

In the Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, ET AL.,

Respondents.

On Writ of Certiorari to the Colorado Supreme Court

JOINT APPENDIX VOL. I OF IV (JA1-JA554)

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Petition for Writ of Certiorari Filed: Jan. 3, 2024

Certiorari Granted: Jan. 5, 2024

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JA1
**RELEVANT DOCKET ENTREES FROM THE
DISTRICT COURT FOR THE CITY AND COUNTY
OF DENVER, STATE OF COLORADO**
Norma Anderson et al. v. Jena Griswold et al.
Case No. 2023CV32577

Date Filed	Docket Description
9/6/2023	Verified Petition Under C.R.S. 1-4-1204, 1-1-113, 13-51-105, and C.R.C.P. 57(a)
9/6/2023	District court Civil Cover Sheet
9/6/2023	Motion for an Expedited Case Management Conference
9/7/2023	Notice of Removal to United States District Court for the District of Colorado w/attached
9/7/2023	Copy of Notice of Removal (US District Court-District of Colorado) (Exhibit A to Notice of Removal to United States District Court for the District of Colorado)
9/12/2023	Order from US District Court remanding case back to Denver District Court
9/13/2023	Order re Notice to Set

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9/14/2023	Colorado Republican State Central Committees Motion to Intervene
9/14/2023	Colorado Republican State Central Committees Verified Petition in Intervention Seeking Declaratory and Injunctive Relief Pursuant to C.R.C.P. Rules of Civil Procedure 24 and 57
9/14/2023	Order Re Colorado Republican State Central Committees Motion to Intervene
9/15/2023	Notice of Status Conference Monday, September 18, 2023 @ 10:00am
9/17/2023	Secretary of States Notice of Partial Consent to the Colorado Republican Central Committees Motion to Intervene
9/18/2023	Order: Colorado Republican State Central Committees Motion to Intervene-Granted
9/21/2023	Notice of Status Conference Friday, September 22, 2023 @ 9:00am
9/22/2023	Minute Order – Print
9/22/2023	Donald J. Trumps Special Motion to Dismiss Pursuant To C.R.S. 3-20-1101(3)(a)

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9/22/2023	Respondent Donald J. Trumps Motion to Dismiss
9/22/2023	Exhibit A – Major Party Candidate Statement
9/22/2023	Exhibit B – Motion to Remand
9/22/2023	Motion to Dismiss Intervenor’s Count 1 under Rule 12(b)(1)
9/29/2023	Exhibit to Petitioners’ Opposition to Respondent Trump’s Special Anti-SLAPP Motion to Dismiss – Exhibit sent to Record Dept 10/3/2023
9/29/2023	Colorado Republican State Central Committees Motion for Judgment on the Pleadings Under Rule 12 Judgment as a Matter of Law Under Rule 56
9/29/2023	Colorado Republican State Central Committees Response to Petitioners Motion to Dismiss Intervenor’s First Claim Under 12(b)(1)
9/29/2023	Petitioners’ Response to Intervenor’s Motion to Dismiss
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9/29/2023	Index and Exhibits 1-2 to Petitioners' Response to Respondent Trump's Special Anti-SLAPP Motion to Dismiss(suppressed per court order dated 10/4/2023)
9/29/2023	Exhibit 3 to Petitioners' Response to Respondent Trump's Special Anti-SLAPP Motion to Dismiss(suppressed per court order dated 10/4/2023)
9/29/2023	Exhibits 4-25 to Petitioners' Response to Respondent Trump's Special Anti-SLAPP Motion to Dismiss(suppressed per court order dated 10/4/2023)
9/29/2023	Exhibits 26-47 to Petitioners' Response to Respondent Trump's Special Anti-SLAPP Motion to Dismiss(suppressed per court order dated 10/4/2023)
9/29/2023	Exhibits 48-53 to Petitioners' Response to Respondent Trump's Special Anti-SLAPP Motion to Dismiss(suppressed per court order dated 10/4/2023)
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9/29/2023	Exhibit 54 part 2 to Petitioners' Response to Respondent Trump's Special Anti-SLAPP Motion to Dismiss(suppressed per court order dated 10/4/2023)
9/29/2023	Exhibit 54 part 3 to Petitioners' Response to Respondent Trump's Special Anti-SLAPP Motion to Dismiss(suppressed per court order dated 10/4/2023)
9/29/2023	Exhibit 55-56 to Petitioners' Response to Respondent Trump's Special Anti-SLAPP Motion to Dismiss(suppressed per court order dated 10/4/2023)
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9/29/2023	Exhibit 63-72 to Petitioners' Response to Respondent Trump's Special Anti-SLAPP Motion to Dismiss(suppressed per court order dated 10/4/2023)
9/29/2023	Respondent Donald J. Trumps Motion to Dismiss (w/attach)

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9/29/2023	Exhibit A to Respondent Donald J. Trumps Motion to Dismiss (w/attach)
9/29/2023	Exhibit B to Respondent Donald J. Trumps Motion to Dismiss (w/attach)
9/29/2023	Exhibit C to Respondent Donald J. Trumps Motion to Dismiss (w/attach)
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10/4/2023	President Trumps Response to Courts Order
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10/6/2023	Colorado Republican State Central Committees Reply Brief to the Petitioners Response to the Committees Motion to Dismiss
10/6/2023	Colorado Republican State Central Committees Reply Brief to the Secretary of State Response
10/6/2023	Petitioners Opposition to Intervenor Trumps Third Motion to Dismiss (w/attach)(Suppressed pursuant to court order dated 10/4/2023)
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10/6/2023	Respondent Donald J Trumps Reply in Support of Motion to Dismiss (w/attach)
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10/13/2023	Motion to Realign the Secretary of State as a Petitioner (w/attach)
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10/13/2023	Exhibit B to Motion to Realign the Secretary of State as a Petitioner – Article
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10/16/2023	Colorado Republican State Central Committees Rule 702 Motion to Exclude the Testimony of Professor Gerard N Magliocca (Sealed pursuant to court order dated 10/17/23)
10/16/2023	Respondent Donald J. Trump’s Reply in Support of Motion to Dismiss w/attach (Suppressed pursuant to court order dated 10/4/23)
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10/17/2023	Supplement to Donald J. Trump's Motion to Realign the Secretary of State as a Petitioner (w/attach)
10/17/2023	Exhibit A to Supplement to Donald J. Trump's Motion to Realign the Secretary of State as a Petitioner – Email
10/17/2023	Respondent and Intervenor Donald J. Trump's Motion in Limine to Exclude Petitioners' Anticipated Exhibits (w/attach)(suppressed pursuant to protective order 10/4/23)
10/17/2023	Attachment to Respondent and Intervenor Donald J. Trump's Motion in Limine to Exclude Petitioners' Anticipated Exhibits – Declaration of Congressman Troy Nehls (suppressed pursuant to protective order 10/4/23)
10/17/2023	Exhibit A – H to Respondent and Intervenor Donald J. Trump's Motion in Limine to Exclude Petitioners'

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- | | |
|------------|--|
| 10/17/2023 | Exhibit I – P to Respondent and Intervenor Donald J. Trump’s Motion in Limine to Exclude Petitioners’ Anticipated Exhibits (suppressed pursuant to protective order 10/4/23) |
| 10/17/2023 | Exhibit Q – Y to Respondent and Intervenor Donald J. Trump’s Motion in Limine to Exclude Petitioners’ Anticipated Exhibits (suppressed pursuant to protective order 10/4/23) |
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10/24/2023 (Courtesy Copy) Petitioners Opposition
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to Respondent Trumps Anti-SLAPP
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10/25/2023	Donald J. Trump's Brief Regarding Standard of Proof in this Proceeding
10/25/2023	Respondent Donald J. Trumps Brief Regarding Petitioners Obligation to Prove President Trump had the Specific Intent to Engage in an Insurrection (suppressed per protective order dated 10/14/23)
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10/26/2023	Defendant Donald J. Trump's Brief Regarding 3 U.S.C. Sec 15 with Exhibits
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10/27/2023	Petitioners Response Brief to Trump's Brief Regarding Standard of Proof In This Proceeding
10/27/2023	Petitioners' Response to Trump's Motion to Exclude Expert Testimony (suppressed)
10/27/2023	Petitioners Opposition to Intervenor Colorado Republican Central Committees Rule 702 Motion to Exclude the Testimony of Professor Gerard N. Magliocca
10/27/2023	Petitioners' Exhibit 1 to Response to CRSCC's Motion to Exclude Expert Testimony (suppressed)

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10/27/2023	Petitioners Opposition to Intervenor Donald J. Trumps Rule 702 Moton to Exclude Testimony of Professor Willaim C. Banks.
10/27/2023	Petitioners' Exhibit 1 to Response to Trump's Motion to Exclude Expert Testimony (suppressed)
10/27/2023	Petitioners' Exhibit 1 to Response to Trump's Motion to Exclude Expert Testimony (suppressed)
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10/27/2023	Response to Intervenor Trump's Brief on Specific Intent
10/28/2023	Order re: Donald J. Trump's Brief Regarding Standard of Proof in This Proceeding
10/28/2023	Omnibus Ruling on Pending 7092 Motions
10/28/2023	Motion to Recuse Judge Wallace (suppressed pursuant to court order dated 10/4/2023) w/attach
10/28/2023	Ex A – Affidavit of Scott Gessler (Suppressed pursuant to court order dated 10/4/23)

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10/29/2023	Petitioners’ Response to Motion to Recuse Judge Wallace
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11/1/2023	Minute Order – Print
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11/8/2023	Petitioners’ Exhibit List their September 29, 2023 Opposition to Trump Special (Anti-SLAPP) Motion to Dismiss
11/8/2023	Notice of Status Conference
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Thumb Drive containing video –
Exhibit located in the Records Dept.
(Suppressed per court order dtd
10/4/23)

11/8/2023	Petitioners' Notice of Filing Admitted Trial exhibits w/attach
11/8/2023	Attachment to Petitioners' Notice of Filing Admitted Trial Exhibits (Petitioners' Trial Exhibit List)
11/8/2023	Attachment to Petitioners' Notice of Filing Admitted Trial Exhibits (Petitioners' Admitted Trial Exhibit - Part 1/4)
11/8/2023	Attachment to Petitioners' Notice of Filing Admitted Trial Exhibits (Petitioners' Admitted Trial Exhibit - Part 2/4)
11/8/2023	Attachment to Petitioners' Notice of Filing Admitted Trial Exhibits (Petitioners' Admitted Trial Exhibit - Part 3/4)
11/8/2023	Attachment to Petitioners' Notice of Filing Admitted Trial Exhibits (Petitioners' Admitted Trial Exhibit - Part 4/4)
11/8/2023	Petitioners' Notice of Filing Offered but Excluded Trial Exhibits w/attached

JA24

11/8/2023	Attachment to Petitioners' Notice of Filing Offered but Excluded Trial Exhibits (Petitioners' Trial Exhibit List)
11/8/2023	Attachment to Petitioners' Notice of Filing Offered but Excluded Trial Exhibits (Petitioners' Offered but excluded Trial Exhibit)
11/9/2023	Notice of Supplemental Authority
11/9/2023	Exhibit A to Notice of Supplemental Authority – Opinion in <i>Grove, et al. v. Simon</i>
11/10/2023	Secretary of State's Proposed Findings of Fact and Conclusions of Law
11/10/2023	Response to Notice of Supplemental Authority
11/10/2023	Petitioners' Proposed Findings of Fact and Conclusions of Law
11/10/2023	Proposed Findings of Fact and Conclusions of Law
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**RELEVANT DOCKET ENTREES FROM THE
SUPREME COURT, STATE OF COLORADO
Norma Anderson et al. v. Jena Griswold et al.
Case No. 2023SA3000**

Date Filed	Docket Description
11/20/2023	Application for Review and Adjudication
11/20/2023	Final Order, Nov. 17, 2023
11/20/2023	Petitioners' Application for Review
11/20/2023	District Court Final Order
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11/27/2023	Appendix to Colorado Republican State Central Committee's Answer Brief to Appellant Elector's Opening Brief
11/27/2023	Opening-Answer Brief
11/28/2023	Intervenor-Appellant's Index of Attachments to His Opening-Answer Brief
11/28/2023	Attachment No. 1 – Final Order
11/28/2023	Attachment No. 2 – Response
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12/01/2023	Answer Brief
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12/01/2023	Exhibit 1 – Transcript
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12/01/2023	Exhibit 4 – Petition for Review
12/01/2023	Exhibit 5 – Order Declining Jurisdiction
12/01/2023	Excerpt from Exhibits J-M, AC-AH, AJ to Petitioners' Opening and Reply/Answer Brief (for readability)

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12/04/2023	President Trump's Reply Brief in Support of His Opening Brief
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12/04/2023	Attachment 1 – Order
12/04/2023	Attachment 2 – Petition for Rule to Show Cause Pursuant to C.A.R. 21
12/08/2023	Notice of Supplemental Authority
12/15/2023	Notice of Supplemental Authority
12/15/2023	Supplemental Authority
12/19/2023	Opinion

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DISTRICT COURT
DENVER COUNTY COLORADO
1437 Bannock Street
Denver, CO 80202

Case No. 2023CV032577 Division/Room 209

NORMA ANDERSON, et al.,
Petitioners,
v.
JENA GRISWOLD, et al.,
Respondents.

For Petitioners:
Martha Tierney, Esq.
Eric Olson, Esq.
Sean Grimsley, Esq.
Isabel Broer, Esq.
Jason Murra, Esq.
Mario Nicolais, Esq.

For Respondent Griswold:
Michael Kotlarczyk, Esq.

For Respondent Trump:
Scott Gessler, Esq.
Justin North, Esq.
Geoffrey Blue, Esq.

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For Intervenor:
Michael Melito, Esq.
Robert Kitsmiller, Esq.

The matter came on for hearing on September 18, 2023, before the HONORABLE SARAH B. WALLACE, Judge of the Denver County District Court, and the following proceedings were had.

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P R O C E E D I N G S

(Participants appear in person and via Webex)

THE COURT: Good morning. We are here on Case Number 2023CV32577, Norma Anderson, et al. v. Jena Griswold, et al.

Before we get started, because there's a fairly significant presence on the Webex, I want to remind everyone that unless they — unless you've been granted expanded media coverage, you may not record this proceeding in any fashion. And the only entities that have received — who have asked for expanded media coverage is CNN and Lawfare. I granted Lawfare access about half hour ago. But in the future, the rules require at least 24 hours notice prior to having a request even considered.

So we are here on two items, I think. The first is a motion to intervene and the second is the Plaintiffs' request for an expedited case management conference. Why don't we first talk about the motion to intervene. It's my understanding — well, actually, let's step back. Let's have entries of appearance, please.

MS. TIERNEY: Good morning, Your Honor. Martha Tierney with the law firm Tierney Lawrence Stiles on behalf of the Petitioners. Also with me at counsel table are

Eric Olson and Sean Grimsley from the law firm Olson Grimsley Kawanabe Hinchcliff and Murray. We will be speaking for the Petitioners

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today. Also in the courtroom with us are Isabel Broer and Jason Murray from the Olson Grimley firm, and Mario Nicolais from KBN Law.

THE COURT: Great.

MR. GESSLER: Good morning, Your Honor. Do you prefer me to go to the podium to address you or —

THE COURT: We really don't care so long as it gets picked up by the recording system. So the key is just speaking into the microphone.

MR. GESSLER: I can — I think I can manage that, Your Honor. My name is Scott Gessler and with me today is Justin North, and then Mr. Geoff Blue on Webex. We represent one of the Respondents, Donald Trump.

THE COURT: Great.

MR. KOTLARCZYK: Good morning, Your Honor. Mike Kotlarczyk from the Colorado Department of Law on behalf of the Colorado Secretary of State, Jena Griswold.

THE COURT: And can you just say your name again slowly so I hopefully don't mispronounce it?

MR. KOTLARCZYK: Yes, Your Honor. Kotlarczyk.

THE COURT: Kotlarczyk?

MR. KOTLARCZYK: Yes.

THE COURT: Okay.

MR. MELITO: Good morning, Your Honor.

THE COURT: Why don't you go over to the

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microphone since —

MR. MELITO: Good morning, Your Honor. Michael Melito, Melito Law, joined by Bob Kitsmiller from Podoll

and Podoll. And then appearing on Webex is co-counsel, pending pro hac, Ben Sisney and Nate Moelker from the American Center for Law and Justice. And we represent the Intervenor.

THE COURT: Okay. And I don't think there's been any pro hac requests made to date.

MR. MELITO: It's pending, Your Honor, and we're going to be filing with the Supreme Court and then that'll be sent down to you, I understand.

THE COURT: Okay.

MR. MELITO: Thank you.

THE COURT: So back to the substance. Am I correct that the Plaintiffs do not object, the motion to intervene?

UNIDENTIFIED VOICE: That is correct, Your Honor. We will be opposing some of the claims, in fact, all of the claims in the petition, but not the motion to intervene.

THE COURT: Okay. And how — and I — and, Mr. Gessler, how about former President Trump?

MR. GESSLER: I'll just step up over here, Your Honor. No, we do not oppose.

THE COURT: Okay. And I received the notice filed, Mr. Kotlarczyk, by Griswold. So, I mean, it's my view [p.6]

that I always have the ability to, you know, do things to cause efficiency and I'm going to do that regardless. So to the extent parties are aligned, I'm not going to, you know, let everybody double up so we hear everything twice. And I certainly do agree with you that the — that former President Trump and the Colorado Republican Party are aligned in this case. I think he's probably the de facto head of the National Republican Party. So I'm going to grant the motion to intervene, but we will be working towards avoiding duplication, and in some case, potentially,

briefing, because, you know, I don't want to read everything twice as well.

MR. GESSLER: Understood, Your Honor. Thank you.

THE COURT: Okay. So what I really originally called this hearing for was, is I was getting repeated requests for an expedited case management conference. And, you know, in a normal case, we don't do that until after the Defendants have had a chance to respond to the complaint and any motions to dismiss have been ruled on. So I was hoping to hear from the Plaintiffs on why we should be having a case management conference when we haven't had any response from the Defendants. And then, of course, I'll hear from the Defendants and the Intervenor on that issue as well.

MS. TIERNEY: Thank you, Your Honor. I'm happy to address that issue.

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So the reason for the request for an expedited process is because this case arises under the Election Code, in particular Section 1-4-1201 et. seq., in specific, 1-4-1204. And the process for challenging the qualifications of a presidential primary candidate are laid out in section 1-4-1204(4).

And that process requires that a verified petition be made in writing filed with the district court in accordance with Section 1-1-113, which is the regular procedure for filing claims in an election case in — under the Election Code, and those claims have to be filed no later than five days after the filing deadline for candidates. There is not an earlier time bind — time bound. And then a hearing must be held within five days after that challenge is filed under that statute.

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At the hearing, the Court hears challenges — hears the challenges and assesses the validity of all alleged improprieties, and the Petitioners must sustain the challenge by a preponderance of evidence.

That process is expedited for a reason because of the election calendar, which dictates when things have to be done in an election year. And that calendar has a number of deadlines upcoming, but the most important one is January 5th, 2024, which is the last date to certify candidate names to the primary ballot.

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Thereafter — so as we lead up to that date, any time before December 11th, which is the deadline for primary candidates to submit a statement of intent, they can start submitting those — that statement of intent now. They can — the political party can submit its statement of a bonafide candidate now. So the Secretary is going to be faced with taking action or she is about to take action that we believe will amount to a breach. So she will be committing a breach or neglect of duty under 1-1-113.

So this case — — also importantly, we know that this case is of a national importance and is likely to see appellate review, not only to the Colorado Supreme Court under the 1-1-113 process, but also possibly to the U.S. Supreme Court. And if we are going to get through all of those appeals by the deadline to certify ballots on January 5th, we believe we need to start this process now.

Because the statute calls for an expedited process to have a hearing within five days, we've — we're — as you know, we filed this case on September 6th, it was removed to federal court, we're back down. We understand that the case is very complex. There are lots of issues, there's lots of parties, lots of lawyers, most importantly, and – but we

— nonetheless, the statute calls for an extraordinarily expedited process in this — in these kinds of cases.

And so we believe that not only do — would we

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seek an expedited case management conference, but we would seek an expedited process to hold a hearing at which the Court can hear evidence about the alleged improprieties and issue findings of fact that then can be reviewed if the appellate courts deem that that's what they would like to hear.

I did just want to make one distinction between 1-5 — 1-4-501, which is the statute — and if it would help, Your Honor, I have printed out the relevant statutes that we're going to be talking about today, and I have copies for everyone.

THE COURT: Sure.

MS. TIERNEY: Might I approach?

THE COURT: Yeah, that's fine.

MS. TIERNEY: So in that packet, Your Honor, we've got the — what we believe are the relevant statutes for — possibly for today, which include 1-1-113, which I've just been referencing, where — which talks about how the secretary — how a claim can be brought when the secretary is about to — has committed or is about to commit a breach or neglect of duty, and, of course, 1-4-1204(4), which lays out this expedited process that we've been talking about here.

I did just want to distinguish the process in 1-4-1204 from the process laid out in 1-4-501, which is also in your packet, because I anticipate we're going to be hearing about that here. And 1-4-1201, et seq. was citizen initiated

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in 2017. That sets up a separate process for presidential primaries and presidential primary candidates and how

you challenge those candidates. 1-4-501 is the process that is used for all other state and — you know, candidates that are running under the Colorado Election Code.

The difference in those two statutes in terms of when the challenge must be brought is what I want to bring to your attention. In 1-4-501, the language states that qualifications of any candidate may be challenged by an eligible elector who lives in the district for which the candidate seeks office within five days after the designated election official's statement is issued that certifies the candidate to the ballot.

THE COURT: So —

MS. TIERNEY: So that language cabins the timeframe in which you can bring that challenge, within those five days. Contrast that with 1-4-1204(4), which doesn't create a time bar at the front. It just says that challenges to the listing of any candidate on the presidential primary ballot must be made in writing and filed with the district court in accordance with Section 1-1-113 no later than five days after the filing deadline for candidates. That's in 1204(4).

So we believe that this case is ripe to be heard and that an expedited process is required by the statute, and

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we'd like to move forward with scheduling that process as soon as possible.

THE COURT: Okay. Mr. Gessler?

MR. GESSLER: Thank you, Your Honor. As a prefatory (sic) comment, I think on behalf of Donald Trump, we want this case to move with a sense of purpose, but there is no statutory basis or proper basis for the hair on fire five-day approach. And let me explain how that is.

So with respect to the complaint here, this complaint was brought under three bases for the complaint; Section

113, Section 1204, and then the Declaratory Judgment Act, both the rule and the statute. Let me fur – the timeframes are contained, at least the ones the Petitioners are relying on, are contained in the statutory claims, 113 and 1204.

This is a 14th Amendment case. I think it's pretty clear from the pleadings, from the substantial analysis, the gravamen of the complaint, is that the claim is that Donald Trump is barred by the 14th Amendment. With respect to 113, this — and this is — sort of provides foreshadowing or a hint of things to come for our motions, upcoming motions to dismiss, but I think they're relevant now.

The Colorado Supreme Court on two occasions recently has been — made it very clear that constitutional claims may not be litigated in a 113 proceeding or under 113

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procedures. This isn't, you know, weaving together a web of arguments and inferences, it's just black letter case law in Colorado. And I would direct the Court's attention to *Frazier v. Williams*, that's a Colorado Supreme Court case, 401 P.3d 541. That was decided in 2017.

In that instance, Frazier was a U.S. Senate candidate and barred from the ballot based on a district court. He had raised constitutional claims. After that case was resolved, then there was a separate Supreme Court proceeding, the one I just mentioned, which said very clearly that you can't bring in 1983 in the underlying constitutional claims as part of a 113 proceeding.

And the reason why is 113 moves too fast. It's very, very quick, constitutional claims need greater consideration, and that the 113 is a procedural vehicle that only allows violations of the Election Code, not violations of the U.S. Constitution. So that's *Frazier v. Williams*.

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One year later, petitioned another ballot access contest for another federal candidate. This was Congressman Doug Lamborn at the time, and that's Kuhn v. Williams, spelled K-u-h-n, 218 CO 30-M, that's the more modern citation, but that case reiterated the — it cited Frazier and reiterated it, and I'll just quote paragraph 55.

It says, finally, to the extent the Lamborn Campaign challenges the constitutionality of the circulator

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residency requirement in section 1-4-905, it says, this court lacks jurisdiction to address such arguments in a Section 113 proceeding, it cited to Frazier, and says, holding that — and it described Frazier saying, holding that this Court has — this Court has jurisdiction to consider only claims of breach of neglect or — of duty or other wrongful act under the Colorado Election Code, and that was emphasized, when a petition is brought through a Section 113 proceeding. Therefore, we express no opinion on this issue, the this being the constitutional claim.

So Kuhn was very clear, you do not litigate constitutional claims under a 113 proceeding. We will be moving to dismiss under 113 under directly controlling Supreme Court precedent. But my point for purposes of this conversation is that the expedited procedures of 113 do not apply and cannot apply to a constitutional claim.

Now, let me turn to 1204. 1204, there's also not a statutory basis, regardless of 1-4-501, that's not at issue in this case. What really is at issue is the 1204.

In 1204, there's a couple deficiencies, and again, this is a precursor to our motion to dismiss, but for purposes of the hair on fire filing, it says no later than 60 days — this is in subsection (1) — the Secretary of State shall certify

the names. In other words, it is certification that triggers a cause of action under 1204, and that makes

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sense.

Unless there's a certification, unless someone is certified for the ballot, there is no cause of action. There is no basis for this. And that's the purpose behind the five-day hair on fire deadline. The belief is that once you have certification, you're bumping up against a deadline for printing ballots and whatnot, and so the case needs to move very quickly. That's the basis.

So in other words, 1204 doesn't even apply until there's a certification. And I'm sure the Intervenor will represent, because I've spoken to them, that there's not a single Republican presidential candidate who has gone toward — to the party to ask for a certification as a bonafide candidate, let alone anyone who has actually submitted a statement of intent to the Secretary of State. So none of that — none of that has happened. And, of course, the presumption is that Donald Trump will be filing a statement of intent in Colorado, but that hasn't happened yet.

I would also point out that within 1-4-1204, there is no basis for challenging a candidacy under the 14th Amendment. I'm sure you will hear in the briefings that there's debate as to whether or not a state can actually do that, but for purposes of 1204, Colorado has not done it. You can sort of look through it in vain to find anything. And the closest that comes is section (b) where it says a presidential

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candidate has to be a bonafide candidate as determined by the state party. So it's the state party that has that

authority or that state law delegates that authority to, to say is a bonafide candidate.

My purpose in raising these points now, and we'll further elucidate them in a motion to dismiss, is that there is no basis for the hair on fire five-day — no statutory basis at all for the five-day hearing. And then 1204, of course, refers to the procedures of 113. That's internally consistent, but 1204 suffers from the same infirmities pointed out by *Frazier v. Williams* and *Kuhn v. Williams*, in that you don't have constitutional litigation, specially this type of constitutional litigation where it's a case of first impression in many ways that has nationwide significance, in a five-day timeframe. So the 113 and the 1204 proceedings simply do not apply.

Now, I understand that the Petitioners have claimed that Donald Trump is a candidate for purposes of Colorado law, and to be frank, that just doesn't have merit. To be a candidate, okay, I mean, there's — do you even want me to go there?

THE COURT: Well, I don't want to argue the whole case.

MR. GESSLER: I understand, but let me just —

THE COURT: In the question of whether —

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MR. GESSLER: Okay.

THE COURT: — there should be — we should be starting to kind of plan the process of the case.

MR. GESSLER: Fair enough. Let me point out just a few other things then. Let's talk about timeline. Okay?

THE COURT: And so before we — before you, because I want you to address this before you stop, I don't — it's not my impression at least that the Plaintiffs are asking for a five-day hearing. If that were the case, they would have called my chambers and said, set the hearing.

They seem – I believe they seem to want to kind of set out a timeline to get a resolution so that they can go — one party or the other can go to the Colorado Supreme Court if necessary, and potentially the United States Supreme Court.

And so — and I — and one of the things I want to hear from them is, like, what it — what does that timeline look like for you because I don't think it's five days. And what I'd like to hear from you, at least in part, is if we assume we're not doing the five-day timeline —

MR. GESSLER: What are we doing?

THE COURT: Or — yeah, what are we doing.

MR. GESSLER: Yeah.

THE COURT: And maybe, you know, I mean, I think under your theory, it is a five-day timeline because

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essentially I assume to some extent you're saying that I'm going to have to wait till former President Trump asks to be on the ballot and then we have five days — they challenge, five days later we have a hearing, and everything has to happen between December 11th and January 5th?

MR. GESSLER: Not necessarily, Your Honor. Under the statutory claims, yes. But remember, there's a declaratory judgment claim as well which tees up the 14th Amendment directly. So that — and we'll be filing motions to dismiss on that. And despite your desire not to read duplicate things, you're still going to have to read a lot, I think.

THE COURT: Yeah.

MR. GESSLER: But there's still the declaratory judgment action, so. Now, we don't want to wait and put this in — stay this until, you know, mid-December and then run around with our hair on fire, so.

THE COURT: Okay.

MR. GESSLER: So yeah, I mean, we should brief the 14th Amendment issues and their applicability, and we're happy to file the motions to dismiss with respect to the statutory claims. Let me just tell you sort of on a broad level what our goals are.

THE COURT: Okay.

MR. GESSLER: Okay. And we want to be able to have fulsome briefings for a motion to dismiss. Okay? We want [p.18]

to be able to test the sufficiency of this because we do think there's going to be some problems with it. We file — we plan on filing two motions to dismiss; one, your normal motion to dismiss, and then a anti-SLAPP special motion to dismiss because we believe there's very strong First Amendment issues here as well. And there's an entire line of cases, *Brandenburg v. Ohio*, that talks about speech that incites types of behavior and types of speech that doesn't. So there's a pretty thorough body of case law that talks about that line. It does not appear in the — in the complaint, in the petition here, but we want an opportunity to do that. Okay.

The next thing we want is to understand what the evidence is that's going to be relevant because sort of saying things like insurrection, rebellion or, you know, comfort and aid to enemies of — I think they've characterized enemies of the constitution, are somewhat inchoate, and we want to obtain some greater level of precision on that. It's very difficult for us to contest, with well over 400, almost 500 allegations, it's almost like seeing a big pile of hay and trying to figure out which pieces are relevant. So we want some clarity on that, and we want to understand what the evidence is.

In our conferral, the Petitioners have said they expect to have three days of direct testimony, including several experts. So obviously we don't know what those are yet, and we want to find that out, too. So we want to be able

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to do sort of these thorough briefings, we want to know what we're facing, and we want to have an opportunity to contend with that.

With respect to the deadline, yes, January 5th is the deadline for certification. I would — we actually have — that's about three and a half months. And I know Mr. Kotlarczyk is going to grit his teeth when I say this, but we do have more time than that as well. And I would refer the Court to, again, *Frazier v Williams*. Okay?

In this case, it was a trial court case, and that's 2016CV31574. And what happened there is the Secretary of State issued a statement of insufficiency to Mr. Frazier one day before certifica — the certification deadline. So that really was hair on fire. And we went through that and Frazier lost in district court. But nonetheless, the district court stayed the certification deadline so that a Supreme Court appeal could be heard.

And then the Secretary of State agreed to put Frazier's name on the ballot, even though he was not qualified under the district court ruling, with the proviso that if Frazier did not prevail on appeal, the votes cast for him would not be counted. And then — so that's what the — sort of what the resolution was there. Then it went through about a three-week appellate process in the Colorado Supreme Court. Frazier did prevail and so votes for him were

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counted. But in that instance, the — just to sort of the timeline, and I'm happy to provide supplemental if — you

know, you don't have to weed through all the specific pleadings — but basically the statement of sufficiency was issued on April 28th, for a sense of timeframe, the certification deadline was April 29th. The Supreme — the stay — the Secretary of State ultimately agreed on — I'm sorry, Secretary of State agreed on I think it was like the 9th of May to print ballots with Frazier's name on it pending the resolution of the appeal, and the appeal and then the remand to district court was finally resolved on May 25th, so almost a month after certification deadline. I'm not advocating this type of approach, but I'm also informing the Court how things have worked and can work in reality.

I'd like to just point out two other things. Right now the Secretary of State has not taken a position on whether they support the Petitioners or are going to defend and align themselves with the Respondents or if they're going to sit on the sidelines. I have seen cases where Mr. Kotlarczyk sits in the jury box and cheers the Court to move efficiently so there's adequate time for the Secretary of State. I've seen the Secretary of State when they defend the process. I've never seen the Secretary of State align themselves with Petitioners, but there's a possibility that will happen in this case.

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If I were betting, I'd likely think that it will happen because in the days immediately following the — following this complaint, on national media the Secretary of State essentially parroted or repeated the exact same claims the Petitioners made and basically made the same claims herself, so they very well may align themselves with Petitioners. And if that's the case, we're going to have to consider that, and that throws I think a wrench in the process that historically I've never seen before. So

we'd have to figure that out once the secretary decides how they're going to align themselves. My understanding is they're planning on doing it towards the middle of this week.

One other sort of pseudo-wrench in the gears is right now, we found out on Friday that in fact there was a federal case filed in Colorado District Court challenging Trump's — President Trump's qualifications under the 14th Amendment. That was filed in federal court on August 16th, preceding this case. And then there was an amended complaint filed on September 8th. We've not entered an appearance on that. We're still sort of evaluating it. But along those lines, there are at last count 30 cases nationwide that have been filed on this exact issue, mostly in federal court. And so we may be ultimately seeking consolidation through multidistrict litigation or some other procedural vehicle to try and create some sense of efficiency.

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I would note that along those lines, and I'm sure you did, too, learn about this in law school, *forum non conveniens*. I've never once made this argument in my entire career, but we are looking at an event that occurred, you know, almost two years ago, 2,000 miles away, that is wholly outside the Court's subpoena powers, this Court's, and our ability to obtain witnesses and, you know, compel witnesses and evidence in this case. And that's another wrench and that bears with a multi-district litigation.

I'm hopeful we will have answers in a – you know, be able to approach this Court and say, this is the position we are taking nationwide and this is how we view this case as well, within a week. That's my hope.

One last thing is I've been informed that the National Republican Party is interested in intervening in this case. I say interested, apparently they're having an executive committee meeting today because they don't have authority to intervene absent that. So we will know within a couple days as to whether they plan on intervening. And I think the basis for their intervention is that this process is a presidential primary preference poll for delegates to the national convention.

And then there's a whole line of cases, *Wisconsin ex rel. LaFollette* from the Supreme Court, which basically says the national party has control over its

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delegates and the states are limited in their ability to do that with a private party. So it's a big onion with a lot of layers. We obviously want to be able to brief those layers and present argument to this Court, test the sufficiency, and — of — and then, of course, understand just exactly what we're facing.

We believe we have a good three and a half months and perhaps more if necessary, and that includes appellate process, which we're comfortable with. I do believe that — you know, 113 is a discretionary review by the Colorado Supreme Court. We don't think that applies, but I do believe that the Colorado Supreme Court would look at this essentially under the same standards as a C.A.R. 21. That's discretionary, too, and I have no doubt that the Supreme Court Justices may have heard of this case and are looking at it, as are many.

So we're prepared for this and — but we just want the opportunity to have a fair defense and move forward. So we do believe that a sense of purpose is warranted, but not quite the five-day sense of hair on fire.

THE COURT: Okay. So I'm going to ask the same thing of Ms. Tierney. What do you want to get out of this status conference? I mean, I'm going to order expedited briefing on your motions to dismiss, but it doesn't sound like you're opposed to kind of having some sort of parallel moving forward, or are you wanting a ruling on your motions to dismiss

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before anything else happens?

MR. GESSLER: We very strongly want a ruling on the motions to dismiss before going forward with any evidence. Now, one of the motions to dismiss will be an anti-SLAPP motion. That procedure calls for the Plaintiffs putting on evidence on an affidavit format so the Court can at least test their theories against the First Amendment. That may be a way to sort of resolve this and help us understand exactly what we're looking at.

But yeah, we think — our position is that this is — the case frankly should fail under both statutory claims, pretty — in short order, that there is not a basis under the 14th Amendment. There's going to be standing issues because they did confess that they don't have a particularized or concrete injury here. So we are going to want that resolution, and that itself may wind up being an appealable issue prior to the — prior to evidence. And so, we very strongly would like a ruling on the motion to dismiss before — our two motions to dismiss before going forward with evidence in any manner whatsoever.

THE COURT: Ms. Tierney?

MS. TIERNEY: Thank you, Your Honor.

THE COURT: And I'm going to let the other folks weigh in. I just — at this point, I'm still not quite sure what the Plaintiffs are hoping to have me do.

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MS. TIERNEY: Thank you, Your Honor. Let me try to explain that better. What we would like to see happen is for this matter to proceed more along the lines of how 1-1-113 cases normally proceed, or in the alternative, like a preliminary injunction, because in that way it all moves forward at the same time, arguments all get decided as the Court hears the case. If we end up with motions to dismiss and interlocutory appeals, there is no way we're going to be able to get this case done by the deadlines.

And I will just say one thing about Mr. Gessler's comment about extending the deadline beyond January 5th. While it's true, it has been done occasionally, UOCAVA ballots, which are the ballots that go out to overseas military voters, go out on January 20th. And if those ballots go out with an ineligible candidate on them, we're going to disenfranchise a whole, whole bunch of people. So it would definitely be the — and before the, those ballots can go out, which is a federal deadline, the ballots have to be laid out and printed, and so whether we have time beyond January 5th, it might be a couple of days at most, I think, what we're looking at for an extension there.

THE COURT: Yeah.

MS. TIERNEY: So we really believe that having a full — while motions to dismiss are fine if Your Honor wants to go that way, we don't think they're necessary here. They

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are never, almost never done in a 1-1-113 action because they're so expedited. And if — when they are done, they're filed and then they're — the response is argued orally at the hearing. We believe that the case should

proceed and all rulings done at once so that we don't end up in an interlocutory appeal situation and run out of time.

THE COURT: So your view is we have a hearing and the defense is that they would — or the motions to dismiss would all be ruled on at this hearing?

MS. TIERNEY: That's correct, Your Honor. And that — we don't —

THE COURT: But —

MS. TIERNEY: Sorry.

THE COURT: — part of their hearing — part of their motion to dismiss, as I understand it, is going to be ripeness and — you know, if it's not ripe, I'm not sure that you kind of kick into the expedited proceeding. No?

MS. TIERNEY: You are correct. We're pretty confident that we can defeat that argument based on the fact that President Trump, former President Trump has announced his candidacy, is out campaigning, has raised money in Colorado so that he is a candidate under any definition of the word, and that the different language in 1204 dictates that we can bring that case now, not wait.

THE COURT: As I understood it, the kind of —

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the crucial language was the about, right? Isn't it whether she's about to do —

MS. TIERNEY: About to do.

THE COURT: — about to do something?

MS. TIERNEY: And because there's no front-end deadline to when that can happen, Your Honor can — and we can present evidence on this, but in 2020, President Trump filed his affidavit in October. Candidates don't wait until December 11 — 10th to do that. So, yes, we believe that we need to present all the evidence at one time and that Your Honor rule at one time so that we don't end up in interlocutory appeals.

And let me say one thing about the SLAPP, the anti-SLAPP argument. That is not a proceeding under 1-1-113, and that shouldn't have to be heard at the same time as the 1204 claim. Despite Mr. Gessler's argument that our — we've brought a claim under the 14th Amendment, we haven't brought a claim under the 14th Amendment. We've brought a claim under 1204 that he's not eligible to be placed on the ballot.

THE COURT: Yeah.

MS. TIERNEY: So —

THE COURT: So in your perfect world, we would set a hearing when?

MS. TIERNEY: In October. We'd like to be done with district court by the end of October so we have November and December to get through the appellate process.

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THE COURT: Okay. Mr. Gessler, in your perfect world, when would this hearing be?

MR. GESSLER: Probably towards the end of November. Look, I understand that there's time for the appellate process, but the *Frazier v. Williams*, because that's fresh in my mind, that was entirely — that entire appeal was done in 15 days. And to say that we have to steamroller through a case for 104-page — my apologies, Your Honor — to steamroll a case with a 104-page complaint with almost 500 allegations, with no testing of the complaint on a constitutional issue that has never been decided on its merits in any court in the country and has not even been considered by any court for almost a hundred years, for over a hundred years, since the attorney generals in the — as late as 1922 were able to disqualify candidates, is I would submit just utterly outrageous and unfair as well.

The appellate process can move quickly. It has moved quickly. The tail should not be wagging the dog here. The — this complaint, the sufficiency should be tested. And I know Ms. Tierney said under any definition Mr. Trump's a candidate, so I'm going to go there. And Mr. North has reminded me not to let my face get all red on this issue because I have —

THE COURT: It's already red.

MR. GESSLER: It's always red. It drives me
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nuts, Your Honor.

Look, there's three forms of candidate. There's sort of the colloquial sense. I self-identify as a candidate. I'm like, hey, I'm a candidate, I'm running, I'm going out talking to people. That's a colloquial term. Then you have candidate for campaign finance terms under law. In other words, the candidate, the self-identify has to do something that triggers a law. And there's two forms of triggering a law. One is the campaign finance world and one is the ballot access world.

The Plaintiffs — or the Petitioners have repeatedly referred to the Colorado Constitution, Article 28, Section 2, Subsection 2, the definition of a candidate. And they said, well, he's — Trump's a candidate under the Colorado Constitution. And they said because a candidate — candidate is when they, you know, they announce and take an action. Well, that's Colorado Campaign Finance Law and it ignores two sentences prior in which the Colorado Constitution says a candidate for state or local office.

That makes sense. That's Colorado campaign finance law as compared to federal campaign finance law. The two are different bodies of law, and Trump is a candidate under federal campaign finance law. He is not a candidate in Colorado for purposes of ballot access. That's 1204. And

you don't become a candidate for 1204 to trigger all of this stuff

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until the Secretary of State certifies you as a candidate. That's a slightly different framework than some of these other approaches, and that's what triggers the 1204 five-day review.

So, no, Trump is not a candidate under any sense. He's not taken any action here in Colorado for ballot access. So he's simply not a candidate.

THE COURT: Okay.

MR. GESSLER: But we would like — if there's a hearing, we'd like to see it towards the end of November. The Plaintiffs — or the Petitioners have said they have three days of direct testimony, so they've obviously got their evidence lined up. That may change. I don't — I'm not —

THE COURT: So that —

MR. GESSLER: — here to hold them to it.

THE COURT: — was my other question is how long a hearing are we scheduling?

MR. GESSLER: And we have no idea what our evidence would be. Again, we're laboring under more than a difficulty when we don't have any service of process, and any witness is 2,000 miles away and they've made allegations over the span of five or six years, events that we're supposed to parse and try and figure out what's relevant and what's not over 500, almost 500 allegations. So we can't answer that question right now. But it seems as though they have an answer

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including experts. And frankly, we're going to challenge experts, because that's opinion testimony that's oftentimes based on hearsay and I'm not quite sure —

well, we'll see. We'll see how they endorse their experts, but we need time for that process as well. Thank you, Your Honor.

THE COURT: Okay. So it sounds like we're talking about at least a five-day hearing. Mr. Kotlarczyk?

MR. KOTLARCZYK: Thank you, Your Honor. Let me start with —

THE COURT: And sorry to interrupt you, but I doubt I — you know, I know everybody has a lot of opinions on the kind of overall arguments in the case, but I would at this point like to, you know, kind of stay focused on, like, how is this case proceeding —

MR. KOTLARCZYK: Absolutely.

THE COURT: — because I see my job as to get this case to the next step, whether it's dismissal or the Colorado Supreme Court.

MR. KOTLARCZYK: And that's exactly where — that's what I want to confine my comments to this morning, Your Honor. Let me start with the suggestion that there's some give in that January 5th date. It is a very hard deadline established by statute. I have January 18th as the UOCAVA

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deadline, which is the deadline by which, under federal law, the State of Colorado will be out of compliance with federal law if we have not sent ballots to military and overseas voters. And that is not just hit Control-P on a screen, there is an elaborate process with laying out and preparing a ballot. So that January 5th deadline is a very important deadline in the view of the Secretary of State.

In terms of the procedure pre-January 5th, we — we litigate 113 actions all the time, often with some of the characters in this room, some of the individuals in this room. There is almost never, in fact never that I can recall,

motions practice in a 113. That doesn't mean there aren't arguments raised that go to dismissal. Those can be raised in any manner of — in any manner for — including in pre-hearing briefing. And we would suggest, and I think that the timeline I heard from Plaintiffs would allow for pre-hearing briefing to be filed by all the parties if there's a hearing in October.

I think any arguments that our co-Respondent wanted to make with respect to dismissal could be handled in pre-hearing briefing, and if the Court was persuaded by those arguments could dismiss prior to the hearing. But the idea of there being a separate round of motion to dismiss briefing in a 113 prior to the actual merits being considered in a 113 is not a process we're familiar with.

And we, frankly, you know, we — and we're
[p.33]

usually here in even-numbered years, but we're here multiple times a year in — on 113 actions. And when there is the opportunity for briefing for a hearing, we almost uniformly request it. Sometimes, to use Mr. Gessler's phrase, we're in a hair-on-fire situation and there's no time for pre-hearing briefing. I don't think that's the situation. I think there is time for pre-hearing briefing. And I think any arguments that go to dismissal of the 113 action could be raised and addressed in that pre-hearing briefing.

So that would be our suggestion, Your Honor, in terms of a process from here, that the parties raise and address any of those preliminary matters combined with any other arguments they have to include in that — those pre-hearing briefings. Unless you have any other questions, Your Honor, that's how we typically see these 113s proceeding and how we think would be most efficient for this to advance as well.

THE COURT: Okay.

MR. MELITO: Your Honor, I'll be mindful of the Court's caution about not duplicating. So with that, I can say that our client is not in conflict with anything that Mr. Gessler has said so far. We agree with his case law analysis on Frazier and Kuhn. And then lastly, I would just point out that 1204(1)(b) is a statutory right that's oriented towards the benefit of the party. I think that's important to

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consider.

As far as the Court's request for logistical input, we would certainly have our own motions to dismiss, and we believe at this time the claims are not yet ripe because we don't have a candidate that's been designated, and of course he's likewise not been — or any person has likewise not been certified under the statute. So, I'll end there, Your Honor.

MS. TIERNEY: Your Honor, might I add one thing?

THE COURT: Sure. Sure, sure.

MS. TIERNEY: Thank you.

I did just want to very briefly respond to the candidate argument so that Your Honor isn't left with a — any confusion about the Petitioners' position on that. So while the constitutional definition does refer to state or local candidates, it's important to note that 1201, et seq. incorporates Part 9 of Article 4, and in Part 9, they adopt the candidate definition from the Constitution. So — and 1204 uses the term candidate at least four times. So what — and it doesn't define candidate.

So if you read all of those things together, the adoption of — the referral to Part 9, which has the definition of candidate adopting the constitutional definition, that term has to mean something in the context of a presidential

candidate. And since that provision uses that term over and over and over again, adopt — and refers to Part 9 for a

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candidate's petitioning, we believe that it — the statute has extended that definition to include a presidential candidate.

THE COURT: Okay.

MS. TIERNEY: I'll sit down in just one second. I also just want to note the argument about that there is a complaint with 500 different allegations and that they haven't had time to respond, there's been numerous press reports, and I'll point to an April 14th article from the Washington Post — April 18th article from the Washington Post where the Trump Campaign says, yes, we're preparing to respond to all of these Section 3 of the 14th Amendment challenges. We're working hard to respond to these or preparing to respond to these.

So to the extent that there's a suggestion that they've just learned about this on September 6th, we just want to point Your Honor in that direction. Thank you.

THE COURT: So I guess I — I guess — does anybody have — so what I hear the Plaintiffs saying is — and Mr. Kotlarczyk, just deal with everything at this hearing that we're going to have. And what I hear Mr. Gessler saying is you need to rule on the motions to dismiss before we could possibly have a hearing. But there's certainly the ability for those to go in tandem in the sense that there's no reason not to schedule the hearing while the Court's considering motions to dismiss.

And as I said, I see my job is, at least in

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part, you know, getting this to the Colorado Supreme Court, assuming that it proceeds forward. And I feel as

though I think I need to get them a ruling by Thanksgiving, and I'm not going to rule from the bench on a case like this.

So I think that what we will do is we — and I'm just, you know, looking at my trial calendar, which of course doesn't include any weeks in which I don't have a trial. But I think the thing to do is we're going to set a week-long hearing for November 6th. I'm going to ask when is — when would a response otherwise be due in this case? Does anybody know based on —

MR. KOTLARCZYK: Well, Your —

THE COURT: — based on service?

MR. GESSLER: Under 113, Your Honor, it's ambiguous. Oftentimes, 113 cases don't even receive an answer.

THE COURT: Okay.

MR. GESSLER: If you're operating under that framework. Here's what we'd like. We'd like two weeks to file a full motion to dismiss, Your Honor.

THE COURT: Well, it strikes me that you're pretty far along on your motion to dismiss because you've been citing all sorts of case law to me as to — none of which I've written down because I want to see the arguments in writing. So I —

MR. GESSLER: So may I —

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THE COURT: Go ahead.

MR. GESSLER: — say one thing? I can give you a partial motion to dismiss by the end of this week based on what I've told you. So I'll tell you just how we look at it. There's three categories of motion to dismiss. One is a statutory claim under 113. One is a 1204. We think those are — we can dispose of those pretty quickly.

THE COURT: When you say dispose of, you mean file?

MR. GESSLER: I can get you something by the end of the week.

THE COURT: Okay.

MR. GESSLER: With respect to the declare — request for declaratory relief, we can file a partial motion to dismiss on that by the end of the week as well. Petitioners have already said they don't have a concrete and particularized claim for Article 3 standing, and the federal court and Colorado courts file the same standards with respect to this. We can give — we can get you something pretty quick on that. That's the first category.

The second category is the anti-SLAPP motion. That shouldn't take us very long as well. I can't promise we'll get it done by the end of the week, but I can look at that a little bit more today and give you a better sense, certainly within two weeks.

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The third category is the stuff every law professor seems to hold forth on and write an article about in a national publication. And there's a lot there, you know, is Trump an officer of the United States? What is the definition of insurrection? Who — you know, is the 14th Amendment self-executing?

THE COURT: But to me that all seems like something appropriate for the hearing itself.

MR. GESSLER: I'd submit, no, it's not. I would submit that this is — if a statute is not self — if a constitutional provision is not self-executing, then the Court is without jurisdiction to even hold a hearing. So I would submit otherwise, but we can get that stuff done in two weeks. So I can get you a partial motion to dismiss by

the end of the week, and I can get you more fulsome one in two weeks.

THE COURT: Let's do this. File — you're going to file a motion to dismiss on everything except for the third category by Friday, and the Plaintiffs will respond — well, Ms. Tierney, how long do you think you need?

MS. TIERNEY: Your Honor, we can respond in a week.

THE COURT: Okay. And then the Defendants have a week to reply. I'd like you —

MR. GESSLER: That works fine, Your Honor.

THE COURT: I'd like you to coordinate your
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filings with the Intervenor, please, and not do separate ones unless the Intervenor is moving on some separate issue that you're not moving on.

MR. GESSLER: That sounds fine, Your Honor.

THE COURT: And I don't know what you're going to do, Mr. —

MR. KOTLARCZYK: Briefly on that point, Your Honor, as Mr. Gessler said, there is not a process for a response or an answer in a 113 since they're summary proceedings. So it's not our intention at this time to be filing anything in terms of a motion to dismiss or answer.

THE COURT: Okay.

MR. KOTLARCZYK: I just don't want the Court to be surprised if — and I certainly don't want the first answer we file on a 113 to be to a 500-paragraph complaint. So I just don't want the Court to be surprised if, you know, time elapses —

THE COURT: Yeah.

MR. KOTLARCZYK: — and there's no motion to dismiss or other pleading under Rule 8 that's been

submitted by the Secretary of State. It's our position that those aren't required in 113s.

THE COURT: No, and that's fine. And to the extent that the Secretary of State wants to chime in on the motion to dismiss in a way that is different than the

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Plaintiffs, she's welcome to do so.

MR. KOTLARCZYK: Thank you, Your Honor.

MR. GESSLER: And, Your Honor, we have no objection to the Secretary of State not filing an answer.

THE COURT: Yeah. So then the question is, you know, some sort of pre-hearing schedule in terms of disclosures both of witnesses, exhibits, expert disclosures since it sounds like you're planning on having them. And, you know, I would love for the parties to meet and confer and try to come up with a schedule now that you have a hearing date. So why don't we do this? Why don't you try to come up with a schedule that people can live with and

—

(Court and staff confer briefly)

THE COURT: Sorry. Colin is reminding me that the courts are closed on the 10th for Veteran's Day, so it's not a full week. So let's go back to the drawing board on that. Let's do it the — I'm going to vacate my two-week trial that is starting on October 30th. So we'll start on the 30th and that way if it needs to go into the following week, we will. And on the motions to dismiss, my expectation is your last one will just trail a week behind.

MR. GESSLER: That's fine, Your Honor.

THE COURT: And my expectation is that I will rule on what I think needs to be ruled on prior to a hearing. But to the extent that when I read the motions, I think that

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the Petitioners are — have the right view of it, and that it all should be decided at one time, then I'll decide it all at one time. So does that make sense? So to some extent, to the extent I don't think it needs to be ruled prior to the hearing, it'll, you know, be essentially kind of pre-hearing briefing.

MR. GESSLER: That's fine, Your Honor.

THE COURT: Okay. So in — so please meet and confer, and come up with essentially a trial management order that will include when you're going to exchange things, when you're going to provide things to me. That should include exhibit lists, witness lists, Rule 702 motions. I don't know if you're hoping to have some sort of — you know, if you want depositions. Whatever people want, they should try to come to an agreement, and if they can't come to an agreement, then we will have a hearing on — and I want to do this quickly because I want you to know what is and isn't going to happen.

So we'll have a hearing on Friday to — where I'll decide whatever it is the parties can't decide as to what's going to happen between now and October 30th.

MR. GESSLER: This coming Friday?

THE COURT: Yeah. And we can do that either live or over Webex, just let me know how you want to proceed. And that should also include like, you know, pre-hearing submissions, when they would be submitted to the extent people want to do that, et cetera.

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MR. MELITO: And, Your Honor, this is rewinding a little bit, but we can coordinate with Mr. Gessler, but I'd ask for the unique motions that don't get covered by whatever joint submission you come up with, I'd ask for an extra week.

THE COURT: You're not going to be on the transcript. Sorry.

MR. MELITO: No problem, Your Honor. Sorry about that. I thought I was louder than I was. Your Honor, we can coordinate with Mr. Gessler as it relates to the particular set of motions that he plans on filing so the Court doesn't get duplicate submissions. But I'd ask for an additional one week for any unique motions that the party intends on filing. It will allow us to examine what was said to the Court and then springboard from there if we need anything extra.

THE COURT: I am not following what it is you're asking for. Unique motions in what sense?

MR. MELITO: Sure. Your Honor, you had asked Mr. Gessler to coordinate with the Intervenor —

THE COURT: Yeah.

MR. MELITO: — and we can do that.

THE COURT: Uh-huh.

MR. MELITO: But we might wind up with some motions that are different from what Mr. Gessler comes up with. In the event we think of unique areas to address with the Court, we'd like one more week to address those.

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THE COURT: Those will be at — those — that will be due on the second deadline. So the two-week, not this coming Friday —

MR. MELITO: Yes, Your Honor.

THE COURT: — but the Friday following.

MR. MELITO: Thank you, Your Honor.

THE COURT: And then all briefing is going to be a week, a week.

MR. MELITO: Yes, Your Honor.

THE COURT: A week for a response, a week for a reply.

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MR. MELITO: Thank you, Your Honor.

THE COURT: Anything else we need to talk about today?

MS. TIERNEY: Thank you, Your Honor. What time would you like us to appear —

THE COURT: Oh —

MS. TIERNEY: — on Friday?

THE COURT: — sorry. 9:00 a.m. And just email us whether people are going to be coming in person or they're going to be just participating by Webex. Prefer in person, but I know it's on short notice with no conferral on whether it actually works for other people than me.

Anything else that we need to address?

MR. GESSLER: Not from us, Your Honor. Thank [p.44] you.

MS. TIERNEY: Nothing else, Your Honor.

MR. KOTLARCZYK: No. Thank you, Your Honor.

THE COURT: Okay. I guess we should talk page limitations on the motion to dismiss, especially given that you're doing three of them.

MR. MELITO: Can I have word limitations instead of page limitations, Your Honor? I tend to produce a fair amount of white space for readability, and I can shrink font if you want, but I'd rather have a word limit.

THE COURT: I don't have a specific word count in mind so — and, you know, I got my glasses, so why don't - - you know, just follow the Colorado Rules of Civil Procedure in terms of font, et cetera, and let's keep it to 20, 20, and 10; 20 for the motion, 20 for the response, and 10 pages for any reply.

MR. GESSLER: Your Honor, may I ask your indulgence? To write what we need with my solemn oath that I shan't waste your time in reading surplusage. I

understand that's an unusual request, but this is an unusual case with a lot to it, and I will work — I will — I promise you, I will endeavor to be concise.

THE COURT: Okay. I am going to allow you this first time, but if I —

MR. GESSLER: We'll see how my credibility holds [p.45] up, huh?

THE COURT: Yeah, if I —

MR. GESSLER: Fair enough, Your Honor.

THE COURT: — disagree with — yeah, there's just only so much I can do in a day, so.

MR. GESSLER: No, I appreciate it. I respect your position and I understand where you're coming from. And I — you know, many people have been reputed to say, I'm sorry, I didn't have enough time to write a short letter. Mark Twain comes to mind. We will endeavor to give you good, concise writing.

THE COURT: And so I will extend the same indulgence to the Plaintiffs, at least on this first round of motions to dismiss.

MS. TIERNEY: And I just want to clarify, Your Honor, was it per motion or those are the page limits for all motions, like aggregately?

THE COURT: No, that was per motion, but he's asked to proceed in good faith that he's not going to over-write, which I'm going to allow for one time. It's a one-strike rule. If it is over the top, then we're going to go back to the page limitations.

MS. TIERNEY: Okay. So just so I'm clear, Your Honor, the — no page limitations on any motion, response, or reply?

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THE COURT: Yeah. Let's see what happens.

MS. TIERNEY: Okay. And I had one more bit of housekeeping. We are considering filing a motion to dismiss on one of the Intervenor claims. And if we decide to do that, we would also file it by this Friday.

THE COURT: Okay.

MS. TIERNEY: Thank you.

THE COURT: And, well, I guess the other question I have then is, like, if — is that something that falls out — outside the scope of the kind of 113, no — normally people don't respond, et cetera? So do I need to rule on that so that you answer so that it becomes at issue, et cetera? I'm going to be honest that I — because I didn't even know until this morning whether the intervention was going to be consented to that I have not studied the petition.

UNIDENTIFIED VOICE: Your Honor, since I was handling the motion to intervene, there are three claims in the motion — in the Intervenors' petition, the first of which is a First Amendment claim, a straight-up First Amendment claim, not a 113 claim. And we would — we are considering moving to dismiss that claim. But we would request the same courtesy that Secretary of State received, that we not be required to otherwise answer the claims in the Intervenor petition.

THE COURT: And Mr. — and do the Intervenor's have any objection to that?

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MR. MELITO: Your Honor, not at this time. I may have to file something with the Court. I've just got to think through that a little bit more.

THE COURT: Okay. I think that, and given the expedited proceedings, that that makes sense, so I'm going to allow that. But if you — you know, decide that I

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made a horrible mistake, you should feel free to file something very, very short to that extent. And we can also talk about it on Friday if necessary.

With that, we are going to go off the record on 2023CV32577, and we will be reconvening hopefully to sanction an agreed pretrial schedule. But if not, I will rule on whatever disagreements exist at that point.

MR. GESSLER: Thank you, Your Honor.

(Proceedings concluded at 11:15 a.m.)

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DISTRICT COURT
DENVER COUNTY
COLORADO
1437 Bannock Street
Denver, CO 80202

Case No. 2023CV032577 Division/Room 209

NORMA ANDERSON, et al.,
Petitioners,

v.

JENA GRISWOLD, et al.,
Respondents.

For Petitioners:

Eric Olson, Esq.

Sean Grimsley, Esq.

Martha Tierney, Esq.

Mario Nicolais, Esq.

For Respondent Griswold:

Michael Kotlarczyk, Esq.

For Respondent Trump:

Scott Gessler, Esq.

Justin North, Esq.

Geoffrey Blue, Esq.

For Intervenor:

Michael Melito, Esq.

Robert Kitsmiller, Esq.

The matter came on for hearing on September 22,
2023, before the HONORABLE SARAH B. WALLACE,

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Judge of the Denver County District Court, and the following proceedings were had.

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P R O C E E D I N G S

(Participants appear in person and via Webex)

THE COURT: Let me just turn on the Webex. Everybody can be seated. We're on the record, 2023CV32577, Norma Anderson, et al. v. Jena Griswold, et al. May I have entries of appearance starting with the Plaintiffs?

MR. OLSON: Good morning, Your Honor. Eric Olson, Sean Grimsley, Martha Tierney, Mario Nicolais on behalf of Petitioners.

MR. GESSLER: Good morning, Your Honor. Scott Gessler, and with me are members of my law firm, Geoff Blue and Justin North. We're here on behalf of the Respondent, President Trump.

MR. KOTLARCZYK: Good morning, Your Honor. Michael Kotlarczyk from the Colorado Department of Law here on behalf of Respondent, Secretary of State, Jena Griswold.

MR. MELITO: Good morning, Your Honor. Michael Melito, Melito Law, and Bob Kitsmiller, Podoll and Podoll.

THE COURT: Great. Thank you.

MR. MELITO: On behalf of the Intervenor.

THE COURT: Yep. So we're here just to discuss next steps really. Before we do that, I wanted to ask the parties if they had an opinion on — we've been having — getting a lot of expanded media requests. By the statute, they need to serve the parties so that you have a chance to object.

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Nobody's objected thus far to any of them. One of the media entities has asked if they can just have a — if they can just have all the — do all the proceedings versus every time having to ask for a new one, which would certainly relieve some of the burden on the Court of having to track them and then do them individually.

Does — do any of the parties have an objection to that?

MR. OLSON: Your Honor, Eric Olson for Petitioners. Our only — so no general objection. Our only concern is, as we've flagged in the paper, sort of the identity of the witnesses becoming public. And so we don't anticipate that happening today, but there may be steps in the future where we may ask for portions of the proceeding not to be disclosed if we're talking about witness identity, depending on the protective order and how we handle that issue today or going forward.

THE COURT: Okay. And would that likely be at the hearing scheduled in October?

MR. OLSON: So at the hearing scheduled in October, we expect that to be public, but we also expect there to be a robust understanding of everyone involved as to making sure that the witnesses don't face harassment or intimidation. But we're not going to seek to close the hearing in October.

THE COURT: Okay.

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MR. OLSON: It's more if there are any preliminary matters before disclosure deadlines, we want to make sure that we're doing all we can to ensure that there's a full and fair opportunity for both sides to present evidence here.

THE COURT: Okay.

MR. GESSLER: Your Honor, as a general matter, we don't object. If something develops where we do have an objection, we'll immediately inform the Court.

MR. KOTLARCZYK: Same on behalf of Secretary of State, Your Honor. If any specific circumstances arose, we would voice our objection, but no general objection.

MR. MELITO: Same for the Intervenor, Your Honor.

THE COURT: Okay. Well, I'll think about it. And the bigger burden, frankly, is in each hearing it's that each individual one that comes in, so.

And then you mentioned a protective order. Should we start there?

MR. OLSON: Your Honor, whatever you want — you want — Mr. Grimsley is going to handle the protective order issues. I do think we've narrowed the disputes quite a bit on some of the logistics. So maybe we can start there and then —

THE COURT: Okay.

MR. OLSON: — go to protective orders if you'd
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prefer. But really, whatever's most convenient for you.

THE COURT: No, that's totally fine. And I have some notes of things that I wanted to talk about if you didn't bring them up, so.

MR. OLSON: Okay. Well, I think on the — just the logistics, the deadlines, I think we have a few small differences. We talked this morning again. I think, I'm not sure that President Trump is in full agreement with these, but I think our — hearing all the sides, we would propose — there's a dispute over whether we produce our witness list, exhibit list now or very soon. And we think it should be very soon because we're still confirming availability. It'll be helpful to have input on whether remote testimony is an option for this as we deal with witness lists.

But on the general matters, I think we are in agreement that we, in response to their request, have agreed rather than do simultaneous disclosures, we'll stage disclosures where we go first and they go second.

THE COURT: Okay.

MR. OLSON: And so on fact witnesses, looking at the parties' submissions and what we would propose is, you know, keep our date of October 6th. I know they want it now, but we would agree to their date of October 16th for them to disclose witnesses. And then we would like to keep our date of October 25th for any rebuttal witnesses to be disclosed.

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They want the right to take depositions. We and the Secretary don't think that's appropriate in a 1-113 proceeding, so that's an open question. On experts, we proposed Wednesday to disclose them with the subject matters; we'll do that on Monday. And then I think we're in agreement on the rest of the dates.

THE COURT: Like when you say on Monday, this coming Monday?

MR. OLSON: Yes, yes.

THE COURT: You'll tell them —

MR. OLSON: The name of our experts and their bullet points, subject matter of their testimony, which is — and then I think we have agreement on reports being due October 6th, and any — from us, and any reports from them being due October 27th.

THE COURT: Okay. And then — and you were proposing that they tell you the name of any experts they plan on using on the 27th of —

MR. OLSON: On the — I'm sorry, on the 13th is when we propose that they would propose the name.

THE COURT: Oh, okay. So you would do it this Monday?

MR. OLSON: Correct.

THE COURT: But they would have till the 13th?

MR. OLSON: Correct.

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THE COURT: Okay.

MR. OLSON: And then they want depositions. We don't think depositions are appropriate, so that's something we need to address. And then on exhibits, we'll — seeing their proposal and talking this morning, we'll agree to stage exhibits. We have proposed simultaneous exhibits, but we would propose — we'll disclose our exhibits to them on October 6th. They proposed giving us their exhibits on October 16th, which is fine with us, and then we have a supplemental and objections to each other by the 23rd, which is fine with us.

THE COURT: Okay.

MR. OLSON: So I think, assuming those dates or something very close to that are okay with Respondents, that leaves us — so there's two questions to quarrel about. One is whether our disclosures are now or very soon for fact witnesses, and then whether there's depositions of our witnesses.

We — as the Secretary makes clear, we believe that in these 1-113 proceedings, no depositions are necessary, particularly where we've agreed to provide extensive expert reports that meet the requirements of the rule, of the standard rule. So happy to talk more about it, but our position is we — with the disclosures that we've agreed to, no additional depositions or discovery is needed. And then, candidly, on when we disclose the fact

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witnesses, we're still working out availability. And we also want to make sure, again, that there's no effort to harass or intimidate to prevent them from testifying, and so we think delaying the disclosure, nonetheless keeping in mind Mr. Gessler's opportunity to prepare his case, we think October 6th balances those well. Particularly, we'll have a better sense of any protective order in place at that time.

So happy to answer any questions, but I think those are the issues that remain in dispute. And given the productive dialogue that we've had, we think that our proposal does a good job of meeting all the needs. But happy to answer any questions Your Honor, has.

THE COURT: Well, if we step back for a second, and maybe you've discussed this, but how is all of this going to play in with the SLAPP motion that they say that they're going to file? Have — I mean, it seems to me like there's two options on the SLAPP. One is that you respond — obviously you're going to respond one way or the other, but that you respond and I — it presumably has a bunch of affidavits or something that establishes what you think your prima facie case is. And then I rule on the SLAPP motion, hopefully before October 30th.

But the other option is that I rule on the SLAPP motion essentially after you put on your evidence on October 30th and they have a chance to cross-examine the people, et

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cetera. And it's almost like, kind of like a directed verdict, that they're making under SLAPP.

And the reason I ask that is if I have to rule on the motions, then you may — that may affect all of these dates in terms of your burden on making a prima facie case.

MR. OLSON: Well, given the —

THE COURT: And — of admissible evidence, which

—

MR. OLSON: Right.

THE COURT: — you know, of course complicates everything.

MR. OLSON: Yeah. So two responses, Your Honor. First, we think that the second proposal would work well given that — I don't have the exact date in mind for the SLAPP motion, but it's not that different between our response date and the 30th. And so we think that would work well and would agree to it. And if there's sort of earlier proceedings, to answer your question about sort of discovery and protective order, we would just ask that if the disclosure deadline falls before whatever deadline we have for fact witness disclosure, that we would just have that under seal so just the Court would have that information and it wouldn't be disclosed to the public.

But we think combining those proceedings in one hearing is an effective and efficient way to address these [p.11]

issues. We haven't seen the SLAPP motion, but I think we have a good sense of what it's going to say. And I think having the hearing serve that purpose, too, would work well.

THE COURT: So am I correct in remembering, Mr. Gessler, the SLAPP motion you are filing today, correct?

MR. GESSLER: That is correct, Your Honor.

THE COURT: Okay. So that will be fully briefed by the 6th or the 13th? Today is the 22nd. So you file it today, the Plaintiffs are going to respond on the 29th, and you're going to reply on the 6th. MR. OLSON: Yep.

THE COURT: So that will be fully briefed by the 6th. Okay. Well, and when you say additional proceedings,

you're thinking of an evidentiary hearing on the SLAPP motion?

MR. OLSON: Well, I guess what I was saying was the hearing on the 30th could address —

THE COURT: Right. MR. OLSON: — the same question that is going to be presented in the SLAPP motion.

THE COURT: Right. MR. OLSON: And so —

THE COURT: No, I mean, that was — yeah, and from my perspective, and I'm obviously going to get input from [p.12]

Defendants. From my perspective, if we're going to have an evidentiary hearing on the SLAPP, it would certainly be much more efficient to do it in the manner in which I said, which is, you know, they put on their case and then I say before the Defendants even put on their case, have they made a prima facie case enabling you to proceed under SLAPP — after SLAPP.

Having two evidentiary hearings where you put on your evid — you put on your prima facie case — and I don't think that the rules require — I think it can be done on the papers.

MR. OLSON: Uh-huh.

THE COURT: So it sounds like your preference would be to do it on the first few days of the October 30th hearing.

MR. OLSON: Well, I think it — the evidence is one in the same.

THE COURT: Yeah, exactly. That's why —

MR. OLSON: So I think you — it wouldn't — we wouldn't have a couple days for SLAPP and then turn to the merits. It would be here's our case, and you would say, after our —

THE COURT: Yeah.

MR. OLSON: — case is done, you know, yes, you've met the SLAPP standards or not. And then they get to put on their case.

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THE COURT: Yeah, yep. Okay. So why don't I get a response from the Defendants both on the SLAPP issue and the proposals made by Mr. Olson?

MR. GESSLER: Thank you, Your Honor. Let me first talk about the timing issues. So I understand that both the Petitioners and the Secretary talk about how depositions are not appropriate for 113 proceeding. I'd like to sort of make a few responses to that.

One is the only reason this is at the moment considered a 113 proceeding is because the Petitioner said so. It has not been tested by a motion to dismiss. And we sort of prefaced some of that, and that will be filed today. But, I mean, when you look — in addition, when you look at the language of 113, it's an action against a public official. And what's going on here is 113 is being used against a private individual, President Trump, to remove him from the ballot, basically extinguish a constitutional right to run for office.

And so the presumption that this is properly a 113 we submit is invalid, but we don't think that the Court should operate from that presumption to begin with, but rather operate from the presumption that the normal orderly flow of litigation should apply. Now, I say the normal ordinary flow, obviously not the ordinary deadlines.

And so what — our framework is we don't have much time here, and obviously expressed some frustration at the

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last hearing on the hearing dates. But in light of the exceptionally compressed timeframe, the large complaint,

the serious issues at stake, our approach is and remains this should be treated as analogous to a Rule 26(a) disclosures. We just — we want to see what is against us, people who have knowledge, documents that are being used.

And Mr. Olson and I had a conversation, and I don't mean to use this against him, he's been an absolute pleasure to litigate, but I said, you know, I mean, are we talking 10 documents or a thousand documents, and right now the universe that they're considering is around 200. And, of course, one of the counsel teased me that if they had said 10, I would say those are the most important documents in the world.

But regardless, we want to be able to see that and because we have to prepare a case and we're not quite sure what we're facing. And so that's from a practical standpoint, the Petitioners have represented to this Court and to the public and obviously to us, that they were ready to litigate this case within five days of filing. So they've identified their witnesses, or certainly people who have information. They've identified their experts and have identified them for a while.

Our understanding is, you know, they said that they warned President Trump that this case would be filed a [p.15]

year ago, so the corollary of that is they've had a year to prepare this case and have knowledge of this. And so we're asking for sort of immediate production of information so that we can prepare our case.

We would not characterize October 6th for production of fact witnesses as very soon or even soon in light of the compressed timeframes. With respect to the experts, all right, so they're saying they'll give it to me in three days. I'll accept that. I won't dispute that, because that's pretty

prompt. We'd like the fact witnesses as well and the evidence that may be arrayed against us.

With respect to exhibits, and I would like to maybe — and Mr. Olson and I talked about this, and I had a incorrect thought in my mind. When he suggested production of exhibits, you know, around the 6th and 16th, I would actually suggest the 23rd of October and because exhibits are different than the actual documents that a party has that are available. So my belief is that the parties should sort of exchange documents that they have available certainly by those deadlines, but then give us a little bit of time to determine which of those documents are actually going to be exhibits.

I think that's a way to sort of give us a little more time in this case, which is of paramount importance, without creating unfair surprise. So that's just a bit of a nuance. But as far as those deadlines for us to produce any

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documents that we know of that we may use, I don't have a problem with that deadline. That's the —

THE COURT: And what are you thinking about when you're talking about depositions?

MR. GESSLER: So here's what I'm thinking about depositions. We — well, experts in particular, you know, they rely — it's an opinion they're giving. We want to know what they're going to say, the basis for what they're going to say. And I understand expert reports are nice, but we also know that they're a highly stylized document that goes through multiple layers of review to, you know, be very careful in what is said. And so depositions I think are very important for that, for us to be able to challenge that as well and know what they're going to say.

But with respect to fact witnesses, I certainly want the availability. Now look, if a fact witness is simply going to

say, you know, President Trump sent out a mean tweet on such and such a date and I read it and — I'm not looking to depose that person. But if there's a substantial testimony from a fact witness, we do want to be able to question them.

You know, as far as the propriety in a 113 proceeding, I will back up. The only reason this is a 113 proceeding is because the Petitioners say so, and the presumption should be the orderly process.

Secondly, depositions are a matter of

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practicality, not doctrine. I've been in 113 proceedings where we've done depositions. Last summer, I did six in a 113 proceeding, but — as a matter of practicality. That was in Durango.

I see Mr. Kotlarczyk looking at me quizzically like, I missed one? Yeah, that was actually a Durango School District, did not involve the Secretary of State. And while I'm respectful of the Secretary's institutional knowledge as far as their representation of the history of 113, I will certainly match mine personally against the sec — anyone in that Secretary of State's office, and there have been instances of depositions. And frankly, oftentimes what happens is that the attorneys will talk to one another and instead of doing depositions, they'll say, hey, just interview my witness. Let's get on the phone, ask them any question you want, and we go forward for the exchange of information.

I've done that as well. In fact, in Kuhn, that happened as well, that type of exchange of information, the case that I had cited. In Frazier, we spent probably three and a half hours hammering out a set of stipulated facts. And I believe the Secretary did in fact have a conversation with one of my witnesses — I was — I litigated the Frazier

case — just informally. So it wasn't a deposition, but the same thing, without a bunch of objections and not under oath.

So it's really a matter of practicality and
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fairness, not a matter of doctrine here.

And so we're prepared to — I can't say I'll get any more gray hair, but perhaps my partner's prepared to get gray hair, with the stress of doing this in a very compressed timeframe, but we will do it because this is very important and these are constitutional issues and constitutional rights that we're litigating here. And that fairness is appropriate, particularly in light of the size of the complaint.

We've received an entire haystack of allegations as it were, and we're trying to find out which pieces of hay are going to be relevant or critical. This isn't like a 30- or 40-allegation complaint where you know very precisely exactly what the contours of the factual testimony and allegations are going to be. Here, it's very large and very amorphous.

So we're very insistent upon being able to take depositions of experts, and we're very insistent on being able to take depositions of witnesses that are going to provide substantial testimony. Now, are there any witnesses like that? We don't know. Are they all like that? We don't know. We haven't seen any of them, and we have no idea what's coming our way with respect to witnesses. So we at least want to be able to look at that.

And again, I can promise Mr. Olson and the Court that we're not looking to engage in frivolous depositions. We understand time and money are both at a premium here, and we

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want to move this efficiently, particularly in light of this impending — maybe impending isn't the right word — hearing as soon as October 30th. So that's our view with respect to the timelines and with respect to the — with respect to the depositions.

Again, we're not looking to create any form of ambush. And in fact, I had proposed and I'm thankful that Mr. Olson accepted the thought of sort of sequential production of witnesses, because we're not exactly sure what we're going to use as witnesses, and we won't be sure until we can even understand what their witnesses are going to say.

And so we don't want to create surprise. If they want to add another rebuttal witness or two or three or however many they feel is appropriate, we don't want to terminate that right either. So we're looking for orderly process, we can fully understand these allegations against us, and immediate production of witnesses, which from a practical standpoint is — well, is practical. It's not — it's something that these Petitioners have said that they've had available in their representations for weeks now. Not a lot of weeks, but two weeks I think, maybe two and a half according to my calculations.

Would you like me to address anything else with respect to witnesses and depositions, Your Honor?

THE COURT: No, thank you.

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MR. GESSLER: Okay.

With respect to the SLAPP motion, our understanding of the procedures for the SLAPP motion, and I may defer to Mr. Blue if I'm pinned to the wall with questions I can't yet answer, but — as he moves in his seat. We file a motion, and that will be filed today. They

file a response in which they include affidavits and exhibits as they see fit to make out their prima facie reasonableness of their case. We file a reply. At that point, the Court has a hearing and that hearing is essentially oral argument. It's not actually production and examination of witnesses.

So from a practical standpoint, that can be done very efficiently and well in advance of the hearing. And we do — you know, we believe our SLAPP motion is meritorious. Every single action or inaction that is alleged against President Trump is based on his speech. And so we are — and that clearly squares up First Amendment speech rights. So from a practical standpoint, we think it's very possible.

To the extent that the Court wants more than affidavits, we think that the deposition schedule could solve that as well, and then we could have a oral argument as appropriate shortly — as part of that process. So there's — the SLAPP — anti-SLAPP is a, we submit, and we will submit it today, a very meritorious motion. And we believe it's a winner, and it should be properly litigated, I recognize along

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the compressed timeframe, but according to the terms of the statute.

THE COURT: And just remind me, does the SLAPP statute mandate a hearing or is that you just saying that that's how it usually proceeds? I mean, I agree, they usually have oral argument, but I just can't remember whether it's required.

MR. GESSLER: I'm going to hand it over to my co-counsel, Mr. Blue.

THE COURT: Okay.

MR. BLUE: So, Your Honor, the anti-SLAPP mo — statute does provide for a hearing, I want to say 28 days, I'm looking for the actual citation in it. Thank you. So yeah, 28 days after service of the motion is when the hearing is supposed to be. And in — and that's in Section (5) of the statute. The motion must be scheduled for a hearing not more than 28 days after the service of the motion, unless the docket conditions of the Court require a later hearing.

Of course, if you say that, that's the docket of the Court, not the status of the case, because I'm assuming that you're going to hear that the docket of the Court should push this back to the 30th. But according to this, it says 28 days.

The other thing to note is Section (3)(b) of the statute says, that in making its determination, the Court shall

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consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. So that makes the hearing purely one of oral argument. It doesn't allow witness testimony. And that's why there's a difference between what this hearing is and what the hearing that you've scheduled for the 30th is, Your Honor.

MR. GESSLER: Can I answer any further questions?

THE COURT: No, no, that's super helpful. I am just turning to the statute. Completely in the wrong place. And I'm sorry, 13-21-1101(b) — what was the citation again?

MR. BLUE: Your Honor, the statute is 13-20-1101, Section (5) is the one that talks about the hearing.

THE COURT: Oh, I see, yeah. Okay.

MR. BLUE: And Section (3)(b) is the that talks about how the Court makes its determination.

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THE COURT: Okay. So if we need to have a hearing and — so let's start with the SLAPP motion. It's going to be fully briefed on the 6th of October. If we're going to — since it's going to have a — since as the Defendants point out, it has to be based on the affidavits, I think that probably the most expeditious way to deal with, you know, kind of this admissibility of evidence issue is for, in the papers themselves, for the Plaintiff to note, you know, why

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the evidence is admissible, whether that be in the text of the response or in some sort of addendum or whatever.

And then in the reply, you're going to have to say why you don't think it's admissible so that when I'm considering the affidavits, I can make a preliminary determination of the admissibility. So that's just a pleading issue.

If we're going to have oral argument, and it sounds like the statute provides for that, and thank you for pointing that out, I don't really want to take up time on the 30th with oral argument because I think that should be an evidentiary hearing. And as if — and, you know, if Mr. Gessler is right and you can't make your prima facie case, then we may not need the October 30th hearing. So let's — I'm just looking at my trial calendar. I went like — I went most of the summer without a trial, and I have literally a trial every single week through November still on the books, if not multiple ones.

UNIDENTIFIED VOICE: Sort of like the practice of law as well.

THE COURT: Yeah. So let's — are folks available on October 13th in the afternoon — at that point, the jury should be deliberating — for that oral argument?

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MR. OLSON: So we're confirming availability. Two of our team isn't available. We're seeing whether we can [p.24]

put a team together to argue on the 13th, so —

THE COURT: Okay.

MR. OLSON: — give us a minute.

THE COURT: Okay. (Pause)

MR. OLSON: Your Honor, we can do it on the afternoon of the 13th.

THE COURT: Okay.

MR. GESSLER: That will work.

THE COURT: Okay. And Mr. Kotlarczyk?

MR. KOTLARCZYK: No objection from the Secretary.

THE COURT: Okay. So we will set it for 1:30 to 3:30 on the 13th.

MR. KITSMILLER: Your Honor, can I just interrupt just for a moment? This is Mr. Kitsmiller for the Intervenors.

THE COURT: You need to speak into the microphone if we want it on the record.

MR. KITSMILLER: Okay. Your Honor, we intend to file a motion to dismiss, and while we're in general agreement with Counsel for former President Trump on the procedural mechanisms, I — we think that it makes sense to have a ruling on the motions to dismiss before this hearing on October 30th. We think there are good grounds for it, they're not

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complicated, and, you know, we'd like to have a hearing on that before we have a full-blown evidentiary hearing. And maybe we can take some of this up on the hearing on the SLAPP motion at the same time. I'm sure the issues overlap and it may be worthwhile to do that before this

hearing, before the parties spend tremendous amounts of money and time to go to a hearing that may just be a waste of time.

THE COURT: Okay. Well, once we get past the SLAPP, if we get past the SLAPP, you'll know it's not a waste of time because the Court will have just said that there's a reasonable probability of success on the merits. And the Court only has so many hours in the day. I don't generally do oral arguments on motions to dismiss, they're decided on the papers, and this will be the same. Whether or not that happens before the October 30th hearing or the motions to dismiss are decided and the ultimate ruling is, you know, largely going to depend on how much paper I receive. And my court docket, which as I said, I literally have a trial every single week between now and October 30th and have had to clear about six trials so that I could have this one and have time to rule hopefully, as I said, before Thanksgiving. But — and in terms of the complexity, I'm a little skeptical that it's not complex, but I haven't seen the motions to dismiss yet. So I will do everything that I can. It would

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certainly be my hope to rule on motions to dismiss before the hearing, but whether that happens I am — I'm not going to make promises.

I made the mistake of saying that I hope to have the ruling before Thanksgiving. And now, you know, CNN has told me that I will have it done by Thanksgiving. So I'm not going to make that mistake again.

MR. KITSMILLER: Thank you, Your Honor. Honor.

MR. GESSLER: If I — I feel your pain, Your Honor. At least CNN isn't a court order. How's that?

Just for the Court's information, so we'll be filing, again, and I — you may know this already, but I'm — our

two motions today. One is the statute and sort of standing procedural motion on the declaratory judgment, as well as the SLAPP.

THE COURT: Uh-huh.

MR. GESSLER: Both of those will be fully briefed by October 6th.

THE COURT: Yep.

MR. GESSLER: And then of course, next week we're filing what I would sort of call some of the federal doctrines for dismissal on the 13th, next Friday. We will be filing our reply so it'll be fully briefed on the 13th, the day of the SLAPP motion.

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THE COURT: Uh-huh.

MR. GESSLER: So for what that's worth, we obviously appreciate prompt rulings from the Court, but we also understand the volume of work this whole thing presents, so.

THE COURT: Yep. Okay. So in terms of the dates that you talked about, and when you talk about the disclosure of fact witnesses, is this like, in your view, kind of like a Rule 26 type of disclosure or is this the fact witnesses that you plan on having at the hearing?

MR. GESSLER: Are you — which one of us are you addressing, Your Honor?

THE COURT: Either because you both talked about it, so.

MR. GESSLER: So from our position we're looking at analogous to a Rule 26(a) disclosure.

THE COURT: Okay.

MR. GESSLER: Okay.

THE COURT: And then in your view, you should have that, and then — which would be the greater universe of witnesses and what they may or may not talk about. And

then a subsequent this is who's actually going to show up at trial?

MR. GESSLER: Correct, Your Honor. And the subsequent this is who's going to show up at trial, I mean, we're fine pushing that back a bit later. I understand that, you know, when you litigate, you're trying to make strategic

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decisions as to who's going to do what, so I'm not looking to lock that in very early, but I want to know the universe of evidence arrayed against us so we can begin working on that.

THE COURT: Okay. But Rule 26 goes both ways, so are you prepared to give them the universe of witnesses and what they may testify about as well?

MR. GESSLER: The answer is absolutely yes.

THE COURT: Okay.

MR. GESSLER: But to share my pain with you, I don't know who they are, or may be right now, we just don't know. We are scrambling —

THE COURT: Well —

MR. GESSLER: — to work on that.

THE COURT: — you've read the complaint and it's incredibly detailed.

MR. GESSLER: Uh-huh.

THE COURT: And I understand that, you know, your point is, you know, you've got 104 pages, which of this are you actually going to be able to present? But you can look at that 104 pages and you should have a pretty good idea of how you're going to — who you might use to counter it.

MR. GESSLER: We don't.

THE COURT: Well, okay.

MR. GESSLER: Look, Your Honor, I mean, I'll be frank with you. Every person that we even may approach or —

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with respect to the events of January 6th won't talk. I mean, they're all afraid, and I think with some justification, that they're going to have the FBI knocking on their door the next day, if they haven't already. Furthermore, our ability to compel cooperation is non-existent for people outside the state of Colorado. And sort of still trying to grapple with the contours of a — what a factual hearing looks like is frankly, very difficult.

And I do not relish the thought of standing in front of you saying, I don't have witnesses yet. I really don't like being in this position, but it is where I am right now. I have promised, and I'm — again, it's sort of like trust my word, and I understand the challenges in modern litigation with that, but I've assured Mr. Olson that as soon as I find someone or we find people who — that we're talking to in a substantive manner, I'll present that information and hand that over to Mr. Olson. But at the moment I don't have that information for him.

THE COURT: Okay. So this is what I'm going to do. Both parties are going to do Rule 26 disclosures of witnesses.

MR. OLSON: Could I actually be heard on this, Your Honor —

THE COURT: Okay. Sure.

MR. OLSON: — because I think if you read Rule

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26, then every witness in the January 6th committee is someone with knowledge of relevant facts. And so Rule 26 disclosures are a — for the reason that Mr. Gessler identified, are sort of a very blunt and inefficient tool for

what the question is, which is how are we going to put on our case in this courtroom? And we're going to answer that question in part when we file the response to our SLAPP motion because we have to under the rules.

THE COURT: Right.

MR. OLSON: There's going to be affidavits. And then what's relevant to Mr. Gessler is not, you know, who know — you know, all the people are at the Capitol or all the people that the January 6 report identified as having information, it's who we're going to call in this courtroom. And so we proposed very clearly in the case management order that the witness list will be will call and may call folks, not folks with relevant information, because again, that's thousands of people. And all we're — you know, if it's Rule 26 disclosure, it's going to be, you know, here's a link to the January 6th report, and that's not going to help —

THE COURT: No.

MR. OLSON: — any of us.

THE COURT: No. MR. OLSON: So we would — we want the focus on

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will call and may call, which is why we've made the proposals as we did. And again, this is a 1-113 proceeding and those rules don't apply — Rule 26 doesn't apply to those proceedings. So we think the witness disclosure issue should be one just of will and may call on the dates that we suggest.

THE COURT: Okay. And I always hesitate about the will and may call, because, you know, if you have four people on your will call and 25 on your may call, it's not super helpful, but okay. So this is — I'll strike the Rule 26 because I get what you're saying. And unfortunately, I think what Mr. Gessler is going to do is his Rule 26 is

going to have nobody on it, or everybody in the world as well.

So the Plaintiffs, you're filing the response to the SLAPP motion on 9 —

MR. OLSON: September 29th.

THE COURT: On the same day, let's give your witness list, please. And the Plaintiffs can have until — I mean the Defendants will have until October 9th to give their response, ones — their witness list. And then both parties will have until the 23rd to add any additional ones — add any additional ones and have an order of proof of, you know, who's actually going to come to trial. The 23rd is a week before or so. I would hope at that point you'd know.

There was a question about remote testimony. Remote testimony is absolutely fine on all parts.

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In terms of depositions, I'm going to — I am going to enforce the disclosure requirements incredibly tightly. So when you are preparing your witness and you ask a question, you should also be prepared — if Mr. Olson is putting on the witness and Mr. Gessler objects outside the scope of the report, Mr. Olson should be prepared to show me the paragraph in the report where it is.

And if he — then if the witness then starts talking about the basis is, you know, some conversation he had or whatever the basis is, you know, Mr. Olson should be prepared to show me where that is in the report. So the answer to the expert depositions is we're not going to have them because the reports are going to be completely fulsome and there's not going to be anything allowed in the testimony that can't be found in the report.

That's how I think that the rules were meant to be applied, and I know that most judges don't apply them like

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that. And people are, well, he said it in the deposition. Well, that's not really what the report — that's not really what it was supposed to be about. The reports are supposed to give you what you need, and so there aren't going to be expert depositions. And I will not allow testimony that's not contained in the report or opinions or the basis for them that's not in the report.

In terms of fact depositions, I frankly don't

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understand like really what you're asking because, like you, I have no idea who these witnesses are going to be, et cetera. So I'm going to tell both sides that you need to not only list the witnesses, but the subject matters of their testimony in enough detail so that Mr. Gessler can come to me and say, hey, I really need the deposition of this person because we've never heard of them, we don't know how they would possibly know something about this subject, et cetera. But absent that situation, I just don't think there's really time for depositions. So I'm not ruling out depositions because I just don't know what we're talking about.

If somebody's going to testify who you don't basically know what their testimony is going to be, then I'll probably allow some limited depositions. But until you get the list and the subject matters, I don't know how we could possibly talk about that. So once you get the list, if you think that you, after conferring with the Plaintiffs, the Defendants think that they need depositions or vice versa, you should call my chambers and we'll set up a discovery dispute hearing over Webex to decide the deposition situation.

The other deadlines for the names of the experts on the 25th and the subject matter, I assume you're going to say this is a constitutional historian or whatever, and the

same on October 13th for the Defendants, and then the reports on October 6th and October 27th, is fine.

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The exhibits that — and the exhibits I take will be the universe of documents you might use, for the Plaintiffs on October 6th, the Defendants October 16th. And then what was the deadline of October 23rd that you were proposing? Is that the, like, this is what we're actually going to use at trial list?

MR. OLSON: Yes.

THE COURT: Okay.

MR. OLSON: Sort of resolved objections, narrowed objections, and have the sort of final list ready to go.

THE COURT: Okay. And that will be both sides doing that on October 23rd?

MR. OLSON: Yes.

THE COURT: Okay. That's — that works great. If you — what would be easiest for the Court, I don't want duplicative exhibits. So if you're both going to use, you know, the same exhibit, please have a stipulated list of exhibits, and then the Plaintiffs' and the Defendants' not-stipulated exhibit exhibits on October 23rd.

MR. GESSLER: Thank you, Your Honor. If I may make a suggestion and one request. A suggestion, just very simple for the exhibits, can we just use a sequential numbering system?

