallum Production), McCallum\_01\_001576, McCallum\_01\_001577 (Michael Brown text message to Angela McCallum at undetermined time); Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Deposition of Angela McCallum, (Dec. 8, 2021), at 122. Our search did not turn up any public justification made by Brown for his actions; <https://www.wsj.com/articles/jack-smith-probe-of-2020-election-challenges-focuses-on-trump-lawyers-9fdea5e4?ns=prod/accounts-wsj>; Cohen & Collins, *supra* note 355.

Such conduct may meet the requirements for charges under DOJ standards for Conspiracy for both the high-level officials as well as those on the ground in the states.

**State and national Republican Party officials.** Republican Party officials also actively participated in the scheme. As previously noted, Republican National Committee Chair Ronna Romney McDaniel agreed to assist with the effort in a phone call with Trump and John Eastman<sup>844</sup>—and then followed up by helping to communicate progress of the phony electors in many states.<sup>845</sup> The Select Committee Report also notes that “RNC staffers work[ed] alongside the Campaign as part of the Trump Victory Committee” to assist Michael Roman with his “Electors Whip Operation.”<sup>846</sup> Republican Party officials in various states appear to have helped facilitate the voting of the phony electors as well.<sup>847</sup> The actions of many officials from the top to the bottom may meet the DOJ standards for a charge of Conspiracy to Make a False Statement.

**The phony electors.** The phony electors in the five states that issued unqualified certificates falsely declaring them to be the “the duly elected and qualified Electors” from their respective states may meet the DOJ standards for a charge of Conspiracy to Make a False Statement. They signed onto the phony certificates with the apparent purpose that those certificates be submitted to Congress. As explained below in Section III, however, many members of this group likely have successful defenses to such a charge.

Trump has denied any wrongdoing and claims he is protected by presidential immunity (as discussed in Section I.A.1). Chesebro, Giuliani, and Eastman have all denied any wrongdoing (as discussed in Section I.A.4).

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<sup>844</sup> Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Transcribed Interview of Ronna Romney McDaniel, (June 1, 2022), at 9:10–12.

<sup>845</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (National Archives Production), 076P-R000009527\_0001 (December 14, 2020, forwarded email from Ronna McDaniel to Molly Michael with the subject line: “FWD: Electors Recap—Final”).

<sup>846</sup> Select Comm. Report at 350.

<sup>847</sup> See Select Comm. Report at 351 n.78 (citing David Shafer (@DavidShafer), TWITTER (Dec. 14, 2020, 12:51 p.m.), <https://twitter.com/DavidShafer/status/1338542161932021762>); David Shafer (@DavidShafer), TWITTER (Dec. 14, 2020, 1:07 p.m.), <https://twitter.com/DavidShafer/status/1338546066346676224>; Republican Electors Cast Procedural Vote, Seek to Preserve Trump Campaign Legal Challenge, Republican Party of Pennsylvania (Dec. 14, 2020), <https://pagop.org/2020/12/14/republican-electors-cast-procedural-vote/>; Statement on Republican Electors Meeting, Republican Party of Wisconsin (Dec. 14, 2020), <https://wisgop.org/republican-electors-2020/>; Republican Party of Arizona (@AZGOP), TWITTER (Dec. 14, 2020, 5:13 p.m.), <https://twitter.com/AZGOP/status/1338608056985239554>).

### **Box 3: Trump and Others in Related Schemes**

If the DOJ pursues a broader indictment encompassing the additional schemes in Section II beyond the false electoral slates, other counts under § 371 could also be considered.<sup>848</sup> For example, Meadows helped coordinate efforts to subvert the DOJ’s election protection function, to pressure states to overturn their results (at least with respect to Georgia), and to pressure Vice President Pence to overturn the Electoral College results. It was apparently Meadows who introduced Trump to Clark—and Meadows who repeatedly emailed DOJ leadership about the need to investigate bogus fraud claims.<sup>849</sup> Meadows also traveled to Georgia to pursue allegations of fraud—and then reportedly helped to organize the January 2, 2021 phone call where Trump demanded that Georgia election officials “find” him just enough votes to win by emailing Secretary of State Brad Raffensperger.<sup>850</sup> Meadows then participated in the call, speaking up to object to Raffensperger’s rejection of Trump’s claim that 5,000 dead people had voted in the Georgia election.<sup>851</sup> Meadows also requested voter information, in the form of the Secretary of State’s office’s election data, which was denied by the General Counsel to Georgia’s Secretary of State, Ryan Germany, who told Meadows that doing so would be against the law. Nevertheless, Meadows continued to press for this information, stating that he, Germany, and Trump campaign lawyer Kurt Hilbert, who was also on the call, should reconvene after the call “and work out a plan” whereby Meadows could obtain the voter information.<sup>852</sup>

#### **B. 18 U.S.C. § 1512: The Scheme to Obstruct the Counting of Presidential Electors on January 6**

Having generated these phony slates of electors, the next part of the plan was put into place: pressuring Vice President Mike Pence to either recognize the false slates of electors that had been submitted to Congress, or to delay the count of the legitimate certificates until sometime after January 6, 2021.

18 U.S.C. § 1512(c)(2) forbids corruptly obstructing or impeding—or attempting to obstruct or impede—an official proceeding. Section 1512(k) forbids conspiring to obstruct or impede an official proceeding. We believe the facts support a substantial case that Trump and members of his circle—including, most prominently, John Eastman—violated § 1512(c)(2) and

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<sup>848</sup> See Section II.A.

<sup>849</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Resolution Recommending That the House of Representatives Find Mark Randall Meadows in Contempt of Congress for Refusal to Comply With a Subpoena Duly Issued by the Select Committee to Investigate the January 6th Attack on the United States Capitol, H. Rep. 117-216, (2021), <https://tinyurl.com/8wmya3hx>.

<sup>850</sup> *Id.* at 10; Kranish, *supra* note 420.

<sup>851</sup> Kranish, *supra* note 420.

<sup>852</sup> Ryan Goodman & Juilee Shivalkar, Mark Meadows Timeline: The Chief of Staff and Schemes to Overturn 2020 Election, JUST SECURITY (last updated Aug. 8, 2021), <https://www.justsecurity.org/77681/mark-meadows-timeline-the-chief-of-staff-and-schemes-to-overturn-2020-election/>; Gardner & Firozi, *supra* note 101.

(k) through their scheme to block and delay the congressional count of electoral vote certificates on January 6, 2021.<sup>853</sup>

In full, § 1512(c)(2)<sup>854</sup> provides:

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

To convict under § 1512(c)(2), then, the prosecution must prove at a minimum that an alleged perpetrator attempted to (1) corruptly; (2) obstruct, influence, or impede; (3) an official proceeding.

Section 1512(k) provides: “Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.” Conviction for conspiracy under § 1512(k) does not require actual commission or attempt to commit the acts constituting the crime, but does require that (1) two or more persons entered into the unlawful agreement to corruptly obstruct an official

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<sup>853</sup> Trump has denied any wrongdoing and claims he is protected by presidential immunity (as discussed in Section I.A.1). Eastman and other members of the inner circle have all publicly denied wrongdoing (as discussed in Section I.A.4).

<sup>854</sup> Paragraph (2) is a “catch-all” or omnibus provision, designed to cover the many instances of obstruction that could not be itemized in paragraph (1). *See* *United States v. Burge*, 711 F.3d 803, 809 (7th Cir. 2013) (“The expansive language in this provision operates as a catch-all to cover ‘otherwise’ obstructive behavior that might not fall within the definition of document destruction.”). As one circuit court noted, it is a “well-established rule” that “omnibus clauses of federal obstruction statutes be broadly construed.” *United States v. Mitchell*, 877 F.2d 294, 298 (4th Cir. 1989) (collecting cases). That imperative of broad application responds to criminal creativity: Omnibus obstruction statutes ensure that federal law covers “the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined.” *United States v. Griffin*, 589 F.2d 200, 206–07 (5th Cir. 1979).

proceeding; and (2) the defendant knowingly and intentionally joined the conspiracy with an awareness of its unlawful purpose.<sup>855</sup>

### 1. Criminal Intent: To Act “Corruptly”

Factually, there seems to be little doubt that Trump and members of his circle agreed upon and tried to implement a plan to prevent Congress from counting electoral certificates on January 6, 2021. That agreement plainly appears to satisfy the elements of a conspiracy under the law, and the overwhelming weight of precedent holds that an attempt to prevent Congress from counting the certificates is attempted obstruction of an official proceeding within the meaning of § 1512(c). As some commentators have noted, then, the truly dispositive question in a § 1512 prosecution is whether the government could prove beyond a reasonable doubt that Trump and his advisors had the necessary criminal intent for culpability.<sup>856</sup>

The publicly available evidence here strongly suggests that the answer is *yes*.<sup>857</sup> Culpability under § 1512(c) requires that a defendant act “corruptly.”<sup>858</sup> A wealth of caselaw—from D.C. district courts and from circuit courts around the country—has given “corruptly” a consensus “settled legal meaning.”<sup>859</sup> First: A defendant must have “specific intent to obstruct, impede, or

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<sup>855</sup> 18 U.S.C. § 1512(k). Subsection (k), unlike some other conspiracy statutes, contains no overt act requirement. *United States v. Edlind*, 887 F.3d 166, 176 n.4 (4th Cir. 2018) (noting that § 1512(k) “does not contain an overt act requirement.”).

<sup>856</sup> *See, e.g.,* McQuade, *supra* note 14.

<sup>857</sup> *Eastman v. Thompson*, Order Re Privilege of Docs at 36 (“Based on the evidence, the Court finds it more likely than not that President Trump corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021.”).

<sup>858</sup> In the face of the overwhelming weight of precedent, insurrectionists prosecuted for invading the Capitol on January 6 have repeatedly failed to convince any federal judge that the D.C. Circuit’s ruling in *United States v. Poindexter*, 951 F.2d 369, 377 (D.C. Cir. 1991), should control.

There, the appellate court construed “corruptly” as used in the then-extant version of 18 U.S.C. § 1505, which forbade “corruptly” obstructing “the due and proper administration of the law.” As applied to Admiral John Poindexter, the former National Security Advisor convicted of lying to Congress, the term was impermissibly “vague; that is, in the absence of some narrowing gloss, people must guess at its meaning and as to its application.” *Poindexter*, 951 F.2d at 378.

But, as any number of federal judges have recently observed, *Poindexter* simply does not apply to § 1512(c). First: *Poindexter* was an application of a since-rewritten statute—and not the statute at issue in a prosecution under § 1512—to a specific set of facts that are not the facts at issue in a potential prosecution of Donald Trump. *See United States v. Montgomery*, No. CR 21-46 (RDM), 2021 WL 6134591, at 18 (D.D.C. Dec. 28, 2021) (“*Poindexter* turned on the specific language of 18 U.S.C. § 1505 as then written and the specific charge in that case – that is, lying to Congress.”). Since 1991, courts have repeatedly refused to extend *Poindexter* to all uses of “corruptly” in all obstruction cases. *See United States v. Sandlin*, 575 F. Supp. 3d 16, 31 (D.D.C. 2021) (noting that courts have “cabined *Poindexter*’s holding to its facts and have not read it ‘as a broad indictment of the use of the word ‘corruptly’ in the various obstruction-of-justice statutes’”). Most relevantly, both the U.S. Supreme Court and the D.C. Circuit have since upheld the “corruptly” criminal intent requirement in § 1512(b). *United States v. Morrison*, 98 F.3d 619, 629 (D.C. Cir. 1996); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). “In sum, the narrow holding in *Poindexter* does not mean that the word ‘corruptly’ necessarily renders a criminal statute unconstitutionally vague, nor does it compel a conclusion that Section 1512(c)(2) is vague as applied” to a particular defendant’s conduct. *United States v. Puma*, No. 21-CR-454, 2022 WL 823079, at 105 (D.D.C. Mar. 19, 2022).

<sup>859</sup> *United States v. Williams*, 553 U.S. 285, 306 (2008) (“What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the



influence the proceeding.”<sup>860</sup> Here, that is easily shown: Trump himself is on the record specifically calling for Vice President Pence to throw out electoral certificates and to delay the count, while Eastman, Chesebro, Meadows, and Giuliani all took responsibility for pillars of the overall false electors push.<sup>861</sup> Second: There must be a nexus—“a relationship in time, causation, or logic”—between the obstructive conduct and the official proceeding.<sup>862</sup> Trump’s and his collaborators’ efforts were explicitly aimed at the electoral count. He spoke publicly at the January 6 rally, and tweeted on January 6, calling for Pence to throw out votes.<sup>863</sup> Meanwhile, Eastman and Trump’s other primary associates took action in other critical areas of the scheme all with the explicit intent to obstruct the electoral count. Third: As one D.C. federal court recently explained, prosecutors can prove “corrupt” action under § 1512(c) in one of two ways: “Section 1512(c) clearly punishes those who endeavor to obstruct an official proceeding by acting with a corrupt purpose, or ... by independently corrupt means, or both.”<sup>864</sup>

Here, it appears that the actions taken relating to the proceeding had both a corrupt purpose and involved independently corrupt means. As discussed below, case law explains that a corrupt purpose is an “improper purpose”—and, most relevantly, that a defendant acts with “improper purpose” when he is motivated by self-interest and not by legal duty in office. Trump’s and his collaborators’ attempts to obstruct and interfere with the electoral count were undertaken “with a corrupt purpose,” because the facts suggest they were motivated by a desire to retain power rather than a legitimate desire to faithfully execute the law. As to “independently corrupt means,” the caselaw requires means that are independently illegal or normatively wrong. Trump and company appear to have employed “independently corrupt” means, because their efforts to obstruct the count relied on patently dishonest tactics and on actions that Trump and his collaborators had abundant reason to know, even at the time, were both normatively wrong and unlawful.

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indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal culpability to whether the defendant’s conduct was ‘annoying’ or ‘indecent’ — wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.”). This is why no court has found § 1512(c)(2) to be unconstitutionally vague: “The question is whether the term provides a discernable standard when legally construed.” *United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017). As D.C. federal courts have now unanimously found, and as the discussion below shows, “corruptly” has a settled legal meaning, and one which put Trump and his co-conspirators on notice that their conduct here crossed the line.

<sup>860</sup> Sandlin, 575 F. Supp. 3d at 32.

<sup>861</sup> For instance: On January 4, Trump and Eastman met with Vice President Pence and his team at the Oval Office, specifically pressing Pence “to reject electors or delay the count.” *Eastman v. Thompson*, Order Re Privilege of Docs at 7.

<sup>862</sup> *Id.*; *And see, e.g., United States v. Grider*, No. 21-CR-22, 2022 WL 392307, at 31 (D.D.C. Feb. 9, 2022) (“Although the Court of Appeals has not yet weighed in, various judges of this Court have consistently held that ‘corruptly’ requires (1) some degree of specific intent to obstruct and (2) a nexus between the obstruction and the proceeding to be obstructed.”).

<sup>863</sup> *See Naylor*, *supra* note 500 (“Because if Mike Pence does the right thing, we win the election.”).

<sup>864</sup> *United States v. Puma*, 2022 WL 823079 at 103 (citing *United States v. Nordean*, No. 21-CR-175, 2021 WL 6134595, at 24 (D.D.C. Dec. 28, 2021)).

### a. Corrupt Purpose

The most appropriate definition of the word “corruptly” here is provided in 18 U.S.C. § 1505: “As used in § 1505, the term ‘corruptly’ includes acting with an improper purpose.”<sup>865</sup> Federal courts of appeal have applied that definition to other federal obstruction statutes, including § 1503 and § 1512(c). Under that precedent, a would-be obstructor is criminally liable when he is “motivated by an improper purpose.”<sup>866</sup>

A purpose is “improper” or “corrupt” in this context when an actor pursues personal gain or advantage at the expense of professional or ethical duty. As the Ninth Circuit recently explained: “As used in criminal-law statutes, the term ‘corruptly’ usually ‘indicates a wrongful desire for pecuniary gain or other advantage.’”<sup>867</sup> Other circuits concur. “[T]he term ‘corruptly’ in criminal laws has a longstanding and well-accepted meaning,” the Sixth Circuit has held. “It denotes ‘[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others.’”<sup>868</sup>

In *United States v. Cueto*, a lawyer argued that his obstructive motive under 18 U.S.C. § 1503 could not be “corrupt” or improper because he was simply advocating for his client, who ran an illegal gambling operation.<sup>869</sup> But the Seventh Circuit followed its sister circuits in holding that a defendant acts corruptly when he is motivated by personal advancement in derogation of professional responsibility: “It is undisputed that an attorney may use any lawful means to defend his client.... However, it is the corrupt endeavor to protect the illegal gambling operation and to safeguard his own financial interest, which motivated Cueto’s otherwise legal conduct, that separates his conduct from that which is legal.”<sup>870</sup> Similarly, the Second Circuit has held that a defendant acts with an improper purpose—and thus criminally responsible for federal obstruction purposes—when he is motivated by a desire for self-protection in counseling a witness to invoke the Fifth Amendment.<sup>871</sup> Professors Daniel Hemel and Eric Posner, in their recent study, apply that caselaw to presidential obstruction of justice.<sup>872</sup> They conclude that a

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<sup>865</sup> False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 3, 110 Stat. 3459, 3460.

<sup>866</sup> See *United States v. Fasolino*, 586 F.2d 939, 941 (2d Cir. 1978) (interpreting “corruptly” under Section 1503 to mean “motivated by an improper purpose”); *United States v. Gordon*, 710 F.3d 1124 (10th Cir. 2013) (“‘[C]orruptly,’ for purposes of 1512(c), means ‘acting with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede, or obstruct the proceeding.’”); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (“Section 1512(b) does not prohibit all persuasion but only that which is ‘corrupt[ ],’ or ‘motivated by an improper purpose.’”); *United States v. Haldeman*, 559 F.2d 31, 114–115, 115 n.229 (D.C. Cir. 1976) (finding the following jury instruction proper: “The word, ‘corruptly,’ as used in this statute simply means having an evil or improper purpose or intent. In terms of proof, in order to convict any Defendant of obstruction of justice, you must be convinced beyond a reasonable doubt that the Defendant made some effort to impede or obstruct the Watergate investigation or the trial of the original Watergate defendants.”).

<sup>867</sup> *United States v. Lonich*, 23 F.4th 881, 902–03 (9th Cir. 2022) (citing Black’s Law Dictionary).

<sup>868</sup> *United States v. Buendia*, 907 F.3d 399, 402 (6th Cir. 2018). And see, e.g., *United States v. Rooney*, 37 F.3d 847, 852–53 (2d Cir. 1994) (same); *United States v. Ogle*, 613 F.2d 233, 238 (10th Cir. 1979) (same).

<sup>869</sup> *United States v. Cueto*, 151 F.3d 620, 631 (7th Cir. 1998).

<sup>870</sup> *Id.*

<sup>871</sup> *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006).

<sup>872</sup> Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CAL. L. REV. 1277, 1312 (2018).

president acts with improper and corrupt motive when he acts “to advance narrowly personal, pecuniary, or partisan interests.”<sup>873</sup>

Here, based on the available evidence, Trump and others appear to have acted with an improper purpose. They aimed to achieve a partisan victory and to retain power in the face of what they knew to be Biden’s legitimate victory, and after they apparently knew that there was no legitimate avenue for disrupting the congressional count. As former federal prosecutor Barbara McQuade has noted: “It would be wrongful or improper for Trump to seek to retain the presidency if he knew that he had been defeated in the November election.”<sup>874</sup> He—and his cohort—did know. As we showed above, Trump was told—repeatedly, clearly, and by his own partisan allies—that he lost a safe and secure election. His cadre knew that as well. But even had he somehow genuinely believed he won, it would still be improper for Trump to attempt to stop the congressional count if he knew all legitimate and lawful means to contest the election had been tried and had failed.

### **b. Independently Corrupt Means**

In addition to acting with “a corrupt purpose,” Trump and his allies also appear to have acted through independently corrupt means. “Corrupt means” need not be independently criminal, just improper and wrongful, in the dictionary definition sense of “contrary to law, statute, or established rule.”<sup>875</sup> And, as noted *supra*, the Eastman/Trump scheme apparently deployed “corrupt” means in that sense of the term, because it called for Mike Pence to “violate[] the Electoral Count Act on four separate grounds,”<sup>876</sup> even if none of those violations were separate crimes.

Only one federal judge has suggested that conviction under § 1512(c) may require *both* corrupt purpose *and* corrupt means—and that “corrupt means” includes only independently *criminal* behavior. In *United States v. Sandlin*, the prosecution of a defendant who invaded the Capitol building on January 6, U.S. District Court Judge Dabney Friedrich held that the term “corruptly” in § 1512(c) was not unconstitutionally vague as applied to a defendant who was alleged to have impeded the count through violence. She explained that the “core set of conduct against which § 1512(c)(2) may be constitutionally applied” includes “independently criminal conduct that is inherently malign...and committed with the intent to obstruct an official

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For an additional, in-depth discussion of presidential obstruction of justice, see Barry H. Berke, Noah Bookbinder & Norman Eisen, Presidential obstruction of justice: The case of Donald J. Trump, GOVERNANCE STUDIES AT BROOKINGS (Aug. 22, 2018), <https://www.brookings.edu/research/presidential-obstruction-of-justice-the-case-of-donald-j-trump-2nd-edition/>.

<sup>873</sup> Hemel & Posner, *supra* note 872, at 1312.

<sup>874</sup> McQuade, *supra* note 14.

<sup>875</sup> Wrongful, def. 3(a), Oxford English Dictionary (2d ed. 1989) (cited in *United States v. Sandlin*, 575 F. Supp. 3d 16, 33 (D.D.C. 2021) (Friedrich, J.)).

<sup>876</sup> *Eastman v. Thompson*, Order Re Privilege of Docs at 7.

proceeding.”<sup>877</sup> But Judge Friedrich cautioned that “other cases, such as those involving lawful means...will present closer questions.”<sup>878</sup>

Any interpretation conditioning successful prosecution on proof of independently criminal means should be rejected. Other judges on Judge Friedrich’s court have taken a contrary position and no appellate court has insisted on independently criminal conduct before affirming a conviction under § 1512(c).<sup>879</sup> Instead, the heavy weight of precedent shows that independently corrupt—not necessarily criminal—means may be sufficient to prove corrupt intent, but it is surely not necessary.<sup>880</sup> Indeed, federal appellate courts have repeatedly affirmed obstruction convictions of defendants who commit otherwise lawful acts with criminal intent. Thus, for instance, in *United States v. Smith*, the Ninth Circuit affirmed the obstruction convictions of several Los Angeles Sheriff’s Department employees for engaging in conduct that would have been legal but for the defendants’ intent to interfere with an FBI investigation into civil rights violations at Los Angeles County jails.<sup>881</sup> In *United States v. Mitchell*, defendants—who took money to convince a congressman to stop a congressional investigation—argued that they were wrongfully convicted for the lawful behavior of lobbying Congress.<sup>882</sup> The Fourth Circuit disagreed, holding that the means of obstruction need not be independently criminal: “[M]eans, other than ‘illegal means,’ when employed to obstruct justice fall within the ambit of the ‘corrupt endeavor’ language of federal obstruction statutes.”<sup>883</sup> In *United States v. Cueto*, the Seventh Circuit upheld the obstruction conviction of an attorney who maintained that all his allegedly criminal actions—including filing court pleadings—had been no more than lawful advocacy.<sup>884</sup> “Otherwise lawful conduct, even acts undertaken by an attorney in the course of representing a client,” the court explained, “can transgress § 1503 if employed with the corrupt intent to

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<sup>877</sup> Sandlin, 2021 WL 5865006 at 13 (citing *United States v. North*, 910 F.2d 843, 943 (D.C. Cir. 1990), opinion withdrawn and superseded in part on reh’g, 920 F.2d 940 (D.C. Cir. 1990) (Silberman, J., concurring in part and dissenting in part) and *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005)).

<sup>878</sup> *Id.*; See also Order, *United States v. Reffitt*, No. 21-CR-32, (D.D.C. Dec. 29, 2021), ECF No. 81 (noting the same concern about edge cases that may present vagueness problems).

<sup>879</sup> The United States Court of Appeals for the District of Columbia Circuit recently declined to address “the meaning of ‘corrupt’ intent” under § 1512(c) “until that issue is properly presented to the court.” *United States v. Fischer*, 64 F.4th 329, 341 (D.C. Cir. 2023).

<sup>880</sup> See *United States v. Puma*, No. 21-CR-454, 2022 WL 823079, at 10 (D.D.C. Mar. 19, 2022) (describing “a consensus that Section 1512(c) clearly punishes those who ‘endeavor[] to obstruct’ an official proceeding by acting ‘with a corrupt purpose, or...by independently corrupt means, or [ ] both.’”). And see, e.g., *United States v. Silverman*, 745 F.2d 1386, 1393 (11th Cir. 1984) (interpreting § 1503) (“The statute reaches all corrupt conduct capable of producing an effect that prevents justice from being duly administered, regardless of the means employed.”).

<sup>881</sup> 831 F.3d 1207, 1211 (9th Cir. 2016). In *Smith*, the sheriff’s office defendants violated § 1503 when they enforced otherwise-legal jail rules with corrupt intent—for instance, by seizing a cell phone from an inmate that an F.B.I. agent smuggled to him as part of the investigation. See also Jury Instructions, *United States v. Baca*, No. 16-cr-00066, (C.D. Cal. Mar. 13, 2017), ECF No. 301 (“A local officer has the authority to investigate potential violations of state law. This includes the authority to investigate potential violations of state law by federal agents. A local officer, however, may not use this authority to engage in what ordinarily might be normal law enforcement practices, such as interviewing witnesses, attempting to interview witnesses or moving inmates, for the purpose of obstructing justice.”).

<sup>882</sup> 877 F.2d 294 (4th Cir. 1989).

<sup>883</sup> *Id.* at 299.

<sup>884</sup> 151 F.3d 620 (7th Cir. 1998).

accomplish that which the statute forbids.”<sup>885</sup> And, in *United States v. Cintolo*, the First Circuit held that “any act by any party—whether lawful or unlawful on its face” may violate federal obstruction statutes “if performed with a corrupt motive.”<sup>886</sup>

**c. Section 1512(c)(2) Does Not Require Proof of Consciousness of Wrongdoing—But Trump and His Collaborators Knew Their Behavior Was Wrong**

In his lawsuit to block Congress from obtaining emails about his role in the January 6 insurrection, Eastman maintained that Trump cannot face criminal liability under § 1512(c). In Eastman’s telling, Trump was following the advice of counselors who told him that the election genuinely was stolen. Therefore, for Eastman, Trump did not know he was doing something that broke the law—that is, Trump did not have the “consciousness of wrongdoing,” that, in Eastman’s account, is required for criminal liability.<sup>887</sup>

As we showed above, the facts do appear to support a finding of consciousness of wrongdoing. There is powerful evidence, surveyed in Section I, that Trump knew he lost the election and also certainly knew he lost the court battles, and that the means he employed to overturn the election outcome were dishonest and wrong. Practically speaking, prosecutorial judgment may depend above all on proof of consciousness of wrongdoing. But, at least as a technical matter, that is more than a prosecutor would need to charge and convict Trump and his allies. Consciousness of wrongdoing is a heightened criminal intent standard imported from § 1512(b). It is not native to subsection (c); does not fit with the plain language of the statute; has not been applied by the significant majority of appellate courts to examine the question; and should not be applied here.<sup>888</sup>

The “consciousness of wrongdoing” standard was developed by the Supreme Court in *Arthur Andersen LLP v. United States*, which asked whether a jury was properly instructed on criminal intent in a trial for obstruction under § 1512(b).<sup>889</sup> That subsection punishes anyone who “knowingly uses intimidation or physical force, threatens, or corruptly persuades another person ... with intent to” withhold or alter certain documents.<sup>890</sup> So, the Court was compelled to determine the significance of the statute’s agglomeration of “knowingly” and “corruptly.” It responded with the “consciousness of wrongdoing” standard. For a conviction to stand under § 1512(b), the Court explained, a defendant must know he is doing what the law forbids.<sup>891</sup> That “knowing” language

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<sup>885</sup> *Id.* at 628–31. And see, e.g., *United States v. Ogilvie*, No. 12-CR-121, 2014 WL 117414, at 2 (D. Nev. Jan. 9, 2014), *aff’d sub nom.* *United States v. Tracy*, 598 F. App’x 548 (9th Cir. 2015) (finding that indictment adequately alleged an offence under § 371 when it alleged, *inter alia*, that defendants conspired to file frivolous litigation against the IRS and its employees).

<sup>886</sup> 818 F.2d 980, 991 (1st Cir. 1987).

<sup>887</sup> Pl.’s Reply Brief in Support of Privilege Assertions at 27.

<sup>888</sup> See, e.g., *Eastman v. Thompson*, Order Re Privilege of Docs at 34 (“The Ninth Circuit has not defined ‘corruptly’ for purposes of this statute. However, the court has made clear that the threshold for acting ‘corruptly’ is lower than ‘consciousness of wrongdoing.’”).

<sup>889</sup> *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

<sup>890</sup> *Andersen*, 544 U.S. at 703 (quoting § 1512(b)).

<sup>891</sup> See *id.* at 705–08.

is entirely absent from § 1512(c), which merely requires that a defendant act “corruptly”—a standard that is, on its face, less demanding than *knowingly* acting corruptly.

Eastman cited *United States v. Lonich*, a Ninth Circuit case, to support his claim that the government must prove “consciousness of wrongdoing” to secure a conviction under § 1512(c).<sup>892</sup> But that is not what *Lonich* says. Instead, in *Lonich*, the Ninth Circuit specifically notes that it never had defined, and did not need to define, “corruptly” for the purposes of § 1512(c). That is because the trial court in *Lonich* instructed the jury that consciousness of wrongdoing would satisfy the statute’s criminal intent requirement—and the jury found guilt. In affirming, the Ninth Circuit held only that conscious wrongdoing would certainly be sufficient for culpability under § 1512(c)—not that conscious wrongdoing is necessary. Instead, the court explicitly noted that proof of conscious wrongdoing might well be more than the statute requires: “We have, however, affirmed an instruction stating that ‘corruptly’ meant acting with ‘consciousness of wrongdoing’ because it, ‘if anything, ... placed a higher burden of proof on the government than section 1512(c) demands.’”<sup>893</sup>

*Lonich* has it right on the plain meaning of the statute. But it is nevertheless true that two federal judges interpreting § 1512(c) in cases involving January 6 defendants have suggested that the government must prove consciousness of wrongdoing. U.S. District Court Judge John Bates, while recognizing that § 1512(b) and (c) have different language about criminal intent, overlooked that textual barrier to read § 1512(b)’s “consciousness of wrongdoing” requirement into § 1512(c): “[I]n order to be convicted of obstruction under § 1512(c)(2), a defendant must have been ‘aware that what he does is precisely that which the statute forbids,’ such that ‘[h]e is under no necessity of guessing whether the statute applies to him.’”<sup>894</sup> And, as Judge Bates observed, the federal government prosecuting those January 6 defendants has apparently conceded, in briefing, that it must prove consciousness of wrongdoing to obtain a conviction under § 1512(c).<sup>895</sup> In addition, in *United States v. Reffitt*, the first January 6 prosecution to proceed to a jury trial, U.S. District Court Judge Dabney Friedrich’s jury instruction defined “corruptly” for purposes of § 1512(c) to include consciousness of wrongdoing.<sup>896</sup>

That jury instruction and the government’s concession appear to have been unnecessary, required by neither text nor precedent. As noted, the Ninth Circuit expressly declined to import

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<sup>892</sup> Pl.’s Reply Brief in Support of Privilege Assertions at 20 (citing *United States v. Lonich*, 23 F.4th 881, 906 (9th Cir. 2022)).

<sup>893</sup> *Lonich*, 23 F.4th at 906 (citing *United States v. Watters*, 717 F.3d 733, 735 (9th Cir. 2013)).

<sup>894</sup> *United States v. McHugh*, No. 21-CR-453, 2022 WL 296304, at 21 (D.D.C. Feb. 1, 2022) (citing *Screws v. United States*, 325 U.S. 91, 104 (1945)). And see *United States v. Bozell*, No. 21-CR-216, 2022 WL 474144, (D.D.C. Feb. 16, 2022) (Bates, J., applying consciousness of wrongdoing standard).

<sup>895</sup> See, e.g., *United States v. Montgomery*, No. CR 21-46 (RDM), 2021 WL 6134591, at 83 (D.D.C. Dec. 28, 2021) (“And the government concedes that it will be required to prove at least that Defendants acted with ‘consciousness of wrongdoing.’”).

<sup>896</sup> Final Jury Instruction at 26, *United States v. Reffitt*, No. 21-CR-32, (D.D.C. Mar. 7, 2022), ECF No. 119 (“To act ‘corruptly,’ the defendant must use unlawful means or act with an unlawful purpose, or both. The defendant must also act with ‘consciousness of wrongdoing.’ ‘Consciousness of wrongdoing’ means with an understanding or awareness that what the person is doing is wrong.”).

the *Andersen* criminal intent standard into subsection (c)(2).<sup>897</sup> The Seventh Circuit has similarly declined.<sup>898</sup> Even the appellate cases cited by Judge Batess hold that § 1512(c) requires that a defendant act with an “improper purpose” or “dishonestly,” and with specific intent to obstruct or impede an official proceeding.<sup>899</sup>

In any event, even if the elevated criminal intent standard of consciousness of wrongdoing applied to § 1512(c), prosecutors would have a strong case. As we discussed above, there is abundant evidence indicating that Trump and his collaborators knew their attempt to block the congressional count was against the law and wrong.

## 2. Obstruct, Influence, and Impede

At least 14 district court decisions have held that defendants who attempted to stop the congressional count on January 6 committed an act punishable under § 1512(c)(2), which prohibits attempts to obstruct or impede an official proceeding.<sup>900</sup> As one federal judge put it: Obstruct and

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<sup>897</sup> *United States v. Watters*, 717 F.3d at 735.

<sup>898</sup> *United States v. Matthews*, 505 F.3d 698, 705 (7th Cir. 2007) (declining to adopt the *Anderson* definition, and explaining that corruptly means “with the purpose of wrongfully impeding the due administration of justice”).

<sup>899</sup> *United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013) (“Acting ‘corruptly’ within the meaning of § 1512(c)(2) means acting ‘with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct the [forfeiture proceeding].’” (internal quotation marks and citation omitted)); *United States v. Mintmire*, 507 F.3d 1273 (11th Cir. 2007) (requiring a showing of “improper purpose”).

<sup>900</sup> *See United States v. Gillespie*, No. CR 22-60 (BAH), 2022 WL 17262218, at \*5 (D.D.C. Nov. 29, 2022) (Howell, J.); *United States v. Hale-Cusanelli*, No. 21-cr-37, 2022 WL 4300000, at \*1 (D.D.C. Sept. 19, 2022) (McFadden, J.); *United States v. Robertson*, 610 F. Supp. 3d 229, 233–35 (D.D.C. 2022) (Cooper, J.); *United States v. Williams*, No. 21-cr-618, 2022 WL 2237301, at \*17 n.13 (D.D.C. June 22, 2022) (Berman Jackson, J.); *United States v. Fitzsimons*, 605 F. Supp. 3d 132, 137, 142–150 (D.D.C. 2022) (Contreras, J.); *United States v. Bingert*, 605 F. Supp. 3d 111, 123–28 (D.D.C. 2022) (Lamberth, J.); *United States v. McHugh*, No. 21-cr-453, 2022 WL 1302880, at \*2–12 (D.D.C. May 2, 2022) (Bates, J.); *United States v. Puma*, 596 F. Supp. 3d 90, 107–08, 107 n.4 (D.D.C. 2022) (Friedman, J.); *United States v. Grider*, 585 F. Supp. 3d 21, 29–31 (D.D.C. 2022) (Kollar-Kotelly, J.); *United States v. Nordean*, 579 F. Supp. 3d 28, 43–46 (D.D.C. 2021) (Kelly, J.); *United States v. Montgomery*, 578 F. Supp. 3d 54, 69–79 (D.D.C. 2021) (Moss, J.); *United States v. Mostofsky*, 579 F. Supp. 3d 9, 24–26 (D.D.C. 2021) (Boasberg, J.); *United States v. Caldwell*, 581 F. Supp. 3d 1, 20–33 (D.D.C. 2021) (Mehta, J.); *United States v. Sandlin*, 575 F. Supp. 3d 16, 24–28 (D.D.C. 2021) (Friedrich, J.).

Our theory of prosecution points to specific affirmative steps that Trump and Eastman took in apparent violation of § 1512(c), including their repeated attempts to coerce Mike Pence into discarding electoral certificates. We note, though, that at least one prominent member of Congress has implied that Trump’s *inaction* on January 6 may separately constitute obstruction under § 1512(c)(2)—or, at least, that inaction can be aggregated with Trump’s affirmative actions to suggest an obstructive scheme. *See Bourjaily v. United States*, 483 U.S. 171, 179–80 (1987) (characterizing as a “simple fact[] of evidentiary life” the proposition that “individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.”); *United States v. Pedraza*, 636 F. App’x. 229, 236–37 (5th Cir. 2016) (quoting *United States v. Kingston*, 875 F.2d 1091 (5th Cir. 1989) (“[W]here, as here, the government presents circumstantial evidence of an ongoing pattern of similar transactions, the jury may reasonably infer from the pattern itself that evidence otherwise susceptible of innocent interpretation is plausibly explained only as part of the pattern.”)).

In December of 2021, calling on her colleagues to cite former White House Chief of Staff Meadows for contempt of Congress, Republican congresswoman Liz Cheney invoked the language of § 1512(c): “Did Donald Trump, through action or inaction, corruptly seek to obstruct or impede Congress’s official proceeding to count electoral votes?” *See Aaron Blake, What Crime Might Trump Have Committed on Jan. 6? Liz Cheney Points to One,*

impede “are expansive and seemingly encompass all sorts of actions that affect or interfere with official proceedings, including blocking or altering the evidence that may be considered during an official proceeding *or*, as the defendants attempted, halting the occurrence of the proceeding altogether.”<sup>901</sup>

In the face of this near unanimity, only one judge has agreed with January 6 defendants that § 1512(c)(2) only prohibits behavior that amounts to tampering with evidence, and his decision was overturned on appeal.<sup>902</sup> In *United States v. Miller*,<sup>903</sup> U.S. District Court Judge Carl Nichols dismissed a § 1512(c)(2) charge against a defendant who invaded the Capitol on January 6. The opinion held that Miller’s attempt to impede the congressional count was not prohibited by § 1512(c), which—in Judge Nichols’ reading—“requires that the defendant have taken some action

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THE WASHINGTON POST (Dec. 14, 2021), <https://www.washingtonpost.com/politics/2021/12/14/liz-cheney-trump-crime/>.