THE COURT: Yeah.

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MR. GESSLER: The As and double As and number ones and 8s —

THE COURT: PPP.

MR. GESSLER: Yeah. They drive me nuts. Just 1 through whatever, if we can do that, and I'll work with Mr. Olson on that. And then with respect to production of

documents, I'm going to request that we receive those from the Petitioners this Monday along with witnesses because we have the same sort of concerns as to what those documents are or may be. And again, some of them may just be pretty straightforward where there's not going to be much of a dispute. But some could be much different, and we have no idea right now.

THE COURT: You mean — not this Monday, but you mean on September 29th when you get the witness list?

MR. GESSLER: I'm — that's correct, Your Honor.

THE COURT: What do you — is that possible, Mr. Olson?

MR. OLSON: So the question is, I'm sorry, are — the exhibits themselves? I thought we were producing those on the 6th.

THE COURT: Yeah, I mean, that's what I just said.

MR. OLSON: Yeah.

THE COURT: I think he's asking to move that up. Is that correct, Mr. Gessler?

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MR. GESSLER: Yes.

MR. OLSON: So —

THE COURT: There could be two ways to do this. One, could be these are generally the — well, you said that the original exhibit list was kind of the greater universe that you would then narrow down and you want to do it on the 6th. I think he wants it on the 29th at the same time as he gets his witness list.

MR. OLSON: And I guess my response is some of those exhibits will be in the SLAPP motion, right? So there will be — the core exhibits will be provided on the 29th. And we're still working through who will sponsor what exhibit, et cetera. So it would be a burden on us to produce everything on the 29th in addition to the SLAPP

motion. But I think to Mr. Gessler's core concern, which is what is our case and how will we prove it, he will have a lot of that information on the 29th.

THE COURT: Yeah, and I agree. So we're — we'll just stick with the dates that I just stated for the exhibits. But going now to the motions to dismiss and the affidavits and the — presumably the exhibits that are going to be attached to them, if the parties would be willing to provide the Court with one courtesy copy of the briefing with the exhibits, that would be very helpful to me.

UNIDENTIFIED VOICE: I'm sorry, what?

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THE COURT: So like a binder. MR. OLSON: Yeah. How would you like —

UNIDENTIFIED VOICE: Oh, hard copy?

MR. OLSON: — do you like a three-ring binder or wire-bound? What's your preference and how do you want it?

THE COURT: I don't care, just as long as I don't have to make my staff make the copies.

MR. OLSON: Okay. And is one copy enough?

THE COURT: Yes, just one.

MR. OLSON: Okay.

MR. GESSLER: And, Your Honor, how would you like video evidence? As there will be, I think substantial video evidence in this case. For purpose —

THE COURT: On a flash drive. And when you — if you — you're going to have to deal with the clerk's office in submitting that anyway. I think usually what they do is they have you deliver a flash drive or something.

So let's talk about, since we're all here, about — kind of about the hearing itself and any kind of pretrial briefing, et cetera. Mr. Gessler told me, but the Plaintiffs never told me at the last hearing, that you have — that

the Plaintiffs have three days of evidence. Is that — the three days of evidence, and I know you don't know who's going to be able to come or not come, but does the three days of evidence include projected cross-examination, or is it three days of

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just your witnesses, or do you want to modify that number at all?

MR. OLSON: The three days includes sort of reasonable direct and cross-examination. It does not include, you know, hijacking a witness for some totally unrelated purpose, so.

THE COURT: Okay. So with that being said, I think that we may very well be able to get finished in five days. I was a little bit worried that three days didn't include any cross-examination whatsoever. I am going to, given the type of case and there's so many parties, I am going to keep time for how long people have with the witnesses and, you know, just to make sure that everybody gets their fair opportunity to present their case.

I don't know what I'm going to do with Secretary Griswold in terms of how she fits into the splitting of the time, because at this point it's very unclear to me what role she plans to take in this case at all. If she, as Mr. Gessler posited, you know, is completely aligned with the Plaintiffs, then her time might count against them. If she just doesn't do much, then she might get 10 or 20 percent of the time. We'll figure that out once we know what her position is in this case, which I assume at some point's going to surface itself.

MR. KOTLARCZYK: And, Your Honor, just further on that, I think when we see witness and exhibit lists and we

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know the universe of what the case is going to look like, that would inform our position as well.

THE COURT: Yeah. Do you have something, Mr. Gessler?

MR. GESSLER: Just one comment, Your Honor, for what it's worth. I don't think I have ever been in one of these types of election contests where the parties or the judge correctly estimated the amount of time it's going to take. I mean, and I'm not trying to be the turd in the punch bowl, as it were, but these things always wind up, you know, when they're on a fast track going to like 7:00 at night. If it's a one day trial that we expect — if we expect it to be a half-day trial, they go till 7:00 or 8:00 at night. And so I'm just saying we would all love to do this in five days.

THE COURT: Yep. I've cleared my calendar the following week, so.

MR. GESSLER: Okay. Thank you, Your Honor.

THE COURT: And I am more than happy to, you know, go long days and it's obviously easier without a jury. So, you know, don't make a lot of plans for 6:00 on the week of October 30th.

MR. GESSLER: That's fair, Your Honor.

THE COURT: And — except on Halloween, yeah. We're not going to go past 5:00 on Halloween.

MR. GESSLER: I actually appreciate that deeply.

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That's very important to my kids, so thank you.

THE COURT: I don't personally have kids who still trick or treat, but I live in a neighborhood where I give away around 30 pounds of candy. So there's — I've got a civic duty to be there.

So let's talk about pretrial briefing. I — given the motion to dismiss, including the SLAPP briefing, I don't really — and the volume that I'm already going to have to deal with, I don't really think that pretrial briefing is super — going to be super helpful in this matter. I just don't know that I'll have time really to do anything with it. But what I am going to want, and I think you want to be cognizant of it as you're preparing, is I'm going to want findings of facts — proposed findings of facts and conclusions of law, and I'm going to want them quickly. So, you know, you should not be waking up on the 4th of November and being — you know, started those.

So I'm going to — assuming that the hearing actually ends on the 3rd of November, I'm going to need the findings of facts, conclusions of law by the 8th of November. And you should also assume that that day may not change if we have to go into the next week to finish up the hearing.

Which goes — gets to the court reporter. Strong preference to have a court reporter, I think especially if you're planning on this may go on appeal. You know, an

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expedited transcript with our FTR system is not expedited. It's two weeks. And in a five day trial, I would be — really doubt that they would be able to get it done in two weeks. So hopefully you'll have a court reporter. If you don't have a court reporter, the findings and facts and conclusions of law are going to have to say, this person said this on either the morning or afternoon session of the day and — or, you know, the afternoon, first or second afternoon session of the given day. So they'll have to be pretty specific as to when the testimony was elicited.

In terms of motions in limine, why don't the, why don't both Mr. Olson and Mr. Gessler speak as to how —

whether we need them, given that we're going to have the SLAPP hearing and you're going to put your prima facie case on. What I want to avoid is spending a lot of the hearing having huge evidentiary issues that could have been flagged and could have been dealt with in advance. But at the same time, I feel like since I could only consider admission evidence in the SLAPP that I find would be admissible, that maybe a lot of that will be sorted out in advance.

MR. OLSON: So on the evidentiary issues, Your Honor, I think our position is there's going to be, I'm sure, some ones the Court — we all know the Court's going to need to address; for example, you know, what portions of the January 6th report are admissible evidence under Colorado law? And I

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think a short — I would say our preference would be to have sort of one high level, you know, here are some of the key evidentiary issues that will arise. And, you know, we agree it's authentic, but we disagree as to whether it's admissible, et cetera. But not 38 motions in limine on all sorts of different things.

So we would suggest having sort of after conferral, you know, very close to the time of the hearing so we have the exhibit list, what — that we file a sort of a short, high-level primer of the key evidentiary issues rather than a whole bunch of motions in limine.

MR. GESSLER: Your Honor, my suggestion would be let's see what the SLAPP hearing looks like. Let's allow the parties to confer. We've although had sharp disagreements, we've done it in a hopefully amicable way, and we'll both make — endeavor in good faith to provide a procedure that's streamlined, efficient, and effective.

And then if we have problems, I think we can come to the Court and — or disagreements, I should say, and we can come to the Court and hash those out. But I think we understand we're going to want to tee these up, at least certainly the big issues that we can anticipate, and give you adequate time to consider them. So that's what I would suggest. Just give us a chance to hash it out after January 6th. We'll see — I'm sorry, after the hearing, and we'll see

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if we need to go to you.

THE COURT: Okay. I do like the idea of so kind of in lieu of a trial brief, these are the evidentiary issues that still exist post the SLAPP motion — the SLAPP hearing. So why don't we have each side file something on the 20th with the evidentiary issues that they think are important, and then they can kind of respond to the other person's brief on the 27th? Because in all honesty, like at this point, I have no idea if the January 6th report should come in at all, you know, so. But maybe that'll get sorted out in the — in the SLAPP hearing as well.

MR. GESSLER: Your Honor, I would just say we'll try on those dates, but I think our deadline to produce, you know, sort of final witness list and exhibits is the 23rd, so we'll figure it out. That's —

THE COURT: I mean, I'm really hoping that this, these final lists are really going to be like the fine tuning not —

MR. GESSLER: Right. I understand.

THE COURT: — you know — you're not — you shouldn't be finding out about any new stuff on the 23rd or the process isn't going to work. And then 702s?

MR. GESSLER: We fully plan on filing them, Your Honor. I mean, that's — we're — our current posture is

one of great skepticism as to the appropriateness of experts.

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Again, we don't know who they are or what they're going to say. But we anticipate we're going to file those motions, assuming there's more than one expert.

THE COURT: Okay. And you're going to have the expert report on the 6th, but Plaintiffs aren't going to have the expert report until the 27th, which is, you know, five weeks from now.

MR. OLSON: Our suggestion would be, Your Honor, that we can deal with issues of qualifications and competence to testify as part of the bench trial itself, that there's no need to — particularly given that there's no time for us on this schedule to have any briefing on their experts, that we just can raise it at the hearing itself.

THE COURT: I mean, in general, I don't think that courts generally really entertain Rule 702s very seriously in a bench trial because of this idea that the Court can filter through what is relevant, admissible, et cetera. But as I said, I don't want to have a huge sideshow either at the hearing itself and spend, you know, a whole day arguing about whether an expert should be allowed to testify. And of course, I have no idea what type of experts these are. I can tell you that I'm pretty sure that there's some expert testimony that would be helpful to me because I certainly am not a — currently a scholar of, you know, exactly what the 14th Amendment was supposed to mean when it was written.

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So let's do this. The Defendants, at least to the extent they're going to file a Rule 702, should do so by the 16th of October. And if the Plaintiffs want to respond in writing, you know, they can do so by the 27th. And

unfortunately, you know, we'll have to deal with yours more on the — at the hearing, the Plaintiffs' at the hearing. But, you know, when you get the names, if it's somebody who you just think, you know, and you know — if you have a basis just based on the name and the subject matters, you know, you're free to file something on the same timeframe as the Plaintiffs. But I will obviously give you — you know, I can't make you file something before you have the report.

So any questions on that, Mr. Gessler?

MR. GESSLER: No, Your Honor.

THE COURT: Okay. Any questions, Mr. Olson?

MR. OLSON: No, Your Honor. Thank you.

THE COURT: Let me see if — oh. I mean, in terms of presentation at the trial and at the SLAPP hearing, you know, just please work together to share any equipment, et cetera. And of course, that screen is definitely available.

MR. OLSON: And, Your Honor, what's your preference in terms of do you like the big screen? Would you like a separate screen at your — at the bench in terms of, you know, have — what's the most help — you're the audience for

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all of us, right, so we want to make sure we —

THE COURT: I love a separate screen, but I don't need it. And if you have a court reporter, realtime is definitely helpful for ruling on objections. MR. OLSON: And to have Your Honor get realtime, do you need a computer, a separate computer, or can you run it on the computer that you have?

THE COURT: Oh, they usually just give me like a iPad.

MR. OLSON: Okay, great. We can definitely make sure of that. Any other preferences the Court has in terms of technology being used?

THE COURT: No. And I mean, I can also — I definitely have had the exhibits on — in addition on a screen here, but I'm happy to look at the — at that screen. You know, my guess is, is that there'll be people in the audience and so, you know, if that screen is facing me, then nobody else can really follow what's going on.

MR. OLSON: Okay, great. We'll work together and work with your staff to make sure it's functional and not disruptive.

THE COURT: Yeah.

MR. OLSON: Thank you.

THE COURT: Anything else we should address? Oh, this —

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MR. GRIMSLEY: Protective order.

THE COURT: — protective order. So I've heard a reference to a protective order, but no protective order has been filed.

MR. OLSON: Before we do that, one other just quick issue. We've been — had some folks reach out to us who are interested in filing amicus briefs. Should we just tell them sort of the same deadline of whatever brief that there's in the motions to dismiss? So if they're supporting the Secretary — supporting the Respondents, you know, today for some things, but next week for other motions, or would you just like to have just one time where sort of briefs from amicus parties could be submitted and then another time for Respondents?

THE COURT: Do you also — it sounds like the Plaintiffs would be in favor of amicus briefs. Do you — what's your position, Mr. Gessler?

MR. GESSLER: I think we have to consider that a little bit, Your Honor. I mean, our one concern is there's going to be hundreds and hundreds of pages of people wanting to hold forth and educate the Court on their exceptionally important viewpoints, so that's one. I do know that we — you know, we may want one amicus brief. I mean, we're talking to people who may be experts and — but they may decline and ask to submit amicus briefs instead. So we may want one of someone

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we're talking to, but, you know, and I'm fine if they get one or a very limited number, but I don't want to have to spend, while I'm preparing this case, hours and hours responding to thousands of pages of people holding forth on all of the wonderful things they think this Court should know.

THE COURT: I guess my viewpoint is that amicus briefs is really for the appellate courts, and my job is to hear the facts and apply the law, and whatever an amicus brief may or may not say, which largely would either go to public policy or an alternative view, for instance, of what an expert might say is something that the, you know, part — I don't need more experts who aren't actually part of the hearing and the record to be kind of telling me what the right law is or not. So I think given the abbreviated proceedings, that I'm not going to allow amicus briefs, and they can give those to the Colorado Supreme Court. Mr. Gessler, do we have an update on you had mentioned that the Republican National Party may be interested in intervening. Have they decided not to?

MR. GESSLER: That is correct, Your Honor. They have decided not to.

THE COURT: Well, that solves that issue. So let's talk

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MR. GESSLER: I'm here to help you.

THE COURT: Let's start with the — what's the
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issue with the protective order? It would seem like it'd be in everybody's interest to have one.

MR. GRIMSLEY: Yes, Your Honor. We have not filed it yet, but we have provided it to all parties. And if I may approach?

THE COURT: Oh, sure.

MR. GRIMSLEY: And there's one correction from what we provided earlier this morning to all the parties. In paragraph five, we referred, in the one we sent this morning, to paragraphs two through four. That should have been paragraphs one through four, so that's now corrected in the protective order.

But what we have in here is a very brief protective order. Nothing here should be controversial at all. And I think Your Honor appreciates that this case is getting a lot of attention, as we've discussed already. And I think Your Honor also appreciates that emotions in this country run high around the subject matter that we're talking about here. And I think Your Honor also appreciates that at least one of the parties has a tendency to tweet or Truth Social quite a bit in which said party says things about courts, witnesses, lawyers, et cetera.

And so we're asking for this protective order in order to ensure that all of the parties in this case, Petitioners, the lawyers, the witnesses, this Court, feel

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comfortable going forward and feel that they are safe and not fearful for their own safety or their family's safety. And so these are just basic admonishments that I think anybody would agree to.

We're not asking for anything extraordinary here. We've not gotten a, I think, a position from the other parties on this, but we think it necessary before we start disclosing the names of witnesses. Obviously, we've already disclosed the names of the Petitioners. They're part of the record at this point. And just to show you how emotions are running hot, the Colorado Republican Party chair, who is now intervening in this case, has called the filing of this suit treasonous behavior. That's just — that's code for the folks coming to court have committed a capital crime.

This type of stuff just doesn't belong out there while this case is pending, and certainly if it rises to the level of something more concerning that reasonably could be viewed as intimidation or harassment, it should be shut down. And so that's all we've asked for in that protective order.

THE COURT: Well, before you get off, Mr. Grimsley, what — the witness lists and et cetera are going to be shared by — are you planning on filing them with the Court or are you all just planning on exchanging them?

MR. GRIMSLEY: We were planning on just exchanging so that we could keep it as lowkey as possible. But one of the

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problems we're going to face is that next Friday we're going to be providing a response to the SLAPP motion, which will, I think by necessity, identify some of our witnesses if we have affidavits and the like. And I was going to ask if we could redact those names, essentially file it under seal. So the Court will have obviously the identities, opposing counsel will have the identities, but it wouldn't be available to the public, at least initially. I'm

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not terribly confident that the identity of our witnesses can be kept quiet very long, but the longer the better.

THE COURT: Okay. Mr. Gessler?

MR. GESSLER: Thank you, Your Honor. I just have a few comments and deep concerns here.

First of all, the orders proposed basically asks parties or demands parties not to behave in a manner that violates current law. And it doesn't — I mean, there are laws in place right now not to tamper with witnesses, not to intimidate witnesses from their testimony. There are harassment laws in place and things along those lines. So it's not asking for anything more or less from a substantive standpoint of the law.

However, it is asking in a few instances areas where we object. And it says that no one can say anything inflammatory. Now look, there's lots of disputes as to what's inflammatory. I appreciate opposing counsel's definition of

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treasonous behavior is a capital offense. Look, I would also note that in part of this case, the Secretary has, after the filing, repeatedly stated that President Trump tried to steal the election. She has parroted the same comments or the — basically the substance of the complaint, that this was an insurrection. She has stated that Republican extremists are inciting violence on a consistent basis, so, I mean, it's coming from those quarters and CREW, the Citizens for Responsibility and Ethics in Washington, that organization has used this as a fundraising tool and sought to obtain as much media attention as possible for their lawsuit. They've described it as their lawsuit, their attorneys are on this case.

So that is definitely coming from other quarters, and to indicate that somehow President Trump is uniquely

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responsible for anything is inappropriate here. So I want to immediately dispel that implication — well, it's not even an implication, the statements from Counsel along those lines.

I do have concerns here. One is, you know, the elasticity of the term inflammatory; secondly, statements about testimony. Look, if witnesses are — you know, stand up and testify, it's difficult to see how if someone critiques or makes a comment about that testimony, and I'm not saying we're planning on it and I'm not even saying my client is planning on

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it, but I am, as lawyers are required to do, look at things in a very thorough light, that's not witness tampering in any way after someone has already testified.

I don't like in paragraph six that they're asking for authority to commit — to impose evidentiary and issue sanctions; in other words, to develop an argument that would prevent us from putting forth a fulsome defense because they believe someone made a mean tweet that inflamed someone else. So — and I thoroughly reject someone saying that these statements are code for others.

And I certainly appreciate someone explaining to me the code among the vast right wing conspiracy, but I don't think it's accurate and I don't think it's proper for the judge — for this Court essentially to sanction the theory that generalized public comment and frankly criticism that's — may or may not come, and again, I don't know, but certainly would likely be far less inflammatory than much of what has already been said. I don't want the Court sanctioning the theory that that is wholly inappropriate.

We do have robust political debate going on here. This — for better or worse, this case has become a national

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focal point because of both the robustness of the claims and the accelerated timeframe. So that's what it is, and that's what the Petitioners have brought into this environment by filing here.

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So we don't want the Court to sanction the theory that those comments — that any comments beyond what is currently prohibited by the vast body of law, so we want — to the extent there is a protective order, we want to be treated or we want the implication that Trump, President Trump is being treated fairly in the same way as any other litigant in the country.

If he or counsel here or anyone violates well-established body of law by threatening or intimidating witnesses, they should bear the consequences and that is appropriate. And we certainly welcome those existing protections that have been developed over years.

We don't agree with — and I recognize that this is directed to all parties and so I do recognize that, but we don't agree with sort of these elastic standards of so-called inflammatory nature, which can then be used to reject evidence or preclude us from advancing theories. So there's that deep concern there, Your Honor.

And one last thing. I know we had spoke — Counsel and I had spoken that — that the names of witnesses would be eyes only until after testimony. And frankly, if that's the case, that severely disables our ability to investigate our case, to be able to talk to others and say, this is a witness that has said this, what do you know about them? So like the TV shows where you show up at the door and

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say, I want — tell me about this person. I mean, not that anything that dramatic is going to occur, but we want to be able to have those conversations to develop our case.

MR. GRIMSLEY: And, Your Honor, we withdrew that portion —

MR. GESSLER: Okay.

MR. GRIMSLEY: — of the protective order. That's one —

MR. GESSLER: Okay. Just wanted to confirm that. Thank you.

MR. GRIMSLEY: We understand that they will need to go out and talk to witnesses about our witnesses and so attorneys eyes only would not be appropriate. But that's why we're asking for this protective order, given that —

THE COURT: Yeah.

MR. GRIMSLEY: — those names will be shared.

MR. KOTLARCZYK: Thank you, Your Honor. Just briefly, on behalf of the Secretary. The Secretary strongly supports a protective order entering in this case to protect witnesses, largely for the reasons that Mr. Grimsley identified. Don't think the fact that the protective order overlaps with other pre-existing criminal laws and prohibitions I think is material. It does give this Court direct authority to act in an expedited manner should any of the provisions of this term be violated. And given the high heat and risks of

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threats and intimidation that exist in this case, the Secretary would strongly support and does strongly support the entry of a protective order along these lines.

THE COURT: Go ahead.

MR. GRIMSLEY: And, Your Honor, as Mr. Gessler acknowledged, paragraph six is just restating the inherent authority of this Court —

THE COURT: Yeah.

MR. GRIMSLEY: — to enforce sanctions. It may be odd to say that there would be an adverse inference as a result of some tweet, but if some tweet or statement scared off a witness who was going to provide evidence on something, then we might be coming — or perhaps they would be coming to the Court and asking for an adverse inference or presumption of some sort. But this is just restating what the Court's inherent authority is.

And I don't want to give any more oxygen to some of the threats that have been made. Your Honor, I can hand up the motion that was filed by the Government in Washington, D.C. setting forth numerous statements by certain parties that were intimidating and could very reasonably be seen as harassment. I don't want to give any, as I said, more oxygen to those. But for instance, one of the very first things that President Trump said after Jack Smith brought the case in Washington, D.C. was, you come after me, I come after you.

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So it's those types of statements that if we were to make those types of statements or our clients were, they would be wholly inappropriate. I think they're inappropriate for everyone. The protective order applies to everyone.

THE COURT: So I a hundred percent understand everybody's concerns regarding this case and the safety and — for the parties, for the lawyers, and frankly for myself and my staff, based on what we've seen in other cases. And I understand, Mr. Gessler, that all of these — most of these things are not allowed under the law. But I

also agree that — with Mr. Kotlarczyk that doesn't mean that it doesn't hurt to reiterate the expectations of how parties will conduct themselves during the short course of this case.

So I'm going to enter this protective order. However, in paragraph three, I would like you to strike the descriptions of the type of things that might fall into the category of posing a substantial likelihood of material prejudice to this case. I think that's very fact determinative. So to the extent that anything comes up, I think that's better addressed, you know, in a motion that the protective order has been violated. So if you can just take out the sentence starting with, such statements include.

MR. GRIMSLEY: We'll do that, Your Honor.

THE COURT: And in terms of paragraph six, those [p.58]

are just listing my inherent powers to deal with problems, so I don't see any harm in including them. That doesn't mean that I have any intention whatsoever, certainly at this point, to be preventing anybody from putting on or defending their — this case. It would be an — a measure I would only take under extreme circumstances, such as if a witness who is committed to being a witness then drops out because of feeling scared to do so.

Anything else we need to address?

MR. GRIMSLEY: Nothing else, Your Honor.

MR. GESSLER: Nothing from us, Your Honor.

MR. KOTLARCZYK: Nothing, Your Honor. Thank you.

THE COURT: And in terms of the courtesy copies that I asked for, just the one copy of whatever these motions to dismiss state, I don't — you know, you can — Monday's fine as long as we get it like within 24 hours of

the filing that's — or one business day from the filing, that would be great.

And actually, I'm going to strike that. Mr. Gessler, since you're the moving party, I'm going to ask that you just prepare the submission of a courtesy copy of the full briefing. Does that make sense?

MR. GESSLER: That's fine, Your Honor. Do you want us to give it to you in the — sort of an entire set of briefing once —

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THE COURT: At the end.

MR. GESSLER: — with a little bow wrapped on it at the end?

THE COURT: Yeah.

MR. GESSLER: Absolutely. That's no problem.

THE COURT: And just so you know, don't make the Plaintiffs' response like, you know, in blue paper so I can't read it or anything.

MR. GESSLER: Well, we'll put in invisible ink, slowly disappearing ink.

THE COURT: Yeah, so if it's — but it'll all be done on the on the 6th or the 13th. If you could just do it, if you could just give us a copy, one copy the following Monday would be great.

MR. GESSLER: No problem, Your Honor.

THE COURT: If there's nothing else that we need to address, we are going to go off the record. Oh, here, standing up. There's something else to address?

MR. GESSLER: Just housekeeping, Your Honor.

THE COURT: Go to the microphone just so it's on the record.

MR. GESSLER: Certainly. Do you intend to file a minute order containing all of these dates and deadlines?

THE COURT: Yes.

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MR. GESSLER: As you look over to your clerk.

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Thank you. That's helpful. So we sort of have the one document to work off of, and I'm sure we'll check it if we think there's some —

THE COURT: If something's —

MR. GESSLER: — error in there.

THE COURT: — wrong, definitely just file —

MR. GESSLER: Okay.

THE COURT: — this is what we actually agreed on.

MR. GESSLER: Okay. Thank you, Your Honor.

THE COURT: Great. With that we are going to go off the record on 23CV32577.

(Proceedings concluded at 10:30 a.m.)

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DISTRICT COURT
DENVER COUNTY
COLORADO
1437 Bannock Street
Denver, CO 80202

Case No. 2023CV032577 Division/Room 209

NORMA ANDERSON, et al.,
Petitioners,
v.
JENA GRISWOLD, et al.,
Respondents.

For Petitioners:
Eric Olson, Esq.
Sean Grimsley, Esq.
Mario Nicolais, Esq.
Jason Murray, Esq.

For Respondent Griswold:
Michael Kotlarczyk, Esq.

For Respondent Trump:
Scott Gessler, Esq.
Justin North, Esq.
Geoffrey Blue, Esq.

For Intervenor: M
ichael Melito, Esq.
Robert Kitsmiller, Esq.

The matter came on for hearing on October 13,
2023, before the HONORABLE SARAH B. WALLACE,

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Judge of the Denver County District Court, and the following proceedings were had.

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P R O C E E D I N G S

(Participants appear in person and via Webex)

THE COURT: Good afternoon.

MR. GRIMSLEY: Good afternoon.

THE COURT: You may be seated. So I wanted to — well, let's get on the record. We are on the record on Anderson v. Griswold, 2023CV32577. May I have entries of appearances starting with the Petitioners?

MR. GRIMSLEY: Sean Grimsley, Jason Murray, Mario Nicolais, and Eric Olson on behalf of Petitioners.

MR. GESSLER: Good afternoon, Your Honor. Scott Gessler, Geoff Blue, and Justin North on behalf of President Trump.

MR. KOTLARCZYK: Good afternoon, Your Honor. Michael Kotlarczyk from the Office of Attorney General on behalf of the Secretary of State, Jena Griswold.

MR. MELITO: Good afternoon, Your Honor. Michael Melito and Bob Kitsmiller on behalf of the Colorado GOP.

THE COURT: Great. And so everybody's just going to have to either speak really loudly or get in front of the microphone in order to be heard. So I thought we should just take the opportunity to cover a few things since everybody was planning on being here anyway. I currently still have five pending dispositive motions in front of me.

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MR. GESSLER: Only two from us you — I believe, Your Honor.

THE COURT: Only two from you.

MR. GESSLER: So far.

THE COURT: Two from the Republican Party, and one from the Petitioners. So I am — I'm working on those, but I do think that some of them, the answer's going to be that's exactly what we're going to be addressing at the hearing. But I will get some sort of form of order out before the 30th in which I advise the part — either rule on issues or say I'm going to defer a ruling and wait until we hear the evidence at trial.

Which brings me to the real reason that I thought it might be useful to speak, which is I think it would be useful for the Court to have the parties prepare something in the concept of a pretrial order where they advise the Court what they think the issues that need to be decided are and what they're going to be presenting at the hearing so that if I disagree, I can let you know in advance. And if there are things that I think need to be addressed or I'd like to hear evidence on, that I can give you heads up about that.

I am a little bit worried about — I think under the current schedule, which I'm not going to back out of, I agreed to it, we have a lot that's going to be coming my way literally the Friday before the trial is to start, and there's

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only so many hours in that intervening weekend, including my father-in-law's 80th birthday party. So when would it seem possible to get something like that? And I understand that the parties may not agree, and I also understand that whatever ruling I make on the rest of the dispositive motions will impact that.

But when might you be able to come up with something which at least maybe is the things you agree

need to be addressed and then the things that maybe you don't agree need to be addressed?

MR. GRIMSLEY: Your Honor, this is Sean Grimsley for the Petitioners. We would like to do whatever Your Honor would like. We could have it that Wednesday, the 25th. We could do it that Monday. How long in advance would Your Honor prefer to have that?

THE COURT: I'd just like to have it long enough that I can review it and give you some notice if I think that there's something that the parties are really planning on that I might find to be interesting. And so as an example, and I'm not sure if in 10 days I'm going to still think the same thing, but — A, because I don't have all the briefing yet, and some of the briefing that I do have, I haven't even read.

But for instance, the Petitioners point to the fact that the Secretary of State previously has in the Hassan case looked to the United States constitutional provisions as

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to the qualifications of a president and took the position that Mr. Hassan couldn't be on the ballot. Is that the only time that's ever happened? Does the Secretary of State regularly do that kind of review? That's something that I think would be helpful to have evidence on. Maybe the parties don't, but that's the type of thing, as I've been reading the pleadings, that have been going through my head, which is, you know, what exactly am I going to get to hear evidence on, and is it going to be things that I might find to be useful?

And the Republican Party and Intervenor Trump might say, well, we think that's totally irrelevant, maybe or maybe not, but I'd just kind of like to make sure that we're all kind of heading in the same direction because we have such a limited amount of time. So —

MR. GRIMSLEY: So, Your Honor, it sounds like we would want it far enough in advance to you so that you could get back to us far enough in advance to make sure that we're addressing the questions you have. So I was thinking and just talking with my colleagues that next Friday, I think, would work for us. I don't know if it would work for the other parties.

THE COURT: And is — so next Friday would be —

MR. GRIMSLEY: The 20th. I'm sorry.

THE COURT: Yeah, so it would be the Friday with one week in advance. That to me seems like a good timeframe.

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And obviously, I know it's all moving parts, especially since I've just confessed that I haven't even read all the pleadings that have been filed.

Would that work for your side, Mr. Gessler?

MR. GESSLER: Sure, Your Honor. And let me just add a little bit more, and I've got other stuff to say. But addressing this, what may be helpful would be, you know, if you want to issue a list of questions or thoughts now, because when you said, well, I might want to hear evidence on it, I'm thinking, oh my gosh, I might have to find other witnesses.

So for example, the Hassan case, I mean, I happen to know someone who might have some personal knowledge on that issue. And —

THE COURT: Right. But that — you know, that really — I guess my thought process on that was really, like, is the Secretary of State's office going to make somebody available who might testify as to, you know, what they do when they get these — I know you once were, but you haven't been for a while, so.

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MR. GESSLER: Yeah, and that's all fair. I guess my point is just if you're thinking, I want — I — you know, I'm interested in evidence on this issue or that, if you could tell us sooner than later, I mean, even within the next few days, you know, and maybe, you know, one of us will say, well, we don't think that's relevant, or we do, but we can at

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least —

THE COURT: Yeah.

MR. GESSLER: — maybe mobilize some witnesses or evidence for that.

THE COURT: It —

MR. GESSLER: Or maybe not, I don't know, but —

THE COURT: Yeah, it is a two-way street.

MR. GESSLER: — that would be helpful, yeah. And as far as our — as far as issues, I mean, my sense is, and I will ask for some guidance on this. I mean, my sense is that our third motion to dismiss, the one, as I sort of characterize it, involves federal issues, that may be the one where we have discussions among ourselves where we think there are certain issues; for example, the definition of insurrection or the definition of engage, things along those lines, that may be sort of factual disputes to the extent appropriate. But my sense is some of them may derive from that.

And I think you had indicated at perhaps the last status conference that your inclination was perhaps to take some of those issues under advisement. Don't know if that's still the case, but, you know, that may be sort of fertile grounds for us to have that discussion.

And we had asked and we have pending a motion to respond to the response to that motion this coming

Monday, in part because I like to think we were careful in keeping things

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short. And I teasingly say that the Petitioners wrote almost 15,000 words, which we're fine responding to, but we just need a little bit more time. So I'd certainly ask for that, for clarity here today.

But my sense is, you know, we've had a good relationship and open discussions, and then to the extent the Court can provide guidance sooner than later so that we can prepare this as appropriate.

THE COURT: Yeah. I mean, I have — well, I think what I indicated, and it may be — have been at the very first hearing, was I think that it would be very useful to hear from some constitutional scholars on some of the issues that have been raised. And I have read Intervenor Trump's motion to dismiss the one that you're asking for the extension on, the reply. I have not read the response, but I did note that there was a lot of — a fair amount of citations to Law Review articles which I don't think are going to be admissible.

So, you know, I stand on I think it would be helpful to, when we're trying to decide what was what engagement in 18 — I'm going to probably get the date wrong, but 1860 or whenever it was, you know, I do think that that's something that having expert testimony on would be helpful, because I don't know that it means the same thing today — it means the same thing that Webster says it means today that it meant back then. So that's, you know, another example.

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So I will endeavor to, you know, maybe put out an order of some things that I think would be helpful, but I think it would be great if by next Friday the parties can

provide a list of where they're heading on this. I mean, you — at this point in time, I'm assuming that, you know, you know the issues better than I do.

MR. GESSLER: Perhaps.

THE COURT: I plan to get up —

MR. GESSLER: We'll find out.

THE COURT: I plan to get up to speed, but I've had a few other things going on. So how about you make either whatever you can stipulate to as to issues and then whatever you don't stipulate to. And I'm not going to say, well, you didn't — I — it would just — I just — I really don't want the time that we have to be wasted. So I'm not trying to bind people, I'm just trying to make sure that we're kind of flowing in the same direction and that we don't have, you know, some expert fly in for a day of testimony about a subject that I don't really even understand why we're hearing about. And this is totally hypothetical.

MR. GESSLER: That's fine. Your Honor, I guess I would view it as, I mean, sort of an ongoing conversation to try and narrow and create some trial efficiencies, and we're certainly open to that.

THE COURT: Okay. Great. Anything from the [p.11]

Secretary of State?

MR. KOTLARCZYK: Thank you, Your Honor. The only thing I would add, I think the order Your Honor just mentioned would be very helpful. I think I've said before that we don't have any intention to make an affirmative evidentiary presentation, but if there are witnesses that the Court feels would be beneficial to the Court resolving many of the novel issues that are presented by this case that are within the Secretary of State's Office, you know,

we would love to know that ahead of time and we'll do everything we can to be of use to the Court.

THE COURT: Well, yeah. And, I mean, as you know, the — you know, one of the main arguments of the Republican Party and of Intervenor Trump is that what's being asked to do is, you know, totally afield from anything that the Secretary of State's Office does. So I do think it would be helpful to know historically what it does. You know, when my 17-year-old son asks to have his name put on the ballot, does the Secretary of State not feel it has any obligation to make sure that he meets the age requirements in the Constitution?

MR. KOTLARCZYK: Right. Understood, Your Honor. I think there's a — certainly an element of this that's a legal question, and then I understand Your Honor wants some evidentiary presentation on —

THE COURT: Yeah.

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MR. KOTLARCZYK: — historical practice and —

THE COURT: So I'm hoping that you'll — the Secretary of State, at least in that sense, will work with the Petitioners on some of those issues.

MR. KOTLARCZYK: We'll — we will work — and the 20th date to work with all the parties on a pretrial order should be fine for us, Your Honor.

THE COURT: Great.

MR. KOTLARCZYK: Thank you.

THE COURT: Anything from the Republican Party?

MR. MELITO: No, Your Honor. We just appreciate you getting the rulings out in advance of the hearing. Thank you.

THE COURT: Yeah, and I'm hopefully going to get some more out.

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So on the hearing itself, I take it that Intervenor Trump got my ruling that I really don't want to hear about evidence that was presented — I don't want to hear the evidentiary objections to the evidence that was put into the anti-SLAPP motion, so you know it's coming your way, I don't want to have the briefing done on that on the 27th. And so are you planning on responding to their evidentiary kind of submissions by the close of today?

MR. GESSLER: No, we're not, Your Honor. Our interpretation was that with the anti-SLAPP going away, the

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obligation to object to that also went away. Now, frankly, there were certain items in that that are not, from what we saw, part of the evidentiary exhibits. But we do plan on objecting to a number of things on the evidentiary object — exhibits. And my read was if it wasn't handled in the anti-SLAPP motion, it would be handled — our objections were due on the 20th, I believe. And that's what we're anticipating.

THE COURT: Okay. So the reason that I asked for — you can stand or you can sit, but I always feel like people look uncomfortable.

MR. GESSLER: I'll stand up here so we can —

THE COURT: — leaning over that table.

MR. GESSLER: — have a conversation. That's fine.

THE COURT: So the reason that I asked the Petitioners when they presented the evidence in the anti-SLAPP motion to say how — why they thought it was admissible and — was because had I gotten to the merits of the anti-SLAPP motion, I would have had to rule on the admissibility. That was one reason, but the second reason was presumably a fair amount of the evidence in the anti-SLAPP motion is going to be the evidence at the trial. And

requiring the — both intervenors to respond to that offer of why it was admissibility — it was admissible, would then prevent me on

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the 27th of October of having, you know, every single issue of what are pretty complex admissibility questions before me.

So when I issued the order on I think Wednesday, saying, hey, I read your brief and you didn't do what I asked you to do, which was say why you thought the evidence attached to the SLAPP motion was admissible or not admissible, it was because to the extent it's going to be offered at trial, I want to know the issues so I can start thinking about them.

Now, if there are things that they attach to the — and so that's why I issued the order, and that's why I had the expectation that your client was going to respond to that. So I didn't — in my view, the issue didn't go away with the SLAPP motion because there's still all these outstanding evidentiary issues. And if you make them on the 20th and Petitioners respond on the 27th, we're going to have a lot of time spent — wasted time spent where I'm hearing things for the first time because there's only so many hours in a weekend.

So if there are issues, for instance, of — just picking one out of the top of my head, you know, they gave their evidentiary basis for why the House Report was admissible. If they've listed the House Report on their list of exhibits, which it sounds like you have, I want to know if you're going to object, and if not, why, so I can start having people look into it. And I want that as soon as possible.

MR. GESSLER: Okay. What deadline would you

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give us?

THE COURT: Well, the deadline was today. But I understand if you haven't — if you, as of yesterday or late — I guess late Wednesday, thought that it was no longer necessary, how about close of business on Monday?

MR. GESSLER: Could we do Tuesday, Your Honor?

THE COURT: Sure. On your request for the extension on the what I will call the 14th Amendment motion, you may have till Monday.

MR. GESSLER: Thank you, Your Honor.

THE COURT: But I was struck by the irony that — given I'm the one with what will be a total of six dispositive motions to rule on, but that being said, I haven't even read everything that's in front of me now, so you can have the extra time. MR. GESSLER: Thank you, Your Honor.

THE COURT: So does that make sense to you?

MR. GESSLER: Yep, that makes absolute sense, Your Honor.

THE COURT: Okay. So I want the motions in limine to be limited to things that you already don't know about because of the anti-SLAPP response.

MR. GESSLER: We will keep our motions well under 15,000 words, Your Honor.

THE COURT: Okay.

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MR. GESSLER: And we will work to be concise.

THE COURT: Okay. Anything else?

MR. GESSLER: Sure. Just a few things, Your Honor.

MR. GRIMSLEY: On this issue, may I just be heard briefly?

THE COURT: Sure, sure.

MR. GRIMSLEY: I hesitate to ask this, but in the event there are issues that come up in their response, can

we get some sort of short reply to you by Friday of next week?

THE COURT: Sure.

MR. GRIMSLEY: Thank you, Your Honor.

THE COURT: And I appreciated the brevity of what they put in their appendix.

MR. GESSLER: Okay.

THE COURT: Go ahead.

MR. GESSLER: Is that a hint, Your Honor? We will work to be brief as well.

Just one thing from us, and I hate bringing this up, but I'm going to. So for our anti-SLAPP motion, when we brought that, obviously the Court here dismissed that on what we would sort of describe as sort of procedural grounds, that it's inappropriate for the 113 and based on the public policy aspects of this case. We do want to make sure that we properly bring before the Court and tee up the Brandenburg standards on

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the First Amendment versus the Fourteenth Amendment. The way we had teed those up obviously was in the anti-SLAPP motion.

Now, what we are going to be filing today is another motion to dismiss, but it's essentially going to be almost word for word the same as our First Amendment arguments in the special motion to dismiss so that the merits are properly teed up before this Court.

THE COURT: Okay.

MR. GESSLER: The second thing we're going to be filing, and we had hoped to get this stuff done before this conference so that you would have it to at least look at, but so our apologies on that, we are going to be moving to realign the Secretary of State with the Petitioners. So that motion will be coming; that will be opposed. Okay?

And then lastly, and this is — I don't want to call this a placeholder because it is a meaningful motion, but I don't anticipate the Court will rule on this anytime soon, but we are going to be requesting attorney's fees for the complaint brought by — or the petition brought by the Petitioners. That won't be based on the Fourteenth Amendment aspects of this case, but rather the declaratory judgment, as well as the 113/1204 proceedings.

I under — I doubt that the Court will direct its attention to that anytime soon, and we're not asking for that, but we are at least going to get this in before the Court

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so it's part of the record. So those three will be coming your way, Your Honor.

THE COURT: Okay. Well, so let's take them one by one.

The Brandenburg issue, can that not — I mean, if you need to do a motion to dismiss, that's fine. But, you know, it's kind of then, you know, starts a whole new briefing which I'm not sure is necessary to preserve the issue, one.

The second one was the realignment. To what end? Like, what is the need to realign?

MR. GESSLER: The evidence — when you look at the

—

THE COURT: And I'm not saying that that may be that the Secretary of State isn't more properly aligned with them. I'm just wondering, you know, what the need is for that.

MR. GESSLER: Right. I think there's two, Your Honor. When you look at sort of the evidentiary order of proof and presentation, you know, we think that the — you know, both from her public statements and positions

that she's taken in this case, that the Secretary is aligned with the Petitioners, particularly because at this point the Secretary's unwilling to put President Trump, certify him on the ballot absent an order from this Court when she herself has admitted that there's no explicit authority to prohibit her from doing that or to enable her to refuse to certify. So that's for the merits.

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From the practical, to directly answer your question, you know, hostile parties with respect to cross-examination and direct examination, to the extent there's witnesses propounded by the Petitioner, we want to ensure that the Secretary's going to be doing direct examination because they're sympathetic witnesses. And likewise, that — it may also have implications with respect to the posture on appeal, depending or assuming this is appealed. So there are, we believe, some very practical concerns there as well.

THE COURT: So, okay. Well, I guess I see the Secretary of State's position a little bit differently. I think her position is she is going to put him on the ballot, that she would appreciate direction, absent direction from the Court to not put him on the ballot. But, you know, that's neither here or there. I assume that the Secretary of State will, if she opposes the realignment, will let me know why. And I will put that in on one of the things to rule on before the —

MR. GESSLER: She —

THE COURT: — hearing.

MR. GESSLER: Yeah, and she has indicated her opposition, and obviously we appreciate the opportunity to make our case on this issue.

THE COURT: Yep. I will tell you that the last, at least last thing on my list, but it sounds like you may have

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other things on your list. Then on the third thing with the attorney's fees, why can that not wait until after the hearing when you actually know what your attorney's fees are?

MR. GESSLER: I guess with respect to Count 1, it could. But certainly with respect to Count 2, we think it's appropriate to do it now since the Petitioners have — I won't say formally moved to dismiss, but they've certainly indicated they're —

THE COURT: They —

MR. GESSLER: — abandoning that claim.

THE COURT: They, at our request, filed a motion —

MR. GESSLER: Oh, they did?

THE COURT: — or stipulation —

MR. GESSLER: Okay.

THE COURT: — of dismissal.

MR. GESSLER: Okay. So we think that one's certainly ripe now. I'm not asking this Court to rule on this stuff before the hearing to be frank, Your Honor. We — we're not asking for that. But we just — we do want to get it in to make sure it's part of the record.

THE COURT: Okay. Well, I'm not going to require anybody to respond before the hearing either, nor do you, I think really want to reply before the hearing.

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MR. GESSLER: No. And that's why I'm just putting this out here for you.

THE COURT: Okay.

MR. GESSLER: I'm not — we're not trying to gum up with works procedurally. We just want to make sure we present our case in a robust fashion and in the record before the Court.

THE COURT: Okay. Well, why don't we just say if you're going to file the — a motion for attorney's fees, that the response will be due — I mean, once I make my ruling, you're likely then going to be running off to the Supreme Court, so it's not going to be a particularly good time. So when would you — when would the Petitioners like to respond or what's your view on this? To me it seems premature, but I can't stop somebody from filing something.

MR. GRIMSLEY: Maybe November 15th, Your Honor.

THE COURT: Sure. Okay.

MR. GRIMSLEY: And just to be clear, we don't — if we have a motion for attorney's fees, we don't have to file it now. We can wait until after everything.

THE COURT: No. Yeah, I think it's premature, so.

MR. GESSLER: That's all we have, Your Honor.

THE COURT: Okay. Before I finish, the one thing that I had on my list was we're going to have 35 hours of [p.22]

hearing time. I'm going to split it 50/50 between the Petitioners and the Defendants. But I'm going to — I don't think it sounds like the Secretary is planning on putting on a case, but to the extent, for instance, that she calls somebody from her office, et cetera, to testify, that will be counted towards the Petitioners. So each side will have 17 and a half hours to do with whatever they want, whether it's argument or evidence.

MR. GRIMSLEY: And cross-examination will count against the cross-examining party, correct?

THE COURT: Correct, yep. And, oh, I know; the other thing I wanted to talk about is this issue of the 48-hour requirement. I am a little bit worried about it, you know, so one thought that I had was to have essentially a

closing argument on like the 15th of November to — and then get a ruling out within 48 hours of the closing argument in an effort to abide by the statute. So I guess I'd be interested in whomever thought — thinks it's waivable, why they think it's waivable. And I assume that the — I assume it's the Defendants' position or the Intervenor's position that it's not applicable because 113 isn't applicable at all.

MR. GESSLER: That is correct, Your Honor.

THE COURT: Okay. So I assume it's the Petitioners who think that I can waive it.

MR. GRIMSLEY: Your Honor, we believe, and we [p.23]

haven't done extensive research on this I admit, but we believe we have not seen that as a jurisdictional requirement, and so we believe it can be waived by the parties. I think the Secretary of State is of the same view. And we understand that 48 hours is a lot to ask in a case like this. Your Honor has scheduled this in a way that we think there is enough time to get this done in an orderly fashion before the ballots have to go out. So we wouldn't waive it forever, but willing, certainly, to waive the 48 hours.

THE COURT: Right. And has anybody who does these 113 proceedings with any frequency ever seen it be waived?

MR. KOTLARCZYK: Your Honor, the 48-hour requirement's not in 113. So it — that doesn't apply in your —

THE COURT: Yeah.

MR. KOTLARCZYK: — run-of-the-mill 113.

THE COURT: Right. It's in —

MR. KOTLARCZYK: And —

THE COURT: It's in 1204?

MR. KOTLARCZYK: And this is the very first 1204 action. There's comparable 48-hour requirements in other parts of the Election Code —

THE COURT: Uh-huh.

MR. KOTLARCZYK: — where — there is some older [p.24]

case law showing that the — or holding that those deadlines are not jurisdictional. I don't have those cases right at my fingertips.

THE COURT: Oh, okay.

MR. KOTLARCZYK: But in other provisions of the Election Code that have some of these tight timelines, they have been found to be non-jurisdictional. But again, not exactly in a 113, not exactly in a 1204, but we think that provides ample support for the Court either continuing the closing arguments like Your Honor suggested, or if it closes at the end of the week of the 30th, also just ruling in as timely a fashion as can reasonably be expected in these circumstances.

THE COURT: Yeah. Well, that does give me some solace, and I guess to some extent that ship has sailed in the sense that I did beat the five-day requirement, so.

MR. KOTLARCZYK: I think that's fair, Your Honor.

THE COURT: Okay. So those were the two things that I wanted to address. And I suppose on the closing arguments, you know, we can see how the timing goes at the hearing. And if, you know, people aren't having an oppor — in reality, you know, the findings of facts, conclusions of law are, you know, the most effective closing arguments in terms of assisting the Court, so.

MR. GRIMSLEY: And, Your Honor, I'd agree that I [p.25]

don't think we necessarily need it that week. Having some time, perhaps, between the end of the evidentiary

presentation and the closing might be helpful for Your Honor, because Your Honor may have questions —

THE COURT: Sure.

MR. GRIMSLEY: — that you'd like answered, and that would give you the opportunity to formulate those, perhaps give it to us in advance, and we could come to the closing argument prepared to address those.

THE COURT: Well, why don't we just — if the parties are willing, why don't we tentatively schedule closing arguments for 3:00 to 5:00 on November 15th?

MR. GRIMSLEY: And Your Honor, I have a few additional issues I wanted to raise. Some of them involve witnesses. I can try not to say names.

THE COURT: Okay.

MR. GRIMSLEY: Although one of them I don't think I can avoid.

THE COURT: Okay.

MR. GRIMSLEY: So I wonder if we — if you're — you'd prefer to close the courtroom or if we just talk in code in that way. But let me start with —

THE COURT: Because we do have —

UNIDENTIFIED VOICE: At this point I'd rather close the court —

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THE COURT: There is media —

UNIDENTIFIED VOICE: — if we're going to talk about any names.

THE COURT: There is media on the Webex, so I think if we wanted to really have something in camera, we'd have to go into chambers. And then you'd get to see my piles of all the dispositive motions.

MR. GRIMSLEY: Well, let — Your Honor, let me address a couple things first —

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THE COURT: Okay. MR. GRIMSLEY: — and I can do it, I think, without the need —

THE COURT: Okay.

MR. GRIMSLEY: — to close the courtroom or go in camera. And I was just going to hand up to you Intervenor Trump's witness list. I'm not going to name any witnesses by name.

THE COURT: Okay.

MR. GRIMSLEY: But you will see there that there are 14 witnesses listed, all may-call.

THE COURT: Okay.

MR. GRIMSLEY: And I know Your Honor expressed some concern about the usefulness of may-call lists.

THE COURT: Uh-huh.

MR. GRIMSLEY: I share that concern. We need to [p.27]

get ready. I'd be very surprised if even half of those people were legitimately possible witnesses, but we'd like some better information if possible.

THE COURT: Well, and I also don't think that this complies with my expectations as to the subjects that they'd be testifying about. It's like in a Rule 26 disclosure when —

UNIDENTIFIED VOICE: Judge, the way you're holding that, the camera —

THE COURT: I'm trying to avoid that. The — you know, it's like a Rule 26 disclosure when you say the person has information related to the case. So I can't remember exactly, did both parties exchange witness lists?

MR. GRIMSLEY: We did, Your Honor. We provided a witness list. I think we have six will-calls and three may-calls.

THE COURT: Okay.

MR. GRIMSLEY: We also, and this is not true of all of the witnesses on that list, but provided declarations from many of those will-call witnesses, I think even one of the may-call witnesses, in support of the anti-SLAPP response. So there's been fairly significant discovery from us on most of the witnesses. And then for the remainder, I think we do describe, I don't have it right in front of me, but the basic subject matter over which they were going to testify.

[p.28]

THE COURT: Okay. And so what are you asking for?

MR. GRIMSLEY: If we could get a better good faith list. I know there's going to be a final witness list and there's a deadline for that in the future, but this is so difficult to decipher that we'd like a narrowed-down or at least a list that identifies will-calls by Monday.

THE COURT: Mr. Gessler?

MR. GESSLER: Your Honor, we can produce will-calls by Monday.

THE COURT: Okay.

MR. GESSLER: And if I may address one thing, and I will be frank with the Court, we have obviously lodged our objections in the past, but I will nonetheless renew our deep sense of frustration for this process here. The Petitioners, as we've said before, have had months. We were notified that they were anticipating this case for a year prior, and we have had weeks to try and obtain witnesses where we have no subpoena powers, where — this is an explosive matter where witnesses are very hesitant to even have their names known due to prosecution. The entire process has been exceptionally difficult and we would submit highly prejudicial to our ability to bring a defense.

JA140

I've approached this in good faith with a can-do attitude in trying to do this, but I will be frank, Your Honor,

[p.29]

you yourself have served as a litigator and I'm sure you can understand the challenges we face in trying to obtain witnesses for an event that happened a year and a half ago, 2000 miles away, with no subpoena powers, where everyone is hesitant to speak. It is exceptionally difficult.

And we are doing our level best here. We're certainly willing to provide as much information as we can about will-call by Monday. I'm not objecting to that. But I do not want implications, and to be frank, that there is any way we have not acted in good faith or done anything less than made Herculean efforts to try and move forward on what is an incredibly compressed timeframe where we've had very little opportunity to prepare a case.

THE COURT: Okay. So let's try to have a will-call, may-call, and I do think they're entitled to a little bit more detail as to what these people may or may not say. And I'm assuming that this is not including expert testimony, that —

MR. GRIMSLEY: That's correct. Our expert disclosures are due today, Your Honor.

THE COURT: Okay. Great. And I guess, also, I assume it goes without saying that we don't have time or really want to have, you know, complete duplication of testimony, because it strikes me that many people on this list probably have very similar, if not the same information.

[p.30]

MR. GESSLER: Your Honor, I think that applies to witnesses numbers 7 through 12, certainly.

THE COURT: Yep, and 2. And number 2 as well. Right?

MR. GESSLER: Perhaps not, Your Honor.

THE COURT: Okay.

MR. GRIMSLEY: And, Your Honor, that brings me to the second item about witnesses, and this goes to the hearing itself. As Your Honor has noted, it's going to be a very compressed hearing. Even though I think we will have more evidence to put on, we're going to be constrained by 17 hours, but five days for all of us. Given some of the people you see on that witness list, and as you might imagine might be on ours as well, I just wanted to bring up with the Court that the parties be admonished, and we'll commit to this, that we're not going to engage in sideshows on cross-examination.

The cross-examination should be limited to the testimony and evidence that was presented on direct examination. Bias obviously is generally fine on cross-examination, but not sideshows into things that are just meant to embarrass or sensationalize. And that — I assume that would be the Court's policy, but just wanted to make sure that that was the case.

THE COURT: I am not going to — I'm not going to limit cross-examinations necessarily to the directs because

[p.31]

I do want to employ kind of a one-touch rule where everything gets out at one time. But I am going to limit testimony to issues that are relevant in this case. And so

—

MR. GRIMSLEY: And that's fair, Your Honor. I just do worry that there's a real risk of sideshows. And again, we'll commit to not doing that if some of the witnesses on

that list testify, and I assume that Intervenor Trump would have no problem with that as well.

THE COURT: Well, and also, I mean, to some extent, if somebody wants to do a sideshow and they only have 17 hours, you know, that's a little bit kind of their loss, correct?

MR. GRIMSLEY: It is. But as Mr. Gessler points out, it's not so easy to get witnesses to testify in these cases. And so the idea that total sideshows will be permitted just because it runs out the clock could really dampen somebody's enthusiasm for testifying.

THE COURT: Okay. Well, I have no problem letting people know when I don't want to hear something.

MR. GRIMSLEY: Thank you, Your Honor.

Then there's another non-witness issue. It's there's going to be a substantial amount, I think, of nontestimonial evidence if it comes in, like the January 6th report and the findings that we identified in response to the anti-SLAPP motion. I think there will be some videos that show

[p.32]

the party, the Intervenor, actually giving speeches or talking or whatnot. Those will not necessarily come in through a witness, especially if the last issue I have is true.

So the question is what would you like in terms of a procedure for getting that type of evidence to you? I — one way to do it, and I think maybe the most sensible, is that we cite it in our proposed findings of facts, we provide that evidence to Your Honor. Your Honor can look at it, either ask to look at it at the hearing or on a different schedule so that we're not taking up time with lawyers just either reading or showing endless video.

We may want to show some video just for context, and we'll certainly alert Your Honor to it. But in terms of all

the evidence we have, I don't think it would be a good use of time to be presenting it.

MR. GESSLER: May I respond, Your Honor?

THE COURT: Sure.

MR. GESSLER: I'd just say 17 hours is 17 hours. If they want to have witnesses, if they want to have evidence, if they want to have video evidence, that counts towards their 17 hours. If you want us to produce extensive video of testimony or whatever and ask you to look at it outside the trial, I guess we both can play that, take that approach. But we think it's highly inappropriate for them to say we have 17 hours, and then we're going to give you lots of other hours of

[p.33]

evidence to look at in chambers. We think that's inappropriate, Your Honor.

THE COURT: So I agree. I don't want to be handed, you know, 35 videos and asked to watch them back in chambers because, frankly, that won't really let me know what part of them you think is the most important, et cetera. That doesn't mean, however, that you necessarily need to bring in the video through a witness. If, for instance, it is a video of a Trump — an Intervenor Trump speech, you know, that's a statement against interest. It would be admissible, I believe, and can be played without, you know, somebody saying I took the video.

But in terms of like the House Report, I think it would be — I don't want — I'm going to need to be directed to, obviously, what parts of the House Report are — you think are — that I need to look at. And, B, my assumption is, is that, you know, there's going to be different objections to different parts of it, because while the document itself may pass one hearsay exception, there's going to be hearsay within that as well. And so, I mean, I

think we're going to have to, for the part — for the parts of it that you want to admit, are going to have to somehow be presented to me.

MR. GRIMSLEY: And Your Honor, we're not looking to admit the entire report.

THE COURT: Uh-huh.

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MR. GRIMSLEY: I don't know if Your Honor caught onto this. In our response to the anti-SLAPP motion —

THE COURT: You have —

MR. GRIMSLEY: — we submitted a declaration that had as an exhibit certain findings.

THE COURT: Yeah.

MR. GRIMSLEY: And those are the findings upon which we intend to rely. So we've already narrowed the —

THE COURT: Yeah.

MR. GRIMSLEY: — scope pretty significantly. I can't say it's a list of 15, it's a pretty substantial list. But that is the subset of findings that we would like to present. So we can go ahead and do that, but I do think video's a little bit different, and I understand Your Honor's concern there, but giving you those. And they have those now. If they want to raise objections to those as part of the —

THE COURT: Yeah.

MR. GRIMSLEY: — evidentiary objection process, I think that's up to them. But they know what we want present. We're not giving them a total black box here.

THE COURT: Yep. And the trial, I mean, in any — and then this goes a little bit to Mr. Gessler's point. I mean, in a trial to the Court, you always have — I mean, if you admit a contract and no witness speaks about it, and submit it into evidence, and in your findings of facts, you could

[p.35]

point to a provision that you didn't necessarily have testimony on, it's still evidence that's been admitted.

So I do understand that the findings of facts may include some things where there's no testimony, but, you know, the important things should be presented through some sort of witness or shown or, you know, pointed out so that the Court has the opportunity. I mean, I may have questions during trial and if the evidence isn't given to me during trial, I'm going to have trouble answering — asking those questions. Correct?

MR. GRIMSLEY: Absolutely, Your Honor.

THE COURT: So I think it's some sort of hybrid of what you suggest.

MR. GRIMSLEY: And it may be that there are findings that are sufficiently significant or sensible to present in the flow of the trial, and we can just present them and read them if need be, or we can figure out some manner of presentation. On the videos, we'll be ready to present whatever videos. We're just going to chop them up a bit. There will probably be completeness objections. We'll make sure that Your Honor has the full copy of some of these that we use.

THE COURT: Yeah.

MR. GRIMSLEY: But we will not be presenting, you know, 90-minute speeches.

[p.36]

THE COURT: Thank you.

MR. GRIMSLEY: And the last one is one that Counsel for the Intervenor has asked that we do in camera because it would require the name of a witness.

THE COURT: Okay. I wish I had known in advance so that, you know —

MR. GRIMSLEY: I'm very sorry, Your Honor.

THE COURT: How many people need to come back into chambers? Can it be limited to one per party?

MR. GESSLER: That's fine with us, Your Honor.

THE COURT: So the four of you?

MR. GRIMSLEY: That's fine, Your Honor.

THE COURT: Great.

(Off record)

MR. GESSLER: Not from us, Your Honor.

MR. KOTLARCZYK: Not for the Secretary, Your Honor. Thank you.

THE COURT: Great.

MR. GRIMSLEY: Your Honor, there are three motions that I think they're planning to file. Two — one we've already decided the attorney's fees we don't need to respond to until later, but we don't have a schedule really for these others.

I was going to suggest, actually, on the First Amendment motion, I agree with you, I don't think we're going

[p.37]

to say waiver because you didn't file the motion to dismiss. I don't think you necessarily have to file it in any event to preserve that. I would suggest to save everyone's time and sanity, that we just kind of convert that part of the briefing on the anti-SLAPP to like a pretrial brief that Your Honor has, rather than submit new papers on that.

MR. GESSLER: Let me consider that, Your Honor.

THE COURT: Okay.

MR. GESSLER: Let me think a little bit about it. And actually, I do have one other thing that my colleague pointed out.

For our motion in limine, our motions in limine, I mean, if there's sort of specific clips, you know, to the

extent we could get those so we can target our motion, that would be very helpful for videos.

MR. GRIMSLEY: And we have I think on our exhibit list in many cases put both the full and then clips.

MR. GESSLER: Great.

MR. GRIMSLEY: The clips are the ones that we would be intending to play.

MR. GESSLER: Okay.

THE COURT: Okay. And the — and I don't — you know, absent perhaps this issue with the Brandenburg case, I do not want or need trial briefs. I consider the motions to dismiss to be trial briefs.

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MR. GRIMSLEY: Thank you, Your Honor.

MR. GESSLER: I'm trying to think if there's actually anything else we would want to say and I can't right now, Your Honor, so.

THE COURT: I'm so happy to hear that.

MR. GESSLER: But if it comes up, I'll certainly mention it.

MR. GRIMSLEY: And then, Your Honor, finally on the motion to realign, I heard that you were going — the Intervenor was going to file today, I think.

MR. GESSLER: Yes.

MR. GRIMSLEY: When would you like us to respond to that? And I think it would be more the Secretary of State's response, but I think we may weigh in as well.

THE COURT: Well, so Mr. Kotlarczyk, when do you think you can respond?

MR. KOTLARCZYK: I haven't seen it yet, Your Honor, but in keeping with the schedule of the case, a week.

THE COURT: Okay.

MR. KOTLARCZYK: Thank you.

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MR. GRIMSLEY: And that should be fine for us, too.

THE COURT: Okay. Are you going to need to reply, Mr. Gessler?

MR. GESSLER: If I do, we'll do it in a day or
[p.39]

two, Your Honor.

THE COURT: Okay. Great. Did I pronounce your name right, Mr. Kotlarczyk?

MR. KOTLARCZYK: That's it, Your Honor. Thank you.

THE COURT: Okay. I brought it back up on my screen just to make sure that I was at least attempting to say the right name.

MR. KOTLARCZYK: It's a lot of consonants, Your Honor.

THE COURT: Yeah. Anything else?

MR. GRIMSLEY: Nothing from us, Your Honor.

THE COURT: Perfect. We will go off the record on 2023CV32577.

(Proceedings concluded at 2:36 p.m.)

JA149
DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
1437 Bannock Street
Denver, CO 80203

Case Number 2023CV032577, Division/Courtroom 209

CERTIFIED STENOGRAPHER'S TRIAL
TRANSCRIPT
TRIAL DAY 1: October 30, 2023

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAUFER,
KATHI WRIGHT, and CHRISTOPHER CASTILIAN,

Petitioners,

v.

JENA GRISWOLD, in her official capacity as Colorado
Secretary of State, and
DONALD J. TRUMP,

Respondents,

and

COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE, and DONALD J. TRUMP,

Intervenors.

The trial in the above-entitled matter, commenced on
Monday, October 30, 2023, at 8:06 a.m., before the
HONORABLE SARAH B. WALLACE, Judge of the
District Court.

JA150

This transcript is a complete transcription of the proceedings that were had in the above-entitled matter on the aforesaid date.

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MORNING SESSION, MONDAY, OCTOBER 30, 2023

WHEREUPON, the court convened at 3 8:06 a.m., and the following proceedings were had:

* * * * *

THE COURT: You may be seated.

Good morning. We are on the record on 2023-CV-32577, Norma Anderson, et al., vs. Jena Griswold and Interveners, Colorado Republican State Central Committee and Donald J. Trump.

Before we start, I just want to cover some preliminary matters. The Court has reviewed the motion to recuse that was filed yesterday, as well as the exhibits.

I do not dispute that in October '22, prior to taking the bench, I apparently made a \$100 contribution to the Colorado Turnout Project. That being said, prior to yesterday, I was not cognizant of this organization or its mission.

It has always been my practice, whether I was entirely successful or not, to make contributions to individuals, not PACs. While I have no specific memory of this contribution, it was my practice and my intention to contribute to an individual candidate, not a PAC.

I can assure all of the litigants in this litigation that prior to the start of this litigation,

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and to this day, I have formed no opinion whether events of January 6th constituted an insurrection or whether Intervenor Trump engaged in an insurrection or, for that matter, any of the issues that need to be cited in this

hearing. If I did, I would recuse myself. But because I don't, I deny the motion for recusal.

I'm going to start with some ground rules. The petitioners and Secretary Griswold have a combined 18 hours of testimony, evidence, and arguments, and the intervenors have a combined 18 hours. You may use them as you wish, so long as they are productive and respect the decorum of the Court.

As I said in my prior rulings, the parties have very sophisticated lawyers. If the parties think something is relevant, then I will likely allow the subject to be explored. I will not, however, allow this proceeding to turn into a circus.

I also think that it is worth repeating that to the extent we have discussions on the record regarding evidence and whether it should be allowed in, I will count that time against the party who's objecting to the evidence.

Because I am the judge, I may ask questions. Do not infer anything by my questions.

Petitioners, are you planning on making an
[p.11]

opening statement, or do you intend to go straight to the evidence?

MR. GRIMSLEY: Your Honor, we will make an opening statement, and then we have a few preliminary issues as well.

THE COURT: Okay. And Mr. Gessler, are you planning on making an opening statement?

MR. GESSLER: Your Honor, we have a few preliminary issues, and then we'll make our opening statement.

THE COURT: Yeah. I just want to make sure we all understand the schedule. Okay. Whatever the preliminary issues are.

MR. GRIMSLEY: Thank you, Your Honor. First, the parties have reached some stipulations. We will be filing those with the Court. There are 17 pretty benign, but it should help speed things up and make things more efficient.

THE COURT: Okay.

MR. GRIMSLEY: I can hand up a copy, if you'd like, or if you —

THE COURT: Sure.

Are these factual stipulations?

MR. GRIMSLEY: They are factual stipulations, Your Honor.

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THE COURT: Okay.

MR. GRIMSLEY: The next issue is the rule on witnesses. We would like to invoke the rule on witnesses, meaning that fact witnesses should not be present for testimony in the courtroom. Normally, that would be easy; you just keep people out of the courtroom.

In this case, because it's streaming and people could be watching from other places, we'd ask for an admonition that that not be done and that the parties alert their witnesses to that fact.

THE COURT: Okay. Well, the —

MR. GRIMSLEY: Expert witnesses, though, we would concede, can stay and watch.

THE COURT: Okay. Is that acceptable?

MR. GESSLER: Yeah, that's acceptable. No objection, Your Honor.

THE COURT: Okay. So the Court will enter a sequestration order, and it is incumbent upon the parties to make sure that their witnesses don't walk into the courtroom, but it's also incumbent on the parties to ensure that their witnesses don't log on to WebEx or otherwise

watch the proceedings, either live streamed or after the fact on YouTube, et cetera.

MR. GRIMSLEY: And there's another issue on witnesses I wanted to raise, Your Honor, and this may [p.13]

actually shorten the hearing.

THE COURT: Okay.

MR. GRIMSLEY: We have two of our witnesses — I'm not going to name names — abruptly decide not to testify last week. They asserted — may I approach?

THE COURT: Sure.

MR. GRIMSLEY: — just so you can just see who they are.

I've highlighted the witness names on the second page. These were two Trump administration officials who were set to testify. One at length. We don't think they're necessary for our case, but wanted to alert the Court that they did very abruptly tell us last week they were not going to testify.

There have been some concerns about safety, but I'll confess, they did not say that was the issue. It's not very clear to us what the issue was.

They had raised the possibility of executive privilege. That seemed odd to us since one of them had submitted a declaration and no objection on privilege had been made. A motion to exclude that witness's testimony had been filed, and no objection based on privilege had been made. So it's a little odd to us, but we at least wanted to alert the Court.

[p.14]

If we hear anything that gives us greater concern, we will, of course, bring it to the Court right away.

THE COURT: Okay.

JA154

MR. GRIMSLEY: On experts. As you know, we did not get expert reports — there was only one — from the respondents until Friday shortly before, I think, midnight. We got a report from a Mr. Delahunty — or Professor Delahunty.

In the normal course, we would have filed a 702 motion to exclude. He claims to be an expert on the Fourteenth Amendment and the history of the Fourteenth Amendment. He's never written on it before. He doesn't cite much in the way of actual history in this discussion of the Fourteenth Amendment.

Given the late nature of today, we can either file a short motion, if you'd like, or simply cross-examine Mr. Delahunty when he testifies. I assume that would be either Wednesday or Thursday.

THE COURT: Okay.

MR. GRIMSLEY: And then there were a few issues on exhibits.

In your order, I think on October 27, you had asked us to explain why Plaintiffs' Exhibit 131 was going to be used. That's the video of both Rudy Giuliani

[p.15]

and John Eastman on the Ellipse on January 6. They gave a speech right before President Trump gave his speech, and they provided the basis for President Trump to say that Vice President Pence had the authority to reject certification of the electors, and President Trump referred to their statements in his speech endorsing them. That was also the speech in which Mr. Giuliani said "trial by combat."

And again, we're not offering those statements or that speech for the truth of the matter asserted, but for the effect on the listeners, the effect on Mr. Trump. And, indeed, we don't agree with most of what they said. We're

offering it really for the untruth 14 of the matter asserted.

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And then there are two others, Plaintiffs' Exhibit 73 and Plaintiffs' Exhibit 126. Those were two videos that the Court excluded in its most recent order, I believe. It was not clear from our submission, and we apologize, that those were both videos that were embedded in tweets that President Trump sent out, so they were retweets from his account.

One of them, "The Fight for Trump," Plaintiffs' 73, was sent out the very same day as the "Will be Wild" tweet on December 19, and so we think it is highly relevant as speech of Mr. Trump. It was

[p.16]

endorsed by him and tweeted out. So we would ask for those to be admitted.

THE COURT: Okay. Any response?

MR. GESSLER: Yes, Your Honor. Thank you.

Before going to a response, for a preliminary matter, would you like us to enter appearances on record?

THE COURT: I was going to — I was planning on doing that before openings, but since — why don't — why don't you — why don't you respond to these things, and we'll have everybody enter their appearances.

MR. GESSLER: And then we'll take a half hour for entry of appearances.

So just — and if I may just talk about some of the preliminary matters we have as well. With respect to the witness withdrawals, we feel the petitioners' pain, and with respect to the exhibits, I mean, we'll maintain our objections.

And I understand the posture of the Court, particularly the objections with respect to Mr. Giuliani's and Mr. Eastman's speech. They're not the ones on trial

here today. We're talking about whether President Trump engaged in activities, not — not whether they and — they were not President Trump when they made those speeches. So we would maintain those objections.

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With respect to 73 and 126, we'll have to take a look at that a little bit closer, Your Honor. I confess that I don't have all 100-and-whatever exhibits fully committed to memory at this point.

With respect to some of our points, just to point out — and I know the Court has been very diligent in producing orders on issues. I think we still have the specific intent motion outstanding as far as that, as well as the First Amendment motion to dismiss. I'm assuming the Court will take those issues under advisement, but I wanted to at least point that out.

We have one witness who has concerns about some of the legal threats that have been levied against him, and so he's asked for an attorney to be present to be prepared to make objections to his testimony if the attorney believes it's inappropriate.

We're asking the Colorado Supreme Court, we will be asking them today, to sort of expedite that process so that he can — the attorney can be admitted pro hac vice, and then once that's done, we'll probably come to you and ask for an oral admission for that attorney.

THE COURT: Is that the person who — who filed the Prok motion on Friday, or is that somebody different?

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MR. GESSLER: It's someone yet new, Your Honor.

THE COURT: Okay.

MR. GESSLER: Yeah, that's someone different, Your Honor. It's a witness of our list; I believe it's the second witness we've listed.

JA157

THE COURT: Okay.

MR. GESSLER: Let me — I don't quite have that order — yes, the second witness that we've listed. THE COURT: My guess on both is, I don't think that we need to intervene to tell the Colorado Supreme Court that the hearing is going on currently. But to the extent they say they won't expedite something without hearing from my chambers, just let us know, and we'll try to take care of that.

MR. GESSLER: Thank you.

And we expect, you know, estimates of time, that he'll go on probably Wednesday or Thursday. So we're hopeful we can get that taken care of.

The other thing, and I know — I believe you addressed this before. Some of our witnesses we may ask to call out of order based on schedule and the vagaries of the case.

I will say, Your Honor, it brought us no joy to file that motion earlier, so I just want to tell

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you where we're coming from on that.

THE COURT: No worries.

MR. GESSLER: And I think from preliminary matters, that's it.

While I'm at the podium, if you'd like me to do entries of appearance for our cast of characters, I'm happy to do that or — or wait.

THE COURT: Are you prepared to enter appearance for at least everybody on President Trump's team?

MR. GESSLER: Yes, ma'am.

THE COURT: Okay. If you can do that, that would be great.

MR. GESSLER: Okay. So for the record, my name is Scott Gessler. I represent President Donald J. Trump, and with me at the head of the table here is our paralegal,

Ms. Joanna Bila. She keeps the trains running on time. Mr. Jonathan Shaw, who's been admitted pro hac vice. Mr. Geoffrey Blue, a member of my law firm.

In the back row we have Mr. Chris Halbohn. His motion was submitted. He will not be speaking until he's admitted, or perhaps ever. But he represents President Trump as well. Mr. Justin North from our law firm represents President Trump.

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In the back, we have Mr. Mark Meuser representing President Trump, and Mr. Jacob Roth as well.

I don't think I've missed anyone.

THE COURT: Great.

MR. GESSLER: Thank you, Your Honor.

THE COURT: And why don't we just go to the Colorado Republican Party. Could just one person do — enter the appearance for everyone, and I think it's probably best if you go to the podium.

MS. RASKIN: Certainly.

Good morning, Your Honor. I'm Jane Raskin with the American Center for Law and Justice. With me today, also with the ACLJ, is Norman [sic] Moelker and Benjamin Sisney, who's appearing remotely.

Also with us are Michael Melito of Melito Law, and Bob Kitsmiller of Podoll & Podoll.

THE COURT: Great. Thank you.

MS. RASKIN: Thank you.

THE COURT: And for the petitioners?

MR. GRIMSLEY: Thank you, Your Honor.

Sean Grimsley, on behalf of petitioners. With me is Eric Olson, Martha Tierney, at the end of counsel table. We have Nikhel Sus, Mario Nicolais, Jason Murray. And Derek Hehn will be handling technology for us.

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THE COURT: Great.

MR. SULLIVAN: Good morning, Your Honor. Grant Sullivan with the Colorado Attorney General's Office.

With me is Jennifer Sullivan, Deputy Attorney General. We represent Colorado Secretary of State, Jena Griswold.

I did have just one clarifying question on preliminary matters. The Secretary of State is a party to this case. She's also listed on the GOP's witness list. I just wanted to clarify that she's not subject to the sequestration order.

THE COURT: She is not.

MR. SULLIVAN: Thank you.

THE COURT: Parties are not going to be subject to the sequestration order.

MR. SULLIVAN: Thank you, Your Honor.

THE COURT: Are the petitioners ready to begin?

MR. OLSON: Yes, Your Honor.

THE COURT: Great.

As I look around, I think we have more lawyers and police officers than anybody else

MR. GRIMSLEY: Sign of the times.

MR. OLSON: My apologies, Your Honor.

[p.22]

Give me one second to make sure we have the right thing showing in the right way.

Do we need to turn these monitors on? We're seeing it on the — I think we're getting the output. We just need

—

THE COURT: While we do that, just for everybody's edification, if anybody doesn't want to stand at the podium, we do have a microphone that they can use.

MR. OLSON: Thank you, Your Honor.

JA160

Good morning. Six Colorado voters, four Republicans and two independents, brought this case to ensure Colorado has a fair election among eligible candidates.

Trump incited a violent mob to attack our Capitol, to stop the peaceful transfer of power under our Constitution. That mob got within 40 feet of Vice President Pence after they chased him from the Senate Floor. That mob tried to hurt and kill our elected leaders, and we are here because Trump claims, after all that, he has the right to be President again.

But our Constitution, our shared charter of our nation, says he cannot do so. And Colorado law says this Court must ensure that only eligible candidates appear on our ballots.

Now, this case has four basic components:

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Trump took an oath as an officer of the United States; January 6 was an insurrection against the Constitution; Trump engaged in that insurrection; and the Secretary of State enforces constitutional qualifications, and this Court can order her to keep ineligible candidates off the ballot.

Now, turning to the first element, there's no dispute Trump took an oath as President. That's stipulated. I'll address their novel claim that his oath somehow falls outside of the Fourteenth Amendment later.

And what happened on January 6 was an insurrection against the Constitution. That's not in serious dispute. Trump's own impeachment lawyer admitted as much. Many others have found it.

We'll hear today and tomorrow from three people who were there that day. First are two officers, Officer Danny Hodges and Officer Winston Pingeon. They fought the mob, hand-to-hand combat, you'll see.

JA161

We'll also hear from Representative Eric Swalwell, who will explain how that mob disrupted the core constitutional process of the peaceful transfer of power.

We'll also hear from Professor Gerard Magliocca. He is one of the nation's experts on the — Section 3 of the Fourteenth Amendment. He's written

[p.24]

several peer-reviewed articles on Section 3 and many articles and books on the history of the Fourteenth Amendment. He will explain that when the Fourteenth Amendment was ratified, insurrection against the Constitution referred to any public use or threat of violence by a group to prevent or hinder the execution of the Constitution.

January 6 easily meets that standard. Trump assembled a violent mob that tried to prevent the constitutional transfer of power, and did, in fact, stop that transfer of power for some time.

Now, turning to President Trump's role in all of this, he engaged in this insurrection on January 6. He began by undermining the process for selecting our President in sowing doubts about elections. This early pattern of behavior shows Trump's use of common extremist tactics, using language that played into existing conspiracy theories. He was a leading proponent of the birther myth about President Obama.

He questioned the validity of elections, even the one he won in 2016, claiming he actually got millions more popular votes than he really did. And leading up to the 2020 election, he developed a plan to cast doubt on the results, and after the election, he quickly focused on the January 6 transfer of power to

[p.25]

disrupt the peaceful transfer of power.

JA162

In December, he started laying the groundwork for disrupting the constitutional process on January 6. On December 19, he posted that “There will be a big protest in DC on January 6. Be there. Will be wild.”

A week later, he talked about never giving up: “See everyone in DC on January 6.” “See you in Washington, DC, on January 6. Don’t miss it.”

Again, “See you in DC.”

These tweets continued: “Big protest rally.” “Stop the steal.” We’ll hear about the importance of that language later on.

Again, talking about the 6th, over and over again, here he retweeted a claim that, quote, “The cavalry is coming.”

We’ll hear about Trump’s invocation of military terms to support and rile up his supporters. More admonitions: “Come to DC on January 6th,” over and over and over again. And then on January 6, he reposted his speech.

Now, in addition to this drumbeat of pleas to his supporters to have him come — to have them come to Washington to disrupt the transfer of power on

[p.26]

January 6, he made repeated, deliberate statements to bring a mob primed for violence to DC on January 6.

He refused to criticize the Proud Boys, an important part of the insurrection on January 6th in the presidential debate and, instead, told them to stand back and stand by.

(Video playing.)

MR. OLSON: Leading up to January 6, he praised the Trump Train, which was a group of trucks that intimidated and forced Biden campaign workers on a bus off a highway in Texas. He tweeted, “I love Texas,” with this video.

(Video playing.)

JA163

MR. OLSON: He deliberately praised his supporters that used violent techniques to intimidate political opponents.

Again, leading up to January 6th, he used violent, inflammatory rhetoric. He claimed that if this happened to someone else, they would consider it an act of war and fight to the death.

Right before, January 5, he started — 6th, I'm sorry — he started threatening lawmakers with the crowd he assembled.

On the afternoon of January 5, he said, 'Washington is being inundated with people. Our

[p.27]

country's had enough. They won't take it anymore."

And he got even more bold a few minutes later when he said, "I hope the Democrats, and even more importantly, the weak and ineffective RINO section of the Republican Party are looking at the thousands of people pouring into DC. They won't stand for a landslide election victory to be stolen."

And then he identified three Republican leaders by name. He threatened leaders of his own party with the mob he assembled.

Now, you will hear from an expert in political extremism, who will discuss Trump's relationship with violence and political extremism. Professor Peter Simi has studied extremists for his whole career. He's written books, provided testimony at the January 6 Committee's invitation.

And he will explain how communications like we just saw, and additional ones, by President Trump fit into a longstanding call-and-response pattern that he developed with supporters where he instigated violence and praised

those who committed violence against political opponents on his behalf.

Now, turning back to what happened on January 6, once Trump brought the crowd there, he told them to march to the Capitol and fight. Let's look at

[p.28]

two portions of his speech on the Ellipse on January 6.

(Video playing.)

MR. OLSON: Two important features of that speech we just saw: First is his focus of the crowd on the actions of Mike Pence that were shortly to happen in the Senate Chamber; and second, his repeated reference to fight, and urging his supporters to fight.

Now, I'm sure that Trump will claim that because he used the words, quote, "peacefully and patriotically," later in that speech, that he did not, therefore, engage in insurrection.

That claim is wrong at every level. He used "fight" 20 times in that speech, "peaceful" only once. Professor Simi explains how leaders use language like that, like the peacefully comment, to create plausible deniability that s just filter.

Trump well knew how his supporters would respond. He saw what happened when he told the Proud Boys to stand back and stand by and how they treated that as an endorsement. In fact, his use of "peaceful" in the rally and again use in this proceeding highlights that he knew the power of his other words.

If you don't think people are going to engage in violence after what you told them or that your words will provoke violence, you don't need to say "be

[p.29]

peaceful." They already will be.

JA165

But that speech that we just saw got the crowd worked up and headed to the Capitol. I'll show you a video taken from the top of the Capitol, at 2:23. You can see the time stamp in the upper left.

So after the speech, the crowd followed Trump's orders and marched down to the Capitol. But as you can see from the video, much of the rally, they weren't doing much. They were just standing there. So what did Trump do right after, the minute after this video? He posted a tweet that incited the mob to violence.

Again, channeling on the focus on Mike Pence he used earlier in the day, he described Mike Pence as weak and said he didn't have the courage to do what should have been done to protect our country and our Constitution. "USA demands the truth."

And look what happened. Instantaneously with this tweet, we see people read it in the crowd from bullhorns. They immediately started chanting "Hang Mike Pence," and the violence began in earnest.

(Video playing.)

MR. OLSON: There was no possible innocent explanation for that tweet that set the crowd on fire.

We'll hear later today from

[p.30]

Officer Hodges. This is his body cam at the exact same time. You can see in the upper right-hand corner, it's :, so within five minutes of Trump's issuing that tweet, this is what he faced.

(Video playing.)

MR. OLSON: So within 30 minutes of the tweet, we see the picture from the same vantage point we saw before. The crowd had overrun the barriers, but this was the back of the crowd. This was a crowd that was not the

frontline of the attack, of the assault on our constitutional process.

We have video which shows Officer Hodges. Within 30 minutes of the tweet, he had retreated to the tunnel and was trying to defend the tunnel against this mob.

(Video playing.)

MR. OLSON: That is Officer Hodges, who you'll hear from shortly.

This was an insurrection that Trump led. As we've seen, he summoned and organized the mob. He gave the mob a common purpose: Disrupt Mike Pence's certification of the election. He did that by inciting the mob at the Ellipse.

He knew that mob was armed and dangerous. He told the mob to go to the Capitol with him. Once they

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were there and not sufficiently violent, he incited the mob with that 2:24 p.m. tweet and others that followed.

And, importantly, he helped the mob by refusing to mobilize resources to stop the attack. He spent three hours watching it unfold on TV without doing a single thing, even though he was the most powerful person in the world.

Now, what does Trump say in response to this overwhelming evidence? He says a few things. He says: Hey, I said "peacefully" in the speech so I didn't engage in the insurrection.

We already talked about that. That "peacefully" proves his intent.

He then says: I wasn't there. I did not engage in insurrection.

But he did. He kept quiet. He tweeted inflammatory statements that incited the mob and watched the mayhem unfold for three hours, with doing nothing.

JA167

He continued to try to pressure Congress to do the mob's bidding and overturn the election.

And lastly, Trump says: Others failed to protect the Capitol, so it's not my fault there was an insurrection.

He blames others. But it was Trump's dereliction of duty in violation of his oath to preserve,

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protect, and defend the Constitution that caused the constitutional process to stop.

You'll hear from national security expert Bill Banks, who's dedicated his career to the safety of our nation, studying how that works. He wrote a book 6 recently called "Soldiers on the Home Front: The Domestic Role of the American Military." He explains that Trump did not use the available federal resources.

In fact, Trump didn't use the resources he used in response to other threats, like the Black Lives Matter protest at Lafayette Square, where they used tear gas and federal agents to clear the square very violently.

Now, Trump is going to call witnesses, we understand, to say that he tried to put people in place to defend the Capitol before January 6. That is not true. No record exists of him doing that, no indication that he used his vast power as Commander in Chief to do that at all. That is just an invented excuse after the fact with no evidentiary support.

But even that doesn't matter. Trump cannot avoid culpability for engaging insurrection by blaming the victim. Whether or not an insurrection occurred does not turn on how well defended the Capitol was. He ignited the mob, told them to go to the Capitol,

[p.33]

and inflamed them with his tweet.

JA168

Now, finally, Trump says the law — even if all that's true, the law doesn't apply to him, first because he says he just was using speech. But again, Professor Magliocca explains the history of Section 3 of the Fourteenth Amendment in using robust historical sources; shows that at the time of passage, 1868, engaging in insurrection included words of incitement or specific words of encouragement. That's what Trump did here.

And in any event, it's not just Trump's speech that is at issue. His conduct contributed to the mob's violence. His failure to act when his oath required him to do so led to the insurrection.

Now, Trump brings an expert, Professor Delahunty, but he's no expert at all on the Fourteenth Amendment. Never written a book or peer-reviewed article on this issue; on the Fourteenth Amendment more generally, not performed any original history. There's no record of him studying this before he wrote a short opinion piece two months ago.

Now, Trump next argues that the Fourteenth Amendment doesn't cover the President, that there's an exception because it's a different kind of officer.

Again, Professor Magliocca will explain

[p.34]

why history contradicts this claim. It's nonsensical to create an exception for the most powerful person in government. And at the time, in 1868, there's widespread understanding that "officer" included the President.

Finally, Trump claims that state courts like this one can't hear these disputes. Now, as we've talked about, he's wrong under Colorado law. *Hanlen v. Gessler* makes clear that the Election Code requires issues regarding a candidate's eligibility to be determined by the courts, which is what we're doing here.

In addition to this bedrock law, we'll also hear from Hilary Rudy, who's a deputy director in the Secretary of State's elections division. And she will explain the history of Secretary of State enforcement of qualifications and qualification challenges in court.

And I think Your Honor will easily conclude that this action falls well within a long line of cases where Courts decide ballot eligibility requirements.

Now, our Constitution prevents people who betrayed their solemn oath, as Trump did here, from serving in office again. Colorado law gives these voters the rights to make sure their votes will count by coming to this Court and ensuring that only eligible candidates

[p.35]

appear on our ballots.

Trump engaged in insurrection and, therefore, cannot appear on the ballot. No person, not even the former President, is above the law.

We ask, after this hearing, that this Court find Trump is an ineligible candidate under Colorado law and order the Secretary of State not to place him on the ballot.

Thank you, Your Honor.

MR. GESSLER: Thank you, Your Honor.

So I don't have a highly produced video, but I do have a few words that I think this Court should follow and think about in this case.

The United States is the oldest modern democracy, well over years, far different than any other country in many ways.

And what makes us different is the experiment we launched, which is this thing called elections. We have elections. And that means when it comes to decide as to who should lead our nation, it's the people of the United States of America that get to make those decisions, not six

JA170

voters in Colorado who have picked and chosen who they want to file a lawsuit against.

And this Court should not interfere with

[p.36]

that fundamental value, that rule of democracy. It's the people who get to decide.

And this lawsuit seeks to cancel that principle. This lawsuit is antidemocratic. It looks to extinguish the opportunity, extinguish it, the opportunity, for millions of Coloradans, Colorado Republicans and unaffiliated voters, to be able to choose and vote for the presidential candidate they want.

In fact, the leading Republican presidential candidate, and by many measures, the candidate, you know, most likely to win the presidency, they try — they want to extinguish that opportunity by preventing him from running for office.

It is antidemocratic. This is a case of lawfare that seeks to interfere with the presidential election. We argue here that this, at its basest level, this is election interference.

The petitioners here, the six voters, have appointed themselves private attorney generals that can pick and choose and file lawsuits against whom they seek to disqualify. And they rely on exceptionally weak and, frankly, in some cases fringe legal and logical theories to try and tilt the playing field of this election by wiping out President Trump's ability to run for election well before anyone has an opportunity to vote.

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They're asking today for a number of historical firsts. First, this is the first — they are asking this Court to be the first ever in American history, in American history, to

disqualify a presidential candidate under Section 3 of the Fourteenth Amendment.

I point — we pointed the Court, I believe, to — or we will, Horace Greeley, who ran in as a Democratic presidential candidate. He had paid for Jefferson Thomas's [sic] bail. He was roundly accused, loudly accused of giving aid and comfort to the enemies of the United States shortly after the Civil War, when he ran.

Lots of debate on that issue. No one ever once thought of trying to disqualify him from voting. They took their arguments to the people for them to make that decision.

Eugene Debs, Socialist Party USA candidate in four elections, in ran from jail. He had been convicted of sedition for giving aid and comfort to enemies during the First World War by trying to stop military recruitment. He was convicted of that. He ran from jail.

He was never disqualified. No attempt was made to disqualify him under the — under Section 3 of [p.38]

the Fourteenth Amendment.

The case of Eugene Debs is often regarded as a low point in American history, a low point when it comes to First Amendment protections. And for good reason. People should be able to run for office and shouldn't be punished for their speech.

The petitioners ask this Court to be the first state court in American history to disqualify a presidential candidate. They are asking, for the first time in American history, to disqualify any federal candidate — the state court to disqualify any federal candidate.

This is the first time in Colorado history anyone's ever tried to disqualify a presidential candidate under the Fourteenth Amendment.

JA172

Asking the Secretary of State to go back and research a candidate's behavior, that's also a first. Never been asked or demanded before.

Even right now, there are 50 — about 50 cases, either pending or happen, nationwide specifically attacking President Trump. This is not a new tactic. This is the first where a dismissal has not automatically — I shouldn't say automatically — but promptly been granted because of the weakness of so many of these arguments.

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They're asking for the first time that the January 6 Report be treated as evidence in this Court, in a court of law, that politicized hearing. That's what they're asking, that this Court rely upon that as evidence.

And, frankly, they're asking this Court to be the first in the country ever to embrace a number of legal theories that have never been accepted by a court, state or federal. There's a lot of firsts they're trying in this case.

Their legal theories. I mean, we're arguing we shouldn't even be here, and we've argued that multiple times. This is a federal issue, perhaps the most important federal issue we can have. And it's for Congress to set these standards, for Congress to provide guidance, not for the petitioners to come up with theories and try and convince you that they may be right.

We've argued the Fourteenth Amendment's not self-executing and the preemption of political question, and we understand this Court's ruled against us in every instance. But nearly every Court that's ever looked at presidential qualifications — and I'm not just talking about issues involving President Trump —

(Siren interruption.)

THE COURT: You should just expect this to

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be a regular occurrence.

MR. GESSLER: I live in Denver, Your Honor. I understand sirens, unfortunately.

THE COURT: They really like this courtroom, though, because it's right next to Colfax.

MR. GESSLER: So it's not just President Trump.

You may recall that there was a little bit of controversy about President Obama's citizenship, and there was some controversy about Candidate, Senator, and Presidential Candidate McCain's citizenship, and there was controversy about Senator and Presidential Candidate Cruz's citizenship.

And there's one or two instances where those went to trial. But the vast majority of them were properly dismissed. The overwhelming weight of evidence is that this case should not be here.

Now, I want to talk a little bit about some of these specific claims. The claim that there was an insurrection. What constitutes an insurrection really needs to be grounded in historical usage. Because if you don't ground it in historical usage, you're just making it up.

Now, I'm not accusing the Court of making it up. I'm accusing the petitioners of making it up.

[p.41]

But, look, you will hear from Professor Delahunty that there are lots of definitions of what an insurrection is. It's been going on — that word's been in English usage for a couple hundred years, probably more. I haven't quite looked at the etymology of it. And there are a lot of definitions.

Your Honor, I submit I could construct a legal argument or a law review article defending pretty much any one of those definitions. And when there are

JA174

numerous definitions, that means there's really none. You might as well pick a definition out of the hat. And the petitioners have picked a definition out of the hat that suits them. That's their job, I get it.

But frankly, they're making up the standard so that it fits the facts of January 6, and I'm sure they'll try and come up with an argument that it will just fit to the facts of January 6, and it will never fit any other facts and there can never be any consequences. But the bottom line is, they're making it up, and they're picking a definition out of the hat.

What constitutes an insurrection needs to be grounded in historical usage because that's what the law demands; that's what equality under the law demands; that's what fairness so we understand what the standards are by which we comport our behavior, not post facto

[p.42]

making it up to try and figure that out.

The term "engage." The term "engage" means to do something. Frankly, no one really knows what that means, but I think we can all agree it means to do something. That's what the word "engage" means. Okay.

There's substantial historical evidence that engage does not mean mere incitement through words. It doesn't mean that.

And frankly, President Trump didn't engage. He didn't carry a pitchfork to the Capitol Grounds, he didn't lead a charge, he didn't get in a fistfight with legislators, he didn't goad President Biden into a — going out back and having a fight. He gave a speech in which he asked people to peacefully and patriotically go to the Capitol to protest.

Now, I understand that there's several experts that are going to testify, and one's going to testify that

JA175

President Trump, he just didn't do enough. He should have done more.

Now, that's a case of Monday morning quarterbacking. But he's saying: You should have done more. You didn't do enough. Should have done more, should have done more stuff earlier.

I can come up with all kinds of theories

[p.43]

this professor will say as to why you should have done enough stuff. And that professor is no doubt a learned man and very thoughtful on this.

But his basic argument, when it comes down to it, is they're claiming President Trump was negligent. Now, we reject that factual claim, of course, and you'll hear that — evidence that that characterization is completely wrong.

But more fundamentally, the entire theory is wrong. The failure to do something is the opposite of the word "engage." It's the opposite of the word "engage." And we'll — and we've argued engage requires specific intent. Someone doesn't just sort of stumble into starting an insurrection. They have to have the intent to do that.

And you'll hear evidence that President Trump took very specific actions to try to prevent violence, to take precautions, that he didn't want there to be violence on January 6.

And on January 6, he called for peace, and he used the word "peace" at least four times in his speech at the Ellipse and two tweets and a video message. So he asked for peace.

Now, the petitioners have played a couple videos.

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(Siren interruption.)

THE COURT: The cards are stacked against you, I guess.

JA176

MR. GESSLER: I've been here before, Your Honor.

THE COURT: I promise, it's going to be an equal opportunity problem all week.

MR. GESSLER: I'm assuming your clerks are not timing — taking time against me when the sirens go by. Stop that timer, please.

So my next point is, thank God we have a First Amendment. I'm very thankful for the First Amendment. Spent most of my career defending the First Amendment.

Now, there's a reason it's the First, not 6 the Second, not the Eighth, as I debate with my friends who like the Second Amendment. It's the First Amendment, and it's free speech.

And I referred to Eugene Debs before. Eugene Debs was thrown in jail. He had to run for President from jail because of his speech. And it's properly condemned, that case today. And, in fact, even then, his sentence was commuted very shortly after the election of [sic]. None of President Trump's speech ever

[p.45]

called for violence. Just the opposite. None of it ever called for insurrection. Did it call for political pressure? Yeah. Did it use a metaphor to fight in the political context? Yes. And I don't think even the petitioners would allege that President Trump, when he says "fight," he wants to get into a fistfight with people, okay?

None of his speech call for the overthrow of government, none of it. Any objective reading, the plain language of a speech, was clearly not directed towards violence.

Now, the petitioners are going to have an expert, an expert on speech, an expert who says right-wing speech.

JA177

He understands what right-wing speech — right-wing extremist speech really means.

And he's basically going to argue when you strip away all of the academic language and you look at what he's saying, he's going to say: Look, President Trump used a bunch of dog whistles. And, of course, a dog whistle is a whistle that has a very high pitch that humans can't hear but dogs can hear. Okay?

And he's going to say President Trump, like, had this sort of dog whistle — I don't know if he'll use the phrase "dog whistle" — but he used a speech that really these far right-wing extremists could

[p.46]

understand and mobilize on; but us mere mortals, well, we don't — we missed it. We didn't understand it, but those folks understood it.

And he's going to say that, normal sort of commonly used English doesn't count because there's this subjective special language out there that is sort of underneath it all that has been unearthed by the sociologist, and only right-wing extremists and people very learned in sociology and right-wing extremism can understand.

And he's going to say that with his expertise, he's been able to decipher what we normal mortals cannot, and his decipherment is going to basically say that President Trump was really ordering people to be violent. Even when he said "peaceful and patriotically" and even when he sent out tweets that said to be peaceful, that's not really what he meant. And those ultra right-wingers knew it, he meant something else.

This turns our American values on their head. It is fundamentally anti-First Amendment. He is saying that when we look at political speech, we don't look at it in an

objective way. We don't look at the plain meaning of the words. We look at the secret, hidden

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interpretation that no one in this courtroom or — well, I mean, maybe someone in this courtroom besides him can understand. Maybe he thinks I understand it and no one else can. I will submit, I was in Georgia on January 6 helping with an election. But the right-wing can understand it, but no one else.

That is anti-First Amendment. In fact, that has been soundly rejected by our courts, and properly so. We look at what people say as we commonly understand them. And the common understanding of "peacefully and patriotic" means: Don't commit violence, and support your country. That's what it means.

Let's talk about the history and meaning of Section 3. You're going to hear from two professors. You've gotten about 40,000, words of briefing on sort of the meaning of Section 3.

You've rendered an opinion against us, and I understand. That's a conditional opinion. You want more evidence, and you want to hear more argument, and that's what we're providing.

And so I'm going to ask you three things, all right?

First, I'm going to ask you to reconsider your Footnote 5 in your order.

THE COURT: You're going to have to remind

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me what that is.

MR. GESSLER: I'm not, Your Honor, because I'm not going to take up the time. But I'm simply going to ask you to reconsider it, okay?

THE COURT: I'll write it down so I can —

MR. GESSLER: Thank you.

And I think those cases deserve a much closer reading, and I respectfully say I believe that they were improperly mischaracterized, okay? So that's my first request.

My second request is when you look at the experts, and our position — and I think the Court ultimately agrees — is that they are testifying as to what the law is and what the history is.

And Your Honor rightfully recognized that there's other folks out there, so I'm just going to give you a lineup of the other folks.

On one side, the petitioners cite Baude and Paulsen and Graber, three professors: Baude, Paulsen, and Graber.

And on our side, we cite Tillman and Blackman and Lash. And I'd like you to take particular care to look at Lash's, Professor Kurt Lash's articles. And — because he's done a more thorough analysis of the history behind the Fourteenth Amendment and Section 3,

[p.49]

the Congressional debates and the ratification debates, not just what legislators said, but how it was understood by the public as well.

You're going to get an overview of that, you're going to get argument on that, but I'm going to urge you to take a look at those others closely.

And third, as we've said, we think this is legal argument and not appropriate for Rules of Evidence. It's in. The Court will make good — will provide its analysis.

We have talked to the petitioners about, frankly, including the expert reports, the law professors, as demonstrative exhibits to review. That's fine.

I think what you're going to see is when I had talked about the lack of firsts, there's a reason presidential candidates have not been knocked off, or no one's even

JA180

attempted to, under Section 3 of the Fourteenth Amendment, okay?

There's a reason this is a unique case. There's a reason cases like this have either never been brought or quickly rejected. There's reasons for that. And the reasons are grounded in the text and the language of the Fourteenth Amendment.

You're going to hear about the Secretary's

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authority from Mrs. Hilary Rudy. This is sort of an interesting case in the sense that my understanding is, petitioners are calling Ms. Rudy and haven't even spoken to her. And we haven't even spoken to her. So it's going to be an adventure.

But having had some experience in that office, I'm confident you will see that this case is a radical outlier from the Secretary's past practice, in addition, obviously, to the Fourteenth Amendment.

Let's talk a little bit about the evidence before the Court today — or this next week. To be sure, the petitioners have spent about ten months preparing their case. As you have described, we've talked about this as a mantra.

I'll submit volume does not equal quality. A lot of attorneys does not equal a good argument. A lot of stuff in front of the Court does not equal good evidence. The Court shouldn't confuse a vigorous effort with a good argument or with good evidence.

If anything, the fact that they have to put on so much and make one inference and pile one argument on top of another shows the weakness of their case, not strength.

After all the time they have prepared this case, this is what they've got. They've got the

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January 6 Report.

They've got two police officers out of hundreds, perhaps thousands of police officers there. And not commanders, but two police officers.

And they've got three professors. Two law professors testify about the law, and the sociologist to testify about the coded language. That's what they've got. And they've got one House member, I'm sorry, one House member. So that's what they've got.

And at the end of the day, the start of the day, this case is, frankly, about the January 6 Report. This is their effort to get the Court to endorse the January 6 Report. That's what it comes down to.

The video montage with overlaid sound that you saw in this opening argument, that's a pretty good production. And the reason it's a good production is because the January 6 Committee hired a television producer to produce this stuff for prime time TV.

The January 6 Report made findings, and petitioners have asked to introduce of them, many of which this Court has allowed conditionally and allowed argument against.

But this report is poison, and I mean poison very bluntly. It is a one-sided political document of cherry-picked information, no adversarial process, with a preordained conclusion. It omits a

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number of other arguments. It ignored other witnesses before it. And it ignores other explanations and causes. 3 It has very much.

Let me ask you, Your Honor, and obviously I'm asking rhetorically. If someone walked into court and said: Hey, here is how this court case is going to work. I, on my side, the prosecutor, I'm going to get all kinds of time, years,

year and a half, to investigate witnesses, to take statements, to gather evidence, okay?

And people who strongly disagree with my viewpoint, they get no time whatsoever. They don't get to interview any witnesses, they don't get to get any evidence. They get none of that. But I get all of it, I get to do all of that.

And on top of that, you're not going to hear the case. I'm going to choose my own panel. I'm going to choose my own judges. I'm going to choose my Democrats and a couple of Republicans that agree with me. I get to choose them.

And then what I'm going to do is, I'm going to hire a television producer, and I'm going to time this for an election. And I'm going to put all that out there, and I want you to render legal opinions based on the quality of that evidence.

I think you and everyone else would be

[p.53]

rightfully — would be repulsed by that process. But that's what the January 6th process was, and you are going to hear from a Congressman involved in this, just the deficiencies and the problems of that January 6 process.

And so what the petitioners are doing is they're trying to shove this January 6 Report as evidence for this Court. They're asking the Court to endorse that process. They're asking the Court to endorse that one-sided poisonous report.

There is a reason Democrats, for the large part, love that report and cite it. And there is a reason Republicans, for the most part, hate that report and condemn it. And the reason why is that report is a political document, first and foremost.

JA183

This, however, is a court of law. Like you, we, like the petitioners' attorneys have spent the majority, perhaps all of our adult working lives as officers of the court, defending one of the greatest American institutions, one of the greatest world institutions, is fair courts, that conduct themselves according to the rule of evidence, that work hard to come with good decisions. That's what we do. That's what courts do.

That is not what the January 6 Report was.

[p.54]

And we should hold ourselves here to a much higher standard than that poisonous January 6 Report. We should allow in only real evidence that's subject to cross-exam, that is properly authenticated by people who actually have knowledge of that.

That's what this Court should be about, not importing a bunch of stuff from the January 6 Report that really has little, if any, credibility.

You'll also hear from two police officers, and we want to be very respectful of those police officers. But like any human being, they had a very limited viewpoint on what happened on January 6.

And we're going to ask that you limit the testimony to actually what the officers knew, not what they guessed at, not what they surmised, but what they knew and what they saw, their actual experience.

And we'll point out that, frankly, I mean, there's a reason these officers are here, and it's because of their intense dislike for President Trump. You're going to hear from a member of the House of Representatives, and we're going to give you a member of the House of Representatives, too. There you have it, Your Honor.

And then you're going to hear from three experts from the petitioners. Two are going to

[p.55]

testify to what the law is, and then you're going to have the sociologist, and we've already spoken about. That's it. That's their evidence.

At the end of the day, their evidence is the January 6 Report. Everything they bring in is part of the January 6th report. I won't say everything, but the vast majority of it.

Our evidence, I've refrained from naming witnesses. I'll continue to follow that convention. But you're going to hear that President Trump took very specific precautions to prevent violence on that day as President. You're going to hear that the organizers of the rally at the Ellipse took precautions to avoid violence or inflammatory rhetoric.

You're going to hear that the rally at the Ellipse was peaceful, that there was no violence. You didn't have a crowd that was intent on violence before or after President Trump's speech.

You're going to see that President Trump's communications on January 6 called for peace, they called for respect of the police. Certainly two police officers that were involved in violence, you're going to see that from them.

But we also have at least one witness who's going to say: Look, I didn't — I saw very, very

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little, I saw a peaceful crowd. Nearly everyone was peaceful.

That's a different perspective. And so it's impossible, we think, to say the mob did this or the mob did that, the mob, the mob. There are a lot of people, with a lot of different actions, a lot of behavior. There was not a mind-meld mob that President Trump supposedly mobilized.

And then you're going to hear about how the January 6 Report was a completely partisan, unreliable document. This case here is about President Trump's right to run for office.

That right is the flip side of the coin for people to be able to vote for the candidate of their choice. People can't vote without candidates. Candidates aren't really candidates if people can't vote for them. It's the same side of the coin.

And so we've talked about the right for the people of Colorado to vote for someone for office, and that's very closely bound with the right of Donald J. Trump to be able to run for office. And the petitioners seek to deny millions of Coloradans that right, and they seek to deny President Trump his rights.

Now, I understand the posture that this is merely a state disqualification case. And it's not.

[p.57]

This is a Fourteenth Amendment case. And it is dressed up as a state proceeding. 5 percent of the evidence is a Fourteenth Amendment; maybe it's percent. But the overwhelming majority of the evidence in this case is about the Fourteenth Amendment, and the overwhelming argument is about the Fourteenth Amendment. And the consequences are about the Fourteenth Amendment, and it asks the Court to interpret the Fourteenth Amendment. That's what this case is about.

If it looks like a duck, and if it walks like a duck, it quacks like a duck, it's a duck. This is a Fourteenth Amendment case. Okay?

And so I want to bring — it's a constitutional case. It's sort of what we lawyers dream of being able to litigate. We don't dream in law school of litigating a Section 1204

qualifications. We dream of litigating constitutional law. And that's what this is, it's a constitutional case.

And so I'm going to bring you to my last point. January 6th. So I've been — I'm old enough and overweight enough to — I've been litigating election law in the state of Colorado for well over two decades. And this is the third presidential candidate ballot access case I have litigated, and obviously I'm familiar with the law nationwide.

[p.58]

And there is a rule in election law, and that rule is called a rule of democracy. Maybe I'm making it up a little bit, but it's the rule of democracy. And that rule says that when something is close, when there's a unique and strange argument on the other side, okay, where there's a question or an ambiguity or a stretch, the rule of democracy says: We err on the side of letting people vote. That's what the rule says.

Now, we've made preemption arguments, we've argued about holding office, that the Fourteenth Amendment applies to holding office so that Congress has the choice to remove a disqualification, we shouldn't short-circuit that.

We've made arguments about officer of the United States. We've made arguments about engagement and insurrection, First Amendment, all of that stuff. And to date, the Court has either deferred those or oftentimes ruled against us.

But what I'm asking this Court to do is apply a rule of democracy. When something's close or ambiguous or a stretch or an unusual argument, you don't interpret it as a way to cancel the opportunity for people to choose their representatives. You don't interpret it as a way to cancel the ability of millions

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of people to be able to vote for the leader of the free world.

What you do is you interpret it to allow people to vote. Because there is no doubt that the six electors don't like President Trump. And I would submit that maybe their attorneys don't like President Trump, and their experts, and I know the police officers don't like President Trump. They don't like President Trump. And they have every right to vote against him.

But there are millions of people in Colorado and across this country who are inspired by President Trump, who view them as — who view him as someone who protects their interests and who are going to — and is going to create a nation, help build a nation that they want to live in and that they want their children to live in. Millions of people look to him for hope and inspiration.

And who are the petitioners to prevent those people from not being able to vote on that? Who are they?

Well, we are arguing that they shouldn't be able to stop those votes. That when millions of people are inspired by a candidate, and millions of people may hate that candidate, what we need to do and what the rule of democracy says and what makes America

[p.60]

great is we get to vote on that person. We don't stifle it, we don't short-circuit it through a court proceeding.

We're confident that that's what the framers thought about when they drafted the Fourteenth Amendment. We're confident that that's historical usage. We're confident that our legal arguments and our evidence are appropriate and carry the day.

And part of the reason we're confident is because those arguments and that evidence fits within the long tradition of American democracy and of American law to

allow an election to go forward rather than short-circuiting it and engaging in what we would consider anti-democratic behavior.

Thank you very much, Your Honor.

THE COURT: Do the intervenors — does the Colorado Republican Party have a statement?

MS. RASKIN: Yes, we do. A brief one, Your Honor.

THE COURT: Okay.

MS. RASKIN: Thankfully. The Colorado Republican Party has intervened here, Your Honor, in order to urge you to vindicate the important and ultimate right of the party to select the candidates whose names will appear on the primary election ballot as Republican nominees for

[p.61]

President of the United States.

As the Supreme Court has recognized, under our political system, a basic function of a political party is to select the candidates to be offered to the voters. Indeed, a party's ability to select its candidates implicates the First Amendment right to association. And Colorado law is entirely consistent with this.

Section 1204 of the Election Code requires the Secretary of State to place on the ballot, quote, "only those candidates who are seeking the nomination of a political party as a bona fide candidate for President of the United States pursuant to political party rules."

As the evidence will show, the rules of the Colorado Republican Party require a bona fide candidate to satisfy three categories of rules.

First, the candidate must comply with the constitutional requirements set forth in Article II, Section 1, Clause 5, namely that the candidate be 35 years of old — 35 years of age, be a natural-born citizen, and have lived here for 14 years.

Second, the candidate must register his committee with the FEC.

Third, the candidate must demonstrate enthusiasm, viability, seriousness, and competitiveness

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according to certain party-defined standards.

President Trump has satisfied each of those requirements, and the party has certified to the Secretary of State that he is a bona fide presidential candidate affiliated with the Colorado Republican Party.

The Secretary of State has no basis upon which to thwart the party's political choice and deny him a place on the ballot. As the Secretary herself acknowledges, Section does not give her the authority to evaluate whether a bona fide candidate as selected by the Colorado Republican Party would be subject to disqualification under Section 3 of the Fourteenth Amendment.

And for all the reasons articulated by Mr. Gessler, which I will not repeat and we have briefed, the Constitution doesn't give the Secretary the independent right to do so, nor does it authorize this Court to.

Thank you.

THE COURT: Anything from the Secretary of State?

MR. SULLIVAN: Very briefly, Your Honor.

THE COURT: Okay.

MR. SULLIVAN: Thank you, Your Honor.

Good morning. Grant Sullivan for the

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Secretary of State, may it please the Court.

It's been said that this is an extraordinary case, and the Secretary agrees. I think the video that we just saw shows that.

But in many ways, this is a very typical proceeding under the Colorado Election Code, specifically Section 3.

As in nearly all Section 3 actions, a group of eligible voters alleges that an election official, here the Secretary, is about to commit a breach of her duties or other wrongful act. And like other Section 3 cases, a candidate and a political party have intervened to participate.

That's not at all unusual. It's also not at all unusual for the Secretary of State or other election official, in a 113 action, to act as a nominal respondent and await the Court's direction while the real parties in interest present evidence on the factual issues.

Our pleadings cite three examples from just the last couple of election cycles.

Consistent with this history and practice, the Secretary of State does not intend to offer any evidence in her own right in this case. The Secretary, unsurprisingly, does not have any direct evidence on whether Donald Trump engaged in insurrection or rebellion

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against the United States.

Other parties, of course, will present evidence on that question.

What the Secretary can do and will do in this case is make her deputy elections director available to testify on the election administration issues that the Court has signaled some interest in.

We anticipate that the deputy elections director will testify regarding how the Secretary's office administers Colorado's election law to ensure conformance with federal law. And that includes the presidential primary provisions in Colorado's Proposition 107.

Now, at the end of the day, and the beginning of the day, the Secretary believes that Donald Trump bears significant responsibility for the attack on the Capitol on January 6. But she welcomes the Court's direction on

whether his actions rise to such a level as to disqualify him from appearing on the presidential primary ballot in Colorado. And she will, of course, follow the Court's judgment on that question.

Thank you, Your Honor.

THE COURT: Great.

Are the petitioners ready to call their first witness?

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MR. OLSON: Your Honor, before that, we just wanted to get your preference on admission of exhibits. Was it appropriate to move for the unobjected-to exhibits I referenced in opening now, or would you like to do that at a break? What's Your Honor's preference?

THE COURT: Why don't we do that at a break.

MR. OLSON: Okay. Thank you, Your Honor.

MR. SHAW: Your Honor, springboarding from the Secretary's counsel's request earlier, but our representative, Mr. Dave Williams, is also listed as a witness. We would ask permission to be able to have him log in either online or view the proceedings.

THE COURT: Any objection?

MR. OLSON: No objection.

MR. SULLIVAN: No objection, Your Honor.

MR. GESSLER: None from us, Your Honor.

MR. SHAW: Thank you, Your Honor.

THE COURT: Of course, then.

MR. SUS: Good morning, Your Honor. Nikhel Sus for the petitioners. Petitioners call Officer Daniel Hodges.

THE COURT: And I'm sorry, I did not catch your name.

[p.66]

MR. SUS: Nikhel Sus.

DANIEL HODGES,

having been first duly sworn, was examined and testified as follows:

THE COURT: Just be sure to speak into the microphone.

THE WITNESS: Yes.

THE COURT: And you should feel free to kind of position that screen in any way that you like. You don't need to look right into it.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. SUS:

Q. Please state your name for the record.

A. My name is Daniel Hodges.

Q. And where do you currently work?

A. I currently work for the Metropolitan Police Department of Washington, DC.

Q. And what is your rank?

A. I'm an officer.

Q. When did you join the DC Police Department?

A. I joined the DC Police Department in December of 2014, so I've been on for almost nine years now.

[p.67]

Q. And what was your job prior to joining the DC Police Department?

A. Prior to joining the DC Police Department, I joined the Virginia National Guard in 2012. I served a six-year contract and was honorably discharged in 2018.

Q. What divisions are you assigned to at the DC Police Department?

JA193

A. At MPD, I am assigned to patrol in the Fourth District. I am also assigned to Civil Disturbance Unit 42.

Q. And how long have you been a member of Civil Disturbance Unit 42?

A. I've been with Civil Disturbance Unit 42, or CD 42, since its inception, approximately five years.

Q. And what is the Civil Disturbance Unit?

A. Civil Disturbance Unit is organization within MPD that officers are assigned to specific platoons. We are activated and deployed to planned First Amendment assemblies on an as-needed basis.

Once we are there, we perform law enforcement duties around that First Amendment assembly, be it traffic control or just high visibility, making our presence known, and should they turn riotous, we police that as well.

Q. And what duties do you perform as a member [p.68]

of the Civil Disturbance Unit?

A. As a member of CD 42, I perform all the duties that I just described. CD 42 is also what's called a rapid response platoon. That means that we are issued hard gear, pads, that are not standardized for — that are not standard to all CD members, so we use those as well.

Q. Do you use any other sort of special equipment as a member of the CDU?

A. I do. CDU officers are issued ballistic helmets, gas masks, riot batons, and then the hard gear, the pads I just told you about.

Q. And as a member of the CDU, do you receive special training?

A. We do. CDU members are trained in ways to move in formations as a group, effectively utilize ourselves in a crowd for- — or formations, and how to make arrests and

protect ourselves and others in the event of a criminal First Amendment assembly riot.

Q. Does the CDU respond to civil disturbances anywhere in Washington, DC, or only in particular areas of the city?

A. Typically MPD's CDU units respond to areas under a local city — under the control of a local city. However, we also respond to property that belongs to our

[p.69]

federal partners should they request our assistance.

Q. I'd like to turn now to the morning of January 6, 2021.

Were you on assignment with the Civil Disturbance Unit that morning?

A. I was.

Q. Were you aware of any proceedings happening at the U.S. Capitol Building that day?

A. I was.

Q. What was that?

A. I was aware that at the United States Capitol that day, they were certifying the presidential election with Congress and the Vice President.

Q. And what were your initial orders?

A. Initially, my platoon was ordered to respond to around 11th and Constitution in the morning of January 6 in a high visibility capacity, which means that we simply stood on Constitution Avenue making ourselves visible, letting people know that the police were present.

Q. And about what time was that?

A. We probably arrived on scene around 8:00 in the morning.

Q. And were you monitoring a particular

[p.70]

event?

JA195

A. We were. We were monitoring Donald Trump's rally on the Ellipse.

Q. As you were monitoring the crowd, did you notice anything unusual about how they were dressed?

A. As I was monitoring the crowd, I noticed that there were multiple people who were wearing tactical gear, that — some had helmets like my own ballistic helmets, goggles, gas masks, armored gloves, backpacks full of gear that we couldn't identify, tactical boots, some earpieces for radios, things of that nature.

Q. How did you feel seeing those people wearing tactical gear?

A. It made me very uncomfortable, nervous.

Q. Why is that?

A. Because there's no need for all that tactical gear to listen to a politician speak in a park.

Q. While you were deployed on Constitution Avenue, did you have any other cause for concern about what would happen that day?

A. I did. While I was on Constitution Avenue, I was monitoring our radio frequency we were using for that day for the First Amendment assembly.

I was — heard our Gun Recovery Unit, our GRU unit — or GRU, rather, was identifying people in the [p.71]

crowd who had firearms or they thought potentially had firearms. They were identifying them so they could make arrests later on, or at the time as need be.

I also heard our Explosive Ordnance Disposal Unit, EOD, come over the air and say that they had identified a device on the Capitol Grounds. They also said that the device was viable, and I took this to mean that they had found a bomb.

JA196

Q. Did the crowd stay at the site of President Trump's rally at the Ellipse?

A. Largely the crowd, after staying at the Ellipse for some time, flowed back in the opposite direction on Constitution Avenue towards the United States Capitol.

Q. And what was the general tenor of the crowd as they were moving towards the Capitol Building?

A. The crowd, as they were moving toward the Capitol, were moving with a sense of purpose. They — it would seem like they were moving as they had something to do there, even though the — ostensibly the event they were there to attend had concluded, or come close to it.

Q. And was your platoon eventually deployed to the Capitol?

A. We were. We were monitoring the radio, and we heard our commander that day getting more and more

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agitated as people continued to flow toward the United States Capitol. He was — you could tell from the way he was talking, they were — the crowd was becoming aggressive and attacking and overwhelming the defenses present.

Eventually, he requested CD to back them up at the Capitol, at which time we went back to our vans that we used to transport ourselves, put on our hard gear, and made our way toward the Capitol Grounds.

Q. And about what time did you receive the order to deploy to the Capitol?

A. I believe it was about 1:30.

Q. And what was your understanding of why you were being deployed to the Capitol?

A. We were being deployed to the Capitol to reinforce the defense there, to prevent people who were attacking officers from gaining entry to the Capitol.

JA197

Q. Prior to January 6th, 2021, had you ever been called to respond to civil unrest at the U.S. Capitol Building?

A. No.

Q. What did you do after receiving that order to deploy to the Capitol?

A. After receiving the order to deploy to the Capitol, we — as I said, we went back to the vans, made

[p.73]

our way toward the Capitol Grounds. We made our way toward the — I'd say northwestern port edge of the Capitol Grounds, where we got out on foot, organized ourselves into two columns, and started marching toward the West Terrace of the Capitol.

Q. I want to focus now on the hours — between the hours of 1:50 p.m. to 3:10 p.m.

Could you tell us what happened when you arrived at the Capitol Building?

A. When we arrived at the Capitol, as I said, we organized ourselves into two columns, started marching toward the West Terrace. The crowd at the edges of the Capitol Grounds were more spread out, less aggressive.

However, they quickly identified us and started hurling insults at us, calling us traitors, oath breakers, telling us to remember our oaths, telling us to be on the right side of history. And then we — we ignored them, we moved on.

As we got closer to the West Terrace, the crowd became more dense and more aggressive, until eventually we were attacked. They — our assailants cut us in half, whereas the forward part of our element was able to keep moving toward the West Terrace, the rear portion, which I was a part of, was cut off and encircled by our assailants. And we were attacked at that point

[p.74]

and had to defend ourselves there.

Q. Over the course of the day, how did the crowd attack you?

A. The crowd attacked me in a variety of ways, punching, kicking, pushing. I — chemical irritants such as OC spray or pepper spray. I was beaten in the head with blunt instruments, including my own riot baton. I was pinned and crushed with a police shield. I can't remember all the different ways in which I was assaulted.

Q. Did you sustain injuries?

A. I did.

Q. Which injuries?

A. I experienced pain and bruising about my body and a swollen hand. I had a large contusion on my head from being struck with my riot baton, which I believe resulted in a concussion as I experienced a headache for about two weeks after the fact. I had a — lacerations of the face, bleeding from the mouth, and pain in my eye from where someone attempted to gouge it out.

Q. Tell us what was going through your head when you were being attacked that day.

A. I was afraid. I was afraid for my life and for that of my colleagues. I was afraid for the

[p.75]

people in the United States Capitol Building. I was afraid for Congress, the Vice President, and what these people would do to them and how it would affect our democracy.

Q. Over the course of the day, did you see your fellow officers attacked?

A. I did.

Q. How?

JA199

A. In very much the same way as I was attacked: punching, kicking, pushing, being struck with blunt instruments.

I, unfortunately, couldn't pay too much attention to the ways in which they were being attacked as I had my hands full myself.

Q. Over the course of the day, did you see the attackers use weapons?

A. I did.

Q. What types?

A. They used flagpoles that they had brought as blunt instruments to beat us with. They used stolen police equipment, such as riot batons, police shields to assault us.

They used pieces of what's called bike rack-style barriers, which they had broken into its constituent pieces, the poles, passed out amongst the —

[p.76]

the mob to attack us. And pepper spray, chemical irritants.

Yeah, that's all — that's all I can think of.

Q. And you testified earlier that you saw people on the morning of January 6 wearing tactical gear; is that right?

A. That's correct.

Q. At the Capitol, did you see individuals in the crowd wearing similar types of tactical gear?

A. I did.

Q. And did you observe any behavior by the crowd indicating why they were at the Capitol Building?

A. I did.

MR. SHAW: Objection. Your Honor, I just want to be very careful because I have read some of his prior testimony, and he has a definite tendency to mind-read.

JA200

So I want to be very careful that he limits himself to what he actually observed and not try to get into the head and speculate about what was going through the heads of individual members of the crowd or the crowd as a whole.

THE COURT: Okay. Well, he hasn't testified as to any of those things, so I'm going to

[p.77]

overrule the objection. And if and when he does, you can make a request to strike.

Q. (By Mr. Sus) Do you need me to repeat the question?

A. Please.

Q. Did you observe any behavior by the crowd indicating why they were at the Capitol?

A. I did. I saw the crowd carrying flags with Trump campaign slogans on it, advertising "Trump for ," which was confusing as the presidential election was over.

I saw them carrying banners that said "Stop the Steal," and it's my understanding that that's the — the slogan means that they — bearers believe that the presidential election was somehow stolen.

MR. SHAW: Objection, Your Honor. Unless he has a basis for saying what that slogan meant to any particular person carrying it, that is pure speculation.

THE COURT: Overruled.

But would you just make sure when you make the objections, to speak into the microphone.

MR. SHAW: Yes, Your Honor.

THE COURT: You don't need to stand up if you don't want to.

A. I saw people carrying banners saying "Stop

[p.78]

the Steal," which, based on my understanding, means that people believed the presidential election was stolen,

JA201

which was confusing to me as I was not aware of any evidence that this was the case.

I saw — I heard them chant “Fight for Trump,” which seems very to the point.

They were carrying very — various flags referencing war and revolution.

They told us that we were on the wrong side of history when we were defending the United States Capitol and the peaceful transfer of power.

Q. (By Mr. Sus) Did members of the crowd reference President Trump?

A. They did.

Q. How?

A. By the clothes they wore, the banners they carried, saying “Fight for Trump.” They called — referenced Joe Biden as a tyrant, things of that nature.

Q. Over the course of the day, did you get a sense of how big the crowd was?

A. I did. It was difficult to gauge on the ground where I was, and I have no formal training in crowd estimates.

However, when I was on the — in front of the West Terrace, rather, I was able to look out over the

[p.79]

crowd a bit, and I could not see the end of them. There were thousands, I would say.

Q. How did the size of the mob compare to the size of law enforcement that were present that day?

A. I would — the mob outnumbered us a great deal. I would say 50, 70 to 1.

Q. What impact, if any, did the size of the mob have on your ability to do your job that day?

A. The size of the mob was the greatest weapon utilized by the mob that day — or, rather, most effectively

utilized, I should say. They had us completely outnumbered. They had us encircled.

We were unable to escape should we need to get out of there for medical attention. We were unable to easily receive reinforcements.

There were no uniformed-differentiating people who were violent from people who were not. So the mob aided and abetted those who were violent in that way, as those who were violent would then fall back into the crowd and we would be unable to engage them.

THE COURT: Officer, just pause for a second so that — I think there was an objection trying to be made.

MR. SHAW: Yes, Your Honor. The objection is he continually talks about the mob as if all of the

[p.80]

individuals in the crowd were acting with a single mind or single intent, when clearly —

THE COURT: This is — that's a cross-examination point. He can use the words that he chooses to use. So overruled. I think you probably need to remind him where he was.

Q. (By Mr. Sus) Officer Hodges, I was asking you, did the size of the mob have your — what impact did the size of the mob have on your ability to do your job that day?

A. That's right. It — it was the most effective weapon utilized by the mob. They — we had to treat everyone as a threat, and in that way, we couldn't focus on people who were violent. We — our attention was divided so thinly that it was difficult to engage and protect ourselves and others.

Q. How, if at all, did the size of the mob impact your ability to use firearms?

A. The size of the mob made it extremely difficult to use firearms. While there were those in the mob who at

times used force or assaulted us in ways that were likely to cause serious bodily injury or death, we could not — it made it extremely difficult to engage them legally with firearms as we are not allowed to shoot

[p.81]

into a crowd.

As the crowd was largely the main element present, and very rarely did we encounter individuals that we could not handle one on one, it made it so that firearms were an extremely risky proposition both legally and morally.

Q. How, if at all, did the size of the mob impact your ability to make arrests?

A. The size of the mob made it impossible to make arrests. When we make a custodial arrest, we are legally obligated to the safety, security, and medical treatment of our prisoner.

These are things that we could not guarantee for ourselves at the time, let alone members of Congress and the Vice President inside, let alone, again, any prisoners we might want to take.

Again, if we took a prisoner, typically that requires two officers to guard them at all times, and we needed every officer we had to assist in the defense.

And so taking prisoners at that time was simply untenable.

Q. How, if at all, did the size of the mob impact the ability of emergency medical personnel to render aid to individuals at the Capitol?

[p.82]

A. As far as I could tell, the Capitol was encircled. There was no way for medical personnel to access the — to access the Capitol.

So the mob made it impossible for us to receive professional medical care.

Q. What about nonviolent people in the mob; how, if at all, did they impact your ability to do your job?

A. Nonviolent people in the mob were still a part of the crowd. They created all the problems that I had previously testified to.

Q. So, Officer Hodges, are DC Metro Police officers required to wear body cameras when they're on duty?

A. We are.

Q. Were you wearing your department-issued body camera on January 6, 2021?

A. I was.

Q. And was your body camera activated when you were on the U.S. Capitol Grounds?

A. It was.

MR. SUS: Mr. Hehn, please pull up what's been admitted as Exhibit and pause the video.

Q. (By Mr. Sus) Officer Hodges, can you see the video on your screen?

[p.83]

A. I can.

Q. What is this?

A. This is — depicts me and my platoon walking towards the West Terrace on January 6, 2021.

THE COURT: Okay. And I'm going to apologize because I think I probably confused people. When you — when you're using an exhibit, we should offer and admit it into evidence.

MR. SUS: Oh, okay. I can go back and do that for this.

THE COURT: Okay.

Q. (By Mr. Sus) So, Officer Hodges, can you see what's on your screen?

A. I can.

Q. What is this?

A. This is my body-worn camera recording from January 6, 2021.

Q. And does the footage fairly and accurately depict what you witnessed on January 6, 2021?

A. It does.

MR. SUS: Your Honor, move to admit Exhibit 10.

MR. SHAW: Your Honor, we haven't yet seen the video, so I'm not sure how he can state that it accurately depicts what he saw that day.

[p.84]

THE COURT: Okay. But presumably he's seen it before. And you've had access to it, so do you have an objection?

MR. GESSLER: Your Honor, may I speak?

THE COURT: Sure. But in general, I'd like to limit whoever is — to one party, but . . .

MR. GESSLER: Absolutely.

Your Honor, I understand the procedural posture of this case. Normally, you know, you listen to the video, he looks at the whole thing, he authenticates it. Then's the time for objection or admission.

I guess our preference is and — I mean, I understand that this has been admitted already. I understand we've seen it and —

THE COURT: And —

MR. GESSLER: — but just for purposes of the record, we think that may be the best way to do it, but if you want to provide guidance otherwise, we're willing to follow that.

THE COURT: Okay. So I want to make clear, you made some objections to exhibits, and I overruled some of that — objections.

That doesn't mean that it's admitted into evidence. It needs to be presented at trial to actually be admitted into evidence.

[p.85]

And so I think that he's offering to admit it. I know — I assume you object. If you do, let's get it on the record and proceed.

Does that make sense?

MR. GESSLER: There is text underneath it.

THE COURT: Uh-huh.

MR. GESSLER: If we can just listen to it and, you know, if the text reflects what was said and, you know, indicates it, we're not going to object.

THE COURT: Okay. Perfect.

MR. GESSLER: Let me put it that way.

THE COURT: Why don't we play the video.

MR. SUS: Please play the video.

(Video playing.)

MR. SUS: Stop the video at 13:59:53.

Q. (By Mr. Sus) Officer Hodges, let me ask you first, do you see the numbers on the top right corner of the screen?

A. I do.

Q. What are those numbers?

A. The first set of numbers is the date: 2021/01/06.

The second set of numbers is the time at which the recording was taken in the 24-hour clock. 13:59; in this 12-hour clock, it would be 1:59 p.m.

[p.86]

Q. Now, in this point in the video, where are you headed?

A. Currently we're headed toward the West Terrace.

Q. And what types of things are people shouting in the video?

A. In the video, people are shouting at us, calling us oath breakers, traitors, telling us to remember our oaths, we're on the wrong side of history. That sort of thing.

Q. And how did you interpret those words at the time?

A. At the time, I interpreted those words to mean that they — the people shouting at us —

MR. SHAW: Objection, Your Honor. His interpretation of the — of those shouts is irrelevant to any issue in this case. The shouts were made, but what he understood them to mean is irrelevant.

THE COURT: Objection overruled.

A. I understood the shouts to mean that the people who were shouting at us, which was everyone in the mob that I could perceive, disapproved of us being there.

They understood that we were there to protect the Capitol, which was antithetical to their goals; that by protecting the United States Capitol, we

[p.87]

were somehow breaking our oaths to the Constitution; that we were traitors to the United States.

Q. (By Mr. Sus) And why did you and your fellow officers have your hands on each others' shoulders in the video?

A. We put our hands on each others' shoulders spontaneously as the crowd became more dense and aggressive in an effort to try and keep ourselves from getting separated.

Q. Had you ever done that prior to January 6, 2021?

A. No, we had not.

MR. SUS: Mr. Hehn, please resume the video at time stamp 13:59:53.

(Video playing.)

MR. SUS: Let's pause the video at 14:00:35.

JA208

Q. (By Mr. Sus) Officer Hodges, could you describe what we just saw?

A. In the video, we were — my platoon, rather, we were making our way towards the West Terrace when we were attacked by the mob.

I was assaulted in various ways that I've testified to, and someone attempted to steal my riot baton. I wrestled with control of the baton and was able

[p.88]

to retain my weapon.

When we fended off the initial assault, we were encircled by the mob, at which point they started yelling at us, telling us that we're on the wrong team, which suggested to me that they were going against our efforts to defend the United States Capitol.

MR. SUS: Mr. Hehn, please resume the video at 14:00:35.

(Video playing.)

MR. SUS: Let's pause the video at 14:01:20.

Q. (By Mr. Sus) Officer Hodges, do you see the man wearing a vest in the video?

A. I do.

Q. What kind of vest is that?

A. It appears to be an external carrier vest designed to carry within it a ballistic panel that would protect the wearer from firearms. And judging from the way it's bulging outward, it appears to carry such a panel.

MR. SUS: Okay. Mr. Hehn, please pull up what's been admitted as Exhibit and hit pause.

Q. (By Mr. Sus) Officer Hodges, can you see the video on your screen?

A. I can.

[p.89]

Q. What is this?

JA209

A. This further depicts the — the time in which we were making our way — or trying to fight off the mob and make our way to the west terrace.

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this footage prior to your testimony today?

A. I did.

Q. Does the footage fairly and accurately depict the events you witnessed on January 6?

A. It does.

MR. SUS: Your Honor, at this time we would move to admit Exhibit 11.

THE COURT: Let's go back to 10. You asked to admit it. I didn't rule. Counsel for Intervenor Trump, I think, wanted to wait to decide whether to make an objection.

MR. SHAW: We have no objection to Exhibit 10, Your Honor.

THE COURT: Okay. 10 is admitted.
(Exhibit was admitted into evidence.)

THE COURT: I will let you play 11, and then why don't you give them an opportunity to make an
[p.90]

objection if they would like to.

MR. SUS: Sure.

Please play Exhibit 11.

(Video playing.)

MR. SUS: Let's pause the video at 14:02:41.

Would now be an appropriate time to move to admit, Your Honor?

THE COURT: Is that the end of the video?

MR. SUS: That is the end of this clip, yes.

JA210

THE COURT: Okay. Any objection?

MR. SHAW: No, Your Honor.

THE COURT: Exhibit 11 is admitted.

(Exhibit 11 was admitted into evidence.)

Q. (By Mr. Sus) Officer Hodges, could you describe what we just saw?

A. Yes. I had attempted to forge a path through the mob for the rest of my platoon to follow so we could join the defense of the West Terrace.

However, I looked back and saw that my platoon was again being assaulted by the mob, their forward progress effectively halted and being pushed back.

I backtracked, started pulling off members
[p.91]

of the mob by their backpacks until someone observed me and then assaulted me as well.

We — they tried to steal my riot baton again. We wrestled for control. I was elbowed. We went to the ground, kicked in the chest, at which point I ended up on my hands and knees with the medical mask I was wearing pulled up over my eyes, so I was blind for a moment.

Q. And looking at Exhibit 11 at time stamp 14:02:41, what type of vest is the man wearing in the video?

A. The man appears to be wearing an external carrier vest designed to carry within it a ballistic panel. And again, judging from the way it's bulging outward, it appears to carry such a panel.

MR. SUS: Your Honor, this video does actually contain more content on it, so I prematurely moved to admit it.

And frankly, to explain myself, I thought that these videos were previously admitted and so — but could we watch the rest of the video, and then I move to admit it again? Okay. Thank you.

JA211

So, Mr. Hehn, please resume the video at time stamp 14:02:41.

(Video playing.)

[p.92]

MR. SUS: Pause the video at 14:03:20.

Q. (By Mr. Sus) Officer Hodges, did you hear what the man said in the video?

A. I did.

Q. What did he say?

A. He wanted to get me out of there. He — I told him — he asked me what he could do to help. I told him to leave. He said, “That ain’t gonna happen.” And he said, “It’s going to turn bad,” and that the others were coming up from the back.

Q. And what did you understand those words to mean?

MR. SHAW: Objection. It is — his understanding is irrelevant, it’s speculative, and it’s — he lacks foundation.

THE COURT: Overruled. He can testify as to what somebody said to him, what he thought it meant. It doesn’t mean that’s what they meant. It means it’s what he thought they meant.

Objection overruled.

A. I understood the — the words he told me were very concerning. He said that it was going to turn bad, which means that it was going to — he didn’t think it was bad yet, and it was going to get worse.

He said that the others were coming up

[p.93]

from the back. This indicated to me that there was preplanning, coordination, and that they were intentionally encircling the United States Capitol.

Q. (By Mr. Sus) And when the man asked what he could do to help, you said, “Leave”; is that right?

A. That’s correct.

JA212

Q. Why did you say that?

A. Because aside from convincing other people to leave as well, that is the only thing he could do to help.

His presence there was the biggest problem to us, that he was a part of the mob, and the mob was the threat.

MR. SUS: Mr. Hehn, please pull up Exhibit 12, and press pause.

Yes, Your Honor, at this time we'd move to admit Exhibit 11.

MR. SHAW: No objection.

THE COURT: 11 is admitted.

(Exhibit 11 was admitted into evidence.)

MR. SUS: And now could we pull up Exhibit 12, Mr. Hehn.

Q. (By Mr. Sus) Officer Hodges, can you see the video on your screen?

A. I can.

[p.94]

Q. What is this?

A. This further depicts the — our time on the Capitol Grounds as we make our way towards the West Terrace, “we” being the remnant of CD that was attacked.

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this footage prior to your testimony today?

A. I did.

Q. Does the footage fairly and accurately depict what you witnessed on January 6, 2021?

A. It does.

MR. SUS: And if we could play the video starting at 14:03:57.

(Video playing.)

JA213

Q. (By Mr. Sus) Officer Hodges, could you describe what we just saw?

A. The video depicts me as I, once again, attempt to forge a path through the mob for the rest of my platoon to follow as we make our way towards the West Terrace.

This time I was successful. I was able to push my way through. We made our way toward the area in

[p.95]

front of the West Terrace, where we joined a police line being held there.

Q. And could you describe what you saw in the crowd as you ran through them?

A. In the crowd, I saw people destroying property, breaking down the bike rack-style barriers into its poles, which I saw in the day used as weapons.

I saw agitator — an agitator with a megaphone encouraging further violence. I saw munitions going off, chaos, no one — no one obeying our lawful orders to go home.

Q. And the people in the crowd you were running through, did every one of them try to physically attack you?

A. No.

Q. So did the people just peacefully standing there impede your ability to do your job that day?

A. Yes.

Q. How is that?

A. Even the people who were not — I didn't observe attacking us made it difficult for us to analyze the threats, engage those who were violent, and — because we had no idea who was going to become violent or who would not. The crowd made it so that the mob, when they fell back, had a defense that made it very difficult

[p.96]

for us to deal with.

Q. And did you hear the alarm sound playing in the video?

A. I did.

Q. What was that?

A. That is our LRAD system, which is like a loudspeaker system. It's deployed when a First Amendment assembly becomes unlawful or is unlawful. It broadcasts a very loud order to disperse, and I — it's very — very audible.

Q. And where the crowd was standing in the area depicted in the video, was that area open to the general public?

A. No.

Q. What, if any, chemical irritants did the police deploy that day?

A. That day, I understand the police deployed OC spray or pepper spray, and CS gas or tear gas.

Q. In your experience as a member of the Civil Disturbance Unit, what do crowds typically do after the police deploy chemical irritants?

A. In my experience, crowds typically disperse when confronted with chemical irritants. It's very persuasive in getting them to change their minds about what they're trying to do. Gets them to break up

[p.97]

into individuals instead of continuing to function as a singular group.

MR. SUS: Mr. Hehn, please resume the video at time stamp 14:04:03.

(Video playing.)

MR. SUS: Let's stop at 14:04:45.

JA215

Q. (By Mr. Sus) Officer Hodges, looking at the video, where on the Capitol Grounds are you located at this point in the video?

A. At this point in the video, I am in front of the West Terrace.

Q. And is there a police line shown in the video?

A. There is.

Q. What, if anything, happened to that police line that day?

A. Later on, the mob was able to break through the police line.

MR. SUS: Your Honor, at this time, we'd move to admit Exhibit 12.

MR. SHAW: No objection.

THE COURT: Exhibit 12 is admitted.

(Exhibit was admitted into evidence.)

THE COURT: Are you going to be moving on to another exhibit?

[p.98]

MR. SUS: Yes.

THE COURT: Okay. Let's take a break from 10:15 to 10:30. We're going to resume promptly afterwards.

Did you need something, Mr. Gessler?

MR. GESSLER: No. I'm just —

THE COURT: Stretching your legs?

MR. GESSLER: I've had four glasses of water this morning.

THE COURT: So at 10:30, we will be back on the record.

(Recess taken from 10:14 a.m. until 10:34 a.m.)

THE COURT: You may be seated.

MR. SUS: Ready, Your Honor?

THE COURT: You may proceed.

JA216

MR. SUS: Mr. Hehn, please pull up Exhibit 13, starting at time stamp 14:13:30.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. I do.

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this footage prior to your [p.99] testimony today?

A. I did.

Q. Does the footage fairly and accurately depict what you witnessed on January 6, 2021?

A. It does.

MR. SUS: Mr. Hehn, please play the video.

(Video playing.)

MR. SUS: And we're pausing at 14:13:42.

Q. (By Mr. Sus) Officer Hodges, do you see the yellow flag that says, "Don't Tread on Me," in the video?

A. I do.

Q. Over the course of the day on January 6, did you see the mob holding up flags referencing American wars?

A. I did.

Q. Which ones?

A. I saw the flag you just referenced, which I know to be the Gadsden flag. It's a Revolutionary War flag of the United States.

And I saw Confederate battle flags, referencing the United States Civil War.

Q. Did any other flags stand out?

A. I saw flags advertising Trump for the presidential election of 2020, which at that point was

[p.100]

over.

I saw another flag in the video, crossed rifles, signifying the military and willingness to violence. I —

MR. SHAW: Objection. Foundation.

THE COURT: You can —

MR. SHAW: Move to strike.

THE COURT: I will sustain the objection. You can ask him how he knows.

MR. SUS: I'll move on, Your Honor.

Q. (By Mr. Sus) Officer Hodges, what, if any, Trump paraphernalia did you see among the crowd that day?

A. I saw lots of Trump paraphernalia. People wearing articles of clothing with Trump's name on them. Trump advertisements. Flags and articles of clothing saying, "God, Guns, Trump." Again, the "Stop the Steal" slogan was prevalent.

Q. And what, if anything, did you hear the mob say about President Trump?

A. I heard them say, "Fight for Trump." It was a chant. They — that was the most explicit one.

MR. SUS: And, Mr. Hehn, could you play the video again.

(Video playing.)

MR. SUS: And, Your Honor, that's the

[p.101]

complete video. At this time, we would move to admit Exhibit 13.

THE COURT: Any —

MR. SHAW: No objection.

THE COURT: 13 is admitted.

(Exhibit 13 was admitted into evidence.)

MR. SUS: Mr. Hehn, could you pull up Exhibit 14 at time stamp 14:25:11.

JA218

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. I do.

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this footage prior to your testimony today?

A. I did.

Q. Does the footage fairly and accurately depict the events of January 6, 2021, as you remember them?

A. It does.

MR. SUS: Mr. Hehn, please play the video.

(Video playing.)

Q. (By Mr. Sus) Officer Hodges, did you hear [p.102] the man speaking in the video?

A. I did.

Q. How did you interpret his statements at the time?

A. At the time, I interpreted his statements to — as an attempt to coerce us into joining their assault on the Capitol. He explicitly asks us to take off our badges and put down our weapons and join them. He says that if we don't, then they will run over us.

He then references our guns, saying that, "Do you think those little pee shooters are going to stop us?" This was particularly concerning to me that it meant that he was willing to withstand lethal force that we might use and — in his efforts to achieve his objective.

MR. SUS: Your Honor, at this time, we would move to admit Exhibit 14.

MR. SHAW: No objection.

THE COURT: Exhibit 14 is admitted.

(Exhibit 14 was admitted into evidence.)

JA219

MR. SUS: Mr. Hehn, please pull up Exhibit 15, time stamp 14:28:45.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. I do.

[p.103]

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this video prior to your testimony today?

A. I did.

Q. Does the video fairly and accurately depict the events of January 6, 2021, as you recall them?

A. It does.

MR. SUS: Mr. Hehn, please play the video.

(Video playing.)

MR. SUS: We're stopping the video at 14:30:33.

Q. (By Mr. Sus) Officer Hodges, could you describe what we just saw?

A. The video depicts the police line in front of the West Terrace at the time it was breached by the mob. The — the mob was able to breach the line, they pushed through us, and the sheer size and number of people involved made it impossible to re- — get the line back where it was.

We — they continued to assault us, push us back. We were beaten, pushed, kicked. I was overwhelmed by members of the mob, being pushed back by several at once, until I was pushed back against that

[p.104]

waist/back-high wall you see in the video. I was held there while one of the assailants attempted to gouge out my eye.

And I was able to repel the attackers, and we were forced to retreat.

JA220

Q. Officer Hodges, how did the assailant try to gouge out your eye?

A. He grabbed my face and stuck his thumb in my eye and pushed it in, tried to dig it out as best he could.

Q. So the time stamp at the start of this video was around 2:28 p.m.

Is that about when — the time the mob started to surge?

A. That's correct.

Q. Had you ever seen a crowd break through a police line like that before?

A. No.

Q. To your knowledge, prior to this point, had the DC Metropolitan Police Department ever had to fall back from a police line because a crowd broke through it?

A. No.

Q. Did you hear the man in the video say, "This is our house"?

[p.105]

A. I did.

Q. What did you understand those words to mean?

MR. SHAW: Objection. Relevance.

THE COURT: Overruled.

MR. SHAW: Foundation as well.

THE COURT: You may testify as to what you understood it to mean.

A. At the time, I understood the assailants' words "This is our house" to mean that they had the right to be there or they believed they had the right to be there, that they had the right to enter whenever they wanted, and they had the right to decide what went on and, more pertinently, what did not go on inside the United States Capitol.

JA221

Q. (By Mr. Sus) Over the course of the day, did you hear other individuals say, "This is our house"?

A. I did.

MR. SUS: Your Honor, at this time, we would move to admit Exhibit 15.

MR. SHAW: No objection.

THE COURT: Exhibit 15 is admitted.

(Exhibit 15 was admitted into evidence.)

MR. SUS: Mr. Hehn, please pull up Exhibit 16, starting at time stamp 14:30:44, and pause

[p.106]

the video.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. I do.

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this footage prior to your testimony today?

A. I did.

Q. Is this footage a fair and accurate depiction of the events of January 6, 2021, as you recall them?

A. It is.

MR. SUS: Please play the video.

(Video playing.)

Q. (By Mr. Sus) Officer Hodges, could you describe what we just saw?

A. As we were retreating from the police line being broken on — in front of the West Terrace, I observed a man who was on the ground and had a large knife on his belt. Other officers were attempting to disarm him of his knife, and I assisted while another officer took possession of the knife.

JA222

Q. To your knowledge, was this man arrested
[p.107]
at the scene?

A. No.

Q. Why not?

A. As I previously testified, the current conditions that you see in the video made it untenable to make arrests. We could not guard him adequately with our manpower, nor provide for his safety, security, and medical treatment.

MR. SUS: Your Honor, at this time we would move to admit Exhibit 16.

MR. SHAW: No objection, Your Honor.

THE COURT: Exhibit 16 is admitted.

(Exhibit 16 was admitted into evidence.)

MR. SUS: Mr. Hehn, please pull up Exhibit 17, starting at time stamp 14:32:15, and press pause.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. Yes.

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this footage prior to your testimony today?

A. I did.

[p.108]

Q. Is this a fair and accurate depiction of the events of January 6, 2021, as you recall them?

A. It is.

MR. SUS: Please play the video.

(Video playing.)

JA223

Q. (By Mr. Sus) Officer Hodges, just to orient us, can you describe where you start at the beginning of the video and then where you ended up?

A. At the beginning of the video, I was in front of the West Terrace. I ascended the stairs of the inaugural stage up to the West Terrace proper.

Q. And looking at the time stamp currently showing on Exhibit 17, it says 14:13:11.

So this is approximately 2:33 p.m.; is that right?

A. 14:30- — 14:33, is that what you mean?

Q. Yes.

A. Correct.

Q. And by this time, 2:33 p.m., were the police still in control of where you were standing on the West Terrace of the Capitol?

A. Yes.

Q. Were the police able to maintain control of the West Terrace of the Capitol the rest of the day?

A. No.

[p.109]

MR. SUS: Your Honor, at this time we would move to admit Exhibit 17.

MR. SHAW: No objection.

THE COURT: Exhibit 17 is admitted.

(Exhibit 17 was admitted into evidence.)

MR. SUS: Mr. Hehn, please pull up Exhibit 18, starting at time stamp 14:36:10.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. I do.

Q. Is this more of your body camera footage from January 6, 2021?

A. It is.

JA224

Q. Did you review this footage prior to your testimony today?

A. I did.

Q. Is this a fair and accurate depiction of the events of January 6, 2021, as you recall them?

A. It is.

MR. SUS: Please play the video.

(Video playing.)

MR. SUS: Let's pause the video at 14:37:06.

Q. (By Mr. Sus) Officer Hodges, just to orient us again, can you walk us through where you

[p.110]

started at the beginning of the video and then where you ended up?

A. At the beginning of the video, I was on the West Terrace. I then entered the doorway and into the tunnel that connects the West Terrace to the room known as the Crypt.

Q. And who was coughing in the video?

A. That was me.

Q. Why were you coughing?

A. I was experiencing the effects of CS gas, or tear gas, in the air.

MR. SUS: Your Honor, at this time, we would move to admit Exhibit 18.

MR. SHAW: No objection.

THE COURT: Admitted.

(Exhibit 18 was admitted into evidence.)

MR. SUS: Mr. Hehn, please pull up Exhibit 19, starting at time stamp 19:54:38.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. Yes.

JA225

Q. Is this more of your body camera footage from January 6, 2021?

A. Yes.

Q. Did you review this video prior to your [p.111] testimony today?

A. I did.

Q. Is this a fair and accurate depiction of the events of January 6, 2021 —

A. Yes.

Q. — as you recall them?

A. Yes.

Q. Could you tell us where you're located at this point in the video —

MR. SUS: Oh, I'm sorry, Your Honor. Could we please play the video.

(Video playing.)

Q. (By Mr. Sus) Now, Officer Hodges, could you tell us where you're located at this point in the video?

A. At this point in the video, I am in the tunnel that connects the West Terrace to the Crypt.

Q. So you were on the other side of the tunnel that you had previously seen walking through in the prior video?

A. Correct.

Q. And can you describe what was happening in the video?

A. In the video, we are forming a line inside the tunnel, attempting to defend that entrance from the

[p.112]
mob.

Q. And could you describe the scene inside of that tunnel?

A. The scene inside of the tunnel was a sensory overload. It was chaotic. It was extremely loud. There

JA226

was alarms going off. Lots of people yelling. There were chemical munitions in the air, strobe lights.

And intense body-to-body contact. We — as you got closer to where the assailants in the police line was, the more compressed everyone got, until it was a lot of pressure being exerted on you.

Q. By this point in the day, around 2:55 p.m., had the mob taken control of the West Terrace of the Capitol?

A. Yes.

Q. What was your belief of what would happen if the mob broke through that police line in that tunnel?

A. We — at the time, we had no idea if the mob was able to gain entry into the Capitol building through any other means. We believed that if they were to defeat our line in the tunnel, they would have unfettered access to the Capitol itself and make good on all their threats.

Q. Threats against whom?

[p.113]

A. Congress, the Vice President.

Q. Did you hear the officers in the video say, “Interlock the shields”?

A. Yes.

Q. And what does that mean?

A. Some of our police shields are designed by their shape to be able to interlock with each other when placed next to each other in a certain way. This allows them to function as a single shield and thus eliminates the vulnerability of having two individual shields as individual pieces of equipment.

Q. Prior to January 6, 2021, had you ever used that interlocking shield function?

A. I had not.

MR. SUS: At this time, Your Honor, we would move to admit Exhibit 19.

JA227

MR. SHAW: No objection.

THE COURT: Exhibit 19 is admitted.

(Exhibit 19 was admitted into evidence.)

THE COURT: Officer Hodges, could you just explain for the Court exactly, like — I'm not sure I understand this tunnel. Like, a tunnel from where to where and — and — yeah.

A. It's — it's commonly referred to as the tunnel, but it's a hallway.

[p.114]

THE COURT: Oh.

A. It just connects the outside, the terrace where I was, to the inside of the Capitol itself. It's a hallway.

THE COURT: In my mind, it was some sort of underground tunnel, so . . .

MR. SUS: Mr. Hehn, please pull up Exhibit 20 and pause the video.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. I do.

Q. And what does this video show?

A. This video shows the inside of the tunnel connecting the West Terrace to the Crypt while we were defending it from the mob, who was trying to gain entry to the Capitol.

Q. Did you review this video prior to your testimony today?

A. I did.

Q. And is it a fair and accurate depiction of the events from January 6, 2021, as you remember them?

A. It is.

MR. SUS: Please play the video.

(Video playing.)

Q. (By Mr. Sus) Officer Hodges, can you

[p.115]

describe what we just saw?

A. The video depicts the time at which I had moved to the front of the police line inside the tunnel connecting the West Terrace to the Crypt.

And when I was attempting to repel the attackers, I had positioned myself in front of a metal rigid doorframe in an attempt to use it to support my efforts to push forward. Unfortunately, that time, the momentum had shifted and our assailants had me pushed back and pinned me against the doorframe with a police shield.

At that time, one of my assailants took advantage of my vulnerability, grabbing my gas mask on my face, pushing and pulling rapidly, effectively punching me in the face several times, and then ripping it off my head.

He was able to — at the time, my arms were pinned to my sides. I was effectively defenseless. With this in mind, he was able to rip away my riot baton and then strike me in the head with it.

I — at that point, I was experiencing all the effects of the day: various assaults, the head trauma I had just endured, chemical irritants, and the crushing pressure from the crowd. And I was — my — I could feel my senses diminishing. I was still trapped, though, so I

[p.116]

did the only thing I could do: called for help.

Fortunately, other officers were able to extricate me from my position, and I fell back to the rear of the tunnel.

Q. Did you hear the mob shouting, “Heave ho”?

A. I did.

Q. What was your understanding of what they were doing?

A. The mob shouting “Heave-ho,” I understood to be them coordinating their efforts in order to break through

JA229

our defensive line. They were synchronizing their movement to multiply the force it applied and use their bodies to break through our line and gain access to the Capitol.

Q. Now, the body camera video we previously 6 watched, Exhibit 19, showed you in the tunnel around 2:55 p.m., according to the time stamp on that video; is that right?

A. That's correct.

Q. Approximately how long after 2:55 p.m. did the events shown in this video, Exhibit 20, take place?

A. Approximately 10, 15 minutes.

Q. Okay. So around 3:05 or 3:10?

A. That's correct.

MR. SUS: Your Honor, at this time, we
[p.117]

would move to admit Exhibit 20.

MR. SHAW: No objection.

THE COURT: Admitted.

(Exhibit 20 was admitted into evidence.)

Q. (By Mr. Sus) Officer Hodges, how long did you remain in the tunnel after 3:10?

A. I did not remain in the tunnel for very long at that point. I fell back to the Crypt to convalesce as best I could.

However, the fight was still ongoing, and we needed every body we had in the defense of the Capitol. So I went back out there.

I no longer had my gas mask and a lot of my equipment. I was afraid I would be a liability in the tunnel, so I ascended a stair nearby back out to the West Terrace and joined a police line that was there.

JA230

I remained on that line until reinforcements started to arrive from outside agencies, at which point I returned to the Crypt and waited there.

MR. SUS: Mr. Hehn, could you please pull down the video.

Q. (By Mr. Sus) Officer Hodges, when you left the tunnel, did you still have your body camera on you?

A. I did not.

Q. What happened to it?

[p.118]

A. It either fell off or was ripped off my chest where it was mounted and fell to the ground, where it remained until another officer found it the following day.

Q. And did you retrieve it at some point from that officer?

A. Through my agency, it returned to my possession, yes.

Q. And so what did you do for the remainder of the day after you left the Crypt?

A. Back in the Crypt, I waited while members of my platoon gradually gathered, and we waited to — until we were all assembled, at which point we stood by, waiting for further orders. We stayed there until around midnight, at which point we were told that we were able to clear the Capitol.

We left the Capitol grounds. Those who needed immediate medical attention went to hospitals. Those of us who did not were still on-duty. We reported to downtown and awaited further orders.

I believe at about 1:00 a.m., eventually we were told we could go home. And we went back to our district from there, and then went our separate ways.

Q. How would you characterize the events you witnessed on January 6, 2021?

[p.119]

A. The events on January 6, 2021 at the United States Capitol were horrific. It was a terrorist attack on the United States of America, an assault on democracy, and an attempt to prevent the peaceful transfer of power.

Q. About how many protest events have you worked as a member of the Civil Disturbance Unit?

A. Dozens.

Q. How did the events of January 6, 2021 compare to those other experiences you had as a member of the CDU?

A. The events of January 6 are incomparable to any other riots or protests or First Amendment assemblies I have policed. There is just no — no comparison on the level of violence and stakes.

Q. And what were you fighting for on January 6?

A. On January 6, I was fighting for —

MR. SHAW: Objection. Relevance.

THE COURT: Overruled.

A. On January 6, I was fighting for democracy. I was fighting for the safety and well-being of the members of Congress, the Vice President, the congressional staff who were in the building that day. I was fighting for myself, for my colleagues, and everyone

[p.120]

who participates in our democracy.

MR. SUS: Thank you, Officer Hodges.

No further questions.

THE COURT: Cross-examination.

MR. SHAW: I may want that a little later, but not yet.

CROSS-EXAMINATION

BY MR. SHAW:

Q. Officer Hodges, there were multiple demonstrations —

JA232

THE COURT: Mr. Shaw, can you move the microphone? You're taller so can you —

MR. SHAW: Sure.

THE COURT: — make sure that you're speaking into it?

MR. SHAW: Sure thing. Is that better?

THE COURT: Yeah, a little bit.

Q. (By Mr. Shaw) Officer Hodges, how many demonstrations were there in Washington, DC on January 6?

A. I'm only aware of what transpired at the Capitol and the one at the Ellipse.

Q. Okay. Are you aware that there were people who spoke at the Supreme Court?

A. No.

[p.121]

Q. Are you aware that there were people who spoke at other venues in Washington, DC that day?

A. No.

Q. Are you aware that there were protesters who did not attend any of the events where people spoke?

A. No.

Q. You said that you thought there were — based on your view of the crowd that day, there were at least thousands of people present; is that correct?

A. Correct.

Q. How many people attended demonstrations in Washington, DC, overall, that day?

A. I don't have an exact number.

Q. Okay. Have you heard any estimates of the number who were in attendance at various demonstrations that day?

A. I — at the Capitol, I heard of — or I've read of a number around 9,400.

JA233

Q. Okay. Have you heard an overall number in excess of 120,000?

A. No.

Q. Okay. Is it your position that all of the people who attended demonstrations in Washington, DC that day were members of what you called "the mob"?

A. If there are demonstrations that were not [p.122]

part of the assault on the Capitol, then no.

Q. So "the mob," if I understand you correctly, you're defining as just the subset of people who assaulted the Capitol?

A. Correct.

Q. And as you sit here today, are you able to tell me what percentage of what you call "the mob" attended President Trump's speech at The Ellipse?

A. No.

Q. Are you able to tell me what percentage of what you call "the mob" listened to President Trump's speech at the Ellipse?

A. No.

Q. Now, several times, you said: The mob did this, the mob said this, I saw the mob do this, or words to that effect.

Do you remember that?

A. Yes.

Q. Okay. Fair to say what you're really saying is, I saw individuals in what I call "the mob" do this or say this, correct?

A. A mob is composed of individuals, so yes.

Q. Okay. And there were other people who were standing there who did not do or say those things, right?

[p.123]

A. That is correct.

JA234

Q. And some portion of the people who were standing there were there and did not physically assault anybody, right?

A. I did not — there were times where I observed people and they were not assaulting anyone, correct.

Q. And there were other demonstrators in Washington, DC that day who did not form part of the mob, as you define it, correct?

A. I'm only aware of what transpired at the Ellipse and at the Capitol.

Q. Okay. Now, fair to say that you are not able to read minds, right?

A. That is fair to say.

Q. And just by looking at someone who was there that day, you weren't able to tell if that person attended the speech at the Ellipse, correct?

A. That's correct.

Q. Or if that person had heard the speech, right?

A. Correct.

Q. Or, for that matter, if that person had ever read a tweet by President Trump, correct?

A. Correct.

[p.124]

MR. SHAW: Would you put up Exhibit 14, please. And just pause it right at the very beginning, whoever was working the . . .

Yeah. Okay, great. Joanna's doing it, okay.

Q. (By Mr. Shaw) So, for example, if we look at this picture, you can't tell whether — this woman on the left in the striped shirt, you can't tell whether she attended the — the speech on the Ellipse, correct?

A. I cannot tell that by looking at her, no.

Q. Or in — or in any other way, right?

A. Correct.

JA235

Q. And the man behind her who, a few moments later, was going to yell at you, you can't tell whether he attended that speech, right?

A. Correct.

Q. Or any of the other people in that picture, right?

A. Correct.

Q. Or, in fact, any of the other people in any of the other film exhibits that we saw earlier today, right?

A. I cannot identify individuals who attended the speech and then were at the Capitol.

Q. Or who read any of President Trump's [p.125]

tweets, correct?

A. Correct.

Q. And I wanted to clear up a couple of things I just wasn't clear about from your testimony.

At one point, you said that the — and I forget the exact name of it, but you said there was a gun unit?

A. Gun Recovery Unit?

Q. Gun Recovery Unit. That's it. Thank you.

And you said, I believe, that they identified people who either had weapons or who they thought might have weapons.

Is that correct?

A. That's correct.

Q. Okay. Do you know how many people have been prosecuted for firearms crimes arising out of the January 6 demonstration?

A. No.

Q. Would it surprise you to learn that it is a total of five?

A. No.

JA236

Q. Okay. And that one of those people arrived on January 7 in Washington, DC; so it was really four on January 6?

A. Okay.

[p.126]

Q. And do you know how many people in — how many demonstrators discharged a firearm in Washington, DC on January 6?

A. I do not know.

Q. Would it surprise you to learn it was zero?

A. No.

Q. And then I just — I believe you said that you — you thought you had suffered a concussion, is that correct, because you had a headache for —

A. That's —

Q. — for two weeks?

A. That's correct.

Q. Okay. Were you diagnosed with a concussion by a medical professional?

A. I went to the Police & Fire Clinic, and they sent me to Washington Hospital Center, which is a hospital in Washington, DC.

Received an MRI, and I wasn't diagnosed with a concussion, but that they — they asked me if I wanted to do any further tests for that. And I said no, because if I was or wasn't, the course of treatment is the same.

Q. Okay.

MR. SHAW: I have no further questions for

[p.127]

you, sir. Thank you.

THE COURT: Any questions from the Colorado Republican Party?

MS. RASKIN: No questions, Your Honor.

THE COURT: Any questions from Secretary Griswold?

MR. SULLIVAN: No questions, Your Honor.

THE COURT: Any redirect?

MR. SUS: Brief redirect, Your Honor.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. SUS:

Q. Officer Hodges, you testified that you were initially stationed on Constitution Avenue; is that right?

A. That's correct.

Q. On January 6?

A. Yes.

Q. And that was between the hours of 7:00 a.m. and 1:30 p.m.; is that accurate?

A. That's accurate.

Q. And during that time, did you observe the crowd walking — or your testimony earlier today was that you observed the crowd walking from the Ellipse area to the Capitol; is that right?

[p.128]

A. That's correct.

Q. Okay.

MR. SUS: No further questions, Your Honor.

THE COURT: Officer Hodges, thank you so much for your testimony and your service to this country.

THE WITNESS: Yes, Your Honor.

THE COURT: Next witness.

MS. TIERNEY: Your Honor, our next witness is remote, and so it might just take about one minute. I think they're all ready. We just have to let them in, and they are — it will now be under Congressman Eric Swalwell.

Your Honor, the petitioners call Congressman Eric Swalwell.

JA238

Okay, he's coming right now. Sorry for the delay. Here he is, Your Honor.

THE COURT: I can't see him. Am I supposed to be able to?

MS. TIERNEY: Thank you, Congressman Swalwell. Just one moment while we get the tech set up.

Okay. Good afternoon, Congressman. Can you please introduce yourself.

THE COURT: I need to swear him in.
[p.129]

MS. TIERNEY: Oh, sorry.

THE COURT: Now I'm fumbling with the technology.

MS. TIERNEY: Well, and we have a siren again.

THE COURT: Congressman Swalwell, can you hear us?

THE WITNESS: Yes, Your Honor, I can.

THE COURT: Great.

Will you please raise your right hand.

ERIC SWALWELL,
having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. TIERNEY:

Q. Good afternoon, Congressman Swalwell. Could you please introduce yourself.

A. Good afternoon. My name is Eric Swalwell, and I represent the 14th Congressional District from California.

Q. How long have you been a member of Congress?

A. Going on 11 years. Elected in 2012 and sworn in on January 3, 2013.

Q. Were you at the U.S. Capitol on January 6,

[p.130]
2021?

A. Yes, I was.

Q. And what was supposed to happen in Congress that day?

A. We were sworn in three days earlier, and on the 6th was to be the day where the Congress votes to certify the electoral college votes that were sent from December after being ratified by the states.

Q. I'm going to ask you some more questions about January 6, 2021. But first, I would like to ask you some questions about prior presidential elections.

When, if ever, had you participated in Congress's counting of electoral votes for President before January 6, 2021?

A. I had also participated in the January 6, 2013 certification for the reelection of President Barack Obama, and I also participated on January 6, 2017 for the election of President Donald Trump.

Q. And does Congress always count the votes on January 6?

A. Yes, every four years on January 6.

Again, the new Congress sworn in on the 3rd, and then on the 6th is when the certification occurs.

Q. In your experience, what is the process for counting and certification of electoral votes on

[p.131]
January 6?

A. Largely ceremonial, in that, you know, the Congress convenes in what's called a joint session, meaning the House and the Senate are in the Congress. The Vice President of the United States, the President of the Senate, presides over the count.

JA240

And each state alphabetically has their votes called. If there's an objection, you need somebody to meet your objection from the other Chamber.

So, for example, if a House member objects, a Senator would also have to object. And then both bodies would go back to their Chambers and debate the objection, and then come back for resuming the count.

Q. And how are those objections resolved?

A. They're resolved through debate and then a vote.

Q. And I think you testified about this, but what role does the Vice President play in those proceedings, generally?

A. As the President of the Senate, the Vice President, you know, presides over the count.

There are tellers who are seated just below the Vice President from both Chambers, both parties. They tally the counts that are sent from the states, and the Vice President literally — you know,

[p.132]

kind of like in an award show — opens up the count and reads how the state went for each individual candidate.

Q. In 2016, were there objections to the counting and certification of electoral votes from any state?

A. Do you mean in 2017?

Q. Yes, I'm sorry. Arising out of the 2016 election, so on January 6, 2017.

A. I do recall there was at least one, and perhaps more, Democratic House objections. But I also recall that there was no Senator to sign off, so to speak, or cosign on the objection, and so we never adjourned for a debate.

Q. And so what happened with those objections?

A. I remember Vice President Biden — I was in the Chamber and Vice President Biden asked if there was a Senator who also objected. No Senator objected, and the

JA241

Vice President would open up the envelope or look at the votes sent from the state, and they would just alphabetically proceed to the next state.

Q. And did you object to the counting or certification of any electoral votes?

A. Not in 2013 and not in 2017, no.

Q. Do you recall any of the objectors in [p.133]

2017, on January 6, 2017, suggesting that then-Vice President Biden, as President of the Senate, could have rejected any of the electoral votes submitted by the states?

A. No, I do not recall that ever coming up in any caucus meetings or any public representations.

Q. And what do you recall, if anything, about anyone suggesting that then-Vice President Biden, as President of the Senate, could declare Hillary Clinton the winner of the 2016 election?

A. To my recollection, that was never discussed by any of my House colleagues.

Q. Before late 2020 or early 2021, had you ever heard anyone suggest that the Vice President, as President of the Senate, had discretion to reject electoral votes from states?

A. I would — I would not hear of that line of argument until after the election from the former President, Donald Trump, and his team.

Q. And did then-Vice President Biden try to do any of those things during the counting and certifying of the 2016 presidential election?

A. He did not. If there was not a Senator to match a House member's objection, he moved on with the count.

[p.134]

Q. Do you recall any candidate or colleague suggesting that Congress should ignore the Constitution and certify the election for the winner of the 2016 popular vote?

A. I don't recall that ever happening.

Q. And did any person supporting any candidate for President, to your knowledge, attack the Capitol on January 6, 2017?

A. That definitely did not happen on January 6, 2017.

Q. And are you aware of anyone ever attacking the Capitol during Congress's counting and certification of presidential electoral votes in the history of our country prior to January 6, 2021?

A. Certainly not in my lifetime and not any knowledge I have of the Congress's history.

Q. I now want to turn to the election. Did you have any concerns in the weeks and months leading up to the 2020 presidential election about whether Mr. Trump would accept the results of the election if he lost?

A. I did. And that was the evening of the election, when a statement was made by the President early in the morning, essentially — or not essentially — he was saying that the election was

[p.135]

rigged.

And then — and to be honest, prior to the election, the President would not honor reporters' requests to accept the outcome of the election if he lost.

And then, of course, on the night of the election, he had said in his first public statement that he believed it was rigged.

And then in the weeks after the media declared Joe Biden as the President-elect and the states certified the election outcomes and the lawsuits that the President and

his team had brought had all been dismissed in the courts, the President ramped up his rhetoric in public appearances and on Twitter.

And the one that I recall was an invitation in mid-December via Twitter for people to come to the Capitol on January 6 and stating in the tweet, "Will be wild."

Q. You testified just there that there were legal challenges that you were aware of brought by Mr. Trump to the election.

By December 14, 2020, are you aware of what the status of those legal challenges was?

A. By December 14, I think that, if I recall, is the date where the states were certifying their

[p.136]

counts. Every challenge to the states' counting and doing their certification had been dismissed or dropped by the President's team.

Q. Okay. Following the states' certification of electoral votes on December 14, 2020, what was your understanding as to whether Mr. Trump had any further legal avenues to challenge the election?

A. Again, my understanding was the next step in the process was the January 6 certification and then the January inauguration for President-elect Biden, but that was it. They had been exhausted.

Q. Let's turn now to January 6, 2021.

What was your role in the counting and certification process on January 6, 2021?

A. I was told the day before by Speaker Pelosi that she would like me to preside as the speaker-designate at noon on January 6 to gavel us in, so to speak. And so the day starts, every congressional day starts with the Speaker gaveling the Congress in.

JA244

And so I gaveled us in, led us in Pledge of Allegiance. There was a new chaplain to the Congress, and asked the chaplain — as we do every opening of a session, asked the chaplain to lead us in prayer.

And then I read an appointment of the tellers that each side — that each party in each Chamber

[p.137]

had designated to participate in the count on January 6. And then I adjourned.

And all of that lasted no more than ten minutes.

Q. I'm going to back you up just briefly.

What did you do that morning before the certification process began?

A. I ran from the residence I have in Washington, DC to the Capitol and then back. It's a run I do often.

And I recall on the run back from the Capitol, actually running up North Capitol, seeing dozens of individuals carrying signs that read, "Stop the Steal," and wearing body armor and military fatigue — fatigues.

And I remember pulling down the cap that I was wearing, it was pretty cold, so kind of pulling it over my face because I didn't want to be seen by this crowd or recognized by this crowd.

But it certainly just gave me an unsettling feeling about the direction the day was headed.

Q. Did you watch any of Mr. Trump's speech on the Ellipse that day?

A. I did. Once I returned to the Capitol and

[p.138]

after I had opened the session, I had — I was on the Floor with my Democratic colleagues, and many of us had our phones out, and we were watching the speech on the Floor.

We would step off the Floor into this area called a Cloakroom, which is just footsteps from the Floor, and there were televisions on in the Cloakroom playing the speech from the President and his supporters at the Ellipse.

Q. And what was your reaction to that speech or the parts that you saw of it?

A. Well, in the weeks before January 6, again, the President had fired up his supporters with claims that the election was rigged; said the 6th was going to be wild; and it came together on the 6th. Like just from what I saw of individuals on the streets of Washington and then what I saw in the speech, it appeared that an angry mob had assembled around the Capitol and near the White House.

And when the President said that he was — that his supporters must fight like hell or they won't have a country anymore, that worried me because we were undergoing the process of certifying the election he lost.

And when he aimed them at the Capitol by

[p.139]

saying that he was, in solidarity, going to the Capitol with them, that, "We're going to go to the Capitol," a lot of us in the Cloakroom looked at each other in a "Oh, God, like, what does this mean for us" kind of feeling.

Q. So how did the counting and certification of electoral votes on January 6, 2021 go?

A. So after I recessed, we took a break for about 50 minutes. And then Speaker Pelosi and Vice President Pence, as the President of the Senate, would next reconvene the House and the Senate in the House Chamber. And as I said, it begins alphabetically.

So on the Democratic side, because of COVID, only members of leadership and members from the states that were going to have to defend the vote were on the House

Floor. Any other Democrat would have to watch in the gallery.

So there were, you know, no more than two dozen or so of myself and others on the House Floor. And I should have added, at that time, I was a member of House leadership.

And so Arizona was, you know, the first state to be challenged and, if I recall, Congressman Gosar, Paul Gosar from Arizona, challenged the Arizona vote.

The Vice President asked if there was a
[p.140]

Senator who would cosign the challenge, and I believe it was Senator Cruz from Texas who signed off. And so we adjourned the joint session, meaning the senators left to go to their own Chamber for debate; we stayed in our Chamber; and Speaker Pelosi took the gavel to kick off the debate on the matter of Arizona.

Q. At some point thereafter, you learned that rioters had breached the Capitol, correct?

A. Myself and everyone around us on the floor had our phones out and were watching intently on what was happening around the Capitol.

We were also receiving a number of Capitol Police alerts. There's an email — an internal email system for members and staff, and the alerts were telling us about the mob that was assembling around the Capitol, the Capitol office buildings that were closed, suspected pipe bombs around the Capitol that had been discovered.

And so we were focused on the debate, but also our own security posture, whether it was watching Twitter or receiving the Capitol Police alerts, was also right in front of us in our handheld devices.

Q. And about what time was this happening?

JA247

A. This was between 1:00 and 2:00, as we watched either people who were in the mob and staged at the Capitol during the speech or people who were at the

[p.141]

Ellipse and moved, you know, toward the Capitol after the speech.

Q. What was the first thing that occurred that was unusual to you inside the Capitol?

A. Well, first, I would say watching the mob on our devices blow past, with force, various security perimeters was unusual. We had never seen anything like that before.

But also on the floor, Speaker Pelosi was presiding in the House Chamber and, abruptly, she was asked to step off the podium, and her security detail took her off the Floor.

And I also noticed Mr. Hoyer, who was the majority leader, Steny Hoyer of Maryland, and James Clyburn of South Carolina, who was the majority whip, also their details hurriedly went to them and took them off the Floor.

Q. And about what time was that?

A. This was in the 1:00 hour, I would say mid 1:00 hour.

And at that point, James McGovern, who is a rules committee chairman from Massachusetts, he stepped up to the podium. And so it was a seamless transition; debate did not stop. He stepped up to the podium and presided over the debate on the matter of Arizona.

[p.142]

Q. After Speaker Pelosi and the other members of leadership that you mentioned were moved out of the Chamber, you said debate continued for — for about how long did debate continue?

A. For probably another — no more than 30 more minutes. And it may have been even fewer.

Q. What happened next in terms of safety recommendations?

A. Mr. McGovern suspended debate, and a Capitol Police officer went to the podium. I remember it being the lower podium.

So the podium where the Speaker presides — there's two podiums in what's called the rostrum. The upper podium is where the Speaker presides, and that's where I gaveled us in, and that's where Speaker Pelosi and Pence presided; that's where McGovern presided.

The lower podium, if you think about State of the Unions, where the President speaks.

So a security officer went to that lower podium and told the members that there were people unauthorized inside the building and that Capitol Police was dispersing tear gas, and that we were to reach under our seats and pull out a gas mask and be ready to put it on in case they had to disperse tear gas inside the

[p.143]

Chamber and also be ready to move through an evacuation route.

Q. Had you ever had to put a gas mask on in the Capitol House Chamber before?

A. I didn't — until that moment, I did not know that there were gas masks under our seats. And we had also never before, you know, rehearsed any type of scenario like this.

So first, there was just — I think people were surprised that they were even there. We sit on top of them every day; we just didn't know.

Q. Who were you sitting with at that time?

A. I had moved from sitting with Barbara Lee and Cheri Bustos early in the debate over to Congressman Ruben Gallego of Arizona.

His wife had reached out to me. She was worried that — that Ruben would probably not follow orders of the Capitol Police and that he would want to fight the mob or the protesters, and she asked me if I could just look out for Ruben.

And so I went over and sat — sat with Ruben Gallego.

Q. And what can you tell us about Congressman Gallego's training?

A. So I knew and most of our colleagues knew

[p.144]

that Ruben had served a combat mission as a Marine in the Iraq War.

And so as we were pulling out the gas masks, he saw immediately that I had no idea how to use or even open the gas mask. And so he started having women first throw him or toss him their gas masks, and he was ripping them open, sometimes using his teeth to rip them open, and was just handing out the gas masks and telling people to not breathe too quickly because that could lead you to pass out.

He and I agreed that we would take off our coats so that our congressional pins were not obvious if we had to move to any of the rioters and also so that we had more freedom of movement.

He also handed me a pen that was sitting on the table where he was prepared to debate for Arizona, and he said to me as he handed me the pen, he said, "If any of them get near you, just put this in their neck."

Q. So what was going through your mind at that moment?

JA250

A. A lot. Uncertainty, disbelief that this was happening, that we were taking our coats off, that we were looking for weapons or how to use gas masks.

At that point, as we're waiting for the security officer to give us further instructions, the

[p.145]

chaplain, who I had asked to lead us in prayer earlier in the day, went back up to the podium and, uninvited, unannounced, just started reading from that lower podium a prayer, and she asked all of us if we would pray with her.

Q. What, if anything, did you notice being done to secure the Chamber at that time?

A. So after I and my colleagues prayed, I noticed that Capitol police officers were — along with some — actually, some of my Republican members, were pushing — Republican colleagues, were pushing furniture against the back door.

So if you think of — again, the State of the Union is probably the best way to orient yourself. But the door that the President walks through for the State of the Union, that's the back of the Chamber. Those double doors have glass panes on them, and so furniture was being moved to block those doors because we could hear the pounding on those doors and the shouting of the rioters outside.

In the front of the Chamber where the rostrum is, where the podiums are for the speakers, there's — there's two massive portraits: There's the portrait of George Washington, and that's on the Democratic side. And there's a portrait of

[p.146]

General Lafayette, the French general from the Revolutionary War; that's on the Republican side.

So on the Democratic side, right behind the portrait is a set of double doors that takes you off the Floor and you — they're glass doors. So I could see through the glass doors in what's called the Speaker's Lobby that Capitol Police were stacking furniture and chairs against the doors that lead into the Speaker's Lobby. And they were stacking them as high as they could stack them with what they had. And we — we sat, as I said, and waited for instructions on the evacuation.

Q. How would you characterize the group of people gathered outside the Speaker's Lobby and the House Chamber at that time?

A. I could — at that point, I can mostly just hear the sounds of the banging or the screaming. I — I would not see them until we left.

Q. And how would you characterize those sounds? What did it sound like?

A. They were — they were — it was haunting.

And I say that because the Chamber's mostly windowless. And so just having been alerted on our phones that bombs, suspected bombs were found around the building and watching the violence against the police

[p.147]

officers and seeing that the mob had breached multiple perimeters and had come closer to the Chamber, it was really just the uncertainty of what they wanted or what they would do.

Q. How concerned were you for your personal safety at that moment?

A. It was escalating as we went from gas masks, to a pen in my hand, to a prayer from the chaplain. And it was when the chaplain read that prayer that I finally texted my wife, something I did not want to text her.

JA252

I had essentially been telling her, you know: We're going to be fine. It's okay. I didn't want to, you know, worry her throughout the morning.

Q. During the attack on the Capitol, were you following Mr. Trump's tweets?

A. I was. And as I said, almost all of my colleagues, we had our phones out and we were reading our phones and following the tweets and the Ellipse speeches and listening to debate.

Q. And why were you following his tweets?

A. We connected the President's tweets to our own safety, our own safety in the Chamber, and also the integrity of the proceedings that were taking place.

MS. TIERNEY: I'm going to ask for
[p.148]

Exhibit 148 to be displayed, please.

And, Your Honor, this exhibit has been stipulated by both — by all sides. This is one of Mr. Trump's tweets.

THE COURT: Okay. Are you offering it into —

MS. TIERNEY: I am offering it into evidence, Exhibit 148, Your Honor.

And this is a long exhibit, so we're — we're only going to look at two tweets —

THE COURT: Okay.

MS. TIERNEY: — of the whole compilation.

So this tweet is on page 83 and it has a time stamp of 2:24 p.m. on January 6, 2021.

THE COURT: Okay. Exhibit 148 is admitted.

(Exhibit 148 was admitted into evidence.)

Q. (By Ms. Tierney) Congressman Swalwell, can you see the exhibit on your screen?

A. Yes, I see the tweet from the verified account of the former President.

Q. And do you remember reading this tweet while you were in the Chamber?

A. Yes. We were — the time stamp reflects what I recall — the time that I recall being still on

[p.149]

the floor, which is 2:24 p.m. on the 6th.

Q. And what did — what did — how did you interpret this tweet? What did you interpret it to mean?

A. I interpreted that the President believed that the Vice President was refusing to do something that could overturn the outcome the President wanted.

But again, for my personal safety and the proceedings we were engaged in, the colleagues that I was with, we interpreted it as a target had been painted on the Capitol because that's where the Vice President was when the tweet was sent.

Q. And can you read the tweet, Congressman?

A. Yes.

“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!”

Q. Did you notice any change in — in what was happening outside the Chamber after this tweet occurred, was sent?

A. Well, we didn’t feel more safe. It wasn’t as if, you know, the mob subsided. You know, we were — continued to be updated by Capitol security, that they

[p.150]

were trying to secure an evacuation route and that we should stand ready and — but the pounding and the shouting continued.

JA254

THE COURT: Representative Swalwell, could you just speak up a teeny bit?

THE WITNESS: Sure.

THE COURT: You're starting to trail just a little bit.

THE WITNESS: Yeah. I'm happy to repeat that, too, if that —

THE COURT: If you wouldn't mind.

THE WITNESS: Sure.

A. When the tweet was sent, we did not feel more safe. It wasn't as if the mob subsided.

And so we waited, and this was near the point where we would ultimately leave the Floor, but you could still hear the sounds of the pounding of side of the Chamber and the screaming of the protesters.