Inaction—like Trump’s hours-long failure to try to stop the Capitol invasion on January 6—is not normally criminally punishable. But there are two relevant exceptions. First: inaction can be criminal when there is a duty to act. Second: inaction can be criminal when it is motivated by a desire to aid the perpetrators. *Burkhardt v. United States*, 13 F.2d 841 (6th Cir. 1926).

Article II, Section 3 of the Constitution commands the president to “take Care that the Laws be faithfully executed.” It is true that the Take Care clause does not make the president criminally liable whenever he or she fails to prevent a federal crime from occurring. *See generally* Renato Mariotti, The Bar for Charging Trump with Obstructing Congress Is Higher Than Many Realize, *POLITICO* (Dec. 23, 2021), <https://www.politico.com/news/magazine/2021/12/23/trump-charge-obstructing-congress-525927> (“The key word used by Cheney is ‘inaction.’ Thus far the evidence made public by the committee indicates that in the face of a violent attack on the U.S. Capitol, Trump did nothing. Cheney and others argue that Trump violated his oath of office, in which he swore to ‘preserve, protect and defend the Constitution,’ which requires him to ‘take care that the laws be faithfully executed.’ There can be little dispute that Trump failed to do so. But a president violating his oath of office, in itself, does not constitute a federal crime.”).

But at least one prominent scholar has made the case that “a president unmistakably violates his duty when he refuses to enforce the law because he *wants* a crime to occur—when, for example, he hopes to advance his own interests through the criminal conduct of others.” Albert W. Alschuler, The Easiest Case for the Prosecution: Trump’s Aiding and Abetting Unlawful Occupation of the Capitol, *JUST SECURITY* (Oct. 25, 2021), <https://www.justsecurity.org/78718/the-easiest-case-for-the-prosecution-trumps-aiding-and-abetting-unlawful-occupation-of-the-capitol/>.

<sup>901</sup> *United States v. Sandlin*, 2021 WL 5865006 at 9. *See also* *United States v. Grider*, No. 21-CR-22, 2022 WL 392307, at 10 (D.D.C. Feb. 9, 2022) (Obstruct can and does mean to stop the progression of the proceeding. “Section 1512(c) criminalizes two classes of actions: (1) tampering with evidence that may go before an official body and (2) obstructing the official body itself.”).

<sup>902</sup> *United States v. Fischer*, 64 F.4th 329 (D.C. Cir. 2023). However, that decision has been stayed pending resolution of a potential petition for certiorari to the United States Supreme Court. *United States v. Fischer*, No. 22-3038, 2023 WL 3985537 (D.C. Cir. June 13, 2023).

<sup>903</sup> *United States v. Miller*, No. 21-CR-119, 2022 WL 823070, (D.D.C. Mar. 7, 2022). *See also* *United States v. Fischer*, No. 21-CR-234, 2022 WL 782413, at 7, 8 (D.D.C. Mar. 15, 2022) (same). The meaning and placement of the word “otherwise” at the start of subsection (c)(2) are at the core of the disagreement between Judge Nichols and every other judge to examine the issue. Recall that there are two clauses to (c), which applies to “whoever corruptly— (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so...” The question is whether “otherwise” limits the scope of (2), such that the second clause only prohibits behavior that affects “a record, document, or other object,” like the behavior prohibited in (1). Judge Nichols held that it does. He found the statue susceptible of several plausible meanings, and applied the rule of lenity.



with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding.”<sup>904</sup>

But that idiosyncratic reading misapplied a key precedent<sup>905</sup> and important canons of statutory interpretation.<sup>906</sup> So it was no surprise when Judge Nichols’ opinion was, in April of this year, overturned by the Circuit Court of Appeals for the District of Columbia.<sup>907</sup> It remains to be seen what the Supreme Court might decide, but the weight of authority is now unanimously against Trump, Eastman, and others.

[Note that even if Judge Nichols had been correct, the case seems distinguishable. Trump and co-conspirators stand in a very different position from the insurrectionists who invaded the Capitol, and § 1512 allegations against them would certainly extend to taking “some action with respect to a document.” Their object was to convince Vice President Pence to reject state electoral vote certificates—documents, to be sure—that he was supposed to physically open and present to the appointed “tellers.”<sup>908</sup> They wanted Pence to deprive the tellers of the opportunity to read the certificate documents, list the votes, and ascertain the results.<sup>909</sup>]

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<sup>904</sup> United States v. Miller, No. 21-CR-119, 2022 WL 823070, at 78 (D.D.C. Mar. 7, 2022).

<sup>905</sup> An important part of Miller’s reasoning hinged on his interpretation of *Begay v. United States*, 553 U.S. 137 (2008). As Judge Nichols saw it, the *Begay* court “concluded that the ACCA’s use of the word ‘otherwise’ in some way tethered the text preceding the word to the text following it.” Miller, 2022 WL 823070 at 68. To Judge Nichols, that precedent, in turn, supported a reading of “otherwise” that similarly tethered § 1512(c)(2) to subsection (1), confining subsection (2)’s scope to behavior that—like the behavior in subsection (1)—affects documents and other objects. But, as U.S. District Court Judge Paul Friedman explained only weeks after Miller was decided, the *Begay* court actually declined to rest its opinion on the meaning of the word “otherwise.” Opinion and Order at 25–26, United States v. Puma, No. 21-CR-454, (D.D.C. Mar. 19, 2022), ECF No. 37 (citing United States v. Montgomery, No. 21-CR-46, 2021 WL 6134591, at 11 (D.D.C. Dec. 28, 2021)).

<sup>906</sup> For instance: Miller reasons that, if § 1512(c)(2) is a true residual clause, then it might be read to prohibit everything that § 1512(c)(1) prohibits and more. If so, § 1512(c)(1) would be superfluous. But Miller never confronted the compelling retort advanced by Judge Moss in *Montgomery*, demonstrating that there is a critical difference between § 1512 (c)(2) and § 1512 (c)(1):

The plain text of Section 1512(c)(1) targets the alteration of *evidence* ‘with the intent to impair *the object’s integrity or availability* for use in an official proceeding.’ 18 U.S.C. § 1512(c)(1) (emphasis added). In contrast, Section 1512(c)(2) takes aim at the obstruction of the official proceeding *itself*. In other words, while the official proceeding is the indirect object of the intent requirement in Section 1512(c)(1), it is the *direct* object of the conduct at issue in Section 1512(c)(2). Thus, “otherwise” signals a shift in emphasis from actions directed at evidence to actions directed at the official proceeding itself.

So § 1512(c)(1) is not redundant: It encodes a different standard than § 1512(c)(2). And there is no constitutional or interpretive significance in the mere fact that § 1512(c)(2) covers some conduct that might also fall under § 1512(c)(1). United States v. Montgomery, No. CR 21-46 (RDM), 2021 WL 6134591, at 72 (D.D.C. Dec. 28, 2021) (cleaned up).

<sup>907</sup> United States v. Fischer, 64 F.4th 329, 338 (D.C. Cir. 2023).

<sup>908</sup> 3 U.S.C. § 15(e)(3) (describing the “tellers” as the group required to make the list of votes and to count them).

<sup>909</sup> See Government’s Response to Defendants’ Joint Supplemental Brief at 40, United States v. Miller, No. 21-119, (D.D.C. Nov. 17, 2021), ECF No. 63-1 (“At a bare minimum, Section 1512(c)(2) covers conduct that prevents the examination of documents, records, and other nontestimonial evidence in connection with an official proceeding. If, for example, the defendants had corruptly blocked the vehicle carrying the election returns to the Capitol for

### 3. Official Proceeding

Courts have unanimously found the congressional count of electoral votes to be an “official proceeding” under § 1512(c).<sup>910</sup>

The meaning of “official proceeding” for our purposes can start and end with the language of the statute. 18 U.S.C. § 1515(a)(1)(B) defines “official proceeding” for the purposes of § 1512(c)(2) as including “a proceeding before the Congress.” As Judge Nichols demonstrated in *United States v. Miller*, a purely textualist reading of the statute shows that the count was a “proceeding.”<sup>911</sup> “Proceeding,” Judge Nichols explained, is defined by *Webster’s* as “a particular thing done.”<sup>912</sup> Judge Nichols notes that the count also fits under the *Black’s Law Dictionary* definition, “[t]he business conducted by a court or other official body.”<sup>913</sup>

As Judge Nichols’ decision suggests, that could be the end of the discussion in an era in which “we’re all textualists.”<sup>914</sup> But January 6 defendants have argued, and some judges have agreed, contrary to the apparent plain meaning of § 1515, that “not every ‘proceeding’ before Congress is an official proceeding.”<sup>915</sup> That still does not help January 6 defendants, since courts have unanimously held that the electoral count was “official” in every relevant way. “Official,” as courts have noted, “means formal or ceremonious.”<sup>916</sup> And “[f]ew Congressional events could be more ceremonious and formal than the quadrennial Joint Session of Congress mandated by the Constitution and federal statute.”<sup>917</sup>

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congressional examination at the certification proceeding, that conduct would clearly fit within Section 1512(c)(2). Section 1512(c)(2) would likewise cover blocking a bus carrying the Members of Congress to the Capitol to examine the election returns at the certification proceeding. And it just as readily covers displacing the Members of Congress from the House and Senate Chambers, where they would examine and discuss those returns and other records.”).

<sup>910</sup> See Cong. Defs. Opp. to Pl. Eastman’s Privilege Assertions at 38 (“To date, six judges from the United States District Court for the District of Columbia have addressed the applicability of section 1512(c) to defendants criminally charged in connection with the January 6th attack on the Capitol. Each has concluded that Congress’s proceeding to count the electoral votes on January 6th was an ‘official proceeding’ for purposes of this section, and each has refused to dismiss charges against defendants under that section.”); McQuade, *supra* note 14 (citing cases); Katelyn Polantz, Judge Rejects Oath Keepers’ Efforts To Dismiss Charge in Jan. 6 Prosecutions, CNN (Dec. 20, 2021); Zoe Tillman, Jan. 6 Defendants Keep Losing Challenges to a Felony Charged in Hundreds of Cases, BUZZFEED NEWS (Feb. 3, 2022), <https://www.buzzfeednews.com/article/zoetillman/january-6-riot-felony-obstruction-charges>.

<sup>911</sup> Memorandum Opinion at 9, *United States v. Miller*, No. 21-CR-119, 2022 WL 823070, (D.D.C. Mar. 7, 2022), ECF No. 72 (“But this argument essentially ignores that, as used in § 1512, ‘official proceeding’ is a defined term, and its definition covers the Congressional certification of Electoral College results.”).

<sup>912</sup> *Id.*

<sup>913</sup> *Id.* at 10.

<sup>914</sup> Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> (comments by Kagan, J.).

<sup>915</sup> *United States v. Grider*, No. 21-CR-22, 2022 WL 392307, at 4 (D.D.C. Feb. 9, 2022).

<sup>916</sup> *Id.* (citing *United States v. Sandlin*, 2021 WL 5865006, at 3 (D.D.C. 2021)).

<sup>917</sup> *Id.*; See also *Sandlin*, 2021 WL 5865006 at 4 (“The Joint Session thus has the trappings of a formal hearing before an official body. There is a presiding officer, a process by which objections can be heard, debated, and ruled upon, and a decision—the certification of the results—that must be reached before the session can be adjourned. Indeed, the certificates of electoral results are akin to records or documents that are produced during judicial proceedings, and any objections to these certificates can be analogized to evidentiary objections.”).

Nor has parsing prepositions availed January 6 defendants. Some have insisted that the electoral count may have been an official proceeding *of* Congress without being the requisite “official proceeding *before* Congress.” And some judges have indulged that argument, but it gets defendants nowhere. As Judge Bates explained: “[F]ormality alone does not make a congressional activity a ‘proceeding before the Congress.’ In addition, a second party must be integrally involved in the ‘proceeding’ in order for it to be ‘before’ the Congress.”<sup>918</sup> Unfortunately for January 6 defendants, the congressional count did “involve a second entity as an integral component: the Electoral College.”<sup>919</sup>

Finally, defendants have insisted that only an “adjudicative” proceeding falls within the meaning of the statute—whereas, they (now) maintain, the electoral count was purely “ministerial.”<sup>920</sup> Trump, Eastman, and others could hardly echo that defense: after all, they have loudly and repeatedly argued that the count was adjudicative, with Vice President Pence given the authority to adjudicate and invalidate ballots. But even if Trump and his allies were brazen enough to raise the defense, they would be wrong. Other than impeachments and electoral counts, Congress does almost no adjudication, so “to require that a ‘proceeding before the Congress’ be ‘adjudicative’ would essentially read it out of § 1515, and it beggars belief that Congress would proscribe conduct related to ‘proceeding[s] before the Congress’ while at the same time intending that prohibition to apply solely to functions Congress does not perform.”<sup>921</sup>

#### 4. Conspiracy

The core of conspiracy is agreement among two or more people to achieve a common illegal goal—here, the corrupt obstruction of the congressional electoral count.<sup>922</sup> “The central feature of a conspiracy is the agreement, but it doesn’t need to be formal or even spoken.”<sup>923</sup> As the Supreme Court has explained, the agreement “need not be shown to have been explicit,” and “can instead be inferred from the facts and circumstances of the case.”<sup>924</sup> One typical form of circumstantial evidence in proving a conspiracy is “concert of action,” from which “an agreement can be inferred.”<sup>925</sup> Here, as demonstrated above, we believe the circumstantial and direct evidence

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<sup>918</sup> United States v. McHugh, No. 21-CR-453, 2022 WL 296304, at 5 (D.D.C. 2022).

<sup>919</sup> *Id.* at 7 (“Thus, the certification proceeding sees Congress formally convene to hear, debate, and decide any disputes arising from the proceedings of a second entity. Although the electors are neither physically present in front of Congress nor ‘parties’ to the proceeding *per se*, they and their ballots are in a very real sense integral components of the event.”).

<sup>920</sup> *Id.* at 9.

<sup>921</sup> *Id.* at 8.

<sup>922</sup> See, e.g., Opinion and Order at 29, Thompson v. Trump, No. 1:21-cv-00400, (D.D.C. Feb. 18, 2022), ECF No. 66 (“The key is that the conspirators share the same general conspiratorial objective, or a single plan the essential nature and general scope of which is known to all conspirators.”). Note that, as explained in Section II.A, many of these same actions could be considered for investigation and possibly prosecution under § 371.

<sup>923</sup> United States v. Sanders, 952 F.3d 263, 274 (5th Cir. 2020).

<sup>924</sup> Iannelli v. United States, 420 U.S. 770, 777 n.10 (1975); And see, e.g., United States v. Tyson, 653 F.3d 192, 208 (3d Cir. 2011) (“We have recognized that the existence of a conspiratorial agreement may be proven by circumstantial evidence alone.”); United States v. Morris, 836 F.2d 1371, 1373 (D.C. Cir. 1988) (“[S]ince a conspiracy is by nature secret, the jury may fairly infer the existence of the agreement through either direct or circumstantial evidence.”).

<sup>925</sup> United States v. Mann, 161 F.3d 840, 847 (5th Cir. 1998).

indicating that Trump, Eastman, and others may have agreed on a scheme to obstruct and impede the congressional count on January 6 is compelling.<sup>926</sup>

**There was an agreement to commit an unlawful act.** On January 4, Trump and Eastman both met with Pence together, and they both followed up and kept the pressure on.<sup>927</sup> They, along with Giuliani, both spoke at the January 6 rally, with Eastman directly preceding Trump—both men advocating for Pence to interfere with the congressional count.<sup>928</sup> And both Trump and Eastman continued pushing their illegal scheme even during the Capitol invasion, while Meadows reportedly also failed to act to stop the violence.<sup>929</sup>

**The clear intent of the plan was to obstruct a lawful function of the government.** The United States Government is responsible, through the vice president and Congress, for counting electoral votes in presidential elections.<sup>930</sup> The electoral count is a core function entrusted by law to the federal government, and only capable of being lawfully fulfilled by the federal government. Trump, Eastman, and others specifically intended to obstruct that count. As discussed above, Eastman and Trump repeatedly urged Pence and his team to either reject electors or to delay the count,<sup>931</sup> thus clearly evidencing a specific intent to impede a lawful function of government under § 371. Giuliani and Meadows both played a role in the events of January 6 with the intention of halting the electoral count, while Chesebro’s assistance in the orchestration of the false electors scheme helped to lay the groundwork for that day.

**The scheme was knowingly pursued through deceitful and dishonest means.** Eastman, Trump, and others, including Giuliani and Chesebro, knew that their legal theory was unavailing, and that it would be illegal for Pence to unilaterally throw out electoral certificates or delay the count *even if* the election somehow had been tainted by fraud. As Judge Carter found, Eastman explicitly admitted that his plan broke from consistent historical practice since the founding of the Republic.<sup>932</sup> He admitted “that the Supreme Court would unanimously reject” it.<sup>933</sup> He admitted that it “violated the Electoral Count Act on four separate grounds.”<sup>934</sup> He admitted that it was

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<sup>926</sup> This monograph does not address the contention that Trump criminally conspired with the insurrectionists who sought to obstruct the count by force. We do not reject that possibility, either. Notably, on February 18, 2022, Judge Amit Mehta, of the federal court in D.C., found that plaintiffs—including congressmen and Capitol police officers—plausibly pled a civil conspiracy between Trump and the insurrectionists who invaded the Capitol on January 6. *See* Opinion and Order, *Thompson v. Trump*.

<sup>927</sup> *Eastman v. Thompson*, Order Re Privilege of Docs at 7.

<sup>928</sup> John Eastman, Speech to the ‘Save America March’ and Rally, C-SPAN (Jan. 6, 2021), <https://www.c-span.org/video/?c4953961/user-clip-john-eastman-january-6-rally>; Naylor, *supra* note 500.

<sup>929</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 2:24 p.m.), <https://www.thetrumparchive.com/>; Blake, *supra* note 437.

<sup>930</sup> U.S. Const. amend. XII; 3 U.S.C. § 15.

<sup>931</sup> Josh Dawsey, Jacqueline Alemany, Jon Swaine & Emma Brown, During Jan. 6 Riot, Trump Attorney Told Pence Team the Vice President’s Inaction Caused Attack on Capitol, THE WASHINGTON POST (Oct. 29, 2021), [https://www.washingtonpost.com/investigations/eastman-pence-email-riot-trump/2021/10/29/59373016-38c1-11ec-91dc-551d44733e2d\\_story.html](https://www.washingtonpost.com/investigations/eastman-pence-email-riot-trump/2021/10/29/59373016-38c1-11ec-91dc-551d44733e2d_story.html).

<sup>932</sup> *Eastman v. Thompson*, Order Re Privilege of Docs at 7.

<sup>933</sup> *Id.*

<sup>934</sup> *Id.*

inimical to his own purported convictions as a conservative.<sup>935</sup> He even admitted his plan was entirely aimed at partisan advantage, since he didn't think a Democratic vice president should have the same powers that he claimed for Pence.<sup>936</sup> In an email on January 6, he acknowledged that he was calling on Pence to commit a “relatively minor violation” of the Electoral Count Act.<sup>937</sup> And, in another email responding to Pence's counsel Greg Jacob, who had asked Eastman whether he had “advise[d] that President that in your professional judgment the Vice President DOES NOT have the power to decide things unilaterally,” Eastman responded, “He's been so advised directly.”<sup>938</sup> “But,” Eastman continued, “you know him—once he gets something in his head, it is hard to get him to change course.”<sup>939</sup> Eastman even later conceded the illegitimacy of the false electoral slates he and Trump were pushing Pence to accept; on January 10, Eastman responded to an email asking, “Tell us in layman's language, what the heck happened with the dual electors? Please?” Eastman replied, “No legislature certified them (because governors refused to call them into session), so **they had no authority**, Alas”<sup>940</sup> (emphasis added). So Trump could not hide behind the claim that he did not know he was pressing Pence to do something against the law. The architect of the plan—Trump's own lawyer—told him so.<sup>941</sup> As discussed earlier, Trump's other primary collaborators also knew the legal theory behind the electoral count obstruction was unsound.

#### **Box 4: Other Potential Charges Under § 1512**

Like the narrow set of charges and defendants we considered under § 371—and our explanation that a much broader indictment was also possible—the charges we contemplate under § 1512 are similarly on the narrow end of possible indictments. For example, the scheme to pressure state officials described in Section I.A.3 also aimed to impede Pence from reading the legitimate results of the presidential election (as he was constitutionally required to do). Consequently, the DOJ may reasonably be considering charges here against any of those involved in such a scheme, including Trump, Meadows, Giuliani, and Eastman.

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<sup>935</sup> *Id.* at 39.

<sup>936</sup> *Id.*

<sup>937</sup> Exhibit N at 2, Eastman v. Thompson, No. 22-cv-99, (C.D. Cal. Mar. 2, 2022), ECF No. 160-16.

<sup>938</sup> Exhibit M at 2, Eastman v. Thompson, No. 22-cv-99, (C.D. Cal. Mar. 2, 2022), ECF No. 160-15.

<sup>939</sup> Blake, *supra* note 437.

<sup>940</sup> Goodman, *supra* note 334; Exhibit G at 2, Eastman v. Thompson, No. 22-cv-99, (C.D. Cal. May 26, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/06/justsecurity-clearinghouse-Dkt-350-8-Ex.-G-Eastman-email-re-invalid-dual-electors-january-10-2021.pdf>.

<sup>941</sup> Trump's attempts to use illegal means to reverse the election and remove the duly-elected president did not stop with January 6. *See* Broadwater & Goldmacher, *supra* note 471 (“Representative Mo Brooks... claimed on Wednesday that the former president had asked him repeatedly in the months since to illegally ‘rescind’ the election, remove President Biden and force a new special election.”).

### C. 18 U.S.C. § 2383: Insurrection and Giving Aid or Comfort to Insurrectionists

Under 18 U.S.C. § 2383, “[w]hoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto shall be fined . . . or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.”<sup>942</sup>

In its final report, the Select Committee made a criminal referral of Trump to the DOJ for his actions when it became clear Pence would not yield to his pressure to overturn the results of the lawful election for the Presidency of the United States; specifically, the Select Committee referred him for their role in inciting armed and violent rioters to storm the Capitol—and then failing to stem the violence—in possible violation of 18 U.S.C. § 2383, which prohibits participating in an insurrection.<sup>943</sup> This is a very serious charge—perhaps the most serious that Trump could face. Although few have called for Trump to face this particular criminal charge, a careful review of the facts and evidence appears to support prosecution for this rarely invoked offense. Moreover, as legal scholars Claire Finkelstein and Richard Painter have argued, “it is critical for public perception, for history—for the preservation of democracy—that if [Trump] is charged, it is first and foremost with the crimes that best reflect the gravity of the danger he posed to the country.”<sup>944</sup>

Prosecutors can choose between a broader and narrower approach here. A broader approach to charging this offense would encompass Trump’s words on the Ellipse and indeed other prior calls to action as a basis for the charge; and, indeed, we think it would allow for including crucial evidence of Trump’s participation in insurrection. But as we explain, that would trigger a battle over First Amendment issues. We believe the government would win, but were prosecutors seeking to avoid such a battle, a narrower approach could focus on Trump’s conduct (and omissions) once the assault on the Capitol had already begun: his infamous 2:24 p.m. tweet targeting Pence and his 187 minutes of inaction in derogation of his affirmative duties while the riot raged.

Section 2383 is separate from what is commonly referred to as the U.S. Constitution’s “Disqualification Clause,” found in Section Three of the Fourteenth Amendment.<sup>945</sup> Section Three

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<sup>942</sup> 18 U.S.C. § 2383.

<sup>943</sup> Select Comm. Report at 109.

<sup>944</sup> Claire O. Finkelstein & Richard W. Painter, If Trump is charged, it should be for the worst of his crimes, *THE WASHINGTON POST* (Aug. 12, 2022), <https://www.washingtonpost.com/outlook/2022/08/12/seditious-conspiracy-insurrection-trump-charges/>. In addition to their editorial for the *Washington Post* making the case for charges under the insurrection act, Painter and Finkelstein have recently published a law review article evaluating Trump’s potentially criminal use of presidential removal power for, among other things, incitement of insurrection and sedition. See Claire O. Finkelstein & Richard W. Painter, ‘You’re Fired’: Criminal Use of Presidential Removal Power, *U. PENN LAW SCHOOL* (forthcoming 2023).

<sup>945</sup> Note that two of the report’s authors, Noah Bookbinder & Debra Perlin, are employed by the non-profit non-partisan organization Citizens for Ethics and Reform in Washington, which has announced its plans to seek

of the Fourteenth Amendment sets out a qualification for holding office, analogous to the Constitution’s other qualifications regarding age, citizenship, or residency.<sup>946</sup> Specifically, the Disqualification Clause provides that no individual who “engaged in insurrection or rebellion” against the Constitution—after having previously taken an oath to support it—shall hold any federal or state office (unless Congress removes such disability by a vote of two-thirds in each house).<sup>947</sup>

Though both the Disqualification Clause and § 2383 use the word “insurrection,” they otherwise differ significantly. For example, violations of the federal criminal insurrection statute carry criminal sanctions. In contrast, violations of the Disqualification Clause neither carry criminal penalties nor require criminal conviction.<sup>948</sup> Section 2383’s criminal sanctions must be proved to a heightened “reasonable doubt” standard, as opposed to the significantly lower “preponderance of the evidence” standard applicable to the Disqualification Clause.<sup>949</sup> While these and other textual differences render overall comparisons of the two provisions inapt, the history of the Disqualification Clause can help clarify the meaning of legally significant terms, including “insurrection,” at the time that the language of the modern criminal insurrection statute was drafted.<sup>950</sup>

Although this conduct has been a federal crime since 1862, it has not been prosecuted since the Civil War and thus there is little case law construing the statute.<sup>951</sup> Thus far, the Justice Department has not charged anyone under 18 U.S.C. § 2383 for participating in the January 6 attack.<sup>952</sup> It has, however, charged and secured convictions of several key January 6 participants under the seditious conspiracy statute,<sup>953</sup> 18 U.S.C. § 2384, which closely parallels § 2383 and carries a longer maximum prison sentence.

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disqualification of public officials involved in the January 6 insurrection under the U.S. Constitution’s Disqualification Clause.

<sup>946</sup> See, e.g., Mark Graber, Their Fourteenth Amendment, Section 3 and Ours, JUST SECURITY (Feb. 16, 2021), <https://www.justsecurity.org/74739/their-fourteenth-amendment-section-3-and-ours/>.

<sup>947</sup> U.S. Const. amend. XIV, § 3.

<sup>948</sup> *Id.* (stating the only consequence of violation under the clause is that “[n]o person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State”); Congressional Research Service, The Insurrection Bar to Office: Section 3 of the Fourteenth Amendment (updated Sept. 22, 2022) <https://crsreports.congress.gov/product/pdf/LSB/LSB10569> (explaining that “Section 3 of the Fourteenth Amendment does not expressly require a criminal conviction, and historically, one was not necessary”).

<sup>949</sup> See, e.g., *Louisiana ex rel. Sandlin v. Watkins*, 21 La. Ann. 631 (La. 1869) (appearing to apply a preponderance of the evidence standard to the Disqualification Clause); *Worthy v. Barrett*, 63 N.C. 199, 205 (1869) (same); *In re Tate*, 63 N.C. 308, 309 (1869) (same).

<sup>950</sup> Daniel J. Hemel, Disqualifying Insurrectionists and Rebels: A How-To Guide, LAWFARE (Jan. 19, 2021), <https://www.lawfaremedia.org/article/disqualifying-insurrectionists-and-rebels-how-guide>.

<sup>951</sup> Erin Creegan, National Security Crime, HARVARD NAT’L SEC. J., Vol. 3 (2012), <https://harvardnsj.org/wp-content/uploads/sites/13/2012/01/Vol-3-Creegan.pdf>; Braver, *supra* note 27.

<sup>952</sup> Congressional Research Service, The Insurrection Bar to Office: Section 3 of the Fourteenth Amendment (last updated Sept. 22, 2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10569>.

<sup>953</sup> Steve Benen, In Jan. 6 trial, Proud Boys members convicted of seditious conspiracy, MSNBC: MADDOWBLOG (May 4, 2023), [msnbc.com/rachel-maddow-show/maddowblog/jan-6-trial-proud-boys-members-convicted-seditious-conspiracy-rcna82891](https://www.msnbc.com/rachel-maddow-show/maddowblog/jan-6-trial-proud-boys-members-convicted-seditious-conspiracy-rcna82891).

## 1. Background of 18 U.S.C. § 2383

The modern “rebellion or insurrection” statute, 18 U.S.C. § 2383, traces its roots to the Act of July 17, 1862, also known as the Second Confiscation Act (“1862 Act”), signed into law by President Lincoln during the Civil War.<sup>954</sup> The statute has been modified several times since then,<sup>955</sup> but the elements of the offense have remained fundamentally unchanged: namely, it is a federal crime to “incite[], set[] on foot, assist[], or engage[] in any rebellion or insurrection.”<sup>956</sup>

There is scant authority addressing prosecutions under the 1862 Act.<sup>957</sup> The most extensive discussion is found in *United States v. Greathouse*, an 1863 case in which Supreme Court Justice Stephen Field, sitting as a circuit judge, interpreted the elements of insurrection as they were understood during and before the Civil War.<sup>958</sup> The defendants were convicted under the 1862 Act for “engaging in, and giving aid and comfort to,” rebellion against the United States by procuring and preparing a ship and setting sail to attack United States vessels in the Pacific on behalf of the Confederacy.<sup>959</sup>

However, despite its use in *Greathouse*, due to the federal policy of pardoning Confederates, the insurrection statute was not widely used to prosecute conduct related to the Civil War. While some Confederate leaders, like Jefferson Davis and Robert E. Lee, were initially charged with treason against the United States after the war, federal prosecutors ultimately dropped

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<sup>954</sup> The Second Confiscation Act (1862), U.S. Statutes at Large, Treaties, and Proclamations of the United States of America, Vol. 12 (Boston, 1863), at 589–92.

<sup>955</sup> *Id.*; Rev. Stat. § 5334 (2d ed. 1878) (“Every person who incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States, or the laws thereof, or gives aid or comfort thereto, shall be punished by imprisonment not more than ten years, or by a fine of not more than ten thousand dollars, or by both such punishments; and shall, moreover, be incapable of holding any office under the United States.”); The Act of March 4, 1909, Section 4 (“Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort therefore, shall be imprisoned not more than ten years, or fined not more than ten thousand dollars, or both; and shall, moreover, be incapable of holding any office under the United States.”); The Act of June 25, 1948 (“Whoever incites, sets on foot, assists, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be find not more than \$10,000 or imprisonment not more than ten years, or both; and shall moreover be incapable of holding any office under the United States.”); 18 U.S.C. § 2383 (Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined not more than \$10,000 under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.”).

<sup>956</sup> 18 U.S.C. § 2383.

<sup>957</sup> *E.g.*, *United States v. Greathouse*, 26 F. Cas. 18 (C.C.N.D. Cal. 1863); *United States v. Cashiel*, 25 F. Cas. 318 (D. Md. 1863); *Hart’s Adm’r v. United States*, 16 Ct. Cl. 459, 459 (1880), *aff’d sub nom.* *Hart v. United States*, 118 U.S. 62, 6 S. Ct. 961, 30 L. Ed. 96 (1886).

<sup>958</sup> *United States v. Greathouse*, 26 F. Cas. 18 (C.C.N.D. Cal. 1863); *See also* *Treason and Rebellion Being in Part the Legislation of Congress and of The State of California Thereon, Together with the Recent Charge by Judge Field of the U.S. Supreme Court* (Towne & Bacon, Book and Job Printers: San Francisco, CA, 1863).

<sup>959</sup> *Id.*



these charges.<sup>960</sup> Presidents Lincoln and Johnson pardoned most Confederates not subject to those indictments en masse in a series of executive actions between 1863 and 1868.<sup>961</sup>

Since the Civil War, there have been no reported prosecutions under 18 U.S.C. § 2383 or its predecessors. The reason is likely simple. Because “rebellion” and “insurrection” are inherently political crimes, prosecutors, like their Civil War-era predecessors, may have chosen, either as a matter of policy or a desire to eschew these politically fraught terms, not to bring these prosecutions. Further, since the Civil War, the number of federal criminal statutes, including those for politically motivated crimes, has significantly increased; prosecutors have more paths to prosecuting the same conduct.

The lack of modern precedent for prosecutions under § 2383 has also likely dissuaded prosecutors from bringing indictments under the statute. In general, prosecutors often prefer to bring charges under statutes that are well worn, in order to reduce uncertainty and increase the likelihood of conviction. For example, the Department of Justice has not brought a prosecution under the 1799 Logan Act, which makes it illegal for U.S. citizens to engage in unauthorized foreign diplomacy, in over 150 years. In the context of the case against Trump ally General Michael Flynn, an FBI lawyer testified that the Department of Justice viewed the Logan Act as an “untested statute” that would leave the DOJ vulnerable to “substantial litigation risk” if they brought charges under the law.<sup>962</sup> General Flynn ultimately pleaded guilty to “willfully and knowingly making materially false statements to the FBI” and was never charged with violating the Logan Act, despite there being a prima facie case that he did.<sup>963</sup>

With respect to January 6 prosecutions, the Justice Department can choose from an array of criminal statutes which criminalize the same conduct as § 2383, are used more frequently, and carry stiffer penalties. This includes the seditious conspiracy statute, 18 U.S.C. § 2384, which carries a maximum penalty of 20 years of imprisonment as compared to § 2383’s 10-year maximum.

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<sup>960</sup> See *The Trial of Jefferson Davis Canceled* - February 15, 1869, National Park Service Richmond (last updated Apr. 16, 2022), <https://www.nps.gov/rich/learn/historyculture/the-trial-of-jefferson-davis-cancelled-february-15-1869.htm>.

<sup>961</sup> Abraham Lincoln, Proclamation of Amnesty and Reconstruction (Dec. 8, 1863); Andrew Johnson, 1865 Amnesty Proclamation (May 30, 1865); Andrew Johnson, Proclamation Granting Full Pardon and Amnesty to All Persons Engaged in the Late Rebellion (Dec. 25, 1868). Note that the 1872 Amnesty Act, 17 Stat. 142, which retroactively removed “all political disabilities” from nearly all ex-Confederates disqualified under Section 3 of the 14th Amendment from holding public office, does not apply to the federal criminal insurrection statute. *Cf. Cawthorn v. Amalfi*, 35 F.4th 245, 257–61 (4th Cir. 2022).

<sup>962</sup> H. Comm. on the Judiciary, Transcribed Interview of Lisa Page, (July 16, 2018), at 82–83 (“There were discussions about the Logan Act with the Department and similar concerns, not about the constitutionality of the statute, but about the age and the lack of use of the Logan Act. I did participate in conversations with the Department about it being an untested statute and a very, very old one, and so there being substantial litigation risk . . . This would—this would be a—a risk, a strategic and litigation risk, to charge a statute that had not sort of been well-tested.”).

<sup>963</sup> *United States v. Flynn*, 411 F. Supp. 3d 15 (D.D.C. 2019); See also Marty Lederman, *Understanding the Michael Flynn Case: Separating the Wheat from the Chaff, and the Proper from the Improper*, JUST SECURITY (May 29, 2020), <https://www.justsecurity.org/70431/understanding-the-michael-flynn-case-separating-the-wheat-from-the-chaff-and-the-proper-from-the-improper/>.

Similar considerations could influence prosecutors deciding whether or not to charge Trump with insurrection. But setting aside prosecutors' practical and strategic considerations, Trump's words and conduct before and on January 6 likely meet DOJ standards for charging the crime of insurrection under 18 U.S.C. § 2383.

## **2. Elements of 18 U.S.C. § 2383**

Based on the statutory text and limited case law, Trump appears to meet DOJ standards for prosecution under § 2383. To secure Trump's conviction for this crime, prosecutors would be required to prove beyond a reasonable doubt the following elements: (1) that the January 6 attack on the U.S. Capitol was an "insurrection"; (2) that Trump "incited," "assisted," or "engaged" in the insurrection, or gave "aid or comfort" to those that did; and (3) that the insurrection was against the authority or laws of the United States.

### **a. Insurrection Element**

"Insurrection" is not defined in 18 U.S.C. § 2383. Historically, insurrection has been defined "as something more than a mob or riot,"<sup>964</sup> but it can be less than a full-fledged armed rebellion.<sup>965</sup>

The 1879 Pennsylvania Supreme Court case, *Allegheny Cnty. v. Gibson*, defines the term as "[a] rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state; a rebellion; a revolt."<sup>966</sup> This definition includes "rebellion," but also includes other manners of "rising against civil or political authority." The Pennsylvania Supreme Court's definition of "insurrection" in *Allegheny County* is consistent with the definition set forth in the seminal 1828 edition of *Webster's Dictionary*, defining "insurrection" as a "rising against civil or political authority; the open and active opposition of a number of persons to the execution of a law in a city or state ... [i]t differs from rebellion, for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one or to place the country under another jurisdiction."<sup>967</sup> Recently, a district court considered an 1866 treaty between the United States and the Cherokee Nation, signed just four years after the first criminal insurrection statute. Relying on an 1860 dictionary, the court defined insurrection as "[a] seditious rising against government; a rebellion; a revolt; a sedition."<sup>968</sup>

The term "rising against" is not explicitly defined in any of the instances in which it arises. Webster's 1828 dictionary defines a "rising" as "an assembling in opposition to government;

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<sup>964</sup> 44B Am. Jur. 2d Insurrection § 1.