Q. (By Ms. Tierney) When — at some point, you were led out of the Chamber; is that correct?

A. Yes. Again, the security officer went to that lower podium and told us there was an evacuation route and that we were to go in the direction of the Lafayette portrait.

Again, two sides: One is Washington;
[p.151]

that's where they were stacking chairs. The other was the Lafayette portrait exit. And so we went — we were told to go in that direction.

(Connection lost.)

MS. TIERNEY: Sorry, Your Honor. Small tech issue. Did the entire WebEx go down?

THE COURT: The WebEx seems to still be on.

MS. TIERNEY: Okay.

THE COURT: Congressman Swalwell, we're just having a technical problem.

THE WITNESS: No problem.

MS. TIERNEY: Should I wait?

THE COURT: Let's wait a minute.

MS. TIERNEY: Yeah.

THE COURT: If it doesn't get fixed in a minute, we can still hear him, so . . .

MS. TIERNEY: Okay.

(A pause occurred in the proceedings.)

THE COURT: Ms. Tierney, let's just — I just wanted to make sure that the court reporter could continue if she couldn't see him for lip reading, but she says she can, so why don't we continue while they work on the technical issue.

[p.152]

MS. TIERNEY: Okay. Thank you, Your Honor.

Q. (By Ms. Tierney) Congressman Swalwell, can you hear me?

THE COURT: Yes.

MS. TIERNEY: Oh, I just can't hear him.

THE COURT: Oh, he — can you — can you say something, Mr. Swalwell?

THE WITNESS: Yes, I'm unmuted now. It doesn't allow me on my end to unmute.

MS. TIERNEY: Okay.

THE WITNESS: But I can hear you.

MS. TIERNEY: Okay. Hopefully we'll be back to visual in just a moment.

Q. (By Ms. Tierney) Did you play a role in the evacuation of the Chamber?

A. Well, no. The brave police officers were the ones who asked us to leave.

Being a rule follower, the son of a cop, I immediately started to follow the police officers as we were asked to leave.

But I did see my colleague, Ruben Gallego, who is not a rule follower, did not follow the orders of the police. And

JA256

I saw that he was standing on the House chairs, yelling at the members in the gallery, that they

[p.153]

were going to be okay and just reminding them about their gas masks.

And so I went back to the Washington side of the Chamber, of the Washington portrait side, and started yelling, "Ruben, Ruben, time to go. We've got to go." And was ultimately able to get Ruben to walk out of the Chamber with me.

Q. And what path did you take during the evacuation?

A. So we went out of the doors near the Lafayette portrait, which is the Republican side of the Chamber. And there's a long hallway that those doors lead into that's called the Speaker's Lobby. And in a non-COVID time, that's where the press corps assemble and interview members. There were no press at the time because of the COVID restrictions, and so I went out that door and then down the stairway that was just off that exit.

Q. When you were starting to leave, did you notice that there were any — was there anybody still in the Chamber?

A. There were — there were still police officers in the Chamber. And as I said, if I recall, there were one or two Republican colleagues who were standing at the double doors at the back of the Chamber,

[p.154]

helping push the furniture against the doors.

But Gallego was one of the last ones on the floor, and so I had finally pulled him out. And as we were leaving, I looked down the long hallway of the Speaker's Lobby at the — where they had stacked the chairs and saw the mob, you know, pressed up against the — the glass doors that lead into the lobby.

JA257

Q. When you were leaving the Chamber, was — were there any people left in the gallery?

A. Unfortunately, the gallery colleagues of mine were not able to leave at the same time that we were.

They — many — I did look up at the gallery a number of times, and especially when Ruben was — Congressman Gallego was yelling at them. Many of them were lying under the chairs of the gallery. Some of them had their gas masks on. Some of them looked like they were in kind of like a prayer group, praying together.

But the Capitol Police, as I would later learn in the impeachment, had not yet secured the exit for the third floor doors.

Q. Okay. And what was your reaction to seeing those members and staff in the gallery?

A. Horrified. And felt helpless that I and
[p.155]

the police were not able to get them out and, frankly, felt guilt that I was able to leave and they were still up there.

Q. You testified a moment ago that the path you took led you through the Speaker's Lobby. How long did you stay in the Speaker's Lobby?

A. We were encouraged to move as quickly as we could, but you can only — I learned you would only move as fast as the people in front of you. And with, you know, hundreds of members leaving the floor, there were fits and starts, and so we would move and then we would stop and cluster.

And the evacuation route would last, I recall, well over 10 to 15 minutes to get us out of there.

Q. Did you hear anything as you exited the Chamber?

A. As I was leaving the Chamber and going through the Speaker's Lobby, I did hear what sounded like a gunshot. I did not see it, and I was in the mix of members

who were trying to move as fast as we could to follow the route.

Q. And when did you ultimately make it to a safe location?

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A. It took, as I said, at least 10 to 15 minutes. And so I would say, you know, sometime in the — just before 3:00 or near the 3:00 hour.

Q. Who else from Congress did you meet up with there?

A. House leadership had been taken off the floor when Speaker Pelosi was taken off the Floor. So anyone who remained on the Floor was members of Democratic leadership, members from states that were defending their vote, and then most of my Republican colleagues. It didn't appear that they had the same COVID restrictions that we had on our side. And so that was the group that moved together off the Floor.

Eventually in the evacuation room, our colleagues from the gallery would join us, members of the press corps would join us, and then members of leadership staff who worked in offices in the Capitol would join us.

Q. Once you were in that location, were you receiving updates as to what was going on in the Capitol and outside?

A. The Sergeant of Arms, who is the individual charged with House security, moved with us and was in the room when we arrived.

And so he routinely gave us updates and, you know, frankly, it felt like being on a delayed flight

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where the captain just kept telling me the same thing every 15 minutes, which was that the Capitol was under attack, they were trying to get more resources to clear the

Capitol, but we would have to stay there until the Capitol was cleared.

And that was, you know, every 15 to 20 minutes or so.

Q. Was there communication in that location between you and your colleagues about what was happening outside?

A. Certainly, yes, and there was Republicans and Democrats, you know, in the same room.

And at one point, I do recall that the Sergeant of Arms had kind of loosely implied that they may be bringing buses to the site and that we would leave in buses.

And I was seated next to — for most of the time, next to Congressman Adam Schiff. And I do remember Mr. Schiff vocalizing that we should not leave, we should stay, and that essentially the worst thing we could do, you know, if there's an attempted coup taking place is to leave, you know, the site of the coup. That we needed to go back to the Capitol and finish the count.

Q. I'm going to now show —

A. And I also recall — just, sorry —

[p.158]

Q. No.

A. Ruben Gallego also — because I remember asking Gallego, like: Should, like, we consider the buses?

And Gallego was adamant that he — I remember the phrase, like we would be “sitting ducks” if we got on a bus and left, that that would be the worst thing for us, for our personal safety.

Q. At some point that afternoon, are you aware that Mr. Trump made a statement?

A. Yes. I remember — I remember multiple statements and a video, but yes.

Q. And the —

JA260

MS. TIERNEY: I'm going to have Mr. Hehn 5 bring up Exhibit Number P68.

Your Honor, this is also a stipulated exhibit.

THE COURT: P68 is admitted.

(Exhibit P68 was admitted into evidence.)

Q. (By Ms. Tierney) And can you — do you remember seeing this video, Congressman Swalwell?

A. Yes, I do.

MS. TIERNEY: Can you play the video, Mr. Hehn. He indicates there's an issue with the

[p.159]

WebEx audio.

THE COURT: Ms. Tierney, how much longer do you have with him? I'm wondering if maybe we should break for lunch, and people can figure out the technology.

MS. TIERNEY: I've probably got about another 10 or 15 minutes.

THE COURT: I mean, I was hoping to get through direct before lunch, but I'm worried that the technology issue might take some figuring out.

MS. TIERNEY: Okay. That's fine, Your Honor.

THE COURT: And it may be that it's not possible to play the video over WebEx with sound, so hopefully your tech people can talk to the Court's tech people and we'll figure something out.

MS. TIERNEY: I can also have the video played locally for Congressman Swalwell because everybody here can see the video, I think. So maybe that's an option, too.

THE COURT: Okay. Why don't we figure that out because I — yeah, I'd like to see the video, so —

MS. TIERNEY: Okay. Yeah. And it's only one minute. It's a short video.

[p.160]

THE COURT: Okay. Let's take a break. We will reconvene at 1:15, and hopefully somebody on your team can talk to Collin and the IT people here and figure it out.

MS. TIERNEY: We'll work very hard to do that. Thank you, Your Honor.

THE COURT: Okay.

(Recess taken from 12:08 p.m. until 1:15 p.m.)

AFTERNOON SESSION, MONDAY, OCTOBER 30, 2023

THE COURT: You may be seated.

Representative Swalwell, can you hear us?

I think he's on mute.

Can you hear us, Representative Swalwell?

THE WITNESS: Yes, I can.

THE COURT: Great. You may proceed.

MR. OLSON: Thank you, Your Honor.

Thank you, Congressman Swalwell.

THE WITNESS: Okay.

CONTINUED DIRECT EXAMINATION

BY MS. TIERNEY:

Q. Before we go to the video that halted us for a little bit there, I wanted to circle back and ask you a question about earlier in the afternoon.

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Do you recall Vice President Pence issuing a statement that day before the certification began?

A. I do. I recall it being, I believe, like the 1:00 hour, almost right as we gaveled in.

Q. And what was in the statement, if you can recall?

A. I recall it was written in like a "Dear Colleague" fashion. I think it was a member of Congress —

MS. TIERNEY: One second, sorry. Court reporter asking for a tech pause.

Q. (By Ms. Tierney) Can we start over with that answer? Do you recall what was in the statement, Congressman?

A. I recall it being printed in the cloakroom and being passed around with the members. I remember it being written as a "Dear Colleague," which is a way that members communicate to each other. And Pence, of course, as president of the Senate, is also a member of Congress, so to speak. And he's a former member, and I thought it was interesting that he wrote it in that format.

But it essentially informed us that he would not be stepping outside what he believed his constitutional duties were, in the counting of the votes.

Q. Okay. So just in follow-up to that, so [p.162]

you testified that he stated that he would not be stepping outside his bounds.

Can you explain what you mean by that?

A. It was well-known among myself and my colleagues and the public that President Trump believed that Pence had the — that Vice President Pence had the ability to essentially reject the electoral ballots that were sent from the states.

And so in the 1:00 hour, I do recall being handed, from the cloakroom, a "Dear Colleague" that Pence had sent, essentially saying that he was not going — that he did not believe he had the authority to do what the former President was asking him to do, and that he would not step outside the ceremonial duty of adding up the electoral ballots and declaring a winner.

Q. Okay. Great.

MS. TIERNEY: Okay. Let's try with Exhibit P-68, please, Mr. Hehn.

(Video playing.)

JA263

Q. (By Ms. Tierney) Do you recall seeing that video on January 6, 2021?

A. Yes, I do.

Q. And do you recall approximately what time that video came out?

A. I recall that being in the 3:00 hour. I

[p.163]

don't know the exact time.

Q. Okay. What, if anything, changed after Mr. Trump issued this statement?

A. As I said, we were still in a holding pattern at the evacuation site, being told by the Sergeant of Arms that the rioters were still inside the Capitol. And so at least when it was sent, or when the statement was made, there was still an active attack on the Capitol.

Now, I would watch, you know, on Twitter, in the minutes after the statement, footage of individuals being interviewed or making their own posts that were reposted saying that Trump told them to go home, it was time to go home. So — and these were rioters who had been in the Capitol.

So we do recall — I do recall being with my colleagues and seeing that that statement had at least an effect on some of the people who were posting on social media.

Q. And at this time, you're still in the secure location, correct?

A. That's right.

Q. Now I'm going to have Mr. Hehn pull up another tweet.

MS. TIERNEY: It's P 148, Your Honor,

[p.164]

which we've already stipulated into evidence, and this is just a different page from that tweet — that compilation of tweets.

THE COURT: Okay.

Q. (By Ms. Tierney) Do you see the tweet on your screen, Congressman Swalwell?

A. Yes, I do. Yes.

Q. And can you read it?

A. Yes. It's a tweet from the former President's verified account at 6:01 on January 6, saying:

"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. Go home with love & in peace. Remember this day forever!"

Q. And where were you when this tweet came out?

A. I was still with my colleagues in the evacuation room, not too far from the Capitol.

Q. And so this, as you testified a moment ago, was about 6:00 p.m. on January 6?

A. That's right.

Q. And what happened, if anything, after this

[p.165]

tweet came out?

A. We were still being updated by the Sergeant of Arms that — that reinforcements and law enforcement were on the way to clear the Capitol, that rioters were still in the building, it wasn't safe for us to go back.

And at about this time, Speaker Pelosi also arrived with other members of leadership and told us that she had been on the phone with the Vice President, the Department of Defense, and local governors about getting the National Guard to the Capitol as well so that we could go back and finish the count.

Q. At some point, did Congress resume counting and certifying the states' electoral votes for the presidential election?

A. Around the 8:00 hour, we were told that the Capitol had been secured and that we were going to be able to head back to the Capitol, and there would likely be speeches by — by the leaders of the — both chambers, and then the debate and the count would resume.

Q. And what did you expect would happen when you returned to the Chamber in terms of the debate?

A. Well, certainly that we would just go back to what we had done in 2017 and 2013, which was to not see a contest of the count, considering violence had

[p.166]
occurred.

And so when we learned — when I learned and my Democratic colleagues learned that there were going to be further challenges, again, it was unsettling because we believed that that could still invite further violence. And it was also in a, like, “Are you kidding me” sentiment that, like, after we just went through all of this, we would really go back to trying to challenge the election and believe that the Vice President could do something about it.

Q. About how long had you been gone when you returned to the Chamber?

A. It was about five hours that I had been in the evacuation room and then walked through the Cannon Tunnel, which connects the House office buildings to the Chamber, that I and many colleagues walked back over to wait for the debate.

Q. And what did you observe in the Chamber on your way back in?

A. I went through the back double doors; and again to reorient you, these are the doors for our State of the Union where the President would enter. Those are the doors that, on the other side on the Chamber side, Capitol Police and some Republican colleagues had been

[p.167]

putting furniture against during the attack on the Capitol.

And I stepped over glass, and as the Capitol police officer told me to be careful, I was among one of the first groups to go back. So they were still sweeping up — a cleaning crew was sweeping up glass as you stepped into the Chamber.

And then when I stepped into the Chamber, I noticed two individuals wearing a blue FBI technician jacket, and they were taking photographs and conducting measurements on the House Floor.

Q. Was that unusual?

A. I've never seen — photographs are not allowed on the House Floor, so odd — I don't know why but that was one of the first things I remember thinking, like, You're not allowed to take photos of the House Floor. But, of course, it had become a crime scene.

But yes, it was unusual to see that.

Q. How were other members reacting, in your view?

A. There was a lot of anxiety that the debate would continue, and we were un- — I don't want to speak for everyone.

I was unclear, and the people I spoke to were unclear if —

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MS. TIERNEY: Hold on one — just one second, Congressman. There's a siren coming by the courtroom.

THE COURT: You can start again. Sorry about that.

THE WITNESS: That's okay.

A. I — I was anxious because I feared if we were going to continue to challenge — if Republicans were going to continue to challenge the outcome, that the mob could

return and that the scene on the Floor could also become combustible among the members.

Q. (By Ms. Tierney) Were — did you hear any 3 meaningful speeches?

A. Well, one contentious moment was during the challenge of the Pennsylvania results. And I was seated directly behind Conor Lamb, a Democrat from Pennsylvania, as he defended the count in Pennsylvania.

And Conor began his remarks, essentially saying before the riot, he prepared remarks that was going to show deference and respect to the Republican challenges, but considering that the riot occurred and we're still doing this, they're not worthy of his respect.

And — and then a Republican from Maryland, Andy Harris, started shouting, "Down, Conor,"

[p.169]

and then some of my Democratic colleagues beelined over to Andy Harris, who was behind me, and told them to let Conor finish.

I jumped up and went over, and I saw that Andy Harris and Democrat Colin Allred, a former NFL player from Texas, were essentially in an argument. And I recall yelling at Andy, "You don't want to do that, Andy. He used to tackle people for a living, Andy, you don't want to do that."

And fortunately, it stopped there.

Q. Did Congress ultimately finish the counting and certifying of the states' electoral votes for the presidential election that evening?

A. We did, and it was in the 3:00 a.m. hour the next day, January 7.

Q. And what was the very last act of the night?

A. It was Vice President Pence presiding over the joint session, receiving the tallying from the tellers, and

declaring that Joseph R. Biden was the winner and would be inaugurated on January 20.

Q. What time did you get home that night?

A. I got home just after 4:00 a.m.

Q. And what happened when you returned home?

A. I was greeted by my wife. There was a lot

[p.170]

of late nights at the Capitol. That was the first time she had ever waited up for me.

And gave her a big hug, and then went up and did something that I also would never do with little children, which is to go into their room when they're sleeping, and I just gave both of them kisses on their forehead.

Q. After January 6, 2021, what conclusion, if any, did you come to as to what or who caused or instigated the attack on the Capitol?

MR. SHAW: Objection.

A. Well, I — I —

MR. SHAW: His conclusions are not relevant, Your Honor.

THE COURT: Sustained.

Q. (By Ms. Tierney) In the aftermath of the attack, did Congress consider any action against Donald Trump for his role in the attack?

A. As we were in the evacuation room, colleagues of mine on the Judiciary Committee, David Cicilline, Ted Lieu and Joe Neguse, were already thinking about what we would have to do legislatively to make sure that the inauguration could take place if we did finish the count.

And so within days, Speaker Pelosi,

[p.171]

working with them, would bring forth articles of impeachment, and that would be voted on and — or debated and voted on one week later, on January 13.

Q. How did you vote on the impeachment?

A. I voted with my Democratic colleagues and ten other Republican colleagues to impeach on the count of insurrection.

Q. And what role did you have, if any, in those proceedings, those impeachment proceedings?

A. A few hours before the vote, Speaker Pelosi called me and asked me if I would serve as an impeachment manager on the impeachment team in the Senate, and I — I accepted and would be a part of a nine-person impeachment manager team led by lead manager, Jamie Raskin.

Q. And you testified a moment ago that there were Democrats and Republicans that voted in favor of the impeachment.

Did the — did that vote result in an impeachment of the President by the House?

A. Yes. On January 13, in the evening, President Donald Trump was impeached a second time by the House.

Q. Was there a trial in the Senate?

A. There was, yes.

[p.172]

Q. And what was the result of that trial?

A. In the Senate, the President — 50 Democrats and 7 Republicans voted that the President had, indeed, committed insurrection, although that would be 10 votes short of the two-third requirement for removal.

Q. Did any Republican senators who voted against conviction publicly reveal the reasons for their vote?

MR. SHAW: Objection, Your Honor. This is not relevant.

MS. TIERNEY: Your Honor, I'll try to tie it together here with another question.

THE COURT: Overruled.

Q. (By Ms. Tierney) Do you want me to repeat the question, Congressman?

A. Oh, no, I understand the question.

Shortly after the Senate proceedings, Leader McConnell went to the Floor and said that his vote to acquit did not mean that Donald Trump would escape accountability at all and that there were other legal means, civilly and criminally, that would hold him accountable.

Q. As a member of the House of Representatives, Congressman Swalwell, are you required to take an oath of office?

[p.173]

A. Yes, I take it every other year, if elected, on January 3.

Q. And does that include an oath to the Constitution?

A. Yes, it does.

Q. And what do you understand that oath to the Constitution to mean?

A. That that oath predominates my loyalty to anything else, and I have a duty to defend and protect.

MS. TIERNEY: No further questions.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. SHAW:

Q. Good afternoon, Representative Swalwell.

A. Good afternoon, Counsel.

Q. Am I correct that you weren't injured on January 6?

A. I was not, no, not physically.

Q. Yet you are the plaintiff in a personal injury lawsuit that you brought against Donald Trump in the United

States District Court for the District of Columbia; is that correct?

A. Yes.

Q. And you're seeking damages in that lawsuit?

[p.174]

A. Unstated, but yes, meaning no dollar amount has been stated.

Q. And as a lawyer, you understand that if this proceeding against President Trump is successful, 5 that would improve your chances of success in that 6 lawsuit, correct?

A. I'm sorry, Counsel, could you rephrase the question?

Q. Yeah.

You're a lawyer, are you not?

A. Yes.

Q. And you understand that if this case goes against President Trump, that likely increases your probable success in your personal injury lawsuit against him, right?

MS. TIERNEY: Objection, Your Honor. Relevance.

MR. SHAW: It goes to bias, Your Honor.

THE COURT: Overruled.

A. I'll leave it to the legal experts as to what this means for a separate lawsuit. I don't know.

Q. (By Mr. Shaw) Is it your view, sir, that President Trump has some — or had some lesser quantum of First Amendment rights than every other American on January 6?

[p.175]

A. No, that's not my view.

Q. So he enjoyed the full — as far as you're concerned, he had every right that every other American had to speak with full First Amendment protections on that date?

JA272

A. In accordance with the law, yes.

Q. And you pointed out that during his January 6 speech, he used the phrase “Fight and fight like hell,” correct?

A. Yes.

Q. Okay. And you would acknowledge that that is, in fact, common, or certainly not uncommon discourse, in political circles during speeches, right?

A. I’m sorry, could you clarify, Counsel.

Q. Yeah.

Politicians often say, “Fight or fight like hell,” or words like that, right, when they give speeches?

A. Yes, sir.

Q. You’ve done it yourself, right?

A. I have.

Q. Many of your Democratic colleagues do 3 that, too, right?

A. That’s right. That’s correct.

Q. Okay. And when you do it, you’re not [p.176]

calling for physical violence, right?

A. I am not.

Q. And you’re not saying that your Democratic colleagues are calling for physical violence, right?

A. In my experience, that’s not how I’d interpret it, no.

Q. And you judge that by the words that are said, right?

A. And the surroundings of where they are, but yes.

Q. I’d like to show you Exhibit 1066.

MR. SHAW: Which is a — was designated as a cross exhibit.

Well, I’m not asking you to put it up on the screen. I’m asking, was there — did you have an objection to that?

MS. TIERNEY: Oh. No.

MR. SHAW: Okay. Could you put up Exhibit 1066, please.

THE COURT: Are you asking for it to be admitted?

MR. SHAW: I will, yes. Since there appears to be no objection, can it be admitted, Your Honor?

THE COURT: 1066 is admitted.

[p.177]

(Exhibit 1066 was admitted into evidence.)

Q. (By Mr. Shaw) Okay. And, sir, I will represent to you that this is a collection of tweets from your — your Twitter account. And — we're having a slight technical snafu, so —

A. No worries.

Q. — we'll ask you to bear with us. I'm not going to go through all of these, sir, but why don't we look at page 16 first.

A. Sure.

MR. SHAW: So if you would put page 16 up.

Q. (By Mr. Shaw) Okay. And I ask you if you recognize that as a tweet from your verified Twitter 5 account, dated May 2, 2022?

A. Yes, I do.

Q. Okay. And you wrote, "If you think they'll stop with a women's right to choose, you haven't been paying attention. We have to fight like our lives depend on it, because clearly, they do."

You wrote that, right?

A. Yes, I did.

Q. And you were not calling for any sort of a physical fight, correct?

A. No, sir, I was not.

[p.178]

Q. Okay. You were not advocating violence?

A. I was not.

JA274

Q. Okay. And if you'd look at the next page, please.

Okay. And this is another tweet from your verified account; is that right?

A. Yes, sir.

Q. Okay. And you wrote: "This is just the beginning. They won't stop."

"Fight like your lives depend on it."

"Because they do."

Right?

A. And it says, "Hashtag Vote Blue," yes.

Q. And again, you were not calling for physical violence; that was a metaphorical fight, right?

A. Correct.

Q. Okay. And I could go through a bunch more examples, but I'm not going to spend a great deal of time on that.

There was one other tweet in here that I was — I did want to bring to your attention and ask you about. If you would look at page 13, please.

Is this a tweet from your verified Twitter account, dated February 4, 2022?

A. It looks like it, yes.

[p.179]

Q. Okay. And you write there, "Cheney & Kinzinger may not be in my party but in this fight, we're all on the same side."

Do you see that?

A. Yes, I do.

Q. Okay. And what "fight" were you referring to here?

A. I'd have to see the tweet above it to have context, but I'm assuming, based on the date, that it refers to the January 6, 2021 investigation. But again, I'd have to have more context.

JA275

Q. When you say the January 6 investigation, you mean the January 6 Select Committee?

A. Yes, sir.

Q. Okay. And that was because Representatives Cheney and Kinzinger were the two Republican members who Speaker Pelosi had appointed to that committee; is that right?

A. Yes, sir.

Q. And you considered them to be on your side of that fight, correct?

A. I think I said “we,” but all of our side, yes, which I was on, yes.

Q. Okay. All right. We’ll put that exhibit aside.

[p.180]

Now, earlier today, counsel showed you some tweets by President Trump.

You remember that?

A. I do.

Q. Did counsel pick which tweets they were going to show you, or did you discuss with them which tweets you wanted to testify about?

A. Those are — those are chosen by counsel.

THE COURT: Did you have an objection?

MS. TIERNEY: I’ll let it go, Your Honor.

THE COURT: I’m sorry. So now I missed the — can you repeat the question and the answer.

MR. SHAW: I think he said that they were chosen by counsel, Your Honor.

THE COURT: Okay.

Q. (By Mr. Shaw) So one that counsel focused on —

MR. SHAW: If you would put up the 2:24 p.m.

Q. (By Mr. Shaw) So this is Exhibit 148, page 83, in that first one.

Do you remember discussing this one from 2:24 p.m.?

A. Yes, I do.

Q. Okay. And then —

[p.181]

MR. SHAW: If you go to the next page, the second tweet on that page.

Q. (By Mr. Shaw) And you remember discussing the second tweet at — from 6:01 p.m.?

A. Yes, I do.

Q. Okay. Now let's look at the two that counsel decided to skip that were right in between those two, okay?

Let's look first at the tweet from 15 minutes after the first one you discuss at 2:24 p.m.

MR. SHAW: Page 83, second tweet on the page.

A. Yeah, I see it.

Q. (By Mr. Shaw) Okay. And at 2:38 p.m., 15 minutes or so after the tweet that you discussed about — about Vice President Pence, you see that President Trump wrote, "Please support our Capitol Police and Law Enforcement. They are truly on the side of our Country. Stay peaceful!"

Do you see that?

A. Yes, I do.

Q. Do you remember reading that on January 6?

A. I do.

Q. Okay. What did you understand that tweet to mean?

[p.182]

A. That we needed it ten exits before he sent it, before the mob had come, but he, I imagine, had seen the violence committed against the officers and believed that he had the power, because he sent them there, to stop them from abusing the officers.

Q. So that's — strike that.

JA277

So whether he had the power or not, certainly he's telling people to support our Capitol Police and law enforcement and stay peaceful, right?

A. In that tweet, yes.

Q. Yeah. And he told them that in his speech, right? He told them to proceed peaceably and patriotically to the Capitol, right?

A. You would have to play that for me. I don't have a line-by-line —

Q. Okay. The judge has heard it, so I'm not going to take the time to replay it now. Let's look at the next tweet that he sent, at 3:13 p.m.

MR. SHAW: If you put that up, please.

Q. (By Mr. Shaw) Do you see that tweet? He says, "I am asking for everyone at the U.S. Capitol to remain peaceful. No violence! Remember, WE are the Party of Law & Order - respect the Law and our great men and women in Blue. Thank you!"

[p.183]

You see that?

A. I do, sir, yes.

Q. Okay. Do you remember reading that on January 6, 2021?

A. I do, yes.

Q. Okay. What did you understand that to mean on January 6, 2021, sir?

A. That a lot of violence had taken place. At that time, I was, as I said, probably just arriving with a gas mask in my hand to the evacuation room, and the President is asking the violent rioters to stop attacking the police.

Q. Okay. So that's a couple of posts between the two posts that you had previously discussed where the President has — is asking people to stop attacking and be peaceful, right?

JA278

A. In these tweets, yes.

Q. In those tweets.

And we looked at a — at a short video of about one minute where he asks the people to do exactly the same thing, right, to be peaceful?

A. Essentially, yes.

Q. Yeah. And that came somewhere in the 3:00 hour, so presumably around or slightly after that 3:13 p.m. tweet, right?

[p.184]

A. That's about right, yes.

Q. Yeah.

MR. SHAW: I'm done with that document. Thank you.

I don't have any further questions for you, sir. Thank you very much.

THE WITNESS: Thank you, Counsel.

THE COURT: Are there any questions from the Colorado Republican Party?

MS. RASKIN: No questions, Your Honor.

THE COURT: How about Secretary of State?

MR. KOTLARCZYK: No questions, Your Honor.

THE COURT: Okay. Redirect?

MS. TIERNEY: Thank you, Your Honor, very briefly.

REDIRECT EXAMINATION

BY MS. TIERNEY:

Q. Congressman Swalwell, in colloquy with counsel just a moment ago, he asked you about two other tweets that Mr. Trump sent.

In either of those tweets, did Mr. Trump ask people to go home?

A. No.

Q. And did he ask people to leave the Capitol?

[p.185]

A. Not in those two tweets.

MS. TIERNEY: Thank you.

THE COURT: Congressman Swalwell, I think you're done. Thank you so much for your testimony.

THE WITNESS: Thank you, Your Honor.

MR. NICOLAIS: Your Honor, Mario Nicolais on behalf of the petitioners.

And we are going to call Officer Winston Pingeon as our next witness.

THE COURT: You said it's pronounced "Pingeon"?

MR. NICOLAIS: "Pingeon."

THE COURT: "Pingeon." Okay.

WINSTON PINGEON,

having been first duly sworn, was examined and testified as follows:

THE COURT: So when you sit down, just make sure to speak into the microphone, okay?

THE WITNESS: Yes.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. NICOLAIS:

Q. Good afternoon, Officer Pingeon. Would you please state and spell your name for the record.

A. Yes. My name is Winston Pingeon,

[p.186]

W-i-n-s-t-o-n, P-i-n-g-e-o-n.

Q. Officer Pingeon, where did you go to college?

A. I went to American University in Washington, DC.

Q. And what degree did you receive there?

A. I received a bachelor's in justice and law, which is a criminal justice degree.

Q. When did you receive that degree?

A. In May of 2016.

JA280

Q. Where did you go to work after you graduated from American University?

A. I joined the United States Capitol Police as a police officer.

Q. And roughly when was that?

A. June of 2016.

Q. Are you still currently employed with the USCP?

A. I am not, no.

Q. When did you leave the USCP?

A. I left the department in October of 2021.

Q. Okay. During the course of your career with USCP, what units were you assigned to?

A. I was primarily assigned to the House Division, but I also served on a variety of other

[p.187]

collateral assignments: The Ceremonial Unit or Honor Guard, the Special Operations Division, and the Civil Disturbance Unit.

Q. Can you describe for the Court what the Civil Disturbance Unit is?

A. Yes. The Civil Disturbance Unit is effectively the riot team for the Capitol Police.

Q. Okay. Prior to January 6, 2021, were you ever deployed as a part of the CDU?

A. Yes, I was, multiple times.

Q. Can you describe just briefly some of your deployments prior to January 6?

A. Yes. For large-scale protests or events that the — of numerous people coming to the Capitol, we were deployed sometimes in full riot gear, sometimes with our gear just on standby. But it was commonplace for — for CDU to be deployed for a variety of events of groups that would come and protest or demonstrate around the Capitol.

JA281

Q. Can you provide the Court with some examples of those, those other events?

A. Yes. A few in the summer of 2020 of Black Lives Matter protests, as well as two different ones in November and December of in protesting the results of the election.

[p.188]

Q. During those prior events, did you witness any violence at those events?

A. Nothing large scale, no, but there were — there were times where we would have to arrest people, but no major violence, no.

Q. And did you ever feel, when you were serving in the CDU at those prior events, that your unit would be overrun?

A. No.

Q. Were your lines ever broken in those prior events?

A. No.

Q. Did you ever fear for your life during any of those prior events?

A. No.

Q. Officer Pingeon, I want to take you to January 6, 2021. Were you on duty that day?

A. Yes, I was.

Q. When did you report for duty on January 6?

A. I reported at approximately 8:00 or 9:00 a.m. that morning.

Q. And were you assigned your regular duty or to a separate unit?

A. I was assigned to CDU that morning. My

[p.189]

normal assignment at that time was 3:00 p.m. to 11:00 p.m., so I was working overtime early with CDU.

Q. Okay. What is your understanding of why that changed?

A. I understood that to be the case because of what Congress was doing that day of certifying the results of the election, as well as the former President was hosting a rally or event near the White House.

Q. Okay. How many officers were in your CDU squad that day?

A. In my squad, there were approximately 25 or 30 of us.

Q. Okay. Officer Pingeon, I'm going to ask you just a couple questions about —

MR. NICOLAIS: I want to bring up what's previously been marked as Exhibit P-163, Your Honor. Sorry. I'm grabbing the wrong one.

Q. (By Mr. Nicolais) Officer Pingeon, as a USCP officer, are you familiar with the layout of the U.S. Capitol itself?

A. Yes, I am.

Q. And how are you familiar with the layout of the Capitol?

A. I'm familiar with it because I spent five years there and worked numerous events, and so I

[p.190]

spent a significant amount of time in the Capitol and around the Capitol grounds over my career there.

Q. Okay. And are you familiar with the Capitol grounds as well?

A. Yes, very much so.

Q. So I brought up what is Plaintiffs' Exhibit 163, and I'd like you to take a look at it.

Have you reviewed this exhibit before?

A. Yes, I have.

Q. Would you say that it's a fair and accurate representation of the Capitol grounds and one level of the U.S. Capitol?

A. Yes, it is.

Q. Would you say that this would help you to explain your testimony to the Court?

A. Yes, it would.

MR. NICOLAIS: Your Honor, I'd like to, at this time, move to admit Plaintiffs' Exhibit 163 as a demonstrative exhibit.

MR. SHAW: Your Honor, can I get some clarification? Is this a general representation of the Capitol grounds, or is it a representation at some specific time? Because there are all sorts of markings and —

MR. NICOLAIS: Your Honor, I can — let
[p.191]

Me —

MR. GESSLER: Let him finish, please.

MR. SHAW: There are all sorts of markings and — and annotations on this.

THE COURT: I don't think either one of those really go to admissibility, so I'm going to admit the exhibit.

(Exhibit 63 was admitted into evidence.)

THE COURT: And you can ask questions about what they are, and you can certainly ask on cross-examination.

MR. NICOLAIS: I'll tell you what, I'll try to actually lay some foundation for that, Your Honor.

Q. (By Mr. Nicolais) Officer Pingeon, were you around the Capitol and the Capitol grounds prior to January 6 in the weeks leading up to that?

A. I was on leave the week of Christmas of 2020, but — so I believe my first day back on duty was that Monday, which — January 4, I think.

JA284

Q. Okay. And so when you — were you familiar with some of the additional things that — barricades and things that were placed there prior to the inauguration?

A. Yes.

Q. And does this exhibit, does it accurately

[p.192]

and fairly represent some of those additional structures that were placed there?

A. Yes, it does.

Q. Thank you, Officer Pingeon.

Okay. I'd like to go to — to go back to January 6 and talk to you a little bit about that.

Where did your group — where did your group, your squad, ultimately stage from?

A. We had our roll call in the Longworth House Office Building, but we ultimately staged in the — what we call the truck tunnel along New Jersey Avenue and Constitution Avenue in the northwest. So —

Q. Okay. So I'm — I'm going to use my mouse here.

A. Yes.

Q. And if you can direct me towards where you were talking about.

A. So approximately in this — this area right here (indicating), be New Jersey Ave.

Q. What is that?

A. Well, so where your cursor is now is where we had roll call initially, and opposite from that on the map, about there (indicating), is where we staged and awaited further orders.

Q. Okay. So you were awaiting further

[p.193]

orders. What time was this, roughly, that you were staged over there?

A. That was approximately 11:00 a.m. or so.

JA285

Q. Okay. Were you told to do — how were you to receive further orders?

A. Yes. My lieutenant, who was my commander that day, told us to put our riot gear on around that time.

Q. Okay. Do you remember getting a call on the radio later that day?

A. Yes, I do.

Q. And what was that call, what — what did you hear in that call?

A. In that call, I heard that one of our outer perimeter lines had been breached and that the officers there had been overrun, and I remember distinctly hearing the need for help in the officer's voice.

As a police officer, you know when something's not right. You can hear it in people's voices on the radio. And that was one of those times.

Q. And why were they calling for the CDU at that point?

A. They needed additional officers to respond, and because we were with the CDU, and more

[p.194]

specifically the CDU hard squad in full riot gear, they needed us to — to go assist to back them up.

Q. Can you describe the gear you put on that day?

A. Yes. The CDU gear is similar to hockey or football pads of chest protector over my bulletproof vest, arm protectors, groin protector, thigh protectors, shin pads, as well as additional gear on my belt, like my PR 24 baton, my gas mask, and we had protective sunglasses, too, in case of lasers being pointed at us.

Q. Okay. Were you wearing a body camera at that time?

JA286

A. No, I was not. I was never issued a body camera, and no Capitol police officer at that time wore body cameras.

Q. All right. You said that you had a call from — where was it you said you received a call from?

A. The call came from the — near Peace Circle where Pennsylvania Avenue meets the — meets the Capitol.

Q. I'd like you to take a look at the map again, and is this roughly where you — where you're talking about you received the call from?

A. Yes.

Q. And what was going on in the Peace Circle

[p.195]

at that time, as you understood it?

A. The call for help was that the line had been breached and that people had pushed past those officers and were making their way towards the Capitol.

Q. In response to that call, what did your squad do?

A. We responded over to assist.

Q. And so as I understand it, this is — is this roughly where you were at, where my pointer is?

A. Yes, in that rough area.

Q. And what was your path to get to respond?

A. So we were on a Capitol Police bus, and the bus took us through the north barricade, which is where the Delaware Avenue meets Constitution Avenue.

We went straight, or south, from there and then curved along down the northwest drive to approximately where it says the — Summer House is where we — we stopped.

Q. And is that roughly here (indicating)?

A. Yes, that's correct.

Q. Okay. When you stopped at that — and what's in that Summer House area? Can you describe it a little bit to the Court?

A. Yes. It's — you know, there's some trees, and it's — I think — I don't know the full

[p.196]

history of it, but I'm — it's historic, old function, and there — the white lines there are pedestrian walkways.

So it's an area where tourists or people, you know, neighbors would often jog or bike or walk their dog, that kind of thing.

Q. Okay. What did you see when you got out there near the Summer House?

A. From there, I could see that already individuals of the crowd had made their way up closer to — to the lower West Terrace of the Capitol (indicating).

Q. I see you're pointing at the map, so I just want to, for the Court — so you said originally the call came from the Peace Circle because there's a barricade.

You said that — where were they making their way up to?

A. So they continued — I guess that's southeast along what we call the Pennsylvania Avenue walkway, because the road ends at Peace Circle, but that white area where your mouse is, that's the walkway; and people had made their way up that.

Q. And what's at the end of that walkway?

A. The stairs — well, there's stairs, and at

[p.197]

that time, there were construction parts of the inauguration stage.

Q. So how long between when you received the call and when you got there and saw people making — already on the stage, how long was that?

JA288

A. Oh, approximately five minutes or less even.

Q. Okay. How would you describe the crowd that you saw when you got out?

A. From there, I could see that they were dressed in numerous Trump apparel, red hats and carrying flags, and that they were advancing quickly and that the crowd was already growing larger, just by the minute.

Q. Okay. When you got out, did you put on any additional gear at that point?

A. Yes, I did.

Q. What did you put on, what additional gear?

A. I put on my gas mask.

Q. Had you ever worn your gas mask in the line of duty before?

A. No. Only in a training environment.

Q. And why were you told to put on a gas mask on this day?

A. There were calls that potentially gas either was already deployed or was soon to be deployed,

[p.198]

so the decision was made that we would do that in order to be best prepared.

Q. Okay. So I want to go back. You were — you were here (indicating), and you got out. So is this roughly where you were putting on your gas mask?

A. Yes.

Q. Where did you go from there?

A. From there, we marched — we formed up and marched as best we could to the steps. And ended up in the area here of sort of northwest lawn along that walkway, and we ended up right in that grassy area, right where your — where your mouse is now.

Q. Tell you what, I'm going to zoom in a little bit, Officer Pingeon, so you can see it a little bit better.

JA289

Okay. So you said right about here on the map (indicating)?

A. Yes, that's correct.

Q. Okay. As you were arriving there, did you see anyone in medical distress?

A. Yes, I did.

Q. And what did you see?

A. I saw an individual being carried out on a stretcher and somebody performing CPR on that person.

[p.199]

Q. How did the crowd react to the first responders providing medical care?

A. Well, it was mixed, but I would soon see another person in need of medical care, where the, at that point, mob, had turned hostile and was assaulting officers that were trying to go and help the — the second person in distress.

Q. Officer Pingeon, so from this position where my cursor is currently at, from where your squad was deployed, could you see beyond the immediate area around you?

A. Yes, I could.

Q. And why could you see beyond the immediate area?

A. Primarily because of the elevation of Capitol Hill that I could see and just the direction of how we were sort of lined up closely to Pennsylvania Avenue, that I could see down — down Pennsylvania Avenue looking towards downtown DC.

Q. So would that be looking out over the Peace Circle?

A. Yes, facing west.

Q. And how far beyond that could you see?

A. I could probably see 10 or so blocks until the road shifts.

[p.200]

Q. And what did you see when you looked in that direction?

A. When I looked down there, I could see that there appeared to be thousands of people coming towards the Capitol.

Q. And they were — they were coming towards the Capitol along what route?

A. Along Pennsylvania Avenue.

Q. Did you notice anything unusual about what members of the mob were wearing while you were on the northwest lawn?

A. Yes, I did.

Q. And what was that?

A. That was the equipment that some of them were wearing, to include things like helmets, goggles, what appeared to me to be body armor, paramilitary style gear and equipment that they — that they were wearing.

Q. As a USCP officer, did that concern you?

A. Yes, it did.

Q. And why did that concern you?

A. It concerned me because I had not seen that before and because we don't typically face people who appear to me to be prepared for physical altercations or violence.

Q. Okay. Can you describe any interactions

[p.201]

between your unit and members of the mob while you were on the northwest West Terrace lawn, so roughly where my pointer is?

A. Yes. They were saying things to us as they would continue to say throughout the day, things like, "Trump sent us," and things like, "We don't want to hurt you, but we will." "We're getting in that building."

JA291

And, of course, chanting things like, "Stop the Steal," and a variety of other pro-Trump messages like that.

Q. Were any — were either you or any of the members of your squad physically assaulted in that area?

A. Yes. Members of my squad there started to be assaulted, pushed, and pepper-sprayed by members of the mob.

Q. Could you see any other — could you see members of the mob engage with other law enforcement units in the vicinity?

A. Yes, I could.

Q. And what did you see?

A. From where I was posted, I could see that what's marked here as the northwest steps, that the mob was advancing up those steps and engaging with other Capitol police officers and assaulting them with what

[p.202]

appeared to me to be pieces of construction materials and flagpoles and other things like that that they were striking officers with.

And also spraying them with what appeared to me to be pepper spray or chemical irritants.

Q. Okay. How long, roughly, were you at that position on the northwest lawn?

A. I was there for approximately an hour, maybe a little bit more.

Q. And in that time, what change in size or nature of the mob did you observe?

A. Well, the size of it, like I said, continued to grow larger, and they seemingly became more emboldened by — by that size, that it was apparent to me we were very outnumbered.

JA292

Q. Do you remember your attackers saying or doing anything that would have indicated what they were trying to do?

A. Yes.

Q. And what was that?

A. Well, like I said, they — some of them told me that they were there to break inside and to get into the U.S. Capitol.

Q. Did any of them threaten you?

A. Yes, they did.

[p.203]

Q. And how did they threaten you?

A. Oh, well, saying things like, “We don’t want to hurt you, but we will,” and other taunts of saying, you know, “You look scared and you might need your baton,” or, you know, stuff like that.

Q. You said you were there for roughly an hour, from — from 1:00 to 2:00; is that accurate?

A. Yes, approximately.

Q. Was your CDU unit able to hold the line at the base of the West Terrace?

A. No, we were not.

Q. And why weren’t you able to hold that line?

A. We were not able to hold that line because the mob became increasingly aggressive and hostile towards us, and we were simply outnumbered. So ultimately, the 25, 30 of us or so sort of ended up forming a circle where we were guarding nothing but each other’s backs as the mob sort of surrounded us there.

Q. Okay. Did you eventually leave that position?

A. Yes, I did.

Q. And where did you decide to go from there?

A. So I knew that we needed to get to the upper West Terrace to have that higher ground strategic

[p.204]

advantage because I could see the progress that they had made and were making up those northwest steps, that we needed to go and help those officers.

Q. Can you describe the path that you took to get there?

A. Yes. Basically I went kind of along the corner of the Capitol here, up the northwest lawn, up the north lawn, and was able to, you know, access the upper West Terrace again via this north access path.

Q. And where did you go from there, Officer Pingeon?

A. From there, I knew — excuse me, I knew we needed to get back to where those steps were, so I continued west or down along the North Terrace, sort of where that green line is, and I kind of followed that green line over.

Q. And Officer Pingeon, how many members of your squad were with you at that time?

A. Well, I thought that my whole squad was with me, but I would soon learn that we were getting separated. And given the nature of having all of our riot gear on and having to go up the hill and be impeded by some members of the mob as well, it took some time, and we got separated.

So I soon would learn that it was just

[p.205]

myself and three or four other officers.

Q. Okay. So you said you were going along the North Terrace, walking down, or west at this point?

A. Yes.

Q. Where did you — did you stop there, did you continue on?

A. I continued and rounded the first corner and continued to go to assist those other officers and help defend the building.

Q. And when you got to this corner here (indicating), Officer Pingeon, what did you see?

A. From there, I was horrified to see that there were many members of the mob who had already flooded up into that area of the upper West Terrace, so —

Q. Roughly there (indicating)?

A. More so sort of over here (indicating), but I could see all the way down, but — but they were more in this sort of circle area, from that point I could see.

Q. Okay. And when you rounded that corner, did you stop there?

A. No, I didn't, so I continued forward because, again, I knew I needed to do my job and respond and get — get there as quickly as I could.

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Q. When you said you continued forward, what — what direction were you going?

A. Yes. So at this point, I was going southbound, so again kind of tracing that green line over to that northwest courtyard area.

Q. And, Officer Pingeon, what did you see when you got roughly here on the map (indicating)?

A. So again, I could — was also horrified even more to see that they had broken into the building and that the mob was streaming inside, into the U.S. Capitol.

Q. When you said they had gotten access, what had they gotten — how had they gotten access, how had they gotten in?

A. Well, from there, I could see that they were entering where the red arrow is here, which is an emergency exit fire door, so I could — I assume that they

had broken their way in because those doors are locked and secured normally.

Q. I'm going to zoom in a little bit so that it's easier to see, Officer Pingeon.

So just to be clear, you said from here (indicating), you saw that people were accessing through — what is this Number 1, what's at that Number 1?

[p.207]

A. So where Number is, is it's an emergency exit fire door, and there are windows on either side of it.

Q. Is that what this Number and are?

A. Yes.

Q. And what about Number 3?

A. 3 is a fire door emergency exit.

Q. And what do you find if you go through that emergency exit?

A. There, you'll be in the Senate side of the U.S. Capitol on the first floor there.

Q. Okay. How many people do you think — would you estimate you saw in the northwest courtyard when you came around this corner?

A. I would say at least a few hundred, but again, it was growing because they were coming up the steps as well.

Q. And again, how many of your squad were there?

A. At that point, it was just myself and three or four other officers.

Q. What did you and those three or four officers do at that point?

A. We continued. And I was the first officer, and I led them to go closer to — to those

[p.208]

breach points in an effort to secure those and prevent further people from breaching and accessing the building.

Q. And did they — did the members of the mob let you through?

A. No, they did not.

Q. What happened when you tried to get to those access doors?

A. When I tried to push forward, I was attacked by members of the mob, and I was punched in the face on my left side, and I was also pushed or attacked on the right side.

And before I knew it, they had knocked me on my back. And I couldn't see anything because either my helmet had come down over my eyes and it felt like somebody was on top of me.

Q. Were you able to maintain all of your equipment at that point?

A. No, I was not.

Q. What happened to your equipment?

A. My PR baton, which I had — was holding out in my hands, was ripped from my grip and stolen from me by some person.

Q. Were you concerned about your service weapon?

A. Yes, very much so.

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Q. And what did you do with that concern?

A. Well, because my baton had been stolen from me so quickly and so easily, I was very concerned that they would take my gun from me. So I did what I was trained to do, which was just to hold on to it as best I could and maintain that retention and control in my holster.

Q. And this was all while you were on your back on the ground?

A. Yes.

Q. Did you consider radioing for help, Officer Pingeon?

A. I did briefly.

Q. You did briefly. But did you — did you actually radio for help?

A. No, I did not. And the reason for that was basically because we were just so outnumbered, I felt that there was help needed in many other places as well, and I didn't know if help would come or — or when. So — so that's why I didn't.

THE COURT: And I'm sorry, what's the time frame that we're —

Q. (By Mr. Nicolais) How long — how long were you at the — I'm sorry. How long were you at the northwest lawn?

[p.210]

A. So —

Q. What time frame?

A. So that was — that would have been approximately at maybe 2:30 or so.

THE COURT: So this is —

Q. (By Mr. Nicolais) You're saying — when were you in the northwest courtyard, is that —

A. Yeah, approximately 2:30. So by the time I left the lower West Terrace and made it — you know, by the time I was in the lower West Terrace was probably an hour or so, and so by the time I got up was approximately 2:15, 2:30.

Q. Okay.

THE COURT: And your testimony is, is that people were going through all four of those windows and — and fire exits?

A. They were going through, through Number. And I couldn't see exactly, but I knew they were going through Door Number , and I think either one or both of those windows nearby that.

Q. (By Mr. Nicolais) All right. So we're roughly at 2:30 when that's — when that's happening, and it's roughly — roughly 2:30, you're lying on your back in the northwest courtyard.

Did you think your life was in imminent
[p.211]
danger?

A. Yes, I did.

Q. How did you get up off the ground, Officer Pingeon?

A. Fortunately, with the assistance of one of my squad mates, as well as just my own strength and training, I was able to — to get up and — and right myself there.

Q. You said you were headed towards this Number — this Arrow Number 3.

Were you ever able to get there?

A. Yes. Well, we were just headed in to where we could help and stop the breach. That just happened to be the first most accessible door.

But yes, I was — I was able to continue to fight my way through to ultimately get to that door.

Q. And what did you and your squad do when you reached that door?

A. We were able to close it and secure it as best we could; because — because it is a fire door, once it's locked from the outside — or once it's closed, it is locked from the outside.

Q. And were you on the inside of the Capitol or outside of the Capitol after you closed the door?

A. We stayed on the outside, so we shut the
[p.212]

door and continued to defend the door from — from the outside.

JA299

Q. Did members of the mob who were in that courtyard say anything to you while you were there and securing the door?

A. Yes, they did.

Q. And what did they say?

A. They said all kinds of things similar to what they had told me down previously at the lower West Terrace of, again, you know, "We don't want to hurt you, but we will," and we took an oath to the Constitution, that we were traitors, and that, you know, they were getting in the building.

Q. Okay. Did members of that mob attack you while you were securing that door?

A. Yes. And they continued to throw things at myself and my fellow officers there.

Q. Were you and your fellow officers able to hold or maintain that position at the door?

A. Not for very long, no.

Q. Why weren't you able to hold or maintain that position?

A. Again, primarily because we were so outnumbered and we, similar to before, had to effectively reevaluate very quickly and determine what we needed to

[p.213]

do for a more strategic and tactical advantage, which was not just stand there at that point.

Q. While you were securing that door, was anyone stopping them from going into the other breach points?

A. Not that I could tell, no.

Q. Do you believe that the assault against you could have been more severe if the only point of entry was where you were guarding?

MR. SHAW: Objection. Speculation.

THE COURT: Sustained.

Q. (By Mr. Nicolais) Can you describe the impression of the mob demeanor as they went through the open breaches?

A. Yes. At this point, it had changed because they were very excited and they were cheering, and so they were celebrating because — because they were breaching into the building.

Q. You said before that you found that guarding that door, that breachment was untenable.

What did you do next after deciding you couldn't keep that position?

A. So again, because we couldn't keep that because other officers also had equipment stolen from them and we were so outnumbered, we collectively felt we

[p.214]

needed to get inside the building to, again, get that strategic tactical advantage where we could push them out of the building and try to maintain some kind of control.

Q. Okay. So how did you get back to the building, what path did you take?

A. So I effectively retraced my steps of the way I had come, which was down and then north, effectively along that green line, and then up to where it says "North Terrace" and into the north door where that — as marked by that yellow arrow.

Q. Officer Pingeon, was your way impeded in — were you impeded in any way in getting there?

A. Yes, I was.

Q. And how were you impeded?

A. At that point, the whole upper West Terrace had become overrun by people from the mob, and when I got to that door, there was many individuals trying to gain access there.

JA301

Q. So roughly what time? I understand you probably weren't looking at your watch, but do you have an idea of what time this was?

A. So that time was probably anywhere between 2:30 and 3:00 p.m. or so.

Q. Okay. Were you able to make it through the north doors at any point?

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A. I was ultimately, by forcing my way and fighting with some of the members there to — to ultimately get in, because there were officers inside defending those doors. So it was difficult, but I was able to — to enter the building there.

Q. When you entered the building through the north doors there, what did you see?

A. From there, I could see just complete chaos and that the halls of the U.S. Capitol were overrun by this mob.

Q. And I want to actually ask you a little bit more about the layout of the U.S. Capitol.

So if you're standing at the north doors and you're facing the way that that arrow is facing, what can you see?

A. So normally you could see effectively all the way to the south door, as marked there (indicating). That —

Q. I'm sorry, when you said "there," can I — I'm just going to put my marker. Is — I saw where you're pointing.

Is that roughly where you were pointing (indicating)?

A. Yes, that's correct.

So that hallway there serves like the main

[p.216]

artery of the building, on the first floor at least, and so you can typically see clear from — from one door all the way to the other, across the whole Capitol.

JA302

Q. How large is that hallway?

A. It's a standard hallway. But it — but it's, you know, fairly large.

Q. Did you — did you walk down the hallway in this building before?

A. In this courthouse today?

Q. In this courtroom.

A. Yes, I did.

Q. Was it roughly as wide as that hallway?

A. I would say yes, or maybe slightly narrower than this.

Q. Is it roughly that long?

A. The hallway in the Capitol is longer. To me, it appears to be longer than the hallway here in this courthouse.

Q. When you looked down that hallway on January and you said it was chaos, what could you see looking down the hallway?

A. Well, I certainly couldn't see all the way down to the end because there were so many people already in the building impeding any further view of mine.

Q. Once you were inside, what did you do?

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A. From there, it, again, was very chaotic, but we were in that area where it says "lower Senate corridors" and were trying to, again, maintain — or gain some kind of control to maintain and enforce some sort of order.

Q. And when you were saying we were trying to enforce some sort of order, how — how would — did you go about doing that?

A. Well, primarily it was to secure the doors and try to push people back outside who had — who had already breached and entered.

Q. When you tried to push people outside, did they willingly go?

A. No, they did not.

Q. And how would you describe your engagement with the members of that mob?

A. Well, it was very difficult because, again, there were so many of them, and it just sort of turned into like a back-and-forth where we would get some of them out and then they'd get more back in. So it was just sort of that — that tug-of-war or back-and-forth for a while.

Q. Were you engaging with them from a distance, or how close were you to members of the mob?

A. Oh, I was very close and — and in those

[p.218]

corridors, there were many people there that I effectively was engaged in hand-to-hand combat with.

Q. And how long, roughly, were you engaged in hand-to-hand combat in the halls of the U.S. Capitol?

A. For probably two to three hours.

Q. Okay. Were you ever able to — were you ever able to make it back from the inside to that — to the breach point here?

A. Yes, I was.

Q. And what happened when you got there? What were you — what did you and your squad do?

A. Well, from there, we again attempted to secure that door from the inside, but it was a similar kind of pushing and pulling of the — of the mob. But there were some Metro Transit police officers who had responded and were assisting us there in an attempt to secure that.

Q. What about — what is this where my marker is right here (indicating)? What does that represent?

A. That is a staircase that leads up to the Senate Chambers, Senate Gallery areas.

Q. Did you ever engage members of the mob at those stairs?

A. Yes, I did. And we attempted to form a line to prevent further members of the mob from accessing

[p.219]

upstairs, but again, with the chaos and how outnumbered we were, it was not a position I could maintain very long.

Q. Also in that area, did you see any — did you — I'm sorry, let me rephrase.

In that area, did you see any members of the mob outside of the corridors?

A. Yes. In what's marked here as the "Senate Parliamentarian's Office."

Q. And what did you see inside the Senate Parliamentarian's office?

A. Inside there, I could see that members of the mob had totally ransacked the office. They had turned furniture over. They were ripping through file cabinets, pulling papers out, stealing alcohol from drawers, and just really vandalizing and just totally desecrating that office.

Q. Okay. Officer Pingeon, during the two to three hours that you were in hand-to-hand combat, were you ever near the emergency door and windows that you had talked about up here (indicating)?

A. Yes, I was.

Q. What happened there, Officer Pingeon?

A. So there we were, again, trying to push them — push them out, kind of back and forth. But we

[p.220]

ultimately used — did as best we could to barricade those doors in an attempt to prevent any further people from coming in.

Q. When you say "barricade those doors," what did you use to barricade the doors?

A. We used what we could, which were primarily wooden placards, sort of information for tourists, you know. There's sort of like a small desk almost with — with historical information about the building and about Congress's and our country's history.

And we had pulled those because that was what was most immediately accessible, as well as wooden fire extinguisher holders or cases. Really anything that we could find that we could push up against that door and those windows, we were using.

Q. Did members of the mob continue attacking you through that barricade?

A. Yes, they did.

Q. Do you remember any particular attack on you through that barricade?

A. Yes, I do.

Q. What happened?

A. At one point, I distinctly remember dodging lines of pepper spray that came through — through the broken window there, as well as a sharpened

[p.221]

flagpole that was stabbed that came just about this close (indicating) to my face.

Q. Just for the record, Officer Pingeon, you said "this close to my face."

How close to your face did the sharpened edge of a flagpole come?

A. Approximately 2 inches.

Q. And where did the end of that flagpole finally end up?

A. Past my head, past my ear.

Q. Did that — did that cause you significant fear when that went by your head?

A. Yes, it did.

JA306

Q. Why did that cause you significant fear?

A. Well, because of the force that was used, I was very much fearful that had it hit me in my eye, it would take my eye. Or further, that it could take my life.

Q. Okay. During this time that you were guarding that area of the Capitol, was your radio on?

A. Yes, it was.

Q. How loud did you have your radio turned up?

A. I had it turned up very loud because the alarms of the door breach were blaring, as well as

[p.222]

members of the mob having megaphones and all kinds of noise from them.

So I had it turned up as high — I think as high as it would go so I could hear as best I could what was going on outside the building and in and around the building.

Q. Do you remember any unusual radio calls from — on your radio?

A. Yes, I do.

Q. And what did you — what was — what was one of the unusual calls that you heard?

A. One of them was that there were shots fired.

Q. What went through your mind when you heard that there were shots fired?

A. I was obviously very concerned, and where my mind most immediately went to was that one of my fellow officers had potentially been shot or been shot at.

Q. Okay. How close were members of the mob to you when you got that call?

A. Very close, like within arm's reach.

Q. Do you believe that they probably could have heard that radio call as well?

A. Yes. I know some of them heard it because

[p.223]

I could see how they reacted.

Q. And how did they react to that call?

A. Well, some of them didn't — I guess some of them seemed hesitant about it or perhaps uncomfortable, but by and large, most of them really didn't seem to care.

Q. Okay. At any point in time, did you respond to an "officer down" radio call?

A. Yes, I did.

Q. And can you explain what happened there?

A. Yes. There was a call for assistance for an officer down in the area beneath — under the floor where I was, in the area between where the U.S. Capitol connects underground via subway trolley cars over to the Senate side, and so I responded down in that area to assist.

Q. When you say "down in that area," how — how did you get down there?

A. I went, I believe it was these stairs here (indicating)

—

Q. I'm going to use my marker to show where it looks like you're pointing.

Is this the accurate reflection —

A. Yes.

Q. — of where you were

[p.224]

pointing (indicating)?

So these stairs here, you went down these stairs (indicating)?

A. Correct, and down into that lower basement area.

Q. What did you find when you went down those stairs?

A. When I got down there, I saw that there were already numerous officers on scene there to assist.

And so knowing that I had no additional formal medical training beyond basic first aid and CPR that I had received in the Academy like every other officer had received, I knew that I needed to get back — also because I was in riot gear — that I needed to go back and — that I couldn't be useful there; I needed to be more useful back where I was upstairs.

Q. Officer Pingeon, did you later find out who that officer — that officer was that was receiving help?

A. Yes, I did.

Q. Who was that officer?

A. Officer Brian Sicknick.

Q. And do you know what happened to Officer Sicknick that day and the next day?

A. Yes. He was assaulted in the line of duty
[p.225]

that day and sprayed with chemical irritants like bear spray, and he died the next day, line-of-duty death.

Q. Officer Pingeon, did you attend Officer Sicknick's funeral?

A. Yes, I did.

Q. In what capacity did you attend his funeral?

A. I was at that point, a month or so later, assigned with my honor guard, the ceremonial unit, and I was one of the officers who guarded his remains in the Rotunda of the U.S. Capitol during his lying in honor ceremony.

Q. Okay. Officer Pingeon, I'd like to take you back to January 6. So you talked about the funeral.

Do you at any point in time remember seeing attackers in the Crypt of the U.S. Capitol?

A. Yes, I do.

Q. And so just to orient the Court, is this roughly where you saw them? Is this the Crypt (indicating)?

A. Yes.

Q. Okay. What did you do when you saw — when you saw people there?

A. I ultimately responded to the Crypt and down the stairs to the tunnel, where I believe I had

[p.226]

heard on the radio or talked to other officers around that additional assistance was needed down there.

Q. Officer — Officer Pingeon, you said down the stairs. So these stairs, or what — what are we looking at?

A. So there's stairs underneath those. So there's sort of two sets of stairs, one on top of the other: One that leads up to the Rotunda, and one that is — leads down, down to what's marked as the tunnel where the yellow arrow is, a hallway down that leads — feeds right out to the inauguration stage.

Q. Okay. So if you go down these stairs here, there's a tunnel directly to — is — this?

A. Yes, that's correct. A hallway that leads — leads out to that.

Q. And so the inauguration balcony over here (indicating)?

A. Correct. Yes. The — the tunnel opens up to the walkway right to the — and then you're on the stage, when — when the stage is built.

Q. Is this the same tunnel that Presidents use to walk out to the inauguration stage?

A. Yes, it is.

Q. Okay. What do you remember seeing when you got down into that tunnel?

[p.227]

A. When I got down there, I could see that there were numerous officers with injuries, some with fairly extensive injuries, and I could see that there were officers

JA310

defending that door, entryway to the tunnel from the stage that — and there are many officers packed in tightly as they were defending it from the mob.

Q. And do you have a rough idea when this was, what time this was?

A. This was probably around 5:00 p.m. or so.

Q. Okay. Do you remember anyone asking for additional help at that point in time?

A. Yes, I do.

Q. And what happened, what was the ask?

A. I believe it was — a Capitol Police official was there and was yelling for fresh bodies, fresh officers to go to the front of the line.

Q. And how did you respond at that time?

A. Well, at that time, I also witnessed additional officers from the Virginia State Police and Fairfax County Police had responded there. And so knowing that there were fresh officers there, and I myself was very much not fresh after having been engaged with the mob for hours at that point, I stepped aside and let those additional officers go ahead and answer that call.

[p.228]

Q. Okay. Were you ever — were you ever able to exit the tunnel?

A. Yes, I was.

Q. And what happened when you exited the tunnel? Where did you go?

A. Well, so after I had sort of gotten to regain myself and my composure and maybe had a sip of water or something there, I was able to exit through the tunnel. There were no longer officers guarding it. They had gone out to the stage, and so I followed and went out to the inauguration stage.

JA311

Q. At any point, did you meet any members of the National Guard?

A. Yes.

Q. And what happened when you met those members of the National Guard?

A. I had a conversation with a National Guard commander, command staff, and we got to talk about that day.

Q. What — what did you talk about?

A. Well, he told me that they had been wanting to come but they just didn't have the authorization. They were waiting and really trying to come to our assistance, but that they could not because of their orders.

[p.229]

Q. How did that make you feel, Officer Pingeon?

A. It made me feel angry and very disappointed.

Q. Okay. After you spoke with that National Guard member, though, were you — did you believe you needed to continue fighting, protecting the Capitol?

A. Well, thankfully at that time, it appeared to me that at least most of the Capitol or the parts that I could see as I went back through the Crypt back to the Senate side, that there were no longer members of the mob in there.

But again, I couldn't — I obviously couldn't see the entire building, so I was feeling better, but I was still concerned that there could be people in the building or that they could — because it wasn't secure, they could have left weapons or explosives or anything that we didn't know about inside the Capitol.

Q. Okay. Were you — were you ever able to regroup with the rest of your squad that day?

A. Yes, I was.

Q. When did that happen?

A. That happened probably around 6:00 or 7:00 p.m.

JA312

Q. Okay. And where did you meet up with
[p.230]
them?

A. We — so I was able to find a few, and then I think somebody, our lieutenant or sergeant, called on the radio for us to regroup back in the Senate side around those corridors.

Q. So roughly here (indicating) is where you regrouped?

A. Yes, right in that area.

Q. What were — what was the condition of your squad members when you got there?

A. Well, not good. One of our officers would go to the hospital for injuries, and others had, similar to me, been assaulted and had equipment and gear stolen from them.

Q. Okay. When did you finally leave the U.S. Capitol on January 6?

A. Probably maybe around 7:00 or 8:00 p.m.

Q. Okay.

A. I mean, we went back to Longworth to just stage, so — stage in case we were further needed.

Q. Officer Pingeon, at any time during the time that you were in the U.S. Capitol, were you able to use your cell phone?

A. Yes, at one point.

Q. And what did you use it for?

[p.231]

A. At one point, I was able to — when we had regained some semblance of control, I was able to escape into an office to send a text message to my family.

Q. And what did you tell your family?

A. I told them that I had been attacked and — but I was okay, but — and that I loved them, but that I had to go back and that I was going back in to keep fighting.

JA313

Q. So this was in the middle of fighting, so you had to go back again; is that what you're saying?

A. Yes.

Q. Okay. So this wasn't after you were done?

A. No.

Q. Okay. Officer Pingeon, how did you feel at the end of the day on January 6, 2021?

A. Physically, I was completely exhausted. And mentally, I was just devastated to see everything that had happened that I could not have even imagined, of how desecrated the building had been and how violent the mob had been towards me and my fellow officers.

MR. NICOLAIS: Thank you, Officer Pingeon.

I have no further questions, Your Honor.

THE COURT: Cross-examination?

CROSS-EXAMINATION

[p.232]

BY MR. SHAW:

Q. Good afternoon, sir.

You mentioned the death of Officer —

THE COURT: Try again.

MR. SHAW: Try it again.

Okay. All right, that's better.

Q. (By Mr. Shaw) You mentioned earlier the death of Officer Sicknick.

Do you recall that?

A. Yes.

Q. Okay. And you said that it was a line-of-duty death; is that correct?

A. Yes.

Q. Are you familiar with the criteria for declaring something a line-of-duty death?

A. I am familiar with what the chief of police tells us.

JA314

Q. And what does the chief of police tell you?

A. Well, that this was, in fact, a line-of-duty death.

Q. Okay. So you know that this particular death was declared a line-of-duty death, but you do not know what criteria were used to make the determination; is that fair?

[p.233]

A. Yes.

Q. Okay. Are you aware that the DC Medical Examiner conducted an autopsy of Officer Sicknick?

A. I believe so, that that's the standard thing to do, yes.

Q. Do you know what the results of that autopsy were?

A. Not off the top of my head right now, no.

Q. Are you aware that the DC Medical Examiner found that Officer Sicknick died on January of natural causes, sir?

A. I may have heard that, but I can't — I'm not totally sure.

Q. Are you aware that the Department accepted the findings of the Medical Examiner but, nonetheless, declared it a line-of-duty death?

A. I'm not aware. As I was just an officer, I'm not aware what the department would —

Q. Are you aware, based on your time as an officer, that it makes a difference in terms of the benefits that the survivors of an officer receive depending on whether the department declares it a line-of-duty death versus a non-line-of-duty death?

A. I'm not aware of the specifics or what the difference of those are, no.

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Q. Okay. You have no reason to second-guess the findings of the DC Medical Examiner, correct?

A. No.

JA315

Q. Okay. So if the DC Medical Examiner found that Officer Sicknick's death was due to natural causes rather than to anything that occurred on January 6, you have no reason to question that, correct?

A. I'm not a doctor, so I — no, I can't question their rulings.

Q. Okay. Do you know how many demonstrations there were in DC on January 6?

A. No, I do not.

Q. Do you know if it was more than one?

A. Well, are you talking permitted demonstrations?

Q. I'm not sure what you mean by permanent demonstrations.

A. Oh, sorry, "permitted."

Q. Oh, "permitted." Yes. All right. First of all, let's start with permitted.

Do you know how many permitted demonstrations there were?

A. No, I do not.

Q. Do you know if there were multiple permitted demonstrations?

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A. All I knew at that time was that there — well, I don't even know if it was permitted or not, but all I knew at that time was there was one big one at the White House.

Q. So there was one at the Ellipse, that's what you mean by the White House?

A. Yes.

Q. Okay. Do you know if there was another permitted one at the Supreme Court?

A. I do not know.

Q. Do you know if there was another permitted one elsewhere?

A. No.

JA316

Q. Okay. Do you know if there were people who were demonstrating in DC at unpermitted demonstrations that day?

A. I do not know.

Q. Do you know how many demonstrators were in DC that day in total?

A. No.

Q. Do you have an estimate of how many were?

A. Thousands at least.

Q. Okay. Would it surprise you that estimates in the area of 120,000, have been circulated?

A. That would not surprise me, no.

[p.236]

Q. Okay. You spoke about what you called "the mob"; is that correct?

A. Yes.

Q. And how are you defining "the mob"?

A. Well, I don't know the dictionary definition, but to me, a crowd turns into a mob when they are engaging in unlawful conduct and violence.

Q. Okay. I asked a bad question, so I apologize for that.

I'm asking about "the mob." Was it a particular group of people on January 6 that you're referring to as "the mob"?

A. It was the — I'm not quite sure —

Q. So if you assume — so if you accept for purposes of this question that there were perhaps 120,000 or that order of magnitude people in DC demonstrating that day, are you saying that all of those 120,000 people were "the mob," or is it a subset of them?

A. I didn't see personally 120,000 people so I couldn't characterize all of them as "a mob."

JA317

Q. In terms of the people who were at the Capitol during the afternoon when you were there, do you have an estimate of how many people were there?

A. Thousands, but I couldn't — I don't know an exact number, no.

[p.237]

Q. Somewhere in the — well, let me change that.

You know that an extensive investigation has been conducted by the Department of Justice and the FBI in the wake of January 6, correct?

A. Yes.

Q. And do you know how many people have been prosecuted, roughly?

A. I think more than 1,000, but I don't know exactly.

Q. About 1200 sound right to you?

A. Potentially, yes.

Q. Okay. In terms of the people who were at the — at or around the Capitol that day, do you know what percentage of them attended the rally at the Ellipse?

A. No, I do not.

Q. Do you know what percentage of the people who attended the rally at the Ellipse did not go anywhere near the Capitol that day?

A. No, I do not.

Q. I take it that you don't claim any ability to read people's minds; is that fair?

A. That is fair.

Q. And just by looking at the folks who were

[p.238]

there that day, you weren't able to tell if any particular person attended the rally at the Ellipse, right?

A. Correct.

JA318

Q. And you weren't able to tell if any particular person heard President Trump speak at that rally, correct?

A. Correct.

Q. And you weren't able to tell if any particular person had seen any of President Trump's tweets, correct?

A. That's correct.

Q. What do you currently do for a living, sir?

MR. NICOLAIS: Objection, Your Honor. Relevance.

THE COURT: Can you respond?

MR. SHAW: Yes. I think the relevance will become clear in a moment, Your Honor.

Q. (By Mr. Shaw) What do you currently do for a living, sir?

THE COURT: Well, hey, you don't reask the question when I haven't ruled on the objection.

MR. SHAW: Sorry, Your Honor.

THE COURT: I will — I will allow you to

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answer, but if I don't find it relevant, I'll strike the answer.

A. I work as a sales — I have a sales position in a technology company.

THE COURT: I'm sorry, what kind of company?

A. Technology, software company.

THE COURT: Okay.

Q. (By Mr. Shaw) Do you also sell your artwork?

A. Yes, I do. I am also an artist.

Q. Is much of your artwork January 6 themed?

A. Well, I've been an artist for most of my life, so I've explored numerous mediums and subject matter. But yes, after January 6, it was a source of inspiration, and I use my artwork as a form of healing for the trauma that I endured that day.

JA319

Q. And you — you sell the artwork that you create, correct?

A. I do, yes.

Q. You have an Etsy store?

A. I do.

Q. And you sell your pictures for between \$50 and \$250 a picture; is that correct?

A. Some are lower, some are higher, but

[p.240]

approximately, yes.

Q. And so far, you've sold about 300 pictures from your Etsy store; is that — is that right?

A. I'd have to look exactly, but that sounds about right, yes.

Q. Is it fair to say that you would like to attract more visitors to your Etsy store to buy more pictures?

MR. NICOLAIS: Objection, Your Honor. I don't understand the relevance of Etsy store.

THE COURT: I think I do, but it's — the objection is overruled.

A. You know, as an artist and, I guess you could call it small business owner, yes, it is attractive for me to have more customers buying my artwork.

Q. (By Mr. Shaw) And is it fair to say you expect that being in a televised trial like this one about January 6 is likely to raise your profile and sell more pictures about January 6?

MR. NICOLAIS: Objection, Your Honor. This calls for speculation from the witness.

THE COURT: Overruled.

You can answer.

A. With your endorsement, perhaps.

Q. (By Mr. Shaw) If I can help, glad to.

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MR. SHAW: I have no further questions for you, sir.

THE COURT: Any questions from the Colorado Republican Party?

MS. RASKIN: No questions.

MR. KOTLARCZYK: No questions, Your Honor.

THE COURT: Okay. Redirect?

MR. NICOLAIS: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. NICOLAIS:

Q. Officer Pingeon, I'll try to keep this brief. Did the — did the autopsy results of Officer Sicknick keep him from being honored in the Rotunda of the U.S. Capitol?

A. No, they did not.

Q. And just to be clear, you guarded his body in the Rotunda?

A. His remains, yes.

Q. Okay. I want to go back also to — you were asked about definition of “the mob,” and I want to make sure I got this right.

You said “a mob” is a group of people who engages in unlawful conduct and violence.

Does that sound roughly about what you

[p.242]

said?

A. Yes.

Q. Would you characterize the people who assaulted you on January 6 as “a mob” under that definition?

A. Yes.

Q. Officer Pingeon, there was a question about rallies and permitted events, et cetera.

You responded you thought there was one big event at the Ellipse?

A. Yes.

JA321

Q. And when you were on the northwest lawn and you were looking down from your elevated position, what were you looking toward?

A. Down Pennsylvania Avenue, leads towards the White House and the Ellipse.

Q. And what did you see coming down Pennsylvania Avenue?

A. Thousands of people coming towards the Capitol.

Q. Okay. I do — I'll be brief about your artwork, Officer Pingeon.

Is your artwork your primary source of income?

A. No. Far from it. I — I wish it could

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be, but no.

Q. What is the primary reason that you engage in artwork post January 6, Officer Pingeon?

A. Like I previously stated, it's — you know, I always turn to art in difficult times as a creative outlet to express myself, but it became more important post January 6, as I dealt with posttraumatic stress symptoms, to be able to express myself and heal from that experience by expressing myself artistically.

Q. Are you here today to sell more artwork?

A. No.

Q. Why are you here today, Officer Pingeon?

A. I'm here today to share my story and speak the truth of what happened to me and what I saw, heard, and experienced on January 6.

MR. NICOLAIS: Thank you very much. I have no further questions.

THE COURT: Officer Pingeon, thank you so much for your testimony today.

THE WITNESS: Thank you.

THE COURT: You are released.

JA322

THE WITNESS: Thank you.

THE COURT: We will go on break until 3:20.

(Recess taken from 3:05 p.m. until

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3:22 p.m.)

THE COURT: You may be seated.

And we're going to be watching some videos?

MR. GRIMSLEY: We're going to be watching some videos and seeing some photos. And I know we had discussed it in earlier hearing that there was going to be a period in the case where we wanted to present video evidence and some of the other evidence that wouldn't be coming in through a witness, so we'll do that now.

Your Honor will be happy to hear that we are well ahead of time. And then given what I had said this morning about the witnesses who abruptly pulled out, that gives us some time back as well. So I think we're going to be good.

I don't think the evidence presentation will go all the way through to 5:30.

THE COURT: Okay.

MR. GRIMSLEY: But we've already spoken to counsel for respondents, and we would start with our next witness tomorrow morning.

THE COURT: Okay. That's fine.

Did you — did you bring popcorn?

MR. GRIMSLEY: I did not. I don't know if it's going to be that scintillating, but —

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THE COURT: I think the popcorn is if it isn't that scintillating.

MR. GRIMSLEY: Perhaps you're right as to why we might need it.

JA323

But just in terms of timing, I wanted to let Your Honor know why we don't have that witness here —

THE COURT: Yeah.

MR. GRIMSLEY: — at the ready.

The estimates for cross-examination — and I'm not going to fault them at all —

THE COURT: Yeah.

MR. GESSLER: — were quite a bit longer, shall we say, than the cross-examinations actually were.

THE COURT: Yeah.

MR. GRIMSLEY: So we're well, as I said, ahead of schedule right now.

THE COURT: So we'll just do whatever video evidence you have, and then we'll break for the day?

MR. GRIMSLEY: Yes. And there will be some discussion, I think, of how you would like us to present some of the January 6 Report findings.

THE COURT: Okay.

MR. GRIMSLEY: We could — I could read

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them, but we can — we could talk about whether that makes sense to do —

THE COURT: Okay.

MR. GRIMSLEY: — in terms of a good use of everyone's time.

But Mr. Gessler has said that he has a procedural matter that he wanted to raise before the entertainment begins.

THE COURT: Okay.

MR. GESSLER: Thank you, Your Honor.

So I want to go back to our status conference — I believe it was last week. They're all beginning to bleed together — and we had talked a little bit about experts.

THE COURT: Uh-huh.

MR. GESSLER: We have — Your Honor had said, you know, if there's a way for us to get in an expert, we might — the door was open to testimony next week sometime. And I think we have identified an expert on political communications as a —

THE COURT: Okay.

MR. GESSLER: — as a rebuttal expert for Professor Simi.

May we present that? We'll produce a report. I can't give you an exact timeline, but I know

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the timeline is going to be within a few days. I understand it's pretty fast.

But I'm asking if we would be able to do that, Your Honor.

THE COURT: And do the petitioners have any objection?

MR. GESSLER: And — and, Your Honor, I just sprung this on them, so this is the first they've heard of it as well.

MR. GRIMSLEY: We do have an objection, Your Honor.

Our expert on the subject is going to be testifying tomorrow. He's not, obviously, going to have an opportunity or ability to respond. And they are going to be able to tailor any sort of report, expert report, to his testimony that's offered tomorrow.

We think that is unfair. They've had ample amount of time to find somebody and have not. I don't think next week was meant for an entirely new expert. I think it may have been meant for if Mr. Heaphy needed to testify next week or if there was some fact witness, but this is introducing a whole new kettle of fish into the case.

THE COURT: Okay. I'm going to let them. Everything has been on an extremely compressed schedule,

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and I know it's been hard for both parties to get witnesses to appear on that schedule, but I will allow.

So this is to respond to Professor Simi?

MR. GRIMSLEY: Correct.

THE COURT: If Professor Simi wants to have a rebuttal to that, which would normally happen in his testimony, and wants to do so by phone — by video next week, the Court will allow that, so long as that rebuttal testimony is, you know, disclosed.

Are we going to get a report?

MR. GESSLER: Yes, of course, Your Honor. No, we're going to work very hard to get that. I'm not looking to do an ambush here, but we're going to — we've had some communications. We have to firm that up, and we're going to work like crazy to — to get something to petitioners. It will be a meaningful report.

Understanding the Court's framework from before, that there's not an opinion that's in the report that cannot be elicited on the stand. So we're prepared to abide by that and go forward.

MR. GRIMSLEY: And, Your Honor, as for us, I assume — and I would ask if it's not the correct assumption — that Professor Simi doesn't have to now submit a rebuttal report in advance of his rebuttal testimony in response to the testimony that we don't yet

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know what it is going to be?

THE COURT: Let's — let's see what this rebuttal report looks like before we get too deep into this conversation.

But I'm — I understand that, normally, in a normal course, Professor Simi would have a chance potentially to rebut and that he would do so when he's on the stand and that he's obviously not going to have that opportunity.

So I'm going to make — we'll do what it takes to level the playing fields.

MR. GRIMSLEY: Thank you, Your Honor.

THE COURT: And is Mr. Heaphy coming or testifying?

MR. GRIMSLEY: He is available to testify remotely on Friday, so we can — I expect that I would do a short direct with Mr. Heaphy and then opposing counsel would be able to cross-examine.

THE COURT: Okay. So he'll be testifying out of order?

MR. GRIMSLEY: Yes. He'll be, I think, testifying from Washington, DC.

THE COURT: Okay. So the videos.

MR. GRIMSLEY: Yes.

So I've tried to limit this to exhibits

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that Your Honor has already ruled on, saying that they would be admitted —

THE COURT: Okay.

MR. GRIMSLEY: — or were conditionally admissible.

There were a few — I raised one earlier today — that has not been ruled on yet, but I will obviously raise that when I get to it, so —

THE COURT: Okay. Is that the — is that the videos on — which were embedded in the tweets?

MR. GRIMSLEY: Yes. Those too, Your Honor. I think there's one of those in here. I don't know if it's both in here.

So I was going to raise that when we got there, but I was thinking of the Giuliani and Eastman speech. Again, President Trump referred to that speech — or those speeches explicitly within his Ellipse speech.

It was the justification that President Trump gave and provided to the crowd on that day, that Vice President Trump — or Vice President Pence had the ability to reject certification of the electoral votes, and so was a critical piece of that speech.

And President Trump actually selected them as speakers before he took the stage, so — and, again,

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we're not offering it for the truth of the matter asserted.

THE COURT: I understand you're not offering it for the truth of the matter asserted, but I do have, kind of, fairness issues with having a speech of someone who then isn't available for cross-examination, though I suppose Mr. Gessler would have a lot better chance of getting Mr. Eastman or Mr. Giuliani to respond, so I need — I'm still thinking about it.

MR. GRIMSLEY: And, Your Honor, to be fair, I think, to everyone, I don't think anybody's getting either of those two to testify, other than to assert their Fifth Amendment right against self-incrimination, given that they're both currently under indictment.

But, again, if it had been a document that President Trump held up and said, "Here's the proof that I have that Vice President Trump — or Vice President Pence can decertify the election," I think you would allow it in as part of the speech.

He refers to it, and it comes right before his speech that day. It is an integral part of what he did in his plan to incite the riot.

And obviously Your Honor can take it for the weight it warrants.

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THE COURT: Any response, Mr. Gessler?

MR. GESSLER: Your Honor, at the end of the day, we're talking about President Trump's — whether or not he, quote, engaged in an insurrection, and referral to other speakers is not President Trump speaking. It's not. And it's not President Trump's engagement.

And so we would continue to object to that, just as President Trump may refer to many things and has referred to many things over six, eight years of a political career, or more.

But not every one of them — we would submit none of them — are admissible as his statement or as his embracing of that statement.

MR. GRIMSLEY: I would say that that is generally true, but this was the speech right before him on the Ellipse on January 6, speeches that he planned to have there that day, speeches that he referred to explicitly within his own speech as what gave him the justification for saying that the Vice President could decertify.

It's incredibly important context to understand what President Trump was saying.

MR. GESSLER: Your Honor, I would simply say the Rules of Evidence don't change on January 6.

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MR. GRIMSLEY: No, they don't.

MR. GESSLER: They remain the same.

THE COURT: I'm going to — I'm going to continue to ponder it while I also simultaneously watch the other videos.

MR. GRIMSLEY: Okay. Well, I was going to start and try and break this up into two different categories.

The first is additional evidence that there was an insurrection on January 6 and then additional evidence that President Trump engaged in that insurrection.

THE COURT: Okay.

MR. GRIMSLEY: So I'm going to start with an admitted exhibit, Plaintiffs' 133.

THE COURT: Okay. 133 will be officially admitted.

(Exhibit 133 was admitted into evidence.)

MR. GRIMSLEY: And Exhibit 133 is a series of photos taken by Nate Gowdy. He was a photographer that was present at the Ellipse and then at the Capitol on January 6, and we'll just run through a few of those.

The nice thing about these photos is they have a time stamp on the upper left-hand side. So I just want to look at a few.

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So let's go to page 4. And the time stamp there is 11:38 a.m. Eastern Standard Time. And you see there, somebody there with "Pence Has the Power." And, again, this is why I think it's so important, the Giuliani speech.

Photos of individuals in camo and gear with those plates that were discussed earlier.

(Siren interruption.)

THE COURT: See, Mr. Gessler, I told you they would get their turn.

MR. GESSLER: I'm glad to know the ambulances are an equal opportunity interrupter.

THE COURT: Yeah. Mr. Grimsley, just make sure you speak into the microphone so that —

MR. GRIMSLEY: Yes.

And then let's go to page 17, which is from 2:14 p.m. that afternoon. And you see people holding on and carrying away the bike racks.

JA330

At 2:36 — and this is after the tweet about Vice President Pence — you see the tear gas and chemical irritant and individuals swarming the Capitol.

Here again is another photo that shows individuals carrying — the attackers carrying the Trump flags and various Trump paraphernalia, and that's

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Page 26, 3:27 p.m.

This is page 30 at 3:55 p.m., and you see the sign there: "Certify Honesty Not Fraud," reflecting the claims of fraudulent — of a fraudulent election. And you see again the Trump paraphernalia and flags and the crowd proceeding towards the Capitol.

And then here on page 37 is a photo at 5:07, and you see still Trump paraphernalia. It's getting dark outside, and you see the tear gas and chemical irritant there as well.

Now I'd like to play a portion of Plaintiffs' Exhibit 9-

—

MR. GESSLER: Your Honor, may I just make one clarification.

These are being admitted over our objection, so we are clear. We would object to counsel's characterization of them. They're not the evidence.

So, for example, the people lined up with the vests, I mean, did the photographer say, "Hey, come on in and let me get a photo of you all," or were they locked arm in arm preparing to storm the Capitol? There's just no context.

So we're going to make that objection for the record, and we will ask the Court not consider Counsel's characterization of these photos because

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it's — doesn't come from a witness, and counsel's statements are not evidence.

Thank you, Your Honor.

MR. GRIMSLEY: Your Honor, I'm next going to play a clip from Plaintiffs' Exhibit 94. It's a video that was admitted by Your Honor on October 27. Part of it, I think, has already been played in the opening, so I'll play only a portion of it here.

THE COURT: And 94 is admitted over objection.

(Exhibit 94 was admitted into evidence.)

(Video playing.)

MR. GRIMSLEY: And so I think you heard other portions of Exhibit 94 during openings, so I won't play those here. Next I'd like to show Exhibit 105.

THE COURT: Exhibit 105 is admitted.

(Exhibit 105 was admitted into evidence.)

MR. GRIMSLEY: And this is an exhibit Your Honor has said was admitted. It is a transcript of the closing argument in the —

THE COURT: Did I — have I ruled on this previously, or am I jumping the gun?

MR. GRIMSLEY: Oh, I'm sorry. It's stipulated. You have not ruled on it. It was

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stipulated.

THE COURT: Okay.

MR. GRIMSLEY: And so this is a transcript of the closing argument in the second impeachment trial.

This is from President Trump's lawyer, Mr. van der Veen, and he says: "Yet the question before us is not whether there was a violent insurrection of the Capitol. On that point everyone agrees."

And I've got video of that as well. We hadn't marked that. I can play that. But to be fair, I haven't provided that to the other side, and we can wait if they would like, but it's just video of the same statement.

JA332

THE COURT: I don't — I don't need video of the same statement.

MR. GRIMSLEY: Thank you.

Now I want to play video from Plaintiffs' Exhibit 1. Again, not the entire video, but this is video from January 6.

(Video playing.)

MR. GRIMSLEY: The time stamp on the upper right.

So I would move to admit Plaintiffs' Exhibit 1, as well as Plaintiffs' Exhibit 105. I forgot about that one.

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THE COURT: Hold on.

Plaintiffs' Exhibit 1 is admitted and the other one you said was 105?

(Exhibit 1 was admitted into evidence.)

MR. GRIMSLEY: 105, Your Honor.

THE COURT: And 105 is stipulated, so admitted.

(Exhibit was admitted into evidence.)

MR. GESSLER: Your Honor, if I may.

THE COURT: Yeah.

MR. GESSLER: I don't think Number 105 was stipulated. I think — it was? I may be corrected.

THE COURT: That's what my notes say as well.

MR. GESSLER: Okay.

Again, Number 94 and Number 1 are over our objection.

And I'll simply renew my objection with respect to the first video you saw. That's a movie production. There's sound overlays on it. It's a montage. It is — it's a — it's a good movie production, and it was produced by the January 6 Commission for the purpose of being a good movie production.

It shouldn't be evidence here. I don't

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have an opportunity to cross-examine. I don't know the full context of each one of those videos. We have not been able to pull them apart. We have not been able to pull up the witnesses or the people who actually took those videos or — or the actual context of those radio transmissions and how it's all been assembled together.

So just as I would submit that you wouldn't accept a Steven Spielberg production for the truth of the matter asserted — maybe this rises to that level of quality — but you wouldn't accept this one, either.

So that's going to be our objection there.

MR. GRIMSLEY: You might if it was documentary footage, which is what we have here.

MR. GESSLER: We don't think Michael Moore would be accepted — Michael Moore's documentaries would be accepted by this Court either if we want to use that analogy.

THE COURT: 94 is admitted.

MR. GRIMSLEY: And so we just looked at a portion of Plaintiffs' Exhibit 1.

I want to play a portion of Plaintiffs' Exhibit 92. Again, that was ordered admissible on October 27.

(Video playing.)

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MR. GRIMSLEY: I move to admit Plaintiffs' Exhibit 92.

THE COURT: Admitted. 92 will be admitted.

(Exhibit 92 was admitted into evidence.)

MR. GRIMSLEY: Now I want to show a page from Plaintiffs' Exhibit 26, which is the GAO report from February of 2023 regarding the investigation of that entity into the Capitol security during January 6. This is one that was admitted as well.

THE COURT: Stipulated, I believe. And it's admitted now.

(Exhibit 26 was admitted into evidence.)

MR. GRIMSLEY: And I would just like to go to page 7. And this is a finding from that document:

In the months leading up to the attack on the U.S. Capitol on January 6, 2021, there were reported efforts to organize large groups of protesters to travel to Washington, DC to dispute the outcome of the 2020 presidential election.

Over the course of about 7 hours, more than 2,000 protesters entered the U.S. Capitol on January 6, disrupting the peaceful transfer of power and threatening the safety of the Vice President and members of Congress.

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The attack resulted in assaults on at least 174 police officers, including 114 Capitol Police and 60 DC Metropolitan Police Department officers. These events led to at least seven deaths and caused about \$2.7 billion in estimated costs.

As of September 2022, more than 870 individuals have been arrested on charges including entering a Restricted Federal Building, assaulting officers with a deadly weapon, and seditious conspiracy.

THE COURT: And so when you say that it's page — is it page 7 of the exhibit even though it says page 1?

MR. GRIMSLEY: It's page 7 of the document, but page 1, I guess, of the report. It probably has some little i's and little two i's.

THE COURT: Okay.

MR. GRIMSLEY: And now I wanted to point to just a couple of the January 6 Report findings that Your Honor has found conditionally admissible.