<sup>965</sup> *The Amy Warwick*, 67 U.S. 635, 666, 17 L. Ed. 459 (1862).

<sup>966</sup> *Allegheny Cnty. v. Gibson*, 90 Pa. 397, 417 (1879).

<sup>967</sup> *Webster's Dictionary* (1828), <https://webstersdictionary1828.com/Dictionary/insurrection> (defining "insurrection" as a "rising against civil or political authority; the open and active opposition of a number of persons to the execution of a law in a city or state. It is equivalent to sedition, except that sedition expresses a less extensive rising of citizens. It differs from rebellion, for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one or to place the country under another jurisdiction.").

<sup>968</sup> *Cherokee Nation v. Bernhardt*, 936 F.3d 1142, 1158 n.18 (10th Cir. 2019).

insurrection; sedition or mutiny.”<sup>969</sup> Courts have required the use of force or intimidation by numbers, beyond simple civil disobedience, to meet the definition of a “rising.” For example, in an 1894 criminal conspiracy case in the Northern District of Illinois, the jury was instructed regarding offenses alleged to have been committed during an American Railway Union strike. In that case “obstructing or retarding the passage of the mail” alone, though illegal, was not what constituted “rising against” the government.<sup>970</sup> Instead, it was a mob’s resistance to the arrest of the individuals violating these laws “by such a number of persons” sufficient, even just “for the time being to defy the authority of the United States,” that amounted to a rising against civil authority.<sup>971</sup> According to the jury instruction, the “open and active opposition of a number of persons to the *execution* of law,” even without “bloodshed ... [or] probable success,” would constitute insurrection.<sup>972</sup>

In *Greathouse*, discussed above, Justice Field explained that a conviction under the 1862 Act required proof that there was “an assemblage of persons [acting] in force, to overthrow the government, or to coerce its conduct. ... The offense is complete, whether the force be directed to the entire overthrow of the government throughout the country, or only in certain portions of the country, or to defeat the execution and compel the repeal of one of its public laws.”<sup>973</sup> Justice Field took judicial notice that the Civil War qualified as a “rebellion,” reasoning that it was a “matter of public notoriety, and like matters of general and public concern to the whole country, may be taken notice of by judges and juries without that particular proof which is required of the other matters charged.”<sup>974</sup> The court deemed this “public notoriety,” along with “proclamations of the president” and “acts of congress,” to be “sufficient proof” of a “rebellion” under the 1862 Act.

Other courts have consistently held that the term “insurrection” can refer to something less than armed rebellion. In *The Amy Warwick*, a case decided the same year that the Second Confiscation Act was enacted, the U.S. Supreme Court explained that “[i]nsurrection against a government may or may not culminate in an organized rebellion”<sup>975</sup> An earlier federal case, *Case of Fries*, decided in 1800, explained more explicitly that an insurrection is something less than an armed attack, and most notably explained that the sheer number of people may, itself, be the instrument of intimidation used to oppose the authority and the laws of the United States.<sup>976</sup> In *Fries* the court held “that military weapons (as guns and swords...) are not necessary to make such insurrection...because numbers may supply the want of military weapons, and other instruments may effect the intended mischief.”<sup>977</sup>

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<sup>969</sup> Webster’s Dictionary (1828), <https://webstersdictionary1828.com/Dictionary/rising> (defining “a rising”).

<sup>970</sup> *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894).

<sup>971</sup> *Id.*

<sup>972</sup> *Id.* (emphasis added).

<sup>973</sup> *United States v. Greathouse*, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863).

<sup>974</sup> *Id.* at 23.

<sup>975</sup> *The Amy Warwick*, 67 U.S. 635, 666, 17 L. Ed. 459 (1862).

<sup>976</sup> *Case of Fries*, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800).

<sup>977</sup> *Id.*

Post-Reconstruction authorities defined insurrection in similar terms. For instance, a federal jury charge in 1894 explained:

Insurrection is a rising against civil or political authority,—the open and active opposition of a number of persons to the execution of law in a city or state. ... It is not necessary that there should be bloodshed; it is not necessary that its dimensions should be so portentous as to insure probable success, to constitute an insurrection. It is necessary, however, that the rising should be in opposition to the execution of the laws of the United States, and should be so formidable as for the time being to defy the authority of the United States. When men gather to resist the civil or political power of the United States, or to oppose the execution of its laws, and are in such force that the civil authorities are inadequate to put them down, and a considerable military force is needed to accomplish that result, they become insurgents; and every person who knowingly incites, aids, or abets them, no matter what his motives may be, is likewise an insurgent.<sup>978</sup>

Courts continued to use similar definitions of “insurrection” into the twentieth century.<sup>979</sup> A federal district court in 1930 found that “the word ‘insurrection’ means ‘the action of rising in arms or open resistance against established authority or governmental restraint; an armed rising; a revolt; an incipient or limited rebellion.’”<sup>980</sup> The decision was affirmed without opinion by the Second Circuit Court of Appeals.<sup>981</sup> In 1933, the Washington Supreme Court explained that “[l]exicographers define ‘insurrection’ as ‘action or act of rising against civil or political authority, or the established government; open and active opposition to the execution of law in a city or state;—usually implying less magnitude and success than there is in case of rebels, etc.’”<sup>982</sup> The court added that insurrection does not necessarily “connote armed opposition or resistance” and suggested bloodshed is not required.<sup>983</sup>

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<sup>978</sup> In re Charge to Grand Jury, 62 F. 828, 830 (N.D. Ill. 1894); “Insurrection,” Bouviers Law Dictionary, Vol. 1 (1897) (“Any open and active opposition of a number of persons to the executive of the laws of the United States, of so formidable a character as to defy, for the time being, the authority of the government, constitutes an insurrection, even though not accompanied by bloodshed and not of sufficient magnitude to make success possible.”).

<sup>979</sup> Although the actions of officials in the Nixon administration lacked the requisite element of a violent rising against government authority, one court, citing *The Federalist* No. 78, referred to “the period from the break-in at the Watergate in June 1972, until the resignation of President Nixon in August 1974” as “a ‘season of insurrection or rebellion’ by many actually in the Government” because top government officials “deliberately and flagrantly violated the civil liberties of individual citizens and engaged in criminal violations of the campaign laws in order to preserve and expand their own and Nixon’s personal power beyond constitutional limitations.” *Murphy v. Ford*, 390 F. Supp. 1372, 1374 (W.D. Mich. 1975).

<sup>980</sup> *Gitlow v. Kiely*, 44 F.2d 227, 233 (S.D.N.Y. 1930), *aff’d*, 49 F.2d 1077 (2d Cir. 1931).

<sup>981</sup> *Id.*

<sup>982</sup> *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 256, 23 P.2d 1, 3 (1933) (citing Webster’s New Int. Dict.).

<sup>983</sup> *Id.*

Relevant authority throughout the second half of the twentieth century and into the twenty-first century confirms these definitions. For example, a 1965 case from the Middle District of Georgia explained that the offense of attempting to incite insurrection under a state criminal insurrection statute included “[a]ny attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State.”<sup>984</sup> Although the Georgia statute was struck down as unconstitutionally vague the following year, its interpretation of insurrection aligns with prior and subsequent definitions.<sup>985</sup> In 1971, the Tenth Circuit analyzed detentions by the National Guard in response to a 1967 armed raid on the courthouse in Tierra Amarilla, New Mexico.<sup>986</sup> In considering the group’s tactics, including the use of firearms, knives, and kidnapping public officials, the court held that the raid amounted to “a very real insurrection,” justifying a jury instruction declaring that the National Guard would not be liable for their detention of plaintiffs if the “detention was made in good faith and in the honest belief that it was necessary under the circumstances to preserve peace.”<sup>987</sup>

Separately, in the context of a Fourth Amendment stop at a federal roadblock erected in response to the 71-day siege of the Wounded Knee site on the Pine Ridge Reservation, a federal district court explained in 1974 that a Native American militant group’s hostage-taking and occupation of a town using “gunfire, road blockades, and other various military-type fortifications” justified the government’s use of a roadblock. The court held that the analysis of the reasonableness requirements of the Fourth Amendment was affected by the siege, which could “only be called an insurrection.”<sup>988</sup> In these more recent cases, courts described violent uprisings against local governmental authority, though not constituting an attempt to rebel against or overthrow the entire U.S. government, as insurrections. In these cases, courts were differentiated conduct amounting to an insurrection from conduct protected by the First Amendment.<sup>989</sup>

Other cases from the same period, concerning the question of whether racial justice protests that took place during the late 1960’s should qualify as insurrections or riots, confirmed that the core feature of an insurrection is that “[t]he participants [...] combine for the avowed purpose of resistance to established government.”<sup>990</sup> Even where there is “intervention by organized, disciplined, armed men,” an insurrection does not exist when “it could not be said as a matter of

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<sup>984</sup> Wells v. Hand, 238 F. Supp. 779, 787 (M.D. Ga. 1965), *aff’d sub nom.* Wells v. Reynolds, 382 U.S. 39 (1965).

<sup>985</sup> Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966) (holding that “offenses of insurrection, attempt to incite insurrection, and circulating insurrectionary papers, and fixing punishment upon conviction for offenses of insurrection or attempt to incite insurrection were unconstitutional in that they were so vaguely and broadly written that they could be construed to prohibit conduct and punish offenders for conduct protected by First Amendment.”).

<sup>986</sup> Valdez v. Black, 446 F.2d 1071 (10th Cir. 1971).

<sup>987</sup> *Id.* at 1074–1075, 1077.

<sup>988</sup> United States v. Williams, 372 F. Supp. 65, 66 (D.S.D. 1974).

<sup>989</sup> In a recent decision in New Mexico state court defining “insurrection” within the context of the 14th Amendment, the court dismissed the argument that Black Lives Matters protests were insurrections. In rejecting that comparison, the court credited expert testimony explaining that “while some Black Lives Matter protests ‘caused a lot of property damage’, January 6th was an unprecedented use of ‘violence and intimidation to ‘affect the orderly transition of power’ as mandated by federal law.” See *State ex rel. White v. Griffin*, 2022 WL 4295619, at \*24 (N.M. Dist.) (citing Trial Tr. (Aug. 16, 2022) (Test. of Rachel Kleinfeld, 161:12–18, 163:21–164:7, 148:3–5)).

<sup>990</sup> A & B Auto Stores of Jones St., Inc. v. City of Newark, 256 A.2d 110, 118 (N.J. Super. 1969).

law that the objective was to unseat the government.”<sup>991</sup> Central to the inquiry was whether there was an “organized and armed uprising against authority or operations of government” which “threaten[ed] the stability of the government or the existence of political society.”<sup>992</sup>

Prison uprisings, which occur when incarcerated individuals take control of the whole or some portion of a prison or jail, have also repeatedly been referred to as insurrections.<sup>993</sup> Iowa’s criminal insurrection statute, in particular, has been repeatedly cited in this context,<sup>994</sup> and provides in part, “[a]n insurrection is three or more persons acting in concert and using physical violence against persons or property, with the purpose of interfering with ... the government of the state ... or to prevent any executive ... officer or body from performing its lawful function.”<sup>995</sup> This standard is consistent with previous definitions, namely that organized resistance to governmental authority is central to insurrection.

In September 2022, a New Mexico state court in *State ex rel. White v. Griffin* adopted a similar definition of “insurrection” in construing Section 3 of the 14th Amendment. The court held that an insurrection is an (1) assemblage of persons, (2) acting to prevent the execution of one or more federal laws, (3) for a public purpose, (4) through the use of violence, force, or intimidation by numbers.<sup>996</sup>

Importantly, speech and conduct constituting “insurrection” fall outside of the protections of the First Amendment. Put differently, while “insurrection” can refer to something less than a rebellion, it must be more than political advocacy, protest, or civil disobedience. Of course, activity that falls within the protection of the First Amendment cannot be criminally penalized. For example, as discussed in depth in Section II.C.2.b.ii below, the Supreme Court’s seminal *Brandenburg* case set a high bar for protecting speech in the context of incitement to violence.<sup>997</sup>

However, speech in the context of engaging in aiding, assisting, or inciting a bone fide insurrection, such that it would trigger criminal liability, would fall outside of the protection of the

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<sup>991</sup> *Manzo v. City of Plainfield*, 59 N.J. 30, 33, 279 A.2d 706, 708 (1971).

<sup>992</sup> *A & B Auto Stores*, 256 A.2d at 118 (citing 46 C.J.S. Insurrection and Sedition, 1 (1946) (“Insurrection is distinguished from rout, riot, and offenses connected with mob violence by the fact that in insurrection there is an organized and armed uprising against authority or operations of government, while crimes growing out of mob violence, however serious they may be and however numerous the participants, are simply unlawful acts in disturbance of the peace which do not threaten the stability of the government or the existence of political society.”)).

<sup>993</sup> See *Kramer v. S. Ohio Corr. Facility*, 643 N.E.2d 611 (Ct. Cl. 1993) (stating prisoners’ takeover and control of portion of prison for eleven days was an insurrection); *Van Hook v. S. Ohio Corr. Facility*, 643 N.E.2d 617 (Ohio Ct. Cl. 1994) (explaining that property removal that took place during “inmate riot and insurrection” was acceptable because defendant owed no duty to the inmate based on the exigent circumstances of the insurrection); *Vail v. D.C.*, 1988 WL 63069, (D.D.C. June 2, 1988) (referring to prison insurrection).

<sup>994</sup> *State v. Wagner*, 410 N.W.2d 207 (Iowa 1987); *State v. Misner*, 410 N.W.2d 216 (Iowa 1987); *State v. Jeffries*, 430 N.W.2d 728, 740 (Iowa 1988).

<sup>995</sup> I.C.A. § 718.1.

<sup>996</sup> Trial Order, *State ex rel. White v. Griffin*, 2022 WL 4295619, (N.M. Dist.) (citing, e.g., *Case of Fries*, 9 F. Cas. 924 (C.C.D. Pa. 1800) (Chase, J.)); John Catron, Robert W. Wells & Samuel Treat, *Charge to the Grand Jury By the Court*, July 10, 1861 (St. Louis: Democratic Book and Job Office, 1861) (“Charge to the Grand Jury, July 1861”); “Insurrection,” *Webster’s Dictionary* (1828), <https://perma.cc/9YPA-XN8J>.

<sup>997</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430 (1969).

First Amendment and would properly be considered “speech integral to illegal conduct” under analogous Supreme Court case law.<sup>998</sup> The First Amendment cannot, and does not, protect someone who, beyond a reasonable doubt, attempted to violently prevent the lawful transition of power for the first time in U.S. history by knowingly spreading false claims that the election had been “stolen,” priming a following of supporters willing to engage in violence, and assembling thousands of armed followers in Washington, D.C. to march to the U.S. Capitol on January 6 to “fight” to “Stop the Steal.”

It seems clear that under any of the definitions of “insurrection” above, the violent attack on the United States Capitol on January 6, 2021, to stop the constitutionally mandated certification of the 2020 presidential election, qualifies as an insurrection.

To begin, the January 6 attack is widely regarded by authoritative sources as an insurrection. Each branch of the federal government has called the attack an “insurrection” and the participants “insurrectionists,” including bipartisan majorities of both Houses of Congress,<sup>999</sup> President Biden,<sup>1000</sup> the Department of Justice under former President Trump,<sup>1001</sup> and dozens of federal courts.<sup>1002</sup> In referring Trump for prosecution under 18 U.S.C. § 2383, the bipartisan January 6 Select Committee deemed January 6 an insurrection within the meaning of that statute.<sup>1003</sup> The Department of Justice has also charged, and secured convictions of, several January 6 participants for seditious conspiracy under 18 U.S.C. § 2384, a charge that closely tracks § 2383.<sup>1004</sup> Even Trump’s own impeachment lawyers admitted that January 6 was an insurrection.<sup>1005</sup> As in *Greathouse*, then, the “existence of the [insurrection] is a matter of public

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<sup>998</sup> Eugene Volokh, The ‘Speech Integral to Criminal Conduct’ Exception, 101 CORNELL L. REV. 981, 983 (2016); *See also* Cox v. L.A., 379 U.S. 559, 563 (1965) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

<sup>999</sup> 167 Cong. Rec. H191 (daily ed. Jan. 13, 2021); 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021); H. Res. 503, 117th Cong., 1st Sess. (2021); S. 35, 117th Cong. (2021); H.R. 3325, 117th Cong. (2021).

<sup>1000</sup> Statement By President Joe Biden On the Six-month Anniversary of the January 6th Insurrection On the Capitol (July 6, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/06/statement-by-president-joe-biden-on-the-six-month-anniversary-of-the-january-6th-insurrection-on-the-capitol/>.

<sup>1001</sup> Gov’t Br. in Supp. of Det. at 1, *United States v. Chamley*, No. 21-cr-00003, (D. Ariz. Jan. 14, 2021).

<sup>1002</sup> *E.g.*, *United States v. Munchel*, 993 F.3d 1273, 1281 (D.C. Cir. 2021); *United States v. DeGrave*, 539 F. Supp. 3d 184 (D.D.C. 2021); *Noem v. Haaland*, 542 F. Supp. 3d 898, 906 (D.S.D. 2021); *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216, 274 (S.D. Ohio), modified in nonrelevant part by 2021 WL 3375834 (2021); *United States v. Brogan*, 2023 WL 2313008, at \*2 (E.D.N.Y. June 7, 2021); *United States v. Brockhoff*, 2022 WL 715223, at \*1 (D.D.C. Mar. 10, 2022); *United States v. Hunt*, 573 F. Supp. 3d 779, 807 (E.D.N.Y. 2021); *United States v. Puma*, 2022 WL 823079, at \*2 (D.D.C. Mar. 19, 2022); *O’Rourke v. Dominion Voting Sys. Inc.*, 552 F. Supp. 3d 3168, 1199 (D. Colo.), modified in nonrelevant part by 2021 WL 5548129, at \*2 (D. Colo. 2021); *United States v. Randolph*, 536 F. Supp. 3d 128, 132 (E.D. Ky. 2021); *United States v. Little*, 2022 WL 768685, at \*2 (D.D.C. Mar. 14, 2022); *O’Handley v. Padilla*, 2022 WL 93625, at \*5 (N.D. Cal. Jan. 10, 2022); *Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cnty.*, 2021 WL 719671, at \*2 (W.D. Pa. Feb. 24, 2021).

<sup>1003</sup> Select Comm. Report at 109–111.

<sup>1004</sup> Press Release, U.S. Dep’t of Just., Four Oath Keepers Found Guilty of Seditious Conspiracy Related to U.S. Capitol Breach (Jan. 23, 2023), <https://www.justice.gov/opa/pr/former-leader-proud-boys-pleads-guilty-seditious-conspiracy-efforts-stop-transfer-power>; Press Release, U.S. Dep’t of Just., Former Leader of Proud Boys Pleads Guilty to Seditious Conspiracy for Efforts to Stop Transfer of Power Following 2020 Presidential Election (Oct. 6, 2022), <https://www.justice.gov/opa/pr/four-oath-keepers-found-guilty-seditious-conspiracy-related-us-capitol-breach>.

<sup>1005</sup> *See* 167 Cong. Rec. 5717, 5733 (Feb. 13, 2021) (“[E]veryone agrees that there was ‘a violent insurrection of the Capitol’ on January 6th”).

notoriety” and supported by “public documents” that provide “sufficient proof” to satisfy this element of § 2383. Recently, in the context of a civil *quo warranto* lawsuit, a New Mexico state court found that January 6 was an “insurrection” within the meaning of Section Three of the Fourteenth Amendment.<sup>1006</sup>

The January 6 attack also meets each of the elements of insurrection identified in historical and contemporary authorities. First, applying the analysis used in *Gibson*, the assembly of individuals gathered together on January 6, and their invasion of the Capitol, was certainly more than “a mob or riot”; instead, it was “a rising against” the authority of the United States Congress and Vice President Pence aimed at stopping the joint session of Congress from certifying the 2020 election results. Meeting the definition supplied in *Gibson*, a large “number of persons” supporting Donald Trump met in “open and active opposition ... to the execution of law”—namely, the U.S. Constitution and the Electoral Count Act, the execution of which would confirm Biden as the 46th President of the United States.<sup>1007</sup>

The facts also fulfill the similar definitions established in *Greathouse* (“an assemblage of persons [acting] in force ... to coerce [the government’s] conduct,” and “to defeat the execution and compel the repeal of one of its public laws”), *Gitlow* (“the action of rising in arms or open resistance against established authority”), and *Griffin* (an “(1) assemblage..., (2) acting to prevent the execution of... federal laws, (3) for a public purpose, (4) through the use of violence, force, or intimidation”). Participants in the attack on the Capitol were there to stop the certification of the election and keep Trump in office—a point made abundantly clear by the mob’s chants, flags, banners, clothing, individual text messages, and more.<sup>1008</sup> The mob’s use of force and intimidation to empower someone other than the lawful winner of a presidential election to overthrow the legitimate election results amounts to “an incipient or limited rebellion” under *Gitlow*.<sup>1009</sup>

Consistent with the standard articulated in *Fries*, the sheer number of people assembled in support of Trump and storming the Capitol was a sufficient weapon of intimidation for the Capitol invasion to be considered an insurrection. The Proud Boys, who played a significant role in the attack, reportedly believed that they would “have a large enough group to march into DC armed ... and ... outnumber the police so they can’t be stopped.”<sup>1010</sup> That is indeed what happened. Officer Daniel Hodges, a Metropolitan Police Department Officer who was violently attacked on January 6, including an attempt to gouge out his eye, testified that “the size of the mob was the mob’s greatest weapon” and it is “what enabled them to achieve the level of success that they did.”<sup>1011</sup>

According to the Select Committee, law enforcement estimated that, early in the day on January 6, there were “more than 25,000 people outside the rally site” where Trump was to deliver

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<sup>1006</sup> State v. Griffin, No. D-101-CV-2022-00473, 2022 WL 4295619, (N.M. Dist. Ct. Sept. 6, 2022) (hereinafter “Griffin Decision”).

<sup>1007</sup> Allegheny Cnty. v. Gibson, 90 Pa. 397, 417 (1849).

<sup>1008</sup> See, e.g., Griffin Decision at 9; Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>1009</sup> Gitlow v. Kiely, 44 F.2d 227, 233 (S.D.N.Y. 1930), *aff’d*, 49 F.2d 1077 (2d Cir. 1931).

<sup>1010</sup> Ninth Jan. 6 Hearing Transcript, *supra* note 35.

<sup>1011</sup> Griffin Decision, Trial Transcript Day 1, TR-157.



his speech—a force large enough that law enforcement lost control of the United States Capitol.<sup>1012</sup> Many came prepared for violence in full tactical gear. They used a variety of weapons, brutally attacked and injured more than one hundred law enforcement officers, sought to intimidate the Vice President and Congress, and called for the murder of elected officials, including the Vice President.<sup>1013</sup>

The mob succeeded in delaying the constitutionally mandated counting of electoral college votes by several hours and, for the first time in our nation’s history, disrupted the peaceful transfer of presidential power.<sup>1014</sup> Vice President Pence, Speaker Pelosi, and Leader McCarthy, along with other members of Congress, had to be evacuated to a location outside of the Capitol complex.<sup>1015</sup> To clear the mob and regain control of the Capitol, the Capitol Police called in more than 2,000 reinforcements from 19 agencies.<sup>1016</sup> Officers used chemical spray and munitions, flash bangs, tactical teams with firearms, riot shields, and batons to fight back the mob.<sup>1017</sup> Even with this significant show of force, the Capitol grounds were not deemed secure and the congressional proceedings did not resume until 8:00 p.m.<sup>1018</sup> It was not until approximately 3:42 a.m. on January 7 that Congress completed its business and certified the election.<sup>1019</sup> The fact that the insurrection was ultimately quelled does not change the legal analysis that one occurred.<sup>1020</sup>

Trump may argue that January 6 was nothing more than a protest that got out of control, claiming that he never intended the violence that did occur, pointing for example to his exhortation to stay peaceful in his remarks at the Ellipse, and arguing that not all participants were armed nor were they all part of a cohesive organized militia engaged in rebellion.<sup>1021</sup> Such an argument appears to be patently unreasonable. First, courts almost universally noted that an insurrection need not be an armed resistance, and that it can be of “less magnitude and success than there is in case of rebels.”<sup>1022</sup> Second, members of the Proud Boys and other militia groups were in fact armed with guns and other types of weapons and military gear. In its successful prosecution of members of the Oath Keepers militia group for seditious conspiracy, the Department of Justice presented evidence that Oath Keepers also discussed posting individuals with weapons caches outside of Washington, D.C. on January 6 “await[ing] orders to enter D.C. under permission from Trump, not a minute sooner.”<sup>1023</sup> Even a definition of an insurrection which required the presence of

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<sup>1012</sup> *Id.*

<sup>1013</sup> *Id.*

<sup>1014</sup> Select Comm. Report at 469.

<sup>1015</sup> *See id.* at 465, 665.

<sup>1016</sup> *Id.*

<sup>1017</sup> *Id.*

<sup>1018</sup> *Id.*

<sup>1019</sup> *Id.*

<sup>1020</sup> *Greathouse*, 4 Sawy. 457, 2 Abb. U.S. 364 (Circuit Court, N.D. Cal. 1863) (charging defendants who outfitted a ship to attack Union vessels, despite their capture before leaving port).

<sup>1021</sup> Daniel Dale & Marshall Cohen, Fact check: Five enduring lies about the Capitol insurrection, CNN (Jan. 5, 2022), <https://www.cnn.com/2022/01/04/politics/fact-check-capitol-insurrection-january-6-lies/index.html>; Kathleen Belew, Militia groups were hiding in plain sight on Jan. 6. They’re still dangerous, THE WASHINGTON POST (Jan. 6, 2022), <https://www.washingtonpost.com/outlook/2022/01/06/militias-capitol-january-6/>.

<sup>1022</sup> *State ex rel. Hamilton v. Martin*, 173 Wash. 249 (Wash. 1933).

<sup>1023</sup> Government’s Memorandum In Support of Pre-Trial Detention at 5, *United States v. Watkins*, No. 1:21-cr-28-APM-3, (D.D.C. Feb. 11, 2021).

weapons would be met on these facts. Third, Trump was warned that some in the crowd his speech audience were armed. At any rate, by the time of his 2:24 p.m. tweet and his 187 minutes of inaction, he was aware of the violence.

## **b. Incite, Assist, Engage, or Give Aid or Comfort**

To prove an 18 U.S.C. § 2383 charge against Trump, prosecutors would next have to establish that Trump “incite[d],” “assist[ed],” or “engage[d]” in the insurrection or gave “aid or comfort” to those that did. Prosecutors need only establish that he did one of those things to meet this element of the crime. There is strong evidence that Trump’s speech and conduct meets many if not all of these prongs. We begin in this section with the narrower case, assessing Trump’s potential liability for “assist[ing]” and “engag[ing]” in the insurrection as well as for giving “aid or comfort” to those that did. Next, in Section II.C.2.b.ii, we turn to the broader case, explaining that there is strong evidence that Trump’s conduct may also meet the standard for “incit[ing]” insurrection under 18 U.S.C. § 2383.

### **i. Trump Engaged in the Insurrection, and Assisted and Provided Aid to the Insurrectionists**

Based on the facts, there is a narrow case that meets DOJ charging guidelines that Trump “assiste[d],” “engage[d] in,” or gave “aid or comfort” to those that attacked the Capitol. That case can be built primarily on two aspects of Trump’s conduct on January 6: *first*, Trump’s tweet of apparent encouragement sent at 2:24 p.m. after rioters had already begun storming the Capitol;<sup>1024</sup> *second*, Trump’s 187 minutes of inaction after the invasion began.<sup>1025</sup> Of course, even on this narrower approach that does not charge Trump’s conduct leading up to the insurrection, that conduct on and before January 6 lends essential insight to his intent. That is not only a matter of his Ellipse remarks but also other earlier statements such as Trump’s December 19 message to his supporters suggesting early on that he knew there was potential for violence; that Tweet stated, “Big protest in D.C. on January 6th. Be there, will be wild!”<sup>1026</sup>

**The legal meaning of the terms: “assist,” “engage,” and “aid or comfort” in § 2383.** While there is no case law defining these terms in the context of a prosecution under § 2383, some guidance can be drawn from related legal regimes. Black’s Law Dictionary defines “assist” as to “help; aid; succor; lend countenance or encouragement to; participate in as an auxiliary.”<sup>1027</sup> West’s Encyclopedia of American Law similarly defines “engage” as “[t]o become involved with, do, or take part in something.”<sup>1028</sup>

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<sup>1024</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 2:24 p.m.), <https://www.thetrumparchive.com/>.

<sup>1025</sup> Select Comm. Report at 577.

<sup>1026</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Dec. 19, 2020, 1:42 a.m.), <https://www.thetrumparchive.com/>.

<sup>1027</sup> Black’s Law Dictionary (2d ed. 1910) (defining “assist”); *See also* Webster’s International Dictionary of the English Language (1907) (defining “assist”) (“To give support in some undertaking or effort, or in time of distress; to help; to aid; to succor.”).

<sup>1028</sup> West’s Encyclopedia of American Law (2nd ed. 2008) (defining “engage”).

Caselaw interpreting the Constitution’s Disqualification Clause, enacted six years after the original 1862 federal criminal insurrection statute and whose language largely mirrors that statute, also provides useful guidance with respect to these terms. Although the Disqualification Clause does not make reference to what “engag[ing]” in an insurrection means, commentators have observed that the constitutional provision’s concept of “engage” could encompass other terms, like “assist.”<sup>1029</sup> In fact, one case interpreting the Disqualification Clause, explained, “the word ‘engage’ implies, and was intended to imply, a voluntary effort to *assist* the Insurrection or Rebellion, and to bring it to a successful termination.”<sup>1030</sup>

Under the Disqualification Clause, one “engages” in rebellion by “[v]oluntarily aiding...by personal service, or by contributions, other than charitable, of anything that [is] useful or necessary” to the insurrectionists’ cause.<sup>1031</sup> A person “‘engaged in’ insurrection whenever they were ‘leagued’ with insurrectionists – either by acting in concert with others knowing that the group intended to achieve its purpose in part by violence, force, or intimidation by numbers, or by performing an ‘overt act’ knowing that act would ‘aid or support’ the insurrection.”<sup>1032</sup> An individual does not have to “personally commit” violent acts in order to “‘engag[e] in insurrection.”<sup>1033</sup> “[N]on-violent overt acts or words in furtherance of the insurrection” are sufficient to demonstrate engagement.<sup>1034</sup> In an insurrection, “‘there [are] no accessories’”; rather, “‘[e]verybody...involved’ [is] a ‘principal actor.’”<sup>1035</sup>

Citing *United States v. Greathouse*, a prosecution for rebellion under the 1862 statute, one criminal law scholar has argued that the “assist” and “aid and comfort” provisions of 2383 should be read as synonymous with one another and with “the words aid and abet in the federal statute concerning accomplice liability.”<sup>1036</sup>

To shed light on how to interpret the statute’s “aid or comfort” language, limited analogies can also be drawn to the interpretation of similar language in the context of the Constitution’s Treason Clause.<sup>1037</sup> As articulated in a 2020 U.S. District Court order discussing the crime of treason under the Constitution’s Treason Clause, “[t]o give ‘aid and comfort’ ...one must overtly

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<sup>1029</sup> Hemel, *supra* note 950 (“But again, there is no ironclad rule against surplusage, and the 1862 statute may have included extra verbiage that the 14th Amendment later streamlined. Moreover, other sources suggest that incitement constitutes engagement.”).

<sup>1030</sup> *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871) (emphasis added).

<sup>1031</sup> *Worthy v. Barrett*, 63 N.C. 199, 203 (1869) (mandamus).

<sup>1032</sup> See Griffin Decision at \*34.

<sup>1033</sup> *Id.*

<sup>1034</sup> *Id.*

<sup>1035</sup> *Id.*

<sup>1036</sup> Albert W. Alschuler, Trump and the Insurrection Act: The Legal Framework, JUST SECURITY (Aug. 16, 2022), <https://www.justsecurity.org/82696/trump-and-the-insurrection-act-the-true-legal-framework/>.

<sup>1037</sup> U.S. Const. art. 3, § 3 (“‘Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort’ provides persuasive authority as to how courts have interpreted the terms ‘aid’ and ‘comfort.’”).

and willfully engage in conduct that strengthens the enemy and weakens the power of the United States to resist its attacks.”<sup>1038</sup>

In *Cramer v. United States*, a 1945 Supreme Court case reviewing a criminal treason conviction that examined the historic definition of aid and comfort, the Court explained that “[o]vert acts are such acts as manifest a criminal intention and tend toward the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled.”<sup>1039</sup> The court went on to explain that “the overt acts of aid and comfort must be intentional as distinguished from merely negligent or undesigned ones.”<sup>1040</sup> The Court also explained “from duly proven overt acts of aid and comfort to the enemy in their setting, it may well be that the natural and reasonable inference of intention to betray will be warranted.”<sup>1041</sup> The facts support a conclusion that Trump’s conduct meets this standard.

**The background to Trump’s potentially culpable conduct.** Leading up to the attack, Trump knowingly spread false information about the 2020 election being “stolen,” called on the Proud Boys to “stand back and stand by” during a debate in September, and coordinated with and mobilized efforts including through “Stop the Steal” to exert pressure on state and federal officials. Building on this movement, President Trump called on his supporters to come to Washington for a “wild” rally to “Stop the Steal” of the 2020 presidential election and the lawful transition of power from Trump to the lawfully elected next president. Once assembled on the White House Ellipse, Trump’s speech appeared to direct the armed mob to march on the Capitol, and he in fact unsuccessfully attempted to join them.

As explained above, Trump knew he lost the election based on statements he made to various aides and advisors in the following days. For example, after the election, General Mark Milley recalled Trump’s acknowledgement of his defeat during an Oval Office conversation where it was discussed that certain issues would soon become President-elect Biden’s concern. Similarly, White House communications director Alyssa Farah Griffin recalled Trump remarking, “Can you believe I lost to this effing guy?”<sup>1042</sup> Even before the 2020 election, Trump declared that he would not commit to accepting the results of the election. For example, during a July 19, 2020 interview with Chris Wallace on *Fox News Sunday* Trump refused to commit to accepting the election’s results due to his belief that mail-in ballots—the use of which had been expanded by several states due to the public health dangers of the COVID-19 pandemic—would “rig” the results of the election, thereby making them untrustworthy. This refusal mirrored his conduct during the 2016 presidential election. When asked during the final presidential debate of the 2016 election cycle whether he would accept the will of the voters, Trump insisted that the general election would be

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<sup>1038</sup> *El Bey v. Dominguez*, No. 2:20-CV-73-Z-BQ, 2020 WL 7658088, at \*7 (N.D. Tex. Nov. 23, 2020) (citing *Tomoya Kawakita v. United States*, 343 U.S. 717 (1952)); *Haupt v. United States*, 330 U.S. 850 (1947); *Cramer v. United States*, 325 U.S. 1 (1945) (discussing the definition of giving “Aid and Comfort” in the context of the charge of Treason against the United States consists of “U.S. CONST. art. III, § 3.”).

<sup>1039</sup> *Cramer v. United States*, 325 U.S. 1 (1945).

<sup>1040</sup> *Id.*

<sup>1041</sup> *Id.*

<sup>1042</sup> Singh, *supra* note 69.

rigged against him and stated, with regard to the election results, “I will look at it at the time. I will keep you in suspense.”<sup>1043</sup>

Immediately following the election, citing his false claims, as explained in Section II.B, Trump’s supporters engaged in widespread threats of violence against state legislators and election officials. This violent “Stop the Steal” movement attracted white supremacists and right-wing militia groups—including the Proud Boys and Oath Keepers.

In this context, and after Trump’s advisors and administration officials made clear to Trump that the courts were unlikely to rule in his favor in the wake of the Electoral College certifying their votes, on December 19, 2020, Trump announced his January 6 rally. Immediately thereafter, his supporters began planning to gather in D.C. on January 6.

Trump’s increasingly violent rhetoric and tweets mobilized his followers and members of violent right-wing groups to join him in Washington on January 6, and to come prepared for violence. As described in Section I.C, Trump knew or should have known from prior activities of these groups that they would likely come and that they had the ability to engage in, and proclivity for, violence and intimidation. Further, many local and federal agencies, as well as widely publicized news outlets, highlighted the significant risk of violence ahead of January 6. For example, the Secret Service collected intelligence about violence on January 6 which would have reached senior White House officials in normal operating procedure.<sup>1044</sup> Senior executive branch officials like Acting Deputy Attorney General Donoghue were also aware of the significant risk of violence.<sup>1045</sup> Further, an organizer of Trump’s January 6 “Save America” rally, Katrina Pierson, expressed her concern about the potential speakers being “crazies” directly to Mark Meadows.<sup>1046</sup>

In addition to Trump posting tweets that mobilized his followers to come to Washington D.C. on January 6, his political action committee also reportedly helped fund the rally. According to the Select Committee, Trump created an entity called Save America PAC to collect funds that he and his allies raised through his election fraud claims.<sup>1047</sup> The Select Committee found that Trump’s PAC gave Event Strategies Inc., which ran the January 6th rally at the Ellipse, more than

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<sup>1043</sup> Patrick Healy & Jonathan Martin, Donald Trump Won’t Say if He’ll Accept Result of Election, THE NEW YORK TIMES (Oct. 19, 2019), <https://www.nytimes.com/2016/10/20/us/politics/presidential-debate.html>.

<sup>1044</sup> Jordan Libowitz & Sara Wiatrak, The Secret Service knew about Jan 6 threat. They dismissed it, CREW (Aug. 17, 2022), [<sup>1045</sup> See Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Richard Donoghue, \(Oct. 1, 2021\).](https://www.citizensforethics.org/reports-investigations/crew-investigations/the-secret-service-knew-about-jan-6-threat-they-dismissed-it/#:~:text=These%20documents%20show%20government%20law,an%20assault%20on%20the%20Capitol; Select Comm. Report at 67 (explaining that Bobby Engel, as head of Trump’s security detail, would relay intelligence to Tony Ornato, the White House Deputy Chief of Staff, with the “assumption [...] that it would get to the chief [of staff, Mark Meadows], or that he was sharing the information with the chief” and that “if the chief thinks it needs to get to the President, then he would share it with the President.”)</a>.</p></div><div data-bbox=)

<sup>1046</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Katrina Pierson, (Mar. 25, 2022), at 86.