JA335

And the first is Finding 119, which is at page 35 of Plaintiffs' Exhibit 78:

More than 140 Capitol and Metropolitan Police were injured, some very seriously. A perimeter security line of Metropolitan Police intended to secure the Capitol against intrusion broke in the face of

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thousands of armed rioters, more than 2,000 of whom gained access to the interior of the Capitol Building.

A woman who attempted to forcibly enter the Chamber of the House of Representatives through a broken window while the House was in session was shot and killed by police guarding the Chamber.

Vice President Pence and his family were at risk, as were those Secret Service professionals protecting him. Congressional proceedings were halted, and legislators were rushed to secure locations.

So that's the evidence I wanted to present now on whether there was an insurrection.

I'd like to turn now to whether President Trump engaged in that insurrection.

MR. GESSLER: I'm doing this for the record, Your Honor.

We're going to object to that January 6 finding. We're particularly going to object to the characterization that the protesters were armed. All the testimony you've heard today from police officers was that they weren't armed with any firearms or knives or weapons.

So that's our objection, Your Honor.

THE COURT: And I just want to make sure we're all on the same page, and thank you for your

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objection. But just because I allow a finding in does not mean that I am accepting it as true.

MR. GESSLER: I understand, Your Honor, and it's our job to explain to you why that is the correct finding.

THE COURT: But I just want to — in case you didn't hear me say it before, I just want to make sure that just because I allow in the January 6 Report does not mean that I agree with all of the findings.

MR. GESSLER: I understand, Your Honor.

MR. GRIMSLEY: So now turning to the evidence on engagement, I wanted to start with Plaintiffs' Exhibit 47.

This is — these are clips from President Trump's speech from election night or, really, the next morning, so very early November 4, 2020.

THE COURT: And that — that will be admitted. Exhibit 47, correct?

MR. GRIMSLEY: Yes.

(Exhibit 47 was admitted into evidence.)

(Video playing.)

MR. GRIMSLEY: So that's the first clip. And I'm not going to play the entire speech. It's about nine minutes long.

So the second . . .

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(Video playing.)

THE COURT: And I apologize. You said this is all from the same speech that was 90 minutes long on the night — the morning after the election?

MR. GRIMSLEY: It was only nine minutes long, Your Honor.

THE COURT: Oh, nine minutes. I was like —

MR. GRIMSLEY: So I wanted to spare you the whole speech. We can play it, if you want, but just wanted to play those two portions.

THE COURT: Only if Mr. Gessler wants to play the whole thing.

MR. GESSLER: You never know, Your Honor, but not right now.

THE COURT: Okay.

MR. GRIMSLEY: So now I want to move on to Plaintiffs' Exhibit 148, which has already been admitted. That is the compilation of President Trump's tweets over time. And I want to start with page 12.

And I'm going to walk through these. Mr. Olson walked through some of these during his opening, but I will walk through more of them here.

So November 5, 2020, this is the morning after the speech we just saw at 9:12 a.m. He tweets,

[p.265]

"Stop the Count."

November 8, a few days later: "We believe these people are thieves. The big city machines are corrupt. This was a stolen election. Best pollster in Britain wrote this morning that this clearly was a stolen election, that it's impossible to imagine that Biden outran Obama in some of these states."

Next one, same page: "Where it mattered, they stole what they had to steal." And that, too, I believe, is November 8.

Next page, page 13, November 9: "Nevada is turning out to be a cesspool of Fake Votes. @MSchlapp and @AdamLexalt are finding things that when released will be absolutely shocking."

The next day, November 10: "People will not accept this Rigged Election!"

Next page, 14: "A guy named Al Schmidt, a Philadelphia Commissioner and so-called Republican (RINO), is being used big time by the Fake News Media to explain how honest things were with respect to the

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Election in Philadelphia. He refuses to look at a mountain of corruption & dishonesty. We win!"

November 12: "Report: Dominion deleted 2.7 million Trump votes nationwide. Data analysis finds 221,000 Pennsylvania votes switched from President Trump

[p.266]

to Biden. 941,000 Trump votes deleted. States using Dominion voting systems switched 435,000 votes from Trump to Biden."

On page 15, November 13: "Georgia Secretary of State, a so-called Republican (RINO), won't let the people checking the ballots see the signatures for fraud. Why? Without this the whole process is very unfair and close to meaningless. Everyone knows that we won the state. Where is Brian Kemp?"

Go down to the bottom of page 16, November 14: "What are they trying to hide. They know and so does everyone else. Expose the crime!"

November 14, page 17, 11:17 p.m.: "Antifa scum" run for the — "ran for the hills today when they tried attacking the people at the Trump Rally, because those people aggressively fought back. Antifa waited until tonight, when percent were gone, to attack innocent MAGA people. DC Police, get going - do your job and don't hold back!!!"

November 16, page 18: "Dominion is running our Election. Rigged!"

They go on. December 1, 2020 on page 27: "Rigged election. Shows signatures and envelopes. Expose the massive voter fraud in Georgia. What is Secretary of State and @BrianKemp Georgia afraid of?

[p.267]

They know what will find."

And Your Honor, this was one of the tweets with the embedded video that I had talked about earlier.

THE COURT: Yeah. I'm going to allow videos that President Trump tweeted, so . . .

MR. GRIMSLEY: This is Plaintiffs' 126, so we would move for admission of it.

(Video playing.)

MR. GRIMSLEY: So back to —

THE COURT: Okay. So just to be clear, that is —

MR. GRIMSLEY: That is —

THE COURT: P-126, which —

MR. GRIMSLEY: P-126, which is a video embedded in a tweet in Plaintiffs' 148.

THE COURT: And that's admitted.

(Exhibit 126 was admitted into evidence.)

THE COURT: Do you object, Mr. Gessler?

MR. GESSLER: Yeah, I do, Your Honor. Look, I mean, as a former Secretary of State who's received death threats, violent sexualized threats against my mother, my daughter, and my wife, I'm empathetic to this.

But this is an out-of-court statement intended to prove the truth of the matter asserted. It's

[p.268]

highly inflammatory. It should not be part of this hearing.

THE COURT: So the Court rules, A, it was adopted by President Trump when he decided to tweet it to however many followers President Trump has, which I assume is many, and so I'm going to allow it.

MR. GESSLER: And, Your Honor —

MR. GRIMSLEY: Your Honor —

MR. GESSLER: — I would submit that it's an improper inference to say that President Trump adopted this as his own.

JA340

THE COURT: He tweet — he — he tweeted this statement, okay? Whether that's a legal adoption or not, I'm going to allow it in based on the fact that he is the one that has publicized this statement, vis-a-vis his Twitter account, or whatever they call it now.

MR. GRIMSLEY: And, Your Honor, it's not that we're offering it necessarily for the truth of the matter asserted, although we're happy to do that as well.

It's to show President Trump's state of mind and his communications to his supporters, and that's why I wanted to come back to this tweet on page 27 of Exhibit 148, which is the tweet where President Trump retweets this video that you just saw. "Rigged election. Shows signatures and envelopes. Expose the massive voter

[p.269]

fraud in Georgia. What is Secretary of State and @Brad Kemp GA afraid of? They know what will find."

And there's just more of these, so I'll skip over.

So page 33, tweet from December 10, 2020, 9:24 a.m.: "The Supreme Court has a chance to save our Country from the greatest Election abuse in the history of the United States. 78 percent of the people feel (know!) the Election was Rigged."

3:28 p.m. December 11: "If the Supreme Court shows great Wisdom and Courage, the American People will win perhaps the most important case in history, and our Electoral Process will be respected again!"

December 11, later in the day, 11:50 p.m.: "The Supreme Court really let us down. No Wisdom, No Courage!"

So let's fast-forward to December 19, and this is on page 41. And you've seen this tweet already. But it says: "Peter Navarro releases 36-page report alleging election fraud 'more than sufficient' to swing victory to Trump -"

JA341

At great report by Peter — “A great report. Statistically impossible to have lost the Election. Big protest in DC on January 6th. Be there, will be wild!”

And then this is the other embedded video

[p.270]

that we were talking about, Your Honor. It was played in part in opening. I believe this is — the embedded video is Plaintiffs’ 73.

And the important point here is, it’s released the very same day right after, basically, the “will be wild” tweet on December 19.

THE COURT: I’m going to watch it first before I rule on its admissibility.

(Video playing.)

MR. GRIMSLEY: So that was a video that President Trump retweeted on December to his followers.

THE COURT: And the Court will admit it. It’s not being offered for the truth of the matter asserted.

(Exhibit 73 was admitted into evidence.)

MR. GRIMSLEY: And that’s Exhibit 1- — or Exhibit 73, Your Honor.

And I’m not going to go through the tweets that Mr. Olson put up where he showed the number of times between December 19 and January 6 where President Trump tweeted out about the rally on January 6.

And just moving to January 5, this is page 75 of Exhibit 148. Donald Trump 10:27 a.m.: “See you in DC.”

[p.271]

11:06 a.m.: “The Vice President has the power to reject fraudulently chosen electors.”

5:05 p.m. on page 76: “Washington is being inundated with people who don’t want to see an election victory stolen by emboldened Radical Left Democrats. Our Country has had enough, they won’t take it anymore! We

JA342

hear you (and love you) from the Oval Office. Make America Great Again!"

7 minutes later, 5:12 p.m.: "I hope the Democrats, and even more importantly, the weak and ineffective RINO section of the Republican Party, are looking at the thousands of people pouring into DC. They won't stand for a landslide election victory to be stolen."

January 5, a few minutes later, I think, 5:25 p.m. this is page 77: "Antifa is a Terrorist Organization, stay out of Washington. Law enforcement is watching you very closely! @DeptofDefense @TheJusticeDept @DHSgov @DHS_Wolf @SecBernhardt @SecretService @FBI."

Fast-forwarding to 1:00 a.m. in the morning, January 6, 2021, this is page 80 of the exhibit. "If Vice President Mike Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & even

[p.272]

fraudulent numbers in a process NOT approved by their State legislators (which it must be). Mike can send it back!"

Later that morning, 8:17 a.m.: "States want to correct their votes, which they now know were based on irregularities and fraud, plus corrupt process never received legislative approval. 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!"

And it wasn't just tweets that the President was sending out over this period of time. I want to show clips from two speeches.

The first is Plaintiffs' Exhibit 99. This is a speech by President Trump from December 2 of 2020. That I think has been admitted or will be admitted pursuant to this Court's order.

JA343

THE COURT: So 99 will be admitted.

(Exhibit 99 was admitted into evidence.)

THE COURT: And did you say it's clips or the whole
— MR. GRIMSLEY: It's a clip.

THE COURT: Okay. And I just want to make clear
in terms of the rule of completeness that the intervenor is
always welcome to play other parts of the clips as — so
should they choose.

[p.273]

(Video playing.)

MR. GRIMSLEY: So move to admit Plaintiffs'
Exhibit 99.

THE COURT: Admitted.

MR. GRIMSLEY: The next speech is from December
22. Again, it is a clip. This is Plaintiffs' Exhibit 100.

(Video playing.)

MR. GRIMSLEY: So I've shown evidence of what
went on between November 3 and January 6, so I now
want to turn to January 6 itself.

And, Your Honor, this is where I would play Plaintiffs'
Exhibit 131, Mr. Giuliani and Mr. Eastman.

THE COURT: I'm going to — I'm going to sustain
the objection on Mr. Giuliani and Mr. Eastman. There's
been plenty of evidence that he was — that President
Trump was telling people that Vice President Pence had
the authority to do something, and I think it's cumulative.
And also I think there's a sense of unfairness since they
won't be here to testify.

MR. GRIMSLEY: Thank you, Your Honor.

So I wanted then to move to Plaintiffs' Exhibit 49 and
— and these are clips from President Trump's speech on
the Ellipse. It's about 12 minutes in

[p.274]

total.

THE COURT: Okay.

MR. GRIMSLEY: We didn't want to submit everybody to the 90 minutes, but certainly if Your Honor wants to watch it, I encourage you to do so.

But move to admit 49. I don't think there's any objection to that.

THE COURT: It's been stipulated to, so it's admitted. (Exhibit 49 was admitted into evidence.)

THE COURT: So this is the Ellipse speech, but it's not the whole thing?

MR. GRIMSLEY: It's not the whole thing, Your Honor. And, in fact, I have with me, just for ease of reference, a highlighted transcript, which has the clips, so I think that would be good for everybody if they want to follow along.

May I approach?

THE COURT: Yes, please.

MR. GRIMSLEY: And I'm trying to get the volume right, but these are so variable, so I — you've got to hold on for a second sometimes. So I hope I'm not going to blow anybody's ears out here.

(Video playing.)

(Technical difficulties with video.)

[p.275]

MR. GRIMSLEY: I blame Mr. Gessler.

MR. GESSLER: Bring it. I think that was President Trump's fault, actually.

(A pause occurred in the proceedings.)

MR. GRIMSLEY: You may get a little repeat here, but . . .

(Video playing.)

MR. GRIMSLEY: So that's — I think it's already admitted. That's Plaintiffs' Exhibit 49, at least clips from it.

JA345

I'd now like — see if this works this time. Go to the January 6 Report, which is the findings, Plaintiffs' Exhibit 78.

Finding 315, and this is page 96 of the exhibit:

“At 1:10 p.m. on January 6 President Trump concluded his speech at the Ellipse. By that time, the attack on the U.S. Capitol had already begun, but it was about to get much worse. The President told thousands of people in attendance to march down Pennsylvania Avenue to the Capitol. He told them to fight like hell because if they didn't, they were not going to have a country anymore.”

“Not everyone who left the Ellipse did as the Commander in Chief ordered, but many of them did.

[p.276]

The fighting intensified during the hours that followed.”

I'd like to go back to Exhibit 148, which is compilation of tweets, and see one that we've seen quite a bit already. This is the 2:24 p.m. tweet from January 6.

“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!”

And then I'd like to show Your Honor some additional clips from Plaintiffs' Exhibit 94, which has already been admitted. And some of these we've seen, but not all, I don't think.

(Video playing.)

MR. GRIMSLEY: And I'll show another one.

(Video playing.)

JA346

MR. GRIMSLEY: Now I'd like to move to Plaintiffs' Exhibit 6, and I believe this will be admitted per the October 27 order.

This is a very lengthy video. It's footage from the camera taken on top of the Capitol looking down. I just have a few clips. It's nice to see because it has, I think, the time stamp.

[p.277]

And Mr. Olson reminded me, I did not move to admit Exhibit 100, which was the December 22 Trump speech, so I would like to move to admit that.

THE COURT: Admitted.

(Exhibit 100 was admitted into evidence.)

THE COURT: And then we're on P-6, you said?

MR. GRIMSLEY: Correct, Your Honor.

THE COURT: That's also admitted.

(Exhibit 6 was admitted into evidence.)

MR. GRIMSLEY: And there's no sound here, but you can see the time stamp in the upper left. And it will skip a few as we do the clips, but you'll see it in the time stamp.

So right now this is roughly four minutes after that tweet.

(Video playing.)

MR. GRIMSLEY: Ten minutes, 20 minutes, and a little over 30 minutes.

And then the question I'd like to move on is what President Trump was doing during this time besides putting out some tweets.

And here again, I'll go to the January 6 Report Findings, page 16, Exhibit 148.

THE COURT: I think he said 1—

[p.278]

MR. GRIMSLEY: Yeah, I was mistaken. It's 78, Your Honor.

Finding 55: “Once Trump returned to the White House, he was informed almost immediately that violence and lawlessness had broken out at the Capitol among his supporters.”

Then page 36, Finding 120. Sorry, this one’s a little longer.

“From the outset of the violence and for several hours that followed, people at the Capitol, people inside President Trump’s Administration, elected officials of both parties, members of President Trump’s family, and Fox News commentators sympathetic to President Trump all tried to contact him to urge him to do one singular thing, one thing that all of these people immediately understood was required: Instruct his supporters to stand down and disperse, to leave the Capitol.”

“As the evidence overwhelmingly demonstrates, President Trump specifically and repeatedly refused to do so for multiple hours while the mayhem ensued.”

“Chapter 8 of this report explains in meticulous detail the horrific nature of the violence taking place that was directed at law enforcement

[p.279]

officers at the Capitol and put the lives of American lawmakers at risk. Yet in spite of this, President Trump watched the violence on television from a dining room adjacent to the Oval Office, calling Senators to urge them to help him delay the electoral count, but refusing to supply the specific help that everyone knew was unequivocally required.”

“As this report shows, when Trump finally did make such a statement at 4:17 p.m. after hours of violence, the statement immediately had the expected effect: The

rioters began to disperse immediately and leave the Capitol.”

Go to page 6 —

MR. GESSLER: Your Honor, if I may, I haven’t stood up for a while so I feel as though I need to stand up and make an objection.

I don’t even know where to begin on this one. How do we cross-examine? How do we examine any of this evidence? It contains speculation and opinion in this. This is a finding that is — that characterizes or exemplifies the very worst aspects of the January 6 Commission, so we object to it.

THE COURT: Would you like to just have a continuing objection to the January 6 Report Findings —

MR. GESSLER: Well —

[p.280]

THE COURT: — or do you want to get up and —

MR. GESSLER: Some I feel very strongly about getting up, and this is sort of one of them, Your Honor.

THE COURT: Okay. Well, I’m going to let you make whatever objections you want.

MR. GESSLER: I appreciate that. Thank you.

MR. GRIMSLEY: So we’re going to page 6 of the Findings, Finding 24.

“President Trump had authority and responsibility to direct deployment of the National Guard in the District of Columbia, but never gave any order to deploy the National Guard on January 6 or on any other day, nor did he instruct any federal law enforcement agency to assist.”

Going to page 40 of Exhibit 78, the Findings, going to Finding 134.

“At 3:13 p.m. President Trump sent another tweet, but again declined to tell people to go home. ‘I am asking for everyone at the U.S. Capitol to remain peaceful, no

violence. Remember, we are the party of law and order. Respect the law and our great men and women in blue. Thank you.”

[p.281]

“Almost everyone, including staff in the White House, also found the President’s 2:38 p.m. and 3:15 tweets to be insufficient because they did not instruct the rioters to leave the Capitol. Evidence showed that neither of these tweets had any appreciable impact on the violent rioters, unlike the video message tweet that did not come until 4:17 finally instructing the rioters to leave. Neither the 2:38 nor the 3:13 tweets made any difference.”

And then finally on this, Your Honor, page 100, Finding 331:

“It was not until it was obvious that the riot would fail to stop the certification of the vote that the President finally relented and released a video statement made public at 4:17 p.m.”

And I’d like to show a Truth Social post — I don’t think it’s called a tweet — from two years later that goes to President Trump’s state of mind.

This is a Truth Social post, December 3, 2022. I believe it’s admissible under Your Honor’s 10/27 order, so we would move to admit Plaintiffs’ 74.

THE COURT: Admitted.

(Exhibit 74 was admitted into evidence.)

MR. GRIMSLEY: “So, with the revelation of massive and widespread fraud and deception and working

[p.282]

closely with big tech companies, the DNC and the Democratic Party” — “Democrat Party, do you throw the

Presidential Election Results of 2020 OUT and declare the RIGHTFUL WINNER, or do you have a NEW ELECTION? A Massive Fraud of this type and

magnitude allows for the termination of all rules, regulations, and articles, even those found in the Constitution. Our great ‘founders’ did not want, and would not condone, False and Fraudulent elections!”

And Your Honor, there are some additional findings at some point that we would move into evidence from the January 6 Report, but I don’t want to take up people’s time reading those today.

THE COURT: Okay.

MR. GRIMSLEY: But those are the ones that I did want to present.

THE COURT: Okay. Is that the conclusion of —

MR. GRIMSLEY: It is.

THE COURT: — your presentation today?

MR. GRIMSLEY: It is, Your Honor.

THE COURT: Okay.

MR. OLSON: I have nothing new to present, Your Honor, but I was able to take notes while Mr. Grimsley was talking, and I think we still need to

[p.283]

have P-49 admitted officially.

MR. GRIMSLEY: That’s the Ellipse speech.

MR. OLSON: Ellipse speech. I don’t think — we’ve talked about it, played it, but it wasn’t admitted.

THE COURT: Okay. It’s admitted.

(Exhibit 49 was admitted into evidence.)

MR. OLSON: And then the only other exhibit that I showed in opening that we would like to move for admission is the first portion of P-109. This is the “stand back and stand by” comment that Trump made.

You had ruled the rest of that video clip had your statement that the Trump section was admissible. That’s what we played, and we would move to admit that section of P-109.

THE COURT: That's admitted, but you will at some point need to put — all the exhibits are going to have to be dealt with, but you'll need to make sure that only that clip is submitted —

MR. OLSON: Yes.

THE COURT: — to the Court.

(Exhibit 109 was admitted into evidence.)

MR. OLSON: We will. And, Your Honor, is it your preference that we revise P-49 or we make a new — I'm sorry, P-109 or we make a new exhibit, just

[p.284]

the clip?

THE COURT: I think a revise — when you actually submit P-49 at the end, just have it be what was allowed in.

MR. OLSON: Okay. Thank you, Your Honor. That's all we have.

THE COURT: Okay. So since we have a few extra moments, I think that the — one of — Mr. Gessler, one of the things that you had mentioned at the beginning of the day was that there was the pending question on specific intent, your motion, which I think was largely agreed to by the petitioners with some caveats.

MR. GESSLER: I'm not sure if it was quite a motion, Your Honor.

THE COURT: Yeah.

MR. GESSLER: More like a trial brief.

THE COURT: Right.

MR. GESSLER: But I just wanted to point that out.

THE COURT: Yeah. It's clear that specific intent is going to apply to this case. Exactly how that plays out with the nuances that the petitioners want, something that I will rule on when I make my findings of the facts,

conclusions of law. And I will address your First Amendment arguments regarding

[p.285]

Brandenburg at that time as well.

MR. GESSLER: Okay. Thank you, Your Honor.

THE COURT: Is there anything else we need to address before we stop for the day?

MR. OLSON: Not from petitioners' perspective. Thank you.

MR. GESSLER: More simply, none from us, Your Honor.

THE COURT: Okay. So we will start again at 8:00. Does that work, and is that the plan with your witnesses?

MR. OLSON: Yes, Your Honor. Dr. Simi will be our first witness at 8:00 tomorrow morning.

THE COURT: Okay. And are you thinking, other than Mr. Heaphy, that you will conclude tomorrow?

MR. OLSON: It depends on the brevity of cross, but I think it's possible, but unlikely —

THE COURT: Okay.

MR. OLSON: — I would say.

THE COURT: I just want to make sure that the intervenors are going to be prepared to start whenever it is that the petitioners finish their case absent Mr. Heaphy.

MR. GESSLER: Yeah. We're — Your Honor,

[p.286]

we're anticipating starting Wednesday. So I guess tomorrow's a little bit of a short day, if I remember correctly, until 4:00.

THE COURT: Oh, for Halloween, correct.

MR. GESSLER: Yeah. We probably won't be ready to start tomorrow afternoon if it's done that early, but — but we'll be prepared Monday — Wednesday morning.

JA353

THE COURT: Okay. So we will end at the latest on 4:00 tomorrow. If we finish earlier, then we'll still just go to Wednesday morning, at which point we'll either be finishing petitioners' case or you'll be prepared to start.

MR. GESSLER: Great. And, Your Honor, would it be possible to get a time update, maybe tomorrow morning? No — no rush on that.

THE COURT: Well, I have one, apparently. So the — as we've calculated, the petitioners have used 4 hours and 34 minutes and the intervenors have used 1 hour and 9 minutes.

MR. GESSLER: Okay. Thank you, Your Honor.

THE COURT: And I just remind the parties to tell Collin who is going to be live tomorrow so that security knows.

JA354

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
1437 Bannock Street
Denver, CO 80203

Case Number 2023CV032577, Division/Courtroom 209

CERTIFIED STENOGRAPHER'S TRIAL
TRANSCRIPT
TRIAL DAY 2: October 31, 2023

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAUFER,
KATHI WRIGHT, and CHRISTOPHER CASTILIAN,

Petitioners,

v.

JENA GRISWOLD, in her official capacity as
Colorado Secretary of State, and

DONALD J. TRUMP,

Respondents,

and

COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE, and DONALD J. TRUMP,

Intervenors.

The trial in the above-entitled matter, commenced on
Tuesday, October 31, 2023, at 8:06 a.m., before the
HONORABLE SARAH B. WALLACE, Judge of the
District Court.

JA355

This transcript is a complete transcription of the proceedings that were had in the above-entitled matter on the aforesaid date.

[p.7]

P R O C E E D I N G S

THE COURT: Good morning. We're on the record on Norma Anderson, et al., vs. Jena Griswold and Intervenor Colorado Republican State Central Committee and Donald J. Trump.

May I have entry of appearance — if just one person for each group could make the appearances.

MR. OLSON: Good morning, Your Honor. Eric Olson for petitioners along with Sean Grimsley, Jason Murray, Martha Tierney, Mario Nicolais, and Nikhel Sus.

THE COURT: Perfect. Thank you.

MR. GESSLER: Good morning, Your Honor. Scott Gessler on behalf of President Trump. With me is Geoff Blue, Jacob Roth, Chris Halbohn who's not been admitted yet pro se [sic]. We'll keep him quiet. Mr. Justin North as well.

And I think that's it for our side for the attorneys. Thank you, Your Honor.

THE COURT: There's so many of you, it becomes a memory test.

MS. RASKIN: Here's more for the list. Jane Raskin on behalf of the intervenor, Republican State Committee of Colorado. With me, Mike Melito,

[p.8]

Nathan Moelker, and Bob Kitsmiller.

THE COURT: Great. For some reason, it's Colorado State Central Committee.

MS. RASKIN: State Central Committee. A lot of Cs.

THE COURT: Yeah. That tripped me up as well.

MR. KOTLARCZYK: Good morning, Your Honor. Michael Kotlarczyk from the Attorney General's Office on behalf of Secretary of State Jena Griswold. With me at counsel table is the Deputy Secretary of State, Christopher Beall, and also Jen Sullivan from the Attorney General's Office.

THE COURT: Great. Thank you.

MR. KOTLARCZYK: Thank you.

THE COURT: Are the petitioners ready to proceed?

MR. OLSON: Yes, Your Honor. I do think one preliminary matter about the potential expert from Intervenor Trump. Based on discussion this morning, they've said that they've decided an expert is not available, so they're not going to call an expert — a new expert, yeah.

MR. GESSLER: That's correct, Your Honor. It was a false alarm yesterday. We were not

[p.9]

able to get him.

THE COURT: Okay.

MR. GESSLER: And then also, we are withdrawing one witness.

THE COURT: Okay.

MR. GESSLER: And I think I've notified opposing counsel of that.

THE COURT: Okay.

MR. OLSON: Thank you. We are ready to proceed with testimony. Oh, sorry.

MR. GESSLER: Just one thing.

Your Honor, for clarification of protection order at this point, are we able to reveal the names of witnesses? I know some of them were revealed in opening argument, but I want to just get clarification.

THE COURT: Do the petitioners have a point of view? I think you were mainly concerned about witnesses you were calling.

MR. OLSON: Correct. I guess the question is it going forward, or is it a question of unsealing the stuff that's been filed already?

MR. GESSLER: I've had questions about the names of witnesses. I'd like to be able to reveal them, but I want to be mindful of the protective

[p.10]
order.

THE COURT: Of your own witnesses?

MR. GESSLER: Yes.

MR. OLSON: So our view is what Your Honor said, which was we wanted to make sure that we didn't lose any witnesses before the hearing, which we did.

But now that we're underway in the public proceeding, the names of the witnesses are fine to reveal.

MR. GESSLER: Okay.

THE COURT: Okay. That's fine with the Court as well.

MR. OLSON: Are we ready to start with testimony?

THE COURT: If you are.

MR. OLSON: I am. All right. At this point, the petitioners call Dr. Peter Simi.

THE COURT: Will you raise your right hand, please.

PETER SIMI,

having been first duly sworn/affirmed, was examined and testified as follows:

THE COURT: Great. Just make sure to speak into the microphone, okay?

[p.11]

THE WITNESS: Yes.

JA358

DIRECT EXAMINATION

BY MR. OLSON:

Q. Good morning, Dr. Simi.

A. Good morning.

Q. Could you please introduce yourself and spell your last name?

A. Pete Simi, S-i-m-i.

Q. Dr. Simi, what do you do?

A. I'm a professor of sociology at Chapman University.

Q. Where is Chapman?

A. It's in Southern California.

Q. You're here as an expert witness.

How would you describe your expertise?

A. In short, political violence and political extremism.

Q. How do you know about political violence and political extremism?

A. I've been studying these issues my entire career, 27 years, since 1996.

Q. Do you have any formal training in political violence and political extremism?

A. Yes. I earned a PhD in sociology. That was one of my main emphases in my studies in 2003.

[p.12]

Q. And you said you've been working in this field for about 25, 27 years.

Tell us a little bit about the kind of work you've done over the past two and a half decades.

A. Yeah. I've collected data using a number of different methods to study political extremism and political violence, to include ethnographic fieldwork, interviews with current and former members of extremist groups, and then a variety of different type of archival methods to gather data and information about both political extremism and political violence.

JA359

Q. I want to talk about some of the methodologies you just mentioned. And to help us keep track, I'm going to write them down on the flip chart so we can come back to it a couple times in your testimony.

A. Okay.

Q. And I believe the first kind of methodology you mentioned was fieldwork; is that right?

A. Yes. That's correct.

Q. Okay. What is fieldwork?

A. Fieldwork is a type of method that's employed by a range of different disciplines in the
[p.13]

social sciences and, frankly, outside the social sciences — in the military and business world as well.

But it's a method of gathering information where you spend time with people in their natural environments in order to understand a culture, a community, a group, a set of individuals. Learn from their perspective, learn how they understand the world, learn about their lives in their natural settings.

And so for me that's meant spending lots of time with active members of different types of extremist groups, actually living with families and individuals in some cases attending gatherings and so forth.

Q. When you say "living with families in some instances," tell us a little bit more about that kind of fieldwork.

A. Well, that's sometimes referred to as embedded fieldwork, where you're actually, you know, living with the objects — the subjects of your study. And, you know, for me that meant staying in spare bedrooms or crashing on their living room couch and observing individuals in their daily lives and the other types of activities that they're involved in

[p.14]

beyond, you know, what they do in their home.

Q. And I believe the second kind of methodology you mentioned that you relied on for the past two and a half decades was interviews; is that right?

A. Yes. That's correct.

Q. Okay. Tell us what you mean by interviews.

A. Well, interviews are basically a structured type of conversation where you, you know, sit down with a person and ask, you know, specific questions based on, you know, whatever the focus of your study is. And so for me that meant interviewing current members of extremist groups, but also former members as well.

Q. Okay. What was the third kind of methodology you mentioned?

A. Archival.

Q. Okay. Tell us what archival work is.

A. Well, that's kind of a big bucket. It covers a broad kind of range of — different things would fall under archival research. That would be — you know, if you think about an archive, it's basically just a collection of information.

Sometimes archives are generated for

[p.15]

very specific purposes to allow researchers to conduct, you know, studies of various kind. And other archives are not necessarily generated for that purpose explicitly, but they do provide researchers an opportunity to conduct studies.

So if you think about, for instance, a video archive would be YouTube. And then, of course, there's lots of different historical archives that are available at universities, for example. Social media is a type of archive where you're studying platforms and how people

communicate on platforms. That would be a kind of archive. Websites are a kind of archive, newspapers are a kind of archive.

So it does cover — a broad range of things would fall under that.

Q. Great. Thanks, Dr. Simi.

And if I could just make a request for the court reporter's benefit: If we could slow down a little bit when we're talking, I'm sure —

A. Excuse me. Sorry.

Q. Now, are — these three kinds of methodologies that we've talked about, are those standard methodologies used in sociology?

A. Very much so.

Q. How do you know that?

[p.16]

A. Well, working in the field for 27 years, part of that is — that's part of my job. Part of what you do in terms of presenting your research at professional conferences, that's one of the things that's discussed is research methodology. When you submit your research for peer review in terms of academic journal articles, research methods are certainly scrutinized and reviewed.

And then I teach both undergraduate research methods now at Chapman, but previously at the University of Nebraska I taught PhD-level research methods.

Q. Is your teaching part of the course, or is that a stand-alone course?

A. Okay. Research methods is a stand-alone course.

Q. Okay. And are the methods that we're talking about today the methods you teach in your research methods course?

A. Yes, it is.

JA362

Q. Okay. Now, I want to talk a little bit about some of your experience with each of these methodologies.

And I want to talk first generally, and then we'll talk specifically about the groups involved

[p.17]

in the January 6 attack, okay?

A. Okay. Sure.

Q. How many — well, how much fieldwork have you done generally in your career to study extremist groups?

A. Thousands of hours, literally.

Q. Okay. And then have you done fieldwork — well, I know I'm supposed to talk into the microphone. Let me ask the question.

Have you done fieldwork — well, let me ask a threshold question.

What groups have you identified as playing a leading role in the January 6 attack?

A. The Proud Boys, Three Percenters, and Oath Keepers.

Q. Okay. Have you also done fieldwork with those groups?

A. Yes, I have.

Q. Okay. So if it's okay with you, Dr. Simi, I'll just write "J6," and put all three to show you're familiar with all the groups in this case.

A. Yeah. Sure. That's fine.

THE COURT: I'm sorry. What does the J stand for?

MR. OLSON: The groups involved in

[p.18]

January 6.

THE COURT: Oh, duh.

MR. OLSON: Sorry. Trying to fit it all on one chart, Your Honor.

JA363

Q. (By Mr. Olson) For interviews, how many interviews of right-wing extremists have you done in your career?

A. 217.

Q. And how many interviews have you done with members of the Oath Keepers, Proud Boys, and Three Percenters?

A. 14.

Q. And what about archival research? How would you describe the amount of archival research you've done in your career?

A. It's a little trickier than the fieldwork where you can count hours, or the interviews you can count the number of interviews.

But, you know, you can look at it in terms of time spent, you can look at it in terms of the number of different archives, number of websites, social media platforms. But given that's really where I started in 1996 — was all online and doing archival research online. It would definitely be in the thousands.

[p.19]

Q. Okay. And have you done archival research involving the three groups involved in January 6?

A. Yes, I have.

Q. Okay. Now, Dr. Simi, I want to talk a little bit about your work in this case.

How did the archival material available for your work here compare to the kind of archival material you typically rely on?

A. It's very consistent.

Q. How is that?

A. Similar types of materials. It was social media materials, court documents, scholarship — you know, existing scholarship, folks who are also studying the same

JA364

topics, looking at their findings — government reports. You know, just a variety of different kind of materials that I've used over the years were very comparable to what was done in this case.

Q. And you've used all the three methodologies for your work in this case; is that right?

A. Yes. That's correct.

Q. Is it common for work in sociology to rely on all three of these methodologies?

[p.20]

A. Well, this would be referred to as a multimethod approach. And multimethod approaches are often referred to as kind of gold standard. Certainly to conduct research in an accurate manner doesn't require using all three. You could conduct a very legitimate study with any one or some combination, but using all three certainly would be, like I said, the gold standard.

Q. Dr. Simi, have you testified as an expert before?

A. Yes, I have.

Q. Tell us a little bit about that.

A. I testified in the Sines v. Kessler civil case that was related to the Unite the Right rally in Charlottesville, Virginia.

As you may recall, that was a rally that turned deadly violent in 2017. And I testified on behalf of the plaintiffs in that case as it relates to the way in which the Unite the Right rally was organized and the central role that violence played in how the event was organized.

Q. Have you worked on other cases as an expert?

A. Yes, I have.

Q. Tell us a little bit about that.

[p.21]

A. I testified in a murder case in Portland, Oregon. I was asked by the Multnomah County District Attorney's

Office to review some materials in terms of statements in posts and so forth that the defendant who had been charged in this case had made. And the district attorney's office asked for me to offer an opinion as to whether I felt those statements were consistent with white supremacist extremist beliefs.

Q. Have you ever worked on behalf of defendants in cases?

A. Yes, I have. Many times. I've worked with public defender offices, for example, across the country.

Q. Now, have you published on extremist political violence?

A. Yes, I have.

Q. Tell us about some of your publications.

A. Well, I've written a number of articles, more than peer-reviewed articles or book chapters and edited volumes that address different facets of political violence and extremism. And I've published — co-authored two books on the topic.

Q. Tell us about the two books.

A. Okay. The first book was "America's
[p.22]

Swastika: Inside the White Power Movement's Hidden Spaces of Hate." That relied on all three of the methods that we were just discussing — fieldwork and interviews and archival research. And the basic focus of the book was looking at the type of cultural and social spaces that are important to white supremacist extremists in terms of sustaining their beliefs and the central role violence plays in that culture.

And the second book that's due to be published in the next month or so, I guess, is actually looking at the forces or the influences that ultimately led to the attack on the Capitol on January 6.

JA366

Q. What's your new book called?

A. "Out of Hiding."

Q. Why did you choose that title?

A. Well, we look at the way in which the — starting with the election of Barack Obama in 2008 and a series of other developments following that, how that led to a substantial reemergence of far-right extremists.

Q. And the "Out of Hiding" refers to sort of coming out of hiding?

A. Yes. Exactly.

Q. Okay.

[p.23]

A. Yep.

Q. Now, on the screen I've put Plaintiffs 161, which is a copy of your CV. And I don't want to go into everything in this.

MR. OLSON: And really, I welcome guidance from Your Honor in terms of how you want to do this.

But would it be easiest to move it to a demonstrative exhibit so you have an understanding of his expertise, Your Honor? Or we can go through a couple of highlights.

What would be most preferable to you?

THE COURT: Why don't we just walk through his qualifications. The highlights would be fine.

MR. OLSON: Okay. Great.

Q. (By Mr. Olson) So, Dr. Simi, if we — if we scroll down we see your education, and we've already talked about that.

Can you tell us a little bit about some of the trainings that you've given?

A. Yes. I've done a number of trainings for law enforcement, the legal field, educators over the years in terms of law enforcement. I've provided training to the Federal Bureau of Investigation,

[p.24]

Department of Homeland Security, Federal Bureau of Prisons, Department of Justice, and a number of state-level and local-level law enforcement agencies across the country. I've done trainings for legal organizations like the American Bar Association, and educational institutions across country.

Q. And have you received some grants and fellowships — some grants from federal government agencies to study political extremism?

A. Yes, I have.

Q. Can you tell us — it's on the screen right now.

Can you tell us a couple examples of those?

A. Sure. The National Institute of Justice, which is housed within the Department of Justice, Department of Homeland Security.

Q. What kind of trainings do you provide — I'm sorry. What kind of work do you do under those grants?

A. Sure. It's basic research; that is, research intended to look at different questions as it relates to the causes and consequences of political extremism and political violence, looking at different

[p.25]

factors of the individual group. And on a broader societal level, in terms of what kinds of things influence these issues and what kinds of measures seem to be most effective in terms of countering them.

Q. And here on the screen I have your expert legal consultation.

Is this a list of the cases where you've been retained as an expert, this page and the next?

A. Yep. It appears to be.

Q. Okay. And then did you provide testimony to the January 6 Committee?

A. Yes, I did.

Q. Why was that?

A. I was invited to provide written testimony.

Q. Fair to say, Dr. Simi, you've been working on issues of right-wing extremism well before we've been working together on this case?

A. Yes, I have. My entire career basically.

Q. Okay. Did you work with us to prepare a demonstrative exhibit to summarize your work in this case?

A. Yes, I did.

Q. Okay. I'm having a little bit of

[p.26]

computer issue. Let me see if I can bring it up on the right screen.

THE COURT: While you're doing that, I just have a quick question.

THE WITNESS: Yes.

THE COURT: You said that your book, "Coming [sic] Out of Hiding" is from 2008 forward.

When did — kind of culminating on January 6; is that correct?

THE WITNESS: That's correct, Your Honor.

THE COURT: Did you start working on it before January?

THE WITNESS: We did. Yeah, we did. That happened while we were working on it, which obviously added an additional item that — certainly, an additional development that we needed to address because it was a new facet that was a substantial, important historical event that was very relevant to what we were already analyzing and discussing.

THE COURT: So that was a work in progress, and then that book becomes a new chapter or chapters?

JA369

THE WITNESS: Absolutely.

THE COURT: Thank you.

[p.27]

Q. (By Mr. Olson) On that, Dr. Simi, did you express any concerns about the possibilities of violence related to the — after the 2020 election, before it happened?

A. Yes, I did.

Q. Tell us a little bit about that.

A. Well, in the summer of 2020, I thought it was pretty clear that depending on the outcome of the election there was a lot of anger and resentment and mobilization that was really starting to increase among far-right extremists. And that, should Donald Trump not be reelected, I thought it was pretty clear that far-right extremists would respond with political violence.

MR. OLSON: I think I've got the tech issues worked out.

Q. (By Mr. Olson) So this is the demonstrative that we worked together to prepare for your summary?

A. Yes, it is.

Q. Okay. Let's go to the first page. And tell us, what topic did you address in your work in this case?

A. Looking at the kind of defining characteristics of far-right extremism, including the

[p.28]

central aspects of their communication style; the influence that Donald Trump and relationship Donald Trump has developed with far-right extremists that includes certain communication strategies; the motives for those who attacked the Capitol on January; and then Donald Trump's role in the attack on the Capitol.

Q. How does your expertise over the past years help you address these topics?

A. Well, when you've spent as much time as I have, you know, directly observing, directly engaging, interviewing active and formerly active members of far-right extremist groups and that those aren't, you know, affiliated with specific groups as well, understanding that culture provides lots of different types of insight about things like motivations.

And then the archival research is really important as well because that also provides certain insight about people's perspectives, motivations, communication strategies, and so forth.

Q. You talked about communication strategies.

Can you give us a couple examples of things that are particularly unique to right-wing extremist communication just to help us understand

[p.29]

what you mean by that?

A. Sure. You know, in terms of this case, for example 1776, is very relevant.

To an outsider, that might just sound like a number or a fairly innocuous historical reference to the, you know, Revolutionary War. But to insiders within far-right extremist culture, that has a very specific connotation and relationship to violence, and it really is a direct call to violence.

Q. Tell us a little bit about the materials that you reviewed in this case to address these four issues.

THE COURT: Before you go there, I just have one follow-up question. Sorry.

MR. OLSON: No, please. Go ahead.

THE COURT: When you were talking about the fieldwork, and you said that sometimes you — I heard you say you embed yourself? What do you mean? How is that different than an interview? And does the group that

JA371

you're embedding yourself, like, do they know that you're embedding yourself, or are you undercover?

I'm just trying to understand what the distinction is between fieldwork and the interviews.

THE WITNESS: Sure. It's a great

[p.30]

question, Your Honor.

The fieldwork would involve a more immersive experience from a research standpoint. So it would include a lot of observation. It would include informal interviews, which would be much more conversational in style.

When you're embedded, depending on the approval you receive from what's called the Institutional Review Board — which academic research is governed under federal regulations under institutional review boards. There is a way to do that where you don't have to obtain informed consent and you could do it — you could be embedded surreptitiously without your participants' or subjects' knowledge.

But the fieldwork I did in terms — certainly in terms of the folks that I lived with, they knew that I was doing research. Some of the larger gatherings that I attended as part of fieldwork, people wouldn't necessarily know that I was a researcher, and they might assume that I was one of them. And then I essentially would notify people as my relationship with them kind of developed.

And so the main distinction, I would say, between the interviews is they're much more

[p.31]

structured than compared to the fieldwork, which is, again, intended to be a much more naturalistic way of gathering information, whereas the interviews are, while

helpful and certainly provide a lot of insight, are also pretty structured and formalized.

THE COURT: But for the most part, you're not going — you're not becoming a member of the group or pretending to be a member of the group while you're doing research?

THE WITNESS: I've never done that, Your Honor.

THE COURT: Okay. Thank you.

Q. (By Mr. Olson) And, Dr. Simi, can you just give us a couple real-life examples of — you mentioned sleeping on someone's couch or their spare bedroom.

How do those come to be?

A. Well, it's a pretty kind of involved process you might say in terms of gaining people's trust and building rapport with individuals, spending time with them, to where they feel comfortable with inviting you to do that.

Now, sometimes it ends up happening much quicker than I expected.

Contacting folks, you know, when I first

[p.32]

started, this was in the early stage of the internet, so P.O. boxes were still kind of a thing. So my first contacts actually, you know, emerged through letters that I wrote to P.O. boxes, and I was able to meet with individuals in person. And then from there, develop relationships where they were comfortable enough with inviting me into their homes.

Q. And help us understand how sort of someone who is a member of a right-wing extremist group would say to a university professor, "Why don't you come stay in my bedroom."

How does that come to be?

A. It doesn't always quite happen like that. I've had many doors slammed in my face. I've certainly been

JA373

asked in not-so-polite terms to get lost. So that certainly happens.

But for some, they see it, I think, for a lot of different reasons. First, sometimes people enjoy being the focus of attention, you know. So having a researcher say that, you know, they're interested in you and want to spend time with you, for some people they find that satisfying on some level.

For some they see it as an opportunity to get their message out, to recruit potentially the — if not the researcher, then at least get their

[p.33]

message out there and try and, you know, shape things and influence things more broadly.

So I think there's a number of different motives that, you know, lead to people making those kind of invitations.

Q. And I want to be clear. We've talked about sort of your work with fieldwork and interviews with the groups involved in Jan 6.

Did that work happen before or after January 6, 2021?

A. Before.

Q. Okay. And did you rely on all three of these methodologies in your work in this case?

A. Yes, I did.

Q. Okay. And are these the sort of methods and materials that experts in your field reasonably rely on in forming opinions upon the subject in political extremism?

A. Yes, it is.

Q. Okay. Based on your scholarship, your prior work, and your review of materials in this case, are you familiar with events of and leading up to January, those who participated in the attack, and Mr. Trump's role in those events?

A. Yes, I am.

[p.34]

MR. OLSON: Your Honor, at this point in time, we'd tender Dr. Simi as an expert on political extremism, including how extremists communicate and how the events leading up to and including the January attack relate to longstanding patterns of behavior and communication by political extremists.

MR. GESSLER: We'll renew our 702 objections, Your Honor.

THE COURT: Okay. Professor Simi will be admitted as an expert on political extremism, excluding [sic] how extremists communicates, and his interpretation of January 6 vis-a-vis his expertise in extremism and extremism communications.

MR. OLSON: Thank you very much, Your Honor.

Q. (By Mr. Olson) Let's turn to some high-level findings, and then we'll get more granular as our conversation continues, okay, Dr. Simi?

A. Sounds good.

Q. So on the screen we have pictures of the three groups we've talked about. But let's start with a basic definition.

What is far-right extremism?

A. The best way to think about far-right extremism is that it's defined by some core

[p.35]

characteristics. And let me first say, in terms of thinking about it and visualizing it, is if you think about a constellation in the sky, if you think about a broad-based network, that's what we're talking about with far-right extremism.

There's individual appearance, there's groups and organizations. These are all part of this constellation.

JA375

And it's pretty far-ranging. It includes, you know, a disparate set of elements.

But then there are these core characteristics that cut across certain beliefs, practices, and then communication strategies.

Q. Let's talk about some of these core characteristics.

What are some of the core characteristics about beliefs in far-right extremism?

A. Several things, really.

Heavy reliance on conspiracy theory. Explaining events, situations as the result of kind of shadowy forces that are on scene. And those, you know, specific types of conspiracy theories are pretty far-ranging that are kind of adhered to among far-right extremists, but the use of conspiracy theory is very central.

A strong distinction between us and

[p.36]

them. And, of course, people, you know, in general make distinctions between us and them, and oftentimes it's quite innocuous. If you think about, for instance, sports fans, you know, make distinctions — Packers fans or Vikings fans and so forth. Pretty innocuous for the most part.

But what we're talking about here in terms of distinctions between us and them for far-right extremists is that "them" are really viewed as enemies, as representing existential threat, and are often described in very dehumanizing terms — degenerates, scum, infestation. These kind of dehumanizing terms are often used among far-right extremists to describe the — you know, the people that they believe are opponents and that represent these threats.

Another central kind of tenet is really a kind of antidemocratic ethos that really, you know, moves in the

direction of supporting authoritarian impulses, authoritarian beliefs, authoritarian leaders/structures of various sorts.

So I would say those are kind of three defining aspects of beliefs.

Q. Next on your slide is “Practices Including Violence.”

[p.37]

Talk to us about the role that violence plays in far-right extremism.

A. Because, in part, of what I just mentioned about beliefs, the idea that there’s these existential threats out there that have been dehumanized, violence is viewed as a necessary tactic to achieve political goals.

Violence is glamorized and glorified in many ways, viewed in a kind of legitimized fashion, seen as a form of self-defense to fend off these existential threats.

So it is, again, very central to — it’s certainly not the only practice, but it is a central practice.

Q. And the last core characteristic is communication strategies.

Tell us a little bit about communication strategies you’ve observed in your work.

A. Yeah. So some of the things in terms of communication strategies that I’ve observed, but other scholars in the field have also observed as it relates to far-right extremism, is a reliance on doublespeak, which is a specific kind of deceptive style of communication that often involves using words that have multiple meanings — one meaning for insiders,

[p.38]

another meaning, potentially, for outsiders. Using language with a so-called wink and a nod, you might say.

JA377

Also making substantial kind of distinctions between front- and backstage behaviors. So presenting oneself or a group in a particular way that is more favorable on the front stage, and then being much more open about things like the use of violence on the backstage.

And the same would apply to the doublespeak in terms of its relationship to violence, that it's a technique, a communication strategy that's used to promote violence but in a kind of deceptive way.

Q. And let me stop you right there, Dr. Simi.

Where would the 1776 example that you talked to us about earlier fit in to this vocabulary you're talking about right now?

A. Yeah. That would be a type of doublespeak, because, again, it would have a certain meaning to outsiders who aren't familiar with the kind of inside culture. But to insiders within the culture, they would understand and interpret that word differently.

[p.39]

Q. Do all far-right extremists share these beliefs, practices, and communication strategies?

A. These are core characteristics that cut across the culture. But we are dealing with, you know, a large culture that has different elements. And so, you know, you're going to see varying degrees. But these characteristics do have a high degree of salience that does cut across culture.

Q. You've selected three groups to highlight here on this slide.

Can you tell us a little about each of these groups?

A. Sure. The first group to my left is the Proud Boys. And they were founded in 2016 by Gavin McInnes, more recently been led by Enrique Tarrio. They were really founded, according to McInnes's own words, as a violent

street gang with a political ideology that is referred to as Western chauvinism.

Q. I'm sorry. You said Western —

A. Chauvinism.

Q. Okay. I'm sorry.

Tell us a little bit more about the Proud Boys.

A. Sure. So the political violence that they gravitate towards is, you know, directed to

[p.40]

people they believe to be political opponents. And the emphasis or the kind of central nature of violence for the Proud Boys is kind of best you might say exemplified by their mantra, "Fuck around and find out."

THE WITNESS: Excuse my language, Your Honor.

A. And that's a commonly used mantra. In fact, you actually see it in that image there in terms of the acronym. But that's really kind of an — in a nutshell, how they view the important use of violence to achieve their goals.

Q. (By Mr. Olson) Tell us about the Oath Keepers.

A. Sure. They were founded in 2009 by Stewart Rhodes, who is a Yale Law School graduate. And the Oath Keepers were a part of the second wave of the antigovernment militia movement that emerged shortly after Barack Obama's election in 2008.

The first wave was, of course, during the 1990s and ultimately culminated in the Oklahoma City bombing in 1995. And then the movement was — kind of somewhat dissipated for a period of time, but it then had a second wave that reemerged in 2008.

And so the Oath Keepers were part of

[p.41]

that. They focus a lot on the idea of law enforcement and military, maintaining their oath that — to maintain the

JA379

Constitution, which they believe the government has become tyrannical and is violating the Constitution. And they adhere to lots of different types of conspiracy theories about the government putting people in detention camps and things of that nature.

So there's a high degree of kind of paranoia among the Oath Keepers. They've been involved in various armed standoffs, like the Bundy ranch standoff in 2014 in Nevada, and the Malheur Wildlife Refuge in Oregon, the standoff that occurred there in 2016, and several others.

So that's kind of the Oath Keepers in a nutshell.

Q. What about the Three Percenters?

A. They were founded just a year before the Oath Keepers, so in 2008. So they were also part of the second wave of the antigovernment militia movement that emerged at that time. And the Three Percenters were founded by Mike Vanderboegh, who actually had been involved in the first wave of the militia movement in the 1990s.

And they developed kind of a more

[p.42]

decentralized set of — different types of Three Percenter groups across the country. They've been involved in actual plots — domestic terror plots on multiple occasions. And their name itself refers to the idea — the actually inaccurate idea that only 3 percent of the colonists fought against the British in the American Revolution.

And the reason why that's important for them is because they believe they're this same kind of vanguard that's now fighting against the U.S. government that's become tyrannical.

Q. Let's turn to the next slide.

JA380

And tell us — we've talked generally about the role violence plays in far-right extremism.

But tell us why you chose pictures of the Unite the Right rally to show this violence and the role that violence plays more generally.

A. Well, it was a very important event among far-right extremists. Of course, the name itself indicates in part some of their efforts in terms of uniting the right, and the fact that violence was always intended to be part of this event.

When you looked at the social media platforms where Unite the Right was organized, Discord and other platforms, there were discussions, for

[p.43]

example, of using automobiles to attack individuals that were counterprotester, which obviously ultimately happened on the second day.

Q. Excuse me. Is that what we see on the right?

A. Yes. Yes. So there you see James Fields' car mowing into this group of counterprotesters in the afternoon after the state of emergency had been called and things were starting to disperse.

And, of course, Heather Heyer was murdered in this car attack. And a number of other individuals — you see there Marcus Martin in mid-air — he was permanently disabled from his being struck by the car, and — as were a number of other individuals seriously injured.

So we have the car attack, and then to the left, you see the way in which a flagpole is being used to bludgeon individuals they perceive as political opponents.

That was also discussed ahead of time. Individuals on Discord platform and other platforms were talking about what types of instruments they could use as weapons and

the importance of framing it as self-defense, and also the importance of framing it

[p.44]

as that we're just joking about committing violence.

Q. I want to talk a little bit more about this framing of self-defense.

Tell us a little bit more about that.

A. Well, given that within society we generally recognize the right that individuals have to defend themselves in certain situations where they may be harmed or their life is being threatened, any time an individual or group can frame their violence as self-defense, it offers a degree of legitimacy. And that is true of individuals and it's true of groups.

It's also a part of this worldview that they have that they really are under threat, under attack from a variety of forces. And so, therefore, any time they engage in violence, from their perspective, it becomes kind of seen as a type of self-defense.

Q. And you mentioned some of the humor, I believe, when you answered just now. Let's turn to the next slide.

And tell us what you see on the left. Why did you choose to have this quote from Robert Ray on the left?

A. So Robert Ray was one of the central organizers of the Unite the Right rally. And here he

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is actually explaining. And this is where archival material becomes really useful and important from a research standpoint because in this quote he's explaining the role or the function in terms of how they use humor to essentially promote violence, but do it in a way that is not always obvious. To keep people off balance in terms of not knowing whether their calls for violence are to be taken seriously or not.

They know as insiders that the calls are meant to be taken seriously, but they understand that by framing it as humor, outsiders may not always be able to discern the difference.

Q. And one more question on the violence and far-right extremism.

Does everyone attracted to far-right extremism engage in violence?

A. No. No. Not at all. There's, I think — you know, we can talk about different roles that individuals have in terms of within this culture as it relates to violence.

One are violence players. That is, these are individuals who really help orchestrate, plot violence, but aren't directly involved in it themselves. Stewart Rhodes, Enrique Tarrio would be

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current examples that fit that mold.

Then you have your violent implementers. These are individuals who may help in the planning or may not help in the planning, but their primary kind of role is to actually execute or implement the violence. These individuals often come prepared to commit violence. They may have weapons of various sorts or other instruments that are helpful for them in terms of trying to complete their violent acts.

Then you have other folks that in some situations, they may be open to committing violence, but they're not involved in the planning, and they aren't necessarily, you know, intending to commit violence at the outset. But given a certain situation, they might be open to it or certainly at least wouldn't necessarily prevent violence from occurring.

And then you have kind of a fourth bucket of folks that are kind of sympathetic bystanders you might say. And

these are folks who aren't planning. You know, they're not, you know, engaging in the violence, but they may, you know, more indirectly, in more subtle ways support the violence.

Q. And on the left we see a picture of a person attacking wearing a helmet and goggles.

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Is that an example — like what category of — would you put someone like that in?

A. Without — I would say probably a violence implementer.

Q. Why is that?

A. Well, they've come prepared for violence in terms of having the goggles and the headgear. And then they're, you know, using an instrument that's meant to be, you know, for displaying a symbol. They've turned that into a weapon.

And, again, based on what we know about how Unite the Right was planned and the directives that were discussed in great length about how to use things like flagpoles as weapons, I think that certainly we could, you know, infer that this person came prepared to use their flagpole in that respect.

Q. Okay. Let's go to the communication style. And on the right we have a video of Nick Fuentes.

Who is Nick Fuentes?

A. In short, he is a white supremacist leader, quite influential among folks who follow him. He was present at the attack on the Capitol, January 6. He was present at Unite the Right rally. He has substantial presence in terms of social media

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platforms as well as offline. And yeah, that's Fuentes.

Q. And we'll play the video.

MR. OLSON: But just to make sure we're doing housekeeping correctly, this is P-120, which is admissible, but hasn't yet been admitted under the Court's October 27 order.

So I'll go ahead and play the video.

THE COURT: And is it — is he part of one of the three groups, or is he out on his own?

THE WITNESS: No. He's not involved in those three groups.

THE COURT: Okay. And what — you said it was which video?

MR. OLSON: P-120.

Can I play the video, Your Honor?

(Video was played.)

THE COURT: Could you actually replay it a little louder?

MR. OLSON: Yes.

(Video was played.)

Q. (By Mr. Olson) So, Dr. Simi, why did you include this video of Nick Fuentes?

A. It's an illustration of how the doublespeak works in real time where you have both

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advocacy and then — you know, part of doublespeak is about developing plausible deniability where you insert certain aspects in terms of the communication that allows you then to say after the fact, "Well, I didn't mean it." Or it gives you some type of kind of built-in excuse, you might say, built-in rationale for why you shouldn't be taken in terms of saying what you said as a promotion of violence.

So this really kind of exemplifies that style of communication. And I think it's important to recognize that among far-right extremist leaders like Nick Fuentes,

you're not going to see very often just completely open promotions of violence.

Oftentimes, there's these efforts to build in the plausible deniability so that it's not obvious, and a person can't be — or it's more difficult to hold a person criminally or civilly liable for promoting violence.

So this is, you know, very consistent with what we see among far-right extremists more broadly.

Q. To make sure we understand exactly what you mean, talk us through the specific things Mr. Fuentes did in this video that is that doublespeak.

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A. Yeah. Do you want to replay it one more time?

Q. Sure.

(Video was played.)

A. Okay. Stop it. So right there —

(Video was played.)

A. So. Right. The first statement is, you know, killing state legislators. We've got him saying, "What else are you going to do?" And then we get the negation, "but I'm not suggesting that." But then, "What else can you do, right?"

So it's kind of a teeter-totter back and forth in terms of promoting, bringing it back, and then still promoting. And so that's — that's the strategy.

Q. (By Mr. Olson) Are these techniques unique to far-right extremists?

A. Doublespeak and front- and backstage behavior, these are common aspects of human behavior more broadly.

All of us, I would assume, in this room at some point in our lives have used some form of deceptive language, have used some types of doublespeak. We all present ourselves differently on the front stage.

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If you think about a job interview, for example, you're going to present yourself in one fashion. And then on the backstage when we're in the privacy of our home, we might engage differently. So these are very common things.

What's distinctive about what we're talking about here today is that the front- and backstage and the doublespeak are connected to violence and the use of violence. So that's what distinguishes far-right extremists in these respects as it relates to these communication strategies.

Q. How do you know these communication strategies work?

A. Well, that comes, again, from the data collection. That comes from the fieldwork and having the opportunities to observe the culture and how it operates. That comes from interviewing active members of these groups and formerly active members of these groups and having them discuss these strategies and how things are structured in terms of within the culture.

And that comes from the archival material. I mean, this quote here from Robert Ray is — again, it's an important example of what can be learned from archival material in terms of, you know,

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some of these issues.

Q. What about instances where violence occurs and then there's discussion of violence after the violence has occurred? Have you looked at that in your work?

A. I'm sorry. Could you repeat the question?

Q. Yeah. What about when violence occurs and then there's communication after the violence? Did you look at that in your work in this case?

A. Yes.

Q. Okay. Tell us what you learned about these communications strategies from looking at what people say after violence occurs.

A. Well, you're going to get certain kinds of promotions, certain kinds of endorsements. But, again, it's not always going to be completely transparent in the endorsements for public relations purposes, for, you know, in particular. But certainly, the endorsements afterwards in terms of supporting violence is an important part of reinforcing kind of the cultural — acceptable role violence plays within the culture.

Q. What about condemnation after; is that an important factor? After the condemnation, is that

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something you study?

A. Yeah. When you have an absence of condemnation, that then can be interpreted — and often is interpreted among far-right extremists — as essentially a type of endorsement, that is, an endorsement by omission.

Q. And how are you confident that the audiences understand these speakers' messages when they use this communication style?

A. 27 years of gathering data, spending thousands of hours in the field talking with individuals immersed in this culture, talking with individuals who used to be immersed in this culture and aren't anymore, going through the volume of archival materials. You know, I feel very confident that these strategies are widely understood. Individuals indicate this.

And other scholarship finds similar things, so there's consistency in what I've found with other scholars who've also studied this issue.

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Q. In your report you talk about repeat interactions between a speaker and the audience.

Does repeat interactions influence your conclusion that these communication styles are effective?

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A. Yes. Absolutely. Again, that's part of kind of this cultural immersion. As people become more immersed within a cultural environment — and that would be true of any culture, really. The more repeated interactions between a speaker and an audience, the more understanding develops, the more people begin to be able to interpret contextual cues which are an important part of what we're talking about here. Context is very relevant in terms of understanding communication.

And so the more immersed you are within a culture, the more able you are to interpret context.

Q. Talk to us about your earlier example of 1776 through the lens of this immersed in culture and repeat interactions.

What did you see in your study?

A. Well, for individuals that, again, are immersed in the culture, then you're going to over time start to develop an understanding of a term like "1776" and how it becomes a call for violence. And so as people interact both online and offline and are exposed to the messaging, then that's where the familiarity develops.

Q. Tell us — I think you said this already, but just to make sure we're clear: Based on

[p.55]

your work, what does 1776 mean among far-right extremists?

A. It's a violent call for a revolution.

Q. Okay. Did you see examples of 1776 being used as a violent call for revolution leading up to it on January 6?

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A. I saw the speeches. There's a document that the Proud Boys acquired, "1776 Returns," which was basically a blueprint for attacking the Capitol.

So yes, there were several aspects to 1776 in my opinion was being used as a call for violence.

Q. What is — you talked about a document, "1776 Returns."

Tell us a little bit more about that document.

A. Well, it's a document that Enrique Tarrio acquired through an associate. And the document was — like I said, it was a blueprint. It had logistics in terms of how to go about attacking the Capitol. It had scenarios, you know, vantage points in terms of different location spots, vulnerabilities, and so forth.

So it was, you know, a recipe of sorts, you might say.

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Q. Now I want to turn from far-right extremists generally and focus on their relationship and communication with Donald Trump.

Can you describe these — oh, sorry, I'm getting ahead of myself — the relationship between Donald Trump and far-right extremists?

A. Well, in my years of studying this — and, again, this is confirmed among other scholars — far-right extremists generally would perceive national political leaders with a lot of skepticism and cynicism because of their view of the government being basically corrupt and so forth.

So the relationship that developed between Donald Trump and far-right extremists really, in many respects, is somewhat unprecedented, certainly at least in recent history, in that far-right extremists really were galvanized by his candidacy starting in 2015. And a relationship really emerged between Donald Trump and far-right extremists, with far-right extremists really

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seeing him as speaking their language and, you know, really addressing many of their key grievances.

Q. So on the screen we have an excerpt from Donald Trump's campaign launch speech in 2015.

Tell us why you chose to highlight this
[p.57]

portion of Donald Trump's 2015 speech.

A. Yes. And if I may just very briefly.

Even before 2015, you know, Donald Trump was promoting — you know, one of the kind of leading figures for promoting birther as the challenging — conspiracy theory challenging Barack Obama's legitimacy to serve as President.

And that put him in the orbit of folks like Alex Jones, you know, far-right media influencer. And so that was really the beginning.

And then when he announced his candidacy to run for President there in June of 2015 and used this language, that was a real kind of clarion call for far-right extremists, that this is somebody we want to pay attention to.

And you can see here in the quote referring to when Mexico sends its people, "They're sending people . . . They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."

And using terms like "they're rapists," that phrase, that would be the kind of conversations the far-right extremists have and the kind of terminology they use both on- and offline.

So there was a real kind of alignment in
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terms of language with what they heard in his announcement speech and, you know, the things that are important to them.

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Q. Is calling people from Mexico — claiming they're bringing drugs, crime, and that they're rapists — is that consistent with the Western chauvinism —

A. Absolutely.

Q. — belief structure you mentioned earlier?

A. Yeah. Absolutely.

Q. Okay. Tell us a little bit about what Western chauvinism is.

A. Well, Western chauvinism is a way of claiming that Western civilization is basically superior and that other non-Western cultures and civilizations are deficient. And they use terms like, you know, "West is right" and so forth to kind of underscore this point.

And so it's — that's, you know, Western chauvinism in a nutshell.

Q. And here Donald Trump ends this quote by saying "Some, I assume, are good people."

Why doesn't that sort of undo the earlier language?

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A. Well, this is — we get back to what we were discussing earlier in terms of plausible deniability. So you get this kind of negation that's inserted after using this inflammatory language. And that then provides the speaker with "Well, I didn't say 'all.'"

But for far-right extremists, they hear the rapist part. They hear that language, and so consistent with the kind of conversations they're having, as I mentioned, and understand that the negation is necessary. They understand because this is how they communicate amongst themselves as well.

And their own leaders use and establish plausible deniability, so they understand that a national, you know, individual who is running for the office of the presidency is also going to need to establish plausible deniability.

Q. Now, I want to turn to a specific aspect of Donald Trump's communications over the years, and that's the Stop the Steal movement and Trump's role in it.

Could you describe the movement generally to the Court?

A. Yeah. It's, you know, the conspiracy theory that focuses on different aspects of how the

[p.60]

2020 presidential election was corrupt, stolen, fraudulent, you know, marked by, you know, substantial amount of fraud, and, you know, a variety of different kind of aspects of that conspiracy.

Q. And you've chosen a couple of tweets here.

Before I talk about the tweets, did Donald Trump start the Stop the Steal language questioning elections in 2020, or did it start before then?

A. No, it really predates 2020.

Q. Okay.

A. Yes.

Q. What do we see on the screen here?

A. Yeah, so you see here the upper tweet there from 2012 where Donald Trump is referring to the Romney-Obama election and that there were election machines that switched the votes from Romney to Obama. And "Don't let your vote be stolen." So, again, using that language, that verbiage about, you know, elections being stolen.

And then below that, you see from midterms in 2018 references to, you know, election corruption. "We must protect our democracy" because elections are being stolen, so . . .

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Q. What relationship did you find between the far-right extremists and the Stop the Steal movement?

A. A lot of overlap really. Starting at the beginning when it really starts to emerge in full force in 2020, you see one of the first rallies, for example, in Arizona. Alex Jones is present there as a speaker. Armed antigovernment militia types are there at that rally in Arizona, and then that continues to be the case.

As more and more Stop the Steal rallies, you know, transpired during that time, you see a substantial presence of folks like Proud Boys and others.

Q. Now, moving forward to the 2020 election, in your work did you see Donald Trump spreading doubt about the 2020 election?

A. Yes, I did.

Q. Okay. Let's look at a couple of videos you highlighted.

Why did you choose this video from August 17, 2020?

A. Because it's, you know, multiple months prior to the election, and it's a very clear kind of statement about the election being fraudulent unless

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Donald Trump is reelected.

MR. OLSON: Okay. And this video is P-61. It's another one of these deemed admitted but not yet admitted video exhibits, Your Honor.

And I guess I forgot to move for the admission of P-120.

So would you like to play the video? And then I'd like to move to admit both of these.

THE COURT: So on P-120, which was the Fuentes —

MR. OLSON: Yes.

THE COURT: — I'm actually going to just consider that a demonstrative and a basis for his report but not admit it into evidence.

MR. OLSON: Right.

THE COURT: The two speeches we're about to see, which are — are which numbers?

MR. OLSON: Well, P-61 is Trump's speech and has not yet been admitted. The one on the right has already been admitted. That's P-47.

THE COURT: Okay. So I'll admit 61, the Trump speech.

(Exhibit 61 admitted into evidence.)

MR. OLSON: Okay. So I'll play the video on the left.
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A. Okay.

(Video was played.)

Q. (By Mr. Olson) Why did you choose to highlight this video, Dr. Simi?

A. Well, again, it's multiple months, and we're already getting this narrative, this, you know, conspiracy theory.

Q. Multiple months? I'm sorry?

A. I'm sorry. Before the election itself in November. And it's, you know, very clear, you know, what the message is.

Q. Now, let's play the video on the right.

And this is from the early-morning hours of election night, right?

A. That's correct.

Q. Okay. At this point in time that Trump is giving this speech, have the election results been determined?

A. No. It's still unclear, undecided.

(Video was played.)

Q. (By Mr. Olson) Why did you choose to highlight this speech?

A. This underscores the strategy that had been discussed by people like Steve Bannon, for instance, about claiming victory no matter what on

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election night. Irregardless of what the results suggest, claim victory.

Q. Is there anything else notable about how Trump talked about these elections in these two speeches that you'd like to draw our attention to?

A. Yeah. Very, very much.

Again, this is the language of corruption, of elections being stolen. For far-right extremists, that's going to resonate because it's central to their worldview, to their perspective that, you know, there's this corrupt system that's preventing them from electing somebody that they support, that the system is rigged.

And so, again, you're going to have a high degree of alignment there and resonance for far-right extremists with that kind of language.

Q. Did you select some examples of how far-right extremists responded to this language from Donald Trump?

A. Yes, I did.

Q. All right. What are we — what example did you put on the screen here?

A. Yeah. So this is — these are messages on the Parler social media platform. And this is from Joe Biggs who at the time was a prominent member of

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the Proud Boys. And you can see the time stamps there to my left and — beginning at 5:03 p.m.

The first message, "The left is stealing the election," so there's that and that alignment there. They're "not even trying to hide it. We have no justice, no law and order, and no democracy."

And these are followed up. The second message is, I'd say, additional intensification in the second message

which is about 17 minutes later where there's reference to "The Democrats are shameful, un-American, Commie pieces of shit. I hope you all have shitty, fucking lives. Fuck you."

So this is representative of a certain kind of intensification, amplification that's happening among far-right extremists as it relates to the idea of the election being stolen.

THE STENOGRAPHER: And if you can please watch your speed for me. Thank you.

THE WITNESS: Apologies.

Q. (By Mr. Olson) I want to turn from Trump — I want to turn to Trump's relationship or use of some of these techniques to call for political violence that we talked about earlier. And I want to go to the next slide.

And did you see Trump use these same

[p.66]

doublespeak and other communication strategies to call for violence?

A. Yes, I did.

Q. Okay. Can you — we'll look at a couple of examples, but tell us generally the kinds of things you saw in your work.

A. What you see is this kind of relationship develops. With the relationship that develops between Donald Trump and far-right extremists, one facet of it — and it's a multifaceted relationship, really, so it's happening in many different ways.

But one facet is certainly through rallies where violence is occurring. And there are both promotion and endorsement of violent incidents or violent assaults that are occurring in rallies. So that would be one facet. Again, I would underscore, though, that the relationship

is emerging between Donald Trump and far-right extremists on a lot of different aspects.

MR. OLSON: All right. So the video on the left, Your Honor, is P-53. It's another admissible but not yet admitted exhibit.

THE COURT: And that's a video of President Trump?

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MR. OLSON: Yes.

THE COURT: Okay. 53 will be admitted.

(Exhibit 53 admitted into evidence.)

MR. OLSON: We'll play the video.

(Video was played.)

Q. (By Mr. Olson) How does this exchange support your opinion in this case?

A. Well, this was a press conference. Actually, Ben Carson had just dropped out, and this was to announce his support for Donald Trump's candidacy.

But during the Q and A portion of the press conference, one of the journalists asked Donald Trump about violence at rallies, and so Donald Trump was responding to that question, specifically referring to what appears to have been violence that had just recently occurred prior to this at a rally in Las Vegas.

And what you hear there is, again, this focus on self-defense, violent self-defense. So he's setting up this scenario that you have these counterprotesters that are kind of antagonizing things and that his supporters then used violence as a form of self-defense. And he's really endorsing that, and he's pretty clear in the comments.

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MR. OLSON: And, Your Honor, the second video is P-56. We'd also move for its admission.

THE COURT: And that is also a speech of President Trump?

MR. OLSON: Yes.

THE COURT: P-56 is admitted.

(Exhibit 56 admitted into evidence.)

(Video was played.)

Q. (By Mr. Olson) So set the stage in the video first, and then tell us what you saw in the video.

A. Sure. So this was, you know, a press conference on the heels of the Unite the Right rally which was, again, just to underscore, a deadly Unite the Right rally where one person is murdered and dozens of others injured by white supremacists who had planned and organized an event to be violent, showed up in Charlottesville, Virginia, and executed dozens of acts of violence throughout the day, including murder.

And during this press conference, we hear the President refer to there being “fine people.” And one of the things — as part of this group of white supremacists who had gathered that day.

And one of the things certainly that we

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know is white supremacists and other far-right extremists heard that message as an endorsement. And they tell us that; they thanked the President afterwards for the comments.

Q. Who thanked the President?

A. David Duke, who was present that day at the Unite the Right rally; longtime neo-Nazi, Clansman, Richard Spencer, one of the key organizers of Unite the Right who was present that day; Andrew Anglin, the founder of the Daily Stormer, who wasn’t present at the Unite the Right, but a leading kind of influencer among far-right extremists.

All three of those folks thanked the President for the comments and said that they understood some degree of kind of condemnation in the comments was necessary on his part. But in large, they took it as an endorsement.

Q. And in your work on leaders of political extremism, have you ever seen a national leading political figure endorse violence in the way that you see Donald Trump endorse violence?

A. No, I have not.

Q. Now, let's go to a rally in Alabama.

And tell us what we're going to see here.

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A. So on the — my left there, the rally, you know, in Alabama, in Birmingham, you're going to hear Donald Trump comment about a protester at the rally and needed to be removed.

Q. And then what do we see on the right?

A. And then the following day is Fox News saying that — where Donald Trump is calling in on the phone and is being asked a question about what happened at the rally.

MR. OLSON: And, Your Honor, this is Exhibits P-50 and -48. We move for both of their admission.

THE COURT: Let me — I'll admit P — is this the one on the left? P —

MR. OLSON: P-50 is on the left.

(Exhibit 50 admitted into evidence.)

THE COURT: P-50. And let me —

MR. OLSON: Okay.

THE COURT: — see the interview before I —

MR. OLSON: Great.

THE COURT: — make a ruling.

MR. OLSON: All right. Let's play P-50.

A. Sure.

(Video was played.)

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Q. (By Mr. Olson) And then now it seems he's referring to a protester?

A. He's referring to a protester, yeah.

Q. And now let's play the interview, P-48.

A. Yeah.

(Video was played.)

THE COURT: That is -51?

MR. OLSON: P-48.

THE COURT: P-48 is admitted.

MR. OLSON: Thank you, Your Honor.

(Exhibit 48 admitted into evidence.)

MR. OLSON: Thank you, Your Honor.

Q. (By Mr. Olson) So tell us, Dr. Simi, what did you see in Trump's reaction the next day about his relationship to political violence?

A. He made an endorsement. Again, the built-in kind of defense — self-defense argument there in terms of his comments. But you get an endorsement, "Maybe he should have been roughed up." You get the "maybe" inserted which qualifies it a bit.

But what far-right extremists hear is they hear the comments at the rally, the strong language about getting him out of here, the person's assaulted at the rally by multiple people, and then the next day Donald Trump essentially endorses the

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assault that is committed.

Q. Okay. And we have one more series of — or pair of Trump videos. Let's go to that slide.

MR. OLSON: And, Your Honor, these are both Trump speeches, P-123 and P-56. And they're both just Trump speaking.

THE COURT: Okay. 123 and 126 are admitted.

JA401

MR. OLSON: Sorry. It's P-56 and 123.

THE COURT: P-56 and 123.

(Exhibit 123 admitted into evidence.)

MR. OLSON: Thank you very much.

(Video was played.)

Q. (By Mr. Olson) So tell us about the communication strategies Donald Trump is using in that video.

A. Well, he makes this proposition about "If I say go get him" — which I have no idea why a national political figure would ever say "Go get him" — right? — that — kind of use that kind of language.

So that's that unconventional aspect that we were just talking about that for far-right extremists is something that they are galvanized by, that they're — you know, they're really mobilized by

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that lack of convention.

But he says — you know, if he says that, then he gets in trouble, but if he says "Don't hurt him," then they say he's weak. And so it's this very kind of mixed message.

But certainly, there's no clear, consistent message about condemning violence in any, you know, way, shape, or form, which you would expect, again, among our leaders.

MR. GESSLER: Your Honor, I'm going to object. The witness continues to say "you would expect this among our leaders. Historically, I'm not aware of any leader like this."

We'll accept — or the Court has accepted his expertise in far-right-wing extremism. He is not an expert on political discourse, political campaigns, issues along those lines, historical behavior of other presidents.

So we'd object to that. He has very limited expertise here, and that's what he's here for.

THE COURT: I will strike it, Professor Simi's statement regarding what one would expect of political leaders.

Q. (By Mr. Olson) Dr. Simi, in your 27 years working on far-right extremism, do you look

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at the relationship between far-right extremists and politicians as part of that work that you've done?

A. Yes, I do.

Q. Both local and national politicians?

A. That's right.

Q. In your 27 years of experience, have you ever seen either a statewide or a national politician use the kind of language that we're seeing here from Donald Trump about violence?

MR. GESSLER: Same objection, Your Honor.

THE COURT: Overruled.

A. No, I have not.

Q. (By Mr. Olson) Okay. Let's turn to the second video. And before we play the second video on the screen, tell us what you see — tell us what we're going to see.

A. Okay. This is also from the press conference after Unite the Right, so same press conference where we saw the earlier clip about "fine people." And we're going to see additional comments.

(Video was played.)

Q. (By Mr. Olson) Why does Donald Trump saying "there was some rough, bad people" sort of serve as a condemnation that you said you were looking

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for?

A. Far-right extremists understand that those kinds of engagements, that kind of condemnation is going to be necessary on some level. And, again, they tell us that.

So it's very clear that from an audience perspective, far-right extremists realize that the — that that part of the comments were necessary, but that still the overall message for them they received was affirmation.

Q. And as part of your work on far-right extremism, have you looked at how Trump supporters react to these kind of statements that we've seen?

A. Yes, I have.

Q. And as a general matter, what did you see?

A. Yeah. Well, I mentioned, for instance, you know, Andrew Anglin and the comments that he made, where he actually literally says that basically Trump, you know, gave us, you know, encouragement, affirmation. Gave us a little bit of condemnation, which we understand is necessary. Overall, it's good for us.

And, you know, many, you know, nonleaders, rank-and-file, similar sentiments expressed, on, you know, various social media

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platforms and so forth.

Q. Okay. Now, in your work have you seen other politicians use language like "fight," et cetera, in their speech?

A. Oh, sure.

Q. And what observed differences do you see between Donald Trump's use of rhetoric like that and other political speakers?

A. Well, this is all about context, what we've been discussing, this relationship between Donald Trump and far-right extremists. It's — you know, it has to be understood within a pattern that developed over multiple years.

And so the meaning of words within that pattern, within that context, take certain shape. The same word,

though, in a different context without that pattern would obviously have different meanings.

Q. All right. In your study, have you ever seen any other national political figure have the same kind of repeated violence occurring in their presence and refusal to condemn or endorsement of it as you see with Donald Trump?

A. No, I have not.

Q. I want to turn now to the events leading up to January 6. We've talked about sort of Donald [p.77]

Trump's relationship with far-right extremists generally, and I want to focus on the lead-up to January 6.

And I want to start with the admitted exhibit about Donald Trump saying to the Proud Boys, "Stand back and stand by."

So let's play this, and then I have a couple questions for you about this statement.

(Video was played.)

Q. (By Mr. Olson) What impacts did Trump's statement of "Stand back and stand by" to the Proud Boys have?

A. Well, it's powerful. It's influential almost immediately. Well received. Received as, again, affirmation, as an endorsement of sorts. You start to see Proud Boys turn the mantra into T-shirts that are being sold.

And it's not just the Proud Boys that received that message. Far-right extremists more broadly saw and heard that message as affirmation, as an endorsement.

Q. In this exchange, who — well, who used the word "Proud Boys"? Was he asked a question about the Proud Boys, or did he pick that out of his own brain to say it?

[p.78]

A. Yeah. Can you replay it?

Q. Sure.

A. It's right there on the screen.

(Video was played.)

Q. (By Mr. Olson) Did replaying it help answer the question?

A. Yeah. There's some crosstalk, so, you know, it's a little bit harder in terms of the audible. It sounds — I mean, he obviously says "Proud Boys."

Q. Yeah. And you mentioned that Proud Boys and other extremist groups took this as an endorsement.

Did Trump eventually issue a statement that these groups understood as a call to stop standing by, but rather to act?

THE COURT: Before you go there, I mean, I don't — I mean, what does "Stand back, stand by" — what — how did they, in your view, interpret it? Because it doesn't mean anything to me.

THE WITNESS: Sure. Yeah. They interpreted it as a preparedness, as an endorsement to be prepared and to kind of be on alert, you might say.

THE COURT: For something?

THE WITNESS: For something.

[p.79]

Q. (By Mr. Olson) And did Donald Trump then tell them what that something was?

A. Yes, he did.

Q. Okay. Let's show the next slide.

What do we see on the left on this slide?

A. A tweet from Donald Trump.

Q. And in your work, what importance does this tweet have?

JA406

A. Very substantial. You see the reference to a 36-page report about election fraud. And then at the end of the statement is the final kind of line, "Big protest in D.C. on January 6. Be there. Will be wild," with an explanation point.

Q. And in your work did you look at how the far-right extremists reacted to this tweet?

A. Yes, I did.

Q. Okay. Let's play Exhibit P-80.

MR. OLSON: And, Your Honor, this was on the admitted — or admissible exhibits based on Your Honor's earlier ruling.

Let's just play this as a demonstration rather than admissible evidence, okay?

THE COURT: Okay.

(Video was played.)

[p.80]

Q. (By Mr. Olson) What did you see in the reaction of right-wing extremists to Trump's tweet in that video?

A. Well, there's quite a bit there. You have various references, including specific references to attacking the Capitol, storming the Capitol, pushing indoors. You have a reference to a "red wedding," which is a reference to a TV show, a massacre that occurs on a TV show. You have general kind of calls to action based on the tweet and the tweets that followed in terms of, you know, encouraging, urging people to go to January 6.

Q. In your review of this, did you also look at other reactions of right-wing extremists to Donald Trump's "Will be wild" tweet beyond this?

A. Yes, I did.

Q. And in your general review of the reaction to the "Will be wild" tweet, did you see folks understand the purpose of being there?

JA407

A. Yeah, absolutely. Including that it's now time to take action. We were on standby, and now it's time for action.

Q. Okay.

A. So there's actual explicit references and statements made by far-right extremists about that

[p.81]

understanding.

Q. Now, I want to play Exhibit P-73 next, which is the video that Trump retweeted the same day as the "Will be wild" speech. And I want — let's play the video, and then I'm going to ask you how you connect — what connection you see between the "Will be wild" tweet and the video.

(Video was played.)

Q. (By Mr. Olson) So, Dr. Simi, I have a few questions about this video.

Tell us how the communication strategies used in this video relate to communication strategies used by other leaders of far-right extremists.

A. Well, the "Fight for Trump" and "Save the World, Save America."

So, again, this goes back to something we've, you know, been talking a lot about, which is this idea of an existential threat. And that's — requires certain kinds of action, violent action, to fend off these threats.

I should point out that the video is reposted from TheDonald.win, a site that became a hotbed for violent, far-right extremists' comments/statements, including specifically related to the attack on the Capitol. And that's that context

[p.82]

that's also important that we've been talking a lot about, looking at the larger context from where the video comes — you know, comes from and the consistency —

JA408

Q. And let me stop you there.

What do you mean by reposted from TheDonald.win?

Tell us how this video came to be — did Donald Trump post it from his Twitter feed, right?

A. Correct.

Q. Okay. So what do you mean it was reposted from TheDonald.win?

A. It originally appeared on TheDonald.win —

Q. Okay.

A. — as — you know, a video appears on any platform; it can be reposted on a different platform. And so prior to Donald Trump posting on Twitter, it appeared on TheDonald.win site.

Q. And what significance to you does that context have?

A. Again, as I mentioned, TheDonald.win, you know, had — for quite some time had been a hotbed for far-right extremists' comments/statements involving violence. And then ultimately in the

[p.83]

lead-up to the attack on the Capitol, there were specific statements about attacking the Capitol and committing various acts of violence on January 6.

So that's —

THE COURT: And this is Donald.win.com, or something?

THE WITNESS: Net, I believe. Yeah. Which it's actually now Patriots. And so the name — the domain name has changed since January 6.

Q. (By Mr. Olson) So it was Donald.win.net?

A. At the — yeah, at the time.

Q. Okay.

A. At that time. I couldn't tell you exactly when the domain name change happened.

Q. And how — based on your work, how do followers — the right-wing extremist followers of Donald Trump, interpret this “Fight for Trump” mantra that we hear chanted over and over again in the video?

A. Far-right extremists view the word “fight” in political terms. And “fight” implies the need to commit violence to fend off threats. And, again, they — from their perspective, they would see fighting as a form of self-defense.

Q. Now, based on your work —
[p.84]

THE COURT: When you say “self-defense,” it’s more of, like, an existential self-defense of democracy?

THE WITNESS: It’s a — well, yeah, they tend to be antidemocratic, so I would leave off the last part. But, yes, definitely an existential threat that needs to be fended off.

THE COURT: And a threat to democracy as they see it because they feel like it’s corrupt, et cetera? I mean . . .

THE WITNESS: Yeah. So in that respect, yeah.

Q. (By Mr. Olson) And talk to us, Dr. Simi, about how this self-defense language, the Stop the Steal movement in the fall of 2020, how that plays into the extremists’ view of the election process that is going to play out from November through January.

A. I’m sorry. Could you repeat the question?

Q. Yeah. Sure. Just following up on the judge’s question.

In terms of the existential threat that you’ve talked about far-right extremists seeing and their framing it in terms of self-defense — let me

[p.85]

ask a preliminary question first.

JA410

How does self-defense, that viewpoint, relate to the way the extremists looked at the election and the process that followed the election?

A. Again, it's about, you know, this idea of theft and being — still having things taken, things stolen. So the election was stolen, the system is corrupted, all of that. It's consistent with the broader kind of worldview that they tend to have.

Q. Okay. And what did they view, based on your work, as the existential threat that the election posed to them?

A. To no longer have Donald Trump in power and to have that taken from them.

Q. Now, based on your work, how did far-right extremists react to Trump's calls to come to Washington, D.C., on January 6?

A. That they were galvanized, mobilized, energized.

Q. Beyond organizing them to come to Washington, D.C., what did you see about other reactions they had to Trump's call for them to be there?

A. Well, a number of things happened after the December 19 tweet, and certainly lots of messaging

[p.86]

occurred in terms of far-right extremists, you know, being energized, mobilized in terms of January 6.

Q. And on the next slide we have a couple examples of some extremist reactions to the "Will be wild" tweet.

Tell us what we see on the left. First, who is the group, the Three Percenters, originally?

A. Well, as I mentioned at the beginning, the Three Percenters are, you know, organized in different kinds of sects. The Three Percenters Original would be one kind of sect of Three Percenters, and you might have another one, Three Percenters Kansas, so forth and so on across the country.

JA411

So this was one of those.

Q. And what do you see in the quote — the first quote where they said “Stand ready and are standing by to answer the call from our President”?

A. Yeah. This is — you know, goes to, you know, the way in which the comment about — you know, that was made during the debate really resonated with far-right extremists. Not just the Proud Boys, but here you see the Three Percenters referencing the statement that Donald Trump made during the debate and saying they’re, you know, ready for action.

[p.87]

Q. And the next quote says “Pure evil that is conspiring to steal the country away from our American people.”

Do you see that?

A. Uh-huh. Yes.

Q. How does that fit into the pattern of communication?

A. Again, it represents the worldview in terms of seeing these imminent threats, these existential threats deeply tied to the idea of a stolen election. But also more broad than that. That, you know, basically our country is on the verge of being completely taken away from us.

Q. And the next quote from the Three Percenters Original is instructing “any member who can attend . . . to participate on January 6 because ‘the President of the United States has put out a general call for patriots of this nation to gather in Washington, D.C.’”

Did you see other examples of far-right extremists viewing the “Will be wild” tweet as a general call for patriots of this nation to gather in Washington, D.C.?

A. Yes. It was very — I’d say very substantial — a general — I’d say, across far-right

[p.88]

extremists, that was a substantial presence of that reaction.

Q. On the right we see another message.

Why don't you read the message and tell us how that fits into what you see in those patterns of communication.

A. Yeah. So here you have a message that says "Trump is calling for Proud Boys to show up on the 6th." So pretty straightforward in terms of the — you know, the — that's how the message was received in terms of the tweet.

Q. Now, beyond using social media to bring people to Washington, D.C., on January 6, did Trump say or do anything else to communicate his support for protesters who were coming out to support him?

A. Yes, he did.

Q. Okay. Were there rallies between — after the election and before January 6 in D.C.?

A. Yes, there were.

Q. Okay. Was there one in November?

A. Yes, there was. The Million MAGA March.

Q. And at the Million MAGA March, did it turn violent?

A. Yes, it did.

Q. Okay.

[p.89]

MR. OLSON: And, Your Honor, I'd like to show a video for demonstrative purposes only. This is a video that — on the left is Donald Trump's motorcade sort of driving through the march.

It hasn't been admitted, but I think just for demonstrative purpose only, if I can show it for the expert?

THE COURT: Yep. That's fine.

(Video was played.)

Q. (By Mr. Olson) So what do we see in that video, Dr. Simi?

A. Well, you see a presidential motorcade driving, you know, through the protest, the site of the protest. And obviously, they're responding very favorably to the motorcade and are very excited, and, you know, viewing this as what seems to be an affirmation of sorts.

Q. In your work on political violence and extremism, have you ever seen a national politician show support like this for a rally that turned violent?

MR. GESSLER: Objection. Your Honor. That's a leading question.

MR. OLSON: I'll re-ask it.

THE COURT: If you can rephrase.

[p.90]

The objection is sustained.

Q. (By Mr. Olson) Dr. Simi, how does the video we just watched relate to your study of other national politicians?

MR. GESSLER: Objection. Your Honor. I don't think he's testified that he's studied other politicians. It's beyond the scope of expertise.

THE COURT: He did actually previously testify that a part of his work includes studying national politicians in general and their relationship to extremism.

So I'm going to let him answer the question to the extent he can.

A. I've never seen anything — certainly in recent history that's similar to this — what happened in the video.

Q. (By Mr. Olson) On the right, what do we see?

A. So this is a tweet by Donald Trump responding to what happened ultimately in terms of the violence that occurred.

And you see it starts with “Antifa scum ran for the hills today when they tried attacking people at the Trump rally, because those people aggressively fought back. Antifa waited until

[p.91]

tonight” — ultimately, it says “to attack innocent, hashtag, MAGA people. D.C. police, get going. Do your job and don’t hold back.”

THE COURT: So was the violence before or after the drive-through?

THE WITNESS: After.

THE COURT: After?

THE WITNESS: Yeah. It was in the evening.

Q. (By Mr. Olson) How did far-right extremists view Donald Trump’s comments on the violence?

A. Endorsement. It’s pointing, you know, essentially responsibility for — at Antifa. And using, you know, a language that would be consistent with the kind of language they would use to describe Antifa as scum.

So again, there’s alignment in terms of the language, and then there’s the, you know, at least perceived endorsement of the violence that, again, framed as self-defense, that the violence directed towards Antifa was necessary for self-defense purposes.

Q. Were there events outside of rallies that show you how extremists reacted to Trump’s

[p.92]

rhetoric about Stop the Steal and invocation of political violence?

A. Yes, there were.

JA415

Q. Okay. Let's look, next, at the video — the video that's already been admitted into evidence.

And before we play the video, tell us, what are we looking at here?

A. As the Stop the Steal conspiracy theory started galvanizing far-right extremists, one of the things we saw was a substantial increase in threats to election workers and election officials.

And so here we're about to hear from one of the officials in Georgia in the Secretary of State's office essentially ask President Trump to stop inciting violence. So that would be his comments —

Q. Okay.

A. — in the video.

Q. So let's play the video, and then let's talk about how Trump responded to that request.

A. Okay.

(Video was played.)

Q. (By Mr. Olson) Who was he telling to stop encouraging people to engage in violence?

A. President Trump.

Q. Okay. How did President Trump respond

[p.93]

to that specific call from the Georgia Secretary of State worker to stop telling people to engage in violence?

A. So to the right of the video you just played is Donald Trump tweeting a message, but also retweeting the video that — it's a clip of the video that we just saw. So we see in the comment, "Rigged election. Show signatures and envelopes. Expose the massive voter fraud in Georgia."

So we get the video where he's being asked to condemn violence, stop inspiring violence. And the response is to double-down on the very thing that Mr.

JA416

Sterling has claimed is inspiring the threats of violence towards the election workers and officials in Georgia.

So the double-down on the thing that's inspiring it, no reference to condemning violent threats or saying there's no place for that. That's completely omitted in the —

THE STENOGRAPHER: In the what?

A. In the video clip.

Q. (By Mr. Olson) Based on your work, how would far-right extremists perceive Trump's response?

A. Endorsement. Support. This is — there's no condemnation. There's — so you get that

[p.94]

omission that we talked about earlier, which is often perceived by far-right extremists as a sign of support. But also the doubling-down on the very thing that's galvanizing the threats in the first place would be a sign of support from the perspective of far-right extremism.

Q. I want to turn now to the days leading up to January 6.

In your review of what happened, did you find evidence that helped you understand why some attacked the Capitol?

A. Yes, I did.

Q. Okay. I want to play for demonstrative purposes only a video, P-81, and then we can talk about the context that these speeches fit into the larger January 6 event.

(Video was played.)

Q. (By Mr. Olson) So what do we see here, Dr. Simi? Why is this important for your work in this case?

A. In the first portion of the video clip, you see Ali Alexander talking about 1776— speaking to 1776 being an option. And you see the references to the deep state being degenerates. So, again, we're back to the dehumanizing language, which is an

[p.95]

important piece of this in terms of enabling violence. So that's that portion of the beginning.

And then the second kind of portion is Alex Jones shouting repeatedly, "1776." And, again, within this cultural context, that term is going to have a very specific meaning that's different than it would for outsiders outside of that context.

Q. And in the video we see a couple banners in the background.

Tell us what those banners show.

A. Well, you see one to my right, a white banner that says "Stop the" — "Stop the Steal." It's sort of — "Stop the Steal" in black lettering. There's a "Trump" banner, "2020." There's — you know, so . . .

Q. Okay. And now, do you know which people on January 6 stormed the Capitol saw which political speech the day before?

A. I mean, certainly not across the board, no.

Q. Yeah. And does that undercut your ability to explain what happened on January 6?

A. No, I don't think so.

Q. Why not?

A. We're talking about a lot of different

[p.96]

sources of influence. We're talking about what happened specifically on January 6 in terms of the speech at the Ellipse. We're talking about various tweets. We're talking about various events in the lead-up to January 6.

So, you know, for saying one thing is the source of the influence would, you know, not be really accurate.

What we can see, though, is among far-right extremists how these different sources of influence

JA418

ultimately resulted in terms of producing the attack on the Capitol.

Q. And in your work, did you see Donald Trump as leading that influence?

A. Yes, I did.

Q. Now, let's talk about what happened on January 6.

THE COURT: So before — I think what we're going to do, since it's been almost two hours —

MR. OLSON: Okay.

THE COURT: — is — let's take a break.

But, Mr. Gessler, I just want to make sure that you'll do cross probably immediately following without a break in between.

Because I'm assuming, Mr. Olson, that

[p.97]

you're kind of getting towards the end?

MR. OLSON: Yeah. I probably have another 20 to 30 minutes.

THE COURT: Okay. So we'll go straight into direct after Mr. Olson finishes — or we'll go straight into cross after Mr. Olson finishes his direct. And we will be back at —

MR. OLSON: Just — before we break, I just want to make sure we have a common understanding about the — our interaction with witnesses during breaks that are on the stand.

I assume we're not to talk to them about the subject of testimony —

THE COURT: Yes. Yes, please.

MR. OLSON: — while on a break? Okay. Great. Thank you.

THE COURT: So we will be back at 10:15.

(Recess from 10:01 a.m. to 10:19 a.m.)

THE COURT: Everyone may be seated.

JA419

So I think we were at the day of?

MR. OLSON: Yes.

THE COURT: Okay.

MR. OLSON: Thank you, Your Honor. Just one quick housekeeping matter.

Q. (By Mr. Olson) Dr. Simi, over the break
[p.98]

I was looking at your report, and in your report you talked about a website called TheDonald.win.

A. Yes.

Q. Is that what we were talking about before?

A. Yes.

Q. Okay.

A. Forgive me.

Q. Thank you.

I want to turn now to the morning of January 6.

Did Trump make any statements or remarks that you focused on before the speech?

A. Yes, I did.

Q. You —

A. I'm sorry. Yes, I did.

Q. Okay.

A. Yes, sir.

Q. What do we see here on the morning of January 6 before the speech?

A. Two tweets from Donald Trump, both referencing Vice President Mike Pence. In the upper tweet:

"If Vice President Mike Pence comes through for us, we will win the presidency. Many

[p.99]

states want to decertify the mistakes they made in certifying incorrect and even fraudulent numbers in a process not approved by the state legislators. Mike can send it back."

JA420

THE COURT: So, Professor Simi, when you read, then you're even faster. And I have the vantage point of being able to see the court reporter struggling.

THE WITNESS: Okay.

THE COURT: So —

THE WITNESS: My sincere apologies.

THE COURT: I'm just trying to protect the record.

THE WITNESS: Sure. Sure.

THE COURT: Did you get it?

THE STENOGRAPHER: I believe so.

Q. (By Mr. Olson) So let's not read the second tweet, Dr. Simi.

But I do want to ask you, both focus on Mike Pence, right?

A. That's correct.

Q. What significance does these early warning statements focusing on Mike Pence from Donald Trump have in your study?

A. It's part of the — this stolen

[p.100]

election, that if Mike Pence takes certain actions, then, you know, Donald Trump would remain in power. Which, again, for far-right extremists, they're seeing this in terms of the — what's necessary to prevent the transfer of power for Donald Trump to remain President.

Q. Now let's turn to some of the speech that Donald Trump gave on the Ellipse.

But before we do that, can you tell us, did you see similarities or differences between the speeches of Donald Trump that we looked at earlier today and the speech he gave on the Ellipse in terms of his use of language?

A. Yeah. Many similarities.

Q. Okay. Can you give us some examples we should be looking for?

JA421

A. Sure. A certain aggressive kind of words in terms of phrasing of things, the really strong emphasis, again, on this issue about an existential threat, the idea that something is going to be taken from you — your country, your culture, your way of life. These kind of themes that we've been discussing, very prevalent.

Q. Okay. Let's watch the speech, and then I want to ask you some questions about it — or

[p.101]

portions of the speech.

(Video was played.)

Q. (By Mr. Olson) What did we see in this speech that related to Trump's use of language?

You mentioned it was similar to what he's used before. What do we see here in terms of his use of language before that led to violence?

A. "Fight" or "fighting," some variation is mentioned approximately 20 times in the speech. There was a strong emphasis on this. There's at one point the association between fighting and playing by a different set of rules when you have fraud.

So there's this kind of — what you might call permission in terms of using other — other actions than one might take. There is a — the focus on losing your country is a consistent theme. And there is a mention of peaceful and patriotic, which is also consistent with many things we've been talking about in terms of plausible deniability.

Q. Based on your understanding of political extremism, how would extremists have understood Trump's repeated calls to fight in that speech?

A. A call to violence.

Q. Why?

A. It's — within far-right extremist

[p.102]

culture, fighting is meant to be taken literally. A call to fight for far-right extremists, especially within the context as it's laid out, that these threats are imminent and that you're going to lose your country, then fighting would be understood as requiring violent action.

Q. Trump in the speech said, "We're going to walk peacefully and patriotically."

Why wouldn't the extremists in the audience have understood Trump calling only for a protest, a peaceful protest?

A. Part of it has to do with the emphasis. So we get back to contextual cues which are extremely important in terms of understanding how communication operates. And in this case there's such a balance in favor of the fighting versus only the one reference to the peaceful — you know, marching peacefully down to the Capitol.

So there's a clear — for far-right extremists, there would be a clear understanding that fighting is the real message, not being peaceful.

THE COURT: Is it your testimony that if you had watched that speech that — and nothing had happened, that you would have the same view? I mean, I guess, what worries me with all of this is it's all

[p.103]

kind of in sort of 20/20 hindsight. You know, we know what happened.

So if — and first of all, did you watch the speech in real time?

THE WITNESS: No, I did not.

THE COURT: Okay. But is it your testimony that had you watched it in real time prior to knowing the ultimate result that you would have considered it a call to violence?

JA423

THE WITNESS: Yes, that is my testimony. Yeah. I was already concerned, certainly, about the precursors to January 6. And that speech in real time, given the language, the reference, the amount of emphasis on fighting, that would have given me very, very substantial concern that violence would be soon to follow.

Q. (By Mr. Olson) And, Dr. Simi, if I can follow up on that.

Did you have an interview with a reporter prior to the election in 2020?

A. Yes, I did.

Q. And in that interview to the reporter — a reporter for The Atlantic, I think?

A. That's correct.

Q. Okay. And in that interview with The [p.104]

Atlantic, did you — what did you say about the likelihood of political violence led by Donald Trump?

A. I said it was quite high, especially in a scenario if he was not reelected. That my concern was not necessarily the election itself. It would be post-election, in particular as we get closer to inauguration time.

Q. Did what we saw on January 6 reflect your concern that you made before the election?

A. Yes, it did.

Q. About political violence led by Donald Trump?

A. Yes, it did.

Q. Okay. Now we've heard some testimony that some of the Proud Boys and Oath Keepers already had a plan to attack the Capitol. You mentioned the "1776 Return" sort of planning document.

How could this speech by Donald Trump affect them if they already had a plan and were already executing the plan?

JA424

A. Well, two things I would just want to mention.

First, the plan among those like the Proud Boys to, you know, go directly to the Capitol and essentially begin executing the attack, that was

[p.105]

largely influenced by things that happened prior to January 6 that involved Donald Trump. Not the least of which would have been the December 19 “Will be wild.”

In terms of what happens on January 6, though, the individuals who ultimately marched to the Capitol and take — for those that take part in the attack on the Capitol, they are going there at the urging of Donald Trump. What that ends up doing, it creates a situation where you have this very — you know, much larger crowd than you would have had, you know, with just those that went directly to the Capitol.

And, of course, that — you know, as Officer Hodges testified to yesterday, that becomes a weapon of sorts itself. It certainly becomes a force multiplier. And so that large number of individuals who then appear at the Capitol, some of whom then directly take part in the attack, all of that becomes, you know, a reinforcement to those who went there directly.

Q. And earlier you talked about sort of the violence implementers, the violence planners.

Remind us the term for the folks that are maybe open to it but don't show up with a plan.

[p.106]

A. There — well, we refer to them exactly in those terms. So there's also the term “sympathetic bystander” which would fit some of those who, you know, marched to the Capitol as well who may not have necessarily directly partaken in the violence, but were there.

JA425

And, you know, as was, I think, illustrated yesterday, just the size of the crowd became, you know, a very substantial obstacle that prevented the Capitol from being protected.

Q. And you spoke — well, let me ask a threshold question first.

Based on your review of what happened on January 6, did the crowd have a unity or purpose that you saw?

A. Yes, it did.

Q. Okay. Even though some were more prone to violence than others?

MR. GESSLER: Objection. Leading, Your Honor.

THE COURT: Why don't you just answer the first question.

The original question was did the crowd have unity or purpose that you saw?

THE WITNESS: Yes, it did. I can go
[p.107]

ahead and expand.

THE COURT: Can you explain?

THE WITNESS: Yeah. Sure.

A. It certainly wasn't that every single person — there was a kind of single mind to the crowd. But you can see, as demonstrated in some of the video footage, some of the things that people said after the fact, some of the things we learned from some of the court documents, for example — you can see there were certainly, you know, a degree of unity of purpose in terms of coordination and cooperation and collaboration during the attack on the Capitol.

Q. (By Mr. Olson) Okay. Let's play some videos from the Capitol.

MR. OLSON: And, Your Honor, P-117 similarly is a list — is an exhibit that you deemed admissible. We'll

JA426

play it just for demonstrative purposes here because it involves folks other than Trump.

But let's play this video, and then I have a couple of questions.

THE COURT: Okay.

(Video was played.)

Q. (By Mr. Olson) So I want to first focus on the first call that "This is our house; this is a

[p.108]
revolution."

Based on your understanding of the communication patterns of far-right extremists, what does "This is a revolution" — how would that be interpreted?

A. It's a violent revolution. Yeah. And, of course, by this time, you know, there had been various violent acts taken.

Q. And on the second clip we see with the language still on the screen, you see "Fight back. They touch us, we hit them back."

How does that relate to some of the communication patterns we talked about today?

A. Very consistent with this theme of self-defense, so framing the violence that one might be committing, but setting it up as necessary to defend oneself.

Q. And who is the "they" in here?

A. The members of the crowd that are saying it.

Q. No. I'm sorry. "They touch us" —

A. Oh, I'm sorry. Yeah. The police officers.

Q. Now, on the right we see a flag flying there. We see two flags.

[p.109]

What's the meaning of the symbolism in the bigger flag?

JA427

A. Yeah. So it's a — you know, a U.S. flag there, but it has a Three Percenter symbol in the blue portion. And then you can see in the background there's a Confederate flag, which is a pretty prominent symbol used among far-right extremists to represent the Confederacy and the U.S. Civil War.

Q. Now, did you see — in your review of what happened in the Capitol, did you see other indicia that folks came, planned to commit violence there.

A. Yes, I did.

Q. Talk to us about what you saw, evidence of folks came planning to commit violence?

A. Based on equipment the people brought, including weapons. But also things like tactical gear, headgear, various sorts of kind of preparation — you know, things that would indicate a certain person had planned ahead of time that they would be engaged in violence.

Q. You mentioned weapons. And I believe Mr. Gessler said yesterday there were no weapons discovered at the Capitol.

Were there weapons discovered at the
[p.110]
Capitol?

A. Yes. Absolutely.

Q. Okay. What kinds of weapons?

A. A wide range. Certainly knives. There were, of course, flagpoles that were used as weapons. Officers in some cases had their own weapons taken from them and used. And, of course, you know —

MR. GESSLER: Your Honor, we're going to object to this. He's testifying on items that he has no personal knowledge of.

Obviously, he is able to base his expert report and develop his opinions based on hearsay, but here he's

actually testifying as a fact to things he has no personal knowledge of.

To the extent the petitioners want to prove weaponry, they can use sources and whatever they seek to do, but they don't get it in through expert testimony.

MR. OLSON: Your Honor, if may I respond?

THE COURT: Sure.

MR. OLSON: This goes directly to Dr. Simi's observation that many of the right-wing extremists at the Capitol came prepared to be violent. Just like they brought tactical gear, the fact that

[p.111]

they brought weapons supports his claim or his opinion and finding that the people were there with a purpose of committing violence and engaging a violent political attack on the Capitol.

THE COURT: And was this disclosed?

MR. OLSON: Yes. This was on page 33 of his report.

MR. GESSLER: Can you just give me a moment to look at page?

THE COURT: Sure. Of course.

MR. GESSLER: Your Honor, his opinion is that people coming armed to the Capitol is consistent. That is different than, you know, him providing substantive testimony that people actually were armed. If he wants to accept that information as a hypothetical, then he can base an opinion on it.

But the fact of the matter is, Your Honor, when Mr. Olson said, "Can you," he's basing that on his observations. If he was at the Capitol on January 6, he can certainly testify to that. And if that's a premise of his opinion, that's fine.

But he doesn't get to testify as to the actual testimony of that — the actual facts.

THE COURT: Okay. Well, he was here and he watched the videos where we all saw people armed.

[p.112]

But . . .

MR. OLSON: Your Honor, if I may —

THE COURT: I'm taking it for what it's worth, Mr. Gessler. He obviously was not a — he didn't — he wasn't at the Capitol, I presume?

THE WITNESS: That's correct.

THE COURT: And so his testimony is based on — in part on what he's observed in court. And I'm not going to strike his testimony that it's his understanding that people were armed.

MR. OLSON: Your Honor, if I could? I just want to correct a significant misrepresentation that Mr. Gessler just made about the report.

I put a page on the screen about what Dr. Simi actually said. And he didn't say what Mr. Gessler said. He says, in the first line there, "Many who attended came prepared for violence from those armed with weapons, including guns to tactical gear."

Then he talks through a list of significant examples where there were findings by people. Either they refused to go through the magnetometers or folks were arrested.

So this is a significant and substantial disclosure that Mr. Gessler misrepresented.

[p.113]

THE COURT: Okay. So the objection is —

THE STENOGRAPHER: The objection is what?

THE COURT: Overruled.

Q. (By Mr. Olson) Let me get us back to where we were. So we'll pick up where we left off, Dr. Simi. We talked about this slide.

Now, in addition to coming armed and with tactical gear, was there other evidence that you relied on in understanding the mob's purpose at the Capitol?

A. Sure. A variety of things. Things that were, you know, apparent on the video footage, things that were learned after the fact in terms of statements that individuals made. And then, of course, you know, prior to January 6 itself, the information that was available on open source, on social media about the plans in terms of committing an attack on the Capitol, so . . .

Q. Okay. Did you review as part of your work a collection of sort of social media statements that participants in the — that the mob made describing why they were there and what their purpose was?

[p.114]

A. That's correct.

MR. OLSON: Okay. I'm not offering this for admissibility, but just to talk about the basis for Dr. Simi's opinion.

If I could bring up Exhibit P-25 just to show the kind of things he relied on. I just wanted to — Your Honor, instead of hearsay, we're not offering it as direct evidence, but it's a demonstration of the kind of material that Dr. Simi relied on.

THE COURT: Well, that's — let's get him to confirm that first.

MR. OLSON: Okay. So can I show it to him to make sure we're talking —

THE COURT: Yeah.

MR. OLSON: Okay. Great. Thank you.

Q. (By Mr. Olson) So, Dr. Simi, on the screen should be — nope. This is — I'm sorry. I have the wrong exhibit.

MR. OLSON: We'll move on, Your Honor. I apologize.

JA431

Q. (By Mr. Olson) But did you rely on a compilation of statements on social media as to why people were there at the Capitol?

A. Yes, I did.

[p.115]

Q. And can you just tell us at a high level what that was — or the kind of statements they made?

Excuse me.

A. Yeah. To — you know, to attack the Capitol to prevent the certification of the election results, to disrupt the democratic —

THE STENOGRAPHER: To disrupt the what?

A. The democratic transfer of power.

Q. (By Mr. Olson) Did you — great.

And then did you look at — sorry. We already saw that.

Did you look at some videos of the mob itself in terms of their unity of purpose?

A. Yes, I did.

Q. Okay. I think we've seen the video on the right a couple of times. This is when Danny Hodges was attacked, so let's not play that.

But tell us what the video on the left is.

A. In this you're going to see a substantial number of folks start chanting, "Heave-ho." And so that's a coordination and kind of vocalization that they're engaged in as they're moving in a particular direction.

Q. And what are they trying to do?

[p.116]

A. They're trying to essentially push through the barricade of officers in this kind of tunnel — tunnel area.

(Video was played.)

MR. OLSON: And, Your Honor, that was Exhibit P-21. And we — it's on the — the objection was overruled.

JA432

It was on the to-be-admitted exhibit list. We move for admission of P-21.

THE COURT: Admitted.

(Exhibit 21 admitted into evidence.)

Q. (By Mr. Olson) Now, we've talked — I'll skip to the next one.

We've talked about the mob's purposes.

Did you see any evidence in your review of the material in this case that showed Trump's role in the attack as the attackers — what they thought Trump's role in the attack was?

A. Yeah. There was definitely consistent themes in terms of individuals reporting that they — they believed Donald Trump had sent them there, that — you know, indicating substantial influence from Donald Trump.

MR. OLSON: And if we — this is video P-96. Again, it is the video of what happened on January 6, Your Honor.

[p.117]

We would — it's on the to-be-admitted list from October 27. We move for its admission as well.

THE COURT: Is this the one that was prepared by the January 6—

MR. OLSON: Yes.

THE COURT: — Committee?

MR. OLSON: Yes.

THE COURT: I will admit.

MR. OLSON: Thank you.

Q. (By Mr. Olson) Let's play the video, Dr. Simi.

(Video was played.)

Q. (By Mr. Olson) And in addition to this compilation put together by the January 6 Committee, do you see other evidence of the stated purpose why people were there?

A. Yes, I did.

Q. Okay. And actually, I think I had the right exhibit up. I was looking at the wrong page from before. So let's try this again. I apologize.

MR. OLSON: Again, for demonstrative purposes only, Your Honor, let's look at P-25.

Q. (By Mr. Olson) And if we scroll down here — and I can just — can you read that okay, or

[p.118]

do I need to make that bigger?

A. No, I can read that fine. Thanks.

Q. Okay.

A. That helped.

Q. And, for instance, we see — is this what you — part of what you looked at in your work on this case?

A. That's correct.

Q. And we see statements like this that were collected as part of legal proceedings: "I am here to see what my President called me to D.C. for."

Do you see that?

A. Yes, I see that.

Q. And then we see this sort of statement after statement of a similar vein. We can just pull up this page.

And — like we see a statement here from a Watson about why they went to D.C.

Are these the kind of statements you relied on to see the purpose for why these folks went to D.C.?

A. Yes. This would be consistent.

Q. Okay. Now, I want to turn back to the attack on the Capitol.

And did we —

[p.119]

THE COURT: Before we move on, I am going to exclude 96. I apologize. I think I only — I must not have

watched the whole thing, but I'm going to exclude it as hearsay. That doesn't mean if that's something that Mr. Simi would consider in forming his opinions that he can't do that, but I'm not going to admit it into evidence.

So 96 is excluded.

MR. OLSON: Okay. Thank you, Your Honor.

Q. (By Mr. Olson) And just to make sure the record is clear: Dr. Simi, did you look at Exhibit 96 and other statements by folks at the Capitol as part of forming your opinion?

A. Yes, I did.

Q. Okay. Great.

Now, did Trump do anything during the attack that influenced the extremists engaging in it?

A. I'm sorry. Can you repeat the question?

Q. Did Trump do anything during the attack that influenced the extremists engaging in it?

A. Yes.

Q. What was that?

A. Well, there's a — the tweet we're reading — or we're looking at here from Donald Trump

[p.120]

indicates that Mike Pence didn't have the courage to do what was — he was expecting and what he wanted and that, you know, the fraud would not be rectified, basically, that Mike Pence was supposed to rectify the stolen election and that —

THE STENOGRAPHER: And that what?

A. And that did not happen.

Q. (By Mr. Olson) We saw the tweets earlier in the day where Trump was focused on Mike Pence, right?

A. Yes. That's correct.

Q. And did Trump talk about Mike Pence's courage in the Ellipse speech?

JA435

A. Yes, he did.

Q. Okay. And so now he says “Mike Pence didn’t have the courage.”

Now, we’ve seen the video of the person reading his tweet with a bullhorn, so I’m not going to replay that now. But I do want to ask you about one image from that video, which is the noose that we see there.

Based on your study of the right-wing extremists, does a noose have any particular meaning in that movement?

A. Within far-right extremist culture,
[p.121]

there is a particular book that has a substantial amount of influence called “The Turner Diaries.” It was published in 1978. And it’s a — it’s a fantasy fictional novel, but it envisions a revolution within the United States.

And there’s a passage in the book that’s referred to as the Day of the Rope. And the Day of the Rope in the novel, what they call as race traitors, political opponents of various sorts, are hung from lightposts or lampposts, and this is a mass killing. And that term, “Day of the Rope,” has a lot of salience among far-right extremists.

We actually saw it used by one of the members of the Proud Boys specifically referencing what was going to happen on January 6 use the term, “It’s going to be ‘Day of the Rope.’”

And I’m paraphrasing, but something to that effect, yes.

Q. Okay. Now, did Trump eventually say something that caused the crowd to stop their attack?

A. Yes, he did.

Q. Okay. Let’s look at — was this video what you had in mind?

A. Yes.

Q. Okay. I know we’ve played this video

[p.122]

before, but let's play it one more time. I'd like to get your input on the video based on some of our earlier conversations today.

(Video was played.)

Q. (By Mr. Olson) Dr. Simi, based on our discussions of how leaders of right-wing extremists communicate to their followers, how does this speech fit into that context of the communication style?

A. From the perspective of far-right extremists, I think there's three things happening here. One is a continuing affirmation of the stolen election conspiracy theory. So really continuing to emphasize the idea that the election was stolen.

Two, an affirmation of the attackers and the attack that just happened.

And then, three, there is consistent messaging in terms of going home.

Q. Why is it — consistent messaging in terms of going home notable in your experience?

A. It's not just a one-off. It's not just something that seems more about developing plausible deniability. But it does come across as a consistent theme that this is what Donald Trump wants us to do.

Q. Did he, in this speech, condemn the acts of violence?

[p.123]

A. No, he did not.

Q. I want to turn to one last tweet from Donald Trump.

This is at — this is — was this before or after the speech we just saw?

A. This is after.

Q. Okay.

A. About two hours approximately.

JA437

Q. And how does this tweet about what happened that day fit into the pattern of communication of leaders of far-right extremism?

A. Again, there is no condemnation; there's affirmation. Again, further emphasizing the stolen election, referring to patriots — "great patriots," actually.

So for far-right extremists, that is a very substantial, meaningful term, because they see themselves as patriots, and this emphasis on being treated unfairly.

Q. Does Donald Trump continue to enjoy strong support from far-right extremists?

A. Yes, he does.

Q. Now, I forgot to ask this earlier.

Before we get to your sort of headline or your conclusions here, Dr. Simi, have you been paid

[p.124]

for your work in this case?

A. Yes, I have.

Q. Tell us how much you've been paid and what your hourly rate is.

A. Approximately \$35,000.

Q. Okay. And what's your hourly rate?

A. \$300 an hour.

Q. Okay. Is that your standard rate?

A. That's my standard, yeah.

Q. All right. Thank you.

Let's look at sort of the conclusion slide here. Could you describe for the Court your conclusions about the issues that you were asked to address in this case?

A. January 6 in terms of the attack on the Capitol certainly should be seen within a larger, longer context of political violence committed by far-right extremists.

JA438

There is certainly a high degree of evidence supporting that the violence was committed for political goals, political purposes. Certainly, there's a large number of people in planning or organization that was present, apparent in terms of the attack on the Capitol. And that the goal really was focused on preventing the democratic transfer of

[p.125]

power.

Now, within that context of far-right extremist violence, January 6 does have some unique aspects to it that are also important to underscore. So the size, the intensity, and the scope would stand out in terms of the — what's represented by the attack on the Capitol.

And there's most notably the role that Donald Trump played in terms of influencing the events. The nurturing of the violence ultimately committed in terms of the attack on the Capitol, that would certainly be distinctive from other — you know, other types of violence committed by far-right extremists.

Q. How confident are you in your conclusion that Donald Trump played a central role leading these events?

A. Very confident.

Q. Why is that?

A. It's in the evidence. It's from my years of studying how far-right extremists, you know, perceive communication; the relationship that they developed with Donald Trump over multiple years; the various signals, including everything from the things we discussed at the rallies in terms of promoting or

[p.126]

endorsing violence; the things done over social media; the messages in regards to various types of out-groups that

are identified by far-right extremists that are aligned with many of the things Trump said over the years.

So that relationship that was established and built really, I think, underscores how much influence he has for far-right extremists and how much they perceive him as essentially on their side or one of them.

Q. And in this pattern — repeated pattern of communications, do you have any doubt in your mind that Donald Trump is aware of the influence his words have on right-wing extremists?

A. It seems pretty clear to me. You know, I'm not in Donald Trump's mind, obviously, but the — you know, in terms of observable patterns, in terms of the repeated nature of the things we've been discussing, that's all pretty apparent.

MR. OLSON: Okay. All right. Your Honor, these are all the questions I had. But I want to — if you had any additional things you wanted to ask Dr. Simi about, I wanted to make sure we covered those before I sit down.

THE COURT: I'll follow up on that last

[p.127]

question about — you know, how obviously you're not a mind reader, you don't know what President Trump was thinking.

I guess, what more can you say about the possibility that this just isn't how — isn't just he speaks this way versus deliberately speaking in a way that would cause people to react?

THE WITNESS: Well, again, I would come back to this point about, yes, social scientists, we are trained to try and identify observable patterns.

And so, you know, I completely am not in Donald Trump's mind. But there are patterns that we've been discussing that were observable that occurred over

JA440

multiple years where you have these kind of repeated, you know, occurrences and things of similar nature kept repeating to occur.

And we also, from a far-right extremist's perspective, have a lot of evidence about how they saw the relationship and how they saw his influence, how they saw him — what they believe to be endorsing and promoting their violence, their cause more broadly.

THE COURT: Right. But, I guess, how it's perceived is one — one element of — but that, again, doesn't — I mean, you don't have any evidence

[p.128]

that President Trump was trained on this kind of form of communication or anything like that, correct?

THE WITNESS: That is correct.

THE COURT: Thank you.

MR. OLSON: And can I just ask a couple quick follow-up questions?

Q. (By Mr. Olson) The Unite the Right rally, when was that?

A. 2017. August 2017.

Q. And we saw that — the speeches from when Trump was President commenting on “very fine people on both sides,” right?

A. That's correct.

Q. Okay. And the Proud Boys were involved in some of the Unite the Right rally?

A. Yes, they were.

Q. Okay. So when you have a political rally where people are — or someone is murdered and other people are hurt — right?

A. Yeah.

Q. I'm sorry.

A. I thought there was an objection.

JA441

Q. And then you later have the President, unprompted, identifying that group by name, right?

A. Correct.

[p.129]

MR. GESSLER: Objection. I'm not sure that was quite a question, but there was an answer to it. This is clearly leading and argumentative.

MR. OLSON: Okay. Well, I'll rephrase my question.

THE COURT: Okay. I'm going to sustain the objection, not on the argumentative part but the leading.

MR. OLSON: Okay.

Q. (By Mr. Olson) You just talked about patterns, observable patterns to the social scientists?

A. That's correct.

Q. Okay. Is what we see between the 2017 rally, 2019 comment, is that an observable pattern or not in your mind?

A. Yes. It's certainly part of one.

Q. Okay. Why is that?

A. Well, you know, things that are said, things that are done, these are things that we can point to as happening or not happening. We can look at how the statements or actions are interpreted by others, how they are perceived by others. These are all things that we can, you know, observe.

Again, when we're talking about being in

[p.130]

somebody's mind, that's not really observable.

Q. But in terms of when you're talking about observable patterns, this is an example of one, right?

A. Yes. Yeah, exactly.

MR. OLSON: Okay. Thank you very much, Dr. Simi. I have no further questions at this time. We may get to talk again after Mr. Gessler, but thank you.

JA442

THE WITNESS: You're welcome.

MR. GESSLER: Your Honor, might I have about three or four minutes to fumble around with the technology? And I can't promise my fumbling will be over at that point, but I just want to get set up here, Your Honor.

THE COURT: Okay.

MR. GESSLER: Okay. I'm just going to try and go somewhat technology-free. We'll see how that works, Your Honor.

CROSS-EXAMINATION

BY MR. GESSLER:

Q. Good morning, Dr. Simi.

How are you today?

A. Doing well.

Q. Good.

[p.131]

A. Good morning to you.

Q. And we shook hands briefly yesterday —

A. That's correct.

Q. — outside the men's room. So thank you for being here.

So since you've been a witness before, you know how this works. I'll ask you some questions. If I'm not clear on something, please just tell me.

A. Sounds good.

Q. So I want to ask you a little bit about your methodology here.

So you've, it says, done about interviews, you said, of far-right-wing extremists?

A. That's correct.

Q. And over how many years is that?

A. Beginning in 1997.

Q. Okay. So 20— over about 26 years?

A. Yeah.

Q. Okay.

A. That's correct.

Q. And 14 of the Proud Boys, Oath Keepers, and Three Percenters; is that correct?

A. That's correct.

Q. Okay. And how many of those interviews

[p.132]

were people who participated in the January 6 riots?

A. So that's — it sounds like a question that's a little bit complicated.

There's Institutional Review Board regulations that provide confidentiality, so I certainly wouldn't be able to name individuals that I've interviewed. I don't know if that was — you know, if that's kind of where you were going with the question, but . . .

THE COURT: Was that where you were going?

MR. GESSLER: I may, but I'm — but probably not.

THE COURT: Okay. Yeah. I took the question just as a — whether the people in your 14 were involved in the January 6 protests.

A. None to my knowledge; however, it's certainly possible that — you know, obviously, I don't know the identity of every single person, you know, that participated in January 6, so . . .

Q. (By Mr. Gessler) Right. So —

A. None to my knowledge.

Q. So you may have interviewed Person A, and that person may have shown up on January 6, but you just don't know?

[p.133]

A. That's right.

Q. Okay.

A. Yeah.

JA444

Q. So it would be fair to say that you interviewed these people well before January 6, those 14?

A. Yes. That's correct.

Q. Okay. Did you interview any participants, far-right-wing extremist participants in the January 6 after January 6?

A. No, I have not.

Q. Okay. Did you live with any families or people who participated in the January 6 riots?

A. Not to my knowledge.

Q. Okay. So your field — so your interviews and sort of fieldwork living with people — I'm sorry. This — okay.

Does fieldwork — fieldwork consists of interviews and sort of embedding yourself or living with people; would that be correct?

A. That's correct. The interviews are — can be either formal in nature or more informal.

Q. I just want to make sure I'm properly describing fieldwork.

So your fieldwork also occurred with

[p.134]

respect to this group of people before January 6; is that fair to say?

A. Yes. That's correct.

Q. Okay. And then as far as embedding yourself or living with families, did you embed yourself or live with any families that participated in the January riots, to your knowledge?

A. To my knowledge, no.

Q. Okay. As far as the archives go, so which archives did you rely on here? I saw a number — let me — let me back up.

So I saw a number of — we counted your expert report citations.

JA445

A. Sure.

Q. And I'm going to represent to you we counted about 78 citations to the January 6 report.

Does that sound about right to you?

A. I counted the same number.

Q. Well, that's good. Thank you for answering my question on that.

What other archives did you rely on?

A. So as I mentioned, archives can be more formal in natural or informal in nature. So social media, for example, would be — those would be — the various platforms are all types of archives which has

[p.135]

been a big — big part of, you know, my research and what I looked at, including in this case.

So various, you know, social media platforms would fit there.

Certainly, videos. Again, I mentioned at the outset, YouTube really is an important type of archive. It's widely used among researchers in terms of accessing different kinds of collections of material. They're housed in that. Again, it's not established for research purposes, but it provides information that —

Q. So let me ask you a question.

And I'm sorry. I don't mean to interrupt.

A. No.

Q. I might do that a little bit, but —

A. Sure.

Q. So in determining — how do you determine whether you're going to look at one social media archive versus another archive? Or do you just choose every single archive you can get your hands on?

I mean, how does that selection process occur?

JA446

A. Yeah. It — you know, some — some archives are — have a greater presence of far-right
[p.136]

extremists than others. But you certainly want to try and sample from as many different archives as possible. You're certainly—it's unlikely to be able to use every single social media platform. But I certainly utilize the kind of major social media platforms. They're more what you might call the mainstream-type platforms like Twitter or what used to be Twitter, Facebook, Instagram.

But then also more what you might call niche or fringe social media platforms like Telegram. But it has a substantial concentration of far-right extremists.

Q. So let me ask you this.

So if there's a body of opinion, say a body of opinion among sort of far-right extremists, what measurements do you have in your profession to determine whether or not a particular archive is representative of that body of opinion?

A. What you would look at is really, A, the presence of, you know, trying to make some determination about their presence on that particular platform.

Q. Okay. So it would be fair to say that the — that the ones that are sort of — have a greater presence or sort of more commentary, perhaps

[p.137]

louder commentary? I don't know quite how you measure loud in the social media world; they type in all caps?

A. Yeah. You look at intensity.

Q. Intensity?

A. Yeah. Q. Okay.

A. So, for instance, a call to violence would be, obviously, a more intense statement on a social media

platform than a statement that didn't involve a call to violence.

Q. Okay. So that's, in part, how you choose what to look at? You look at the intensity and the amount of presence?

A. Those are two things, yeah.

Q. Okay. Anything else?

A. Well, you'd want to look at how the social media platforms compare to each other as well. That way, you get a sense of their kind of differences in terms of how one platform is used versus another.

Q. Okay. And is any one platform in your experience more representative of sort of the body of far-right-wing opinions?

A. I don't think there is in my opinion. And certainly in the literature there's never been to my knowledge any kind of published scholarly

[p.138]

identification of one platform being most representative.

Q. Okay. So I want to apply that, maybe take it down one level for the January 6 rioters, okay?

Did you — what — did you look at any particular platform that you believe represents the entire spectrum of views — best represents the entire spectrum of views of people who rioted on January 6?

A. Well, I don't think there is one single platform. But I certainly looked at a number of different platforms, yes, to include some of the ones already mentioned — Telegram, for example.

Q. And you chose those platforms in part based on the intensity of the commentary on there and the volume of commentary?

A. Well, not quite.

Q. In part?

JA448

A. Just want to back up on the intensity.

The intensity is something you look at in terms of no matter what their presence is on the platform. You would look at — that would be one indicator of the kind of the nature of the speech and whether there are calls to violence or not.

Q. So —

[p.139]

A. You wouldn't assume necessarily that there is a high degree of intensity.

Q. So how do you measure or identify the opinions of people who aren't on social media platforms?

A. Well, that's why you don't exclusively rely on social media certainly. There's — that's what the fieldwork is.

Q. So interviews?

A. Interviews, yeah, absolutely.

Q. Fieldwork?

A. Absolutely.

Q. Okay.

A. Yeah.

Q. Okay.

A. Surveys can be done.

Q. Okay. Did you do any surveys of participants in the January 6 riots?

A. No, I did not.

Q. So you looked at social media platforms.

You looked at the January 6 report, correct?

A. Those are two things, but . . .

Q. What else?

A. Well, again, scholarly research that's

[p.140]

related to the topic. Certainly looked at —

Q. May I interrupt you just for a second?

A. Yeah.

JA449

Q. So what scholarly research did you look — specifically with respect to January 6?

A. Oh, I'm sorry. I thought you meant political violence more broadly.

Q. No. I understand.

But I'm talking — that's why I interrupted you.

A. Sure.

Q. So specifically with January 6, I saw that you wrote a scholarly work, a published work on that; is that correct?

A. That's correct.

Q. Have you consulted any others?

A. Yeah. Oh, yeah. Absolutely.

Q. Okay.

A. I certainly have looked at other expert testimony in regards to —

Q. For this report?

A. What's that?

Q. For the report that —

A. Yeah —

Q. — you produced today?

[p.141]

A. — for the report. Yeah.

Q. Okay.

A. There's an archive of expert testimony.

Q. Okay. So you looked at other people's opinions on January 6?

A. That's correct.

Q. Okay. Let me ask you a little bit about patterns of behavior. So we talked about patterns of behavior. And I want to make sure I understand sort of correctly what — some of these patterns of behavior.

One, you said, was a sort of conspiracy belief, a belief in conspiracy or shadowy forces?

A. Yeah. That's a central core belief.

JA450

Q. Okay. And the us-versus-them?

A. That's a central dynamic within —

Q. Sort of an antidemocratic ethos is what you called that, authoritarianism?

A. That would be another element.

Q. Okay. And you said violence?

A. That is a practice. Yes. That's correct.

Q. Okay. And then you talked about using various communication strategies?

A. That's correct.

[p.142]

Q. Okay. Now, I want to take each one of those.

My understanding is — from your testimony is that, probably except for violence, a lot of these others are sort of commonly used in political discourse by others?

Is that fair to say?

A. They're generic features of social life, human behavior, which is what makes them so powerful.

Q. Okay. So, for example, conspiracy theories and shadowy forces, is that — that, would be fair to say, is often used in political discourse, correct?

A. I'm sorry. I misinterpreted. I thought you were speaking exclusively about the communication strategies.

Q. Yeah.

A. Conspiracy theory. There's obviously — when you look at, for instance, surveys that measure belief in conspiracy theory, there's quite a bit of variability. So that's not necessarily the same — it doesn't have the generic feature the way, say, the use of doublespeak does, but . . .

Q. Okay. And let's focus on conspiracy theories, for example.

[p.143]

A. Okay.

JA451

Q. So are you familiar with political discourse where people will complain about shadow — special interests controlling our government?

A. Yes, I've heard those phrases. Yes.

Q. Okay. And you agree with me, that's a common feature for people sort of across the political spectrum to be angry or upset about special interests controlling their world?

A. I think that's fair.

Q. Okay. People will talk about big oil or big corporations or big labor.

Those are all sort of a variant of a conspiracy theory; is that fair to say?

A. They could be.

Q. And, in fact, that goes back quite a way.

Are you familiar with the political scientist, Richard Hofstadter?

A. Yes, I am.

Q. And he wrote a very famous book in called "The Paranoid Style in American Politics," right?

A. Yes.

Q. And he sort of talked about conspiracy

[p.144]

theories as — in American politics, how they were a consistent feature as far back now as 60 years ago.

Is that fair to say?

A. It is. And a group of scholars that Richard Hofstadter was associated with did identify, though, what they called right-wing radicalism was especially kind of characterized by conspiratorial beliefs.

Q. But they also said that it was common — a common feature throughout American politics?

A. Yeah. Fair enough.

JA452

Q. Okay. How about — let's talk about us-versus-them.

That's — would it be fair to say that that's a common theme in American politics as well?

A. Sure.

Q. Is that fair to say?

A. Yeah.

Q. Okay. Democrats are angry at Republicans; that's an us-versus-them element. And Republicans can get angry at Democrats as an us-versus-them element.

It fits both sides of the political spectrum; is that fair to say?

A. Sure. What we're talking about here as

[p.145]

us and them is associated so closely with violence, which

—

Q. Understood.

A. — wouldn't be a common feature.

Q. Understood.

A. Yeah.

Q. But I'm trying to isolate each one —

A. Okay.

Q. — to give me a better sense of —

A. Sure.

THE STENOGRAPHER: If you could both please be careful about speaking one at a time for me, please.

MR. GESSLER: I'm sorry.

Q. (By Mr. Gessler) And then, an antidemocratic ethos or authoritarianism.

I think you would — would you agree with me that there — that's also a very frequently occurring or common feature in American politics?

A. I don't know that I would agree with that.

Q. Okay.

A. Yeah.

Q. So would you agree with me that people on both sides of the political spectrum are sometimes

[p.146]

frustrated to say that the legislature or Congress can't be trusted?

A. That's a statement I've heard from various political orientations, sure.

Q. Okay. You've heard — in fact, we've heard Presidents talk about how, if Congress isn't going to do something, they're going to take matters into their own hands.

You've heard that from both sides of the spectrum; would that be fair to say?

A. Is that — could you repeat that?

Q. We've heard that from both sort of political parties, that Presidents who get frustrated with Congress not moving forward on legislation talk about how they're going to take things into their own hands?

A. Okay. Yeah.

Q. Okay. You've heard arguments where — I'll ask you.

Would it be fair to say you've heard arguments where people on both sides of the political spectrum throughout will argue that the legislature should not be taking action, that it's up to the courts to decide.

Is that fair to say?

[p.147]

A. Generally.

Q. Okay. And so your point is that the thing that characterizes far-right extremism is that they have sort of these three — these elements, and they add to the mix of violence.

Would that be fair to say?

JA454

A. Yes, that's a defining feature of extremism —

Q. Okay.

A. — the close relationship with violence.

Q. Okay. Let's talk about communication strategies.

So you talked a little bit about doublespeak —

A. That's correct.

Q. — right?

And if I remember correctly, you said that we sort of all do doublespeak to some effect?

A. I —

Q. Just —

A. Oh —

Q. To some extent.

I'm sorry. We all do doublespeak to some extent?

A. That's correct.

[p.148]

Q. Okay. And I think you used the example, sometimes we'll put — we'll emphasize a particular aspect towards a job interviewer and a different aspect or a different face towards perhaps a romantic partner or something like that?

A. Actually, I used that example to illustrate the front-and backstage behavior distinction, which is a different concept.

Q. Okay. I'll get to that in a little bit.

A. It's —

Q. Let me continue to focus on the doublespeak.

So doublespeak would be saying one thing in public and a different thing in private.

Is that fair to say?

A. That could be an example. It's also saying one thing, irrespective of whether it's public or private, that could be interpreted different ways depending on the audience's understanding.

JA455

And so it might be understood in one way by outsiders who don't have a good contextual understanding of a particular culture, and then a different way by insiders within a specific culture will understand it to mean something different than what outsiders would.

[p.149]

Q. Okay. So is —

A. The same or different understanding.

Q. Okay. That's what I'm asking.

A. Yeah.

Q. So I'm asking, a person will use the same word in front of one audience, which has a particular meaning, and then they'll use the same word in front of a different audience that has a different meaning.

Is that doublespeak?

A. That would be an example of doublespeak or a facet of doublespeak.

And, again, I would say — underscore again this is a generic facet of communication. Oftentimes it's innocuous. Sometimes it can even have well-intentioned aspects to it in terms of maybe not wanting to use certain language that could be interpreted in a different way so as to not offend someone; for example, to try and be polite or kind of adhere to some form of etiquette.

Again, though, I'm underscoring that for far-right extremists, it's deeply connected to the violence issue.

Q. But it's —

THE COURT: I'm sorry. You said it's

[p.150]

deeper connected to what?

THE WITNESS: Deeply connected to the violence issue.

THE COURT: Okay.

JA456

Q. (By Mr. Gessler) I'm sorry. Did you see "deeper" or "deeply" connected?

A. Deeply.

Q. Okay. So your characteristic — your application to far-right extremists is that they'll use doublespeak just like everyone else, but they also connect it to violence.

Is that fair to say?

A. That's fair to say.

Q. Okay. And then you talked about a couple other communications. I wanted to just sort of go through these. Front- and backstage. That was one of them.

Where you're sort of favorable and you put a favorable foot forward in front of someone, and then a different aspect or personality in front of someone else.

Is that fair to say?

A. Yeah. That's a fair characterization.

Q. Okay. And that was the example of a person will behave one way in a job interview and

[p.151]

behave a different way towards a romantic partner?

A. That's correct.

Q. And that would sort of be a form of doublespeak?

A. A form of front- and backstage.

Q. I'm sorry. That would be a form of front and back?

A. Yes, sir.

Q. I'll work on my sociology degree during this cross-examination.

And one — so would one example of sort of doublespeak be a politician who presents him- or herself in a very moderate way in front of one group and in a very radical way in a different group? Would that be a form of doublespeak?

JA457

A. That would involve — that would likely involve language that would kind of fit the characteristics of doublespeak —

Q. Okay.

A. — based on what you've described here.

Q. So doublespeak, you use different language between the two audiences?

A. Well, you may use different language or you may use the same language with the understanding that audiences will potentially receive it

[p.152]

differently.

Q. Okay. Okay. So I say okay, but I'm not understanding.

A. Okay.

Q. So doublespeak — why don't you give me doublespeak in your words —

A. Sure.

Q. — and we'll go from there.

A. Sure. I mean, we talked about 1776.

THE STENOGRAPHER: Would you speak a little closer to the microphone for me, please?

THE WITNESS: Sure.

A. When we talked about 1776, for example. So the term for insiders within far-right extremist culture is understood in a way that would likely be different for outsiders who aren't steeped in that culture.

So it's the same term, but it has — it's understood differently depending on kind of cultural context, which is really what doublespeak is all about. It's about basically contextual understandings and how they vary depending on a whole host of different factors, including the situation, the audience, what their understanding is, tone of voice.

[p.153]

And you can imagine there's lots of different things that go on to how sort of contextual cues shape understanding.

Q. (By Mr. Gessler) Okay. So let me see if I can understand that.

So let's say — let's say I'm involved in politics, and I'm running for office or I'm an officeholder. And I go to a Fourth of July parade, and I give a speech. And the speech says "Remember the Spirit of 1776. This is why our forbearers fought and died," sort of a rousing patriotic speech. And I frequently use the term "1776," okay? And there's far-right-wing extremists in that audience, okay?

And then let's say I do the same speech at a different — I'm going to a bunch of Fourth of July parades. So I go to one Fourth of July parade and give that rousing speech, and there's far-right-wing extremists in it. And then I go to another Fourth of July parade, I give the same rousing speech or something pretty close, because I've practiced it a lot. So I'm giving a pretty close speech. Maybe I even wave a 1776 flag as part of my speech in both audiences. And that one contains no far-right-wing extremists.

Is that a form of doublespeak?

[p.154]

A. Yeah. Again, you're going to have different understandings.

Q. Okay. Because one crowd will understand it in a particular way, and the other crowd will understand it in a different way?

A. Yes. Q. That's doublespeak?

A. Based on kind of cultural context —

Q. Okay.

A. — and how they understand it.

Q. Now, as a speaker, do I have to know that there's far-right-wing extremists in one audience? And do I have to know that there aren't far-right-wing extremists in the other audience in order for that to be doublespeak?

A. Not necessarily.

Q. So if I'm — now, I want to make sure I — so if I'm a politician and I'm running for office or I'm holding office and I give my rousing Fourth of July speech in front of far-right-wing extremists — and I don't know they're far-right extremists. I mean, some of them have salt-and-pepper beards like they're grandfathers. I don't know. Maybe, maybe not.

But let's say there are people, but I

[p.155]

just don't know.

A. Okay.

Q. And then I go to this other rally; same speech, no far-right-wing extremists.

I have engaged in, from a sociological standpoint, doublespeak; would that be fair to say?

A. What I've described here in terms of far-right extremism is the doublespeak tends to be intentional.

Q. I —

A. So, you know, you described something that may not be intentional.

Q. I understand that. And I've been very clear on my hypothetical, where it's not intentional.

But I'm asking, is it still doublespeak if it's not intentional?

A. Well, it would have — it may have similar consequences. So the consequence or the effect of it in terms of how it's received, then that would constitute an aspect of doublespeak. It wouldn't be kind of true

doublespeak without more of an intentional aspect to it, though.

Q. Okay. So it would be fair to say it's characteristic of doublespeak, but absent intentionality, it's not true doublespeak; is that

[p.156]

fair to say?

A. As far as how doublespeak is practiced by far-right extremists, it's associated with, you know, a high degree of intentionality.

Q. Okay. So far-right extremists will be intentional about how they do that?

A. Part of the culture.

Q. Okay. But you can have someone doing the same time thing unintentionally and they're not a far-right extremist?

Let me rephrase that question. It's a terrible question.

A. Thank you.

Q. So you're saying far-right-wing extremists, they're intentional about it, correct?

A. Within far-right extremist culture, doublespeak is used in an intentional fashion.

Q. Okay. And so it's fair to say that when you define doublespeak with respect to far-right-wing extremism, you're implying intentionality; the speaker intends to have a different effect on different audiences?

A. That's correct. And part of that has to do with the violence aspect.

Q. Right. And to some extent, that would

[p.157]

imply that the speaker knows that there's different audiences and that's why he or she is using the doublespeak, because they understand their audiences?

JA461

A. Or they suspect.

Q. Or they maybe suspect?

A. Yeah. They may not be sure about potential differences, but they may have some reason to believe.

Q. Okay. And — all right. So you have to understand the intentionality first before really understanding whether it's a far-right-wing speaker using doublespeak; is that fair to say?

A. Can you rephrase that question?

Q. Do you need to understand intentionality before you can understand whether a far-right-wing speaker is actually using doublespeak?

A. Well, you can observe the practice. So the practice certainly can be observed.

Q. Okay. So you can observe the practice, and you can say, well, one audience here, one audience there. It correlates. It correlates with doublespeak.

Would you say that?

A. It correlates, consistent, yep.

Q. But you don't really know if that

[p.158]

speaker is engaging in doublespeak absent some understanding of their intent?

A. Yes. That's why the fieldwork and interviews is so important.

Q. I see.

A. And also the archival material in some cases will oftentimes betray the intent in some fashion, as the example of Robert Ray, for example.

Q. As an example of — I'm sorry?

A. The example from the organizer of Unite the Right that we discussed earlier when he was talking about how humor is used in terms of a way to establish uncertainty

JA462

among audiences so folks don't know when they're seriously promoting violence or versus joking about it.

Q. Okay. Now, you've also talked about how someone will have — make a statement. And I think you spoke about this in the context of some of President Trump's speeches.

But how someone will make a statement and then negate that statement —

A. Yes.

Q. — correct?

A. Yeah. A certain negation of sorts.

Q. Okay. So something like, you know, "Go
[p.159]

do something terrible, but I'm just joking," or don't really do it.

Would that be an example?

A. Yeah. That's a fair — the video clip we saw of Nick Fuentes doing that.

Q. Okay. And you say that's very common among right-wing extremists?

A. What we found in our research as well as a number of other scholars have found.

THE COURT: I'm sorry. What was the last thing you said?

THE WITNESS: That's what a number of other scholars have found.

THE COURT: Ah. Thank you.

THE WITNESS: Sure.

Q. (By Mr. Gessler) Okay. And I think — and I think you had talked about — if I remember correctly, there was a video from President Trump's press conference after a Unite the Right rally in Charlottesville; is that correct?

A. That's correct.

JA463

Q. Okay. And I have in my notes that you used that as an example of a failure to condemn.

Was that right?

A. I said there was a statement that was

[p.160]

perceived by far-right extremists as promotion despite — we showed two clips, if you recall. The first clip about “fine people on both sides.” The second clip had a type of condemnation and that that, for far-right extremists, was overridden by the “fine people on both sides” comment.

Q. Okay. So the “fine people on both sides.” So the right-wing extremists listened to the “fine people on both sides,” and they said, “That speaks to us.” And then the condemnation in the second clip, they said, “Oh, President Trump is just saying that because he has to”?

A. It’s almost a verbatim quote from Andrew Anglin that you just said, so yeah, I agree with your comment.

Q. I don’t exactly know who he is.

A. He was the — he is the founder the Daily Stormer and —

Q. Okay. So maybe that’s an example of how, I will represent to you, a lawyer who is not a far-right extremist may use similar language as a far-right extremist?

A. Well, I — you or —

Q. As an example in front of you, so . . .

A. I interpreted your comments paraphrasing

[p.161]

what a far-right extremist might say.

THE COURT: You’re both talking over each other.

Q. (By Mr. Gessler) I’m not accusing you of calling me a far-right extremist.

A. Thank you.

Q. Okay. Let’s —

JA464

THE COURT: But, Professor Simi, make sure to allow him to finish his questions before you start answering them.

THE WITNESS: Okay. I apologize.

MR. GESSLER: And my paralegal just sent me a note admonishing me too, my behavior.

Your Honor, can we take a one- or two-minute break? I just need to figure out a way to get the right video loaded.

THE COURT: Okay.

MR. GESSLER: Thank you.

(Pause in the proceedings.)

Q. (By Mr. Gessler) So I'm going to show you a clip, and I think this is a clip you testified about earlier.

A. Okay.

MR. GESSLER: Can we play that, please, starting at — starting at :55.

[p.162]

(Video was played.)

Q. (By Mr. Gessler) So I'm going to stop there.

So it's your — sort of based on your study. And it's your analysis that sort of the first part of his talk where he said, you know, "fine people on both sides," that the far-right extremists sort of took comfort in that, took inspiration.

And then the second part where he said, you know, "Neo-Nazis, they should be condemned entirely," and whatnot, they view that as doublespeak?

A. Yeah. Establishing plausible deniability.

Q. Okay.

A. Inserting negation after offering a source of affirmation.

Q. Okay. So I'm going to show you a video from the day before this, okay?

JA465

MR. GESSLER: And that's Number 1059, please.
And start that at 1:40.

(Video was played.)

MR. GESSLER: Let's go back. How did we practice
law before?

(Video was played.)

Q. (By Mr. Gessler) So I'm going to
[p.163]

represent to you that that speech at the White House took
place the day before.

So in — when put in conjunction with the April 15, how
did far-right extremists interpret those statements?

Did they view that — let me be more specific.

Did they view that as an example of plausible
deniability?

A. They — remember, this — these remarks at that
time, real time. And it was — no, it was not taken because
these set of remarks were very clear. And when they —
what I think really — you have to understand, there was
already a relationship between Donald Trump and far-
right extremists prior to 2017. And far-right extremists
were already perceiving him in certain ways.

But those set of remarks, if that had been the final
word, it's possible their understanding obviously would
have been different, at least as it pertained to the Unite
the Right rally.

But they weren't. They were followed by the
comments that we saw previously about “fine people on
both sides.” And so that's ultimately what far-right
extremists took from Donald Trump in terms

[p.164]

of his characterization of what happened in
Charlottesville.

JA466

Q. Okay. So let me understand this correctly. So Donald Trump goes to the White House. He makes a statement where he's condemning people from both sides, and far-right extremists sort of look at that.

But then they — then the next day, Donald Trump in his press conference says, "There are very fine people on both sides," and then about a minute later he condemns the KKK and neo-Nazis.

And so you're saying that what the far-right extremists took from this was really "the fine people on both sides." That's what inspired them. And that they essentially disregarded the press conference before, and they disregarded the comments — I'm sorry — they disregarded the White House press conference before, and they disregarded the latter remarks subsequent to "the very fine people."

Is that fair to say?

A. Yeah. I'm saying —

Q. Okay.

A. — that far-right extremists actually are pretty clear on that in terms of confirming

[p.165]

what — how you just characterized it.

Q. Okay. So I guess, you know, the analogy that came to my mind is — have you ever seen the movie "Dumb and Dumber"?

A. You know, I never have.

Q. Okay. I'm going to describe to you a scene. Maybe you've heard this scene.

A. Okay.

Q. There's a scene where sort of the protagonist — I think it was played by John [sic] Carrey. He's the guy who — I don't know if he's the dumb or dumber guy.

JA467

But he's talking to a woman he has a crush on, and he says something along the lines of "If we were the only people left on earth, okay, would you" — "would you like me or would you want me?"

And she says, "Well, you know, maybe" — something along the lines of "one in a million chance."

And he gets this big smile on his face, and he says to her, "So you're telling me there's a chance?"

Did you ever hear that scene?

A. No.

Q. No?

[p.166]

A. Vaguely familiar, but not any —

Q. Was that sort of —

A. — specific —

Q. — would that seem to sort of describe a far-right extremist, where they're always looking for something — something to latch on to that they believe inspires them and will disregard any other evidence to the contrary?

A. No. I don't think that's consistent with the pattern in terms of the relationship between Donald Trump and the far-right extremists.

Now, I will say going back to the Unite the Right and "the fine people," you — we have to put that in context in terms of him saying "fine people." This is not something far-right extremists are used to hearing coming from the President of the United States. And that — so that did have a substantial overriding effect. I think you can understand why given their views typically of politicians and conventional politicians.

And so I think the way you just characterized it is not really consistent with that history in terms of the relationship between Donald Trump and the far-right extremists.

JA468

Q. Okay. Let me ask you about this 1776
[p.167]

thing. I think you had said that sort of far-right extremists view the number 1776 or the phrase involving 1776 as a call to violence, right?

A. Within — yeah, within —

Q. Within their circles?

A. Yeah, within —

Q. And you said —

THE STENOGRAPHER: I'm sorry. I did not hear your answer.

A. Within their circles and certain contexts.

Q. (By Mr. Gessler) And you said that it takes — it takes time for someone to develop that understanding; is that correct?

A. Yes. I said that in terms of how culture operates in terms of the more people become immersed over time, the more understanding they'll develop.

Q. So if I'm someone who's not a part of the far-right-wing extreme movement and I see the number 1776 or the Spirit of 1776, I won't — it's unlikely I'll view that as a call to violence; is that fair to say?

A. Yes.

Q. Okay.

[p.168]

A. I think that's fair to say.

Q. And then I start hanging out with these far-right extremists, and they start using this term "1776." And it will take a while, but eventually, if I subscribe to the far-right extremism, I'll view that as a call to violence, a coded call to violence when it's used?

A. Well, the amount of time it takes is going to vary a lot depending on a whole host of different factors. There's no formula, certainly, that says it's going to take X

JA469

number of hours or days or weeks or months. It's going to depend on how much exposure the person has, the types of exposure.

But generally speaking, yes, as a person becomes more familiar with the culture, they'll start to develop an understanding.

Q. Okay. Let me ask you a little bit about the Stop the Steal.

A. Okay.

Q. Okay. Is it your testimony that talking about stealing — a stolen election is consistent with far-right extremism?

A. The word "stolen," in particular the idea of political corruption, the idea of fraud, these have high degrees of salience within far-right

[p.169]

extremist culture.

It doesn't mean every time those terms are used that that's indicative of far-right extremism. But within far-right extremist culture, those terms are very meaningful and would tend to resonate with their worldview.

Q. Would you agree with me that concerns or being upset about a stolen election is a common feature of modern American politics?

A. Yeah.

Q. And you'd agree with me that people who were opposed to Donald Trump thought that the — or voiced concerns, some of them, that the 2016 election was stolen because of Russian interference?

A. Yeah. I am familiar with those —

Q. Okay.

A. — those claims.

Q. And that, in fact, there was an election in Georgia in which the person who lost, she argued that the election

JA470

wasn't valid and was essentially stolen because of voter suppression.

Do you remember that?

A. I do remember that.

Q. Okay. So it's been a — the stolen election theme, unfair election forces that stole the

[p.170]

election is — that's not uncommon, correct?

A. It's not my opinion that it's exclusive to far-right extremism in —

Q. Okay.

THE STENOGRAPHER: In terms of what?

THE WITNESS: In terms of these issues.

THE STENOGRAPHER: And if you could speak into the microphone, please.

Q. (By Mr. Gessler) But what makes it connected to far-right extremism is the connection towards violence; is that correct?

A. Connection towards violence and, again, the contextual issues that when certain allegations are made as it relates to a stolen election, it would have more meaning in some cases for far-right extremists than some of the examples for — you know, the instance that you just pointed to.

Q. Okay. So if Hillary Clinton, the loser of the 2016, says "Our election was stolen. Donald Trump is an illegitimate President because of Russian interference," that would not have resonance for far-right-wing extremists?

A. No. Far-right extremists would perceive Hillary Clinton — or do perceive Hillary Clinton in very antagonistic terms.

[p.171]

Q. Right. And if Donald Trump were to say the same thing — and I understand he didn't blame Russia for the 2020 election.

But were he to say almost the same thing word for word and blame a foreign power, that would resonate with far-right-wing extremists; is that fair to say?

A. Exactly. Because of this relationship that we've been talking about in terms of this pattern over time that developed between Donald Trump and far-right extremists. Those claims would have a very different meaning for far-right extremists than, as you pointed out, Hillary Clinton making similar claims in that scenario.

Q. Okay. Now, let's —

MR. GESSLER: So, Your Honor, before I continue, I would like to move to admit the exhibit — I believe that's 1060 — I'm sorry. Let me make sure I have my numbers correct. Yeah. Number — I believe Number 1060 has already — that's the same video that's already been admitted, the press conference.

And we move to admit Number 1059, the press conference at the Oval Office.

THE COURT: Admitted.

(Exhibit 1059 admitted into evidence.)

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Q. (By Mr. Gessler) So let me also understand that — so when Donald Trump talked about — President Trump talked about the, you know, immigrants from Mexico, some of them being rapists and assuming some of them are very fine people, your testimony was that was a clarion call for the far-right extremists?

A. They heard that, those messages, those terms, and it was a substantial alignment that it had with their own conversations. As it relates to immigration, it was a very

JA472

close alignment. And they found that speech and especially that part of the speech to be very powerful. And you certainly had a lot of discussion among far-right extremists after his announcement and when he was — given that the announcement included those terms.

Q. Okay. And that if — so there's been a lot of debate, I'll submit to you, about immigration — immigrants that some people refer to as illegal immigrants or illegal aliens, there's a number of phrases, but of people who have recently entered the United States being in northern cities. And there's mayors that are sort of getting upset by that.

If a mayor like that — let's call it a Democratic mayor, someone who is not viewed as a

[p.173]

conservative or sympathetic to the far right. So if a Democratic mayor were to use those same words, would that be a clarion call to the far right?

A. You know, in a hypothetical situation without any other contextual information, it's hard to say. It would depend on that person, their history, what the far right knew or didn't know about the person.

Which is why, again, I mentioned that with the 2015 — the campaign announcement, you can't take that in isolation. You also have to take into consideration the currency he had developed based on the Birtherism claims and the involvement he had in terms of promoting that conspiracy theory, which was a major facet of far-right extremism in terms of challenging Barack Obama's legitimacy to serve as President, and, frankly, just being very antagonistic about his election.

Q. Okay. So it would be fair to say that it takes a period of time, a consistent pattern of behavior by a

JA473

politician before the far-right-wing extremists will view his or her comments as a clarion call to action?

Is that fair to say?

A. Yeah. It's hard to say exactly how long

[p.174]

it would take, you know. But certainly these — it would have a pattern, and patterns take time to emerge.

Q. Okay. So it could be a couple of months, a couple of years, but it requires a pattern of behavior?

A. Correct.

Q. I'm going to be jumping around a little bit, so I will apologize to you for lack of thematic development.

A. No problem.

Q. I want to go back to sort of the deniability. Can we — where you said President Trump would say one thing and then immediately negate it afterwards.

Do you remember that?

A. I don't remember saying "immediately."

Q. Okay. But would negate it afterwards?

A. That's a common feature —

Q. Okay.

A. — for far-right extremist leaders in general. And, you know, much of what we've been discussing fits that pattern in terms of the relationship between Donald Trump and the far-right extremists.

[p.175]

Q. Okay. I'm going to show you a video and ask you if — certain speech, if that fits that pattern.

A. Okay.

MR. GESSLER: Your Honor, I may take a few minutes here, so I apologize if I do.

Q. (By Mr. Gessler) All right. I'm not going to be able to find the video quickly, so I'm just going to talk to you about it.

JA474

THE COURT: So it's noon, so . . .

MR. GESSLER: So a respite to find my video.

THE COURT: I'm going to give you a Hail Mary here to find all your videos so you are not eating away time on finding videos.

MR. GESSLER: Thank you, Your Honor.

THE COURT: So why don't we just reconvene your cross at 1:00.

MR. GESSLER: Okay. Thank you.

THE COURT: We're off the record.

(Recess from 11:58 a.m. to 1:07 p.m.)

THE COURT: You may be seated.

Mr. Gessler, are you ready to proceed?

MR. GESSLER: Yes, ma'am.

Q. (By Mr. Gessler) Okay. So, Dr. Simi,
[p.176]

I'm going to start with some exhibits here. And I want to — I'm going to talk about some intentionality and interpretation —

THE STENOGRAPHER: I'm sorry. Can you speak a little louder for me, please?

Q. (By Mr. Gessler) I'm going to talk about —

THE COURT: Mr. Gessler —

MR. GESSLER: Yes, ma'am.

Q. (By Mr. Gessler) Let's try that again.

I'm going to talk about intentionality and interpretation for sort of the next part of what we're going to talk about.

So let's bring up 1074. Okay.

(Technical difficulties.)

A. I thought that was a trick question there for a second.

Q. (By Mr. Gessler) Okay. Can we play just the first five speakers on this video, please.

JA475

(Video was played.)

Q. (By Mr. Gessler) So you heard a number of speakers use the term “fight,” correct?

A. That’s correct.

Q. And I’d represent to you that those are leading members of the Democratic party in office.

[p.177]

Are you able to tell from their speech whether or not they’re intending to provide a message to the members of the far-right wing — you know, far-right-wing extremists.

A. If I may explain my answer?

Q. Let’s just start off on small bits, then I’ll certainly give you a chance.

So from what they’re saying, so using the word “fight,” are you able to tell if they’re intending to speak with far-right extremists?

A. No. Absolutely not.

Q. And it’d be fair to say that you can infer that they’re not intending to speak with far-right extremists because they tend towards a different side of the political spectrum?

Would that be fair to say?

A. I wouldn’t necessarily want to make that kind of inference on limited information, but I see where you’re — I understand your characterization.

Q. Would it be fair to say that in order to understand whether they’re — well, let me back up.

Can you tell from what they’re saying whether or not the members of the far — you know, far-right-wing extremists would view that as a communication to them?

[p.178]

A. Ten-second clips? Absolutely not.

Q. You’d need more context, correct?

JA476

A. More information and more context.

Q. And what is some of that more information you need?

A. You'd want to look at past communication patterns. You want to understand the historical context between the speaker and whatever, you know, community or culture you're trying to understand, whether they have a relationship. You'd want information from that culture's perspective — in our case, right-wing extremists — and how they receive messages and in particular as it relates to that specific person.

So there's, you know, a number of different types of information you'd want to, you know, more fully assess and try and identify whether there's any patterns —

Q. Okay.

A. — that are present.

Q. Let's play a little bit more. I'm guessing your answers are going to be the same, but we're going to go through this.

A. All right.

(Video was played.)

[p.179]

Q. (By Mr. Gessler) Would you answer the same for those five?

A. Yes, it is.

Q. Okay. Let's just finish the clip, and I'll ask you a few more questions at the end of this clip, okay?

(Video was played.)

Q. (By Mr. Gessler) Okay. You heard a few speakers in there say, "We're going to take the fight to the streets."

Do you remember hearing that among some of the speakers? A few of them, I believe, said that.

A. Okay. I trust your characterization.

JA477

Q. You don't want me to play that whole thing again, do you?

A. I'd rather not.

Q. Okay. And so there's a couple of speakers that said, "We're going to take the fight to the streets."

If — if they were at a rally with far-right-wing extremists in it, and they used the term "fight" and "We're going to take the fight to the streets," would those far-right-wing extremists interpret that as a call to violence?

A. If they had a relationship with the
[p.180]

speaker that involved a history of that speaker promoting and endorsing violence, both before and after violent incidents had occurred; had developed a relationship, you know, signaling various things that were important to that community, that culture; signaling things in terms of their support for various grievances; using language representing threats as existential in nature and requiring, you know, violent action — if all of those things were present, then, yeah, quite possibly they would interpret it in that fashion.

Q. Okay. And if those things weren't present, it's unlikely they would interpret those terms "fight" and "take the fight to the streets" as a call to violence, correct?

A. It's always hard to, you know, predict — you know, you take something out of the equation. Again, if you're just saying in isolation one thing, and if that one thing is not present, then, yeah, that would make sense that it would have a substantial influence in terms of a lack of action that might not be taken.

Q. Okay. So let me give you a hypothetical. Let's say there's a speaker. Say one of those speakers in there that says, you know, "We're

[p.181]

going to fight like hell” and “We’re going to take the fight to the streets.” That’s what they say. And they say that at a big rally, and that rally has far-right extremists in it.

But they don’t have a history of promoting violence, at least none that the right-wing speakers know of, and they don’t have any perceived relationship with the far-right-wing extremists. So they don’t have those two factors.

Would that be considered a call to violence?

A. What are the other contextual factors present? That would make a big difference too.

So again, you know, some of these hypotheticals, when they’re asked without enough information, it’s hard for me to answer that question and — depending on what’s the context of that speech that’s being given, why were they saying certain things, what was it related to.

You know, the audience is going to receive — even with a lack of information, you could still imagine that an audience would receive certain calls to action in a particular way depending on the situation.

Q. Okay. Let’s take a look at a few more

[p.182]

videos. And I think they’ll provide a little more context, but perhaps not enough. So we’ll talk about that.

A. Okay.

MR. GESSLER: Exhibit 1026, please.

(Video was played.)

MR. GESSLER: Okay. Let’s stop it right there.

Q. (By Mr. Gessler) So you saw the woman in there. And I’ll represent to you that she’s a congresswoman. And she’s speaking to a crowd, and she’s telling them, the crowd, to push back and make people not feel welcome there. And people are cheering her on.

JA479

Is that a call to violence, or would you need additional contextual information?

A. It would — you know, one of the factors that would be important in terms of additional contextual information is, is there — you know, are there individuals and groups present in the audience that have known violent histories for committing acts of political extremism — violent political extremism?

Saying — you know, making a statement like that with a crowd that has that known history is different than saying those things in a crowd where

[p.183]

that's not present.

Q. Okay. This is Congressman Waters. She may or may not know if people have that history are — who have that history are in that crowd.

A. Okay.

Q. So you're saying, well, maybe it's a call to violence if there are people with that history in the crowd, and maybe it's not a call to violence if there's people without that history in the crowd.

Is that a fair characterization?

A. Yeah. That would be one — again, one aspect. There's — we're only talking about one aspect, though.

Q. So what other aspects would I need?

A. I would go back to what we just discussed, which is the history in terms of relationship between the speaker and members of the audience.

Q. Okay. Great.

MR. GESSLER: Let's look at Number 147.

(Video was played.)

Q. (By Mr. Gessler) Okay. So they're joking about smacking people there, and she's laughing at it.

Does that give you enough context to

[p.184]

know whether or not that would be perceived as an endorsement of or a call to violence?

A. No, it really doesn't. I mean, again, fairly short clip. I'm not familiar with the speakers as far as the radio hosts. I — there's just not much contextual information for me to say much about it.

Q. Okay. MR. GESSLER: Let's look at Number 1048, please.

(Video was played.)

Q. (By Mr. Gessler) Okay. Let's talk about that one a little bit.

Do you know who that is speaking, or do you understand the context behind that?

A. I know who the speaker is.

Q. Okay. And you understand the context, that that was involved in a debate with respect to abortion and the possibility of the United States Supreme Court issuing a decision?

A. Yes. That's my understanding based on what I saw.

Q. Okay. Did you have a preexisting understanding before looking at this video?

A. Of this particular clip?

Q. Yeah.

[p.185]

A. No, I did not.

Q. Okay. So you heard Senator Schumer. He talked about how women are coming under attack, how people are waging war on them and taking fundamental rights.

Is that language characteristic of some of the language used by far-right-wing extremists?

I'm not saying he is one, but does it have the same characteristics of some of the language used by far-right-wing extremists?

JA481

A. One of the things I would want to know more about in order to more fully answer your question would be the history of the speaker's use of the term "war" and whether there's, you know, evidence basically that would suggest that the speaker really believes that a literal war is taking place and that some type of action is required or whether the speaker is using a more figurative type of term in terms of "war."

So without that information, that — it's really hard to assess kind of this — how the speaker is using that term, "war."

Q. Okay. Does the speaker using the phrase "we're coming under attack" — does that create a sense of self-defense and an us — does that create a

[p.186]

sense of self-defense among the listeners?

A. It could. Again, you know, how the — the history of the speaker's use of the terms and their understanding of the terms — how they used it in the past, whether they used it in the past — these would all be important, you know, kind of, again, contextual factors to look at.

Q. So you can't really tell just looking at the words?

A. I don't think there's a social scientist in the world that would say you can take just words at face value. Context is always important, whether we're talking about violence or otherwise.

Q. Okay.

MR. GESSLER: Let's take a look at 1054, please.

(Video was played.)

Q. (By Mr. Gessler) Okay. So — and take — when — I believe it was President Joe Biden. He may not have been President yet at that clip.

But at the time President — I'll call him President Joe Biden, because I don't know the time, out of respect.

JA482

At the time he made that comment, could or would that have been interpreted by the far — by

[p.187]

far-right-wing extremists as a call to violence?

A. Well, let me just first say that any one of the contextual factors in looking at that statement is he said, “I wish I were in high school.” So — and that that — and I think you said important aspect of the statement in terms of understanding.

Would far-right extremists —

Q. So let me interrupt you a second.

Couldn't him saying “I wish you were in high school,” be treated as a case of plausible deniability, almost like a joke to mask his violent tendencies?

A. That is possible. Again —

Q. Okay.

A. — with more context, we can make a better determination.

Q. So it would require context to understand whether he's engaged in — is that doublespeak or front/back behavior?

A. Doublespeak.

Q. Doublespeak.

A. But front/backstage would have other application.

Q. Okay. So we would need context to understand whether one of those two methods of

[p.188]

communication were to apply?

A. Yeah. I hate to sound like a broken record, but we'd want to know whether there was a relationship between Joe Biden and far-right extremists such that there had been a pattern developed where he would have far-right extremists who would understand certain things in a certain way based on the speaker's words.

JA483

Q. Okay. Great. I'm not going to subject you to any more of these types of videos.

So thank you very much for that. Let me move on.

I want to go to the — there's a demonstrative exhibit — picture you used. Picture Number 4, if I remember correctly.

Do you remember looking at that?

A. Yes, I do.

Q. Okay. I want you to look at that picture on the left.

A. Okay.

Q. I'm guessing — and I'm wondering if this is your opinion as well that those are two people fighting.

Does that look like two people fighting?

A. When you say "two people," you're

[p.189]

referring to, on my left, a person in a kind of light-blue-colored shirt that's holding the flag that appears to be as a weapon — using as a weapon?

Q. And the person in the green.

A. And the person in the green.

Q. Okay.

A. To me, it appears that the person in the blue is getting ready to, I guess you might say, stab the person in the green with a flagpole.

Q. Okay. And the person — well, let's look at those people.

So the person in the blue has a helmet, right?

A. Yes. That's correct.

Q. And the person in the green has a gas mask on?

A. It appears to be, yes.

Q. Yeah. So it looks as though maybe they both prepared for violence.

Would that be fair to say?

A. I think that's fair.

JA484

Q. Okay. And the person in the blue — and I see what you're saying. It looks as though that person is preparing to stab.

But I had wondered — it would be fair

[p.190]

to — it could be that that person in the blue had just — was pulling the flag away from the person in the green trying to grab it.

The person in the green's arms — their arms are outstretched, right?

A. Yeah. It appears that way.

Q. Okay. So it could be that they are — and I don't know if it is, but they could be trying to pull it away from the person in the green.

That's a fair interpretation of that photo, isn't it?

A. That's fair in this particular photo. I will say that —

Q. Well, let's just stick with the photo. I'll let you explain. I'm not going to entirely cut you off.

A. Sure. Sure. Appreciate it.

Q. And it could be that the person in the blue is preparing to try and stab the person in the green or hit the person in the green with that flagpole, and the person in the green is sort of reaching out to defend themselves.

Could that be the case?

A. Yes.

Q. That could be the case.

[p.191]

And it could be maybe that the person in the green has swung that flagpole, and the person in the blue caught it, and the person in the green just released it.

That could be an interpretation?

A. It could be.

Q. That could have been —

A. Yeah, it could be.

JA485

Q. So from that photo, we're not really sure who's the instigator of the violence, whether it's the person in the green or the person in the blue, right?

A. That's correct.

Q. Okay. And from what I could tell, just looking at the attire, I mean, the person in the blue, I didn't, you know, see any, like a — like a 1776 emblem or a Betsy Ross that we had talked about that would necessarily indicate that that person in the blue was a — or is a member of a far-right-wing extremist group. I mean, is there some attire — and it looks like it's a woman, a she. Long hair. It looks like that from the back. I could be wrong.

But you'd agree with me, there's nothing in that person's attire that signifies it was a far-right-wing extremist?

[p.192]

A. Other than the fact that they attended a Unite the Right rally which was attended by far-right extremists.

Q. Right. That's fair. So the context, where they're located, but not necessarily their attire themselves?

A. No.

Q. Okay. All right.

A. Some people at Unite the Right had more kind of group-specific attire; many others did not. That was pretty common that day.

Q. And you'd agree with me, same person — same with the person in the green? There's nothing necessarily in their attire that signifies that they're a far-right-wing extremist or a member of that group?

Would you agree with me on that?

A. I would agree with you.

Q. Okay. So you had talked about —

JA486

MR. GESSLER: And we can turn that off for a second.

A. You did say I could explain a little bit. Is that —

Q. (By Mr. Gessler) All right. I'll let you explain.

[p.193]

A. Very briefly. The reason I selected that photo is because dozens of people were assaulted by far-right extremists that day using various weapons, including flagpoles.

Q. Okay.

A. And that's — that's a documented fact.

Q. And so you selected that photo?

A. To be representative of the type of violence that happened at Unite the Right that was committed by far-right extremists.

Q. Okay. Now, did you attend? Did you attend that rally?

A. No, I did not.

Q. Were you an observer of the rally?

A. No. I was in Montreal at the time.

Q. Okay. So you were out of the country during the rally?

A. Correct.

Q. Let's talk about the — you talked a little bit about the million MAGA — the Million MAGA March; is that correct?

A. That's correct.

Q. Okay. And you — and there was a video where a car that you said was President Trump's motorcade drove through it?

[p.194]

A. That was my understanding.

Q. That was your understanding.

And what's that understanding based on?

JA487

A. It's been documented in multiple places.

Q. Okay.

A. And I —

Q. And the reason I ask that is I just saw one vehicle drive through. I mean, I guess in my experience, it seems like usually there's sort of a whole convoy.

A. I think we might have seen a little different aspect of the video. There's several vehicles.

Q. Okay. And you testified, if I remember correctly, that the vehicle went through, and then after that, violence broke out?

A. No, that wasn't my testimony.

Q. How did I misunderstand that?

A. The way you're characterizing it now, it sounds like it kind of almost immediately broke out. I said, "at some point later."

Q. Oh, at some point later.

A. Yeah, yeah.

Q. Okay. I'm sorry.

A. Yeah.

[p.195]

Q. I was just trying to get the sequence right.

A. Sure.

Q. I didn't mean to imply that it was immediate.

A. Okay.

Q. So the vehicle drove through, people cheered it, and then at some point later, violence broke out?

A. Correct.

Q. And did you attend that event?

A. No, I did not.

Q. Okay. Now, you also — there was a tweet in which President Trump said that Antifa — I think he called them scum — but he said Antifa attacked and they were driven off, and then later on other people attacked.

JA488

Do you remember that tweet?

A. I do.

Q. Okay. And I remember your testimony very clearly, because I tend to do a fair amount of writing. I mean, that's all that lawyers produce is words and hot air. And so I'm always sort of keenly attuned to the passive tense.

A. Okay.

[p.196]

Q. And you said that after the — you know, after President Trump's motorcade drove through, sometime later violence — it turned violent.

Were you there to witness who instigated violence?

A. I was not present then.

Q. Okay. Is it your testimony that members of far-right extremists started attacking people?

A. It's my testimony that members of far-right extremist groups like the Proud Boys committed acts of violence that night.

Q. Okay. Is it your testimony that they were defending themselves from an attack from Antifa?

A. It's my testimony that President Trump framed it that way in the tweet.

Q. Okay. But we don't, at this point, stand and watch and say at this point — you know, where you are now, you don't know who may have started the violence?

A. My understanding is that certainly some of the members of the Proud Boys instigated the violence, so there were arrests made and so forth. So . . .

Q. And what's that understanding based on?

A. Public documents.

[p.197]

Q. And I guess the reason I'm asking is I didn't see a public document in your expert report that would indicate who caused any of that violence.

A. I mean, I'd have to review my report.

Q. Okay. Let's talk about — let's talk about that Million MAGA March.

President Trump did not organize that march; is that correct?

A. That's correct.

Q. Okay. And he didn't invite the speakers to it, did he?

A. No, he did not.

Q. And he did not invite who attended to it — he didn't invite the attendees, did he?

A. That's correct.

Q. The only thing he did was drive through it, correct?

A. Presidential motorcade, correct.

Q. Okay. Let me ask you another question.

So there was another video, and I think it's Number 73. And I'm just going to play a portion of it to remind you. I'm not quite sure how to describe it.

(Video was played.)

Q. (By Mr. Gessler) So you remember

[p.198]

talking about this video?

A. That — yes, I do.

Q. And you said that that was posted on that Donald — Donald.win?

A. Donald win, yeah. Donald.win.

Q. Donald.win website?

A. Yeah, so it's a website. So it originally started as a subreddit, and then got weird and turned into more of a website.

JA490

Q. Okay. But that's not President Trump's official website, is it?

A. That's correct.

Q. And it's not his personal website?

A. That's correct.

Q. And there's no evidence that he put it on there, is there?

A. No, I didn't testify to that.

Q. And you testified that there was some traffic or other postings or conversations on that website?

A. A substantial amount. These were — these are large sites that have for years had a substantial amount of extremist right-wing — far-right extremists' posts, including ones of a violent nature.

[p.199]

Q. And there's no post on that website from Donald Trump, is there?

A. Not to my knowledge.

Q. Okay. In fact, there's no evidence that President Trump is even aware of that website, is there?

A. I mean, I'm not inside Donald Trump's mind in terms of what he's aware of in terms of specific sites. But I can tell you that it was — as indicated in the report, that there was a specific situation in terms of some of Trump's advisors, staff, that involved some of the posts on that particular site as it related to January 6. And certainly there were a number of posts that specifically addressed the plans to commit violence on January 6.

Q. Now, was one of those posts by Steve Bannon? You had mentioned a post by — a comment by Steve Bannon. I don't remember if you said he had posted on that website or it was elsewhere.

JA491

A. No. When I referenced Steve Bannon, it was in regards to comments he had made about claiming victory no matter what the election results were.

Q. Okay. And do you know the relationship between Steve Bannon and President Trump?

A. I know he served initially as his
[p.200]

primary campaign manager. And then after Donald Trump was elected President, he served as a White House adviser and that they're, at least according to Steve Bannon, maintaining communication.

Q. So Steve Bannon claims that he's maintaining communication with President Trump?

A. I've heard in the public record that he's made statements in regards to that.

Q. Okay. Would it surprise you if — to learn that President Trump had fired Steve Bannon?

A. No. I recall that.

Q. Okay. And do you recall President Trump saying "Steve Bannon has nothing to do with me or my presidency. When he was fired, he not only lost his job, he lost his mind"?

Do you remember President Trump saying that?

A. I do recall that, yes.

Q. Okay. So you remember President Trump disavowing Steve Bannon, correct?

A. Yes. Correct.

Q. Okay. So let's go back to the speech — to sort of speech patterns. So you were talking about relationships and whatnot.

So if President Trump were at a rally —

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and we saw, I think, where he was — there was a protester or something, and he says, “Get that person out of there.”

That could be considered a call to violence if there’s far-right-wing extremists in that group; is that fair to say?

A. Yes, especially if it’s part of a pattern and it involves after-the-fact endorsements.

Q. Okay. And then if he said, “Get that person out of here,” and then like a few seconds or after a pause said, “but don’t hurt him,” would that “but don’t hurt him,” in your view, be plausible deniability?

A. It certainly could be. Again, we’d have to look at the specific instances and the context. But that could certainly — that statement could serve certainly as a means of establishing plausible deniability.

Q. Okay. And so I’m going to give you — well, let me ask you.

So let’s say President Trump said, “Get that person out of here, but don’t hurt them,” and then members of the crowd pushed that person out and roughed them up a bit, injured them a little bit somewhat.

[p.202]

Would that change your opinion?

A. I’m sorry. Could you —

Q. Would that — in your view, if President Trump said, “Get that person out of here,” and then shortly after said, “but don’t hurt them” —

A. Right.

Q. — and members of the crowd interpreted that to get the person out — to physically, forcibly remove that person.

A. Including assaulting the person?

JA493

Q. And there was — that person was hurt, injured, so

—

A. By means of assault?

Q. By means of — well, yeah, exactly what those people did.

A. Okay.

Q. Would you view President Trump's comments as a call to violence?

A. I would view — well, so that's what the previous question was about, plausible deniability.

Q. I understand. Let me — I'll first ask you —

A. Okay.

Q. — if you view that as a call to violence.

[p.203]

A. Within context, if there's a pattern established, if there's been endorsements for violence after the fact, then certainly that would fit that pattern.

Q. Okay. And then if he said, "but don't hurt them," would that be an example of plausible deniability?

A. If there was an after-the-fact endorsement of the violence that occurred, then certainly that would give credence to interpreting the statement that you just mentioned as an effort to create plausible deniability.

Q. Okay. But I'm not going to give you that part of the hypothetical.

A. Okay.

Q. I'm just going to say that President Trump said, "Get him out of here," and then said, "but don't hurt him," and that there was a crowd, and the crowd, in fact, reacted — or at least some members of that crowd reacted with violence. They forcibly put that person out of there, okay?

Is the phrase, "but don't hurt them," is that plausible deniability? That's all we have to go on.

A. I mean, the answer to that is it

[p.204]

depends. It's going to depend on context. It's going to depend on patterns. So giving one isolated example as a hypothetical with small bits of information, you know, it's difficult to know exactly how these things should be interpreted or would be interpreted.

Q. But in your view, there's a possibility that it could be interpreted as a call to violence plus plausible deniability? There's a possibility that that could be the case?

A. Yes.

Q. Okay. And so I want to draw your attention to January 6 or the events leading up to and surrounding January 6. So you testified about a number of tweets, and one of the tweets that you testified was President Trump tweeting "Come to January 6. Will be wild."

Do you remember that?

A. Yes, I do.

Q. And when I say "Come to January 6," I'm paraphrasing that. But he was trying to drum up support, and the last part he said, "Will be wild," right?

A. That's correct.

Q. Okay. Was that phrase, "Will be wild," a call to violence?

[p.205]

A. By itself? Is that what you're asking?

Q. I'm giving you the tweet. I can bring it up again if you want.

A. Not necessary.

Q. Okay. Was that tweet in and of itself a call to violence? A. It was — for far-right extremists, they wouldn't understand it in and of itself; they would understand it within the context of a pattern. And in that

respect, certainly it was interpreted that way, as a call to violence.

Q. Okay. So knowing what you know of all of President Trump's and the far-right-wing extremists and their respective activities leading up to the day where he says "Will be wild," your testimony is that the far-right-wing extremists certainly interpreted that as a call to action?

A. That's correct.

Q. Okay. Was it — do you have evidence that it was President Trump's intention to call them to action?

A. My, you know, opinion is not addressing that issue. Again, not in President Trump's mind. I could tell you about the patterns that have been observed by myself and other scholars as it relates to

[p.206]

issues in terms of far-right extremism and issues. And I can tell you what I've observed in terms of patterns specifically relating to President Trump and his relationship with far-right extremists.

Q. Okay. So your testimony today, then, it's fair to say, is really sort of limited to how far-right-wing extremists interpreted President Trump's remarks?

A. It's — it's referencing that. But it's also — certainly part of observing a pattern is not just observing what far-right extremists do, but also what the speaker, the sender of the message is doing too.

And so that's part of the pattern. The pattern is not just the far-right extremists and their response, but also the messages that are being sent, the things that are being done, the acts that are taken, the words that are spoken — all of that is part of the pattern as well.

JA496

Q. And what you just said is that it's beyond your opinion today as to whether or not Trump intentionally sought to mobilize people to violence on January 6.

Is that right to say?

A. I can say that he expressed a consistent [p.207]

pattern of messages over time that encouraged violence, he expressed messages over time that endorsed violence. And that's very, you know, I think clear in terms of this matter.

Q. Okay. So on January 6 you saw his speech, and you saw where he said, "Go down there and march peacefully and patriotically to the Capitol."

Do you remember that part of the speech?

A. Yes, I do.

Q. Okay. And your testimony is that the — or your conclusion — and tell me if I'm wrong.

Your conclusion is that the far-right-wing extremists interpreted that to be plausible deniability because of this past history and because your belief that President Trump had aggressive language that outweighed the peacefully and patriotic statement — those two factors, the history and the outweighing of the peaceful and patriotic; is that correct?

A. Those are two, yeah, very critical factors. Yeah. I think that's a fair characterization.

Q. And the aggressive language had to do with going down there and fighting and that type of phrasing?

[p.208]

A. As well as the existential threat type of language, you might say, as well as the reference to essentially a different set of rules applying. So it was the aggressive language in terms of the references to fighting, which

JA497

there were a number of times — several times, but also some of these other things I just pointed to as well.

Q. Okay. But at the end of the day, you don't — I mean, like you said, you don't know what was actually going through President Trump's head?

A. I'm not in President Trump's mind.

Q. Okay.

MR. GESSLER: Excuse me one moment, Your Honor. I think I'm almost done.

Q. (By Mr. Gessler) Oh, one other question about plausible deniability.

If I heard you correctly, so if one of the characteristics, would be fair to say, of plausible deniability is that the speaker only says — only makes that denying statement once, and it's a different matter if the speaker makes that denying statement multiple times in a speech?