<sup>1047</sup> Second Jan. 6 Hearing Transcript, *supra* note 43.

\$5 million.<sup>1048</sup> And rally organizers included members of Trump’s team, such as Pierson, who was Trump’s former campaign spokesperson. Moreover, there is documentation of direct communication with Meadows about the planning of the rally as well as individuals and groups the rally organizers were reaching out to in order to secure their appearance and share details.<sup>1049</sup>

Prosecutors may also be able to develop additional evidence that Trump assisted the insurrection by organizing his assemblage of people, including known violent extremist groups, and attempting to lead them to the Capitol. For example, Trump’s former National Security Advisor, Lt. Gen. Michael Flynn, and Trump’s former campaign advisor, Roger Stone—both long-time loyal allies of Donald Trump—appear to have been in direct communication with the Proud Boys and the Oath Keepers in the lead-up to the January 6 attack. The Select Committee report also details evidence of coordination between the Proud Boys method of attack and Trump’s mobilization of the mob to march on the Capitol. These facts, and others, appear to indicate that it is at least conceivable that there was coordination between Trump and/or his allies and some of the violent groups who led the attack on the Capitol, evidence of which a prosecutor may be able to unearth. Such additional evidence would be helpful, but not necessary, to establish insurrection under this theory.

On January 6 itself, as described further in I.C.1 above, he directed the mob that he had assembled to “fight” to overturn the election results by marching to the Capitol to “stop the steal,” knowing that they were armed and that the likelihood of violence was high.

The crowd’s belief that the President of the United States, the most powerful person in the country, would be marching alongside them to the Capitol building added an aura of legitimacy to their efforts. In the words of one of the rioters, speaking through his attorney: “I was in Washington, D.C. on January 6, 2021, because I believed I was following the instructions of former President Trump and he was my President and the commander-in-chief. His statements also had me believing the election was stolen from him.”<sup>1050</sup>

After unsuccessfully attempting to join the mob,<sup>1051</sup> Trump actively encouraged it while the assault on the Capitol was ongoing with his 2:24 pm tweet as well as aiding it by failing to take action to disperse the mob for 187 minutes. We now turn to the statutory implications of that conduct.

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<sup>1048</sup> *Id.*; Who We Are, Event Strategies, Inc. (accessed Jan. 24, 2023), <https://eventstrategiesinc.com/about> (Event Strategies, Inc. “refers to itself as a full-service ...event management and production services for clients and events of all types and sizes...from press conferences to corporate conventions...to presidential campaigns.”).

<sup>1049</sup> *Id.*

<sup>1050</sup> Dan Mangan, Capitol Rioter Garret Miller Says He Was Following Trump’s Orders, Apologizes to AOC for Threat, CNBC (Jan. 25, 2021), <https://www.cnbc.com/2021/01/25/capitol-riots-garret-miller-says-he-was-following-trumps-orders-apologizes-to-aoc.html>.

<sup>1051</sup> See Select Comm. Report at 592 (describing the Secret Service document that stated, “PPD IS ADVISING THAT [THE PRESIDENT] IS PLANNING ON HOLDING AT THE WHITE HOUSE FOR THE NEXT APPROXIMATE TWO HOURS, THEN MOVING TO THE CAPITOL.”); *Id.* at 585 (Trump told the crowd at the Ellipse Speech: “[A]fter this, we’re going to walk down, and I’ll be there with you, we’re going to walk down, we’re going to walk down, [ . . . ] [W]e’re going to walk down to the Capitol”).

**On the afternoon of January 6, Trump’s conduct implicated § 2383 in two primary ways.** Each potentially supports a finding that charges against Trump for § 2383 are appropriate under DOJ guidelines: First, while the attack was ongoing, at 2:24 p.m., Trump issued an incendiary tweet; second, Trump’s 187 minutes of inaction as the assault on the Capitol raged on.

*The 2:24 p.m. tweet.* Trump had just hours earlier given an inflammatory speech, calling on his supporters to “fight like hell” (a speech which, as we note in Section II.C.2.b.ii below is potentially itself the basis for insurrection charges, albeit subject to a First Amendment challenge). Trump had been aware of the ongoing violence at the Capitol for more than an hour when he broadcast to his supporters: “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!”<sup>1052</sup> This tweet strengthened the mob; the mob recognized the tweet as a statement in support of their efforts and between 2:25 p.m. and 2:28 p.m. a surge of violence occurred, resulting in the rioters breaching the East Rotunda doors and the Capitol Crypt police line, and forcing the evacuation of Vice President Pence.<sup>1053</sup>

That tweet, it should be noted, is not protected speech under the First Amendment and thus can provide some of the basis of a criminal prosecution. We explain the *Brandenburg* test more fully in Section II.C.2.b.ii, *infra*. In sum, courts have found that the First Amendment does not protect speech in circumstances that create a serious risk of imminent violent harm; specifically, the First Amendment does not protect speech when “(1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech.”<sup>1054</sup> The evidence indicates all three apply to Trump’s tweet: he knew the siege of the Capitol was ongoing yet encouraged the very people engaged in the violence; the apparent meaning of the tweet was to encourage the rioters to engage in unlawful activity, namely, the use of force to obstruct Congress; and it is implausible Trump was not aware that those already engaged in violence, and to whom the tweet appeared directed, would imminently engage in further violence and lawless action based on the tweet. Indeed, as previously noted, one White House staffer even recalled in her testimony before the Select Committee that, when Trump posted the 2:24 p.m. tweet, “[t]he situation was already bad, and so it felt like he [Trump] was pouring gasoline on the fire by tweeting that.”<sup>1055</sup>

Trump’s mental state during this time period is illuminated by the other actions he was taking. Throughout the day, while the violence was ongoing, Trump called a number of lawmakers, pressuring them to vote against certifying the election once Congress was back in session.<sup>1056</sup> These phone calls occurred at the very moment that insurrectionists were invading the Capitol and putting the lives of law enforcement, lawmakers, and Vice President Pence at risk. Instead of

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<sup>1052</sup> Select Comm. Report at 38 (quoting President Trump’s 2:24 p.m. tweet).

<sup>1053</sup> *Id.* at 111.

<sup>1054</sup> *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 246 (6th Cir. 2015).

<sup>1055</sup> Third Jan. 6 Hearing Transcript, *supra* note 324 (recorded interview of Sarah Matthews).

<sup>1056</sup> Bob Woodward & Robert Costa, Jan. 6 White House logs given to House show 7-hour gap in Trump calls, *THE WASHINGTON POST* (Mar. 29, 2022), <https://www.washingtonpost.com/politics/2022/03/29/trump-white-house-logs/>.

calling the military to put down the attackers laying siege to our Capitol, Trump was calling Members of Congress to do the mob's bidding. This outreach, while the Capitol was being overrun, strengthened the insurrectionists by implicitly encouraging their actions and advancing their shared goal of keeping Trump in power.

*The 187 Minutes.* The second significant aspect of Trump's conduct that would support a finding that charges are warranted for insurrection under DOJ's charging guidelines concerns his 187 minutes of inaction. Trump also assisted—and gave aid and comfort to—the mob through his failure to order their dispersal. As the Select Committee explained in its final report:

As Commander-in-Chief, President Trump had the power—more than any other American—to muster the U.S. Government's resources and end the attack on the U.S. Capitol. He willfully remained idle even as others, including his own Vice President, acted.<sup>1057</sup>

Indeed, in a CNN town hall in May, Trump admitted that the mob would have listened to him:

COLLINS: But when it was clear to you that they were not being peaceful – you saw them rushing the Capitol, breaking windows. They were hitting officers with flagpoles, Tasing them, beating them up.

When it was clear they weren't being peaceful, why did you wait three hours to tell them to leave the Capitol? They listen to you like no one else.

TRUMP: Yes.

COLLINS: You know that.

TRUMP: They do. I agree with that.<sup>1058</sup>

In most circumstances, inaction cannot be a basis for criminal charges. Indeed, a fundamental principle of the American criminal legal system is that there must be an *actus reus*, or a guilty act, for criminal charges to be brought and sustained.<sup>1059</sup> That generally requires an actual affirmative act, rather than inaction.<sup>1060</sup> Nonetheless, a defendant can still be criminally culpable for an omission under certain, limited circumstances. As one leading treatise explains,

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<sup>1057</sup> Select Comm. Report at 577.

<sup>1058</sup> READ: Transcript of CNN's town hall with former President Donald Trump, CNN (May 11, 2023), <https://www.cnn.com/2023/05/11/politics/transcript-cnn-town-hall-trump/index.html>.

<sup>1059</sup> Sungeeta Jain, *How Many People Does It Take to Save A Drowning Baby?: A Good Samaritan Statute in Washington State*, 74 WASH. L. REV. 1181, 1183 (1999) ("Traditionally, criminal law requires that an affirmative act, or an *actus reus*, be present before imposing liability for the commission of certain acts.").

<sup>1060</sup> *Id.*



“[f]or criminal liability to be based upon a failure to act it must first be found that there is a duty to act—a legal duty and not simply a moral duty.”<sup>1061</sup>

Here, Trump had such a duty, in that he had a constitutional obligation to “preserve, protect, and defend the Constitution of the United States,” a duty that extended to defending the Capitol when it was attacked. Instead, as explained in detail in Section I, Trump took no action for 187 minutes to respond to the violence, the breach of the Capitol building, or the peril faced by his Vice President, Members of Congress, executive branch and congressional staff, law enforcement, and the public on January 6.<sup>1062</sup>

After spreading lies for months, calling his supporters to come to D.C., urging them to march on the Capitol, and further inflaming them, Trump’s failure to effectively send home the individuals conducting the January 6 attack and protect the U.S. Capitol and lawmakers inside was not, as the Supreme Court described in *Cramer*, a “merely negligent” or an “undesigned” act. To the contrary, it appears to have been a designed and conscious decision not to defend the Capitol and the joint session of Congress and to use the chaos and delay as yet another opportunity to push lawmakers to overturn the election results. The fact that he ignored repeated requests to call off the violence, including from those in his White House, members of Congress, his own family, and others demonstrates a choice to not intervene, rather than mere negligence.<sup>1063</sup> Further, the fact that so many people in Trump’s orbit urged him to call off the crowd demonstrates both that they recognized he had the power and authority to do so and that those in the crowd were likely to listen to him.

As the principal person empowered to order military or federal law enforcement to defend the Capitol, Trump’s decision not to do so appears to amount to “willful[] ...conduct that weaken[ed] the power of the United States” to resist the attack.<sup>1064</sup> Trump’s former White House attorney Ty Cobb argued that Trump “aid[ed] and comfort[ed]” the January 6 insurrectionists through his “three hours of inaction.”<sup>1065</sup>

Trump’s statements and conduct in the aftermath of January 6 further support a finding that mere negligence cannot account for President Trump’s inaction that weakened the United States on January 6.<sup>1066</sup> Before law enforcement had even successfully established a security perimeter

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<sup>1061</sup> 1 Wayne R. LaFare, *Substantive Criminal Law* § 6.2 (2d ed. 2008); *United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010).

<sup>1062</sup> Select Comm. Report at 578 (According to Chairman of the Joint Chiefs of Staff General Mark Milley, “President Trump did nothing to marshal the Government’s resources during the assault on the U.S. Capitol.” Miley testified: “You’re the Commander in Chief. You’ve got an assault going on on the Capitol of the United States of America, and there’s nothing? No call? Nothing? Zero? . . . I just noted it.”).

<sup>1063</sup> See, e.g., Select Comm. Report at 600–604.

<sup>1064</sup> *El Bey v. Dominguez*, 540 F. Supp. 3d 653 (N.D. Tex. 2020).

<sup>1065</sup> Rebecca Cohen, Ex-Trump White House lawyer believes Trump gave ‘aid and comfort to the insurrectionists, BUSINESS INSIDER (Aug. 4, 2022), <https://www.businessinsider.in/politics/world/news/ex-trump-white-house-lawyer-believes-trump-gave-aid-and-comfort-to-the-insurrectionists/articleshow/93332541.cms>.

<sup>1066</sup> Cf. *Cramer v. United States*, 325 U.S. 1 (1945) (reviewing a criminal treason conviction, finding that “the overt acts of aid and comfort must be intentional as distinguished from merely negligent or undesigned ones” to confer criminal liability).

around the Capitol building,<sup>1067</sup> he wrote that “[t]hese are the things and events that happen,” when a victory is “so unceremoniously & viciously stripped away” and he told his supporters to “remember this day forever.”<sup>1068</sup> Trump apparently considered “blanket pardons” for those who participated in January 6th, and at a January 29th, 2022 rally in Conroe, Texas, vowed that if reelected, he would pardon those convicted of crimes related to January 6.<sup>1069</sup> One former prosecutor described Trump’s discussion of “blanket pardons” as demonstrating “consciousness of guilt.”<sup>1070</sup>

Based on all the available evidence, case law, and analogous historical precedent, Donald Trump’s combined support for the insurrectionists and inaction while the insurrection was ongoing seems to more than pass the bar to support charges under DOJ policy for engaging in the January 6, 2021 insurrection and providing support, aid, or comfort to the insurrectionists under the criminal insurrection statute, 18 U.S.C. § 2383.

## **ii. Trump Incited the Assembled Mob to Insurrection at His January 6 Rally**

We believe prosecutors can prove a case, albeit a more complex one, that Trump incited insurrection through his words on and before January 6. It is more challenging because the protection provided by the First Amendment is “at its zenith” when it concerns political speech.<sup>1071</sup> Nevertheless, case law has developed exceptions to those protections in extreme circumstances, including those involving incitement to violence. The U.S. Supreme Court defined incitement in *Brandenburg v. Ohio*, as “advocacy [that] is directed to ... producing imminent lawless action” and which “is likely to incite or produce such action.”<sup>1072</sup> Subsequent cases interpreting *Brandenburg* have applied that case as a three-part test. The Sixth Circuit Court of Appeals explained in a 2015 case, *Bible Believers v. Wayne County*, that under the *Brandenburg* test, speech is not incitement “unless (1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2)

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<sup>1067</sup> Office of the Secretary of Defense, U.S. Dep’t of Defense, Timeline for December 30, 2021 – January 6, 2021 at 3 (2021), <https://media.defense.gov/2021/Jan/11/2002563151/-1/-1/0/PLANNING-AND-EXECUTION-TIMELINE-FOR-THE-NATIONAL-GUARDS-INVOLVEMENT-IN-THE-JANUARY-6-2021-VIOLENT-ATTACK-AT-THE-US-CAPITOL.PDF> (noting that USCP, DCNG, and MPD only successfully established a security perimeter on the west side of the Capitol building by 6:14 p.m., and USCP did not declare the Capitol secure until 8:00 pm).

<sup>1068</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2021, 6:01 p.m.), <http://web.archive.org/web/20210106232133/https://twitter.com/realdonaldtrump/status/1346954970910707712> (archived).

<sup>1069</sup> Brad Dress, Trump raises pardons for Jan. 6 rioters if reelected, THE HILL (Jan. 29, 2022), <https://thehill.com/policy/national-security/591972-trump-says-hell-treat-jan-6-rioters-fairly-if-reelected-if-it/>.

<sup>1070</sup> Mary Papenfuss, Trump's Jan. 6 'Blanket Pardon' Plan Bares 'Consciousness Of Guilt': Ex-Prosecutor, YAHOO! NEWS (Dec. 29, 2022), <https://news.yahoo.com/trumps-jan-6-blanket-pardon-045741315.html>.

<sup>1071</sup> *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (quotation marks omitted).

<sup>1072</sup> *Brandenburg v. Ohio*, 89 S. Ct. 1827, 1829 (1969). While satisfying the *Brandenburg* test would be required to prove incitement of insurrection under 18 U.S.C. 2383, it would not be required to establish disqualification under Section 3 of the Fourteenth Amendment. That is because Section 3 is not a mere statute, but a part of the U.S. Constitution on equal footing with the First Amendment. Thus, the two provisions must “be read together and harmonized” so that “Section Three is not rendered ‘without effect.’” See Griffin Decision at \*24; See also Brief of Amici Curiae, State ex rel. White v. Griffin, No. D-101-CV-2022-00473, (Aug. 1, 2022).

the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech.”<sup>1073</sup>

Two other U.S. Supreme Court cases provide additional clarification on the definition of incitement, limiting to some extent what speech can be punished under the law. In *Hess v. State of Indiana*, the Supreme Court applied *Brandenburg*, and held that, where speech is “not directed to any person or group of persons,” it is not advocacy “intended to produce, and likely to produce, imminent disorder.”<sup>1074</sup> The case seemed to hold that speech cannot be punished if violence is not directed at a specific, immediate target. However, the Supreme Court also suggested in that decision that such speech can be proscribed and punished where there is “evidence or rational inference from the import of the language, that ... words were intended to produce, and likely to produce, imminent disorder.”<sup>1075</sup> In another case, *N.A.A.C.P. v. Claiborne Hardware Co.*, the Supreme Court held that when speech “do[es] not incite lawless action, [it] must be regarded as protected speech.”<sup>1076</sup> Essentially, that case explained that speech cannot be punished as incitement if the lawless action advocated, or seemingly induced, does not actually occur.

In a February 2022 opinion in the case *Thompson v. Trump*, Judge Amit Mehta of the U.S. District Court for the District of Columbia analyzed Trump’s January 6 speech immediately preceding the attack on the U.S. Capitol under *Brandenburg* and related cases.<sup>1077</sup> Judge Mehta did not take a position on whether defining *Brandenburg*’s standard as a three-part test is useful, but opined that “[t]he key to *Brandenburg* . . . [is] whether the speech is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>1078</sup>

Addressing *Hess*, Judge Mehta explained “there is no safe haven under *Brandenburg* for the strategic speaker who does not directly and unequivocally advocate for imminent violence or lawlessness, but does so through unmistakable suggestion and persuasion. Federal appellate courts have understood the *Brandenburg* exception to reach implicit encouragement of violent acts.”<sup>1079</sup>

The District Court held that “the President’s statements that, [W]e fight. We fight like hell and if you don’t fight like hell, you’re not going to have a country anymore, and [W]e’re going to try to and give [weak Republicans] the kind of pride and boldness that they need to take back our country, immediately before exhorting rally-goers to walk down Pennsylvania Avenue, are plausibly words of incitement not protected by the First Amendment.”<sup>1080</sup> Judge Mehta was careful to note that the court was able to reach its conclusion based solely on Trump’s speech at the January

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<sup>1073</sup> *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 246 (6th Cir. 2015).

<sup>1074</sup> *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973).

<sup>1075</sup> *Id.* at 109.

<sup>1076</sup> *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982).

<sup>1077</sup> *Thompson v. Trump*, 590 F. Supp. 3d 46, 112 (D.D.C. 2022) (“The key to *Brandenburg*...is: whether the speech “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”), appeal pending.

<sup>1078</sup> *Id.* (quoting *Brandenburg*, 395 U.S. at 447, 89 S. Ct. 1827.) (At the time of this writing, parties in *Thompson* are appealing the District Court decision.)

<sup>1079</sup> *See, e.g., Bible Believers*, 805 F.3d at 246 (inquiring as the first element whether “the speech explicitly or implicitly encouraged the use of violence or lawless action”).

<sup>1080</sup> *Thompson v. Trump*, 590 F. Supp. 3d 46, 115 (D.D.C. 2022).

6 rally, without analyzing Trump’s words and social media posts prior to the rally. Though not addressed in Judge Mehta’s opinion, these earlier statements further help support a finding of incitement.<sup>1081</sup>

The District Court in *Thompson* also cited a Seventh Circuit Court of Appeals case, *Tri Corp Housing Incorporated v. Bauman*, to clarify that “public officials urge their constituents and other public bodies to act in particular ways” and “[t]hey have every right to do so...as long as they refrain from making the kind of threats that the Supreme Court treats as subject to control under the approach of *Brandenburg v. Ohio*.”<sup>1082</sup>

While avoiding the question of whether Trump’s words and conduct would meet the *Brandenburg* standard, the national board of directors of the American Civil Liberties Union (ACLU), which litigated *Brandenburg*, passed a resolution calling for the impeachment of President Donald J. Trump because he posed a “‘grave and imminent threat to civil liberties’ by engaging in an extended pattern of bad-faith conduct designed to subvert the results of a democratic election ... [including by] [u]rging an unruly mob to riot at the United States Capitol on Jan. 6, in an effort to prevent the certification of the Electoral College results and to intimidate members of Congress from carrying out their constitutional duties ... in order to maintain himself in office.”<sup>1083</sup> So too did a bipartisan majority in the House of Representatives and the Senate vote<sup>1084</sup> in favor of an article of impeachment charging Trump with “incitement of insurrection” by “inciting violence against the government of the United States.”<sup>1085</sup>

**(a) Trump’s Speech Fulfilled Part One of the Brandenburg Test Because His Speech “Encouraged the Imminent Use of Violence or Lawless Action”<sup>1086</sup>**

Trump’s speech on January 6, his prior statements, and the totality of his conduct leading up to, and on, January 6 likely qualifies as incitement under the first part of the *Brandenburg* test. Trump appeared to encourage the use of violence and lawless action in the lead-up to and on January 6. Shortly after concluding a day marathon of meetings with both White House and outside advisors, including Michael Flynn, during which it was made clear that legal tactics were unlikely

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<sup>1081</sup> Cf. *id.* (In this particular case, the “Plaintiffs do not contend that President Trump’s words prior to the January 6 Rally Speech (almost entirely through tweets) meets the *Brandenburg* incitement exception. They focus on the Rally Speech, so the court does, too....”).

<sup>1082</sup> *Tri-Corp Hous. Inc. v. Bauman*, 826 F.3d 446, 449 (7th Cir. 2016) (citing *Novoselsky v. Brown*, No. 15–1609, 822 F.3d 342, 2016 WL 2731544, (7th Cir. May 10, 2016)).

<sup>1083</sup> Press Release, American Civil Liberties Union, ACLU Again Calls for Impeachment of President Trump (Jan. 10, 2021), <https://www.aclu.org/press-releases/aclu-again-calls-impeachment-president-trump>; American Civil Liberties Union of Ohio, *Brandenburg v. Ohio* 395 U.S. 444 (1969), (accessed July 10, 2023), <https://www.acluohio.org/en/cases/brandenburg-v-ohio-395-us-444-1969#:~:text=On%20June%209%2C%201969%2C%20the,led%20to%20imminent%20lawless%20action.>

<sup>1084</sup> 67 Cong. Rec. H191 (daily ed. Jan. 13, 2021); 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021); H. Res. 503, 117th Cong., 1st Sess. (2021); S. 35, 117th Cong. (2021); H.R. 3325, 117th Cong. (2021).

<sup>1085</sup> Resolution Impeaching Donald John Trump, President of the United States, For High Crimes and Misdemeanors, H.R. Res. 24, 117th Cong. (2021).

<sup>1086</sup> *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 246 (6th Cir. 2015); § 20.15(d) The Brandenburg Test, 5 Treatise on Const. L. § 20.15(d).

to prevail in the wake of the Electoral College certifying their votes, Trump, in the early hours of December 19, 2020, announced a “wild” rally to take place on January 6.<sup>1087</sup>

With that announcement, Trump, as chief architect, consecrated January 6 as the day on which his supporters were to coalesce in Washington to take action in support of his attempt to remain president of the United States, despite losing the election. Allied groups, including armed militias, immediately heeded his call to come to D.C. and organized their supporters to do the same, with Women for America First appealing to the Park Service within hours of Trump’s tweet to change their permit for an event they had already planned on January 22<sup>nd</sup> and 23<sup>rd</sup> to be rescheduled to January 6th in response to Trump’s tweet. Trump’s plans to call for, and join, a march to the Capitol itself were sprung on the Secret Service the day of the insurrection.<sup>1088</sup> Trump’s December 19, 2020 tweet<sup>1089</sup> calling for his supporters, who included militant and violent right-wing groups he had long courted, such as the Proud Boys and the Oath Keepers, to descend upon Washington, D.C. for a “wild” rally on January 6 is evidence of his intent to use violence, or the threat of violence, to achieve his goals.

During his speech at the Ellipse immediately preceding the Capitol attack, Trump ad-libbed several references to Pence and fighting that were not in the prewritten script.<sup>1090</sup> In particular, he called on his supporters to “fight like hell...you’ll never take back our country with weakness.” The Select Committee found that the word “‘fight,’ or a variation thereof, appeared only twice in the prepared text,” but that “Trump would go on to utter the word twenty times during his speech at the Ellipse.”<sup>1091</sup> Trump went on to tell them: “You have to show strength and you have to be strong.”<sup>1092</sup> And he directed them toward the Capitol Building. He fomented their anger toward Pence and suggested to the assembled mob that there was an opportunity for them to achieve their collective goal of a second term for Trump’s presidency. After stoking the mob, he told them “if Mike Pence does the right thing, we win the election,”<sup>1093</sup> and he directed them to the Capitol Building.

The Select Committee collected substantial video evidence showing that the rioters not only listened to Trump’s speech, but marched to the Capitol to act on it. As mentioned in Section I, one person in the mob said “I guess the hope is that there’s such a show of force here that Pence

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<sup>1087</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26; Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Dec. 19, 2020, 1:42 a.m.), <https://www.thetrumparchive.com/>.

<sup>1088</sup> Mark Robinson, Sworn Testimony Before the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, video testimony presented at eighth Select Comm. hearing (July 22, 2022); Kayleigh McEnany, Sworn Testimony Before the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, video testimony presented at ninth Select Comm. hearing (Oct. 13, 2022); Exhibits presented at ninth Select Comm. hearing (Oct. 13, 2022) (Secret Service Messages).

<sup>1089</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Dec. 19, 2020, 1:42 a.m.), <https://www.thetrumparchive.com/>.

<sup>1090</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26.

<sup>1091</sup> Select Comm. Report at 540; Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (National Archives Production), 076P-R000002911\_00001, 076PR000002912\_00001 (January 6, 2021, email from Robert Gabriel Jr. to Dan Scavino at 1:25 p.m. re: Final draft attached with attachment ‘210106 Save America March.doc’); Statement of Jennifer Mercieca, (Mar. 31, 2022), at 18.

<sup>1092</sup> Naylor, *supra* note 500.

<sup>1093</sup> President Donald J. Trump, Speech to the ‘Save America March’ and Rally (Jan. 6, 2021), [perma.cc/2YNN-9JR3](https://perma.cc/2YNN-9JR3).

will decide to—Just do his job. Do the right thing, according to Trump.”<sup>1094</sup> A Trump supporter said: “I’m telling you what, I’m hearing that Pence—hearing that Pence just caved. ...I’m telling you, if Pence caved, we’re going to drag motherfuckers through the streets. You fucking politicians are going to get fucking drug through the streets.”<sup>1095</sup> Another clip showed rioters chanting “Bring him out. Bring out Pence. Bring him out. Bring out Pence. Bring him out. Bring out Pence. Bring him out. Bring out Pence.”<sup>1096</sup> And yet another segment of video featured rioters chanting “Hang Mike Pence. Hang Mike Pence. Hang Mike Pence. Hang Mike Pence. Hang Mike Pence.”<sup>1097</sup> In other acts of intimidation, members of the mob charged toward the office of Speaker of the House Nancy Pelosi, chanting menacingly, “Nancy! Nancy! Nancy” with one individual later boasting on social media that he “kicked in [her] office door” and would have “torn [her] into little pieces” if she had been found.<sup>1098</sup>

The rioters responded to Trump’s urging and did, in fact, engage in violent and lawless conduct resulting in the tragic deaths of seven people, including three law enforcement officers.<sup>1099</sup> Some of the thousands of Trump supporters who marched to the Capitol were, armed and wore tactical gear.<sup>1100</sup> Once they arrived at Capitol West Front grounds, members of “the mob... illegally breached security barriers surrounding that area.”<sup>1101</sup> The mob then overwhelmed law enforcement forming the remaining security barricade around the Capitol perimeter and scaled walls.<sup>1102</sup> By about 2:11 p.m., the mob challenged law enforcement face-to-face, smashed windows, and breached the Capitol building.<sup>1103</sup>

Using weapons including chemical irritants, cattle prods, flag poles, broken pieces of the barricade, as well as their bodies and gear stolen from the police officers, members of the mob beat and attacked police officers for multiple hours. As of January 4, 2023, approximately 284 defendants had “been charged with assaulting, resisting, or impeding officers or employees,

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<sup>1094</sup> Third Jan. 6 Hearing Transcript, *supra* note 324.

<sup>1095</sup> *Id.*

<sup>1096</sup> *Id.*

<sup>1097</sup> *Id.*

<sup>1098</sup> See, e.g., U.S. Gov’t Accountability Off., GAO-22-104829, Capitol Attack: Additional Actions Needed to Better Prepare Capitol Police Officers for Violent Demonstrations (Mar. 2022), <https://www.gao.gov/assets/gao-22-104829.pdf> (providing a timeline of the attack); Untitled Video Compilation Presented by the House Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (June 9, 2022) (hereinafter “Jan. 6 Select Comm. compilation video”); Capitol Police surveillance video compilation, United States Capitol Police (Jan. 6, 2021) (hereinafter “Capitol Police surveillance video compilation”); Matthew S. Schwartz, As Inauguration Nears, Concern Of More Violence Grows, NPR (Jan. 9, 2021), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/09/955289141/as-inauguration-nears-concern-grows-of-more-violence-to-come>; David K. Li & Ali Gostanian, Georgia Lawyer Said He Kicked in Pelosi’s Door, She Could’ve Been ‘Torn into Little Pieces’, NBC NEWS (Jan. 19, 2021), <https://www.nbcnews.com/news/us-news/georgia-lawyer-said-he-kicked-pelosi-s-door-she-could-n1254756>.

<sup>1099</sup> Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6, Senate Committees on Homeland Security and Governmental Affairs and Rules and Administration, (June 1, 2021), [https://www.hsgac.senate.gov/imo/media/doc/HSGAC&RulesFullReport\\_ExaminingU.S.CapitolAttack.pdf](https://www.hsgac.senate.gov/imo/media/doc/HSGAC&RulesFullReport_ExaminingU.S.CapitolAttack.pdf) (hereinafter “June 2021 Committee Report”).

<sup>1100</sup> *Id.* at 22–23, 27–29; Griffin Decision at 9.

<sup>1101</sup> Griffin Decision at 10.

<sup>1102</sup> June 2021 Committee Report at 24; Griffin Decision at 10.

<sup>1103</sup> See, e.g., Jan. 6 Select Comm. compilation video; Capitol Police surveillance video compilation.

including approximately 99 individuals who have been charged with using a deadly or dangerous weapon or causing serious bodily injury to an officer;” and “91 defendants have been charged with entering a restricted area with a dangerous or deadly weapon.”<sup>1104</sup>

It was evident based upon the jeers shouted by the mob, the attire they wore, and the paraphernalia they carried that they were following Trump’s instructions to “Stop the Steal.” That is, they apparently intended to physically interfere with the certification of the 2020 election and the transfer of presidential power.<sup>1105</sup> According to the Justice Department, “[m]ore than 295 defendants have been charged with corruptly obstructing, influencing, or impeding an official proceeding, or attempting to do so, as well as seditious conspiracy.”<sup>1106</sup> Many have been convicted. At least four federal judges have referred to the January 6, 2021 attack as an “insurrection.”<sup>1107</sup> Ultimately, 2,000 officers from 19 different agencies across the local, state, and federal levels were called in as reinforcements, relying on a myriad of tools to resist and quell the mob, including “chemical spray and munitions, flash bangs, tactical teams with firearms, riot shields, and batons.”<sup>1108</sup> After several hours of effort by these officers the Capitol grounds were secured.<sup>1109</sup>

As the D.C. Circuit summarized in *Trump v. Thompson*, the “rampage” by the mob of Trump’s supporters “injured more than 140 people, and inflicted millions of dollars in damage to the Capitol” and “[t]hen-Vice President Pence, Senators, and Representatives were all forced to halt their constitutional duties and flee the House and Senate chambers for safety.”<sup>1110</sup>

**(b) Trump’s Speech Fulfilled Part Two of the Brandenburg Test Because He Subjectively Intended That His Speech Would Result in the Use of Violence or Lawless Action**

The evidence supports the conclusion that Trump intended that his speech would result in lawless conduct and violence. A former member of Trump’s campaign team organizing the activities on January 6, Katrina Pierson, raised “red flags” to Meadows on January 6 that “there

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<sup>1104</sup> Press Release, U.S. Att’y Office of D.C., 23 Months Since the January 6 Attack on the Capitol (updated Dec. 8, 2022), <https://www.courthousenews.com/wp-content/uploads/2022/12/jan-6-case-update-december-2022.pdf>.

<sup>1105</sup> Griffin Decision at \*18.

<sup>1106</sup> Press Release, U.S. Att’y Office of D.C., 23 Months Since the January 6 Attack on the Capitol (updated Dec. 8, 2022), <https://www.courthousenews.com/wp-content/uploads/2022/12/jan-6-case-update-december-2022.pdf>.

<sup>1107</sup> Budowich v. Pelosi, 2022 WL 1422823, at \*1 (D.D.C. 2022) (referring to the “attempted insurrection on January 6, 2021”); United States v. Bingert, 2022 WL 1659163, at \*1 (D.D.C. 2022) (referring to January 6 as a “unsuccessful insurrection”); United States v. Reffitt, 2022 WL 1404247, at \*3 (D.D.C. 2022) (quoting defendant who referred to the event, in writing, as an “insurrection”); United States v. Caldwell, No. 1:21-cr-00181-CKK, (D.D.C. Mar. 3, 2021) (Minute Entry for sentencing proceedings (Judge Colleen Kollar-Kotelly repeatedly described Caldwell as an “insurrectionist.” “You’re entitled to your political views but not to an insurrection,” the judge said. “You were an insurrectionist.” “Insurrection is not,” she said, “and cannot ever be warranted.”)); See also Shawna Chen, Over 1,000 people now face charges in connection to Jan. 6 riots, AXIOS (May 19, 2023), <https://www.axios.com/2023/04/06/jan6-riots-doj-charged>.

<sup>1108</sup> *Id.* at 26–33; U.S. Gov’t Accountability Off., *supra* note 1098, at 21; Griffin Decision at 13; U.S. Gov’t Accountability Off., GAO-22-105001, Capitol Attack: The Capitol Police Need Clearer Emergency Procedures and a Comprehensive Security Risk Assessment Process (Feb. 2022), <https://www.gao.gov/assets/gao-22-105001.pdf>.

<sup>1109</sup> June 2021 Committee Report at 26.

<sup>1110</sup> *Trump v. Thompson*, 20 F.4th 10, 15–16 (D.C. Cir. 2021).

were a bunch of entities coming in” who “were very suspect.”<sup>1111</sup> Included amongst those were individuals like Alex Jones and Ali Alexander who had brazenly entered the Georgia State Capitol Building in November 2020 to demand that the state lawmakers call a special session to investigate alleged instances of electoral fraud and overturn the state’s presidential election results. It was to this assemblage of people that Trump directed his incendiary rhetoric—rhetoric that the District Court in *Thompson* found to plausibly be incitement under *Brandenburg*.

It would seem unreasonable to believe that Trump was not aware of how his call to his own supporters to come to D.C. was being interpreted in the weeks leading up to the January 6 rally. As explained in detail in Section I.C. above, prior to January 6, White House security personnel, Trump, and members of his team had access to considerable information online confirming that Trump’s supporters understood his December 19 tweet as a call for violence. On January 3, senior administration officials within DOJ, DHS, and FEMA, as well as Robert C. O’Brien, Trump’s national security adviser, spoke on the phone to discuss national security concerns around January 6, including the “possibility of protesters targeting federal buildings.”<sup>1112</sup> One would expect that such information was relayed directly to the president. Further, on the morning of January 6, Deputy Chief of Staff and former Secret Service agent Tony Ornato briefed Meadows that individuals in the crowd had “knives, guns in the form of pistols and rifles, bear spray, body armor, spears and flag poles.”<sup>1113</sup> Meadows asked Ornato, “Have you talked to the President?” And Ornato replied, “Yes, Sir. He’s aware.”<sup>1114</sup>

Additionally, witnesses provided information that, on the morning of January 6, prior to his speech, Trump was made aware that individuals in the crowd were armed. Trump nevertheless reportedly said, as Cassidy Hutchinson testified: “I don’t f\*cking care that they have weapons. ... They’re not here to hurt me ... They can march to the Capitol from here.”<sup>1115</sup>

Moreover, in the weeks following the election, Trump’s supporters engaged in widespread intimidation and threats of violence against state and local officials in response to Trump’s calls to “Stop the Steal.”<sup>1116</sup> Reuters identified more than 100 threats of death or violence made to U.S. election workers and officials,<sup>1117</sup> and verified at least 850 threatening and hostile messages related to the 2020 election aimed at election officials and staff across 30 jurisdictions in 16 states; Reuters concluded that “virtually all expressed support for former President Donald Trump or echoed his

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<sup>1111</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Transcribed Interview of Katrina Pierson, (Mar. 25, 2022), at 75:21–76:16.

<sup>1112</sup> Aaron C. Davis, Red Flags: As Trump propelled his supporters to Washington, law enforcement agencies failed to heed mounting warnings about violence on Jan. 6, THE WASHINGTON POST (Oct. 31, 2021), <https://www.washingtonpost.com/politics/interactive/2021/warnings-jan-6-insurrection/>.

<sup>1113</sup> Cassidy Hutchinson, Sworn Testimony Before the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, live testimony presented at sixth Select Comm. hearing (June 28, 2022).

<sup>1114</sup> *Id.*

<sup>1115</sup> *Id.*

<sup>1116</sup> Michael Wines, Here Are the Threats Terrorizing Election Workers, THE NEW YORK TIMES (Dec. 3, 2020), <https://www.nytimes.com/2020/12/03/us/election-officials-threats-trump.html>.