A. That could make a difference. It would — again, this is all contextual. So, you know, it would depend on the overall statement, what portion

[p.209]

the specific efforts that plausible deniability kind of consisted of. There's just a lot of factors we have to take into consideration.

Q. Okay. So probably it would be fair to sum up your testimony as saying, when someone makes certain comments or speeches, to understand the impact of that speech, you need to understand not just the words that are used but the contextual factors of which there can be many.

Is that fair to say?

A. Very fair.

MR. GESSLER: That's all I have. Thank you, Your Honor.

THE COURT: Any redirect?

JA498

MR. GESSLER: Oh, Your Honor, I would ask to be able to admit the videos I played —10446, -47, -48, -54, and -74. Not for the truth of the matter that those people wanted to fight, but obviously as a basis for the witness's testimony here in these proceedings.

THE COURT: Your response, Mr. Olson?

MR. OLSON: That's fine.

THE COURT: You're okay with that?

MR. OLSON: Yeah.

THE COURT: Okay. Then I will admit
[p.210]

them.

(Exhibits 1046, 1047, 1048, 1054, and 1074 admitted into evidence.)

THE COURT: But I — yeah. Could you repeat the list?

MR. GESSLER: Numbers 146, 147.

THE COURT: Okay. I think you meant 1046, right?

MR. GESSLER: I'm sorry. Let me get — Numbers 1046, 1047, 1048, 1054, and 1074.

THE COURT: Thank you.

MR. GESSLER: Thank you.

REDIRECT EXAMINATION

BY MR. OLSON:

Q. Good afternoon, Dr. Simi.

Do you have enough water?

A. I think I should be fine. Thank you.

Q. Okay. Great.

I want to start by talking about the patterns of Trump's behavior that you referenced in your conversations with Mr. Gessler. And to help us keep track, I want to put some on the flip chart here.

Can you see that, or do I need to scoot it over a little further so you can see it?

JA499

A. I think I should be able to see it.

[p.211]

Some of it is blocked a little bit, but —

Q. Well, let's —

A. That's better.

Q. Is that better?

MR. OLSON: Your Honor, can you see it okay?

THE COURT: If you move over that screen just like 6 inches. Now I can, yeah.

MR. OLSON: And I should ask, Mr. Gessler, can you see it?

MR. GESSLER: Do I have to? No, I'm good.

Q. (By Mr. Olson) So I want to talk about the pattern. And I want to do that by sort of using the list you put in your report as a frame for this discussion. And if you could turn to page 18 of your report. And I have it here. And we're not going to sort of read everything here, but I want to bring up some of the sources you cite for this pattern in your report and talk about them one by one.

And you see here in this — we see at the bottom it's November 2015. I think we've talked about that already, right? We showed that video?

A. Yes. That's correct.

Q. And I can show it if you want.

[p.212]

Would that be helpful?

A. I don't need to see it again.

Q. Okay. But this is the one where we saw both Trump told them to "Get the protesters the hell out of there." And then the next day he said, "Well, maybe the protesters should have been roughed up," right?

A. That's correct.

Q. Okay. So would this be a data point in your pattern?

A. Most definitely.

JA500

Q. Okay. So I'm going to put here "2015." And to help us remember, I'm just going to put a couple phrases from each incident if we could.

What would you use as a two- or three-word phrase?

A. "Roughed up."

Q. Roughed up. Okay. And you see the next example there is 2000—

MR. GESSLER: Can I interrupt just a second? This is a different version of what we have on the screen.

MR. OLSON: This is the revised report.

MR. GESSLER: All right. We'll double-check.

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MR. OLSON: Okay.

MR. GESSLER: Sorry.

MR. OLSON: No. It's fine. But do you want to take a minute to make sure you have the right thing?

MR. GESSLER: Why don't you keep — we'll look while you're going, and if there's a problem, we'll shout.

MR. OLSON: Great.

Q. (By Mr. Olson) The next example you give is February 2016.

Do you see that?

A. Yes, I do.

Q. And then at the bottom is a footnote — and this is dangerous to do — but you see the footnote says "Knock the crap out of tomato throwers," and there's a web — a link to Washington Post?

A. Yes, I see that.

Q. All right. Well, let's watch that video and see what Trump says.

(Video was played.)

Q. (By Mr. Olson) Okay. Is this another example in your pattern of Trump's calling for violence in his speeches?

JA501

A. Yes. Absolutely.

[p.214]

Q. Okay. What phrase should we use to remember this one by?

A. Well, I don't know. "Knock the crap"?

Q. Okay. And this was 2016, correct?

A. Correct. February.

Q. Okay. And if we look back at your report, we see the same example. The next one about — in February '16 about punching him in the face; do you see that?

And do you see in Footnote 74 there's a YouTube link there?

A. Yes, I see that.

Q. All right. Well, let's watch that YouTube link.

(Video was played.)

Q. (By Mr. Olson) How would you — this was in 2016.

What catchphrase should we use for this one, part of the pattern?

A. How about "punch"?

Q. Okay. Well, there may be another one that involves punch.

Can we say maybe "punch in the face"?

A. Sure.

Q. Now, if we go back to your report, we

[p.215]

see — you have another example from March 2016 — sorry, we don't have a video for that one. So let's go to the next page, page 20. I'm sorry, I'm jumping ahead of myself. I have my notes going from — oh, here we go.

From October 2018, do you see that one?

A. Yes, I do.

Q. All right. And that is a New York Times link — right? — in the footnote?

A. Yes, it is.

JA502

Q. All right. And let's look and see what that link says.
Let's play the video.

(Video was played.)

MR. OLSON: Your Honor, I thought I got rid of all the ads. I apologize. Give me seven seconds.

MR. GESSLER: Your Honor, we want to see all the ads.

THE COURT: We've all been there, waiting for the ads.

(Video was played.)

Q. (By Mr. Olson) Is this another example of the work that you reviewed in your report about Donald Trump's pattern of praising political violence?

A. Yes, it is.

[p.216]

Q. Okay. What —

MR. OLSON: The risk of doing it live.

Q. (By Mr. Olson) What should we use for that catchphrase?

A. "Body slam"?

Q. Great. Now I want to go to — we talked about a little bit at the end of our conversation, the "Stand back and stand by" comment that Trump made.

Do you remember when he made that comment to the Proud Boys, or should I pull the video up?

A. Oh, yes, I remember it.

Q. When was it?

A. Oh, well, it was at the debate, so — gosh. I don't have the exact date off the top of my head.

Q. Okay. Well, I'll pull the slide up so we can just make sure we all get it right on the demonstrative.

A. Okay.

Q. Does seeing the slide help you remember when the "Stand back, stand by" comment was made?

A. Yes, it does.

Q. Okay.

A. September 29.

[p.217]

Q. Okay. Do you need to see the video or are we good?

A. No.

Q. Okay. And the comment, “Stand back, stand by” here?

A. Yeah, that sounds — that makes sense.

Q. And then another event in 2020 that we talked about on direct, but I want to provide some more context based on the conversation and — that you had with Mr. Gessler about what we can infer from Trump’s patterns. We played a short excerpt of this video.

Do you remember that with your thing?

A. Yes, I do.

Q. Now, I’d like to play the whole video.

But before I do that, can you just remind us again what was important about Trump’s response to the statement by the Georgia election worker to stop calling for violence? What was important about Trump’s response?

A. Well, I would say two things. One, there’s an omission of any kind of clear condemnation to threats of violence or acts of violence. And there’s a doubling-down as it relates to the very specific issue that’s being referenced in terms of

[p.218]

what’s inspiring people to threaten the lives of election workers and election officials.

Q. Okay. Well, I’m going to play the full exhibit.

MR. OLSON: It’s admitted, Your Honor. It’s P-126. And thanks for bearing with me while we switch back between programs.

And we’ll start at the beginning.

(Video was played.)

Q. (By Mr. Olson) And I want to turn back to President Trump's response. And on the right-hand side of the screen, that's what we see.

Did President Trump at all do anything to discourage his followers from committing those acts of violence? After being specifically identified, specifically requested, and with specific examples given of harm that was caused, did he do anything to stop that?

A. Not a thing.

Q. I know you're not a mind reader, but is it consistent with someone who wants their followers to behave peacefully to give this response to a specific request for help?

A. Not at all.

Q. I want to put this example on our chart.

[p.219]

And our chart so far focuses on words that Trump has used.

So what word — what catchphrase should we use for this — Mr. Sterling — plea for help and Trump's response?

A. Maybe "Help."

THE STENOGRAPHER: Can you repeat that, please?

A. Maybe "Help."

Q. (By Mr. Olson) Well, again, I want to focus on Trump with what we have here.

A. Okay.

Q. And so what language —

A. "No condemnation."

Q. "No condemnation." Okay.

And can I put "Georgia" underneath to help us remember?

A. Sure.

Q. And the last thing I'd like to talk about on this demonstrative is the Ellipse speech on January 2021. And in your conversation with Mr. Gessler, I noticed it — I'm sure it was a mistake or a paraphrase by his part, but he said that Mr. Trump said in that speech to "Go march peacefully."

[p.220]

Did he say those words, or did he say something different?

A. It was something different.

Q. Okay. Was it a command at all?

A. It was not a command —

Q. Okay.

A. — no.

Q. I can play the speech. Do you remember what it was? Well, we can play the speech if it's helpful.

A. If it's possible to get —

Q. Yeah. We can do that.

A. — to that specific part of it.

Q. I'm going to get close but not perfect. So we'll start a little bit before when it happens.

A. Okay.

(Video was played.)

Q. (By Mr. Olson) So that's — was that a command?

A. Not in my opinion.

Q. And how did that differ from the language that Trump used at the — the speech at 4:17 that afternoon?

A. The speech at 4:17 in the video would be much more consistent with commands.

[p.221]

Q. Why is that?

JA506

A. Because they were directives. They were very specific directives in terms of going home, and they were repeated multiple times.

Q. Now, I want to make sure we don't forget to put the Ellipse speech on this demonstrative.

What catchphrase should we use for the Ellipse speech?

A. "Ellipse speech"?

Q. Okay. Now, Dr. Simi, looking at these patterns over and over of Trump's use and, again, acknowledgment of political violence, what does this tell you about his awareness of the effect of his language on his supporters?

A. It suggests — it suggests a — in terms of when encouragement and promotion of violence occurs, that people respond to that. And that it suggests an awareness on the speaker's part — in this case, Donald Trump knowing that these acts of violence occurred — and is able to then basically endorse and affirm the violence.

So that would be hard to do without an awareness.

Q. I want to turn now and talk about a couple of specific things that you and Mr. Gessler

[p.222]

talked about.

You spent some time with him discussing Steve Bannon, right?

A. That's correct.

Q. Do you remember that?

And as part of that conversation, you or he referenced sort of a plan to declare victory before the election. Do you remember that part of the conversation?

A. Yes, I do.

Q. Okay. I'd like to play that clip now.

MR. OLSON: And, Your Honor, this is not admitted evidence. I want to have it — use it for demonstrative

JA507

purposes to give more context to the conversation that he had with Mr. Gessler. And it's just an audio clip, so there's no video.

(Audio was played.)

Q. (By Mr. Olson) Well, I guess we have half of a video there.

But, Dr. Simi, what kind of relationship did Steve Bannon have with right-wing extremists?

A. A very close one.

Q. And Mr. Gessler mentioned that Mr. Bannon was fired at some point by President Trump.

[p.223]

But didn't President Trump pardon Steve Bannon?

A. That's my understanding.

Q. And you talked about this "Fight for Trump" — oops. Sorry. I know what's happening. My apologies. I'm trying to do too much at one time. I apologize.

Do you see the "Fight for Trump" on the screen?

A. Yes, I do.

Q. Okay. And Mr. Gessler asked you a bunch of questions about TheDonald.win and how Donald Trump didn't have anything to do with that.

Do you remember that?

A. I do remember that, yes.

Q. Okay. But who tweeted this video to all of their followers?

A. Donald Trump.

Q. And I want to talk — and this will be my last series of questions — about — one more subject after this — about Trump's personal relationships with other leaders of right-wing extremism.

Do you know who Roger Stone is? You talked about him in your report.

[p.224]

A. Yes, I do.

Q. Okay. Who is Roger Stone?

A. He's a longtime advisor for Donald Trump.

Q. And what relationship did Roger Stone have with right-wing extremism?

A. A very close one. Had been associated with the Proud Boys for some number of years prior to the Capitol attack. Had a relationship with the Oath Keepers, using them as security.

Q. And you said he was a close advisor of President Trump?

A. That's my understanding.

Q. Okay. Was Roger Stone in D.C. around January 6?

A. That's my understanding.

Q. Was he in D.C. with the Proud Boys around January 6?

A. Proud Boys and Oath Keepers.

Q. And then lastly, you mentioned — we saw some speeches from Alex Jones about 1776. And you talked about who he is. I want to talk about Alex Jones' relationship with President Trump.

Did President Trump appear on Alex Jones' radio show shortly after he announced his

[p.225]

candidacy?

A. Yes, he did.

Q. Okay. And that they had other connections over time?

A. Yes, they have.

Q. Okay. And did Alex Jones — you saw a speech of him speaking —

MR. GESSLER: You know, Your Honor, I have two objections on this. One is this is, you know, being —

questioning. Second, this is far beyond the cross. Far beyond.

THE COURT: It seems like Stone is beyond the cross.

MR. OLSON: Okay. I was just — there was an effort to distance Mr. Trump from these right-wing extremist leaders, and I was putting that effort that Mr. Gessler made in context. There were very tight relationships. So that's what I was attempting to do. But that was my last question on that. I'm happy to move on.

THE COURT: Okay.

So objection sustained.

Q. (By Mr. Olson) Okay. And then lastly, you spent a fair bit of time with Mr. Gessler talking about the "fine people on both sides" comment

[p.226]

that President Trump made?

A. Yes. That's right.

Q. And he showed you the video of the earlier speech from the White House?

A. That's right.

Q. And it seemed to maybe seem somewhat incredible that people would focus on just one snippet from those series of speeches that Trump made about "fine people on both sides"?

A. Yes.

Q. Well, how do you know that the far-right extremists responded so strongly to Donald Trump's statement of "fine people on both sides"?

A. That's the research. That's the data collection. The interviews, the archival materials provides us with ample evidence from their own mouths talking about how they interpreted that comment about "fine people."

JA510

Q. Can you give us — I know you talked about it in your report, but can you give us a couple examples just offhand of —

A. Sure.

Q. — the kind of material you're relying on?

A. Yeah. I think I might have mentioned

[p.227]

this earlier. But David Duke, Richard — David Duke, who was present at the Unite the Right rally. He was one of the featured speakers who ended up speaking. But Richard Spencer was one of the key organizers of Unite the Right. And, again, Andrew Anglin. All three of them were very public in their thanking of Donald Trump for those comments.

And certainly those are just three examples, but there were certainly many other, you know, not-so-high-profile folks that were also expressing similar sentiments in terms of interpreting that message in that fashion.

MR. OLSON: Thank you, Dr. Simi. That's all the questions I have.

But just one housekeeping matter, Your Honor. I'd like to admit those videos of President Trump speaking that I pulled up online because — we talked about them. They're not in the exhibit list; they were responsive to the cross.

Oh, they are on the exhibit list. Oh.

So it's Exhibit — I have exhibit numbers. Exhibit P-51 is the — "Knock the crap out" video. Exhibit P-52 is — my colleague used a different catchphrase than I did, so we'll figure that out and come back to that one. Exhibit P-57 is the

[p.228]

"body slam" video. And I will quickly figure out which of the other two are here that have been admitted at a break.

JA511

THE COURT: Okay.

MR. OLSON: But right now, P-51 and P-57 we move for admission.

THE COURT: And P-52, correct? 51, 52, 57?

MR. OLSON: Yes. I'm sorry. Thank you. Yes. And then we'll — yes.

MR. GESSLER: No objection, Your Honor.

THE COURT: Okay. They're admitted.

(Exhibits 51, 52, and 57 admitted into evidence.)

THE COURT: So we are — we are done with —

MR. OLSON: Yes.

MR. GESSLER: I have a little bit of recross, Your Honor.

THE COURT: It will be very short because we're not — I generally don't allow recross at all, Mr. Gessler.

MR. GESSLER: Thank you for your indulgence, Your Honor.

THE COURT: Sorry, Professor Simi.

[p.229]

THE WITNESS: No problem.

RECROSS-EXAMINATION

BY MR. GESSLER:

Q. Look at it this way, Professor Simi. You're getting more experience on the stand and just for your own development there.

A. I appreciate it.

Q. Okay. Just a couple questions. So the sources — I want to talk about the sources that you went to.

How did you choose — I mean, what was your process for choosing those sources?

A. When you say — can you ask the question again?

Q. What was your process for choosing these sources upon which to base your opinion?

A. The incidents themselves.

JA512

Q. Okay. What was your process? Why did you choose those incidents?

A. Well, that's part of the research process and studying what happens in terms of during the campaign and what happened after Donald Trump was elected. And so there's certain things that would be relevant to focus on and study in more closer detail. And as you're looking at far-right extremists —

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Q. So I'm going to cut you off a little bit only because the Court has admonished me to be brief —

A. Sure.

Q. — and I don't want to be too long.

So did you listen to every single speech President Trump gave since?

A. No, I did not.

Q. You didn't listen to every single word, no?

A. No, I did not.

Q. So there may have been lots of parts of those — lots of things he said outside of your scope of review that, perhaps, endorse violence? There could have been, right?

A. You're saying there are additional examples?

Q. No. I'm asking, you don't know whether there were?

A. That's fair.

Q. And you don't know whether there was stuff outside of these examples that you didn't look at that — where he was advocating peacefulness? You just don't know?

A. That's right. In fact, I can guarantee

[p.231]

you that when you have a pattern, there will be exceptions to the pattern. No pattern is ever 100 percent.

Q. So you're familiar with the term "selection bias," right?

A. Of course.

Q. Okay. So the only way to truly get a representative of President Trump's speech would be to listen to all of it and take a representative sample out, correct?

A. You wouldn't need to listen to the entire total of the speeches to, you know, arrive at an analysis of different segments of the speeches. That wouldn't — you would be — you wouldn't be sampling at that point. You would look at the entire universe, which is different than sampling.

Q. So you'd have to take a sample — a random sample of — a line up of his speeches. You'd have to line them all up, you'd have to provide identifiers for each minute or each segment, and then you'd sample each segment, correct?

A. That would be one way of doing it, although not the only way. Random samples are not the only type of sampling strategy. And, again, if we're talking about identifying patterns, you would not need

[p.232]

to do what you just described to identify a pattern.

Q. What I'm getting at is it's true, isn't it, that you basically focused on the stuff that you thought was relevant to far-right-wing extremism, and you ignored things that you didn't think was relevant to far-right-wing extremism?

A. I don't think that's fair. I think I certainly looked at positive cases, which these would be examples of what we call positive cases. I certainly looked at negative cases. And, again, you can identify a pattern by looking at positive cases without looking at every single case in a sample or a universe.

Q. So let's look at these positive cases.

So the first one is the 2015 "roughed up," right?

A. That's correct.

JA514

Q. And we saw a sample video of that, correct?

A. That's correct.

Q. And that sample video did not — after Trump — or before Trump spoke — President Trump spoke in that video, there was no evidence of someone being roughed up, correct?

A. I'm sorry. Can you repeat that?

[p.233]

Q. There was no evidence in that video of someone actually being roughed up?

A. That's fair.

Q. And in the “knock the crap” video, there was no evidence of anyone actually having the crap knocked out of them, right?

A. These are positive cases of encouraging or promoting violence —

Q. I understand.

A. — not —

Q. And my point that I'm making, and I'm going through it bit by bit, is that every one of these was speech, and there was no video in any of these examples of actual violence occurring; is that correct?

A. These are positive cases of promoting violence, so of course not.

Q. So there's no violence that occurred in that video, “body slam,” after President Trump spoke in the video?

A. Yes, that's right.

Q. Okay.

A. Because these are about promoting violence, not committing violence.

Q. So it was all based on President Trump's

[p.234]

speech, correct?

A. These are all, you know, video clips that involve speech, yes.

Q. There's — you're not saying that President Trump actually waded into the audience on — in 2018 and body-slammed someone?

A. As it pertains to this list, it's a list of positive cases related to promoting violence. That's the specific —

Q. And —

A. — thing we're dealing with.

Q. And the promotion of violence is his speech, correct?

A. That is correct.

Q. Okay.

MR. GESSLER: That's all I have, Your Honor.

MR. OLSON: I'm sorry. Mr. Gessler made a gross mischaracterization of the record, and I'd like a chance to just show one thing to the witness.

If I may, Your Honor?

THE COURT: Yeah. Go ahead.

MR. OLSON: My apologies. My . . .

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CONTINUED REDIRECT EXAMINATION

BY MR. OLSON:

Q. So, Professor Simi, we saw this. I don't want to replay it.

But on the left we see Trump telling someone to get roughed up, right?

A. That's correct.

Q. And on the right he's talking about the fact they — a person was roughed up, right?

A. That's correct.

Q. There's no doubt in anyone's mind that what they were talking about on the right was a person at a Trump rally getting roughed up, right?

A. That's correct.

Q. Okay.

MR. OLSON: Thank you, Your Honor.

THE COURT: So it's 2:25. I know we're breaking at 1:00 [sic]. So let's — who is the next witness, and how long do you anticipate they will take?

MR. GRIMSLEY: It's Professor Banks, Your Honor.

THE COURT: Okay. So he was going to be a short one?

MR. GRIMSLEY: Relatively short.

[p.236]

THE COURT: Okay. So it sounds like we can for sure get through him?

MR. GRIMSLEY: Depending on the cross-exam, yes.

THE COURT: Okay. Were you planning on then having another witness start, or do you think we're in a position that we don't need to use up all the time?

MR. GRIMSLEY: I don't think we need to use up all the time, Your Honor. We could have a witness start, but I think it would make more sense to have the witness start fresh tomorrow.

THE COURT: Are they here? Are they here?

MR. GRIMSLEY: They are here, Your Honor.

THE COURT: Okay.

MR. GRIMSLEY: It's — Professor Magliocca would be the next witness.

THE COURT: Do we need a bathroom break? Okay. I'm getting nods. So let's start — Mr. — is it Mr. Banks?

MR. GRIMSLEY: Professor Banks.

THE COURT: Professor Banks. Let's start with Professor Banks promptly at 2:40, and we'll

[p.237]

see how quickly it goes before we decide whether to start the other — the second, Magliocca, after that. But we will stop before regardless.

(Recess from 2:28 p.m. to 2:43 p.m.)

THE COURT: You may be seated.

MR. GRIMSLEY: Stand up, Professor Banks. She's going to swear you in.

THE COURT: I'm going to swear you in. Will you raise your right hand, please.

WILLIAM BANKS,
having been first duly sworn/affirmed, was examined and testified as follows:

THE COURT: Great. Thank you. And just make sure to speak into the microphone.

THE WITNESS: Sure. Thank you.

MR. GRIMSLEY: And not too fast.

THE WITNESS: Got it.

DIRECT EXAMINATION

BY MR. GRIMSLEY:

Q. Please introduce yourself to the Court, sir.

A. My name is William Banks.

Q. What do you do for a living?

A. I'm a law professor.

Q. Where are you a law professor?

[p.238]

A. I've been a law professor at Syracuse University in Syracuse, New York, since 1978.

Q. What do you teach at Syracuse?

A. I teach courses in constitutional law, national security law, counterterrorism law, the domestic role of the military, various seminars in subjects related to those areas.

JA518

Q. Now, in addition to teaching, do you do anything else at Syracuse?

A. Yes. I founded an institute in 2003 called the Institute for National Security and Counterterrorism, which was created to provide opportunities for graduate students and law students to engage in advanced study to enter careers in the national security field, primarily in the government and in military in Washington, D.C.

Q. Is there anything else you do related to national security issues? A. I've done a number of projects for the Department of Defense and civilian agencies in our government providing for emergency preparedness and response exercises, case studies, simulations, the like, where senior members have come to Syracuse or me to Washington to work through some scenarios, red teaming and the like, to better prepare for crisis

[p.239]
situations.

Q. What have you been asked to do in this case?

A. I've been asked to prepare a report and then provide testimony on the legal authorities that President Trump had at his disposal to quell the violence on January 6.

Q. And are you prepared to testify about that here today?

A. I am.

Q. Have you ever served in the military?

A. I have not.

Q. But have you worked for the military?

A. In those contract cases that I mentioned a moment ago. I've had several relationships with entities inside the Department of Defense over the years, yes.

Q. And have you ever advised the military?

A. With respect to emergency preparedness and response and follow-ups to those case studies and simulations, I have, yes.

Q. Well, if you never served in the military, how did you get interested in national security law?

A. Short story. Please indulge. .

[p.240]

1987. Presidents Reagan and Gorbachev were at one of their well-known summits in efforts to try to develop a framework for the reduction of the nuclear stockpile.

After a few of those meetings, they had become pretty friendly with one another. And they approached the dais to have a press conference after one such session, and they didn't realize that the microphones were on. And they were joking with one another about having their fingers on the nuclear button.

That happened to be a Saturday, and for reasons that I can't recall, I was in my office. And my phone rang. And it was a reporter, a national reporter from somewhere. And she asked could the President of the United States just do that? Could he whimsically launch nuclear weapons?

You know, thinking as quickly as I could, I said, "I don't think so, but I'm not sure why."

So on the basis of that gnawing concern that I had, I gathered with some other colleagues around the United States and American legal education, and we essentially created a new field of study of national security law, wrote a casebook which is now

[p.241]

in production and going into its eighth edition and used in more than 100 American law schools.

Q. What does your academic scholarship focus on?

JA520

A. It focuses on those same areas. I have nearly 200 books and articles and subjects of constitutional law, national security law, presidential power, counterterrorism law. In recent years, a fair number of pieces on cybersecurity.

Q. Have you written any books or articles on the topic you're here to testify on today, namely the President's authority to respond to domestic security threats?

A. The most prominent book is called "Soldiers on the Home Front: The Domestic Role of the American Military." It was published by Harvard University Press in 2016.

Q. Roughly how many articles and books do you think you've written related to the topic of the President's authority to deal with domestic security threats?

A. Somewhere between 30 and 40.

Q. Have you given any presentations or lectures on that topic?

A. Many around the United States and around [p.242]
the world, yes.

Q. Give me an estimate of how many you think.

A. 30.

Q. Are you a member of any professional organizations related to the topic you are here to testify about today?

A. Yes. I'm a member of the American Bar Association Standing Committee on Law and National Security. I just completed my second term as chair of that committee which was created by Justice Lewis Powell in 1962. It's the oldest standing committee of the ABA.

I'm also the past President of the Association of American Law Schools' Section on National Security Law.

Q. Where did you go to law school?

JA521

A. About four blocks from here at the University of Denver.

Q. When did you graduate from DU?

A. 1974, when the law school was still downtown.

Q. Did — I was going to say. Did you get any other degrees?

A. Yes. I stayed on at DU and took

[p.243]

a course of study called master of science in law and society. It was a post-law masters. It no longer is available here, I believe, but I achieved that degree in 1982.

Q. Now, when again did you start teaching at Syracuse?

A. 1978. So I was studying and teaching at the same time for a bit.

Q. When did you start teaching national security law and related topics?

A. After the Reagan-Gorbachev meeting. We started — I think my first class was 1989, and the book was first published in 1990.

Q. So before moving to your opinions, I wanted to ask you about any research you did specific to this case.

What, if anything, did you review regarding the January 6, 2021, attack and events leading up to it in coming to your opinions in this case?

A. I reviewed several documents, including the January 6 Committee report, the Department of Defense timeline surrounding the January 6 period, the Inspector General report the Department of Defense completed in the following year, provisions of the

[p.244]

District of Columbia code, provisions of the United States code, sections of the United States Constitution, general scholarly articles.

MR. GRIMSLEY: Your Honor, at this point we would like to tender Professor Banks as an expert in the U.S. President's powers to prevent or stop domestic attacks on the government and the authorities that President Trump had to call on to stop the attack on January 6.

MR. GESSLER: Your Honor, we'll renew our 702 objections that this is — he's testifying on an issue of law that the Court is better equipped to handle and that it's not appropriate to have legal opinions at — come in as expert reports — as expert testimony. Sorry.

THE COURT: I will, to the extent you're renewing your motion, deny the motion for the same reasons I did in my written ruling. And I will admit him as an expert on national security and the — I think it was the presidential powers to respond to a domestic attack.

MR. GRIMSLEY: Yes, Your Honor. So the President's authorities to respond to a domestic attack.

THE COURT: Correct.

[p.245]

Q. (By Mr. Grimsley) Now —

THE COURT: Can I ask you a question, though, before we —

THE WITNESS: Sure.

THE COURT: — go on? Where was the DU law school?

THE WITNESS: Across the street from the art museum.

THE COURT: Okay. No idea. I learn something new every day.

JA523

THE WITNESS: It was a pretty small structure. In fact, all the clinical programs had to be in downtown office buildings. And I did many of those, so I spent about half my time at the school and half in the clinics, which then was joined to a YMCA, I think.

THE COURT: Okay. A little trivia.

THE WITNESS: Yes.

Q. (By Mr. Grimsley) So I wanted to start with one of the findings from the January 6 Committee that I think you referenced in your report. And this is from page 577 of the January 6 report. And it — we've got it highlighted here.

It says "President Trump could have called top officials at the Department of Justice, the
[p.246]

Department of Homeland Security, the Department of Defense, the FBI, the Capitol Police Department, or the D.C. mayor's office to ensure that they quelled the violence."

Was that one of the findings in the January 6 report that you reviewed?

A. It was.

Q. What is your view of that finding?

A. I think the finding is correct.

Q. Why?

A. Well, the President had plentiful authority to respond to the January 6 attack, including by reference to all the departments that are included in that sentence that you just reviewed. In addition to that, as many here know, he's also the commander of the D.C. National Guard and had a very potentially important role.

Q. Let me stop you there. I want to start asking you some questions specific to the D.C. National Guard.

A. Yeah.

JA524

Q. What authority does the U.S. President have over the D.C. National Guard?

A. The President of the United States is in a unique position vis-a-vis the D.C. National Guard.

[p.247]

He's the commander — he's the commander notwithstanding any interest that the mayor or anyone else at the District may have, and he's been the commander of the D.C. National Guard since 1889. At the time when Congress confirmed that position by statute on the President, there was no local government in the District of Columbia.

As we know in every other state, the governor is the commander of the militia when they're going out in state capacity. Because there's no governor in D.C. and Congress has not seen fit, at least up to this time, to confer that status of command on the mayor, the President has been consistently in charge of the D.C. National Guard since 1889.

Q. Roughly how many members of the D.C. National Guard were there on January 6?

A. I'm told there were around 2,000, 1,100 or so who were activated by that day.

Q. And you talked about this a little bit, but how does the President's authority over the D.C. National Guard differ from his authority over National Guards in other states?

A. Yeah. It's uniquely different. There's a principle in American law called posse comitatus.

[p.248]

The Latin stands for power of the county, which was neither here nor there.

But the posse comitatus law was enacted after the Civil War to establish a baseline presumption that we

don't want members of the military enforcing civilian laws. We've always entrusted civilian law enforcement to civilians, and we, as a culture and a society, have wanted to keep it that way.

The exception to that principle are the National Guard to the various states and the District of Columbia. When those forces are called out by the governor — or in the case of D.C., by the President of the United States — they're what is called the militia capacity, active-duty state capacity, and posse comitatus does not apply.

So they may supplement law enforcement by their own force, and that force was available to the President on January 6.

Q. Well, let me ask you this, just backing up.

You had said that posse comitatus does not apply to the D.C. National Guard?

A. That's correct.

Q. So can the D.C. National Guard, then, be [p.249]

deployed to a major — to what would traditionally be law enforcement activities?

A. They may.

Q. And who has the authority to do that?

A. The President of the United States.

Q. Does the President, in order to deploy the D.C. National Guard, need the permission or a request from the mayor of D.C.?

A. He does not.

Q. Does he need permission or a request from anyone?

A. No, he does not.

Q. If President Trump, in the days leading up to January 6, had been concerned about the potential for violence, what could he have done regarding the D.C. National Guard?

MR. BLUE: Objection, Your Honor. He's leading the witness now.

THE COURT: Overruled.

Q. (By Mr. Grimsley) You can go ahead.

Do you need the question again?

If President Trump, in the days leading up to January 6, had been concerned about the potential for violence, what, if anything, could he have done with the D.C. National Guard?

[p.250]

A. He could have deployed them or arranged for them to be on call or ready to be deployed on January 6.

Q. Again, what sort of permission or request would he have needed from the mayor?

A. He would have needed no request or permission from any other official.

Q. Once President Trump knew that a mob, a violent mob, was attacking the Capitol on January 6, what, if anything, could he have done with the D.C. National Guard?

A. He could have immediately ordered them to report to the Capitol.

Q. Would he have needed any request or permission from the mayor?

A. No.

Q. Now, put aside January 6, and let's go back in time a little bit.

Have you seen any evidence of President Trump deploying the D.C. National Guard in Washington, D.C., prior to the November 2020 election?

A. In the summer of 2020, I believe it was early June, the President deployed the National Guard and various law enforcement personnel in the wake of the protests surrounding the murder of George Floyd.

[p.251]

Q. Did the President need any permission to do that?

A. He did not.

Q. Do you recall if there was a request from the mayor's office for him to do that?

A. There was not.

Q. Now, there's been some suggestion already in this case that prior to January 6, President Trump authorized 10- to 20,000 National Guard troops to be available at the Capitol.

Is that even possible?

A. It would have been very difficult to envision. I see no — nothing in the record that indicates that that order by the President was ever issued.

The reason I say it would have been difficult is that the National Guard, when federalized by the President of the United States — he certainly has the legal authority to do that, call the National Guard from anywhere and federalize them — they then are subject to the posse comitatus principle and could not engage in direct law enforcement in D.C.

If he's going to rely on National Guard from the governors of adjoining states, for example, he may well do that, and they, then, are not subject

[p.252]

to posse comitatus. But then they're subject to the command of their governor, not the command of the President of the United States.

Q. So I want to break that down. So there's the 10- to 20,000 number.

How many, roughly, D.C. National Guard over which the President had authority were there?

JA528

A. There were up to about 100. About 340 had been prepositioned on that day for duties unrelated to law enforcement.

Q. If the President had, in fact, authorized far more than that, he would have had to go through governors?

A. Yes.

Q. If the President had, in fact, authorized 10- to 20,000 National Guard troops to be available on January 6, what type of documentation would you expect to have seen?

A. We would have seen —

MR. BLUE: Excuse me, Your Honor. This is way beyond his expert report. And if I remember correctly, you had said that because we weren't doing depositions that the experts would be limited to their expert reports.

THE COURT: That is absolutely true.

[p.253]

But give —

MR. GRIMSLEY: I was just going to bring up where it is.

THE COURT: The first full paragraph or —

MR. GRIMSLEY: It's — this is — we served a supplemental expert report, Your Honor, and this is on page 3 of that supplemental expert report. And this is addressed right there.

THE COURT: Okay.

MR. BLUE: Can you give me a few minutes, Your Honor?

THE COURT: A few minutes to find it?

MR. BLUE: Yep. Well, in my documents.

THE COURT: It's clearly there, so I'm going to —

MR. BLUE: What page are we looking at?

MR. GRIMSLEY: It's page 3 of the supplemental report.

THE COURT: It's the first sentence of the first full paragraph.

MR. GRIMSLEY: Yeah. It's actually a full paragraph on this topic that carries over to page 4.

MR. BLUE: Okay. Thank you, Your Honor.

[p.254]

THE COURT: Objection overruled.

Q. (By Mr. Grimsley) What documentation would you have expected to see if there had, in fact, been authorization of 10- to 20,000 National Guard troops to be available on January 6?

A. We would have seen documentation inside the Department of Defense, and we would have also seen documentation from the National Guard Bureau for any forces that came from adjoining states.

Q. Why would you expect to see documentation if 10- to 20,000 troops had been authorized?

A. Because that's a significant number. They're not D.C. National Guard. They're either going to be federalized, again, in which case posse comitatus would prevent them from law enforcement, or they're coming from adjoining states, probably Maryland and Virginia, and the governors of those states and the command in those states would have had to issue orders for their force.

Q. Did you review documents in this case to see whether there were, in fact, records of authorization of 10- to 20,000 troops?

A. I did review the Inspector General's report of the — of the Department of Defense that was

[p.255]

compiled during the year after the January 6 events, and I also reviewed the January 6 Committee report extensively. And in neither case did I see any indication

of an order for that size or magnitude of force from anyone.

Q. I want to show you what's been submitted as Exhibit T-V. It's one of President Trump's exhibits.

MR. GRIMSLEY: And we would move to admit it. I assume there will be no objection.

MR. BLUE: T-V?

MR. GRIMSLEY: It was the three-page Department of Defense timeline.

MR. BLUE: It's been renumbered.

MR. GRIMSLEY: Okay. So I'm going to call it T-V for the moment. I'll let you know, Your Honor, we have no objection to it being admitted.

THE COURT: Okay.

Q. (By Mr. Grimsley) So I'm going to show this to you, Professor.

Do you recognize what's marked here as Exhibit T-V?

A. I do. It's the Department of Defense timeline on the days surrounding January 6.

Q. Is there anything — well, who put [p.256]

together that timeline?

A. The Pentagon.

Q. Anything in that timeline reflecting the presidential authorization of 10- to 20,000 National Guard troops?

A. There is not.

Q. What does that suggest to you?

A. That it never happened.

Q. What other documents, if any, did you review to determine if there was an authorization of 10- to 20,000 troops?

A. Again, I read carefully through the DOD Inspector General report that was compiled later that year, and that made no reference to such a decision by the President.

JA531

Q. What about the January 6 report?

A. Likewise, extensively reviewed, and no mention of such an authorization.

Q. Now, I want to go to an entry on January 3, 2021.

Do you see that?

A. Yes.

Q. And there's a bullet point, the third bullet point. And what I learned from doing this is the military really likes acronyms. So I'm going to

[p.257]

spell them out, and correct me if I'm wrong.

The third bullet point says "Acting Secretary of Defense and Chairman of the Joint Chiefs of Staff meet with the President. President concurs an activation of the D.C. National Guard to support law enforcement."

Could that be an authorization of 10- to 20,000 troops?

A. It could not. You see a couple of things about that bullet point. One is the reference there is to the D.C. National Guard, not to any forces. And there weren't 10- or 20,000 D.C. National Guard personnel available for deployment on that day.

And second, if we look back up the timeline, you see that the Sunday, January 3, bullets are partially in response to a request by Mayor Bowser and the Homeland Security Chief Rodriguez from December 31 requesting a modest number of National Guard personnel to perform traffic duties, Metro enforcement, and a few other things on that day, totaling about 340 personnel.

Q. So I want to ask you about that in just a second.

MR. GRIMSLEY: Your Honor, a housekeeping matter. It's Exhibit 1027.

[p.258]

THE COURT: And no objection, Mr. Blue?

MR. BLUE: No, Your Honor.

THE COURT: 1027 is admitted.

(Exhibit 1027 admitted into evidence.)

Q. (By Mr. Grimsley) Now, you said earlier there was no reflection of an authorization of 10- to 20,000 troops in this timeline put together by the Department of Defense.

But is there a discussion of some much smaller number of troops —

A. Yes.

Q. — in this?

A. That's the 340 now that you're going to highlight on the — Monday the 4th of January. This was Mayor Bowser's request that you see there, traffic control, two shifts of 90; Metro station support, two shifts of 24; so-called WMD Civil Support Team, which was about 20; and then command and control personnel, 52. And then on top of that, there was authorized a quick reaction force of 40 which would be staged at Joint Base Andrews available for deployment if needed.

Q. So the 340, were those deployed in the Capitol — meaning Washington, D.C., not at the Capitol building — on January 6?

A. Not the 40 that remained at Andrews.

[p.259]

Q. The 340.

A. Of the remaining, that 300— those 300 personnel, yes, they were deployed. And, again, they were in two shifts, so they weren't all there at one time. But about half of them would have been at either a traffic control point or at a Metro station or at a command control center during — during the entire day.

Q. And that's my fault. It's 300 around the city and then 40 at Andrews Air Force Base?

A. That's correct.

JA533

Q. So what were the 40 at Andrews Air Force Base doing?

A. Well, they were waiting instruction to move to the District because they were simply there to respond to a disturbance —

THE STENOGRAPHER: A disturbance what?

THE WITNESS: A disturbance if one broke out. Sorry.

Q. (By Mr. Grimsley) What, if anything, could President Trump have done on January 6 with regard to the 300 troops stationed around the city and the 40-troop quick reaction force at Andrews Air Force Base once he knew that the Capitol was under attack?

A. Once he learned that that force had

[p.260]

already been deployed outside the District and he could see from his own video screen that violence was breaking out at the Capitol, he could have redeployed them from their existing stations to the Capitol with the time — a limited amount of time needed to get there and then also to be equipped with riot gear. Riot gear was apparently stored at convenient places near their present places of deployment.

Q. In your review of the documents, did you see any evidence that President Trump did that?

A. No.

Q. We talked about what he could have done with the D.C. National Guard.

Is there anything that he could have done with regard to the Virginia or Maryland National Guard units once he knew the Capitol was under attack?

A. He could have spoken with the governors of those respective states or either one of them and approve their

deployments of their forces to the Capitol as quickly as possible.

Q. Now, that would have taken longer, right?

A. That would have taken longer. There is the time to get from Maryland to Virginia to the Capitol, and there's also the communication that would

[p.261]

have to go on between the Pentagon and those National Guard officials.

Q. In your review of the evidence in this case, did you see anything that suggests that President Trump deployed that authority?

A. He did not.

Q. Now, we've discussed what President Trump could have done with the National Guard. Was that the only law enforcement entity that he could have called on that day?

A. No. He could have called on other executive branch agencies to deploy personnel.

Q. Let me show you what's been marked as Plaintiffs' Exhibit 148 at — sorry — page 77.

And do you see a tweet there?

A. Yes.

Q. Who is that tweet from?

A. From then-President Trump.

Q. What date was that tweet sent?

A. January 5, 5:25 p.m.

Q. The night before the January 6 attack?

A. Yes.

Q. And what does Mr. Trump say?

A. He's warning Antifa to stay out of Washington. And he says "law enforcement is

[p.262]

watching," and then he tags various executive branch entities including the Pentagon, the Justice Department,

the Department of Homeland Security — actually, the Department of the Interior — that's Secretary Bernhardt — and the Secret Service. Of course, the FBI's part of Justice.

Q. How, if at all, do those tagged entities relate to the law enforcement authorities that President Trump could mobilize on January 6 when he saw that the Capitol was under attack?

A. Particularly, the first three — or the first — the second — the Justice Department and DHS have personnel that could have been brought to the Capitol from headquarters very quickly on that day, rapid response teams that could have deployed to the Capitol on the order of the President.

Q. What could he have done with the Department of Homeland Security?

A. They, likewise, have a rapid response team that could have deployed in a matter of minutes from headquarters to the Capitol.

Q. You said Secretary — Secretary Bernhardt was the Secretary — or was the Secretary of the Interior.

What relevance does the Secretary of the
[p.263]

Interior have to law enforcement personnel that could have been mobilized on January 6?

A. That department includes the National Park Service. And, of course, the President's speech earlier that day was from the Ellipse, which is on the territory for which the National Park Service is responsible.

Q. And what about the Secret Service?

A. They have, of course, a protective detail, a large segment of protective personnel, who could have been instructed either by the secretary of DHS or by the President himself to respond to the crisis.

JA536

Q. How about the FBI?

A. Likewise, the Department of Justice, they would have been among the first personnel that the attorney general would have contacted if there was a call from the President.

Q. What authority does the President of the United States have over all of those entities?

A. The simplest and most direct authority is his responsibility as chief executive under Article II of the Constitution to take care of all the laws being faithfully executed. That includes faithfully executing the transition and the counting

[p.264]

of electoral votes on the day appointed.

Q. And do all of those entities report up, ultimately, to the President?

A. They do.

Q. What, if any, evidence have you seen that President Trump took any action to deploy any of these entities on January 6?

A. I've seen no such evidence.

Q. Who else in the world had all of those authorities at their disposal on January 6?

A. No one.

MR. GRIMSLEY: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. BLUE:

Q. Good afternoon, Professor Banks. How are you today?

A. I'm well. Thank you.

Q. We met briefly earlier.

A. Yes, we did.

JA537

Q. So I want to talk a little bit about your qualifications. You've been a professor in national security for a while, you said, and you've had some contract experience with the military.

Have you — what's your experience in

[p.265]

advising governors or Presidents in national security issues?

A. I've never advised a governor or a President.

Q. And have you ever — so you've never actually advised a President on actually declaring an emergency or activating the National Guard; is that correct?

A. Only in a war-game scenario with hypothetical players.

Q. And so your advice — your testimony today is, frankly, not about practicality, but more about what the law says; isn't that correct?

A. Well, it's about what the law says in a practical situation of crisis.

Q. Well, but you've never been in that kind of crisis, so you wouldn't really know how the laws would actually interact in that situation, would you?

A. I've simulated those crises many times over —

Q. But you've never actually been in one, correct?

A. I have not. That's right.

THE COURT: Mr. Blue —

MR. BLUE: I went over him again, right?

[p.266]

THE COURT: Yeah. Just both of you try not to talk over each other —

THE WITNESS: I'm sorry.

THE COURT: — for the court reporter.

MR. BLUE: Sorry, Your Honor.

And sorry to the court reporter.

JA538

If we could pull up Exhibit 1045, please.

MR. GRIMSLEY: What exhibit?

MR. BLUE: 1045.

MR. GRIMSLEY: Thank you.

Q. (By Mr. Blue) Professor Banks — sorry, I was spacing on your name for a second — this is a letter from June 4 from Mayor Bowser to President Trump, correct?

A. Yes.

Q. Have you seen this letter before?

A. I have.

Q. And you've read it, but you did not consider this letter in your expert report because it wasn't listed as one of the things you thought you looked at, is it?

A. That's correct.

Q. And if you would look at the last sentence of the first paragraph. And could you

[p.267]

read — starting with "Therefore." Could you read that, please, out loud.

A. "Therefore, I'm requesting that you withdraw all extraordinary federal law enforcement and military presence from Washington, D.C."

Q. Thank you. And now, I know earlier you testified that the President has sole authority, whatever.

Are you aware about how that authority has been delegated?

A. Yes.

Q. And could you explain to the Court what that is?

A. In a 1969 executive order, President Nixon actually delegated to the Secretary of Defense and then to the Secretary of Army by memorandum of the day-to-day authority over deployment decisions with regard to the National Guard.

JA539

Q. Thank you. And you had testified earlier that this letter came from the summer during the Black Lives Matter protests and riots, correct?

A. That's correct.

Q. And are you aware of whether Mayor Bowser approved of the deployment of National Guard at that time?

[p.268]

A. I have seen nothing to indicate that she did.

Q. Do you — have you seen anything to indicate that she did not approve of it?

A. I have not.

Q. So this is the only document we have that referred — references that, correct?

A. Yes. So far as I know.

Q. And isn't it true that once President Trump received this letter, the National Guard was removed from Washington, D.C., at the time?

A. I believe that's true. I didn't study those incidents carefully.

Q. And if you could read the last sentence of the third paragraph, please.

A. Yes. "The deployment of federal law enforcement personnel and equipment are inflaming demonstrators and adding to the grievances of those who, by and large, are peacefully protecting" — "protesting for change and the reference to the racist and broken systems that are killing Black Americans" — "reforms" — I'm sorry — "to the racist and broken systems that are killing Black Americans." I'm failing my vision test here this afternoon.

MR. GRIMSLEY: Could you zoom in a

[p.269]

little bit?

THE WITNESS: There you go.

JA540

MR. BLUE: Yeah. I can't, but Joanna can.

MR. GRIMSLEY: Thank you.

Q. (By Mr. Blue) So the reason I want to talk about this letter for a moment is there — well, there may not be — well, there's formal authorities, correct?

A. (Nodding head.)

Q. There are also informal relationships and informal authorities involved in the governmental process, correct?

A. That's certainly always been my experience.

Q. And President Trump and Mayor Bowser are the two people who have authority in Washington, D.C., correct?

A. But only the President has authority on —

Q. I didn't ask that question. I appreciate that.

A. Yeah.

Q. But they're the ones with the authority in Washington, D.C., correct?

[p.270]

A. Yes.

Q. And while President Trump may have actual legal authority, he has to work with Mayor Bowser going forward, correct?

A. Yes, he does.

Q. And when you were giving your opinion, it doesn't appear that you considered at all the political ramifications or that relationship between President Trump and Mayor Bowser?

A. I was giving real opinion, I think, regarding the authorities of the President and the mayor, if any, during that period.

Q. All right. If we could go to Exhibit 148, please. And we're going to be going to page 6. And we're going to talk about the May 30 tweet, please.

JA541

And you used the — you reference this tweet in your report, didn't you?

A. Yes.

Q. And why did you reference this tweet?

A. It's an indication that President Trump was familiar with the uses of the National Guard for national security.

Q. And are you aware of how the National Guard ultimately was deployed into Minneapolis?

[p.271]

A. I don't know the details of that incident, no.

Q. So you don't know — in fact, you did not address in your report or here that President Trump did not unilaterally order the National Guard into Minneapolis, did he?

A. He did not. I believe that was the governor's deployment decision.

Q. Right. Okay. So — and that was the governor's decision, correct?

A. Yes.

Q. In your report, you also mention the fact that President Trump should have activated the National Guard on January 5, right?

A. Yes.

Q. And —

A. Not — January 5, no. I — my determination was that he should have activated the National Guard in response to the violence that broke out on January 6.

MR. BLUE: Can you — where's my . . .

MR. BLUE: Excuse me, Your Honor. I apologize. I did not expect to have to find this in the report.

THE COURT: No worries.

[p.272]

Q. (By Mr. Blue) Well, let's do this a different way. So leading up to — leading up to January 6—

JA542

MR. BLUE: If we could go to Exhibit 156, please.

Q. (By Mr. Blue) And Exhibit 156 is a tweet from Mayor Bowser that includes a letter that she sent to President Trump, correct?

Not to President Trump, but to the United States Attorney General, the Acting Secretary of Defense, and the Secretary of the Army, correct?

A. Yes.

Q. And remind us who actually had command authority of the D.C. National Guard through the delegation of authority?

A. President Trump delegated to the acting secretary at the time and the Secretary of the Army.

Q. So the Secretary of Defense who then delegated on down to the Secretary of the Army, right?

A. Yes.

Q. So this letter was to the two individuals who had been delegated the authority by President Nixon, and that delegation was still in effect at the time, correct?

[p.273]

A. That's correct.

Q. Right. And if you read the tweet from Mayor Bowser, she talks about that she's not requesting any other federal law enforcement personnel and discourages any additional deployment without notification or consultation, correct?

A. Yes.

Q. So she was making it very clear on the day before January 6 that she didn't want National Guard, didn't she?

A. That's right. She was not anticipating a violent attack on the Capitol, however.

JA543

Q. Well, and that's true. And is it your testimony today that President Trump was anticipating a violent attack on the Trump — on the Capitol?

A. I do not know whether the President was anticipating —

Q. Okay.

A. — such an attack.

Q. And if in the letter — and you've read this letter before, correct?

A. Yes, I have.

Q. And the letter says basically the same thing, doesn't it?

A. It does.

[p.274]

Q. And so you're not — your testimony is not that he should have actually deployed National Guard — not just the 300 or the 340, but the 1,100 who were available — you're not saying that he should have had them ready to go on January 5 to deploy on January 6?

A. No.

Q. Okay.

MR. BLUE: Just a minute, Your Honor.

Q. (By Mr. Blue) So are you aware of any warnings that suggested that maybe there was going to be violence at the Capitol?

A. I am not.

Q. Is it your testimony today that even if Mayor Bowser said that President Trump should not deploy troops that he should have done it anyway?

A. Yes.

Q. So he — you think that he should ignore the elected official in Washington, D.C., if he disagrees with her on this issue?

JA544

A. He should respond to his constitutional responsibilities to protect the national security of the United States when there's an assault on our democratic process.

Q. Okay. And are you aware this — of any
[p.275]

other national politician who said that he should not be deploying troops to Washington, D.C.?

A. No.

Q. Like, say, if Senate Majority Leader Mitch McConnell said, "Do not deploy troops," he shouldn't listen and he should just do it, correct?

A. I'm not familiar with Secretary — with
Mr. McConnell's —

Q. Well, no. I'm saying if he did it.

THE STENOGRAPHER: And a little bit slower and one at a time, please.

Q. (By Mr. Blue) If Senate Majority Leader McConnell said, "Do not deploy troops into Washington, D.C.," President Trump should ignore him, correct?

A. That's correct.

Q. And if Nancy Pelosi said that, you're also — she — he should ignore it and go forward?

A. Once the violence broke out, yes.

Q. So on January 6, you say that he should have deployed the National Guard, correct?

A. Yes.

Q. At what point?

A. As soon as he was aware that violence had broken out at the Capitol, sometime after 1:00 p.m. that day.

[p.276]

Q. Okay. So there's violence at the Capitol and there's police forces there. And — but at that point in that process should he be thinking, Okay, now I need to get the

National Guard in; they're not going to be able to take care of this problem.

A. My recollection of the specific minutes in those hours may not be exact, but I believe some — around 1:34, the mayor and the chief of police at the Capitol placed a call to the White House seeking support, seeking more law enforcement support. And they repeated that call. I think it was at 1:49.

So there were at least two calls before 2:00 p.m. that day that should have alerted the President what he was already seeing on his television screen, that there was a violent attack going on at the Capitol.

Q. And are you aware specifically of what Donald Trump — what President Trump knew and when he knew it?

A. I am not.

Q. All right. Let's move to Exhibit 22.

This is "Examining the U.S. Capitol Attack: A review of the Security, Planning, and Response Failures on January 6," okay? And this is the staff report from the Senate that was a bipartisan report.

[p.277]

Have you read this report?

A. I have.

Q. Okay. But you did not take this report into account when you were giving your opinion today, did you?

A. I did not.

Q. And so you did not include any of the statements in this report in your expert report or your opinion, correct?

A. That's correct.

Q. And would you agree that there was not — that there was a lack of consensus about the gravity of the threat that was going to be posed on January 6?

A. I read that in several sources, yes.

Q. Okay.

MR. BLUE: If we could go to page 46. Yeah. Page 46 of the report. And then I think I have the right page. Yep. And if you could blow up the first paragraph under Section C.

A. Yes, I see it.

Q. (By Mr. Blue) And I want to focus on the first sentence.

A. Okay.

Q. And could you read that first sentence.

[p.278]

A. "Inconsistencies between intelligence products and within the January 3 special assessment led to a lack of consensus about the gravity of the threat posed on January 6, 2021."

Q. And so what that sentence is saying is that this committee found that there really wasn't — it was really unclear about what was going on on January 6 and — about the threats on that — coming forth from the right wing; is that correct?

A. That's my understanding, yes.

MR. BLUE: And if we could go to page 48. I should go there too.

Q. (By Mr. Blue) And we'll look at the first paragraph.

A. Okay.

Q. And, again, we have Mr. Irving. And Mr. Irving, I will represent, was the House Sergeant at Arms, right? And he told the committees "Every Capitol police daily intelligence report from January 4 to January 6, including on January 6, forecasts the chance of civil disobedience and arrests during the protests as remote to improbable."

Again, highlighting the fact that this was an unprecedented and unexpected event, correct?

A. Correct.

[p.279]

Q. And if you go down just to the next paragraph it says “Months following the attack on the U.S. Capitol, there is still no consensus among the USCP” — which is the United States Capitol Police, right?

A. Yes.

Q. — “officials about the intelligence report threat analysis ahead of January 6,” correct?

A. Correct.

Q. So, again, we’re highlighting the fact that there just was no — the intelligence reports weren’t clear and weren’t being presented that suggested that this kind of event could happen, correct?

A. Yes.

Q. All right. And if we could move to Exhibit 1031, please. And Exhibit 1031 is the Inspector General’s report regarding January 6, correct?

A. Yes.

Q. And you referenced this earlier in your testimony today, didn’t you?

A. I did.

Q. So you’ve read this document?

A. I have.

[p.280]

Q. And if you — if we could turn to page 18 of the — of the PDF. I have the right page this time. And you’ll look at where it says January 3, the one, two — the fourth block down, the fourth row.

A. Yes.

Q. And it says the President asked Mr. Miller and General Milley about election protests preparations, correct?

A. Yep. Yes.

JA548

Q. And he was informed “We’ve got a plan, and we’ve got it covered,” correct?

A. Correct.

Q. So the President at that point was informed that a plan was in place to take care of things, correct?

A. Yes.

Q. Is there any reason that you would think that he would not believe that?

A. No.

Q. Now, you have given us a number of options that the President had legally, correct?

A. Yes.

Q. And you haven’t identified a single instance where the President has actually activated

[p.281]

the National Guard in a way that did not coordinate with the local political officials, correct? So he — you can’t identify a time where he’s activated the National Guard in Washington, D.C., without Mayor Bowser’s approval?

A. He —

Q. Without the mayor of Washington, D.C.’s approval, correct?

A. We’re going to have to rewind the question a bit. I’m a little confused.

I think in June of 2020 he called out those units on his own volition without a request from the mayor.

Q. Well, earlier you said that she — you had no idea if he — if she agreed with it or not, correct?

A. He did this unilaterally, did it on his own authority in June or late May or whatever it was in 2020 in response to the Floyd protests.

Q. Okay. Well, when we were talking about this earlier, I asked if you knew if she approved it or if they

talked about it or if they had a conversation, and you said you did not know —

A. I don't know.

Q. — is that correct?

[p.282]

A. Yes.

Q. So you do not know whether she actually was communicating with him about that —

A. No, I don't.

Q. — correct? And I can't remember. Did you say that the President could have declared a national emergency?

A. I —

Q. Is that something you said?

A. It's in my report. I don't believe I testified to it this afternoon.

Q. Are you aware of a President declaring a national emergency within two or three hours of a riot starting?

A. Oh, yes. Many times.

Q. Oh, really?

A. Historically, yes.

Q. Okay.

A. Yeah.

Q. Like what?

A. Little Rock, 1950s. Birmingham, early 1960s.

Q. Okay.

A. Los Angeles, 1984.

Q. Within three hours?

[p.283]

A. Oh, yes.

Q. Okay. And are you aware of any debates that were going on inside the White House regarding a response to the riots on January 6?

A. No.

JA550

Q. So you have no idea about whether — why the decisions were being made not to — for the President not to actually do the things that you've said?

A. No.

Q. You don't know if he considered doing them, do you?

A. I do not.

Q. You're just saying that these are things that he possibly could have done; isn't that correct?

A. That's correct.

MR. BLUE: All right. Your Honor, that's all I have. But I would like to admit five exhibits we talked about today: 1031, 1045, 148, 156, and 22.

THE COURT: Okay. Do you have any objections to any of them?

MR. GRIMSLEY: No.

THE COURT: Okay. Did you get the numbers?

[p.284]

THE CLERK: No.

THE COURT: Can you repeat it one more time?

MR. BLUE: I tried to go slow. Apparently I have to go even slower.

1031, 1045, 148, 156, 22.

What? I'm sorry, it's 1056.

Are you sure? Because it's 156 on here.

Hold on. Let me look at my notes.

It's 156, not 1056.

THE COURT: And it's 148, not 1048?

MR. BLUE: 1034, 1045, 148—

THE COURT: 156.

MR. BLUE: —156, 22.

THE COURT: Okay. (Exhibits 1031, 1045, 148, 156, and 22 admitted into evidence.)

MR. GRIMSLEY: It sounds like tax forms.

JA551

THE COURT: Redirect?

MR. GRIMSLEY: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. GRIMSLEY:

Q. You were asked a number of questions about whether in the lead-up to January 6 there wasn't a consensus about whether there might be violence that [p.285]

day. Do you recall that?

A. Yes.

Q. As of 1:30 in the afternoon on January 6, was there consensus about whether there was violence?

A. Yes.

Q. What was that consensus?

A. Violence was breaking out at the Capitol.

MR. BLUE: Objection, Your Honor. I'm not sure what the basis of that statement is other than what he saw on TV.

THE COURT: Overruled.

Q. (By Mr. Grimsley) Did you review the January 6 report in coming to the opinions in your — in this case?

A. I did.

Q. I want to show you a few. The first one is Finding 316. Oops. Sorry. It's not hooked up. Finding 316 says "By 1:21 p.m., President Trump was informed that the Capitol was under attack."

Do you see that?

A. Yes.

Q. What, if anything, did you see the [p.286]

President or any evidence of the President doing prior to 4:17 with regard to exercising his authorities to deploy either the National Guard or the federal law enforcement personnel we discussed earlier?

JA552

A. Absolutely nothing.

Q. Do you recall what the January 6 report said about what President Trump was doing during that nearly three-hour period of time?

A. I believe he said he was watching the television screen and tweeting.

Q. Now, you were asked about whether, perhaps, Senator McConnell or House Speaker Pelosi had said they don't want the D.C. National Guard at the Capitol.

Did you see anything to suggest they were saying that as of 1:30 p.m. —

A. No.

Q. — on January 6?

A. No. Those statements were prior to the outbreak of the violence.

Q. And finally, you were asked some questions about whether there was even consensus the morning of January 6 as to whether there might be violence.

Do you recall that?

[p.287]

A. Yes.

Q. Have you seen any evidence that the President told any of those individuals that he was going to ask them to march down to the Capitol?

A. No.

Q. Did you see any evidence that the President told any of those individuals that there were people refusing to go through magnetometers —

A. No.

Q. — before his speech?

A. No.

Q. Did you see any evidence that President Trump told any of those authorities what he was going to say?

A. No.

MR. BLUE: Objection. Your Honor, he's leading again.

THE COURT: You can rephrase.

Q. (By Mr. Grimsley) What evidence, if any, did you see that President Trump told any of those security officials what he was going to say on the Ellipse that day?

A. I saw no such evidence.

MR. GRIMSLEY: No further questions.

THE COURT: And I —

[p.288]

MR. BLUE: Your Honor, I have no recross.

THE COURT: And I apologize. I forgot — I didn't ask the Colorado Republican Party or the Secretary of State about Professor Simi, whether you wanted to do anything. But I'm assuming you would have shouted at me if I had not. But I will give you the opportunity now.

Do you have any questions for Professor Banks?

MS. RASKIN: We have no questions, Your Honor.

MR. KOTLARCZYK: No questions, Your Honor. Thank you.

THE COURT: Great. So for all of you with young kids, I'm sure you'll be happy to hear we're going to recess. Please, though, I know that people have a lot going on with Halloween, if not going trick-or-treating, but distributing candy.

Can we please, though, make sure to let us know who the live witnesses are going to be tomorrow? We need to know that today.

So with that, we will go off the record on Case Number 2023-CV-32577, and we will reconvene at 8:00 a.m. tomorrow.

[p.289]

* * * * *

JA554

WHEREUPON, the foregoing deposition was
concluded at the hour of 3:38 p.m. on October 31, 2023.

In the Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, ET AL.,

Respondents.

On Writ of Certiorari to the Colorado Supreme Court

JOINT APPENDIX VOL. II OF IV (JA555-JA1001)

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Petition for Writ of Certiorari Filed: Jan. 3, 2024

Certiorari Granted: Jan. 5, 2024

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The following opinions, decisions, judgments, and orders, constitutional, and statutory provisions have been omitted in printing this joint appendix because they appear on the following page in the appendix to the Petition for Certiorari:

Colorado Supreme Court opinion.....	1a
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U.S. Const. amend. XIV, § 3	318a
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JA555
DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
1437 Bannock Street
Denver, CO 80203

Case Number 2023CV032577, Division/Courtroom 209

CERTIFIED STENOGRAPHER'S TRIAL
TRANSCRIPT
TRIAL DAY 3: November 1, 2023

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAHER,
KATHI WRIGHT, and CHRISTOPHER CASTILIAN,
Petitioners,

v.

JENA GRISWOLD, in her official capacity as Colorado
Secretary of State, and
DONALD J. TRUMP,
Respondents,

and

COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE, and DONALD J. TRUMP,
Intervenors.

The trial in the above-entitled matter, commenced on
Wednesday, November 1, 2023, at 8:20 a.m., before the
HONORABLE SARAH B. WALLACE, Judge of the
District Court.

JA556

This transcript is a complete transcription of the proceedings that were had in the above-entitled matter on the aforesaid date.

[p.8]

MORNING SESSION,
WEDNESDAY, NOVEMBER 1, 2023

WHEREUPON, the court convened at 8:20 a.m., and the following proceedings were had:

* * * * *

THE COURT: Good morning. Everyone may be seated. Do we need to talk about any preliminary matters, or can we get to the next witness?

MR. OLSON: I think we can get to the next witness, Your Honor.

MR. GESSLER: Nothing from us, Your Honor.

MS. RASKIN: I would just like to renew our motion to exclude testimony from yesterday. I would like to renew our motion to exclude the testimony of Mr. Magliocca, 702.

THE COURT: And that — that motion is denied on the basis of my previous written ruling. Anything from the Secretary?

MR. KOTLARCZYK: No preliminary matters for the Secretary, Your Honor.

THE COURT: Great. Let's call your next witness.

MR. MURRAY: Your Honor, would you like entries of appearance first?

THE COURT: Yes. Thank you.

[p.9]

MR. MURRAY: For petitioners, Jason Murray, Eric Olson, and Sean Grimsley, Martha Tierney, Mario Nicolais, and Nikhel Sus.

JA557

THE COURT: Thank you.

MR. GESSLER: Your Honor, on behalf of President Trump, I have to look around to see who's here today. Myself, Scott Gessler, Jacob Roth. Next to me, Jonathan Shaw and Chris Halbohn.

MS. RASKIN: Jane Raskin, Mike Melito, Nathan Moelker and Robert Kitsmiller on behalf of the Republican State Central Committee.

MR. KOTLARCYK: And good morning, Your Honor. Michael Kotlarczyk on behalf of the Secretary of State, joined with Jennifer Sullivan from the Attorney General's Office and Deputy Secretary of State, Christopher Beall.

THE COURT: Great. Thank you. And thank you, Mr. Murray.

MR. MURRAY: Of course. Petitioners call Professor Gerard Magliocca to the stand.

THE COURT: Professor Magliocca.

GERARD MAGLIOCCA,

having been first duly sworn, was examined and testified as follows:

[p.10]

DIRECT EXAMINATION

BY MR. MURRAY:

Q. Good morning, Professor. Could you introduce yourself, please.

A. Yes. I'm Gerard Magliocca.

Q. How do you spell your last name?

A. M-a-g-l-i-o-c-c-a.

Q. Where do you work?

A. I teach at the Indiana University, Robert H. McKinney School of Law.

Q. Now, you're here as an expert today. What topics are you here to testify about?

JA558

A. I am here to give expert testimony on the history of Section 3 of the Fourteenth Amendment.

Q. How long have you been at Indiana University McKinney School of Law?

A. 22 years.

Q. And in those 22 years, has your scholarship had any particular focus?

A. Yes. I focus mainly on constitutional history.

Q. Are you a member of any professional organizations related to constitutional history?

A. Yes. I'm a member of the Supreme Court Historical Society, the American Society of Legal [p.11]

Historians, and I'm on the board of editors of the Journal of American Constitutional History.

Q. Can you give us a general overview of what kinds of published works you have in the area of constitutional history?

A. Well, I've written five books and something in the neighborhood of law review articles on various constitutional history subjects.

Q. Have you written any books specifically about the Fourteenth Amendment or its history?

A. Yes. About ten years ago, I wrote a biography of Congressman John Bingham, who was the main drafter of Section 1 of the Fourteenth Amendment as a member of the Joint Committee on Reconstruction.

Q. Have you written any academic articles or journals related to the history of the Fourteenth Amendment?

A. Yes. I have four articles that cover different aspects of the history of Section 1, Section 2, and Section 3 of the Amendment.

Q. Do you have any other articles about 19th century history?

A. Well, yes, several. I mean, some of them cover the period of Jacksonian democracy. Some cover the period in the late 19th century, sort of around the

[p.12]

Populist period or the Gilded Age, and others of my — my books also focus on different aspects of those subjects.

Q. You mention that you've written on the subject of Section 3 of the Fourteenth Amendment. Tell us about that.

A. Yes. So in 2020, I drafted a paper on Section, and that paper was posted to the Social Science Research Network, which is the place where professors post their draft papers to share with the public, in December of 2020.

Q. Was that later published?

A. Yes. That was published in 2021 in Constitutional Commentary, which is a peer-reviewed journal run out of the University of Minnesota.

Q. Before you posted your article about Section 3 on SSRN in December of 2020, give us a sense of the state of the existing scholarship on Section 3 of the Fourteenth Amendment.

A. There really wasn't any.

Q. How, if at all, has that changed since then?

A. Well, it's changed quite a bit, especially in the last few months.

Q. Have you written any other articles about Section 3?

[p.13]

A. Yes. I have a draft paper that is going to be coming out in the Journal of Constitutional History that's — or Constitutional Law that is kind of run out of the University of Pennsylvania. That was given as a talk at a symposium in January on the Fourteenth Amendment.

JA560

Q. Can you tell us whether any of your work on Section 3 has ever been cited by courts?

A. Yes. My original article was cited by the United States Court of Appeals for the Fourth Circuit, as well as a Federal District Court in Georgia.

Q. Has your work on Section 3 ever been cited by any government agencies?

A. Yes. The Congressional Research Service cited the article in an analysis of Section 3 that they did.

Q. Have you ever given expert testimony on Section 3 of the Fourteenth Amendment?

A. Yes, I have. I gave expert testimony on the history of the Amendment in an administrative proceeding in Georgia that was addressing the eligibility of Representative Taylor Greene.

Q. I want to pull up Petitioners' Exhibit 162.

What is this?

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A. This is my CV.

Q. Is it current?

A. Yes.

Q. I don't want to talk about every entry here, but just briefly, can you summarize your educational background for us.

A. Yes. I received my undergraduate degree from Stanford and my law degree from Yale.

Q. If you go to the second page, just tell us briefly which of the books on your CV relate to 19th century history or constitutional history.

A. All five of the ones that have been published.

Q. And is this entry here the biography you were referring to about John Bingham?

A. Yes, it is.

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Q. And if we go down to “Book Chapters, Law Review, Articles and Essays,” we see a few entries related to Section 3 of the Fourteenth Amendment.

Were those the forthcoming article and the previously published article —

A. Yes.

Q. — that you mentioned earlier?

A. Yes.

Q. And briefly, on page 4, can you just [p.15]

highlight for us on this page of your CV some of the articles here that relate to 19th century history or the history of the Fourteenth Amendment.

A. Sure. The one at the top is about Section 2 of the Fourteenth Amendment.

Then also the one, let’s see, going down a little bit — okay, “Why did the Incorporation of the Bill of Rights Fail in the Late 19th Century” is a 19th century historical piece.

And then also the one that’s entitled “Indians and Invaders: The Citizenship Clause and Illegal Aliens” focuses on Section 1 of the Amendment, on the citizenship clause of Section 1.

And the paper on the legal tender cases, “A New Approach to Congressional Power, Revisiting the Legal Tender Cases” is about the Supreme Court decisions on the constitutionality of paper money that were rendered in the 1860s and 18- — well, up into the 1880s.

“Constitutional False Positives in the Populist Moment” was about constitutional development in the late 19th century, basically focusing on the 1890s.

“Cherokee Removal and the Fourteenth Amendment” was talking about the Trail of Tears and then how that had

an influence on some of the thinking behind Section 1 of the Fourteenth Amendment.

[p.16]

Q. If we go to the next page of your CV, you have a list of recent professional activities.

Do any of those relate to the history of the Fourteenth Amendment?

A. Yes. So the podcast on Section 4, which I haven't written a whole article about that, but I did write about that in one — a piece of one article. I did a podcast with Eric Foner, who is basically America's leading historian on Reconstruction, earlier this year.

And then the symposium piece is the one I mentioned earlier. That's my draft paper about another aspect of Section 3.

And then the — there was a presentation about the Section 3 article last fall. And then I gave a talk last year about my biography of Bushrod Washington at John Marshall's house, which was rather fun.

Q. And on the last page, I'm not going to highlight all of these, but did some of these also relate to Section 3 of the Fourteenth Amendment?

A. Yes. I did a podcast with Professor Dan Hemel in January of 2021 about Section 3. That was, of course, in the immediate aftermath of January 6, 2021.

Q. And what about this entry about John Bingham with Kurt Lash?

A. Yeah. So that was a podcast I did with

[p.17]

Professor Lash for the National Constitution Center about John Bingham's career that was part of a series of events that commemorated the 150th anniversary of the ratification of the Fourteenth Amendment in 2018.

Q. When you're doing your historical scholarship on the Fourteenth Amendment, what kinds of sources do you consider?

A. Well, I mean, I'm trying to look at primary sources because that's the best way to try to get at the truth of what happened. So I'm always most interested in looking at those.

Q. What are the — what are the types of primary sources that you would look at in your scholarship?

A. Well, they kind of run the gamut, but you could look at congressional debates and reports. You can look at presidential documents.

You can look at judicial cases. You can look at contemporary newspapers, contemporary books, basically any kind of source that would be a sort of firsthand account of what occurred in a particular time period.

Q. I'm pulling up Petitioners' Exhibit 144. What is this exhibit?

A. This is an index of the materials that I
[p.18]
considered for my expert report.

Q. And if we walk through this index, we see some cases. There's some citations to law review articles, some statutes, citations to Congressional Record, et cetera.

Are those the sorts of materials that you would review in your historical scholarship outside the courtroom?

A. Yes, they are.

Q. Tell us a bit about the historical methodology that you used in forming your opinions in this case.

A. Well, I mean, the first thing you want to do is make sure that the sources you're looking at are true and accurate. I mean, usually that's pretty straightforward

because they are official government records of one sort or another.

You know, for example, there was an official compilation of presidential documents assembled at the end of the 19th century, and I have a set in my office that I found in an antique shop one time. And so I refer to that just to make sure, if I see a document online, that I can look it up to make sure it's a real document and not — there's not some error in transcription or something.

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For newspapers, it's a little more challenging. I mean, there are some sort of trustworthy databases of old newspapers. One's run by the Library of Congress.

You can also cross-check newspapers because typically an article would be reprinted more than once, or at least the sort of substance of the article would be reprinted in another newspaper. So you can try to make sure that whatever you're looking at is, in fact, an accurate rendition of whatever the article is discussing.

Q. As a historian, what do you do if there is some kind of ambiguity or mismatch among different historical sources?

A. Well, look, the first thing you're looking at is kind of what is the context of the source.

Now, for example, in the case of the Fourteenth Amendment, you would be more interested in what supporters of the Amendment had to say than you would be about what an opponent of the Amendment would have said, in the same way that if you were looking at a judicial opinion, you'd be more interested in what the Court said rather than what any dissenting opinions said to understand what the opinion was about.

Also, you would look at who the speaker or

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author was. Now, in — some people are just more authoritative than others in their exposition of the Fourteenth Amendment. And, you know, at the top of the list or near the top would be John Bingham, I mean, not just because I wrote a book about him, but because he was centrally involved in all elements of the Fourteenth Amendment's proposal and ratification and implementation. And this has been recognized by the Supreme Court many times and by scholars many times.

Q. Can you tell us whether or not the historical methodology that you've just laid out was the method that you used in forming and presenting your opinions in this case?

A. It was.

MR. MURRAY: At this time, petitioners move to admit Professor Magliocca as an expert in the history of Section 3 of the Fourteenth Amendment.

MR. GESSLER: Your Honor, we have no objection to Professor Magliocca's expertise.

Obviously we renew and endorse the 702 motion, Your Honor.

THE COURT: Professor Magliocca will be admitted as an expert in the history of Section 3 of 14 — of the Fourteenth Amendment.

MR. MURRAY: Thank you, Your Honor.

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Q. (By Mr. Murray) Let's start by setting the stage for the adoption of Section 3.

What does the historical record tell us about why Section was put into the Fourteenth Amendment in the first place?

A. Well, the main thing that prompted Section 3 was that they wanted to keep officials who had left to join the

Confederacy from returning to office unless they showed that they deserved a second chance to return to office.

So basically there were elections held throughout the South in 1865 after the war ended, and many of the same people who had been in office before the war and had left to join the Confederacy were returned to office. And some of them showed up to the new Congress and essentially said, "Okay, we're here to take our seats now," as if nothing had happened.

And Congressional Republicans were very upset at this idea. They felt that this was wrong. And so there was a proposal by the Joint Committee on Reconstruction to do something to exclude people like that from positions of authority unless they demonstrated some repentance or, you know, deserved forgiveness.

Q. Does the historical record tell us anything about whether that was intended as punishment

[p.22]

for insurrectionists?

A. Yes. I mean, it was not intended as punishment. There was — a number of senators discussed the fact that this was simply adding another qualification to office because of the events that had occurred.

Q. What does the historical record tell us about the role that the oath plays in Section 3?

A. So the oath plays a central role, not just in the text, but in the rationale for Section 3 in two respects.

I mean, the first is it was a way of limiting the scope of the provision. They didn't want to disqualify all former Confederates from office or from serving. They wanted to focus that on the people they thought were most responsible for Secession and the Civil War, and the oath was a way to do that.

Now, secondly, senators said if you had sworn an oath to support the Constitution and you had broken it by engaging in insurrection and joining the Confederacy, it was a kind of moral perjury — that was the term that some people used — that you had engaged in and you were just untrustworthy to hold office again unless you demonstrated some reason why you should be allowed a second chance.

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Q. What, if anything, does the historical record tell us about whether Section 3 was limited to the events of the Civil War or not?

A. It was not limited to the events of the Civil War, and we know that because, first, the language was general. It just referred to insurrection or rebellion, and secondly, there were senators in the debate that made pointedly clear that they thought it also should apply to any future insurrection that might occur.

Q. When did the Fourteenth Amendment get ratified?

A. 1868.

Q. In the years after its ratification, walk us through some of the ways that Section 3 got enforced to exclude from office those who had been engaged in insurrection or rebellion in violation of their oath.

A. Okay. So this happened in different forms. In some states that were under martial law, the Union Army did the enforcing.

In southern states that were no longer under martial law, state officials and state courts did the enforcing.

Individual Houses of Congress also sometimes did the enforcing if someone was a member elect

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and then there was a question raised about whether they could be seated because of some involvement with the

Confederacy. And then the individual House of Congress, the House or the Senate, would have to decide if the person could be seated or not.

And then finally, in 1870, Congress passed a — or created a federal civil action to enforce Section 3 by allowing U.S. attorneys to bring a writ of quo warranto to oust officials who were in office illegally because of Section 3.

Q. You mentioned state courts enforcing Section 3. Tell us a little bit more about that history.

A. Yeah. So in 1869, there were cases in North Carolina and Louisiana that addressed enforcement of Section 3 of the Fourteenth Amendment against state officials pursuant to state enforcement mechanism.

So in North Carolina there were two officials who were removed from office as ineligible, and in Louisiana they didn't remove the person because of a procedural reason, but they said that it could have been had the procedural posture been correct.

Q. Were those cases in North Carolina and Louisiana before or after the enactment of federal implementing legislation in 1870?

A. They were before. They were in 1869.

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Q. Tell us a bit about the history of amnesty under Section 3 and Congress's power to remove the disability by a two-thirds vote.

A. Right. So as soon as the Fourteenth Amendment was ratified, applications poured in from people who were disqualified seeking a waiver.

Basically you would apply to your member of Congress, and then what Congress did initially was pass a series of measures that would simply give amnesty to people by name, right? There would be a list of names, all

of these people get amnesty if you could get a two-thirds vote of each House to pass the legislation.

After a couple of years, Congress decided to create a more general amnesty that did not involve individual names. And that was enacted in 1872 and gave amnesty to nearly all of the people covered by Section 3, except for a few hundred who were sort of considered the worst of the worst, including Jefferson Davis, the former President of the Confederacy.

Q. And what does that history of amnesty tell you about the historical understanding of whether congressional legislation was needed to enforce the disability of Section 3?

A. Well, it tells me that people didn't think it was needed. Now, that goes along two dimensions.

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First, the people who were applying for amnesty must have thought that they needed it right away.

And why did they think that? Probably because the Amendment had been ratified, and states were in a position to enforce the Amendment if needed.

Secondly, Congress granted amnesty to these individuals, in some cases, before any enforcement legislation was enacted. And in a sense, they were removing a disability that existed. Because the Fourteenth Amendment had been ratified, they couldn't remove something that didn't exist.

Q. I want to pull up the language of Section 3, and I want to first highlight the phrase "insurrection."

Have you studied the historical meaning that the word "insurrection" would have had at the time of ratification of the Fourteenth Amendment?

A. Yes, I have.

Q. What did insurrection mean at that time?

JA570

A. Well, according to the historical sources, an insurrection was any public use of force or threat of force by a group of people to hinder or prevent the execution of the law.

Q. What were some of the historical sources that you looked at that informed your understanding of

[p.27]

insurrection as a public use of force to — or threat of force to prevent execution of the law?

A. Well, I looked at historical examples of insurrections that occurred before the Civil War as informed by some presidential documents about them.

I looked at dictionaries, I looked at judicial decisions, and I looked at an authoritative treatment of the law of war that was issued during the Civil War.

Q. You mentioned historical examples. Tell us a little bit more about what historical examples informed the understanding of insurrection during Reconstruction.

A. Sure. Well, there were two notable insurrections early on in American history. One was the Whiskey Insurrection, which is also known as the Whiskey Rebellion, and that happened in 1794 in Pennsylvania.

It was a tax protest by farmers who were angry at a new federal tax on distilleries that had been put in as part of Alexander Hamilton's financial scheme for the Federal Government.

And during that time, armed farmers basically attacked federal tax collectors, who tried to collect the tax, or used intimidation to prevent them from doing so.

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Eventually President Washington called out the militia to sort of restore the legal authority of the government on tax collection, and a few people were prosecuted, but President Washington pardoned them all.

Q. How many, roughly, armed farmers were involved in the Whiskey Insurrection?

A. In the hundreds.

Q. You mentioned that there was another example you looked at. Tell us about that.

A. Yes. The second example was called Fries's Insurrection. That was in 1799. That was in a different part of Pennsylvania. It was a different group of farmers that were upset about a different tax.

This time it was a federal property tax, and they used intimidation to prevent the tax assessors from the Federal Government to come in and do the property assessments that would have been necessary to collect the tax.

Q. And what was the scale of the violence involved in Fries's Insurrection?

A. Well, there was no actual violence. There's no record of anybody being killed. And again, you're talking about, you know, hundreds of armed farmers who were sort of behind the sort of resistance to this tax.

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Q. If there was no actual violence, in what sense was it understood to be an insurrection?

A. Well, it involved the threat of violence; that is, there was violent intimidation of the federal tax officials, I mean, and that — that did — did the trick, at least from the point of view of the farmers, for some period of time.

Q. What relevance did the Whiskey Insurrection and Fries's Insurrection have to the historical understanding of the meaning of insurrection during Reconstruction?

A. Well, these were well-known examples. I mean, probably the Whiskey Insurrection was a little better known because it was referred to in the 39th Congress. I mean, you can find books written about the Whiskey Insurrection in the run-up to the Civil War.

And also one of the leading cases on sort of discussing insurrection arose out of Fries's Insurrection in — it was a case from 1800, so all of this would have been background that people would have been familiar with at the time.

Q. These weren't obscure examples?

A. No, not at all.

THE COURT: I'm sorry, Professor. So when you say that it informs what an insurrection was at a

[p.30]

time, is that because, like, case law called them insurrections or . . .

THE WITNESS: Well, yes, in part. The, case of Fries, for example, which arose out of Fries's Insurrection, described it that way, as did President Adams' pardons of the individuals who were involved.

THE COURT: Okay.

THE WITNESS: Uh-huh.

Q. (By Mr. Murray) And you've already touched on this, but did either of these examples rise to the level of a full-scale war or rebellion?

A. No.

Q. You also mentioned that you looked at some dictionary definitions. Tell us what we're looking at here.

A. This is Webster's Dictionary from 1828.

Q. This is on page 785 of your appendix.

How did Webster's Dictionary define insurrection at that time?

A. Webster's defined it 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."

Q. And did — did Webster's say anything about any difference between insurrection on the one hand

[p.31]

and rebellion on the other?

A. Yes. It said that a rebellion was basically an attempt to overthrow the government or create a new government.

I mean, people, to some degree, used those terms interchangeably because, as I said, the Whiskey Insurrection is sometimes called the Whiskey Rebellion, but this definition defined them more historically, or different — differentiated them more historically.

Q. Was this the only example of a dictionary definition that you found informative?

A. No.

Q. I want to pull up page 747 of your appendix.

What is this?

A. This is a dictionary from 1848 by the Reverend John Boag, who was a noted English lexicographer.

Q. And why did you look there?

A. Well, because it is another — he was a noted person, I mean, not as famous as Noah Webster, obviously, but — and — but it had a definition of insurrection within it.

Q. How did the definition in this dictionary compare to what we just looked at in Webster's

[p.32]

Dictionary?

A. It is essentially identical.

Q. You also mentioned that you looked at cases defining insurrection.

Tell us first a bit about how those cases came up.

A. Right.

So prior to 1862, there was no crime of insurrection. So the only time that cases discussed insurrection came in treason cases when judges were instructing juries, giving

them a charge on treason, and invariably they would discuss what an insurrection was in those charges.

Q. If we go to page 750 of your appendix, is this one such charge?

A. Yes.

Q. And tell us the circumstances of this charge.

A. Okay. So this is a charge to a grand jury in the United States Circuit Court in Missouri in 1861. The way things worked then, Supreme Court Justices would participate in trials to some extent. And so this grand jury charge was presided over by John Catron, who was an Associate Justice of the Court at that time.

Q. If we go to page 752 — and I apologize,

[p.33]

sometimes these historical sources are a little bit hard to read. But can you tell us how Justice Catron defined insurrection?

A. Yes. He said that “The conspiracy and the insurrection connected with it must be to effect something of a public nature concerning the United States,” and that included “overthrowing the government, or to nullify and totally hinder the execution of some U.S. law or the U.S. Constitution, or some part thereof, or to compel its abrogation, repeal, modification, or change by a resort to violence.”

Q. And how does that inform your opinion here?

A. Well, I mean, that is an authoritative statement of law in 1861, close to the time when the Fourteenth Amendment was ratified. And it is consistent with the dictionary definitions just seen, in saying that an overthrow of the government was not required to have an insurrection.

And it’s consistent with the examples of the Whiskey Insurrection and Fries’s Insurrection where there was no

attempt to overthrow the government. There was an attempt instead to resist the execution of law.

Q. Was this instruction by Justice Catron an isolated example in the case law?

[p.34]

A. No.

Q. Tell us a bit more about that.

A. Well, there are other treason cases from before the Civil War that have very similar language. The one I mentioned earlier was a case they called Case of Fries, which was about Fries's Insurrection, and then another called United States vs. Hanway from the 1850s.

Q. How did the charges in the Case of Fries and Hanway compare to Justice Catron's charge here?

A. They're essentially identical.

Q. You said you also looked at sources related to the laws of war.

I want to pull up page 553 of your appendix.

Tell us what we're looking at here.

A. So this is the legal code that was, you know, issued to the Union Army during the Civil War.

Q. And why did you look at the — at this source by Francis Lieber?

A. Yeah. So a couple of reasons. First is, it was the authoritative sort of law of war that applied during the Civil War.

And secondly, Francis Lieber was probably the leading legal scholar of his day, and so he's a particularly authoritative author or speaker on these

[p.35]

kinds of questions.

Q. On page 594 of your appendix, walk us through what Frances Lieber said constituted an insurrection.

JA576

A. He said that “Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws.”

Q. And how, if at all, in this source did insurrection contrast to Civil War or rebellion?

A. Well, Lieber described a rebellion as simply a very large insurrection, although he then went on to say that often it involved an attempt to overthrow the government or to set up a separate government.

Q. And again, how does this discussion by Francis Lieber inform your opinion as to the understanding of insurrection during Reconstruction?

A. Well, it’s consistent with all the other sources that I looked at.

Q. Can you tell us whether or not you saw any serious disagreement during Reconstruction about the meaning of the phrase “insurrection”?

A. No, I did not.

Q. How have today’s historical scholars addressed the definition of insurrection?

A. Well, of the ones who have addressed it

[p.36]

recently, they have been in agreement basically with the opinion that I’m offering and these sources that you’ve seen; in particular, the draft paper by Professor William Baude and Professor Michael Stokes Paulsen and the work, again, in a draft paper by Professor Mark Graber at the University of Maryland.

Q. If we go back to the language of Section 3, I want to now turn our attention to the phrase “insurrection or rebellion against the same.”

How, if at all, does the language “against the same” affect your opinion as to the historical understanding of Section 3?

JA577

A. Well, that the language limits the definition of an insurrection, for Section 3 purposes, to one that is against the Constitution of the United States.

Q. And so how does that limit or change the definition of insurrection?

A. Well, it eliminates a certain class of insurrections from things that would be considered for purposes of Section 3.

So the most obvious example would be an insurrection against state or local law. That would not be a Section 3 insurrection because it does not involve the Constitution of the United States.

[p.37]

Q. Does the historical record tell us anything about why Section 3 would be limited to a particular type of insurrections, namely, those against the Constitution?

A. Okay. Well, one is, again, they were concerned to limit the scope of the provision, right, and this is a way of doing that.

And then second, there's a thought that since the oath was central to both sort of the limitation and the rationale, the oath that you take is to the Constitution of the United States. It's not to the United States generally. And so it makes sense to think that the insurrection we're concerned about, or rebellion, would be one against the Constitution that you swore an oath to support.

Q. I want to draw our attention now to the language "shall have engaged in insurrection or rebellion."

Does the historical evidence shed light on what it means to have engaged in insurrection or how that would have been understood historically?

A. Yes. I mean, during Reconstruction, engage in insurrection was understood broadly to include any

voluntary act in furtherance of an insurrection against the Constitution, including words of incitement.

[p.38]

Q. What sorts of historical sources did you look at in forming that opinion?

A. Well, I looked at judicial decisions. I looked at opinions of the United States Attorney General. Those were sort of the two leading sources that I looked at.

Q. I want to pull up page 788 of your appendix.

Tell us what we're looking at here.

A. This is an opinion by the United States Attorney General in 1867 interpreting the Military Reconstruction Acts of Congress.

Q. Okay. And what's the historical significance of this opinion of the U.S. Attorney General interpreting the Reconstruction Acts?

A. Okay. This will take a minute to explain.

So in 1867, Congress passed a series of measures that placed most of the former Confederacy under martial law, and in doing so, Congress ordered that these states hold new elections for conventions that would write new state constitutions and would ratify the Fourteenth Amendment.

Now, as part of the direction as to how these elections were to be run, Congress said that people who would be disqualified from office by the language of

[p.39]

Section 3 of the Fourteenth Amendment should not be allowed to vote in the elections for these new conventions, and the Union Army was tasked with enforcing this provision.

Q. So just to back us up a little bit, this is May of 1867. Was that after Congress had submitted the Fourteenth Amendment for ratification?

A. Yes. It was in the period between the submission of the Amendment to the states and its ratification. So the statute refers to the proposed Section 3 of the Fourteenth Amendment.

Q. And to be clear, how did the language of the Reconstruction Acts compare to the language of the proposed constitutional Amendment in Section 3?

A. It was identical.

Q. Did this opinion of the U.S. Attorney General have any kind of legal effect?

A. Yes, it did. The opinion was approved by the Cabinet. We have the Cabinet minutes on that. And then was the basis for instructions that were issued to the Union Army commanders in the former Confederacy as to how they were to implement Congress's directive on these elections.

Q. What form did the instructions to the Union Army take in terms of implementing the opinion of

[p.40]

the Attorney General on the Reconstruction Acts?

A. Basically they were instructions issued by the Secretary of War. Also, Ulysses S. Grant was involved because he was the General of the Armies at the time.

Q. Can you tell us whether or not those instructions included the language of this opinion?

A. They did.

Q. So how would you characterize the historical significance of these opinions by Andrew Johnson's Attorney General?

A. Well, they are an authoritative interpretation by the Attorney General of the United States on the language that ended up being ratified in Section 3 of the Fourteenth Amendment.

Q. Who was the Attorney General at the time?

JA580

A. Stanbery.

Q. I want to direct our attention to page 800 of your appendix.

Walk us through what Attorney General Stanbery said about what it means to have engaged in insurrection.

A. Well, he described it as some direct, overt act done with the intent to further the rebellion.

And then later he said that the act had to

[p.41]

be voluntary, because there was some concern about people who were drafted into the Confederacy, that they not come under the disqualification because they had not acted voluntarily.