<sup>1117</sup> Linda So & Jason Szep, U.S. election workers get little help from law enforcement as terror threats mount, REUTERS (Sept. 8, 2021), <https://www.reuters.com/investigates/special-report/usa-election-threats-law-enforcement/>.



debunked contention that the election was stolen.”<sup>1118</sup> The U.S. Department of Justice task force formed to investigate these threats found that 58 percent of all potentially criminal threats reviewed were in states where President Trump challenged the election results following the 2020 election.<sup>1119</sup>

Trump’s supporters also descended on election centers in Arizona, Georgia, Michigan, and Pennsylvania, demanding election workers stop counting allegedly fraudulent ballots.<sup>1120</sup> In response to Trump’s allegations about widespread election fraud in Georgia, county-level election officials received death threats.<sup>1121</sup> Election officials in other states also faced death threats.<sup>1122</sup> On December 1, the Georgia Secretary of State’s chief operating officer, Gabriel Sterling (who voted for Trump), warned President Trump that his incendiary rhetoric could mean that “someone’s going to get killed.”<sup>1123</sup> And yet, knowing that the individuals in the crowd on the morning of January 6 were armed and dangerous, as well as his supporters’ history of intimidation and threats of violence in response to his rhetoric, Trump still told them to “fight like hell”<sup>1124</sup> and told them “you’ll never take back our country with weakness. You have to show strength and you have to be strong.”<sup>1125</sup>

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<sup>1118</sup> Peter Eisler et al., Anatomy of a Death Threat, REUTERS (Dec. 30, 2021), <https://graphics.reuters.com/USA-ELECTION/THREATS/mopanwmlkva/index.html>.

<sup>1119</sup> U.S. Dep’t of Just., Office of Public Affairs, Readout of Election Threats Task Force Briefing with Election Officials and Workers (Aug. 1, 2022), <https://www.justice.gov/opa/pr/readout-election-threats-task-force-briefing-election-officials-and-workers>.

<sup>1120</sup> Brianna Whiteny (@BrianaWhitney), TWITTER (Nov. 4, 2020, 11:41 p.m.), [https://twitter.com/BrianaWhitney/status/1324210208948719616?s=20&t=7gk0\\_ts\\_4LTz8mdMaRQBOQ](https://twitter.com/BrianaWhitney/status/1324210208948719616?s=20&t=7gk0_ts_4LTz8mdMaRQBOQ); Annalise Frank, Chaos at TCF Center as crowds of election challengers shout ‘Stop the vote’, CRAIN’S DETROIT BUSINESS (Nov. 4, 2020), <https://www.crainsdetroit.com/elections/chaos-tcf-center-crowds-election-challengers-shout-stop-vote>; Associated Press, Armed men arrested near Philadelphia vote counting location, AP NEWS (Nov. 6, 2020), <https://apnews.com/article/philadelphia-men-guns-arrested-near-vote-d9f8fa1f3d556f3ee014769c543abd0d>.

<sup>1121</sup> Linda So, Trump-inspired death threats are terrorizing election workers, REUTERS (June 11, 2021), <https://www.reuters.com/investigates/special-report/usa-trump-georgia-threats/>.

<sup>1122</sup> See, e.g., Bill Chappell, Michigan Secretary Of State Says Armed Protesters Descended On Her Home Saturday, NPR (Dec. 7, 2020), <https://www.npr.org/sections/biden-transition-updates/2020/12/07/943820889/michigan-secretary-of-state-says-armed-protesters-descended-on-her-home-saturday>; Brahm Resnik, Video: Group Chants ‘We Are Watching You’ outside Arizona Secretary of State Katie Hobbs’ Home, KPNX-TV 12 NEWS (Nov. 18, 2020), <https://www.12news.com/article/news/politics/video-group-chants-we-are-watching-you-outside-arizona-secretary-of-state-katie-hobbs-home/75-a569ae35-3b62-424e-88f8-f03ca8b89458>; Ryan Teague Beckwith, Violent Threats to Election Workers Spiraled After 2020 Election, BLOOMBERG (Aug. 3, 2022), <https://www.bloomberg.com/news/articles/2022-08-03/violent-threats-to-election-workers-spiraled-after-2020-election?leadSource=uverify%20wall>.

<sup>1123</sup> GPB, Gabriel Sterling of Sec of State’s Office Blasts Those Threatening Election Workers, YOUTUBE (Dec. 1, 2020), <https://www.youtube.com/watch?v=jLi-Yo6IucQ>.

<sup>1124</sup> Select Comm. Report at 104; Naylor, *supra* note 500.

<sup>1125</sup> Naylor, *supra* note 500.

**(c) Trump’s Speech Fulfilled Part Three of the Brandenburg Test Because, In Context, His Words Were Likely to Produce Imminent, Lawless Action<sup>1126</sup>**

The known facts indicate that Trump was aware of who his supporters were, and that he was aware of their propensity for violence.<sup>1127</sup> Over a long period preceding January 6, Trump cultivated support from militant groups and individuals, such as the Proud Boys and the Oath Keepers. As early as the 2016 presidential campaign, Trump promised to pay legal fees for supporters willing to “knock the crap” out of protestors at his rallies.<sup>1128</sup> When violence eventually broke out at his rallies he celebrated it, announcing “that’s what we need a little bit more of.”<sup>1129</sup> In 2017, President Donald Trump maintained that there were “very fine people on both sides” of clashes at a white supremacist rally in Charlottesville, Virginia after a white supremacist deliberately drove his car into a crowd of counter-protesters, murdering one counter-protester and injuring 35 other people.<sup>1130</sup> In 2020, Trump expressed support and admiration for armed protestors that entered the Michigan State Capitol while protesting the state’s coronavirus policies. Later that year, when Trump was asked during a Presidential debate whether he would condemn the Proud Boys he told them to “stand back and stand by.”<sup>1131</sup> Online reactions show that the Proud Boys construed Trump’s statement as “marching orders” for potential election-related violence.<sup>1132</sup> A Proud Boys leader testified that the organization’s membership tripled in response to Trump’s “stand back and stand by” statement.<sup>1133</sup>

Immediately following the election, citing his false claims, Trump’s supporters engaged in widespread threats of violence against state legislators and election officials.<sup>1134</sup> Trump and his campaign pushed his supporters to pressure election officials and legislators, including by sharing their personal information on social media.<sup>1135</sup> Trump’s supporters made death threats to state and

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<sup>1126</sup> § 20.15(d) The Brandenburg Test, 5 Treatise on Const. L. § 20.15(d).

<sup>1127</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 26. As Rep. Raskin explained: “On January 6, Trump knew the crowd was angry. He knew the crowd was armed. He sent them to the Capitol anyway.”

<sup>1128</sup> Camila Domonoske, Trump on Rally Violence: ‘Don’t Accept Responsibility,’ Might Pay Legal Bills, NPR (Mar. 13, 2016), <https://www.npr.org/sections/thetwo-way/2016/03/13/470294270/trump-on-rally-violence-dont-accept-responsibility-might-pay-legal-bills>.

<sup>1129</sup> Eric Levitz, Trump on His Supporters Attacking Protesters: ‘That’s What We Need More of’, NEW YORK MAGAZINE (Mar. 11, 2016), <https://nymag.com/intelligencer/2016/03/trump-punching-protesters-is-very-appropriate.html>.

<sup>1130</sup> Donald J. Trump, Remarks at Trump Tower (Aug. 15, 2017), YOUTUBE, <https://www.youtube.com/watch?v=JmaZR8E12bs>; Paul Duggan, James A. Fields Jr. Sentenced to Life in Prison in Charlottesville Car Attack, THE WASHINGTON POST (Dec. 11, 2018), [https://www.washingtonpost.com/local/public-safety/james-a-fields-jr-sentenced-to-life-in-prison-in-charlottesville-car-attack/2018/12/11/8b205a90-fcc8-11e8-ad40-cdfd0e0dd65a\\_story.html](https://www.washingtonpost.com/local/public-safety/james-a-fields-jr-sentenced-to-life-in-prison-in-charlottesville-car-attack/2018/12/11/8b205a90-fcc8-11e8-ad40-cdfd0e0dd65a_story.html).

<sup>1131</sup> Adam Gabbatt, Trump’s Refusal to Condemn White Supremacy Fits Pattern of Extremist Rhetoric, THE GUARDIAN (Sept. 30, 2020, 10:39 p.m.), <https://www.theguardian.com/us-news/2020/sep/30/trump-white-supremacy-extremist-rhetoric>; Ronayne & Kunzelman, *supra* note 516.

<sup>1132</sup> See, e.g., Ben Collins & Brandy Zadrozny, Proud Boys celebrate after Trump’s debate callout, NBC NEWS (last updated Sept. 30, 2020), <https://www.nbcnews.com/tech/tech-news/proud-boys-celebrate-after-trump-s-debate-call-out-n1241512>.

<sup>1133</sup> Jeremy Bertino, Sworn Testimony Before the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, recorded testimony presented at first Select Comm. hearing (June 10, 2022).

<sup>1134</sup> See, e.g., Wines, *supra* note 1116; Eisler et al., *supra* note 1118.

<sup>1135</sup> See, e.g., King, *supra* note 225.

local election officials (including specific officials identified by Trump), surrounded their homes and offices, and threatened their families, sometimes while brandishing weapons.<sup>1136</sup> As Pierson said in a text message obtained by the Select Committee, Trump “likes the crazies,”<sup>1137</sup> referring to people like Alex Jones and Ali Alexander who routinely advocated for violence.

As reviewed in detail in Section I, after Trump’s December 19, 2021 tweet announcing the January 6 rally, there was substantial activity online and on social media indicating that some of Trump’s supporters understood “Trump’s tweet as a call for violence.”<sup>1138</sup> Numerous individuals posted messages on an online forum called thedonald.win.<sup>1139</sup> In a recorded deposition the website’s founder, Jody Williams, testified that Trump’s tweet coalesced all of the activities of Trump’s supporters around January 6.<sup>1140</sup>

Testimony and statements gathered by the Select Committee indicate that several individuals in the White House and within Trump’s inner circle understood the likelihood for violence and lawlessness. According to Hutchinson, Meadows told her a few days before that “things might get real, real bad on January 6.”<sup>1141</sup> Similarly, on January 5, 2021, Steve Bannon demonstrated apparent foreknowledge of what was to come, stating: “All hell is going to break loose tomorrow. It’s all converging and now we’re on, as they say, the point of attack.”<sup>1142</sup> “I’ll tell you this: it’s not going to happen like you think it’s going to happen,” he added. “It’s going to be quite extraordinarily different. And all I can say is strap in.”<sup>1143</sup>

There is evidence that White House, law enforcement, and Defense Department officials were all aware of the threat posed by the individuals that Trump called to Washington, D.C. on January 6. Trump appears to have set the stage, by assembling individuals who would respond violently if called upon by him. A text message obtained by the Select Committee, sent at 2:38 p.m. on January 6 from Ali Alexander to another organizer during the attack, said “[Trump] is not ignorant of what his words would do.”<sup>1144</sup> He called upon the assembled mob to “fight like hell,”<sup>1145</sup> and he called upon the mob to march to the Capitol where the joint session of Congress was then taking place. It seems unreasonable to suggest that violence and lawlessness would not be the likely, and imminent, outcome of his speech within this context.

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<sup>1136</sup> See, e.g., Associated Press, Armed men arrested near Philadelphia vote counting location, AP NEWS (Nov. 6, 2020), <https://apnews.com/article/philadelphia-men-guns-arrested-near-vote-d9f8fa1f3d556f3ee014769c543abd0d>; So, *supra* note 1121.

<sup>1137</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 93.

<sup>1138</sup> Select Comm. Report at 527.

<sup>1139</sup> *Id.*

<sup>1140</sup> Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Deposition of Jody Williams, (June 7, 2022), at 72.

<sup>1141</sup> Sixth Jan. 6 Hearing Transcript, *supra* note 124.

<sup>1142</sup> Ninth Jan. 6 Hearing Transcript, *supra* note 35.

<sup>1143</sup> *Id.*

<sup>1144</sup> Eighth Jan. 6 Hearing Transcript, *supra* note 504.

<sup>1145</sup> Naylor, *supra* note 500.

Speaking about Trump’s plan to go with the crowd to the Capitol Building, a White House security official, whose identity was withheld for his protection, said:

[W]e all knew what that indicated and what that meant, that this was no longer a rally, that this was going to move to something else if he physically walked to the Capitol....**I don’t know if you want to use the word insurrection, coup, whatever. We all knew that this would move from a normal democratic, you know, public event into something else.**<sup>1146</sup> (emphasis added)

The argument that Trump subjectively intended violence is supported by the fact that, during the attack on the Capitol, he sent the 2:24 p.m. tweet about Pence’s refusal to implement the likely illegal scheme pushed by Trump and Eastman: “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!”<sup>1147</sup> As discussed in Section I, Trump was apparently watching cable news in the White House when he sent this tweet and was aware of the violence and that the Capitol had been breached, and therefore should have known that it very likely would produce imminent violence and lawlessness.<sup>1148</sup> Nevertheless, instead of demanding that his supporters leave the Capitol, Trump instead seemed to encourage the perpetrators. According to Hutchinson, Trump was aware that the mob was “literally calling for the vice president to be f’ing hung.”<sup>1149</sup> And Hutchinson said that Meadows said something to the effect of “[Trump] thinks Mike deserves it.”<sup>1150</sup> It even appeared obvious to members of Trump’s team that his 2:24 p.m. tweet was likely to produce further imminent violence and lawlessness, with Deputy Press Secretary Sarah Matthews describing Trump’s tweet as “pouring gasoline on the fire”—a fire that Trump himself in effect helped to organize, a fact that the January 6 Select Committee proved when it compiled a list of hundreds of examples of statements by January 6 criminal defendants who claim they went to the Capitol because Trump called upon them to do so.<sup>1151</sup>

### c. Against the United States

The final element under 18 U.S.C. § 2383 requires a prosecutor to prove that the insurrection was “against the authority of the United States or the laws thereof.”<sup>1152</sup> It is difficult

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<sup>1146</sup> Ninth Jan. 6 Hearing Transcript, *supra* note 35.

<sup>1147</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 2:24 p.m.), <https://www.thetrumparchive.com/>.

<sup>1148</sup> See, e.g., Cong. Defs. Opp. to Pl. Eastman’s Privilege Assertions at 13, *Eastman v. Thompson*, No. 22-cv-99, (C.D. Cal. Mar. 8, 2022) (“The evidence obtained by the Select Committee indicates that President Trump was aware that the violent crowd had breached security and was assaulting the Capitol when Mr. Trump tweeted.”); See also Select Comm. Report at 593.

<sup>1149</sup> Sixth Jan. 6 Hearing Transcript, *supra* note 124.

<sup>1150</sup> *Id.*

<sup>1151</sup> Citizens for Responsibility & Ethics in Washington, “Trump has called all patriots”: 174 Jan. 6th criminal defendants say Trump incited them (July 2023), <https://www.citizensforethics.org/reports-investigations/crew-reports/trump-incited-january-6-defendants/>; See also Select Comm. Report at 135 n.17.

<sup>1152</sup> 18 U.S.C. § 2383.

to conceive of an argument that the attack on the Capitol, the threats faced by members of Congress, the Vice President, and their staffs, and the disruption of the joint session of Congress was not against the authority or laws of the United States. The legislative branch of the United States government was the target of the attack. It was delayed from performing its legal duty under the Constitution and the Electoral Count Act, a federal statute. Moreover, Trump’s intent as demonstrated by his actions in the weeks leading up to January 6, and the intent of the attackers, was to prevent Congress and the Vice President from carrying out their duties under the law. Trump’s own lawyer, John Eastman, admitted that the ultimate goal was for Pence to take action that would violate the law—the Electoral Count Act.<sup>1153</sup> Further, a state judge in New Mexico found that the January 6 attack was an insurrection “against the Constitution of the United States.”<sup>1154</sup>

For Trump, he may well try to argue that his speech on the Ellipse was merely political grandstanding and not “against the authority of the United States or the laws thereof” as required by the statute. For the reasons we articulate in Section II.C.2.b.ii, above, we disagree. Nevertheless, as to the 2:24 p.m. tweet and Trump’s 187 minutes of inaction, that conduct appears indefensible. It is difficult to hypothesize how any party could make a good faith argument that aiding, encouraging, or failing to stop the January 6 attack was not “against the authority of the United States or the laws thereof.”

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<sup>1153</sup> *See, e.g.*, Select Comm. Report at 32; Exhibit N at 2, *Eastman v. Thompson*, No. 22-cv-99, (C.D. Cal. Mar. 2, 2022), ECF No. 160-16.

<sup>1154</sup> Griffin Decision at 29.

### **Box 5: Other Conspiracy Statutes**

The Select Committee also referred Trump for prosecution under two other conspiracy statutes: 18 U.S.C. §§ 372 (conspiracy to impede or injure an officer) and 2384 (seditious conspiracy).

**18 USC § 372:** Conspiracy to impede or injure an officer. This statute, originally passed in 1861, has broad applications. The statute applies generally in circumstances where there is a conspiracy to impede a federal officer from either taking office or executing their duties “by force, intimidation, or threat,” or in circumstances where the conspiracy is to injure an officer “on account of the lawful discharge” of their duties.<sup>1155</sup> The statute has been successfully used recently in prosecutions of some of the militant group members involved on January 6. Although far from a common charge to appear in prosecutions, it is a statute that has been charged from time to time throughout its existence. That makes prosecutions based on this statute—rather than insurrection or seditious conspiracy—much less unusual. Trump’s conduct, as well as that of Eastman and perhaps others, as it pertained to conspiring to impede Pence from executing his duties, merits investigation as to whether it fits sufficiently within the ambit of the statute to support charges under DOJ policy.

**18 USC § 2384:** Seditious Conspiracy. Like the insurrection statute, 18 U.S.C. § 2384 also criminalizes certain acts aimed at disrupting or overthrowing the United States government. Specifically, the statute criminalizes conspiring “to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof.” The statute was created as a mechanism to detain and punish those who support rebellion against the United States, even if their conduct falls short of treason. Since the Select Committee’s referral of Trump for possible violations of this statute, a number of insurrectionists have been convicted for such conduct. Stewart Rhodes, the founder of the Oath Keepers, was convicted and sentenced to 18 years in prison.<sup>1156</sup> Those convictions mean at a minimum that juries have found that the actions of some who stormed the Capitol on January 6 constitute sedition. Consequently, if Trump or others in his inner circle conspired with those rioters or others likewise found guilty of sedition to effectuate that result, that would constitute an important avenue for prosecutors. But that is a big if, and such evidence is not forthcoming at least in the public record. It remains to be seen whether prosecutors have it. There is, however,

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<sup>1155</sup> 18 U.S.C. § 372 (“If two or more persons in any State, Territory, Possession, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined under this title or imprisoned not more than six years, or both.”).

<sup>1156</sup> Carrie Johnson, Stewart Rhodes, Oath Keepers founder, sentenced to 18 years for seditious conspiracy, NPR (May 25, 2023), <https://www.npr.org/2023/05/25/1178116193/stewart-rhodes-oath-keepers-verdict>.

some public evidence that merits DOJ investigation of whether Trump may have conspired with some of the insurrectionists whose conduct on January 6 may amount to sedition. For example, he tweeted, “Big protest in D.C. on January 6th. Be there, will be wild!” In the days leading up to January 6, he tweeted about his rally more than a dozen times. And then on January 6, in his speech at the Ellipse, Trump gave an incendiary speech in which he urged his supporters to march on the Capitol:

We will not let them silence your voices. ... we’re going to walk down to the Capitol, and we’re going to cheer on our brave senators and congressmen and women, and we’re probably not going to be cheering so much for some of them. ... you will have an illegitimate president. That’s what you’ll have. And we can’t let that happen. ... And we fight. We fight like hell. And if you don’t fight like hell, you’re not going to have a country anymore. ... So we’re going to, we’re going to walk down Pennsylvania Avenue. I love Pennsylvania Avenue. And we’re going to the Capitol...

Given the aggressive tone of the speech and repeated calls to “fight,” it is no wonder that Trump’s supporters took Trump literally. Given the track record of successful prosecutions against leaders in the Proud Boys and the Oath Keepers, DOJ may evaluate such charges against Trump as well. Nevertheless, due to the “conspiracy” element of the statute, criminal charges would require more evidence of direct connection or coordination between Trump and the rioters than we are aware of based on the public record; it is entirely possible, however, that DOJ has unearthed more evidence to meet the Department’s high standards for its inclusion in an indictment.

### III. DEFENSES

We have already discussed a number of the principal defenses that Trump and his allies—namely, Meadows, Eastman, Giuliani, and Chesebro—might raise to prosecutions, as well as the denials of wrongdoing they have already articulated. Most prominently, we explained why there is strong evidence of culpable criminal intent. We showed that prosecutors could prove—even though they need not prove—that Trump and his allies acted through independently corrupt means. In this section, we address nine additional possible defenses they can be expected to make, pointing to defenses which may apply specifically to each of the five. We conclude that they are all likely meritless.

#### A. The First Amendment Does Not Protect Speech Integral to Criminal Conduct

We separately discuss the implications of the First Amendment for the potential charge of Inciting an Insurrection in Section II.C.2.b.ii. But the remaining theories of prosecution articulated here as to Conspiracy to Submit Fabricated Electoral Slates, and the Scheme to Obstruct the Counting of Presidential Electors on January 6 do not depend on Trump’s Ellipse speech. Instead, the theories discussed here involve many questions about whether things said by Trump and others were “speech integral to criminal conduct,”<sup>1157</sup> which is never protected by the First Amendment. It is a long-accepted rule that “First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.”<sup>1158</sup> As such, Eastman cannot successfully argue—as he attempted to do so in response to a bar complaint filed against him in California<sup>1159</sup>—that spreading baseless claims of election fraud and filing meritless lawsuits based upon those claims is protected speech under the First Amendment.<sup>1160</sup>

Unprotected speech includes advice on how to commit a crime and speech that amounts to an agreement to commit a crime.<sup>1161</sup> So Trump cannot claim, for instance, that his urging Pence to

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<sup>1157</sup> United States v. Stevens, 559 U.S. 460, 468 (2010) (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)).

<sup>1158</sup> California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972).

<sup>1159</sup> In his capacity as the co-founder and executive chair of the States United Democracy Center and States United Action, Ambassador Eisen has also participated in bar complaints against attorneys who allegedly participated in the attempted overturn of the election, including Eastman and Chesebro, among others. *See, e.g.*, Letter from States United Democracy Center to George S. Cardona, Chief Trial Counsel of the State Bar of California, Re: Request for Investigation of John C. Eastman, Ca. State Bar No. 193726 (Oct. 4, 2021), [statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf](https://statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf); Letter from States United Democracy Center and Lawyers Defending American Democracy to Hamilton P. Fox, III, Disciplinary Counsel for the District of Columbia Court of Appeals, Re: Request for Investigation of John Charles Eastman (Aug. 11, 2022), [https://statesuniteddemocracy.org/wp-content/uploads/2022/08/08.11.22\\_StatesUnited-LDAD\\_Complaint-to-DC-ODC-re-John-Eastman\\_Final.pdf](https://statesuniteddemocracy.org/wp-content/uploads/2022/08/08.11.22_StatesUnited-LDAD_Complaint-to-DC-ODC-re-John-Eastman_Final.pdf).

<sup>1160</sup> Respondent John Charles Eastman’s Answer to Notice of Disciplinary Charges at 19–20, In re John Eastman, No. SBC-23-O-30029, (Feb. 15, 2023) (“Respondent ADMITS that American Citizens have the right to question illegality and fraud in the conduct of their elections, and that his intent in making those statements was to expose such illegality and fraud, as was his constitutional right under the First Amendment. Respondent DENIES that his statements were false or misleading, or that he knew or was grossly negligent in not knowing that they were false or misleading.”).

<sup>1161</sup> Scales v. United States, 367 U.S. 203, 229 (1961).



unilaterally discard votes or to delay the counting of electors are statements by him that are protected by the First Amendment.

## **B. Trump Has No Absolute Immunity for His Conduct as President**

Trump is likely to argue that he is absolutely immune for his conduct in relation to January 6 on the basis of his then-role as President of the United States.<sup>1162</sup> Indeed, he has done so several times in recent cases, and has so far been rebuffed each time.<sup>1163</sup> Such an argument will also be unavailing here.<sup>1164</sup> In support of such a defense, Trump will likely cite the U.S. Supreme Court case, *Nixon v. Fitzgerald*, which held that presidents (including former presidents) are absolutely immune from civil liability for acts committed in the course of performing their official duties.<sup>1165</sup> He can be expected to say that the principle is the same in criminal cases and indeed, even more compelling because criminal penalties can be more severe.

Absolute immunity under *Nixon* for a president while in office does not extend to conduct beyond the “outer perimeter” of the president’s “official responsibility.”<sup>1166</sup> Instead, as the Supreme Court later explained in *Clinton v. Jones*, in the context of civil litigation, the *Nixon* case recognized a “functional” immunity focused on “the nature of the function performed, not the identity of the actor who performed it.”<sup>1167</sup> Thus, “[w]ith respect to acts taken in his ‘public character’—that is, official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts.”<sup>1168</sup>

Trump’s conduct in the many schemes leading up to January 6 or in the insurrection itself does not remotely qualify for any form of immunity. Simply put, the president has no role to play in counting or tabulating ballots—or certifying results—in presidential elections. As Judge Mehta of the District of D.C. found in a related context while denying absolute immunity, “President Trump cites no constitutional provision or federal statute that grants or vests in the President (or the Executive Branch) any power or duty with respect to the Certification of the Electoral College vote.... That is because there is none.”<sup>1169</sup> Although that decision is currently on appeal, we think that proposition is entirely correct and almost certain to be sustained by the U.S. Court of Appeals for the District of Columbia. Indeed, in another lawsuit involving Trump’s conduct in office that

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<sup>1162</sup> Norman L. Eisen & Trevor W. Morrison, Trump Is Telling Us How He’ll Respond to Future Indictments, SLATE (June 7, 2023), <https://slate.com/news-and-politics/2023/06/trump-fulton-county-indictment-new-york-trial.html>.

<sup>1163</sup> Carroll v. Trump, No. 20-CV-7311 (LAK), 2023 WL 4266726, (S.D.N.Y. June 29, 2023); Thompson v. Trump, 590 F. Supp. 3d 46, 82 (D.D.C. 2022); See also Kyle Cheney & Erica Orden, Judge rejects Trump’s ‘presidential immunity’ defense in second E. Jean Carroll case, POLITICO (June 29, 2023), <https://www.politico.com/news/2023/06/29/trump-carroll-defamation-immunity-ruling-00104306>.

<sup>1164</sup> Although updated based on the latest facts and case law, this section has been adapted from some of the authors’ analysis of this potential defense in a separate report. See Eisen et al., *supra* note 30.

<sup>1165</sup> *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

<sup>1166</sup> *Id.* at 756.

<sup>1167</sup> 520 U.S. 681, 694–95 (1997).

<sup>1168</sup> *Id.* at 696.

<sup>1169</sup> Thompson v. Trump, 590 F. Supp. 3d 46, 77 (D.D.C. 2022).

denied Trump’s assertion of absolute immunity, Judge Kaplan of the Southern District of New York recently cited Judge Mehta’s opinion with approval.<sup>1170</sup>

Instead, the Constitution assigns primary responsibility in this field to the states: Article II provides that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors” who will vote on the president.<sup>1171</sup> State legislative processes, rather than any presidential function, are thus central to the presidential election process. In its limited provisions empowering the federal government to play a role in such elections, the Constitution entrusts only Congress, not the president, with the power to count electoral ballots under the Twelfth Amendment. Similarly, the main federal statute in this field—the Electoral Count Act—does not contemplate any role for the president in counting or tabulating ballots or certifying results.<sup>1172</sup> Every relevant constitutional and statutory provision cuts against the notion that a president has any official duty that could conceivably have been implicated by schemes to overturn the lawful results of an election or to disrupt the certification of results by force.

Because neither the Constitution nor applicable federal statutes vest the president with any official responsibility here, Trump’s actions took him far beyond the outer perimeter of his office (and past the scope of authorized official acts). There are good, self-evident reasons why our legal system does not give the sitting president a role in counting, tabulating, or certifying the election for his successor—an election in which he may be a candidate. Any claim that Trump’s apparent involvement in the creation of false electoral slates claiming victory in states he lost, in a campaign to pressure Pence to unilaterally override the will of the voters, or in directing a group of armed and violent rioters to the Capitol to disrupt the certification of the election results was in furtherance of official federal business, rather than in pursuit of personal political gain, will not stand. Such a claim offends the Constitution’s structural safeguards against electoral self-dealing, as well as its prohibitions against making any single person or official the judge of their own case.

To be sure, Trump may assert, per the Take Care Clause of the Constitution, that his power to “take Care that the Laws be faithfully executed” required him (as the nation’s chief law enforcement officer) to ensure the integrity of the presidential election. But that argument would fail. First, it conflicts with the design of the Constitution, which plainly and prudently denies the president a role in the counting, tabulation, and certification processes that Trump targeted. Second, it reflects a blatant misapplication of the statutes and constitutional provisions that the president is charged with enforcing, none of which supports interventions of the kind that Trump undertook: there is no basis for concluding that Trump acted in official furtherance of federal election laws (including voter fraud statutes) when he helped promote false electors, pressured Pence to override the will of the voters, or told armed and violent rioters to “fight” on January 6. Third, it misses the fact that Trump was acting not only as the president, but also as a candidate for the very office on which he fixated. Fourth, it ignores the reported facts surrounding his attempts to retain power despite having lost the election, all of which powerfully establish a decidedly personal, unofficial motivation for his interference. Fifth, it fails to account for the

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<sup>1170</sup> Carroll v. Trump, No. 1:20-cv-07311-LAK, 2023 WL 4266726, at \*10 (S.D.N.Y. June 29, 2023).

<sup>1171</sup> U.S. Const. art. II, § 1, cl. 2.

<sup>1172</sup> Electoral Count Act of 1887, 24 Stat. 373, 3 U.S.C. §§ 5–6, 15.

complete absence of historical or precedential support for the notion that any of the schemes described in this report fall within the office of the president. Finally, it misdescribes the Take Care Clause: because “the President’s Take Care Clause duty [] does not extend to government officials over whom he has no power or control,” there is no legal authority “that would support [the] assertion that merely exhorting non-Executive Branch officials to act in a certain way is a responsibility within the scope of the Take Care Clause.”<sup>1173</sup>

At bottom, Trump was not acting within the scope of his official duties when he engaged his efforts to overturn the results of an election that he knew he lost.

### **C. Prosecuting Trump Would Not Violate the Constitutional Prerogatives of the Presidency**

In 1995, the Office of Legal Counsel (OLC) —a DOJ arm that advises the president and executive branch agencies—issued an opinion articulating the “clear statement” rule, aimed at protecting the president’s authority and prerogatives. The OLC’s rule provides that “statutes that do not expressly apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President’s constitutional prerogatives.”<sup>1174</sup> Courts need not follow the clear statement rule—but the DOJ must, until it is withdrawn or overturned.

But there is no reason to believe the clear statement rule, even if it was correct when issued, would prevent DOJ from investigating and seeking an indictment against Trump—much less against his collaborators who do not benefit from any special Article II considerations.

In 2019, Special Counsel Robert Mueller found that the clear statement rule would not stop prosecutors from applying federal obstruction statutes—including, specifically, § 1512(c)(2)—to the president. Mueller started by observing that the 1995 OLC opinion explicitly approved the application to the president of a criminal statute that “raises no separation of powers questions were it to be applied to the President,” like the prohibition against bribery.<sup>1175</sup> From there, Mueller reasoned that Congress could and did prohibit the president from engaging in similar acts of corruption and obstruction: “Congress can permissibly criminalize certain obstructive conduct by the President, such as suborning perjury, intimidating witnesses, or fabricating evidence, because those prohibitions raise no separation-of-powers questions.... The Constitution does not authorize the President to engage in such conduct, and those actions would transgress the President’s duty to ‘take Care that the Laws be faithfully executed.’”<sup>1176</sup>

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<sup>1173</sup> Thompson, 590 F. Supp. 3d at 78 (“Here, the Vice President, acting as President of the Senate, and members of Congress had constitutionally and statutorily prescribed duties to carry out the Certification. Their actions are those of a co-equal branch, not subject to Executive Branch control. President Trump’s advocacy of the scope of their duties and how they should be performed therefore falls outside even the expansive Take Care Clause.”).

<sup>1174</sup> Office of Legal Counsel, U.S. Dep’t of Just., Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges at 351 (Dec. 18, 1995), <https://www.justice.gov/file/20126/download>.

<sup>1175</sup> Robert S. Mueller, III, Report on the Investigation Into Russian Interference in the 2016 Presidential Election at 170 (Mar. 2019), <https://www.justice.gov/archives/sco/file/1373816/download>.

<sup>1176</sup> *Id.*

The clear statement rule, Mueller understood, was aimed at protecting the presidency’s constitutional prerogatives. Trump’s campaign to coerce Pence to throw out electoral slates<sup>1177</sup> went far beyond those prerogatives. In fact, the campaign interfered with prerogatives reserved to the vice president and to Congress under the Twelfth Amendment. A knowing and intentional campaign to reverse a democratic election is simply not arguably within the president’s powers—especially where the campaign was specifically aimed at infringing on powers specifically withheld from the president and entrusted by the Constitution to other officers and branches of government.

#### **D. Trump’s Acquittal in His Second Impeachment Trial Is No Defense**

In *Thompson v. Trump*, a civil suit brought by U.S. representatives and Capitol police officers, Trump claimed that he could not be held civilly liable for his role in the January 6 insurrection since the Senate had already declined to convict him for that same behavior. But U.S. District Judge Amit Mehta correctly rejected that claim, and it is even less likely to apply in a criminal prosecution.

Trump’s argument invoked two separate but related legal doctrines—*res judicata* and *collateral estoppel*, also known as claim preclusion and issue preclusion. Both are designed to promote finality and prevent repeated litigation of the same issues by the same parties. As Judge Mehta explained, under the *res judicata* doctrine, “a subsequent lawsuit will be barred if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction.”<sup>1178</sup> *Collateral estoppel*, meanwhile, “bars successive litigation of an issue of fact or law when “(1) the issue is actually litigated; (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; and (4) under circumstances where the determination was essential to the judgment, and not merely dictum.”<sup>1179</sup>

Neither doctrine applied in *Thompson v. Trump*, and neither would apply here. First: As noted, the doctrines only apply in subsequent litigation “between the same parties or their privies.” Judge Mehta found in *Thompson* that even individual House members, suing in their private capacity, were not the “same party” as the full House as a prosecuting body. Nor were those individual representatives “in privity” with—that is, sharing the same interests with—the full House.<sup>1180</sup> It is harder still to imagine that the DOJ—which represents the executive branch in prosecuting crimes—is in privity with the legislative branch. Second: The Constitution explicitly

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<sup>1177</sup> Michael S. Schmidt, Trump Says Pence Can Overturn His Loss in Congress. That’s Not How It Works, THE NEW YORK TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election.html>.

<sup>1178</sup> *Thompson v. Trump*, No. 21-CV-00400 (APM), 2022 WL 503384, at 22 (D.D.C. Feb. 18, 2022) (quoting *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006)).

<sup>1179</sup> *Id.* at 22–23 (quoting *Capitol Servs. Mgmt., Inc. v. Vesta Corp.*, 933 F.3d 784, 794 (D.C. Cir. 2019)).

<sup>1180</sup> *See Primax Recoveries, Inc. v. Lee*, 260 F. Supp. 2d 43, 52 (D.D.C. 2003) (“A party is considered to be ‘in privity’ with another where he is ‘so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved.’”).

provides that an impeached president can also be criminally tried.<sup>1181</sup> So, as Judge Mehta noted, “it would be an odd result to then say that the acquitted individual could use the non-conviction by the Senate to have preclusive effect, which would thwart any second proceeding.”<sup>1182</sup> Third: As Judge Mehta observes, “applying preclusion principles here would require the court to assess the adequacy of the Senate proceedings, an inquiry that is nonjusticiable.”<sup>1183</sup> And fourth: “[I]t is impossible to discern whether there was a ‘final, valid judgment on the merits’ for purposes of res judicata, and what issues of fact or law the Senate deemed ‘necessary to its judgment’ for purposes of collateral estoppel.”<sup>1184</sup>

### **E. A “Good Faith” Defense Cannot Save Trump or His High-Level Co-Conspirators**

A “good faith” defense to a prosecution of Making a False Statement (or to conspiracy to commit such an offense) is the flipside of the criminal intent requirement. As explained above, the Government will be required to prove that any potential defendant prosecuted for such an offense had knowledge that their conduct was generally unlawful—in other words, that the false statement was not made in good faith. A good faith defense here would assert the opposite, that the statement was in fact made in good faith. The prosecution would be required to disprove a defendant’s asserted good faith beyond a reasonable doubt.<sup>1185</sup>

Trump and his allies, as discussed in Section I.A.4, have denied wrongdoing here, and some have attempted to articulate defenses in this vein before the public. Chesebro’s lawyer, for example, has asserted that Chesebro simply intended to provide the Trump campaign with avenues for “keeping its options open” as a “contingency” plan should the courts find fraud.<sup>1186</sup> Others, including Meadows, Giuliani, and Eastman, have argued in various forums that they genuinely

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<sup>1181</sup> U.S. Const. art. I, § 3, cl. 7 (“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”); *Nixon v. United States*, 506 U.S. 224, 234 (1993) (“[T]he Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses—the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings.”).

<sup>1182</sup> *Thompson v. Trump*, No. 21-CV-00400 (APM), 2022 WL 503384, at 23 (D.D.C. Feb. 18, 2022).

<sup>1183</sup> *Id.* at 24.

<sup>1184</sup> *Id.* In fact, the record suggests that at least one influential senator may have acquitted Trump at his impeachment trial for the events of January 6, despite Trump’s apparent guilt, precisely because of the availability of later prosecution. See Alex Rogers & Manu Raju, *McConnell Blames Trump but Voted Not Guilty Anyway*, CNN (Feb. 13, 2021), <https://www.cnn.com/2021/02/13/politics/mitch-mcconnell-acquit-trump/index.html> (statement of Senate Minority Leader Mitch McConnell) (arguing that “impeachment was never meant to be the final forum for American justice” and declaring: “We have a criminal justice system in this country. We have civil litigation. And former Presidents are not immune from being held accountable by either one.”).

<sup>1185</sup> See *United States v. Bowser*, 318 F. Supp. 3d 154, 176 (D.D.C. 2018), *aff’d*, 964 F.3d 26 (D.C. Cir. 2020).

<sup>1186</sup> Charlie Savage, *Lawyer Group Asks Court to Punish an Author of Trump Electors Scheme*, THE NEW YORK TIMES (last updated Oct. 18, 2022), <https://www.nytimes.com/2022/10/12/us/politics/kenneth-chesebro-trump-fake-electors.html>.

believed in the validity of allegations that there had been fraud in the 2020 election.<sup>1187</sup> Meadows has additionally written that “[c]ontrary to what the media reported, we never asked for an automatic victory for President Trump. All we wanted was time—time to sort through the ballots, root out the illegal ones, and count every single one of the valid ones.”<sup>1188</sup> We expect that each may well endeavor to articulate similar good faith defenses before jurors in the event of prosecution, and we turn now to address why all such defenses are likely to fail.

***It is factually and legally unsustainable that Trump or any of his high-level allies assisting in his scheme acted in good faith.*** As explained above, they all knew that Trump had lost the election in each of the states that submitted phony electoral certificates—and they knew the express purpose of submitting those electoral certificates was to overturn a lawful election. Indeed, the central plotters (including Chesebro<sup>1189</sup> and Eastman<sup>1190</sup>) expressly acknowledged that the scheme was unlawful. And although internal memos claimed good faith based on an asserted “precedent” in Hawaii in 1960, they also privately may have acknowledged that the so-called “precedent” was inapplicable to the 2020 election.<sup>1191</sup> The evidence accordingly indicates they knew their conduct was unlawful and that this defense cannot be sustained. As the New York court’s order temporarily suspending Giuliani’s New York law license, the D.C. bar committee’s report recommending Giuliani’s disbarment, and the other sanctions of Trump-associated

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<sup>1187</sup> Hugo Lowell, Rudy Giuliani stonewalls Capitol attack investigators during lengthy deposition, *THE GUARDIAN* (May 24, 2022), <https://www.theguardian.com/us-news/2022/may/24/rudy-giuliani-capitol-attack-committee-testimony>; Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Deposition of Rudolph Giuliani, (May 20, 2022); Mark Meadows, *THE CHIEF’S CHIEF* 224, 240 (2021); Respondent John Charles Eastman’s Answer to Notice of Disciplinary Charges at 15, In re: John Eastman, No. SBC-23-O-30029, (Feb. 15, 2023) (“Respondent DENIES that he sought to ‘overturn the legitimate results of the election’ because whether the election results were ‘legitimate’ was and remains hotly contested, based as they were on acknowledged illegality and serious allegations of fraud in the conduct of the election. Respondent DENIES that his legal analysis and factual allegations were not supported by the facts or the law, and even if they were not, DENIES that he made such analysis and factual assertions knowing them to be false or grossly negligent in not knowing them to be false.”).

<sup>1188</sup> Mark Meadows, *THE CHIEF’S CHIEF* 242 (2021).

<sup>1189</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Joshua Findlay Production), JF044 (December 9, 2020, memo from Kenneth Chesebro titled “Statutory Requirements for December 14 Electoral Votes”) (acknowledging the voting in the states would be “somewhat dicey in Georgia and Pennsylvania” and “very problematic in Nevada”).

<sup>1190</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Chapman University Production), Chapman053476 (Word Document, “PRIVILEGED AND CONFIDENTIAL January 6 Scenario,” attached in Dec. 23, 2020, John Eastman email to Boris Epshteyn and Ken Chesebro) (tacitly acknowledging that the scheme would violate the Electoral Count Act of 1887, albeit calling the law “unconstitutional”).

<sup>1191</sup> Pro-Kennedy electors did submit an electoral certificate in 1960 following an initial count of voters that favored Nixon, which contained nearly identical language to those of five States that submitted phony electoral certificates in 2020 false proclaiming to be the “duly elected and qualified Electors” of their respective States. Kyle Cheney, See the 1960 Electoral College certificates that the false Trump electors say justify their gambit, *POLITICO* (Feb. 7, 2020), <https://www.politico.com/news/2022/02/07/1960-electoral-college-certificates-false-trump-electors-00006186>. Nevertheless, at that time, the initial count had Nixon winning by only 140 votes, and a recount was underway on December 19, 1960 (the date by which electoral certificates were required to be completed). *Id.* Chesebro acknowledged in an email, copying Giuliani, that 2020 was different because “in the Hawaii 1960 incident, when the Kennedy electors voted[,] there was a pending recount.” Haberman & Broadwater, *supra* note 328.

attorneys show, the allegations of fraud and lawsuits to keep the illusion of a contested election alive were frivolous and there “was not even a ‘faint hope of success on the legal merits.’”<sup>1192</sup>

***Many of the phony electors and some of the lower-level coordinators of the scheme, however, can more plausibly raise a good faith defense.*** As several people told the Select Committee in interviews and depositions, it was communicated to the phony electors and the organizers on the ground that the reason for compiling the false electoral certificates was to avoid mooting the ongoing legal battles over alleged election fraud.<sup>1193</sup> Those that coordinated the compilation of the certificates, and those that signed onto the certificates, who genuinely (albeit incorrectly) believed that the phony certificates were some kind of legal formality in the event the ongoing litigation resolved in Trump’s favor, were acting in good faith. As the director of Trump’s Election Day Operations in Georgia told the Select Committee, “[W]e were just, you know, kind of useful idiots or rubes at that point.”<sup>1194</sup>

Nevertheless, it seems at least some of the phony electors and lower-level coordinators of the scheme did know the plan was generally unlawful, such that they may not be successful in raising a good faith defense. For example, Wisconsin Republican Party Chairman Andrew Hitt signed his State’s phony electoral certificate despite texting a colleague two days prior, that “[t]hese guys are up to no good and its [sic] gonna fail miserably.”<sup>1195</sup> Indeed, the illegality was so clear that fourteen of the original electors from the seven States decided not to participate—

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<sup>1192</sup> Report and Recommendation of Ad Hoc Hearing Committee at 22, In re Giuliani, D.C. App. No. 2020-D253, (July 7, 2023) (quoting In re Spikes, 881 A.2d 1118, 1125 (D.C. 2005)); See also In re Giuliani, No. 2021-00506, slip op. at 22 (N.Y. App. Div. May 3, 2021) (per curium); And see, e.g., Opinion and Order, King v. Whitmer et al., No. 20-13134, (E.D. Mich. Aug. 25, 2021); Alison Durkee, Here Are All The Places Sidney Powell, Lin Wood And Pro-Trump Attorneys Could Also Be Punished For ‘Kraken’ Lawsuits After Michigan Sanctions Ruling, FORBES (Aug. 26, 2021, 3:09 PM), <https://www.forbes.com/sites/alisondurkee/2021/08/26/here-are-all-the-places-sidney-powell-lin-wood-and-pro-trump-attorneys-could-also-be-punished-for-kraken-lawsuits-after-michigan-sanctions-ruling/?sh=405b991be1aa>.

<sup>1193</sup> E.g., Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Transcribed Interview of Josh Findlay, (May 25, 2022), at 34:11–18 (“Q Okay. And are you aware of how the process was described to the electors 12 at this time? A So I’m not aware of what each individual RPD said, but the general message that went out around this whole process was what I described earlier that, you know, the attorney general of Texas has filed this lawsuit. Because of that, there is like an air of legitimacy to it. It’s before the Supreme Court. These States are in controversy. There’s some precedent for this. We need to be prepared if something happens with the court ruling.”); Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Transcribed Interview of Robert Sinners, (June 15, 2022), at 10:18–19 (“And the attorneys at the time said that part of -- the court challenge would effectively be mooted unless these electors were put in place to do so.”); Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Deposition of Kelly Ruh, (Feb. 28, 2022), at 13:22–25 (“That was a text message, I believe, that I had received that was putting me on notice that I may still need to attend the meeting on December 14th in the event that Donald Trump would be declared the winner of Wisconsin after going through various court processes.”); Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, Deposition of Shawn Still, (Feb. 25, 2022), at 20:13–16 (“It was explained to me like this. It’s like, when you have the Super Bowl, you print T-shirts, both teams as being the winner, and you keep the T-shirts for the ones that were the winner, and you throw away the ones that weren’t, but you still have to have two sets of T-shirts for both sets of winners.”).

<sup>1194</sup> Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Transcribed Interview of Robert Sinners, (June 15, 2022), at 37:11–12.

<sup>1195</sup> Documents on file with the Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol (Andrew Hitt Production), Hitt000083 (December 12, 2020, text messages between Andrew Hitt and Mark Jefferson).

with some expressing discomfort with the scheme.<sup>1196</sup> Given the reservations some of the original pool of Trump electors held, it is entirely possible a jury would not be quick to accept any assertions of good faith. Notwithstanding those considerations, the Special Counsel appears to have acknowledged somewhat lesser culpability for the false electors, as he has reportedly granted immunity to some in exchange for their grand jury testimony—presumably to gain further evidence against those at the top that planned and orchestrated the scheme.<sup>1197</sup>

#### **F. Advice of Counsel is No Defense**

Trump could not plausibly argue that he lacked the requisite dishonest or corrupt state of mind merely because he acted on advice of counsel, relying on guidance from Giuliani, Eastman, or Chesebro.

First: To the extent that a defendant claiming advice of counsel must show that the advisor was actually his lawyer, Trump may fail. It is true that Judge Carter, in *Eastman v. Thompson*, found Eastman was functioning as Trump’s lawyer. But that proceeding also showed that Eastman could not produce a signed retainer agreement, and further investigation may undercut any claim that Eastman was Trump’s lawyer.

Second: Trump embraced a false narrative about fraud and proved willing to use the power of the federal government to partisan ends, before either Eastman or Chesebro came on the scene. So the notion that he was merely following counsel’s advice is factually unpersuasive. He had malign intent long before they appeared.

Third, and relatedly: The advice of counsel defense is not available when the purported lawyer is a co-conspirator. Thus, in *U.S. v. Carr*, the Fifth Circuit held that a defendant could not avail himself of an advice of counsel defense where the attorney in question had been “integrally involved in the sham operation.”<sup>1198</sup>

Fourth, and finally: The defense only works if it is reasonable for the defendant to rely on counsel, and that also means a defendant cannot have shopped around until finding a lawyer to say otherwise (like private attorney Eastman) when his other attorneys (here, including White House lawyers) have advised that the law clearly does permit his actions.<sup>1199</sup>

Here, for all the reasons shown above, reliance was unreasonable. Even Eastman himself, for instance, told Trump directly that the scheme violated the law.<sup>1200</sup>

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<sup>1196</sup> Select Comm. Report at 352 nn.88–95.

<sup>1197</sup> Polantz et al., *supra* note 386.

<sup>1198</sup> 740 F.2d 339 (5th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

<sup>1199</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 68; Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Transcribed Interview of Eric Herschmann, (Apr. 6, 2022), at 194:15–18.

<sup>1200</sup> Exhibit M at 2, *Eastman v. Thompson*, No. 22-cv-99, (C.D. Cal. Mar. 2, 2022), ECF No. 160-15.



## G. Lawyering Activities Are Not Shielded From Prosecution

Neither Giuliani, Eastman, nor Chesebro could hide behind claims that their activity is protected as zealous advocacy for clients. That does not mean they will not try. For example, as discussed in Section I.A.4.b, Chesebro has already claimed that his role in designing the false electors scheme in a series of memos “is what lawyers do,” adding that “is the duty of any attorney to leave no stone unturned in examining the legal options that exist in a particular situation.”<sup>1201</sup> But it simply is not true that all legal advocacy is beyond the reach of § 371 or § 1512(c).<sup>1202</sup>

In *United States v. Lonich*, discussed at length above, the Ninth Circuit held that a lawyer purporting to advise his client is not categorically protected from prosecution under § 1512(c). There, the defendant, a lawyer, counseled his purported client “to give grand jury testimony that was either outright false, seriously misleading, or both.” Under the circumstances, the court held, the defendant had gone beyond any “latitude” that an attorney might have helping clients frame public statements “consistent with the truth.”<sup>1203</sup>

And in *United States v. Cueto*, the Seventh Circuit upheld the § 371 conviction of a lawyer whose advocacy crossed the line. Amiel Cueto engaged in unethical and frivolous litigation tactics to protect his client and business partner, who was at the center of an illegal gambling operation.<sup>1204</sup> When he was convicted of violating § 371, Cueto claimed that he could not be punished under § 371 for his advocacy activities. The Seventh Circuit did not agree, because Cueto went far beyond lawyering: “[T]he record clearly demonstrates that his conduct, which necessarily includes his corrupt endeavors, was not typical conduct of a lawyer and that it certainly was not lawful lawyering conduct.... Although his actions initially may have stemmed from routine, even vigorous, advocacy, at some point his conduct exceeded the scope of lawful lawyering conduct.

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<sup>1201</sup> Kovensky, *supra* note 327.

<sup>1202</sup> Of course, Clark and Eastman were not the only lawyers who apparently counseled and collaborated in Trump’s efforts to overturn the election. Rudy Giuliani, Cleta Mitchell, Sidney Powell, Lin Wood, and others may be implicated in Trump’s schemes—and, at a bare minimum, may have violated rules of legal ethics and professional responsibility. Some are facing disciplinary action as a result. *See, e.g.*, Cameron Jenkins, Texas State Bar Refers Sidney Powell to Judge for Discipline over Efforts to Overturn Election, *THE HILL* (Mar. 9, 2022, 3:34 p.m.), [thehill.com/homenews/state-watch/597565-texas-state-bar-refers-sidney-powell-to-judge-for-discipline-over/](https://thehill.com/homenews/state-watch/597565-texas-state-bar-refers-sidney-powell-to-judge-for-discipline-over/); Alison Durkee, Here Are All The Places Sidney Powell, Lin Wood And Pro-Trump Attorneys Could Also Be Punished For ‘Kraken’ Lawsuits After Michigan Sanctions Ruling, *FORBES* (Aug. 26, 2021, 3:09 p.m.), <https://www.forbes.com/sites/alisondurkee/2021/08/26/here-are-all-the-places-sidney-powell-lin-wood-and-pro-trump-attorneys-could-also-be-punished-for-kraken-lawsuits-after-michigan-sanctions-ruling/?sh=405b991be1aa>. Any far-reaching DOJ investigation into efforts to overturn the election should follow the law and the facts wherever they lead—including to members of the bar.

<sup>1203</sup> 23 F.4th 881, 907 (9th Cir. 2022).

<sup>1204</sup> The indictment alleged, *inter alia*, that Cueto “conspired to influence and hinder the function of the grand jury by filing false motions, which attacked the operations of the FBI and the Office of the United States Attorney, in an attempt to delay and disrupt the investigation and to discharge the grand jury. Finally, the third aspect of the conspiracy focused on Cueto’s attempts to obstruct the proceedings in federal district court by persuading Venezia’s (and his co-defendants’) defense counsel to file various motions, including a motion to disqualify the district court judge assigned to hear the racketeering case.” *United States v. Cueto*, 151 F.3d 620, 628 (7th Cir. 1998).

‘[A]cts which are themselves legal lose their legal character when they become constituent elements of an unlawful scheme.’”<sup>1205</sup>

The *Cueto* decision did not deny that prosecution of attorneys for conduct that involves advocacy has the potential to chill the right to counsel—but the Seventh Circuit identified a counterbalancing concern for the impartial and fair administration of justice: “If lawyers are not punished for their criminal conduct and corrupt endeavors to manipulate the administration of justice, the result would be the same: the weakening of an ethical adversarial system and the undermining of just administration of the law.”<sup>1206</sup> So the court refused to decree immunity for lawyers who conspire to obstruct government functions by deceit or dishonesty: “Although we appreciate that it is of significant importance to avoid chilling vigorous advocacy and to maintain the balance of effective representation, we also recognize that a lawyer’s misconduct and criminal acts are not absolutely immune from prosecution.”<sup>1207</sup> It is of course the “dishonest means” requirement that protects lawyers against prosecution for innocuous conduct. Lawyers often act with specific intent to impede, and ideally to entirely defeat, government functions—for instance, the prosecution of their clients. But the use of dishonest means distinguishes that (ethical) advocacy from illegal conspiracy.<sup>1208</sup>

A critical point, from the Seventh Circuit’s perspective, was that *Cueto* plainly violated a host of professional responsibility rules and ethical canons, including against filing frivolous motions and against an attorney pursuing his own financial interests over his client’s goals. Those violations—even if not independently illegal—went to the “dishonesty” of his means.<sup>1209</sup> Other

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<sup>1205</sup> *Cueto*, 151 F.3d at 636 (quoting *United States v. Bucey*, 876 F.2d 1297, 1312 (7th Cir.1989)). And see *United States v. Cintolo*, 818 F.2d 980, 993 (1st Cir. 1987) (“Nothing in the caselaw, fairly read, suggests that lawyers should be plucked gently from the madding crowd and sheltered from the rigors of 18 U.S.C. § 1503 in the manner urged by appellant and by the amici.”).

The defendant in *Cintolo*, an attorney, was convicted on one count of conspiracy to obstruct justice under the offense prong of § 371. He had, among other things, “represented a witness in a grand jury investigation of racketeering while he acted at the direction of the criminal organization leader, who used Cintolo to ensure that the witnesses did not testify. Cintolo counseled his ‘client’ to assert the Fifth Amendment and, when granted immunity, to refuse to testify and to suffer a contempt charge.” Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 686–87 (2005). On appeal, Cintolo argued that the conviction could not stand because his legal advice was not independently illegal, which the First Circuit held was beside the point: His “innocent acts” were alchemically converted “to guilty ones by the addition of improper intent.” *Cintolo*, 818 F.2d at 993. “Notwithstanding that the means used by the appellant might be regarded as lawful, if viewed in a vacuum, clear proof of improper motive could surely serve to criminalize that conduct.” *Id.*

<sup>1206</sup> *Cueto*, 151 F.3d at 632.

<sup>1207</sup> *Id.*

<sup>1208</sup> Criminal intent is also what separates zealous advocacy from criminal obstruction in the related context of 18 U.S.C. § 1512(c), which similarly prohibits obstructing official proceedings. See Hemel & Posner, *supra* note 872, at 1285 n.35 (“The criminal defense lawyer who moves to quash a subpoena thereby impedes an investigation, but that does not mean that he should go to jail. What separates the wheat from the chaff in obstruction cases is the mens rea requirement: to be guilty of obstruction, a defendant must act with a corrupt purpose.”).

<sup>1209</sup> *United States v. Cueto*, 151 F.3d 620, 636 (7th Cir. 1998) (“Indeed, it is evident that many of his actions were prohibited by the rules of professional responsibility and the canons of legal ethics...Although those violations do not necessarily constitute criminal violations of the law, they are further evidence of an intent to participate in the conspiracy.”).

courts have agreed. Thus, in *Cintolo*, the Court thought it relevant that the convicted lawyer plainly violated his professional responsibility of loyalty to his client, a grand jury witness.<sup>1210</sup>

Here, as noted, Eastman advocated for legal theories that he apparently knew could not stand up in court. And courts might also find it relevant—like the lawyers in *Cueto* and *Cintolo*—that Eastman is currently at risk of disbarment for professional ethical violations.<sup>1211</sup> Giuliani has been suspended from practicing law in New York State following a devastating court opinion, and a D.C. bar disciplinary committee recently recommended that he be permanently disbarred on account of his “frivolous claims.”<sup>1212</sup> Chesebro is the subject of a disciplinary complaint in New York as well.<sup>1213</sup>

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<sup>1210</sup> As one commentator put it: “On the facts presented by the government, Cintolo’s conduct was clearly professionally blameworthy, because he was acting for the benefit of another client who feared the witness’s testimony and contrary to the interests of the witness himself.” Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327, 371-72 (1998).

In a related context, the Sixth Circuit has held that professional norms and duties are relevant to an attorney’s culpability for obstructive conduct. In *United States v. Wuliger*, the defendant, a divorce lawyer, was convicted of violating wiretapping law for using illegally-obtained tapes as the basis for his depositions. He claimed, though, that he’d gotten the tapes from his client, and that as his client’s agent and advocate he was entitled to believe his client’s assertion that the tapes were legally obtained. The Sixth Circuit held that, while he was not immunized by his advocacy, the attorney was entitled to have the jury take into account the nature and scope of his professional duties in determining whether he had the requisite guilty knowledge. 981 F.2d 1497 (6th Cir. 1992).

<sup>1211</sup> Press Release, State Bar of California, State Bar Announces John Eastman Ethics Investigation (Mar. 1, 2022), <https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-announces-john-eastman-ethics-investigation>.

Norman Eisen, one of the authors of this report, is one of the authors of the disciplinary complaint against Eastman. *See infra* note 1213; *See also* Tom Hamburger & Jacqueline Alemany, Group Files Complaint with California Bar Association Against John Eastman, Lawyer Who Advised Trump on Election Challenges, *THE WASHINGTON POST* (Oct. 4, 2021, 6:07 PM), [https://www.washingtonpost.com/politics/eastman-trump-bar-complaint/2021/10/04/26dc7d50-2535-11ec-8831-a31e7b3de188\\_story.html](https://www.washingtonpost.com/politics/eastman-trump-bar-complaint/2021/10/04/26dc7d50-2535-11ec-8831-a31e7b3de188_story.html). Disciplinary proceedings began against Eastman on June 20 this year in Los Angeles. Summer Concepcion, John Eastman faces disbarment proceedings in California over effort to reverse 2020 election, *NBC NEWS* (June 20, 2023), <https://www.nbcnews.com/politics/politics-news/john-eastman-faces-disbarment-proceedings-california-effort-reverse-20-rca90127>.

<sup>1212</sup> Letter from James T. Phalen to Rudolph W. Giuliani at 37 (July 7, 2023), <https://s3.documentcloud.org/documents/23868906/2023-07-07-issuance-letter-and-hearing-committee-report-giuliani.pdf>.

<sup>1213</sup> David Thomas, Lawyer group says Trump attorney broke ethics rules in fake elector plan, *Reuters* (Oct. 12, 2022), <https://www.reuters.com/legal/legalindustry/lawyer-group-says-trump-attorney-broke-ethics-rules-fake-electoral-plan-2022-10-12/>.

In his capacity as the co-founder and executive chair of the States United Democracy Center and States United Action, Ambassador Eisen has also participated in bar complaints against attorneys who allegedly participated in the attempted overturn of the election, including Eastman and Chesebro, among others. *See, e.g., supra* note 1211; Letter from States United Democracy Center to George S. Cardona, Chief Trial Counsel of the State Bar of California, Re: Request for Investigation of John C. Eastman, Ca. State Bar No. 193726 (Oct. 4, 2021), [statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf](https://statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf); Letter from States United Democracy Center and Lawyers Defending American Democracy to Hamilton P. Fox, III, Disciplinary Counsel for the District of Columbia Court of Appeals, Re: Request for Investigation of John Charles Eastman (Aug. 11, 2022), [https://statesuniteddemocracy.org/wp-content/uploads/2022/08/08.11.22\\_StatesUnited-LDAD\\_Complaint-to-DC-ODC-re-John-Eastman\\_Final.pdf](https://statesuniteddemocracy.org/wp-content/uploads/2022/08/08.11.22_StatesUnited-LDAD_Complaint-to-DC-ODC-re-John-Eastman_Final.pdf); Letter to District of Columbia Court of Appeals’ Office of Disciplinary Counsel Re: Jeffery Clark’s Professional Conduct (Oct. 5, 2021), <https://ldad.org/wp-content/uploads/2021/10/DC-Ethics-Complaint-Against-JeffreyClark.pdf>; States United Democracy Center’s Letter

## H. Trump Did Not Order the National Guard to Stop the Insurrection

One defense that Trump and his allies have floated since January 6, 2021 is that he in fact ordered thousands of National Guard troops to intervene to stop the insurrection.<sup>1214</sup> As recently as May this year, Trump stated that he “offered [Nancy Pelosi and the mayor of Washington, D.C.] 10,000 soldiers.”<sup>1215</sup> From a legal perspective, that might not operate as a complete defense to the charge of insurrection—a reasonable jury could still conceivably find Trump’s many other actions to encourage the mob to march on the Capitol and inaction to stop it—to be sufficient for a conviction.<sup>1216</sup> Nevertheless, it would at least muddy the waters as to Trump’s true intentions, and could make prosecutors’ jobs more difficult. But Trump did not issue any such order (and his claim actually suggests he anticipated violence ahead of January 6).

Given the scope of the security failure on January 6, investigations were conducted by a number of bodies to determine what went wrong. The Select Committee interviewed numerous high-level officials within the Department of Defense.<sup>1217</sup> The DOD Office of the Inspector General conducted its own review, including writing a report following interviews with 44 witnesses.<sup>1218</sup> Although there is some disagreement about some details from the day,<sup>1219</sup> most witnesses agree to the key facts as it pertains to Trump.

*The witnesses uniformly agree that Trump never issued an order to deploy the D.C. National Guard.* Mark Milley, the Chairman of the Joint Chiefs of Staff, indicated that Trump made no such order on January 6th itself, “[A]t no time did I and I am not aware of anyone in the Pentagon having a conversation with President Trump on the day of the 6th.”<sup>1220</sup>

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to Colorado’s Attorney Regulation Counsel Jessica E. Yates Re: Request for Investigation of Jenna L. Ellis (also known as Jenna Lynn Rives), Colorado Registration Number 44026 (May 4, 2022), <https://statesuniteddemocracy.org/wp-content/uploads/2022/05/2022.05.04-Jenna-Ellis-complaint-cover-letter.pdf>; Letter from Lawyers Defending American Democracy to the Attorney Grievance Committee of the Supreme Court of the State of New York Re: Professional Responsibility Investigation of Kenneth John Chesebro, Registration No. 4497913 (Oct. 12, 2022), <https://int.nyt.com/data/documenttools/ethics-complaintagainst-kenneth-chesebro/dd035b3fceffbbab/full.pdf>.

<sup>1214</sup> Amanda Carpenter, Trump’s Jan. 6th National Guard Lie Crumbles, THE BULWARK (July 27, 2022), <https://www.thebulwark.com/trumps-jan-6th-national-guard-lie-crumbles/>.

<sup>1215</sup> READ: Transcript of CNN’s town hall with former President Donald Trump, CNN (May 11, 2023), <https://www.cnn.com/2023/05/11/politics/transcript-cnn-town-hall-trump/index.html>.

<sup>1216</sup> See *United States v. Elias*, 976 F.2d 1445 (D.C. Cir. 1992) (evidence is sufficient to sustain a conviction if “any reasonable jury *could* find guilt beyond a reasonable doubt”) (internal quotation marks omitted).

<sup>1217</sup> See *generally*, Select Comm. Report at Appendix 2 (DC National Guard Preparation for and Response to January 6th).

<sup>1218</sup> Review of the Department of Defense’s Role, Responsibilities, and Actions to Prepare for and Respond to the Protest and its Aftermath at the U.S. Capitol Campus on January 6, 2021, U.S. Dep’t of Defense Office of Inspector General (Nov. 16, 2021), <https://www.dodig.mil/reports.html/Article/2844941/review-of-the-department-of-defenses-role-responsibilities-and-actions-to-prepa/>.

<sup>1219</sup> See Dan Lamothe & Paul Sonne, Former D.C. Guard commander demands Pentagon inspector general retract Jan. 6 report, THE WASHINGTON POST (Nov. 18, 2021), <https://www.washingtonpost.com/national-security/2021/11/18/william-walker-january-6-inspector-general/>.

<sup>1220</sup> Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Transcribed Interview of Gen. Mark A. Milley, (Nov. 17, 2021), at 82:13–16.

*As to any potential authorization on the days before, the witnesses similarly acknowledge that Trump issued no such order.* Acting Secretary of Defense Christopher Miller was asked by the Select Committee about a statement Mark Meadows made to Fox News, that “as many as 10,000 National Guard troops were told to be on ready by the Secretary of Defense.”<sup>1221</sup> Miller described that statement as inaccurate and emphatically stated, “There was no direct—the was no order from the President.”<sup>1222</sup> Kashyap Patel, Chief of Staff to the Acting Secretary of Defense also acknowledged to the Select Committee that he did not “recall, from the best of my memory, ... any orders being issued.”<sup>1223</sup> Notwithstanding that they acknowledged no orders were ever issued, Patel suggested that Trump may somehow have “preemptively authorized” upwards of 10,000 troops from the National Guard.<sup>1224</sup> Miller also confirmed to the Select Committee that Trump had said to him on January 5, “[Y]ou’re going to need 10,000 troops.”<sup>1225</sup> Miller said he told Trump in response, “[S]omeone’s going to have to ask for that,” which he indicated Trump did not.<sup>1226</sup>

Trump also cannot plausibly claim that he did not know he had the authority to deploy the D.C. National Guard when the Capitol was under siege. Former Secretary of Defense Mark Esper told the Select Committee that he had previously discussed with Trump the President’s authority to deploy the D.C. National Guard, as well as active-duty personnel under the Insurrection Act.<sup>1227</sup> According to Esper, he discussed such authority with Trump in June 2020, when Trump initially wished to deploy “up to 10,000” troops in response to protests following the murder of George Floyd.<sup>1228</sup> News reports also suggest that Trump’s interest in the action was sufficiently serious that White House aides drafted a proclamation to invoke the Insurrection Act at that time.<sup>1229</sup> Although Trump did not invoke the Insurrection Act in June 2020, those events offer strong evidence that he knew the authority it gave him.

A related defense asserted by Trump and some members of his inner circle is that it was not Trump who was responsible for the inaction of the D.C. National Guard, but rather Mayor

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<sup>1221</sup> Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Transcribed Interview of Christopher Charles Miller, (Jan. 14, 2022), at 100:6–14.

<sup>1222</sup> *Id.* at 100:10–101:1.

<sup>1223</sup> Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Transcribed Interview of Kashyap Pramod Patel, (Dec. 9, 2021), at 42:13–14. In the same breath, Patel said despite the lack of any “orders,” he recalled “authorizations being made for the mobilization of Guard [sic] should it be deemed necessary by law enforcement and Governors.” *Id.* at 42:14–15.

<sup>1224</sup> *Id.* at 38:19–25.

<sup>1225</sup> Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Transcribed Interview of Christopher Charles Miller, (Jan. 14, 2022), at 102: 8–16.

<sup>1226</sup> *See id.* at 102:8–12, 100:10–101:1.

<sup>1227</sup> Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Transcribed Interview of Mark Esper, (Apr. 1, 2022), at 9–12.

<sup>1228</sup> *Id.*

<sup>1229</sup> Michael S. Schmidt & Maggie Haberman, Trump Aides Prepared Insurrection Act Order During Debate Over Protests, *THE NEW YORK TIMES* (June 25, 2021), <https://www.nytimes.com/2021/06/25/us/politics/trump-insurrection-act-protests.html>.

Muriel Bowser.<sup>1230</sup> Although it is true Bowser requested (and received) only a force of 340 unarmed members of the D.C. National Guard,<sup>1231</sup> the suggestion that Bowser rather than Trump is responsible for their severely delayed response on the day of the insurrection turns the relationship between the city of Washington, D.C. and the federal government on its head. Every state, along with Puerto Rico, Guam, the U.S. Virgin Islands, and Washington, D.C. has a National Guard organization.<sup>1232</sup> The D.C. National Guard is the only one out of the fifty-four total National Guard organizations that is never under local control.<sup>1233</sup> Rather, under the D.C. Code and federal law, the President of the United States is the Commander-in-Chief of the D.C. National Guard.<sup>1234</sup> Although the President’s authority has been delegated to the Secretary of Defense, the Secretary of the Army, and the Secretary of the Air Force,<sup>1235</sup> “neither the D.C. Mayor, nor any other D.C. official, has authority to call up the Guard.”<sup>1236</sup> Trump therefore cannot sidestep blame for his inaction by pointing the finger at Bowser, who had no legal authority over the National Guard.<sup>1237</sup>

Trump likewise cannot plausibly escape culpability by attempting to place the blame on his subordinates. Given Trump’s personal knowledge of the situation at the Capitol throughout the afternoon,<sup>1238</sup> the gravity of an invasion of the Capitol complex, and a President’s ability to deploy the D.C. National Guard, the blameworthiness of other actors—while certainly arguable<sup>1239</sup>—is

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<sup>1230</sup> Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (July 29, 2022) (accusing Bowser of “refus[ing] National Guard help when it came to providing Security at the Capitol Building ... on January 6th”), <https://truthsocial.com/@realDonaldTrump/posts/108730895847184204>; Kash Patel on Jan. 6 Timeline: Trump Authorized 20,000 National Guard Two Days Before, KASH’S CORNER (June 14, 2022) (stating that Trump authorized “up to 20,000 National Guardsmen” and that “no request, as required by law, came from Capitol police or from Mayor Muriel Bowser”), <https://podcasts.apple.com/hu/podcast/kash-patel-on-jan-6-timeline-trump-authorized-20-000/id1601933882?i=1000566558142>.

<sup>1231</sup> Jaclyn Diaz, Ex-Capitol Police Chief Says Requests For National Guard Denied 6 Times In Riots, NPR (Jan. 11, 2021), <https://www.npr.org/2021/01/11/955548910/ex-capitol-police-chief-rebuffs-claims-national-guard-was-never-called-during-ri>.

<sup>1232</sup> Elizabeth Goitein & Joseph Nunn, Why D.C.’s Mayor Should Have Authority Over the D.C. National Guard, JUST SECURITY (Jan. 8, 2021), <https://www.justsecurity.org/74098/why-d-c-s-mayor-should-have-authority-over-the-d-c-national-guard/>.

<sup>1233</sup> *Id.*

<sup>1234</sup> D.C. Code § 49-409, <https://code.dccouncil.gov/us/dc/council/code/sections/49-409.html>; Mar. 1, 1889, 25 Stat. 773, ch. 328, § 6; Goitein & Nunn, *supra* note 1232.

<sup>1235</sup> Exec. Order No. 11,485, 34 Fed. Reg. 15,411 (Jan. 3, 1969); Supervision and Control of the National Guard of the District of Columbia, 34 Fed. Reg. 15,411, 15,443 (Oct. 1, 1969); Goitein & Nunn, *supra* note 1232.

<sup>1236</sup> Jill I. Goldenziel, ‘Revolution’ at the Capitol: How Law Hindered the Response to the Events of January 6, 2021, 81 MD. L. REV. 336, 346 (2021). Ironically, although the Mayor of Washington, D.C., has (and had) no authority to call up the National Guard, the President does have absolute authority to federalize and direct the D.C. Metropolitan Police force whenever the President determines “that special conditions of an emergency nature exist.” D.C. Code § 1-207.40, <https://code.dccouncil.gov/us/dc/council/code/sections/1-207.40.html>.

<sup>1237</sup> For similar reasons, any suggestion that either Rep. Nancy Pelosi or Sen. Chuck Schumer somehow blocked or rejected National Guard assistance is also legally implausible. *See* Bill McCarthy, No evidence Pelosi ‘rejected’ Trump’s authorization for ‘20,000 National Guard’ before Jan. 6 attack, POLITIFACT (June 13, 2022), <https://www.politifact.com/factchecks/2022/jun/13/sean-hannity/no-evidence-pelosi-rejected-trumps-authorization-2/>.

<sup>1238</sup> *See supra* Section I.C.1.

<sup>1239</sup> On a call with Department of Defense and D.C. government officials, Lieutenant General Piatt allegedly cited “optics” as a reason to not intervene on January 6. *See* Select Comm. to Investigate the Jan. 6th Attack on the United

not sufficient to relieve Trump of fault. The authority vested in the Department of Defense does not preclude a President from intervening: he is still highest in the chain of command. The failure to intervene was his own.

## **I. The Insurrection Statute is Not Unconstitutionally Vague**

Given the difficulty in discerning the definition of “insurrection,” it would be no surprise for Trump or others to argue that 18 U.S.C. § 2383 is unconstitutionally vague. Their argument would likely be that the statute cannot put anyone on fair notice, consistent with the Due Process Clause of the Fifth Amendment, of what the statute prohibits. Despite the challenges associated with delineating the scope of the statute, the law is not vague in a legal sense so as to render its enforcement unconstitutional in this context.

Under the “void-for-vagueness” doctrine, a law is unconstitutionally vague when “it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement.”<sup>1240</sup> Even though Supreme Court jurisprudence applies an “ordinary person” standard, “a statutory term is not rendered unconstitutionally vague because it ‘do[es] not mean the same thing to all people, all the time, everywhere.’”<sup>1241</sup> Nor is a law unconstitutionally vague simply because a statute uses abstruse or arcane terminology. The Supreme Court has explained that “[e]ven trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.”<sup>1242</sup> The key inquiry is whether such analysis clearly proscribes some “‘core’ behavior” so as to provide fair notice consistent with the Due Process Clause of the Fifth Amendment.<sup>1243</sup>

Even if there could theoretically be outlier cases that could test the clarity of the Insurrection statute as to its constitutionality, the facts at issue here do no such thing. “[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise.”<sup>1244</sup> As explained in Section II.C.2.a, the statute at a minimum applies to a “rebellion” or “an assemblage of persons [acting] in force, to overthrow the government, or to coerce its conduct.”<sup>1245</sup> That conduct is what is at issue for Trump and his allies; the statute therefore “will not be struck down as vague.”

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States Capitol, Transcribed Interview of William Walker, (Dec. 15, 2021), at 105:20. The use of the word “optics” was corroborated by others’ testimony, though Piatt denies specifically using the word. Others testified that there was concern with maintaining an image of military independence and claimed that placing military so close to an election proceeding would threaten the military’s rapport with the American people as politically independent. *See id.* at 105:22-23.

<sup>1240</sup> Johnson v. United States, 576 U.S. 591, 595 (2015).

<sup>1241</sup> United States v. Bronstein, 849 F.3d 1101, 1107 (D.C. Cir. 2017) (quoting Roth v. United States, 354 U.S. 476, 491 (1957)).

<sup>1242</sup> Rose v. Locke, 423 U.S. 48, 50 (1957).

<sup>1243</sup> Bronstein, 849 F.3d at 1108 (quoting United States v. Poindexter, 951 F.2d 369, 385 (D.C. Cir. 1991)).

<sup>1244</sup> United States v. Harriss, 347 U.S. 612, 618 (1954).

<sup>1245</sup> United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863).

## CONCLUSION

In carefully cataloging the events leading to January 6, holding compelling public hearings, and releasing a meticulously detailed report—along with numerous transcripts and a large volume of documents—the Select Committee has done the nation a great service. Through their work, it is now clear that although the country’s democratic structure withstood the sustained, nation-wide effort led by Trump and members of his inner circle to overturn the election, it did so only narrowly.

A careful review of the Select Committee’s work and other significant amounts of public information leads us to an inescapable conclusion: not since the Civil War has our democracy been so threatened. It is therefore appropriate that charges seldom seen since the Civil War would be considered in prosecuting the allegedly criminal conduct engaged in by Trump and some of his closest associates. They came perilously close to preventing, by force, the lawful transition of power to a duly elected president.

Trump’s initial efforts to interfere with the lawful transfer of power through the use of coercion and deception, although bloodless, are also serious. While unsuccessful, Trump and his many advisors in the White House and as well as supporters across the country laid the groundwork for a realistic attempt to override the electoral results and the will of the American people.

The federal investigation of January 6 and related events, which Attorney General Merrick Garland described as the “most wide-ranging” in DOJ history, has been ongoing for more than two years.<sup>1246</sup> Numerous witnesses have testified before the grand jury, and countless documents have been obtained. Now, with the testimony in hand of some of the highest-level officials in Trump’s orbit—including Mike Pence and Mark Meadows—it seems likely the investigation is entering its final phase.

Given the evidence we are aware of and our assessment of the law, we believe there is a powerful case to be made against Trump and others for the charges listed herein. Consequently, it would be consistent with DOJ policy to bring charges under such circumstances. An indictment would reflect a balanced assessment of the facts and the law, without fear or favor due to Trump’s former role as president or current role as candidate.

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<sup>1246</sup> Attorney General Garland on Firearms Trafficking, C-SPAN (July 20, 2022), <https://www.c-span.org/video/?521868-1/attorney-general-garland-firearms-trafficking>.



## ABOUT THE AUTHORS

**Donald Ayer** is a former prosecutor, an appellate lawyer, and law professor. He has served since 2006 as an adjunct professor teaching a course in Supreme Court Litigation at Georgetown Law School and has also taught at the law schools of Stanford, Duke, and New York University. For 29 years, ending in 2018, he was a partner in the Washington, D.C. office of Jones Day, engaged in Supreme Court and appellate practice. Before entering private practice in 1990, Ayer spent ten years in the United States Department of Justice, including two presidential appointments. He worked in California, first as an assistant United States attorney, and from 1981–1986 as United States attorney in Sacramento. In 1986 he moved to Washington as principal deputy solicitor general under Solicitor General Charles Fried, during the final three years of the Reagan administration. In 1989, after briefly joining Jones Day, he was appointed by President George H.W. Bush and served as deputy attorney general from 1989–1990. Ayer has argued 19 times in the U.S. Supreme Court, more than 70 cases in the intermediate appellate courts, and has also been lead counsel in approximately 20 jury trials. He received an A.B., with Great Distinction, from Stanford in 1971, an M.A. in American History from Harvard in 1973, and his J.D. from Harvard in 1975, where he was articles editor of the Harvard Law Review. He clerked for Judge Malcolm R. Wilkey of the U.S. Court of Appeals for the D.C. Circuit, and for Justice William H. Rehnquist. He previously served as president of the American Academy of Appellate Lawyers and of the Edward Coke Appellate Inn of Court and is presently a member of the Council of the American Law Institute and chair of the Publications Committee of the Supreme Court Historical Society. His former firm, Jones Day, has been publicly reported to represent the Trump campaign. While at the firm, he did not work on any matter for that or any other Trump-related entity or receive any related confidential client information. No such confidential information has been utilized in the preparation of this report, which is entirely based upon publicly available sources.

**Noah Bookbinder** is the president and CEO of Citizens for Responsibility and Ethics in Washington (CREW). Prior to joining CREW, he served from 2013 to 2015 as director of the Office of Legislative and Public Affairs at the United States Sentencing Commission. Before that, Bookbinder served as chief counsel for Criminal Justice for the United States Senate Judiciary Committee, where he worked from 2005 to 2013. From 1999 to 2005, Bookbinder worked as a trial attorney for the United States Department of Justice's Public Integrity Section. He has taught about prosecuting public corruption as an adjunct professor at George Washington University Law School and Howard University School of Law. He graduated from Yale University and Stanford Law School and served as a law clerk to United States District Judge Douglas Woodlock. He and CREW have filed legal complaints and written on several of the issues covered in this report, including complaints asking the Department of Justice to investigate Donald Trump, Mark Meadows, and Jeffrey Clark in connection with efforts to overturn the 2020 election. CREW has publicly committed to challenging Donald Trump's constitutional eligibility for office under Section Three of the Fourteenth Amendment. Relevant authorities may address such ineligibility without a determination of Trump's liability for involvement in insurrection in the separate criminal proceedings we here address. A discussion of the organization's relevant publicly reported matters can be found online at CREW's website, <https://www.citizensforethics.org>.

**Ambassador Norman Eisen (ret.)** is a senior fellow in Governance Studies at Brookings and a CNN legal analyst. He served in the White House from 2009 to 2011 as special counsel and special assistant to President Barack Obama for ethics and government reform, was the U.S. Ambassador to the Czech Republic from 2011 to 2014 and served as special counsel to the House Judiciary Committee for the Trump impeachment and trial from 2019 to 2020. Before that, he was a partner in the D.C. law firm Zuckerman Spaeder, where he practiced law from 1991 to 2009. He is the author or editor of five books, including *A Case for the American People: The United States v. Donald J. Trump* (Crown 2020). Eisen received his J.D. from Harvard Law School in 1991 and his B.A. from Brown University in 1985, both with honors. He is the co-founder and former chair of Citizens for Responsibility and Ethics in Washington (CREW) and the co-founder and executive chair of the States United Democracy Center and States United Action. In that capacity, Ambassador Eisen is co-counsel in the case brought against militia groups and their members who were involved in the January 6, 2021 assault on the U.S. Capitol. *See* Complaint, District of Columbia v. Proud Boys International L.L.C., et al, No. 21-cv-3267 (D.D.C. Dec. 12, 2021), ECF #1. States United represents government entities involving various matters which may relate to this report; discussion of the organization's publicly reported work can be found online at States United's website, <https://statesuniteddemocracy.org/resources/>. Eisen also does legal work at his pro bono law firm Eisen PLLC. He has served as co-counsel on amicus briefs involving various matters which may relate to this report; a list can be found at his firm website, <https://www.normaneisen.com/eisen-llc>. Eisen is also a board member of Democracy 21 Education Fund, a 501(c)(3) organization. Democracy 21 Education engages in legal work and public analysis to protect our democratic system and uphold the rule of law. In that capacity he has authored reports and opinion pieces relating to the content of this report.

**Kayvan Farchadi** serves as counsel at CREW. Prior to joining CREW, Kayvan worked as a white collar and regulatory associate at Covington and Burling LLP. Kayvan received his J.D. from George Washington University Law School with high honors and his B.A. from the College of William and Mary.

**Debra Perlin** serves as CREW's policy director. Perlin came to CREW from the American Constitution Society (ACS) where she served as director of policy and program and oversaw the development of policy on national security, separation of powers, and rule of law issues. Prior to ACS, Perlin served in several positions in the federal government including as the Supreme Court fellow in the Office of the Counselor to the Chief Justice at the U.S. Supreme Court, an attorney at the U.S. Department of Homeland Security, and a justice advisor at the U.S. Department of State. Perlin received her J.D. cum laude from Boston College and her B.A. summa cum laude from Brandeis University.

**E. Danya Perry** is the founder of Perry Law, one of New York's premier white collar defense and commercial litigation boutiques. She is a trial lawyer with extensive experience in both government and private practice. She has successfully tried dozens of cases and has argued dozens of appeals. Prior to founding Perry Law and a predecessor firm, Perry served as chief of litigation and deputy general counsel at MacAndrews & Forbes; deputy attorney general for the State of New York; chief of investigations for the Moreland Commission to Investigate Public Corruption; and assistant U.S. attorney for the Southern District of New York, including as senior trial counsel

and deputy chief of the Criminal Division. Danya graduated from Yale Law School and holds a B.A. from Harvard University. She clerked for a federal district judge in the Southern District of New York, has taught trial advocacy and prosecution clinics at NYU School of Law, serves as a trustee of the Vera Institute of Justice, is a founding member of When There Are Nine Scholarship Project, and is a director of NYC Kids Rise. Nationally recognized as an industry expert, she frequently writes op-eds published in papers of record, including the New York Times and the Washington Post; appears on MSNBC, CNN, and BBC, and in national publications; and speaks on white collar and enforcement panels. Perry is a single mother of three and a sub-three-hour marathoner.

**Jason Powell** served as the Chief Investigative Counsel for Citizens for Responsibility and Ethics in Washington (CREW) at the time of his contribution to this writing. Prior to joining CREW, Powell served in various legal, investigative, and policy roles in the House of Representatives and the Executive Branch, including as General Counsel for the House Committee on Oversight and Reform under Chairwoman Carolyn B. Maloney, and before that, as Deputy General Counsel under the late Chairman Elijah E. Cummings. Earlier in his career, Powell served on that same Committee during the tenures of former chairmen Edolphus Towns and Henry Waxman. Powell also previously served as Legislative Director for Rep. Maxine Waters and as Counsel for the House Committee on Financial Services. During the Obama Administration, Powell served at the U.S. Department of the Interior as Senior Counsel in the Office of the Secretary and the Office of Congressional and Legislative Affairs. Powell began his career on Capitol Hill as a Congressional Black Caucus Foundation Fellow serving in the Office of Rep. Edolphus Towns and on the staff of the House Committee on Energy and Commerce under the late Chairman John Dingell. Powell has a degree in political science from Case Western Reserve University and earned his J.D. from Cleveland-Marshall College of Law at Cleveland State University.

**Joshua Stanton** is Counsel at Perry Law and President and founder of the Defense of Dignity Center, a non-profit organization dedicated to criminal justice reform. Stanton recently completed a two-year research and teaching fellowship at Vanderbilt Law School, where he served as a clinical professor and co-director of the school's Criminal Practice Clinic. While at Vanderbilt, Stanton authored multiple amicus briefs in support of criminal justice reform and successfully represented numerous defendants charged with felony offenses in the state courts of Nashville, Tennessee. Prior to Vanderbilt, Stanton was an associate at an elite international litigation firm. Stanton has dedicated the majority of his professional career to public service. He served as a public defender in Memphis, Tennessee, where he graduated from the esteemed Gideons Promise training program. He served as a judicial law clerk to District Judge Jon Phipps McCalla. Prior to law school, as a member of Teach For America, Stanton was a middle and high school teacher at a public school expulsion program outside New Orleans, Louisiana. Stanton received his J.D. magna cum laude and Order of the Coif from NYU School of Law, and his B.A. from U.C. Berkeley.

## **ACKNOWLEDGMENTS**

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## APPENDIX A: FALSE ELECTOR DOCUMENTS<sup>1247</sup>

### *Arizona*

#### MEMORANDUM

TO: President of the Senate (By Registered Mail)  
United States Senate  
Washington, D.C. 20510

Archivist of the United States (By Registered Mail)  
700 Pennsylvania Avenue, NW  
Washington, DC 20408

Secretary of State (By Certified Mail)  
State of Arizona  
1700 W. Washington St., Floor 7  
Phoenix, AZ 85007

Chief Judge, U.S. District Court (By Certified Mail)  
District of Arizona  
Sandra Day O'Connor Courthouse  
401 W. Washington Street  
Phoenix, AZ 85003

FROM: Nancy Cottle, Chairperson, Electoral College of Arizona

DATE: December 14, 2020

RE: Arizona's Electoral Votes for President and Vice President

Pursuant to 3 U.S.C. § 11, enclosed please find duplicate originals of Arizona's electoral votes for President and Vice President, as follows: two (2) duplicate originals for the President of the Senate and the Archivist, and one (1) duplicate original for the Secretary of State and Chief Judge.



AMERICAN  
OVERSIGHT

NARA-21-0174-A-000001

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<sup>1247</sup> American Oversight, *supra* note 397.

**CERTIFICATE OF THE VOTES OF THE  
2020 ELECTORS FROM ARIZONA**

\*\*\*\*\*

WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Arizona, do hereby certify the following:

- (A) That we convened and organized in the City of Phoenix, County of Maricopa, State of Arizona, at 12:00 noon on the 14th day of December, 2020, to perform the duties enjoined upon us;
- (B) That being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for President and then for Vice President, by distinct ballots; and
- (C) That the following are two distinct lists, one, of all the votes for President; and the other, of all the votes for Vice President, so cast as aforesaid:

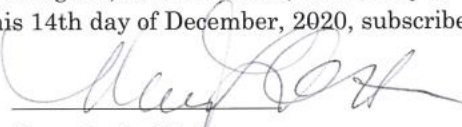
**FOR PRESIDENT**

Names of the Persons Voted For	Number of Votes
DONALD J. TRUMP of the State of Florida	11

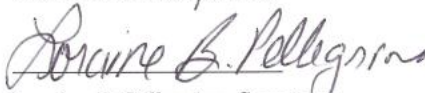
**FOR VICE PRESIDENT**

Names of the Persons Voted For	Number of Votes
MICHAEL R. PENCE of the State of Indiana	11


IN WITNESS WHEREOF, we, the undersigned, have hereunto, in the City of Phoenix, in the State of Arizona, on this 14th day of December, 2020, subscribed our respective names.



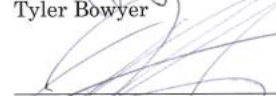
Nancy Cottle, Chairperson



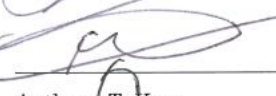
Loraine B. Pellegrino, Secretary



Tyler Bowyer



Jake Hoffman



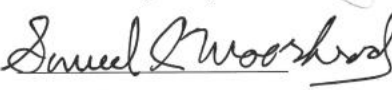
Anthony T. Kern



James Lamon



Robert Montgomery




Samuel I. Moorhead



Greg Safsten



Dr. Kelli Ward



Dr. Michael Ward

## Georgia

David J. Shafer

Chairman, Georgia Republican Party

Chairman, Electoral College of Georgia

### MEMORANDUM

TO: President of the Senate (By Registered Mail)  
United States Senate  
Washington, D.C. 20510

Archivist of the United States (By Registered Mail)  
700 Pennsylvania Avenue, NW  
Washington, DC 20408

Secretary of State (By Certified Mail)  
State of Georgia  
214 State Capitol  
Atlanta, GA 30334

Chief Judge, U.S. District Court (By Certified Mail)  
Northern District of Georgia  
2188 Richard D. Russell Federal  
Office Building and U.S. Courthouse  
75 Ted Turner Drive, SW  
Atlanta, GA 30303

FROM: David J. Shafer, Chairperson, Electoral College of Georgia

DATE: December 14, 2020

RE: Georgia's Electoral Votes for President and Vice President

Pursuant to 3 U.S.C. § 11, enclosed please find duplicate originals of Georgia's electoral votes for President and Vice President, as follows: two (2) duplicate originals for the President of the Senate and the Archivist, and one (1) duplicate original for the Secretary of State and Chief Judge.



David J. Shafer



STATE OF GEORGIA  
COUNTY OF FULTON

**CERTIFICATE OF THE VOTES OF THE  
2020 ELECTORS FROM GEORGIA**

\*\*\*\*\*

WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Georgia, do hereby certify the following:

- (A) That we convened and organized at the State Capitol, in the City of Atlanta, County of Fulton, Georgia, at 12:00 noon on the 14th day of December, 2020, to perform the duties enjoined upon us;
- (B) That David J. Shafer presided and Shawn Still served as Secretary for the meeting.
- (C) That the undersigned 2020 Electors from the State of Georgia cast each of their respective ballots for President of the United States of America, as follows:

**FOR DONALD J. TRUMP – 16 VOTES**

JOSEPH BRANNAN  
JAMES “KEN” CARROLL  
VIKKI TOWNSEND CONSIGLIO  
CAROLYN HALL FISHER  
HON BURT JONES  
GLORIA KAY GODWIN  
DAVID G. HANNA  
MARK W. HENNESSY  
MARK AMICK  
JOHN DOWNEY  
CATHLEEN ALSTON LATHAM  
DARYL MOODY  
BRAD CARVER  
DAVID SHAFER

SHAWN STILL

C.B. YADAV

(D) That the undersigned 2020 Electors from the State of Georgia cast each of their respective ballots for Vice President of the United States of America, as follows

**FOR MICHAEL R. PENCE – 16 VOTES**

JOSEPH BRANNAN

JAMES “KEN” CARROLL

VIKKI TOWNSEND CONSIGLIO

CAROLYN HALL FISHER

HON BURT JONES

GLORIA KAY GODWIN

DAVID G. HANNA

MARK W. HENNESSY

MARK AMICK

JOHN DOWNEY

CATHLEEN ALSTON LATHAM

DARYL MOODY

BRAD CARVER

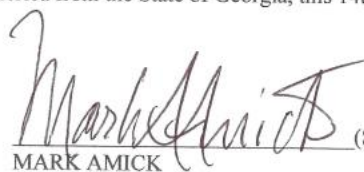
DAVID SHAFER


SHAWN STILL

C.B. YADAV

Witness the hands and seals of the undersigned as the duly elected and qualified Electors of the President and Vice President of the United States of America from the State of Georgia, this 14th day of December, 2020.

 (SEAL)  
JOSEPH BRANNAN

 (SEAL)  
MARK AMICK


 (SEAL)  
JAMES "KEN" CARROLL


 (SEAL)  
VIKKI TOWNSEND CONSIGLIO

 (SEAL)  
CAROLYN HALL FISHER

 (SEAL)  
JOHN DOWNEY

 (SEAL)  
GLORIA KAY GODWIN

 (SEAL)  
DAVID G. HANNA

 (SEAL)  
MARK W. HENNESSY

 (SEAL)  
BRAD CARVER

 (SEAL)  
CATHLEEN ALSTON LATHAM

 (SEAL)  
DARYL MOODY

 (SEAL)  
BURT JONES

 (SEAL)  
DAVID SHAFER

 (SEAL)  
SHAWN STILL

 (SEAL)  
C.B. YADAV

December 14, 2020

**VIA HAND DELIVERY**

The Honorable Brian P. Kemp  
Governor, State of Georgia  
206 Washington Street  
111 State Capitol  
Atlanta, GA 30334

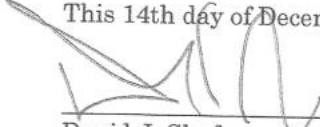
**RE: Notice of Filling of Electoral College Vacancy**

Dear Governor Kemp,


In accordance with O.C.G.A. § 21-2-12, I hereby give you notice of the following:

1. On December 14, 2020, 12 of the 16 electors pledged to Donald J. Trump for President and Michael R. Pence for Vice President assembled in accordance with O.C.G.A. § 21-2-11;
2. 4 electors, John A Isakson, Patrick Garland, Cj Pearson, Susan Holmes did not appear at the time appointed by law;
3. The Electors present proceeded to fill those vacancies;
4. The Electors elected by unanimous voice vote, Brad Carver, Mark Amick, John Downey, Burt Jones persons of the same political party as the absent Electors;
5. As the presiding officer of the Georgia Electoral College, I am immediately transmitting their names to you, and ask that you notify them in writing of their election as a Presidential Elector to fill the vacant Elector positions, and of their duty to perform, along with the other Electors, the duties required of them by the Constitution and laws of the United States.

This 14th day of December, 2020.

  
\_\_\_\_\_  
David J. Shafer  
Chairman, 2020 Georgia  
Electoral College Meeting

Attest:

  
\_\_\_\_\_  
Shawn Still  
Secretary, 2020 Georgia  
Electoral College Meeting

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM GEORGIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Elector

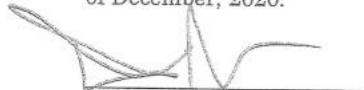
**John A. Isakson**

Thereupon, by nomination duly made and seconded,

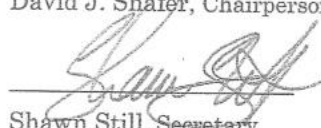
**John Downey**

Was elected by the Electors present, as an Elector of President and Vice President of the  
United States of America for the State of Georgia to fill the vacancy in the manner provided  
by law. This Elector participated in the proceedings as set forth in the record of the  
Electoral College.

IN WITNESS WHEREOF, the undersigned  
Chairperson and Secretary of the  
Electoral College of Georgia hereunto  
Subscribe their names this 14th day  
of December, 2020.



David J. Shafer, Chairperson



Shawn Still, Secretary

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM GEORGIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Elector

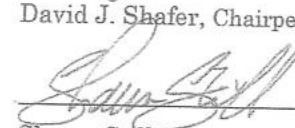
**Susan Holmes**

Thereupon, by nomination duly made and seconded,

**Brad Carver**

Was elected by the Electors present, as an Elector of President and Vice President of the  
United States of America for the State of Georgia to fill the vacancy in the manner provided  
by law. This Elector participated in the proceedings as set forth in the record of the  
Electoral College.

IN WITNESS WHEREOF, the undersigned  
Chairperson and Secretary of the  
Electoral College of Georgia hereunto  
Subscribe their names this 14th day  
of December, 2020.

  
David J. Shafer, Chairperson  
Shawn Still, Secretary

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM GEORGIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Elector

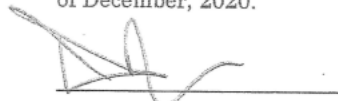
**Patrick Gartland**

Thereupon, by nomination duly made and seconded,

**Mark Amick**

Was elected by the Electors present, as an Elector of President and Vice President of the  
United States of America for the State of Georgia to fill the vacancy in the manner provided  
by law. This Elector participated in the proceedings as set forth in the record of the  
Electoral College.

IN WITNESS WHEREOF, the undersigned  
Chairperson and Secretary of the  
Electoral College of Georgia hereunto  
Subscribe their names this 14th day  
of December, 2020.



David J. Shafer, Chairperson



Shawn Still, Secretary



**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM GEORGIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Elector

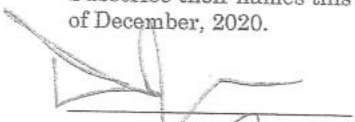
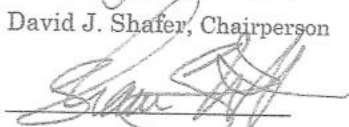
**CJ Pearson**

Thereupon, by nomination duly made and seconded,

**Hon. Burt Jones**

Was elected by the Electors present, as an Elector of President and Vice President of the  
United States of America for the State of Georgia to fill the vacancy in the manner provided  
by law. This Elector participated in the proceedings as set forth in the record of the  
Electoral College.

IN WITNESS WHEREOF, the undersigned  
Chairperson and Secretary of the  
Electoral College of Georgia hereunto  
Subscribe their names this 14th day  
of December, 2020.

  
\_\_\_\_\_  
David J. Shafer, Chairperson  
\_\_\_\_\_  
Shawn Still, Secretary



December 14, 2020

I, Brian P. Kemp, Governor of the State of Georgia, in accordance with O.C.G.A. § 21-2-12, hereby give notice of the following to \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ [names of the substituted electors]:

1. On December 14, 2020, \_\_\_\_ of the 16 electors pledged to Donald J. Trump for President and Michael R. Pence for Vice President assembled in accordance with O.C.G.A. § 21-2-11;

2. \_\_\_\_ electors, \_\_\_\_\_ [name], \_\_\_\_\_ [name], and \_\_\_\_\_ name . . . [etc.], did not appear at the time appointed by law;

3. The Electors present then proceeded to fill the vacancies;

4. The Electors elected by unanimous voice vote, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, persons of the same political party as the absent Electors;

5. Immediately following that vote of the Electors, David Shafer, the presiding officer of the Electors, transmitted the names of the substitute Electors to me;

6. By this Certificate, I am hereby notifying \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ of their election to fill the vacant Elector positions.

Witness my hand and seal of  
of my office this 14th day of  
December, 2020.

\_\_\_\_\_  
Brian P. Kemp, Governor

**MEMORANDUM**

TO: President of the Senate (By Registered Mail)  
United States Senate  
Washington, D.C. 20510

Archivist of the United States (By Registered Mail)  
700 Pennsylvania Avenue, NW  
Washington, DC 20408

Secretary of State (By Certified Mail)  
State of Michigan  
430 Allegan Street  
Richard H. Austin Bldg., 4th Floor  
Lansing, MI 48918

Chief Judge, U.S. District Court (By Certified Mail)  
Western District of Michigan  
113 Federal Building  
315 West Allegan Street  
Lansing, MI 48933

FROM: Kathy Berden, Chairperson, Electoral College of Michigan

DATE: December 14, 2020

RE: Michigan's Electoral Votes for President and Vice President

Pursuant to 3 U.S.C. § 11, enclosed please find duplicate originals of Michigan's electoral votes for President and Vice President, as follows: two (2) duplicate originals for the President of the Senate and the Archivist, and one (1) duplicate original for the Secretary of State and Chief Judge.

---

**CERTIFICATE OF THE VOTES OF THE  
2020 ELECTORS FROM MICHIGAN**

\*\*\*\*\*

WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Michigan, do hereby certify the following:

- (A) That we convened and organized in the State Capitol, in the City of Lansing, Michigan, and at 2:00 p.m. Eastern Standard Time on the 14th day of December, 2020, performed the duties enjoined upon us;
- (B) That being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for President and then for Vice President, by distinct ballots; and
- (C) That the following are two distinct lists, one, of all the votes for President; and the other, of all the votes for Vice President, so cast as aforesaid:

**FOR PRESIDENT**

Names of the Persons Voted For	Number of Votes
DONALD J. TRUMP of the State of Florida	16

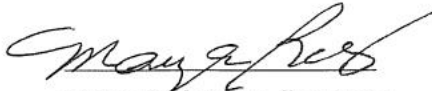
**FOR VICE PRESIDENT**

Names of the Persons Voted For	Number of Votes
MICHAEL R. PENCE of the State of Indiana	16

IN WITNESS WHEREOF, we, the undersigned, have hereunto, in the City of Lansing, in the State of Michigan, on this 14th day of December, 2020, subscribed our respective names.



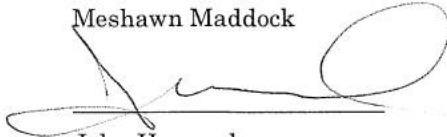
Kathy Borden, Chairperson



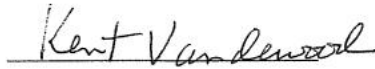
Mayra Rodriguez, Secretary



Meshawn Maddock



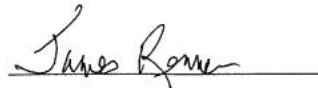
John Haggard



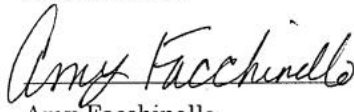
Kent Vanderwood



Marian Sheridan



James Renner



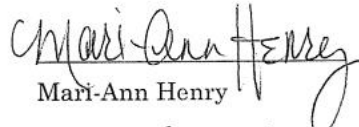
Amy Facchinello



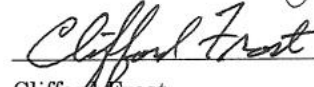
Rose Rook



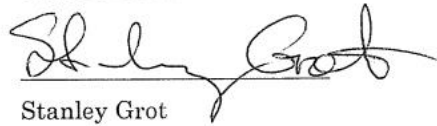
Hank Choate



Mari-Ann Henry



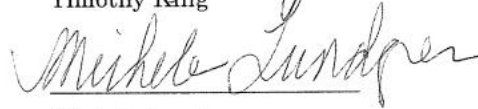
Clifford Frost



Stanley Grot



Timothy King



Michele Lundgren



Ken Thompson

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM MICHIGAN**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Elector

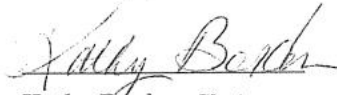
**TERRI LYNN LAND**

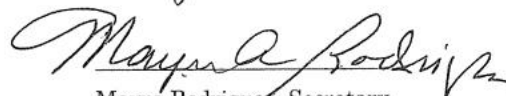
Thereupon, by nomination duly made and seconded,

**KEN THOMPSON**

Was elected by the Electors present, as an Elector of President and Vice President of the United States of America for the State of Michigan to fill the vacancy in the manner provided by law. This Elector participated in the proceedings as set forth in the record of the Electoral College.

IN WITNESS WHEREOF, the undersigned  
Chairperson and Secretary of the  
Electoral College of Michigan hereunto  
Subscribe their names this 14th day  
of December, 2020.

  
Kathy Berden, Chairperson

  
Mayra Rodriguez, Secretary

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM MICHIGAN**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Elector

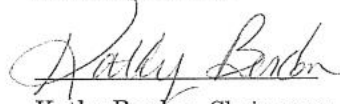
**GERALD WALL**

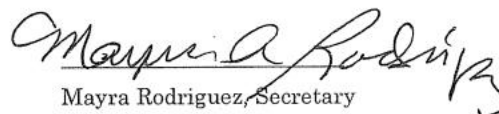
Thereupon, by nomination duly made and seconded,

**JAMES RENNER**

Was elected by the Electors present, as an Elector of President and Vice President of the  
United States of America for the State of Michigan to fill the vacancy in the manner  
provided by law. This Elector participated in the proceedings as set forth in the record of  
the Electoral College.

IN WITNESS WHEREOF, the undersigned  
Chairperson and Secretary of the  
Electoral College of Michigan hereunto  
Subscribe their names this 14th day  
of December, 2020.

  
Kathy Berden, Chairperson

  
Mayra Rodriguez, Secretary



## CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM MICHIGAN

\*\*\*\*\*

WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Michigan, do hereby certify the following:

- (A) That we convened and organized in the State Capitol, in the City of Lansing, Michigan, and at 2:00 p.m. Eastern Standard Time on the 14th day of December, 2020, performed the duties enjoined upon us;
- (B) That being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for President and then for Vice President, by distinct ballots; and
- (C) That the following are two distinct lists, one, of all the votes for President; and the other, of all the votes for Vice President, so cast as aforesaid:

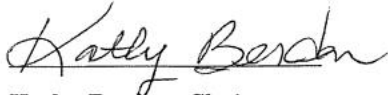
### FOR PRESIDENT

Names of the Persons Voted For	Number of Votes
DONALD J. TRUMP of the State of Florida	16


### FOR VICE PRESIDENT

Names of the Persons Voted For	Number of Votes
MICHAEL R. PENCE of the State of Indiana	16

IN WITNESS WHEREOF, we, the undersigned, have hereunto, in the City of Lansing, in the State of Michigan, on this 14th day of December, 2020, subscribed our respective names.



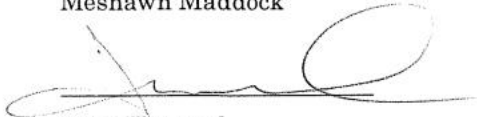
Kathy Berden, Chairperson



Mayra Rodriguez, Secretary



Meshawn Maddock



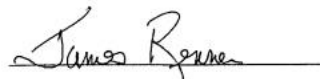
John Haggard



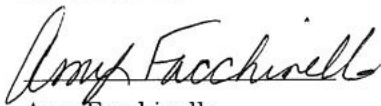
Kent Vanderwood



Marian Sheridan



James Renner



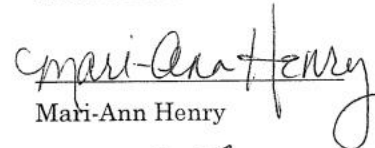
Amy Facchinello



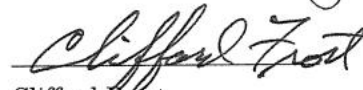
Rose Rook



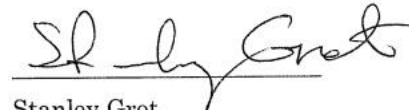
Hank Choate



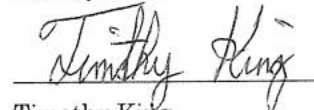
Mari-Ann Henry



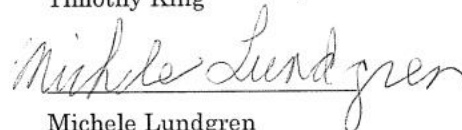
Clifford Frost




Stanley Grot



Timothy King



Michele Lundgren



Ken Thompson



**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM MICHIGAN**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Elector


**TERRI LYNN LAND**

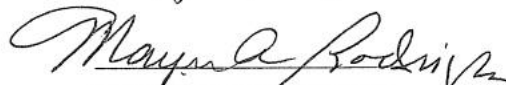
Thereupon, by nomination duly made and seconded,

**KEN THOMPSON**

Was elected by the Electors present, as an Elector of President and Vice President of the  
United States of America for the State of Michigan to fill the vacancy in the manner  
provided by law. This Elector participated in the proceedings as set forth in the record of  
the Electoral College.

IN WITNESS WHEREOF, the undersigned  
Chairperson and Secretary of the  
Electoral College of Michigan hereunto  
Subscribe their names this 14th day  
of December, 2020.

  
Kathy Berden, Chairperson

  
Mayra Rodriguez, Secretary

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM MICHIGAN**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Elector

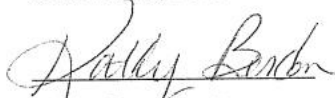
**GERALD WALL**

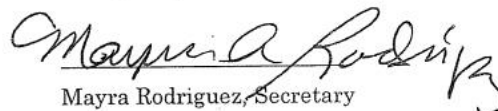
Thereupon, by nomination duly made and seconded,

**JAMES RENNER**

Was elected by the Electors present, as an Elector of President and Vice President of the  
United States of America for the State of Michigan to fill the vacancy in the manner  
provided by law. This Elector participated in the proceedings as set forth in the record of  
the Electoral College.

IN WITNESS WHEREOF, the undersigned  
Chairperson and Secretary of the  
Electoral College of Michigan hereunto  
Subscribe their names this 14th day  
of December, 2020.

  
Kathy Berden, Chairperson

  
Mayra Rodriguez, Secretary

## CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM NEW MEXICO

\*\*\*\*\*

WE, THE UNDERSIGNED, on the understanding that it might later be determined that we are the duly elected and qualified Electors for President and Vice President of the United States of America from the State of New Mexico, do hereby certify the following:

- (A) That we convened and organized at the State Capitol, in Santa Fe, New Mexico at 12:00 noon on the 14th day of December, 2020, to perform the duties enjoined upon us;
- (B) That being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for President and then for Vice President, by distinct ballots; and
- (C) That the following are two distinct lists, one, of all the votes for President; and the other, of all the votes for Vice President, so cast as aforesaid:

### FOR PRESIDENT


Names of the Persons Voted For	Number of Votes
DONALD J. TRUMP of the State of Florida	5

### FOR VICE PRESIDENT

Names of the Persons Voted For	Number of Votes
MICHAEL R. PENCE of the State of Indiana	5

IN WITNESS WHEREOF, we, the undersigned, have hereunto, at the Capitol, in Santa Fe, in the State of New Mexico, on this 14th day of December, 2020, subscribed our respective names.

  
JEWELL POWDRELL, Chairperson

  
DEBORAH W. MAESTAS, Secretary

  
LUPE GARCIA

  
ROSIE TRIPP

  
ANISSA FORD-TINNIN

---

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM NEW MEXICO**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Elector

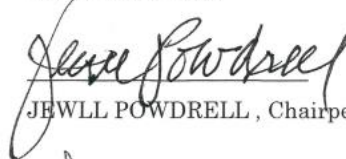
**HARVEY YATES**

Thereupon, by nomination duly made and seconded,

**ANISSA FORD-TINNIN**

Was elected by the Electors present, as an Elector of President and Vice President of the  
United States of America for the State of New Mexico to fill the vacancy in the manner  
provided by law. This Elector participated in the proceedings as set forth in the record of  
the Electoral College.

IN WITNESS WHEREOF, the undersigned  
Chairperson and Secretary of the  
Electoral College of New Mexico hereunto  
Subscribe their names this 14th day  
of December, 2020.



JEWELL POWDRELL, Chairperson



DEBORAH W. MAESTAS, Secretary

**CERTIFICATE OF THE VOTES OF THE  
2020 ELECTORS FROM NEVADA**

\*\*\*\*\*

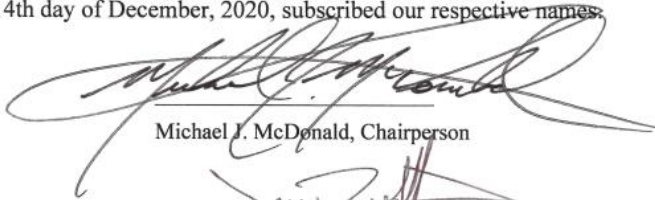
WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Nevada, do hereby certify the following:

- (A) That we convened and organized at the State Capitol, in Carson City, Nevada, at 12:00 noon on the 14th day of December, 2020, to perform the duties enjoined upon us;
- (B) That being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for President and then for Vice President, by distinct ballots; and
- (C) That the following is a list of all the votes for President, so cast as aforesaid:

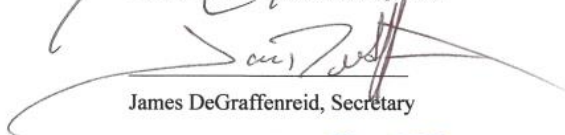
**FOR PRESIDENT**

Names of the Persons Voted For	Number of Votes
DONALD J. TRUMP of the State of Florida	6

IN WITNESS WHEREOF, we, the undersigned, have hereunto, at the Capitol, in Carson City, in the State of Nevada, on this 14th day of December, 2020, subscribed our respective names:



Michael J. McDonald, Chairperson



James DeGraffenreid, Secretary



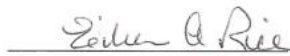
Durward James Hindle III



Jesse Law



Shawn Meehan



Eileen Rice

**CERTIFICATE OF THE VOTES OF THE  
2020 ELECTORS FROM NEVADA**

\*\*\*\*\*

WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Nevada, do hereby certify the following:

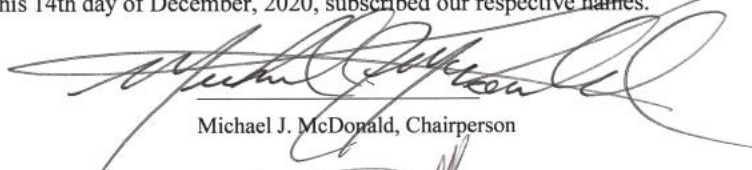
- (A) That we convened and organized at the State Capitol, in Carson City, Nevada, at 12:00 noon on the 14th day of December, 2020, to perform the duties enjoined upon us;
- (B) That being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for President and then for Vice President, by distinct ballots; and
- (C) That the following is a distinct list of all the votes for Vice President, so cast as aforesaid.

**FOR VICE PRESIDENT**

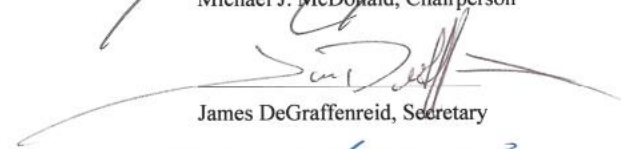
<u>Names of the Persons Voted For</u>	<u>Number of Votes</u>
MICHAEL R. PENCE of the State of Indiana	<b>6</b>



IN WITNESS WHEREOF, we, the undersigned, have hereunto, at the Capitol, in Carson City, in the State of Nevada, on this 14th day of December, 2020, subscribed our respective names.

A large, stylized black ink signature of Michael J. McDonald.

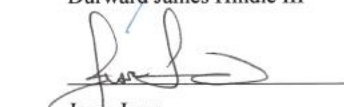
Michael J. McDonald, Chairperson

A black ink signature of James DeGraffenreid.

James DeGraffenreid, Secretary

A blue ink signature of Durward James Hindle III.

Durward James Hindle III

A black ink signature of Jesse Law.

Jesse Law

A black ink signature of Shawn Meehan.

Shawn Meehan

A black ink signature of Eileen A. Rice.

Eileen Rice

**CERTIFICATE OF THE VOTES OF THE  
2020 ELECTORS FROM PENNSYLVANIA**

\*\*\*\*\*

WE, THE UNDERSIGNED, on the understanding that if, as a result of a final non-appealable Court Order or other proceeding prescribed by law, we are ultimately recognized as being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Pennsylvania, hereby certify the following:

(A) That we assembled in the City of Harrisburg, Pennsylvania, the seat of government of this Commonwealth, at 12:00 noon on the 14th day of December, 2020, to perform the duties enjoined upon us;

(B) That being so assembled, we proceeded to vote by ballot, and balloted first for President and then for Vice President, by distinct ballots; and

(C) That the following are two distinct lists, one, of all the votes for President; and the other, of all the votes for Vice President, so cast as aforesaid:


**FOR PRESIDENT**

Names of the Persons Voted For	Number of Votes
DONALD J. TRUMP of the State of Florida	<b>20</b>

**FOR VICE PRESIDENT**

Names of the Persons Voted For	Number of Votes
MICHAEL R. PENCE of the State of Indiana	<b>20</b>

IN WITNESS WHEREOF, we, the undersigned, have hereunto, at the Capitol, in the City of Harrisburg, in the Commonwealth of Pennsylvania, on this 14th day of December, 2020, subscribed our respective names.

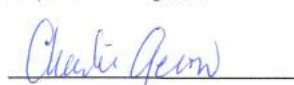
  
Bill Bachenberg, Chair

  
Tom Carroll

  
Chuck Coccodrilli

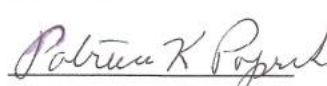
  
Sam DeMarco III

  
Christie DiEsposti


  
Charlie Gerow


  
Leah Hoopes

  
Andre McCoy


  
Pat Poprik


  
Suk Smith

  
Lou Barletta

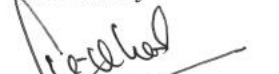
  
Ted Christian

  
Bernadette Comfort

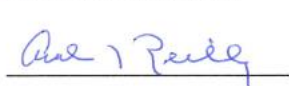
  
Marcela Diaz-Myers


  
Josephine Ferro

  
Kevin Harley

  
Ash Khare

  
Lisa Patton, Secretary

  
Andy Reilly

  
Calvin Tucker

December 14, 2020

**VIA FAX DELIVERY**

The Honorable Tom Wolf  
Governor, Commonwealth of Pennsylvania  
508 Main Capitol Building  
Harrisburg, PA 17120  
FAX: 717-772-8284

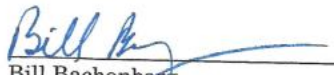
**RE: Notice of Filling of Electoral College Vacancies**

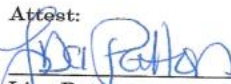
Dear Governor Wolf,

In accordance with 25 Pa. Stats. § 3193, I hereby give you notice of the following:

1. On December 14, 2020, 13 of the 20 electors pledged to Donald J. Trump for President and Michael R. Pence for Vice President assembled in accordance with 25 Pa. Stats. § 3192;
2. 7 electors, Robert Asher, Robert Gleason, Thomas Marino, Lance Stange, Lawrence Tabas, Christine Torretti, and Carolyn Welsh did not appear at the time appointed by law;
3. The Electors present proceeded to fill those vacancies, as authorized by 25 Pa. Stats. § 3193;
4. The Electors elected by unanimous voice vote, Tom Carroll, Christie DiEsposti, Charlie Gerow, Kevin Harley, Leah Hoopes, Andre McCoy, and Suk Smith.
5. As the presiding officer of the Pennsylvania Electoral College, I am immediately transmitting their names to you, and ask that you notify them in writing of their election as a Presidential Elector to fill the vacant Elector positions, and of their duty to perform, along with the other Electors, the duties required of them by the Constitution and laws of the United States.

This 14th day of December, 2020.

  
Bill Bachenberg  
Chairperson, 2020 Pennsylvania  
Electoral College Meeting

Attest:  
  
Lisa Patton  
Secretary, 2020 Pennsylvania  
Electoral College Meeting

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM PENNSYLVANIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Electors:

**Robert Asher**

Thereupon, by nomination duly made and seconded,

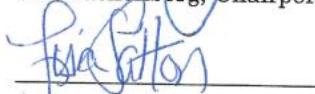
**Tom Carroll**

Was elected by the Electors present, as an Elector of President and Vice President  
of the United States of America for the Commonwealth of Pennsylvania to fill the  
vacancy in the manner provided by law. This Elector participated in the proceedings  
as set forth in the record of the Electoral College.

**IN WITNESS WHEREOF**, the undersigned  
Chairperson and Secretary of the  
Electoral College of Pennsylvania hereunto  
Subscribe their names this 14th day  
of December, 2020.



Bill Bachenberg, Chairperson



Lisa Patton, Secretary

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM PENNSYLVANIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Electors:

**Lawrence Tabas**

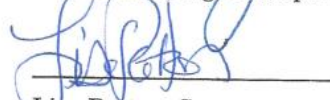
Thereupon, by nomination duly made and seconded,

**Leah Hoopes**

Was elected by the Electors present, as an Elector of President and Vice President  
of the United States of America for the Commonwealth of Pennsylvania to fill the  
vacancy in the manner provided by law. This Elector participated in the proceedings  
as set forth in the record of the Electoral College.

**IN WITNESS WHEREOF**, the undersigned  
Chairperson and Secretary of the  
Electoral College of Pennsylvania hereunto  
Subscribe their names this 14th day  
of December, 2020.

  
\_\_\_\_\_  
Bill Bachenberg, Chairperson

  
\_\_\_\_\_  
Lisa Patton, Secretary



**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM PENNSYLVANIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Electors:

**Thomas Marino**

Thereupon, by nomination duly made and seconded,

**Charlie Gerow**

Was elected by the Electors present, as an Elector of President and Vice President  
of the United States of America for the Commonwealth of Pennsylvania to fill the  
vacancy in the manner provided by law. This Elector participated in the proceedings  
as set forth in the record of the Electoral College.

**IN WITNESS WHEREOF**, the undersigned  
Chairperson and Secretary of the  
Electoral College of Pennsylvania hereunto  
Subscribe their names this 14th day  
of December, 2020.



Bill Bachenberg, Chairperson



Lisa Patton, Secretary

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM PENNSYLVANIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Electors:

**Lance Stange**

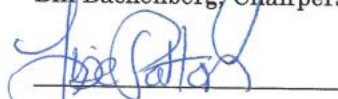
Thereupon, by nomination duly made and seconded,

**Kevin Harley**

Was elected by the Electors present, as an Elector of President and Vice President  
of the United States of America for the Commonwealth of Pennsylvania to fill the  
vacancy in the manner provided by law. This Elector participated in the proceedings  
as set forth in the record of the Electoral College.

**IN WITNESS WHEREOF**, the undersigned  
Chairperson and Secretary of the  
Electoral College of Pennsylvania hereunto  
Subscribe their names this 14th day  
of December, 2020.

  
\_\_\_\_\_  
Bill Bachenberg, Chairperson

  
\_\_\_\_\_  
Lisa Patton, Secretary



**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM PENNSYLVANIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Electors:

**Carolyn Welsh**


Thereupon, by nomination duly made and seconded,

**Suk Smith**

Was elected by the Electors present, as an Elector of President and Vice President  
of the United States of America for the Commonwealth of Pennsylvania to fill the  
vacancy in the manner provided by law. This Elector participated in the proceedings  
as set forth in the record of the Electoral College.

**IN WITNESS WHEREOF**, the undersigned  
Chairperson and Secretary of the  
Electoral College of Pennsylvania hereunto  
Subscribe their names this 14th day  
of December, 2020.

  
\_\_\_\_\_  
Bill Bachenberg, Chairperson

  
\_\_\_\_\_  
Lisa Patton, Secretary

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM PENNSYLVANIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Electors:

**Christine Toretta**


Thereupon, by nomination duly made and seconded,

**Andre McCoy**

Was elected by the Electors present, as an Elector of President and Vice President  
of the United States of America for the Commonwealth of Pennsylvania to fill the  
vacancy in the manner provided by law. This Elector participated in the proceedings  
as set forth in the record of the Electoral College.

**IN WITNESS WHEREOF**, the undersigned  
Chairperson and Secretary of the  
Electoral College of Pennsylvania hereunto  
Subscribe their names this 14th day  
of December, 2020.

  
\_\_\_\_\_  
Bill Bachenberg, Chairperson

  
\_\_\_\_\_  
Lisa Patton, Secretary

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM PENNSYLVANIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Electors:

**Robert Gleason**


Thereupon, by nomination duly made and seconded,

**Christie DiEsposti**

Was elected by the Electors present, as an Elector of President and Vice President  
of the United States of America for the Commonwealth of Pennsylvania to fill the  
vacancy in the manner provided by law. This Elector participated in the proceedings  
as set forth in the record of the Electoral College.

**IN WITNESS WHEREOF**, the undersigned  
Chairperson and Secretary of the  
Electoral College of Pennsylvania hereunto  
Subscribe their names this 14th day  
of December, 2020.

  
\_\_\_\_\_  
Bill Bachenberg, Chairperson

  
\_\_\_\_\_  
Lisa Patton, Secretary

[letterhead, Governor of Pennsylvania]

December 14, 2020

I, Tom Wolf, Governor of the Commonwealth of Pennsylvania, in accordance with 25 Pa. Stats. § 3193, hereby give notice of the following to Tom Carroll, Christie DiEsposti, Charlie Gerow, Kevin Harley, Leah Hoopes, Andre McCoy, and Suk Smith.

1. On December 14, 2020, 13 of the 20 electors pledged to Donald J. Trump for President and Michael R. Pence for Vice President assembled in accordance with 25 Pa. Stats. § 3192;

2. 7 electors, Robert Asher, Robert Gleason, Thomas Marino, Lance Stange, Lawrence Tabas, Christine Torretti, and Carolyn Welsh did not appear at the time appointed by law;

3. The Electors present then proceeded to fill the vacancies;

4. The Electors elected by unanimous voice vote, Tom Carroll, Christie DiEsposti, Charlie Gerow, Kevin Harley, Leah Hoopes, Andre McCoy, and Suk Smith, persons of the same political party as the absent Electors;

5. Immediately following that vote of the Electors, Bill Bachenberg, the presiding officer of the Electors, transmitted the names of the substitute Electors to me;

6. By this Certificate, I am hereby notifying Tom Carroll, Christie DiEsposti, Charlie Gerow, Kevin Harley, Leah Hoopes, Andre McCoy, and Suk Smith of their election to fill the vacant Elector positions.

Witness my hand and seal of  
of my office this 14th day of  
December, 2020.

---

Tom Wolf, Governor

MEMORANDUM

TO: Archivist of the United States (By Registered Mail)  
700 Pennsylvania Avenue, NW  
Washington, DC 20408

FROM: Bill Bachenberg, Chairperson, Electoral College of Pennsylvania

DATE: December 14, 2020

RE: Pennsylvania's Electoral Votes for President and Vice President

Pursuant to 3 U.S.C. § 11, enclosed please find duplicate originals of Pennsylvania's electoral votes for President and Vice President, as follows: two (2) duplicate originals for the President of the Senate and the Archivist, and one (1) duplicate original for the Secretary of State and Chief Judge.

*Bill Bachenberg*

NARA-21-0174-A-000041

AMERICAN  
OVERSIGHT

Wisconsin



**MEMORANDUM**

TO: President of the Senate (By Registered Mail)  
United States Senate  
Washington, D.C. 20510

Archivist of the United States (By Registered Mail)  
700 Pennsylvania Avenue, NW  
Washington, DC 20408

Secretary of State (By Certified Mail)  
State of Wisconsin  
P.O. Box 7848  
Madison, WI 53707

Chief Judge, U.S. District Court (By Certified Mail)  
Western District of Wisconsin  
120 N. Henry Street  
Madison, WI 53703

FROM: Andrew Hitt, Chairperson, Electoral College of Wisconsin

DATE: December 14, 2020

RE: Wisconsin's Electoral Votes for President and Vice President

Pursuant to 3 U.S.C. § 11, enclosed please find duplicate originals of Wisconsin's electoral votes for President and Vice President, as follows: two (2) duplicate originals for the President of the Senate and the Archivist, and one (1) duplicate original for the Secretary of State and Chief Judge.

A handwritten signature in black ink, appearing to read "Andrew Hitt", is written over a horizontal line.

AMERICAN  
OVERSIGHT

NARA-21-0174-A-000042



## CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM WISCONSIN

\*\*\*\*\*

WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Wisconsin, do hereby certify the following:

- (A) That we convened and organized at the State Capitol, in the City of Madison, Wisconsin, at 12:00 noon on the 14th day of December, 2020, to perform the duties enjoined upon us;
- (B) That being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for President and then for Vice President, by distinct ballots; and
- (C) That the following are two distinct lists, one, of all the votes for President; and the other, of all the votes for Vice President, so cast as aforesaid:

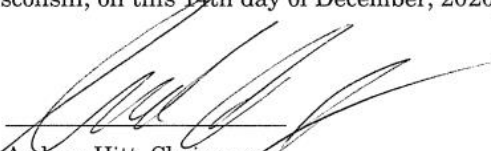


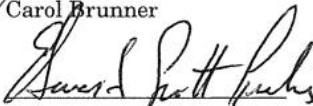
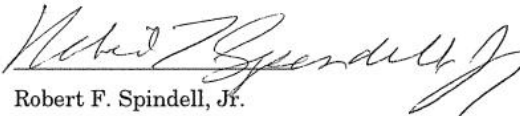


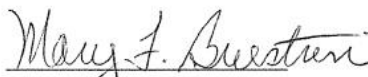
### FOR PRESIDENT

Names of the Persons Voted For	Number of Votes
DONALD J. TRUMP of the State of Florida	10

### FOR VICE PRESIDENT

Names of the Persons Voted For	Number of Votes
MICHAEL R. PENCE of the State of Indiana	10

IN WITNESS WHEREOF, we, the undersigned, have hereunto, at the Capitol, in the City of Madison, in the State of Wisconsin, on this 14th day of December, 2020, subscribed our respective names.

  
\_\_\_\_\_  
Andrew Hitt, Chairperson  
\_\_\_\_\_  
Kelly Ruh, Secretary  
\_\_\_\_\_  
Carol Brunner  
\_\_\_\_\_  
Edward Scott Grabins  
\_\_\_\_\_  
Bill Feehan  
\_\_\_\_\_  
Robert F. Spindell, Jr.  
\_\_\_\_\_  
Kathy Kiernan  
\_\_\_\_\_  
Darryl Carlson  
\_\_\_\_\_  
Pam Travis  
\_\_\_\_\_  
Mary Buestrin



**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM WISCONSIN**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Elector

**Tom Schreiber**

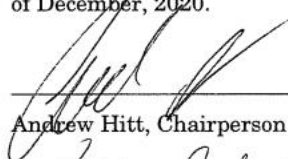
Representing the Fifth Congressional District of Wisconsin

Thereupon, by nomination duly made and seconded,

**Kathy Kiernen**

Was elected by the Electors present, as an Elector of President and Vice President of the United States of America for the State of Wisconsin to fill the vacancy in the manner provided by law. This Elector participated in the proceedings as set forth in the record of the Electoral College.

**IN WITNESS WHEREOF**, the undersigned  
Chairperson and Secretary of the  
Electoral College of Wisconsin hereunto  
Subscribe their names this 14th day  
of December, 2020.

  
\_\_\_\_\_  
Andrew Hitt, Chairperson  
\_\_\_\_\_  
Kelly Ruh, Secretary

## APPENDIX B: JEFFREY CLARK’S POTENTIAL EXPOSURE UNDER 18 U.S.C. §§ 371 AND 1512

While we have in this report focused on the false electors scheme, the publicly available evidence also suggests that Trump and Jeffrey Clark may have agreed, tacitly or explicitly, to work in concert toward the common goal of coercing DOJ officials and coopting DOJ’s law enforcement powers to overturn the 2020 presidential election. As we explained in the Introduction, it may be prudent for the Special Counsel to defer a charging decision related to this alleged scheme at this time. Nevertheless, we include this analysis as a pros memo would typically do with respect to an important additional matter.

On September 3, 2020, Trump appointed Clark as acting Assistant Attorney General for the Civil Division of the Department of Justice.<sup>1248</sup> DOJ policy forbids all Assistant Attorneys General from initiating or participating in initial communications with the White House about “pending or contemplated” investigations,<sup>1249</sup> which must be routed through the Attorney General, Deputy Attorney General, Associate Attorney General, or Solicitor General.<sup>1250</sup> Nevertheless, according to then-Acting Attorney General Jeffrey Rosen’s testimony, Clark violated policy and met directly with Trump—without Rosen’s approval or knowledge—on December 23 or 24, 2020, with the apparent purpose of discussing enforcement actions and investigations surrounding the election.<sup>1251</sup> In a call on December 27, Trump told Rosen and then-Acting Deputy Attorney General Richard Donoghue that he had received advice to “put him [Clark] in” a leadership position at DOJ.<sup>1252</sup> Trump apparently referenced replacing DOJ leadership with Clark in the context of demanding that Rosen and Donoghue “just say the election was corrupt and leave the rest to me and the Congressmen,” and in the context of Rosen’s telling him that DOJ “can’t and won’t just flip a switch and change the election.”<sup>1253</sup> In other words: Trump sought to install Clark as acting Attorney General precisely so that Clark would effectuate their common goal of overturning the election.

A few days later, on December 28, 2020, Clark emailed Rosen and Donoghue with “Two Urgent Action Items.” The first was a request for a national security briefing, citing “evidence” from “hackers” that a “Dominion [voting] machine accessed the Internet through a smart thermostat with a net connecting trail leading back to China.”<sup>1254</sup> The second “action item” was Clark’s brazen proposal to have “DOJ send letters to the elected leadership of Georgia and other contested states, urging them to convene special legislative sessions in order to appoint a different slate of electors than those popularly chosen in the 2020 election.”<sup>1255</sup> In a “Proof of Concept”

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<sup>1248</sup> U.S. Dep’t of Just., Jeffrey Bossert Clark (accessed July 10, 2023), <https://www.justice.gov/enrd/jeffrey-bossert-clark>.

<sup>1249</sup> Senate Report at 9-10 (citing Memorandum from Attorney General Eric Holder for Heads of Department Components, All United States Attorneys, at 1 (May 11, 2009)).

<sup>1250</sup> Senate Report at 9 (citing Memorandum from White House Counsel Donald F. McGahn II to All White House Staff at 1 (Jan. 27, 2017)).

<sup>1251</sup> Senate Report at 14, 19-20.

<sup>1252</sup> Senate Report at 16.

<sup>1253</sup> *Id.*

<sup>1254</sup> *Id.* at 20.

<sup>1255</sup> *Id.* at 21.

letter that Clark drafted for his superiors, this unprecedented politicization of DOJ was said to be justified by unspecified “irregularities” that raised “significant concerns” about the 2020 election.<sup>1256</sup>

Donoghue and Rosen quickly shut down Clark’s initiative. First, Donoghue sent an email that debunked Clark’s claims of irregularities and concerns: “I know of nothing that would support the statement ‘we have identified significant concerns that may have impacted the outcome of election in multiple states.’”<sup>1257</sup> Then Donoghue and Rosen met with Clark, who called on Rosen “to hold a press conference where he announced that ‘there was corruption.’”<sup>1258</sup> Donoghue and Rosen rejected both the press conference and the letters, and Clark alluded again to his meeting with Trump.<sup>1259</sup>

The pressure on DOJ continued, now coming from directly inside the White House. On December 29, Trump’s Oval Office coordinator sent DOJ leadership a draft complaint, copying Meadows, at Trump’s explicit direction.<sup>1260</sup> As the Office of the Solicitor General observed, the meritless brief—a contemplated lawsuit to be filed directly in the Supreme Court, challenging the elections in six swing states—lacked a cause of action or any evident jurisdictional hook.<sup>1261</sup> But Trump, directly and through a personal lawyer, Kurt Olson, repeatedly pressured DOJ leadership to file the meritless brief.<sup>1262</sup>

On December 31, as Donoghue recalls it, Trump summoned Rosen and Donoghue to a “contentious” Oval Office meeting where, according to Rosen, Trump “seemed unhappy” that they had not “found the fraud.” Trump also warned that “Rosen and Donoghue weren’t doing their jobs and that people were telling him he should fire both of them and install Clark instead.”<sup>1263</sup> After the meeting, Rosen spoke to Clark, who “revealed that he had in fact spoken to Trump again,” and that Trump had asked if Clark was “willing to take over as Acting Attorney General.”<sup>1264</sup> In an apparent attempt to debunk Clark’s claims of fraud, Rosen agreed to facilitate Clark’s request for a briefing from the Director of National Intelligence on election fraud. Rosen also urged Clark to speak with BJay Pak, the U.S. Attorney for the Northern District of Georgia, who could reassure Clark that there was no truth to allegations of election fraud in Atlanta.<sup>1265</sup> But while Clark attended the intelligence briefing, which confirmed no evidence of ballot fraud, he continued to spout claims of fraud.<sup>1266</sup> And he also apparently never contacted Pak.<sup>1267</sup>

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<sup>1256</sup> *Id.* at 21-22.

<sup>1257</sup> *Id.* at 21.

<sup>1258</sup> *Id.* at 23.

<sup>1259</sup> *Id.*

<sup>1260</sup> *Id.* at 24.

<sup>1261</sup> *Id.* at 24, 26.

<sup>1262</sup> *Id.* at 26-27.

<sup>1263</sup> *Id.* at 27-28.

<sup>1264</sup> *Id.*

<sup>1265</sup> *Id.* at 29.

<sup>1266</sup> *Id.* at 33-34.

<sup>1267</sup> *Id.* at 34.

On January 2, Rosen and Donoghue again met with Clark. Again, Clark told them that he was considering accepting Trump’s offer to replace Rosen—but that he would not accept if Rosen were willing to send Clark’s letter to the Georgia state legislature.<sup>1268</sup> Rosen declined once more to send the letter.<sup>1269</sup> The next day, January 3, Clark called for a meeting with Rosen, informing Rosen that he would be replacing him as Acting Attorney General, effective that same day,<sup>1270</sup> thus suggesting that Clark and Trump—directly, or through an intermediary—were in communication about the election aftermath and the DOJ.

That night, there was a two to three-hour meeting in the Oval Office which included Trump, Clark, Rosen, Donoghue, Engel, and White House lawyers: “According to Rosen, Trump opened the meeting by saying, ‘One thing we know is you, Rosen, aren’t going to do anything to overturn the election.’”<sup>1271</sup> The purpose of installing Clark was thus to empower him to send his letter to state legislatures. As Judge Carter summed it up: “President Trump attempted to elevate Jeffrey Clark to Acting Attorney General, based on Mr. Clark’s statements that he would write a letter to contested states saying that the election may have been stolen and urging them to decertify electors.”<sup>1272</sup> But eventually Trump backed down in the face of threats of widespread DOJ resignations.<sup>1273</sup>

All this is suggestive of a possible agreement between Trump and Clark—and perhaps others—that implicates 18 U.S.C. § 371 (and for trying to create a false government record, 18 U.S.C. § 1001). The goal of such agreement, as Trump himself put it, appears to have been to use DOJ to “overturn” Joe Biden’s victory thereby defrauding the United States. Direct evidence from Rosen and Donoghue shows multiple clandestine and unsanctioned meetings between Trump and Clark. Clark’s own admissions, relayed by Rosen and Donoghue, show that Trump and Clark planned—seemingly together—to use the DOJ’s credibility and power to reverse the election. Their planned means included cloaking unsubstantiated claims of election “irregularities” in the DOJ’s authority, sending letters urging state legislatures to undemocratically arrogate to themselves the power to overrule the people’s vote, and filing frivolous litigation.

18 U.S.C. § 1512 may also come in play, because Trump apparently referenced replacing DOJ leadership with Clark in the context of demanding that Rosen and Donoghue “just say the election was corrupt and leave the rest to me and the Congressmen.” This reference to Act Two of the scheme we have outlined in this report may bring Clark within the main body of the case we have analyzed, depending on his knowledge and actions. We do not have sufficient information to ascertain whether the Special Counsel will consider Clark for charges on the false electors theory of the case under 18 U.S.C. §§ 371 or 1512, but the Special Counsel may. As discussed in Section

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<sup>1268</sup> *Id.* at 33-34.

<sup>1269</sup> *Id.* at 34.

<sup>1270</sup> *Id.* at 35.

<sup>1271</sup> *Id.* at 38.

<sup>1272</sup> *Eastman v. Thompson*, Order Re Privilege of Docs at 5.

<sup>1273</sup> Senate Report at 38.

I.A.2, Clark denies wrongdoing, stating that he has not “harbored any scienter to act in a dishonest fashion for self gain or to achieve an illicit objective for former President Trump.”<sup>1274</sup>

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<sup>1274</sup> Tierney Sneed & Katelyn Polantz, Jeffrey Clark told DC Bar that DOJ search of his home linked to false statements, conspiracy, obstruction investigation, CNN (Sept. 14, 2022), <https://www.cnn.com/2022/09/14/politics/jeffrey-clark-doj-false-statements-conspiracy-obstruction-investigation/index.html>.

## **APPENDIX C: POTENTIAL OBSTRUCTION OF EFFORTS TO INVESTIGATE THE JANUARY 6 ATTACK BY SECRET SERVICE PERSONNEL<sup>1275</sup>**

Over the course of the Select Committee’s eleven public hearings, evidence began to emerge of a potential effort on the part of Secret Service personnel to conceal evidence that would shed further light on the events of January 6 and the days leading up to it—evidence that would potentially corroborate critical witness testimony about those events, such as that of Cassidy Hutchinson.

On July 13, 2022, in a letter addressed to the House and Senate Homeland Security committees, Department of Homeland Security Inspector General Joseph Cuffari revealed that, at some point after the Office of the Inspector General (OIG) requested electronic communications records from the Secret Service pursuant to its review of the January 6 attack, “many U.S. Secret Service (USS) text messages, from January 5 and 6, 2021 were erased as part of a device-replacement program.”<sup>1276</sup> Additionally, Cuffari wrote, “DHS personnel have repeatedly told OIG inspectors that they were not permitted to provide records directly to OIG and that such records had to first undergo review by DHS attorneys,” preventing his office from securing the records in a timely manner, with delays lasting multiple weeks, and casting doubt as to whether DHS has turned over all responsive electronic communications.

In a statement responding to the publication of the letter one day later, the Chief of Communications for the Secret Service, Anthony Guglielmi, denied any wrongdoing on the part of the Secret Service. He asserted that the agency did not “maliciously” delete text messages, and that it “has been fully cooperating with the OIG in every respect.” According to Guglielmi’s statement, “in January 2021, before any inspection was opened by OIG on this subject, the Secret Service began to reset its mobile phones to factory settings as part of a pre-planned, three-month system migration. In that process, data resident on some phones was lost.” He continued to refute any implication of nefarious intent by explaining that “DHS OIG requested electronic communications for the first time on Feb. 26, 2021, after the migration was well under way. The Secret Service notified DHS OIG of the loss of certain phones’ data, but confirmed to OIG that none of the texts it was seeking had been lost in the migration.”<sup>1277</sup>

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<sup>1275</sup> This subsection is adapted, and includes language directly from, a previously published editorial written by one of the authors (Eisen). See Norman Eisen, Frederick Baron & Dennis Aftergut, How did the Secret Service lose its Jan. 6 texts? So far, the explanations won’t wash, SALON (July 20, 2022), <https://www.salon.com/2022/07/20/how-did-the-secret-lose-its-jan-6-texts-so-far-the-explanations-wont-wash/>.

<sup>1276</sup> Letter from Inspector General Joseph V. Cuffari to Chairman Gary C. Peters & Ranking Member Rob Portman, S. Comm. on Homeland Security & Gov’t Affairs, & Chairman Bennie G. Thompson & Ranking Member John Katko, H. Comm. on Homeland Security (July 13, 2022), <https://www.cnn.com/interactive/uploads/20220714-letter-to-house-select-committee.jpg>.

<sup>1277</sup> Jamie Gangel, Zachary Cohen & Ryan Nobles, Secret Service erased text messages from January 5 and 6, 2021 – after oversight officials asked for them, watchdog says, CNN (July 15, 2022), <https://www.cnn.com/2022/07/14/politics/secret-service-text-messages-erased/index.html>; Statement of Anthony Guglielmi, Chief of Communications for the United States Secret Service on Accusations of Deleted Text Messages From DHS Inspector General (July 14, 2022), <https://www.secretservice.gov/newsroom/releases/2022/07/statement-anthony-guglielmi-chief-communications-united-states-secret>.

Then, after receiving a briefing on the matter from Cuffari, on July 15, 2022, the Select Committee subpoenaed the texts and related records.<sup>1278</sup> According to Rep. Zoe Lofgren, the Secret Service said “they, in fact, had pertinent texts.” But on July 19, the day the texts were demanded to be produced by, Assistant Director of the Secret Service Ronald Rowe announced in the letter to the Committee’s subpoena that the Secret Service had no further texts to turn over to the Committee, apparently contradicting the statement that “none of the texts . . . had been lost.”<sup>1279</sup> Instead, the Secret Service produced for the Committee 10,569 pages of other records.<sup>1280</sup>

Rowe’s letter to the Select Committee also revealed further information on OIG’s efforts to investigate the text deletion. On June 11, 2021, according to the letter, OIG had requested a month’s worth of texts from 24 people with the Secret Service, reportedly including former President Trump’s head Secret Service officer, Robert Engel, as well as former Vice President Pence’s, Tim Giebels.<sup>1281</sup> Rowe stated that the Secret Service had only been able to produce for the OIG one such text message, a “conversation from former U.S. Capitol Police Chief Steven Sund to former Secret Service Uniformed Division Chief Thomas Sullivan requesting assistance on January 6.”<sup>1282</sup> The Secret Service likewise produced that text message in response to the Committee’s subpoena.

Rowe’s letter offered a number of defenses of the Secret Service’s incomplete responses to OIG’s and the Committee’s inquiries. As for why the records had not been backed up prior to the migration—which, in the first instance, should have been suspended due to the tremendous importance of maintaining evidence related to the January 6 attack—Rowe explained that each employee, not the agency, was responsible for preserving their own records and had been provided with instructions on how to do so prior to the migration.<sup>1283</sup> As for whether any of those deleted

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<sup>1278</sup> Nicholas Wu & Kyle Cheney, Jan. 6 committee subpoenas Secret Service amid text message controversy, *POLITICO* (July 15, 2022), <https://www.politico.com/news/2022/07/15/jan-6-committee-subpoenas-secret-service-amid-text-message-controversy-00046199>; Zolan Kanno-Youngs & Maggie Haberman, Secret Service Says Some Missing Jan. 6 Texts Are Unlikely To Be Recovered, *THE NEW YORK TIMES* (July 19, 2022), <https://www.nytimes.com/2022/07/19/us/politics/secret-service-texts-jan-6.html>.

<sup>1279</sup> Carol D. Leonnig & Maria Sacchetti, Secret Service cannot recover texts; no new details for Jan. 6 committee, *THE WASHINGTON POST* (July 19, 2022), <https://www.washingtonpost.com/nation/2022/07/19/secret-service-texts/>; Letter from Ronald L. Rowe, Jr., to the Hon. Bennie G. Thompson at 2 (July 19, 2022), <https://www.documentcloud.org/documents/22090294-us-secret-service-response-to-house-january-6-committee-subpoena> (U.S. Secret Service response to Select Comm. subpoena); CBS News Staff, Jan. 6 committee subpoenas Secret Service, seeking texts from Jan. 5-6, *CBS NEWS* (July 15, 2022), <https://www.cbsnews.com/news/jan-6-committee-subpoenas-secret-service-seeking-texts-from-january-5-6/>.

<sup>1280</sup> Letter from Ronald L. Rowe, Jr., to the Hon. Bennie G. Thompson (July 19, 2022), <https://www.documentcloud.org/documents/22090294-us-secret-service-response-to-house-january-6-committee-subpoena> (U.S. Secret Service response to Select Comm. subpoena).

<sup>1281</sup> *Id.*; Jamie Gangel, Secret Service provided a single text exchange to IG after request for many records, *CNN* (July 20, 2022), <https://www.cnn.com/2022/07/19/politics/secret-service-text-messages-january-6-inspector-general/index.html>; Whitney Wild & Jeremy Herb, First on CNN: Secret Service identified potential missing text messages on phones of 10 individuals, *CNN* (July 23, 2022), <https://www.cnn.com/2022/07/22/politics/secret-service-investigators-text-messages/index.html>.

<sup>1282</sup> Letter from Ronald L. Rowe, Jr., to the Hon. Bennie G. Thompson (July 19, 2022), <https://www.documentcloud.org/documents/22090294-us-secret-service-response-to-house-january-6-committee-subpoena> (U.S. Secret Service response to Select Comm. subpoena).

<sup>1283</sup> Gangel, *supra* note 1281.

text messages could be recovered, while stating that the agency had no further text messages to turn over at the time, he asserted that it was investigating “whether any relevant text messages sent or received by the 24 identified individuals were lost due to the ... migration and, if so, whether such texts are recoverable.”<sup>1284</sup>

On July 20, however, the Secret Service paused its investigation upon receiving notice from OIG that a criminal investigation into the matter had been opened and that the agency must stop all internal probing.<sup>1285</sup> The criminal investigation appears to be ongoing.

Because deletions of January 5 and 6, 2021 texts apparently occurred after requests by Inspector General Cuffari, the Secret Service has some explaining to do for its failure to create adequate backup.<sup>1286</sup> If the DOJ finds intentional deletion at the Secret Service after an IG information request, that raises obvious obstruction of justice concerns. Destroying evidence with the intent to influence or obstruct a federal investigation is a federal offense. Other potential offenses are cited by Citizens for Responsibility and Ethics in a July 18, 2022 complaint letter to the attorney general and FBI regarding the text deletions.<sup>1287</sup>

The unusually close relationship between some Secret Service personnel and Trump raises the question of whether the Secret Service deviated from standard procedures under pressure from or the influence of Trump loyalists within the group. For example, Anthony Ornato was the Service's deputy assistant director who headed Trump's security detail until Trump made him White House deputy chief of staff for operations in December 2019. Following Hutchinson's June 2022 testimony, other former Trump administration aides have alleged that Ornato has a history of changing his story to protect Trump.<sup>1288</sup>

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<sup>1284</sup> Letter from United States Secret Service to The Hon. Bennie Thompson (July 19, 2022), <https://s3.documentcloud.org/documents/22090294/us-secret-service-response-to-house-january-6-committee-subpoena.pdf>.

<sup>1285</sup> Pete Williams & Julia Ainsley, DHS watchdog has launched criminal probe into destruction of Jan. 6 Secret Service text messages, sources say, NBC NEWS (July 21, 2022), <https://www.nbcnews.com/politics/dhs-launched-criminal-probe-destruction-jan-6-secret-service-text-mess-rcna39392>.

<sup>1286</sup> This direct portion of the appendix can also be found in Eisen, Baron & Aftergut, *supra* note 1275.

<sup>1287</sup> Letter from CREW to Attorney General Merrick Garland & F.B.I. Director Christopher Wray Re: Request for Investigation of the Secret Service for Violating Federal Law by Destroying Records (July 18, 2022), <https://www.citizensforethics.org/wp-content/uploads/2022/07/2022-7-18-Secret-Service-Destruction-of-Records.pdf>.

<sup>1288</sup> Aaron Blake, Anthony Ornato has repeatedly disputed key White House conversations, The Washington Post (June 30, 2022), <https://www.washingtonpost.com/politics/2022/06/30/anthony-ornato-dispute-conversations/>.