So basically a direct, overt act done with intent to further the rebellion that was voluntary.

Q. There's a discussion here of "mere acts of common humanity."

Charity can't be considered as participating in the rebellion, or forced contributions can't be seen as participation, correct?

A. Correct.

Q. Did the opinion of the Attorney General identify any other conduct in furtherance of insurrection or rebellion that would be considered outside the scope of Section 3?

A. No.

Q. What does this source tell you about whether or not someone would have needed to have taken up arms in order to have been understood to have engaged in insurrection at this time?

A. It was not required.

Q. Let's go to page 804 of your appendix.

Tell us what we're looking at here.

A. Well, this is a second opinion that the

[p.42]

Attorney General issued because, remember, the Army had never organized an election before, so the Union Army commanders requested additional guidance from the Attorney General as to how to do this. So a second opinion was issued.

Q. Does this second opinion have any historical significance?

A. Yes. Again, it was — it was approved and used as a basis for instructions to the Union Army commanders.

Q. If we go to page 815, walk us through what this second opinion of the Attorney General tells us about what it meant to have engaged in insurrection.

A. Well, again, here it says that “it must be an overt and voluntary act done with the intent of aiding or furthering the common unlawful purpose, namely, the insurrection,” and then that “voluntary contributions, even such indirect contributions as arise from a loan of money or the purchase of bonds, would count for disqualification.”

Q. And so again, what does that tell us about whether or not Section 3 was understood to apply only to those who took up arms against the Union?

A. It did not apply only to those who took up arms.

[p.43]

Q. Later in that page, what did Attorney General Stanbery say about speech?

A. Well, he said that “Disloyal sentiments, opinions, or sympathies would not disqualify, but when a person, has, by speech or by writing, incited others to engage in rebellion, he must come under the disqualification.”

Q. Now, we’ve seen this discussion in the Attorney General’s opinion about a voluntary act in furtherance of the rebellion.

Tell us how early judicial cases compare to this discussion in the Attorney General's opinion.

A. They are consistent.

Q. If we go to page 203 of your appendix, what is this case?

A. This is Worthy vs. Barrett, one of the North Carolina cases that I referred to earlier.

Q. And when was this case decided?

A. 1869.

Q. On the second page, what does the Worthy Court say about what constitutes engaging in rebellion?

A. Well, "A voluntary act by personal service or by contributions, other than charitable, of anything that was useful or necessary."

[p.44]

Q. How did that compare to what we just looked at from Attorney General Stanbery?

A. It's essentially the same.

Q. Were there any other cases addressing this language at this time?

A. Yes. There was a federal case in North Carolina in 1871, United States vs. Powell, that again said that a voluntary act in furtherance of insurrection or rebellion was the definition of engaged in insurrection.

Q. Were there any cases at this time that disagreed with Attorney General Stanbery's opinion that words of incitement were enough to have engaged in insurrection?

A. Not that I'm aware of, no.

Q. In your report, you also discuss some pre-Civil War cases on the law of treason. Why did you look at those cases?

A. Well, as I mentioned earlier, the only time that judges discussed insurrection before the Civil War came in treason cases, so naturally I wanted to look at those.

Q. Do those cases, those treason cases from before the Civil War, shed any light on this question of whether or not someone needed to have personally taken up

[p.45]

arms in order to have levied war against the government or engaged in insurrection?

A. Yes. They made clear that you do not need to take up arms to be engaged in levying war. You could do so by encouraging or instigating an insurrection.

Q. And did those cases specifically address this issue of instigation or incitement?

A. Yes, they do.

Q. And you touched on this a minute ago, but walk us through kind of what those cases said about incitement.

A. Well, I mean, basically they said that just because you had not been on the scene of the — of the violent event or that you had sort of not — not taken up arms, that that didn't matter. That what mattered was basically you could be engaged in an overt act supporting treason if you instigated, incited, encouraged that activity.

Q. During Reconstruction, did — and during the Civil War, did Congress ever address this issue of disqualifying insurrectionists?

A. Yes. So as I mentioned earlier, if a member elect showed up to the House of Representatives or the Senate, there could be a challenge about whether that person was involved in the Confederacy, and then each

[p.46]

House of Congress would have to assess whether that involvement disqualified them.

Q. Let's turn to page 463 of your appendix.

What is this historical source?

A. This is "Hinds' Precedents" of the House of Representatives, which is an authoritative source of

decisions by individual Houses of Congress running through the 18th and 19th centuries.

Q. Why did you look at Hinds' Precedents?

A. Well, this is where you would look for precedents from individual Houses of Congress as opposed to, say, legislation or judicial precedents.

Q. Tell us a bit about the case of John Young Brown.

A. Yes. So John Young Brown was a member elect to the House of Representatives from Kentucky, and when he arrived in 1868, he was challenged on the ground that he had given aid to the Confederacy.

Q. Let's look at page 465 of your appendix, and I want to pull up some language here.

What are we looking at here?

A. This is essentially a letter to the editor that Mr. Brown wrote early during the Civil War in which he advocated violence against Union troops that might enter Kentucky.

[p.47]

Q. And was there any argument in the case of John Young Brown that he had done anything to aid the rebellion, other than this letter to the editor?

A. No. This was all that he was accused of doing.

Q. How did Congress decide the case of John Young Brown?

A. They did not seat Mr. Brown.

Q. On what basis?

A. That he had been involved with the Confederacy and was disqualified.

Q. Now, you said this case was in 1867, correct?

A. Yes — 1868.

Q. 1868?

Was that before or after Section 3 had been ratified?

A. It was a little bit before Section 3 was ratified, so it was not a Section 3 enforcement strictly speaking.

Q. So on what basis did Congress say that Mr. Brown was disqualified?

A. Well, they — the House has broad power to disqualify or refuse to seat members elect, especially in that era, and so basically they said that he had given

[p.48]

aid to the Confederacy, through this editorial.

Q. If the case of Mr. Brown was not a case applying Section 3 itself, why did you look at it in informing your understanding as to the scope of Section 3?

A. Well, because this decision was taken in the year that the Fourteenth Amendment was ratified, and it concerned the kind of conduct that would be considered disqualifying. So it seemed like informative, as an example, for what people might have been thinking about when the provision was subject to ratification.

Q. Did you look at any other congressional cases of disqualification or exclusion?

A. Yes.

There was one other case in 1867 of Philip Thomas. Mr. Thomas was a senator elect from Maryland, and he had given \$100 to his son before his son went off to join the Confederate Army, and he was challenged on the grounds that he had given aid to the Confederacy by doing that.

Q. Had he done anything other than give \$100 to his son when his son was leaving to join the Confederate Army?

A. No.

Q. How did Congress address the case

[p.49]

of Philip Thomas?

JA586

A. They did not seat Mr. Thomas.

Q. On what basis?

A. That he had given aid to the Confederacy. That was disqualifying.

Q. Same question as with Mr. Brown. Was that a Section 3 case?

A. No, it was not because it came in 1867, a year before the Fourteenth Amendment was ratified.

Q. And did you still consider that to be relevant in understanding the historical backdrop to Section?

A. Yes, for the reasons I just identified, that it happened while Section 3 was pending before the states and concerned what kind of conduct would be considered disqualifying from office.

Q. You've — you've mentioned historical sources discussing "a voluntary act in support of insurrection by words or deeds."

Did the issue of inaction ever come up? Were there any cases where an individual was charged for having abdicated a duty to protect the Constitution?

A. No.

Q. So does the historical evidence kind of tell us anything one way or another about whether they

[p.50]

saw any kinds of inaction as potentially being covered by Section 3?

A. No.

Q. If we step back and look at all the historical sources that you've just discussed, what do those sources tell us about whether or not an individual is disqualified, or was understood to be such at the time, without having taken up arms against the government himself or herself?

JA587

A. Well, the answer is, you could be disqualified without having had taken up arms against the government in the period of the Civil War.

Q. I want to move now to a discussion of offices and officers.

Set the table for us a little bit about how those terms come up in Section 3.

A. Sure.

Well, Section 3 says that “No person shall hold any office, civil or military, under the United States” — or under any state — “if they had taken an oath as an officer of the United States,” among other things, “to support the Constitution of the United States and then have engaged in insurrection against the same.”

Q. So to be clear, first you have to have taken an oath as a qualifying official or officer of the

[p.51]

United States and then engaged in insurrection?

A. Correct.

Q. And if you’ve done that, if you’ve taken an oath as an officer and engaged in insurrection, then what kinds of offices or positions are you disqualified from at that point?

A. Right. That’s — right. So the first portion describes the offices, and the second portion describes the officers.

Q. Have you looked at historical evidence bearing on the question of whether the office of the presidency was understood to be an office under the United States such that a disqualified individual could not take that office?

A. I have.

Q. And what is your opinion on that question?

A. My opinion is that during Reconstruction, the presidency was considered an office under the United States for purposes of Section 3.

JA588

Q. And have you looked at historical evidence addressing whether or not the President during Reconstruction was considered as an officer of the United States?

A. I have.

Q. And what is that opinion?

[p.52]

A. My opinion is that during Reconstruction, the President was considered an officer of the United States for purposes of Section 3.

Q. In addressing the meaning of officer and office, what kinds of historical evidence did you look at?

A. So I looked at congressional debates and reports. I looked at presidential documents. I looked at opinions of the United States Attorney General. I looked at judicial decisions, contemporary newspapers, were the main ones.

Q. Did historical sources at this time define, in the context of Section 3, what it meant to be an officer of the United States?

A. Yes, they — yes, they did.

Q. And what did they say you had to do in order to be an officer of the United States?

A. Well, the main thing was that you had to have taken an oath to support the Constitution, that that — again, the oath was central to the text and the purpose, and it was also considered pivotal to the question of whether you were an officer or not.

Q. If we go back to the North Carolina Supreme Court's decision in Worthy, was this one of the cases on this issue that you were mentioning earlier?

[p.53]

A. Yes.

Q. What did the Worthy Court's decision tell us about who was an officer?

A. Well, the Court said that it "did not know how better to draw the distinction between an officer and a mere placement," let's say an employee, "than by making his oath the test."

And then went on to say that every officer is required not only to take an oath of office but an oath to support the Constitution of the state and of the United States.

Q. Did Attorney General Stanbery ever address this issue as well?

A. Yes, he did, in one of his opinions that we looked at earlier.

Q. If we go back to the first opinion of the Attorney General on page 797 of your appendix, walk us through what Stanbery said about officer of the United States under the language of Section 3.

A. Well, he said that the term was to be used in its most general sense and without any qualification, and that the oath was central to determining whether someone was an officer or not.

Q. And how did Attorney General Stanbery's opinion that officer is used without any qualification

[p.54]

relate to your opinion as to whether the presidency was understood to be covered at this time?

A. Well, there was no qualification for the President of the United States.

Q. I want to ask you briefly about an argument that's been made in this case, that the President's oath under Article II "to preserve, protect and defend the Constitution of the United States," is not, for purposes of Section 3, an oath to support the Constitution of the United States.

JA590

Are you familiar with that line of argument?

A. Yes, I am.

Q. Have you seen any historical evidence that bears on the question of whether the President's oath to defend the Constitution would have been understood to fall under Section 3?

A. I have.

Q. I'm pulling up page 869 of your appendix, and I apologize, this is another one of those hard-to-read historical sources.

But what are we looking at here?

A. This is a grand jury charge that was issued by a Federal Circuit Judge in Tennessee in 1870, and it was reprinted in a newspaper.

[p.55]

Q. Well, why are we looking at a newspaper here?

A. Well, because in those days, grand jury charges were often reprinted in newspapers as a kind of exercise in public education, as well as just to tell people what — what was going on in the courts.

Q. And who originally identified this historical source?

A. I did.

Q. Okay. What did this charge tell us about oaths in Section 3?

A. Well, Judge Emmon said: The oath which shall have been taken need not be in the precise words of the Amendment, quote, "to support the Constitution of the United States."

He went on to say that there were slight differences in the forms of the oaths that people took, but the important thing was whether they include, you know, substantially, even if not literally, an obligation to the federal power. And that the jury was not to consider the argument that,

in effect, the wording of the oath was not — did not include the word “support.”

Q. How does that relate to your opinion that the oath that the President swears to defend the Constitution is covered by Section 3?

[p.56]

A. It leads me to the conclusion that it is covered because the difference in wording is irrelevant.

Q. Did you also consider any presidential proclamations in addressing whether the President was considered to be an officer of the United States at this time?

A. I did.

Q. And tell us a bit about those proclamations.

A. Well, these are proclamations that were issued by President Andrew Johnson, who was the President at the time that the Fourteenth Amendment was ratified, in which he explained how he had the authority to create provisional governments in the Confederacy following Lee's surrender to Grant.

Q. If we look at page 442 of your appendix, is this one of those proclamations?

A. Yes, it is.

Q. Tell us a bit about the context here.

A. Yes. Well, the President is issuing, in effect, an executive order — they called it a proclamation then usually — where he's establishing a government in one of the former Confederate states. And he justifies that on the grounds, in part, that he is the chief civil executive officer of United States.

[p.57]

Q. And remind us what year this was.

A. This is 1865.

Q. Before — shortly before Section 3 of the Fourteenth Amendment was adopted?

A. Yes.

Q. Was this an isolated example of President Andrew Johnson?

A. No. He issued the same proclamation for different states throughout the Confederacy, and these proclamations were widely reprinted in newspapers at the time because they were setting forth the terms of the governments that were to govern in several states of the United States.

Q. Was Andrew Johnson the only President in the 19th century to refer to himself as an officer of the United States?

A. No. President John Tyler, in the 1840s, referred to himself as the chief executive officer. And President James Buchanan, who was Lincoln's predecessor, referred to himself as the chief executive officer under the Constitution.

Q. In your report, you also talk about examples of how this issue came up in Congress. Tell us a bit about that.

A. Yes. Well, there were references to the

[p.58]

President as either the executive officer of the United States or an executive officer of the United States in Congress multiple times during the Congress, either that proposed the Fourteenth Amendment or the one that oversaw its ratification.

Q. I want to look at page 488 of your appendix, an excerpt from the Congressional Globe.

What are we looking at here?

A. This is a speech by John Bingham in 1868 in which he describes the President as the executive officer of the United States.

JA593

Q. And remind us what John Bingham's role was in the adoption of the Fourteenth Amendment.

A. Well, he was the principal drafter of Section 1 of the Amendment, and he was a member of the Joint Committee on Reconstruction, which was sort of the pivotal committee that essentially assembled the proposal of the Fourteenth Amendment more generally.

Q. Tell us about some of the other contexts in which this issue of the President as an officer of the United States came up at this time.

A. Yes. Well, it was also addressed in President Johnson's impeachment trial, which occurred in 1868, shortly after this speech that Bingham gave, in which the President's own lawyer described him as an

[p.59]

executive officer of the United States.

Q. Was that an isolated reference in Congress at the time?

A. No. There were many other references to the President as — different formulations, whether executive officer of the United States, the executive officer of the United States, in one case mere executive officer of the United States, by various members of Congress, including Bingham on at least one other occasion.

Q. Let's look at page 811 of your appendix.

This is from a second opinion of Stanbery on the Reconstruction Acts. And what did he say on that issue?

A. Well, he said that the President, who was his boss, is simply an executive officer.

Q. Did anyone at the time specifically address the question of whether Section 3 covered the office of the President?

A. Yes.

Q. How did that come up?

JA594

A. That came up during the Senate debate on the Section 3 language.

Q. I'm pulling up page 477 of your appendix, excerpts from the Congressional Globe from that time.

[p.60]

Walk us through how that issue came up in the debate about Section 3.

A. So a question was posed as to why the President or the Vice President was not specifically mentioned among the offices listed in Section 3, and Senator Lot Morrill of Maine, who was a supporter of the Fourteenth Amendment said: Well, let me call the senator's attention to the words "hold any office, civil or military, under the United States."

And then the response to that was, in effect: Oh, yes, I'm sorry about that. Never mind.

I mean, when I first saw this excerpt in 2020 when I was researching the original article, it was very exciting because you rarely get such a clear statement of legislative history, right? Normally, legislative history is about things that you're not particularly interested in or they're more vague in their phrasing.

This is about as specific as you can get.

Q. Were you the one who dug this up?

A. Yes.

Q. Did anyone come back later in the debate and say: Actually you were wrong, we are excluding the presidency from Section 3?

A. No.

[p.61]

Q. Talk to us a bit about how Jefferson Davis came up in the debates around Section 3.

A. Well, there was a consensus at the time that Jefferson Davis was ineligible to be President because of

Section 3. And when Congress considered granting amnesty to individuals, an objection to granting amnesty to everyone was that, “Well, that would give Jefferson Davis amnesty, and that meant that he could then be President of the United States,” which people thought was just unacceptable.

Q. And when specifically did that issue of kind of amnesty including Jefferson Davis come up in these debates?

A. Well, it came up more — I mean, it was discussed a little bit during the time that the Fourteenth Amendment was under ratification, pending, but it really came up more when the debate on amnesty heated up in the 1870s, around the time of the General Amnesty Act in 1872, and then again in a debate in 1876, when they were thinking about giving amnesty to the remaining few hundreds of people who had not been given amnesty in 1872.

Q. In the discussions about amnesty that might allow Jefferson Davis to become the President again, describe kind of the tone of the supporters of

[p.62]

Section 3 at that prospect.

A. Well, they thought it was kind of preposterous that Jefferson Davis could be eligible to be President of the United States, and they insisted that the only way that could happen is if he were given amnesty.

Q. Can you tell us whether the historical purpose that you’ve identified behind Section 3 tells us anything about whether or not the President was understood to be excluded.

A. Well, yes, in the sense that it would have been odd to say that people who had broken their oath to the Constitution by engaging in insurrection were ineligible to every office in the land except the highest one.

Q. Did the debates ever talk about kind of high office versus sort of lower-level officials in the context of Section 3?

A. Yes. There were references in the Senate to the fact that, in part, the idea of Section 3 was to go after people who were the most responsible for Secession and the Civil War, and that tended to include higher-level officials. They were seen as basically more blameworthy for what had happened than, say, your lower-level official.

[p.63]

Q. I want to ask you just a few final questions.

Last Friday, Trump served an expert report in this case by Robert Delahunty. Have you had a chance to review that expert report?

A. I have.

Q. Describe for us your level of familiarity with the people who today are recognized as experts on Section 3.

A. I'm very familiar with them.

Q. When was the first time you had ever heard of Robert Delahunty?

A. When I learned that he would be an expert witness in this case.

Q. How would you characterize Robert Delahunty's contributions, if any, to the scholarly debate on the history of Section 3?

A. I don't know of any.

Q. Is Robert Delahunty someone that you would consider to be an expert in this history?

A. No.

Q. Robert Delahunty cites an article, a law review article —

MR. GESSLER: Your Honor, I'm going to object to this entire line of questioning. This was not

[p.64]

part of his expert report, and it's totally improper.

MR. MURRAY: Your Honor, we got his expert report at midnight on Friday, and I understood that we were able to do short rebuttal or response to that since we did not have a chance to respond in writing.

MR. GESSLER: Your Honor, he may contend with Professor Delahunty's arguments if he sees fit, but he is not an expert on Professor Delahunty's expertise. He is not here to render an opinion on whether he's a better expert than Professor Delahunty is a better — or Professor Delahunty is a better expert.

So I understand some experts think they're — well, I won't say any more. Thank you, Your Honor.

THE COURT: The Court will sustain the objection to the extent that I agree, I don't think it's proper for one witness to comment on the other witness's expertise. That's what you do on cross-examination.

However, I will allow the professor to talk about his response to the opinions of — Professor Delahunty, is that the correct name?

MR. GESSLER: Yes, ma'am.

MR. MURRAY: Thank you, Your Honor.

Q. (By Mr. Murray) One of the sources that Professor Delahunty relies on is an article by

[p.65]

Professors Blackman and Tillman on the question of whether or not the presidency is an office under the United States.

Is that an article that you're familiar with?

A. I am.

Q. Can you situate that article in the broader scholarly debate surrounding the history of Section 3?

JA598

A. Well, I mean, of the draft papers that have considered the question of whether the President is an officer of the United States for purposes of Section 3, and there aren't that many, I would say that their position so far is in the minority.

Q. Tell us who some of the other scholars are who have addressed this issue and disagreed with the Blackman and Tillman position.

A. Yeah. So there's the draft paper by Professors Baude and Paulsen that I mentioned earlier, the draft paper by — a draft paper by Professor Graber that I referenced earlier.

There's another draft paper by John — and I — Villalopos [phonetic], I believe, is the correct pronunciation of his name, and they all take the view that the President is an officer of the United States for

[p.66]

purposes of Section 3, as I do.

Q. I want to ask you about a few other sources that are cited in Mr. Delahunty's expert report. I want to pull it up on the screen here, Petitioners' Exhibit 227.

If we go to page 10, there's a discussion of the presidential election of 1872 and the candidacy of Horace Greeley, which I think was also referenced in opening statements.

Have you reviewed this portion of Mr. Delahunty's report?

A. Yes, I have.

Q. And tell us what you understand to be the argument about Horace Greeley in 1872.

A. Well, I understood the argument to be that Horace Greeley ran for President in 1872 as the Democratic nominee, and no one objected to that on the grounds that he was ineligible to do so under Section 3, and that,

therefore, that might mean that Section 3 does not apply to the presidency.

Q. Do you agree with that argument?

A. No.

Q. Why not?

A. Horace Greeley was not a Confederate. He was a loyal supporter of President Lincoln during the [p.67]

war. He was a supporter of Radical Republican policies during Reconstruction early on. He was a supporter of the conviction of Andrew Johnson in the impeachment trial in 1868.

Section 3 had nothing to do with him.

Q. Didn't anybody kind of criticize him for southern sympathies though?

A. Yes. But, I mean, that was just sort of political rhetoric that people were putting out. And, you know, there's a distinction between that and the sort of legal ineligibility that would attach to Section 3.

Now, for example, John Bingham gave a speech in 1872, a campaign speech against Greeley. He was campaigning for Grant's reelection, and he expressly distinguished Horace Greeley, whom he opposed, but basically he could be President if he won, from Jefferson Davis, who he said could not be President because of Section 3 of the Fourteenth Amendment unless Davis got amnesty.

So it was pretty clear. Davis was a Confederate; he was ineligible. Greeley was not a Confederate; he was eligible.

Q. And let's — I know you've said that Horace Greeley was not a Confederate, and so wasn't covered by Section 3. But let's assume for the sake of

[p.68]

argument that he was otherwise covered by Section 3.

What, if anything, does the state of amnesty by the time of the 1872 election tell us here?

A. Well, if Greeley had been covered by Section 3, he would have received amnesty under the General Amnesty Act that was enacted in the spring of 1872, so it wouldn't — Section 3 couldn't have applied to him anyway while he was running for President.

Q. Does the example of Horace Greeley tell us anything here?

A. No.

Q. There's also a discussion in Mr. Delahunty's report citing to an article by Professor Kurt Lash about earlier drafts of Section 3 of the Fourteenth Amendment and whether those shed any light on whether the presidency is covered.

Are you familiar with those arguments?

A. Yes.

Q. And what is your opinion on those arguments from a historical standpoint?

A. Well, they're inconclusive, right? That is to say, you can't draw a conclusion from early drafts as to what the final draft means unless somebody says: The reason we're changing the draft from this to that is because of something.

[p.69]

So nobody made any such commentary about the differences between early drafts and the final draft.

I mean, it would be nice if we had more information about the drafting and ratification of the Fourteenth Amendment, but we have what we have. And so, therefore, you really can't draw any conclusion about the final draft from any of the earlier drafts.

JA601

Q. Is there any indication that you've seen in any of the congressional debates about Section 3 that anyone intended to exclude the President or the presidency?

A. No.

Q. I want to turn to page 30 of the report.

There's a discussion here of three sources identified by Professors Blackman and Tillman that they cite to suggest the President is not constitutionally an officer of the United States.

Did you review that portion of Mr. Delahunty's report?

A. I did.

Q. Were those historical examples persuasive to you?

A. No.

Q. Why not?

A. Well, a couple of reasons. I mean, first

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of all, they all arise a decade after the ratification of the Fourteenth Amendment.

They are not about Section 3. That's a second reason.

Now, a third is, I don't know who David McKnight was. I mean, he — but put another way, he's not Noah Webster or Francis Lieber, so he doesn't have the same sort of authority. So the statement in his treatise is of, you know, only very limited importance.

The other two statements came out of the Senate impeachment trial of Secretary of War, William Belknap. He was accused of corruption, among other things.

And the thing is that in — first of all, that was a trial that was not about the President. So the statements by the senators that the President was not an officer of the United States were a kind of dicta, basically, that had nothing to do with the trial that they were involved in.

JA602

Now, let's contrast that with the statements about this issue in the impeachment trial of Andrew Johnson, right?

Now, that happened in 1868 when the Fourteenth Amendment was ratified. That was about the President. He was on trial. People did say that he was

[p.71]

an officer of the United States. His own lawyer said it, as well as members of the — of Congress.

And it was an actual issue in the trial, and the reason for that is that President Johnson was accused of committing a high crime and misdemeanor by refusing to follow an act of Congress because he thought it was unconstitutional. Okay. So set aside what you think of that argument.

Part of making that argument meant saying: Well, he wasn't a judicial officer, and only judicial officers can set aside laws because they are unconstitutional. He's only an executive officer.

So that was part of the reason why people were describing him as an executive officer or the executive officer. So it was actually related to the issues under discussion in a way that, of course, these statements that you see here in the Secretary of War's trial some years later were not.

So I just think, overall, it's not persuasive evidence on the question.

Q. I want to briefly ask you about Professor Delahunty's argument that Section 3 is too ambiguous for courts to decide without congressional implementing legislation.

[p.72]

Do you have a view on that issue from a historical matter — standpoint?

A. Well, yes. First of all, we see examples of people applying Section 3 and interpreting it at the time, right? And so in the end, it's really no different than a lot of other legal standards which are broad, and you have to figure out how to apply them to a particular set of facts. But that's what we do with standards like that.

Now, it would be nice if we had more examples, more cases to guide us, but I had a colleague, you know — she's no longer with us now — but when people would say, "Why don't we have more information before we make a decision," she would just look at you and say, "Alas," you know, like, we have what we have. We have to — we have to work with what we have.

But there's no reason to think that we can't work with what we have.

Q. Do you agree with Mr. Delahunty's argument that the phrase "insurrection" was ambiguous at the time?

A. No. I mean, we've gone through quite a bit of material to define what insurrection was and, you know, that doesn't mean we know how it should be applied to every set of facts, but it's — there's quite a bit of material that defined what an insurrection was as of

[p.73]

Reconstruction.

Q. Do you agree with Mr. Delahunty's argument that the phrase "engaged in insurrection" does not include speech?

A. No, I do not agree with that.

Q. Mr. Delahunty cites the Second Confiscation Act in making that argument.

Can you explain to us what the Second Confiscation Acts were and kind of what you understand that argument to be.

A. Sure.

The Second Confiscation Act was a criminal statute enacted in 1862 that defined insurrection by listing a series of terms including “to set afoot, to incite, to engage.”

And then my understanding is the argument is: Well, Section 3 did not include the word “incite” in — in its terminology in the way that the Second Confiscation Act did, so, therefore, maybe incite was not included by Section 3.

Q. Do you agree with that argument from a historical perspective?

A. No.

Q. Why not?

A. Well, first of all, I mean, there’s a
[p.74]

difference between a criminal statute, which is what the Second Confiscation Act was, and the provision of Section 3, which is creating a new qualification for office. So the comparison is not that close.

Secondly, there’s no explanation in the debates on Section 3 as to why the word “incite” was not included. So again, it’s like you can’t really draw conclusions from a prior version, right, as compared to the final version unless you know something about why there’s a difference.

Thirdly, constitutional provisions are not statutes. They are not as specific as statutes. They’re written in general language. That was well understood at the time.

Chief Justice Marshall explained this in his opinion for the Court in *McCulloch vs. Maryland*, that you can’t make constitutions as specific as statutes because then they would be incredibly long, incredibly hard to understand for average people.

JA605

So, you know, constitutional provisions like Section 3 were written in general terms.

Q. What, if any, conclusion do you draw from the fact that Section 3 does not specifically mention incitement?

A. I don't draw any particular conclusion
[p.75]

from it. I draw conclusions from the other sources that interpreted Section 3, mainly the Attorney General's opinions.

Q. My last question for you is, if we step back and evaluate Professor Delahunty's historical methodology laid out in his report as a whole, what is your opinion as to the reliability of his historical method?

MR. GESSLER: Your Honor, we will object again.

THE COURT: Sustained.

Q. (By Mr. Murray) Professor Magliocca, you discussed earlier the types of historical methodologies that scholars in history typically follow when they are deciding historical questions, correct?

A. Yes.

Q. And can you tell us whether or not, in your view, Mr. Delahunty followed those prescribed methodologies?

MR. GESSLER: Your Honor, objection again. And further we would note that Mr. Magliocca has not been — I'm sorry, Professor Magliocca has not been proffered as an expert on historical methodologies.

THE COURT: Sustained. He can talk about his methodologies, but you can cross-examine

[p.76]

Professor Delahunty on his.

MR. MURRAY: Understood, Your Honor.

We don't have any more questions. Thank you.

THE COURT: Cross-examination.

You may proceed. Thank you.

JA606

MR. GESSLER: Sure.

CROSS-EXAMINATION

BY MR. GESSLER:

Q. So you've been on the witness stand before, correct, in the Georgia case —

A. Yes.

Q. — if I remember correctly?

Okay. Have you been a witness in any other instances?

A. No.

Q. Okay. So do you know how this works with me asking a few questions?

A. Uh-huh.

Q. And thank you for being here today.

So I want to ask a little bit about sources.

You'd agree with me, with respect to the Fourteenth Amendment and Section 3, that there's recently, within the past few years, a substantial amount

[p.77]

of new scholarship on that issue?

A. Yes.

Q. Okay. And you mentioned that your view that the Tillman and Blackman viewpoint is in the minority, correct?

A. Yes.

Q. Okay. And you would agree with me that when courts make decisions on interpretation, they don't count up the number of professors on one side of an issue versus the number on the other side and make their decision on that basis?

A. Well, no, it's not the only factor.

Q. Well, it's probably not even one factor. They look at the strength and the quality of the underlying arguments, correct?

A. Yes.

Q. Okay. Now, you're — you and I had chatted just very briefly, and you're familiar with Professor Blackman, correct?

A. Yes, I know him, and I like him.

Q. And you two have mutual admiration for one another and mutual respect for one another's scholarship?

A. Yes.

Q. And you still have some pretty sharp disagreements on the meaning and application of [p.78]

Section 3. Is that fair to say?

A. Yes.

Q. Okay. And it's fair to say that you two will continue to have discussions, continue to disagree, perhaps sometimes resolve your disagreements as part of the scholarly and analytical process?

A. Probably later today.

Q. He may even be listening to your testimony today.

A. Could be.

Q. Okay. And then you'd agree with me that people will — that scholars such as yourself and others will continue to analyze the historical record and sometimes modify your opinions based on what you find, correct?

A. Yes.

Q. Okay. And, in fact, there's one instance where Professors Baude and Paulsen quoted the historical record of the case of Jefferson Davis.

Do you — are you familiar with that?

A. Yes. Q. Okay. And Professors Tillman and Blackman looked at the history very closely and said the actual record, this record written by — with respect to Justice Chase's ruling was incorrectly recorded.

[p.79]

Do you remember that?

A. Well, they've made the argument that it was incorrectly recorded.

Q. Okay. And so what they did is they compared an 1869 version from an American Law Review to an 1894 version and said: Look, the 1894 was essentially — that sentence with respect to Section 3 was inserted, we believe, incorrectly?

A. Well, yes. Now, that's a bit more complicated in the sense that, I mean, first of all, it's not clear that it was inserted incorrectly. Because if you look at newspaper commentary at the time, I mean, there was somewhat of a mixed set of views about what Chief Justice Chase was saying in that case or thought about it.

Secondly, it was actually pretty common practice back then for comments to be inserted in official reports years after the fact.

In my book on Bushrod Washington, he would revise his reports or he had someone who helped him edit them, you know, years after the fact to change them.

And so today — they didn't have an official set of reporting systems the way we do now, right? So today that would seem, well, improper or very odd, whereas back then it was more common.

[p.80]

So yes, but they've made that argument as you've described it.

Q. And so the point I'm trying to make — and I'm assuming you'll agree with me, but I'll ask you if you agree with me — that there's still substantial debate about the accuracy or the quality of the historical record, in some instances, with respect to Section 3?

A. Yes.

JA609

Q. Okay. And you'd agree that you have a pronounced point of view, and some other scholars have different points of view on that issue?

A. Yes.

Q. Okay. Now, my understanding and — is that you have not rendered an opinion, nor have you been asked to render an opinion on the meaning of the word "incitement"?

A. That's correct.

Q. Or "incite" or any variant of that?

A. Right.

Q. And so your argument is that insurrection can include words of incitement?

A. Yes.

Q. But you're not necessarily defining what incitement is?

[p.81]

A. Correct. I'm not a First Amendment expert.

Q. Okay.

MR. GESSLER: Excuse me one moment.

Q. (By Mr. Gessler) And is it — just to understand sort of your definition of insurrection, in order to engage in insurrection, in your view, that requires — does that require an overt and voluntary act?

A. Well, an overt or a voluntary act would constitute engaging in insurrection. I mean, whether inaction could be — was just not something that was addressed, so the history doesn't tell us the answer to that.

Q. Okay. Could someone engage in insurrection with an involuntary act?

A. No.

Q. Okay. Could someone engage in insurrection with a secret act?

JA610

A. Well, no, in the sense that there had to be some public action that was being — that was involved probably in the sense that there was a public use for — or public purpose to the insurrection.

Q. Okay.

A. So, yeah, I would — I would tend to think not.

[p.82]

Q. So you'd agree with me that it requires an overt and voluntary act?

A. Well, an overt and voluntary act would qualify, yes.

Q. Okay. And that someone has to have a specific intent?

A. Well, that's a question on which the sources don't give us a clear answer. The Attorney General's opinions do refer to intent.

On the other hand, the cases don't. The cases, to some degree, could be understood as saying that awareness or knowledge is sufficient.

The reason I say that is because let's say you had a sheriff, okay, in a southern state. They're the sheriff before the Civil War, they maintain the same position during the Civil War and after the Civil War. So they're doing the same job the whole time. All that's changed is, you know, they were — they were under the United States, they were under the Confederacy, they're under the United States.

It's not clear there if there's any intent involved, but they would have been disqualified because they had served prior to the war, now they're serving during the war, now they're still there after the war.

It is clear that they were aware of the

[p.83]

insurrection, right? But they were just doing the same job in the same way. So it's less clear as — that that would constitute intent.

Q. So let me ask you, I mean, because there's a couple branches of Section 3, right?

A. Uh-huh.

Q. There's the "aid and comfort to the enemies" branch, and there's the "engage in insurrection or rebellion"?

A. Yes.

Q. Okay. So are you saying it's unclear whether or not that sheriff engaged in insurrection or —

A. No. That sheriff was deemed to have engaged in insurrection.

Q. Okay.

A. My point was that you can't say that there was any specific intent involved there —

Q. Okay.

A. — that we know of.

Q. Because he was exercising civil authority under the government of the Confederacy?

A. In the same way that he did before and afterwards, yes.

Q. Okay. Are you familiar with Professor Kurt — well, you are familiar with

[p.84]

Professor Kurt Lash. You two, I think, have either written an article together or served on a panel?

A. We did a podcast together, yes.

Q. Okay. And he recently wrote an article sort of talking about the historical record of Section 3, correct?

A. Yes.

JA612

Q. And you'd agree with me that he uncovered some — some aspects or some items within the historical record that were relatively new to scholarship?

A. Well, yeah, I think every draft paper is able to do that, yes.

Q. And — and that's just part of the advancement of scholarship, each draft paper adds new information?

A. Right.

Q. Okay. And have you been in correspondence or spoken with Professor Lash since he wrote his paper?

A. I have, yes.

Q. Okay. And that's a collegial relationship similar to the one you share with Professors Tillman and Blackman; would that be fair to say?

A. Yes.

Q. Okay.

MR. GESSLER: Could you excuse me one [p.85]

second, Your Honor.

(A pause occurred in the proceedings.)

Q. (By Mr. Gessler) Let me just ask you one more question, or just another set of questions on the First Amendment issues, the word with incite.

So did I correctly hear you saying that you're not here today as an expert on the First Amendment?

A. Correct.

Q. Okay. So you have not, for purposes of today — maybe at some other point — sort of done an analysis of what incitement means or the historical record about that?

A. No. I mean, there were no First Amendment cases from the Supreme Court until well after Reconstruction, so that's — that's part of the reason why.

JA613

Q. Okay. So basically the historical record you've looked at predates modern First Amendment law?

A. Correct.

MR. GESSLER: Okay. All right. I have no further questions. Thank you very much.

THE COURT: Any redirect?

MR. MURRAY: Very briefly, Your Honor.

[p.86]

REDIRECT EXAMINATION

BY MR. MURRAY:

Q. You were asked about Professor Kurt Lash. Do you remember that?

A. Yes.

Q. Have you reviewed Professor Lash's draft paper on Section 3?

A. Yes.

Q. Can you tell us whether anything in that draft paper changed or affected your opinion on what would — what insurrection would have been understood to mean at the time of Reconstruction?

A. No. He didn't really address that very much.

Q. Can you tell us whether or not anything in Professor Lash's paper changed your opinion as to what kinds of conduct was sufficient to have engaged in insurrection?

A. No. He didn't really address that much either.

Q. Can you talk to us just very briefly about what the time period was that Professor Lash looked at?

A. Well, I mean, he was mostly looking at to, although he did talk about a few other things, including the Horace Greeley example that

[p.87]

Professor Delahunty also referred to in his expert report.

JA614

Q. Can you tell us whether or not, in your opinion, the time period he looked at in his article was sort of the whole body of historical evidence?

A. Well, I mean, mostly but not identically, right? That is, in other words, the time period that we're really all looking at is pretty much between 1865 and 1872, when Congress passed the General Amnesty. I mean, there may be one or two things after that but very little.

So his paper covers, you know, much of that period, though not — I would say not certain things that came kind of towards the latter end of that period.

MR. MURRAY: Thank you, Your Honor.

THE COURT: Does the Colorado Republican Party have any questions for Professor Magliocca?

MS. RASKIN: We have no questions. Thank you.

MR. KOTLARCYK: No questions from the Secretary, Your Honor.

THE COURT: Okay. Professor Magliocca, thank you so much for your testimony.

THE WITNESS: Thank you.

MS. TIERNEY: Good morning, Your Honor.

[p.88]

Our next witness is Hilary Rudy, and she is not in the courtroom yet. She is walking over at this very moment.

THE COURT: Okay. Why don't we take our break then a little bit early and reconvene at 10:15.

MS. TIERNEY: Okay. Thank you.

(Recess taken from 9:54 a.m. until 10:15 a.m.)

THE COURT: You may be seated.

MS. TIERNEY: Are we ready to go?

THE COURT: Yeah. Oh, I'm sorry. I didn't even see you there.

Will you raise your right hand, please.

HILARY RUDY,

JA615

having been first duly sworn, was examined and testified as follows:

THE COURT: Great.

DIRECT EXAMINATION

BY MS. TIERNEY:

Q. Good morning. Could you introduce yourself, please.

THE COURT: I cannot hear you very well, so if you could —

MS. TIERNEY: Can you hear me better now?

THE COURT: Yeah.

MS. TIERNEY: Okay. Here we go. I'll

[p.89]

lean in.

Q. (By Ms. Tierney) Could you introduce yourself, please.

A. Yes. Good morning.

My name is Hilary Rudy. I'm the deputy elections director in the Colorado Secretary of State's Office.

Q. And how long have you held that position at the Colorado Secretary of State's Office?

A. Since 2013.

Q. And did you hold a different position or different positions before that position at the Colorado Secretary of State's Office?

A. I did. Prior to that, I held a couple of different positions in the legal team.

Q. And so when did you first start working at the Secretary of State's Office?

A. I began working as a full-time staffer in 2006.

Q. And how many different Secretary of States have you served with?

A. Including my internship in 2005, seven.

JA616

Q. And what political affiliation were those Secretaries of State? Were they mixed? Or all one, the other?

[p.90]

A. Mixed, both Republican and Democratic Secretaries.

Q. And you've not spoken to anyone on our legal team prior to your testimony today or in preparation for today, correct?

A. That's correct.

Q. And have you testified in your role as deputy elections director for the Secretary of State previously?

A. I have.

Q. How many times?

A. I don't know the exact number, but several.

Q. In your present role, what are your duties generally?

A. Generally speaking, I oversee the teams within the elections division that provide support, training, and oversight to the county clerk. So that would be the teams that oversee ballot access, the legal team, the statewide voter registration system, county support, training. Primarily the public-facing and county-facing portions of the Division.

Q. Okay. Can you describe generally what role the Secretary of State's Office has in the administration of elections in Colorado?

[p.91]

A. Yes. So in Colorado, the Secretary of State is the chief election official for state and federal elections.

And our role is to certify the content for state and federal offices to the ballot, to certify it to county clerks, to oversee the county clerks in each of Colorado's 64 counties in running elections, to ensure that they comply with all of the legal requirements, to provide training and

JA617

support in that, and just to generally ensure that they have what they need to run the elections and then certify the results for statewide contests.

Q. Okay. I'm going to ask you a couple questions about some of those roles.

But first, in your — in the Secretary of State's role in administering elections, what role do the courts play in that process?

A. So the Secretary makes decisions with respect to candidate access to the ballot, with respect to certifying results, with respect to a lot of things around the election.

And there is a role for the courts when somebody wants to protest a candidate's qualifications, protest the outcome of an election. There's a role for courts at various parts throughout the elections calendar

[p.92]

to basically make a decision if somebody is protesting a determination made by the Secretary of State.

Q. And once a court makes a decision, what does the Secretary of State's Office do with that decision?

A. Well, once a court has made a decision, then the Secretary's Office conforms to that decision.

So if a court decides that the Secretary decided incorrectly at the outset, then the Secretary's Office will correct that. Or if the Secretary's decision is affirmed, then we will move forward with whatever that determination was.

Q. And is there a particular statute that people challenging a decision of the Secretary of State often use to present issues to the court?

A. Well, there are a number of statutes that allow for a challenge of the Secretary's decision throughout the — throughout Title 1 of the Colorado Revised Statutes.

JA618

But depending on how near we are to particular elections deadlines, typically Section 113 is used to challenge something that needs to be cited quickly.

Q. Okay. And for demonstrative purposes, I'm going to pull that statute up and ask you some questions

[p.93]

about it.

MS. TIERNEY: Could you pull up Colorado Revised Statute 1-1-113.

Q. (By Ms. Tierney) And I, in particular, just want to start with Section 1.

First, let me ask you, how familiar are you with Colorado Revised Statute 1-1-113?

A. I'm fairly familiar. I don't have it memorized, but I'm aware generally of what it says.

Q. And you're a lawyer by training, correct?

A. I have a law degree, but I don't practice.

Q. All right. In the — in 1-1-113, I just want to ask you a couple of questions about some of the provisions in Section 1.

So do you see Section 1 there on the screen?

A. Yes.

Q. So it says: "When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a . . . party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to

[p.94]

commit . . ."

I wanted to ask you how your office —

MS. TIERNEY: Yes, Mr. Gessler?

JA619

THE COURT: Well, first —

MR. GESSLER: I'm waiting for the question.

THE COURT: — you have to finish the question.

Q. (By Ms. Tierney) I wanted to ask you how your office has interpreted the “committed or is about to commit” language?

MR. GESSLER: Your Honor, we would object as to testimony on legal interpretation of a statute.

THE COURT: And I'm going to overrule it because I don't think she's testifying as to what it does, just how it has historically been interpreted by the Secretary of State. I'm the one that's going to have to decide how it — what the actual effect of the statute is.

Q. (By Ms. Tierney) Do you need me to repeat the question, or do you remember it?

A. If you could repeat it once for me, thanks.

Q. I was asking how your — the Secretary of State's Office has interpreted the language, “has

[p.95]

committed or is about to commit a breach or neglect of duty or other wrongful act”?

A. In general, the Office has interpreted this to mean that if the Office has made a decision with which any of the parties listed in the statute disagrees with respect to conducting an election, that that means they have the right to challenge that decision in court and receive a quick decision.

Q. Okay. And in your experience, have people using 1-1-113 to make challenges done so both before an act has been taken and after an act has been taken? So the “about to commit” language versus — and the committed language?

JA620

A. I can't think of specific examples, but generally speaking, yes, I think leading to an election, that has happened, yeah.

Q. Okay. Take you back to my question about what role the Secretary of State's Office has in the administration of elections.

You described a broad, broad role, and are those duties and powers of the Secretary of State set forth in statute?

A. Yes. Generally speaking, they're set forth in Section 1-1-107 of the Colorado Revised Statutes. There's also a provision in Article 1.5, which

[p.96]

discusses the Secretary's authority specifically with respect to federal elections.

Q. Okay. Now, I'm going to turn to ask you some more questions about ballot access generally. You testified that that is one of the functions of the Colorado Secretary of State's Office.

So more specifically, what role does the Secretary of State's Office play in candidate ballot access?

A. So our office is the filing office for state and federal offices for individuals seeking access to the ballot, seeking to run for office in Colorado.

So we receive that paperwork, we verify the information on the application as required under state law, and then ultimately there is a deadline by which our office must certify all contests to the ballot, both candidates and measures.

Q. So specifically what role does the Secretary of State play in certifying that content for the ballot?

A. Can you tell me what you mean by that?

Q. So do candidates submit information to you that then you use to certify the content for the ballot?

JA621

A. Yes. So the law requires candidates submit specific paperwork depending on how they're

[p.97]

accessing the ballot: whether that's by petition, through assembly, or whatever the nominating process is.

And based on the legal requirements for that paperwork, then we will verify the information on the paperwork and then set the ballot.

Q. And what is the deadline for the ballot certification for the presidential primary for Colorado in ?

A. I believe it's January 5.

Q. Is the process for ballot access — explain the process for ballot access for presidential candidates for the presidential primary in Colorado.

A. So for the presidential primary election, what the law requires is that candidates access the ballot through one of three methods.

The first is through party nomination, so they would submit a candidate acceptance, a letter from the party saying they're a bona fide party candidate, and a filing fee.

If they choose to submit a petition, they would submit their petition. But before they can circulate a petition, they need to submit the statement from the party that they're a bona fide party candidate, circulate the petition. And then with their petition submission, they would also need to submit the acceptance

[p.98]

of nomination form for the petition.

And then the third option is to submit a writing affidavit of intent and a filing fee.

Q. Has Colorado always had a presidential primary?

A. No.

Q. Can you explain when we didn't have one and when we got one?

JA622

A. So Colorado had a presidential primary for several years until around 2000, and then it was eliminated in the law.

And then in 2016, a citizen initiative passed, reestablishing the presidential primary and reestablishing it with some specific processes around our current mail ballot model.

Q. And where in the law is the process for presidential primary candidates to be placed on the Colorado presidential primary ballot?

A. It's in Article 4. I don't recall the specific statute citation.

Q. Okay. I'm going to have a copy of that statute brought up just for demonstrative purposes, and that's Statute — Colorado Revised Statute 1-4-1204.

Do you see that statute there?

A. Yes.

[p.99]

Q. And does that — just to be clear, does that statute apply to other ballot access candidates?

A. No. This is the statute specific for presidential primary elections.

Q. Okay. So this part of the statute deals with how a candidate gets their name on the ballot, correct?

A. That's correct.

Q. And you walked through the various processes in your testimony a moment ago.

What is the Secretary of State's view of whether it may exclude candidates from the ballot who are constitutionally prohibited from assuming office?

A. It's the Secretary's position that if we have affirmative knowledge that a candidate is ineligible for office, then we will not certify them to the ballot.

JA623

Q. Let's talk just a little bit about state legislative candidates and how the Colorado Constitution applies to them, and then we'll talk about the presidential candidates and the U.S. Constitution.

What are the constitutional eligibility requirements for state legislative candidates?

A. Well, there's a residency requirement that the candidate reside within their district for the requisite amount of time. There's an age requirement,

[p.100]

and then obviously a Colorado residency requirement.

If it's a partisan office, which state legislative office is, then they must also be affiliated with their party nominating them or unaffiliated for a specific period of time.

Q. And has the Secretary of State's Office kept state legislative candidates off the ballot due to ineligibility in the past?

A. Yes.

Q. About how many times?

A. I couldn't say with any certainty. I mean, it's not unusual for us to correspond with a candidate and ask for additional information to determine if they have additional information to prove an eligibility requirement like residency, but it's — it has happened that a candidate doesn't reside within their district or hasn't been affiliated with the party for the right amount of time.

Q. And what process does the Secretary of State's Office undertake to verify the qualifications for those state legislative candidates?

A. When our office receives the candidate paperwork, we verify the information on that form with the information in the statewide voter registration system.

[p.101]

Q. And if the Secretary of State's Office determines that a state legislative candidate's records in the statewide voter registration database show that the person meets the eligibility criteria, what happens next?

A. Then they are qualified to the ballot and will be certified by the deadline for certification.

Q. And what happens in that case if someone disagrees with the Secretary of State's decision on candidate eligibility?

A. In that case, if someone disagrees with that decision, then they can challenge that decision in court.

Q. And is that the Colorado Revised Statute 1-1-113 process we just discussed?

A. Generally speaking, yes.

THE COURT: Ms. Rudy, would you mind moving the microphone just a little bit closer to you. Thank you.

Q. (By Ms. Tierney) How frequently are those decisions of eligibility challenged, like how frequently is your office responding to those 1-1-113 or other challenges of candidate eligibility?

A. I think generally in almost every election in which we're certifying candidates or measures to the

[p.102]

ballot, we expect we may be challenged based on our decision to certify or not certify a candidate to the ballot.

Q. Okay. So if your office determines that a candidate's records in the statewide voter registration database show that the person is not eligible because they don't reside in the district or they're not of the proper age or some other defect, what actions does the Secretary of State take?

A. Generally, especially in the case of residency, we correspond with the candidate to see if they have

additional information that establishes that they do meet the eligibility requirement in order to determine whether to qualify them or not qualify them to the ballot.

Q. So — and after you engage in the correspondence or dialogue, what happens if you are not satisfied, after you've engaged in that dialogue, that the candidate meets the qualifications?

A. I would say that if it's unclear in any way, we're going to escalate to the administration and seek guidance before we make a final decision.

But in cases where it's very clear, we'll go ahead and exclude the candidate from the ballot.

Q. And again, if someone disagrees with the
[p.103]

Secretary of State's decision to keep a candidate off the ballot, what can they do?

A. They can challenge that decision in court.

Q. And after a court proceeding, whether it's 1-1-113 or another proceeding, what does the Secretary of State's Office do if a court determines that a candidate is eligible?

A. Then we'll certify that candidate to the ballot.

Q. And conversely, if someone disagrees with the Secretary of State's decision to put a candidate on the ballot, do they also have the same recourse to challenge that decision?

A. Yes.

Q. And that's a similar proceeding in court?

A. It's similar, yes. Yeah.

Q. And what does the Secretary of State do after a court proceeding if the Court determines that a candidate is ineligible?

A. Then the Secretary would not certify the candidate to the ballot.

Q. Has the Colorado Supreme Court provided guidance to the Secretary of State on candidate eligibility in terms of past decisions?

A. I think likely, yes, that's happened, but [p.104]

I can't recall specifically.

Q. Okay. Are you familiar with court — Colorado Supreme Court decisions interpreting Colorado's ballot access laws?

A. Yes, generally.

Q. And is it fair to say that they've weighed in many times on ballot access determinations?

A. I think, yes, generally speaking, I think typically we see that weigh-in on citizen initiatives in particular.

Q. Okay. Let's turn to presidential candidates now.

What is the process to verify the qualifications for presidential candidates?

A. Our office looks at the information provided in the affidavit itself. And if the affidavit is complete and we have no affirmative knowledge that any of the information is incorrect, then we would qualify that candidate to the ballot.

Q. And —

THE COURT: And is this the statement of intent, the affidavit you're referring to?

A. Yes, Your Honor, the statement of intent.

Q. (By Ms. Tierney) How many times has the Secretary of State's Office kept a presidential candidate

[p.105]

off the ballot?

A. I don't have a specific number. I — it definitely has happened, and particularly for the general election.

Q. And what does the Colorado Secretary of State's Office do with a constitutionally ineligible candidate?

JA627

A. What do you mean by that?

Q. Do you not certify them to the ballot in that case?

A. Yes, that's correct, if there's information that they are not constitutionally eligible.

Q. Do you remember a ballot access case involving a Mr. Hassan?

A. Yes.

MS. TIERNEY: I'm going to pull up Exhibit P-107.

This exhibit has been stipulated, so I would move it into admission.

THE COURT: 107 is admitted.

(Exhibit was admitted into evidence.)

Q. (By Ms. Tierney) Do you recognize this document?

A. Yes.

Q. And what is this?

[p.106]

A. This is a letter that our office sent to Mr. Hassan after corresponding with him about access to the general election as an unaffiliated candidate for President.

Q. And what year was this?

A. This was in 2011.

Q. And how did it come about that Mr. Hassan was kept off the ballot?

A. Mr. Hassan began corresponding with our office, seeking access as an unaffiliated candidate for President, but notified us that he was not going to fill out the paperwork because he did not want to check the box that he was not a natural-born U.S. citizen.

He didn't want to commit perjury, but he did want to seek access and was — was looking to set up lawsuits challenging that provision in the Constitution.

Q. And did — what did the Secretary of State's Office determine regarding Mr. Hassan's eligibility?

JA628

A. Mr. Hassan told us affirmatively that he failed to meet one of the constitutional qualifications. He also refused to file the required paperwork.

And so our office advised Mr. Hassan that if he was, in fact, ineligible and did not file the correct paperwork, that he could not be a candidate for

[p.107]

that office.

Q. I'm going to direct your attention to the third paragraph in this letter.

A. Yes.

Q. Could you read that first sentence for me.

A. "The Secretary of State is responsible for ensuring that only eligible candidates are placed on the ballot and must give effect to applicable federal and state law unless a court has held such law to be invalid."

Q. And is that still the position that the Secretary of State's Office takes today in?

A. It is.

Q. And can you describe generally what that first sentence in that letter means?

A. Well, as I said, the Secretary's Office is responsible for certifying qualified candidates to the ballot and for overseeing the conduct of elections for those candidate races.

And so our office is responsible for ensuring that we verify, to the extent the law requires us to, eligibility of candidates before placing their name on the ballot.

Q. And based on that statement, can you confirm that the Secretary of State's Office considers

[p.108]

both federal and state qualifications when determining whether a candidate is eligible?

A. We do.

Q. And what position does the Secretary of State's Office take on whether it is the final arbiter of eligibility?

A. The Secretary's Office is never the final arbiter of eligibility because the Secretary's decision to either certify a candidate or not can be challenged in court.

Q. And did the — did Mr. Hassan take his case to court?

A. As I recall, he did.

Q. And do you recall the outcome of that case?

A. Generally, the outcome of that case was the court affirmed his ineligibility.

Q. His ineligibility, yeah.

And so once the Court affirmed his ineligibility, what did the Secretary of State's Office do?

A. We did not place Mr. Hassan's name on the ballot for the 2012 presidential election.

Q. Is the process you outlined for presidential candidates generally the same process for

[p.109]

other federal candidates seeking ballot access for congressional or senatorial seats?

A. Generally speaking, it's the same for congressional or senatorial seats.

We're also required by law to verify residence, party affiliation for partisan candidates.

Q. And aside from Mr. Hassan, have there been other federal candidates disqualified based on constitutional requirements, to your knowledge?

A. To my knowledge, I can't recall.

Q. Let's walk through, you — you testified a few minutes ago about the general process for presidential primary candidate ballot access. I'm going to have — we're going to look at Exhibit P-158.

JA630

MS. TIERNEY: Which has also been stipulated into evidence, and we'll — we'll look at page 2 of that exhibit.

Q. (By Ms. Tierney) Do you see that document?

A. Yes.

Q. And do you recognize it?

A. Yes.

Q. What is it?

A. It's the Major Party Candidate Statement of Intent for the Presidential Primary.

Q. And I'd like to ask you some questions

[p.110]

about the form itself first, before we talk about the candidate who's filled it out.

Who created this form?

A. Our ballot access team within the elections division.

Q. And how long has this particular form been in use by the Secretary of State's Office?

A. This form has been in use since the 2020 presidential primary paperwork deadlines, and this particular version of it since June.

Q. And I see at the bottom — are you looking at the bottom right of the form?

A. Yes. That's correct.

Q. And does it indicate there when it was last revised?

A. It does, although it's cut off on the screen that I see.

Q. Oh, okay. Well — there you go.

A. Uh-huh.

Q. Can you see when it was last revised?

A. Yes.

Q. When was it?

A. June of 2023.

Q. And why are these forms revised?

A. Well, in this case, our office suite had

[p.111]

changed, and so we needed to update the suite number to ensure we could receive our mail properly.

And we also had transitioned to a “.gov” domain since the 2020 elections; we needed to update the email address. And we updated the year at the top of the form.

Q. And were those the only changes to the form, to your knowledge?

A. To my knowledge, yes.

Q. And so this is the — aside from the email address and the suite number, this was the same Major Party Candidate Statement of Intent for Presidential Primary that was used in the 2020 cycle?

A. Yes.

Q. At the top of the form — let me ask you a general question about forms.

What role does the Secretary of State’s Office play in creating forms that are used by candidates for ballot access?

A. The Secretary’s Office creates all forms that are used for candidates for state and federal office for ballot access.

Q. All right. Turning back to the form itself.

At the top of the form, do you see where

[p.112]

it says, “Office Information”?

A. Yes.

Q. And what is the significance of that language?

A. Well, generally at the top of each of our ballot access forms, we include information about the office being sought so that the candidate is aware they’re completing the correct paperwork, but also for our staff in terms of processing that paperwork and verifying qualifications.

JA632

Q. And so underneath that "Office Information," it says, "Year of Presidential Primary Election: 2024."

You see that?

A. Yes.

Q. So, presumably, that year was also changed on this form, right?

A. Yes, that's correct.

Q. And then it lists the "Political Party" for the candidate?

A. Yes, that's correct.

Q. And then there's a section for "Qualifications for Office."

Do you see that?

A. I do.

[p.113]

Q. And what are the qualifications listed here?

A. The qualifications listed here are: "Age of 35 Years"; "Resident of the United States for at least 14 years"; and "Natural-born U.S. Citizen."

Q. And do you know where those qualifications came from?

A. From the U.S. Constitution.

Q. And are you aware there are other qualifications for the President that are contained in the U.S. Constitution?

A. Yes.

Q. I'm going to turn your attention to about halfway down the form, there's some — oh, it might not be blue in yours, it's blue in mine.

There's a bolded word that says, "Signature"?

A. Yes.

Q. And underneath that, there is a — it says, "Applicant's Affirmation."

Can you read that affirmation?

JA633

A. "I intend to run for the office stated above and solemnly affirm that I meet all qualifications for the office prescribed by law. Furthermore, the information provided on this form is, to the best of my

[p.114]

knowledge, true and correct."

Q. And how does a candidate submitting the form confirm that affirmation?

A. A candidate would sign that affirmation and have that signature notarized.

Q. And how does the Secretary of State's Office view that affirmation when considering a candidate's qualifications?

A. Can you tell me what you mean by that?

Q. Well, that affirmation states that the person meets "all qualifications for . . . office."

So does the Secretary of State's Office interpret that to mean more qualifications that are listed on the form?

A. Well, qualifications listed on the form aren't intended to be an exhaustive list of qualifications, but we do require that every candidate affirm that they meet every qualification for office regardless of whether it's listed on the form.

Q. So is it fair to say that that affirmation is like a catchall affirmation?

A. I would say that's fair, yes.

Q. And do you have similar catchall affirmations for other nonpresidential candidates on their candidate statement of intent?

[p.115]

A. Every candidate would sign an affirmation that they meet all qualifications for the office they're seeking.

Q. If a candidate checks the boxes on the form under "Qualifications for Office" and signs the affirmation, what,

if any, additional inquiry does the Secretary of State's — make?

A. Our office isn't going to further investigate that affidavit. It's on its face complete and accurate and so, based on that, would certify a candidate to office — or, I'm sorry, to the ballot.

Q. And as you've testified a moment ago, a Colorado voter could challenge that determination of the Secretary of State, correct?

A. Yes, that's correct.

Q. Are you familiar with the Twenty-Second Amendment to the United States Constitution?

A. I mean, generally. I haven't read it recently.

Q. Okay. Well, can you state generally what your knowledge of it is?

A. It would be helpful to see it.

Q. Yeah, yeah.

Well, I'll just represent it to you, because generally what it says is a President can't hold

[p.116]

more than two terms as President.

Has the — do you have any questions or do you accept my description of the Twenty-Second Amendment?

Has the Secretary of State ever received a statement of intent for a presidential candidate who has already served two terms as President?

A. Not to my knowledge.

Q. From, say, Barack Obama or George W. Bush?

A. No, not to my knowledge.

Q. And what would the Secretary of State's Office do in that situation?

A. Well, I think that knowing that both of the potential candidates you named have served both terms, I think

JA635

that the ballot access team would escalate that within the office to the administration for additional guidance.

But likely, we would not certify that candidate to the ballot.

Q. When you say elevate to the administration, give me just a little description of what that means.

A. Sure.

So when the ballot access manager or the ballot access team receive paperwork and there are questions about whether an eligibility provision is met

[p.117]

and it's not clear, we will escalate that through our legal team within the elections division to the Deputy Secretary of State for additional guidance.

Q. Okay. You testified a few moments ago about how sometimes if there are eligibility questions, you engage in dialogue with the candidate.

Would you engage in dialogue with George W. Bush or Barack Obama on that point?

A. I think we would seek some guidance from the Deputy Secretary before corresponding.

Q. Okay. All right. Let me ask you some specific questions about the pieces of this form that were filled out by the candidate.

Who submitted this particular form?

A. Donald Trump.

Q. And when did the Secretary of State's Office receive this form?

A. If we could scroll to the top.

Q. Oh, sorry.

There you go.

A. We received it on October 11 of 2023.

Q. And turning to the "Applicant's Affirmation" down at the middle of the page, who signed the form?

JA636

A. It appears to be Donald Trump.

[p.118]

Q. And is the signature properly notarized there?

A. It is.

Q. In your reading of this form, has the candidate verified the "Applicant's Affirmation" at the middle of the page there, that affirmation that you read?

A. Yes.

Q. And what did your office do when you received this form?

A. Our office — the ballot access team escalated a question to the Deputy Secretary because there's ongoing litigation with respect to this applicant's qualifications.

Q. And so has your office taken any action with regard to certifying this candidate to the ballot or not?

A. We have not. We're not at the certification deadline. And it is our practice that when there is an ongoing legal challenge to our office's determination about a candidate's qualification, that we wait for that outcome.

Q. Okay.

MS. TIERNEY: Let's turn to page 3 of that exhibit, which is the next page. There we go.

Q. (By Ms. Tierney) Do you recognize this
[p.119]
document?

A. Yes.

Q. And what is this?

A. This is the State Party Presidential Primary Approval form.

Q. And what's the purpose of this form?

A. The purpose of this form is for the state party to advise our office that the candidate seeking party nomination is a bona fide party candidate.

JA637

Q. And who created this form?

A. The ballot access team within the elections division.

Q. And how long has this form been in use by the Colorado Secretary of State?

A. Since 2020.

Q. And was it similarly revised this year?

A. Yes. We would have revised the suite number and the email domain as well on this form, and the date.

Q. And at the top, where it says, "Party Contact Information," what is shown there?

A. That's the contact information for both of Colorado's major political parties.

Q. Okay. And so that contact information may also have been changed since 2020, correct?

[p.120]

A. Yes. That's correct.

Q. Has the same form been used by the Secretary of State's Office regardless of the political party of the Secretary of State?

A. Yes. This form has only been used — this will be its second presidential primary in use.

Q. Okay. And the last presidential primary, who was the Secretary of State?

A. Wayne Williams. Is that right? Am I correct?

Q. Just to confirm, who has the authority to revise or edit this form?

A. The ballot access team within the elections division.

Q. Okay. Now let's talk about the content of this form in terms of who filled it out.

MS. TIERNEY: One moment, Your Honor.

Q. (By Ms. Tierney) I'm going to just ask you a clarifying question on the presidential primary in 2020: Who was the Secretary of State then?

A. Jena Griswold was Secretary in 2020.

JA638

Q. Okay. Okay. Who submitted this form that you see on your screen?

A. Donald Trump.

Q. The — if you look at the bottom of the —
[p.121]

well, let me ask you about that.

Why do you say Donald Trump submitted this form?

A. That's the candidate listed.

Q. And so the information at the bottom of the form is — what is the information at the bottom of the form?

A. It appears it was submitted by the — the campaign representative for Mr. Trump and signed by the state party chair.

Q. And so does the candidate actually submit this form as well?

A. It's submitted by the candidate's campaign, typically.

Q. Okay.

A. Yes.

Q. But not submitted by the state party?

A. No.

Q. Okay. And at the — if we look at the bottom half of the page, it says, "State Party Use Only."

Do you see that?

A. Yes.

Q. And it — can you tell us who is the party official that submitted this form?

A. Dave Williams.

[p.122]

Q. And what is his official job title?

A. Chair of the state party.

Q. I asked that because it — that was not a trick question and maybe you can't see it, but it does say that on the bottom of the form, so well done.

JA639

A. It's cut off on my screen. I see it now, yes.

Q. Okay. Has this particular form been modified by any of the persons filling it out from its original template?

A. It does not appear to have been.

Q. Okay. And what did your office do when you received this form?

A. We placed this with the other candidate paperwork for this candidate.

Q. What happens if a candidate doesn't submit this form?

A. Then we communicate with the candidate that this form is required before we can certify them to the ballot for the presidential primary.

Q. And you testified a few minutes ago about — that the state party has to approve that the candidate is a bona fide candidate.

Do you remember that testimony?

A. Yes.

[p.123]

Q. What does it mean to be a bona fide candidate?

A. I don't know what that means to the party.

From our perspective, it means that the party approves that that candidate represents the party.

Q. Okay. What position is the Secretary of State's Office taking in this litigation?

A. It is the Secretary of State's Office position that the paperwork is complete and final, but there is a challenge to this candidate's qualification. And so our office will not certify this candidate to the ballot until the Court makes its decision.

Q. And if this proceeding ultimately results in a determination that Mr. Trump is eligible to be a candidate for the Colorado presidential primary, what will the Secretary of State's Office do?

JA640

A. The Secretary's Office will certify the candidate.

Q. And similarly, if the outcome of this litigation is that the case is dismissed without further guidance from the Court, what will the Secretary of State's Office do?

A. I can't speculate as to that. I think we need to wait for the Court's outcome before we make a decision.

[p.124]

Q. Okay. Ms. Rudy, are you aware of any threats that the Secretary of State's Office has received regarding election activity?

MR. GESSLER: Your Honor, I'm going to object to this. It's well beyond the scope of what we were notified as to her testimony, and it's frankly irrelevant to this case.

THE COURT: What's the relevance?

MS. TIERNEY: Well, the Secretary of State's Office, I think, has a lot of knowledge about threats to election officials in the state, and I think the relevance here is that those threats can be tied and I will try to tie them to the January — some of the January activity.

THE COURT: I'm going to sustain the objection. That's outside the scope of this hearing.

MS. TIERNEY: As a housekeeping matter, Your Honor, I want to move to admit P-158, which is the document on the screen, which was stipulated into evidence. I just didn't move it.

THE COURT: Okay. I'm sorry. What was the number?

MS. TIERNEY: P-158.

THE COURT: Exhibit 158 is admitted.

(Exhibit 158 was admitted into evidence.)

[p.125]

MS. TIERNEY: May I have just one moment?

THE COURT: Uh-huh.

(A pause occurred in the proceedings.)

JA641

MS. TIERNEY: No further questions, Your Honor.

CROSS-EXAMINATION

BY MR. GESSLER:

Q. Good morning, Ms. Rudy.

A. Good morning.

Q. How are you today?

A. Good. Thanks.

Q. Good.

So I'm going to ask you a few questions. I believe I have cross-examined you at least a few times in the past two decades or so, so I'll just — if you don't understand a question that I have, please just ask me.

THE COURT: And make sure to speak into the microphone, Mr. Gessler.

MR. GESSLER: Certainly.

Q. (By Mr. Gessler) If you don't understand a question I have, just please ask me to repeat it.

Let me start with — in preparation today.

So you did not speak to any members of the petitioners' attorney, correct?

[p.126]

A. That's correct.

Q. Okay. Did you speak about your testimony with anyone in the Secretary of State's Office?

A. I did.

Q. And who is that?

A. Deputy Secretary Beall.

Q. And tell me what your conversation was with him.

A. In what respect?

Q. Describe the conversation. What topics did you discuss?

A. We generally discussed the topics that I could expect to speak about today and —

Q. Okay. Did you talk to him about the Secretary's position or lack thereof of a position with respect to this litigation?

A. We discussed this litigation, and we discussed my testimony today, yes.

Q. Okay. And as part of that discussion, did you have a discussion with him as to what position you would describe with respect to the litigation?

A. What do you mean by "what position . . . with respect" —

Q. Well, you testified —

A. — "to the litigation"?

[p.127]

Q. — earlier that the Secretary is going to, you know, wait for the Court's outcome. You also testified as to the meaning of the form.

Did you discuss either of those two issues with Secretary — with Deputy Secretary Beall?

A. I generally shared with him what my answers to those questions were, yes.

Q. And when you gave your answer — your thoughts as to what those answers were, did he tell you what the — what perhaps his position was or his thoughts on that or what the Secretary's thoughts were?

A. Apart from saying that he agreed with the position that I was stating, no.

Q. Okay. Did you have any conversations with the Secretary herself on this issue?

A. I did not.

Q. Okay. Did you have any conversations with — with the director of elections, Judd Choate?

A. I did not talk with Judd about this, yes.

JA643

Q. Okay. Okay. Did Mr. Beall inform you as to what the topics were going to be for the — for your testimony today?

A. Yes. Mr. Beall and counsel.

Q. Okay. And did he walk through — did you provide all of your answers that you anticipated giving

[p.128]

today, did you provide those answers to Mr. Beall as well?

A. Yes.

Q. Okay. Did he ask you to change your opinion in any way?

A. He did not.

Q. Okay. Okay. Let me ask you, you had testified a little bit earlier about the three methods for presidential — for a major party presidential candidate to get on the ballot.

Do you remember that?

A. Yes, in a presidential primary.

Q. Okay. And you said to get on the — for a — to get on the ballot for a presidential primary, there was the party nomination process, the petition process, and then the affidavit-plus-fee process, correct?

A. That's correct.

Q. So I will tell you, I — my read, I didn't quite understand what — what do you mean by the party nomination process?

A. That's the process of filing the candidate affidavit, the party — party form of bona fide party candidate, and the application fee.

Q. Okay. How is that different from the

[p.129]

filing of the affidavit of intent and the fee?

A. The third affidavit of intent and the fee is for a write-in candidate.

JA644

Q. Okay. For a write-in candidate for the party nomination?

A. That's correct.

Q. Okay. Let me ask you this:

So the — and I was just wondering, so the form — and we may bring it up — but the form that — the statement of intent form, that was created in 2020, correct?

A. That's correct.

Q. Okay.

A. Well, 2019, ahead of the 2020—

Q. In prepara- —

A. — primary.

Q. In preparation.

Was there any rule or regulation setting that — the contents of that form?

A. No.

Q. Okay. And you said earlier that the ballot access team has authority to modify that form —

A. That's —

Q. — correct?

A. — correct.

[p.130]

Q. Did the ballot access team create that form?

A. They did.

Q. Okay. And did they have full authority to create that form?

A. They did.

Q. Okay. And so that's — that form is essentially created by the ballot access team, correct?

A. Yes, that's correct.

Q. Okay. And I want to chat with you about the qualifications, too.

So there's a — I want to chat with you about the congressional form.

JA645

Are you familiar with the fact that the congressional form also requires a person to check three boxes for eligibility?

A. I've not recently looked at the congressional form. If I could see an example of it, that would be helpful.

Q. Okay. Because I'm afraid of the technology, I'm going to see if I can describe this to you.

I'm going to represent to you that one of the boxes that the candidate checks says, "Inhabitant of State."

[p.131]

Does that refresh your memory, or do you still need to see the form?

A. It would be helpful if I could see the form.

Q. Fair enough.

MR. GESSLER: Your Honor, can we take about a minute break? I would like to just pull up that form, please.

THE COURT: Sure. While your team is finding that form, can you —

MR. GESSLER: Just continue the — sure.

THE COURT: — move to another topic and then come back.

MR. GESSLER: Okay. Just let me . . .

Q. (By Mr. Gessler) All right.

THE COURT: There we go.

MR. GESSLER: We have it.

Q. (By Mr. Gessler) All right. Do you see that form in front of you, Ms. Rudy?

A. Yes.

Q. Okay. And that's —

THE COURT: So this is the write-in form?

MR. GESSLER: This will work.

Q. (By Mr. Gessler) I want you to take a look at the write-in form.

[p.132]

A. Okay.

MR. GESSLER: That works fine.

Q. (By Mr. Gessler) And the second box says, "Inhabitant of Colorado," correct?

A. The second box under "Qualifications for Office" says that, yes.

Q. Okay. And in order to — does that mean that the person has to be an inhabitant of Colorado at the time they fill out that form?

A. We verify that they are at the time they fill out that form, yes.

Q. That they are an inhabitant of Colorado at that time?

A. Yes.

Q. Okay. And is that the — would you agree with me, then, that that's the Office's interpretation of federal requirements to qualify for the ballot, that they have to be an inhabitant of Colorado?

A. I don't think that's the sole qualification for that office.

Q. I understand.

But it's the Office's interpretation that that's one of three required qualifications for them to be on the ballot; is that correct?

A. Yes.

[p.133]

Q. Okay. And would it be fair to say, then, for the presidential candidate form, it's the Office's interpretation that to qualify, the candidate has to fill out the three requirements: Specifically that they're a natural-born citizen, 14-year resident, and 35 years of age?

JA647

A. Yes. The form must be fully completed, each of the boxes checked, and the affidavit affirming that they meet all qualifications for office must be signed and notarized.

Q. Okay. And the statutory basis for those three requirements is — is there a statutory basis for those three requirements in Colorado law that you can point to?

A. Are we talking about the presidential form now?

Q. Presidential form.

A. Yes. There is a statute that tells us that we give effect to the federal qualifications for office.

Q. Okay. And — and is that the same statute that you rely on for this — the qualifications for this write-in form?

A. If you could bring the statute back up again, please.
[p.134]

Q. You had said there was a federal statute — I'm sorry, there was a state statute.

Can you tell me what state statute that is?

A. I don't recall the specific citation, but all of the qualifications and requirements for the presidential primary are contained within Article 12 — I'm sorry, within Part 12 of Article 4.

Q. Okay.

A. Beginning with 1-4-1201.

Q. Okay. So it's the 1-4-120- — the 1201, the 12 series of statutes that set forth the statutory basis for those requirements?

A. That's correct.

Q. Okay. And then — and then for these three requirements for the write-in candidate, I'm going to — for the United States Representative candidate, where it says: At least — I think that says 25 years old, inhabitant of Colorado, and then the third item.

Is there Colorado statute that requires you to include — requires the Office to include those three as well?

JA648

A. I don't recall off the top of my head, but the provisions for becoming a candidate in Colorado for Congress or Senate are set out in a different area of the [p.135] law.

Q. Okay. Is it the Office's practice that you need a state statute to include those three, or you can just — or you look only to the U.S. Constitution?

A. The Office is required to certify eligible candidates to the ballot, and so wherever those eligibility requirements are set out is where we look.

Q. Okay. And so that's the Office's attempt — or I should — that's the Office's approach in establishing what the qualifications are for a candidate: Creating that form with those three boxes?

A. Again, that's not intended to be an exhaustive list of qualifications for office. But yes, we list the primary qualifications for office, and then each candidate signs an affidavit that they meet every qualification for office.

Q. Okay. So there could be more qualifications for this affidavit of intent for a write-in designation that's — that are not on this form?

A. There could be.

Q. Okay. And you're saying that's — so that's the intent, and it has been the intent of the Office since you've been there?

A. Yes.

Q. Okay. And — and the basis for saying

[p.136]

that that's the intent is the — is the affidavit write-in, that's — what's the evidence that you are relying upon to say it's the intent: Is it your memory, or are you able to point to something else?

JA649

A. I've worked in the Office for 17 years, and that's been the practice since I have worked there.

Q. Okay. The practice has been for the form to not necessarily include — the form itself to not necessarily list all of the requirements for an officeholder; is that correct?

A. That's correct. In the past, the form required the candidate to list their qualifications for office. The inclusion of checks — checkboxes was intended to help candidates out to identify their specific qualifications.

Q. Okay. Can you identify any other forms in the Office that have requirements but that are not — but they are — that do not list all of the requirements on the form itself?

A. As I sit here now, no. Our office produces quite a number of forms.

Q. Okay. And you produce those forms to be able to provide guidance for a candidate, correct?

A. We produce those forms to provide guidance for candidates, campaigns, parties, voters. Our office
[p.137]

produces quite a number of forms.

Q. Do you produce those forms to be binding legal authority as well?

A. I'm sorry, what do you mean by that?

Q. Do you produce those forms to be binding legal requirements for candidates as well?

A. Binding —

Q. So is the information required to be filled out required for candidates under law?

A. In order to gain ballot access in Colorado, a candidate must complete fully their paperwork before they submit it.

JA650

Q. Okay. Let's talk about going behind the paperwork.

So you're familiar with the controversies involving the natural — the natural-born citizenship for President Barack Obama when he ran in 2021; is that correct?

A. I read the news.

Q. Okay. Did that rise to the level for the Office to investigate whether President Barack Obama was, in fact, a natural-born citizen?

A. Our office never received any formal complaints or request to consider that information.

Q. Okay. So that wasn't quite my question.

[p.138]

You earlier said that if you have affirmative knowledge that a candidate does not meet certain requirements, you will keep that candidate off the ballot, correct?

A. Correct.

Q. Okay. And so if someone comes to you and says, "I have evidence that this candidate is not 35— is not 35 years old," will you keep that candidate off the ballot?

A. We would escalate that to the Deputy Secretary for guidance.

Q. Okay. And do you know what the criteria are that the Deputy Secretary of State would follow for that guidance?

A. If we have affirmative information that a candidate is ineligible, it is the Office's view that the Secretary can refrain from putting that candidate on the ballot.

Q. Okay. So if I — if someone were to come up and say, "I have affirmative evidence, here's — here's evidence that the — this particular candidate is not 35 years old," what do you do with that evidence?

JA651

A. I can't speculate as to a hypothetical, not knowing what that evidence is. That — that would have to be the discussion with the Deputy Secretary.

[p.139]

Q. Okay. And then the Deputy Secretary would make that decision as to the quality of the evidence?

A. The Deputy Secretary, the Secretary would advise the Division as to the best manner to proceed.

Q. Okay. And the Division would follow that advice, correct?

A. That's correct.

Q. Okay. So the Deputy Secretary of State or Secretary would instruct the Division on how to — how to proceed, correct?

A. That's correct.

Q. Okay. And — so the Secretary and Deputy Secretary themselves would sort of personally — would evaluate that — evaluate the quality of the information that you received, correct?

A. The ballot access team would seek that guidance from the Deputy Secretary, that's correct.

Q. Okay. And do you know whether or not the Deputy Secretary of State and the Secretary of State would then evaluate the quality of that information?

A. Again —

Q. I'm going to ask you to hold off for a sec because we have sirens. It's been the pattern and practice in this courtroom.

Do you need me to repeat my question?

[p.140]

A. Please.

Q. Okay. So do you know the criteria that the Secretary or the — and the Deputy Secretary of State would use to evaluate the quality of that information?

JA652

A. Again, I can't speak to a hypothetical situation.

Q. I'm not asking you to speak to a hypothetical situation.

I'm asking if you know what criteria they use to evaluate that information?

A. Well, since we're not in the situation where we're applying those criteria, I can't speak to what criteria they would use.

Q. Okay.

MR. GESSLER: Now, let's go back to the — that write-in candidate form, please.

Q. (By Mr. Gessler) Okay. So if I fill out — let's say I decide to write for — have a temporary bout of insanity and I decide to run for U.S. Congress as a write-in candidate. And I fill out the form and I say, "I am not an inhabitant of Colorado, but I will become an inhabitant at the time I'm elected."

Would you allow me to run, would the Office allow me to run for office?

A. We would escalate that to the Deputy

[p.141]

Secretary to have a discussion.

Q. Okay. I'm going to represent to you that the U.S. Constitution requires, explicitly requires a member of Congress, as a qualification, to hold office at the time they are elected.

With that information, is — does that change your answer?

A. Again, I can't speak to hypotheticals. We would escalate that for a discussion with the Deputy Secretary before making a decision.

Q. Okay. And it's the Secretary or the Deputy Secretary that would make that decision?

JA653

A. We would seek their guidance before making a final determination, yes.

Q. Okay. For Hassan, if I remember correctly, you testified that Hassan never submitted the paperwork, the statement of intent.

Correct?

A. Yes, that's my recollection.

Q. And that was a statement of intent for a write-in candidate, correct?

A. I don't recall specifically. Would it be possible to pull the letter back up?

Q. Sure.

I will represent to you that he was for a
[p.142]

write-in candidate.

Will you accept that representation, or would you like to take a look at the letter?

A. I mean, I would prefer to take a look —

Q. That's fine.

A. — but I will accept that.

MR. GESSLER: Could we pull that letter up, please.
P-107.

Q. (By Mr. Gessler) Just tell us if you need to scroll down.

A. Yes. Could you scroll down to the second paragraph, please.

I don't see that it's for a write-in candidate. Honestly, I don't recall.

Q. Okay. Do you recall him being an unaffiliated candidate?

A. Yes. He was an unaffiliated candidate for the presidential election in November of 2012.

Q. Okay. And he refused to submit the paperwork, correct?

A. That's correct.

Q. Okay. So that did not — as a result, you did not actually have to evaluate the paperwork because it was never submitted to your office, correct?

A. We did not have to evaluate the paperwork,
[p.143]

but we corresponded with him with respect to his qualifications.

Q. Okay.

MR. GESSLER: No further questions, Your Honor.

THE COURT: Do you have some questions?

MS. RASKIN: I do have some questions.

THE COURT: Okay.

CROSS-EXAMINATION

BY MS. RASKIN:

Q. Good morning, Ms. Rudy. I'm Jane Raskin. I represent the Colorado Republican Party.

I just want to go back and make sure I understand the procedure you described your office is following.

When it — in connection with a presidential primary election, it receives paperwork under what I think you described as the party nomination process —

A. Yes.

Q. — right?

So in that instance, as I understand it, you typically will receive the — the Major Party Candidate Statement, the one you went over earlier. I think it was Exhibit 2 — 158.

[p.144]

And that contains as an attachment, as I understand it, a document that's called the State Party Presidential Primary Approval?

A. We receive, for presidential primaries for major party candidates, the candidate statement of intent, the

JA655

party approval form stating that the candidate is a bona fide party candidate, and the filing fee.

Q. Okay. So you now have those two documents in hand, say.

What do you do — and those forms, as — as you have described, contain an affirmation by the candidate that he satisfies the requirements of law for the office he's seeking access to the ballot for, right?

A. Yes.

Q. And they include specifically three boxes for the candidate to check, to which he affirms that he's years old and a natural-born citizen and he's lived in the country for 14 years, right?

A. That's correct.

Q. So you get that document and you get the companion document, which is the party's certification that he's bona fide candidate of the party.

What do you do to verify the candidate's affirmation that he is, in fact, qualified to hold the

[p.145]

office for which he's seeking access to the ballot?

A. The ballot access team doesn't do any investigation beyond the — the review of the paperwork to ensure it's accurate and complete, and to review the party paperwork to ensure that the "Approved" box, as opposed to the "Disapprove" box, is checked.

Q. And if those boxes are all checked, the paperwork is in order, you certify that candidate for inclusion on the ballot, correct?

A. Well, it depends on where we are in the timeline. We don't certify candidates to the ballot until January 5.

Q. Okay. So you may get the paperwork early, but you wait until shortly before the certification date to actually complete the certification?

JA656

A. We certify on the certification deadline.

Q. Okay. And I assume that is, in part, to allow time for other interested parties to challenge the form if they want to, as you've described?

A. What is in time? I'm sorry, I don't understand.

Q. So during the period of time after which you've received the major candidate statement and the party certification that the candidate's bona fide a candidate of the party, you have said that other people,

[p.146]

whether it's a competing candidate or another party or another elector, can come in and make a complaint. Either informally, say, "Hey, look, I think this guy, you know, wasn't born in the United States." Or, alternatively, can actually file a petition under 113.

Right?

A. That's correct.

Q. So before you certify the ballot, you have this time period where those issues may be raised and may be resolved?

A. Those issues may be raised, but there are also other deadlines within that time period before certification for petitions and for the affidavit for write-in. Those deadlines come a little bit later.

Q. No, I understand.

But I'm just talking at this point about the process for a candidate nominated by a major party.

A. I understand, but you asked why we wouldn't certify until the deadline.

Q. Oh, I see — oh, so in other words, what you're saying is, you certify all of the candidates the same day?

A. That's correct.

Q. So the others may implicate that decision even if you already have the major party candidate; is

[p.147]

that . . .

A. Only major parties may be certified for the presidential primary ballot.

But there are multiple ways to be placed on the ballot, and those deadlines differ, so we certify all candidates for both major party presidential primaries on the same date.

Q. Okay. So let's go back to the point at which you receive the paperwork, and understanding you don't certify it until the deadline.

If nobody comes in with any, what you've described, I think, is affirmative information that there's something incorrect in the certification form, and no one has filed a 113, and you ultimately reach the certification date, it's the Secretary's duty to certify that candidate to the ballot, correct?

A. That's correct.

Q. Okay. So when you were discussing earlier that you got some forms and you verify the info as required by state law, you were talking about candidates for state office, right?

A. We review every form that our office receives. State law requires us to verify information for state candidate forms, and for presidential primary elections, we review the information on the affidavit

[p.148]

itself.

We're also required to verify that the party has completed the party approval form and has approved the candidate as a party representative.

Q. Right.

But for federal candidates, as opposed to state candidates, you don't have an equivalent process to check any databases to determine residency or where the

person was born or things of that nature, as you do with state candidates?

A. For presidential candidates, that's correct.

Q. Okay. So when you testified earlier that — I think what you said was that the Secretary is never the final arbiter of whether a candidate is eligible to be listed on a ballot.

That's not the case if there is no challenge made to the — the request to be included, correct?

A. There's always an opportunity for the Secretary's determination to be challenged in court; and in that case, the Court is the final arbiter.

Q. Sure, there's an opportunity.

But if nobody places a challenge, nobody complains, nobody files a 113, then the final decision is

[p.149]

made by the Secretary?

A. That's correct.

Q. Okay. Just one more question.

Has your office, to your knowledge, ever refused to certify a candidate for inclusion on the presidential primary ballot, understanding that it has been an issue for a short period of time?

A. Well, there are candidates that we've corresponded with, you know, ahead of the election who failed to complete the paperwork.

We've corresponded with a candidate ahead of this primary election, and they've failed to complete the proper paperwork.

Q. Has there ever been an instance in which a candidate has completed the paperwork that your office has created that you have disqualified in a presidential primary election?

A. Not to my knowledge.

JA659

MS. RASKIN: That's it. Thank you very much.

THE COURT: Mr. Kotlarczyk, proceed.

MR. KOTLARCZYK: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. KOTLARCZYK:

Q. Just a couple areas I wanted to follow up
[p.150]

on, Ms. Rudy.

You testified about Section 113 on your direct.

Do you recall?

A. I do.

Q. And you were asked some questions about when there are — when the official charged with the duty has committed or is about to commit a breach or neglect of duty or other wrongful act.

Do you recall those questions?

A. Yes.

Q. And you were asked specifically about when a — when it might arise when a 113 will be brought before a Secretary — before an election official, including possibly the Secretary, has committed a breach or neglect of duty.

Do you recall that?

A. Yes.

Q. In the context of certifying a ballot on a certification date, is it — do you have an understanding as to whether Section challenges arise before the — before an election official exercises their duty to certify ballot contents, or whether the challenge would come afterwards?

A. There are a lot of provisions in the

[p.151]

candidate statutes that allow a challenge to a candidate's qualification. If — if that candidate, for example, goes on petition, there are very specific provisions that allow challenges to the Secretary's determination.

JA660

So typically, those challenges arise under — under the statute that the candidate has followed to achieve ballot access.

Q. And are sometimes challenges brought to whether a candidate will be listed on a ballot prior to a ballot certification deadline?

A. Yes.

Q. And can those challenges be brought under — or have those challenges been brought under Section?

A. Yes. I believe some have.

Q. You were — you've also been asked some questions about instances where the Secretary of State's Office has not — has or has not certified a candidate to the — a presidential candidate specifically to the ballot.

Do you recall those questions?

A. Yes.

Q. Do you recall in 2012— and so we're talking before primary ballots; this would be a general

[p.152]

election ballot — do you remember a candidate with the last name of Wilson?

A. Yes, generally.

Q. Do you recall a dispute around Mr. Wilson and whether he would be placed on the presidential ballot as an unaffiliated presidential candidate?

A. Yes. As I recall, Mr. Wilson failed to complete part of the paperwork properly, and we communicated with him and ultimately chose not to place him on the ballot based on his failure to fully complete the paperwork.

Q. Okay. And what about in 2016— which, again, this would have been for the general election, not for the primary — a candidate by the name of Denamore [phonetic]?

A. Yes.

JA661

Q. Could you tell the Court what you remember about that situation?

A. Similar to Wilson, Denamore, as I recall, did not fully complete the paperwork even after our office corresponding with them and we did not certify them to the ballot.

Q. And I believe you just testified a few moments ago about an instance that occurred in this election cycle for the presidential primary ballot.

[p.153]

Could you describe a little more the circumstances around that?

A. Yeah. We received candidate paperwork for Joseph Maldonado. And the paperwork was not on the correct form. We hadn't updated and published the form yet. It wasn't properly notarized. It wasn't signed by the candidate himself.

And so we returned the filing fee to that — that person and advised them that in order to seek access to the ballot, they needed to complete the proper paperwork and — and that included the party — the party approval paperwork as well.

Q. Okay.

MR. KOTLARCZYK: Your Honor, that was it for my questioning.

I know the Court had some areas designated that wanted to hear from a representative from the Secretary of State's Office on. This is the only will-call witness any party has listed from the Secretary of State's Office, so I wanted to be sure that the Court had any opportunity to ask Ms. Rudy any questions.

THE COURT: Why don't we finish redirect. And if my question isn't addressed, then we'll — I could ask it.

MR. KOTLARCZYK: Thank you, Your Honor.

[p.154]

MR. GESSLER: And, Your Honor, I'm going to have one or two follow-up questions. I think we, respectfully, may have gone out of order based on the posture of the parties, but if I could just have an opportunity after Ms. Tierney is done, I would appreciate that.

THE COURT: Why don't you do yours so that then she can —

MR. GESSLER: That's fine.

THE COURT: — wrap up with the redirect.

RECROSS-EXAMINATION

BY MR. GESSLER:

Q. Ms. Rudy, just very quickly.

For Mr. Wilson, Denamore, and Maldonado, all of those were rejected based on their failure to complete the proper paperwork; is that right?

A. Yes, that's correct.

Q. Okay. In your experience, has there ever been a presidential candidate who has completed the proper paperwork, yet been kept off the ballot by your office?

A. As I sit here today, I can't think of a specific example, no.

Q. Okay.

MR. GESSLER: Thank you.

[p.155]

REDIRECT EXAMINATION

BY MS. TIERNEY:

Q. Ms. Rudy, you have answered some questions about — from Mr. Gessler about the forms in the Office. I just want to follow up on that briefly.

He asked you who generally drafts the forms, and I think you said the ballot access team.

Those forms are then reviewed by somebody else in your office for compliance with the law, correct?

JA663

A. Our legal team may take a look at the forms if there are substantive legal changes to those forms, so if qualifications have changed or if it's the first instance of a form. But if we're updating addresses, things like that, it — it will just be the ballot access team.

Q. But the first time a form is created or if substantive changes are made, there is a further review of the form beyond the ballot access team?

A. Yes, that's correct.

Q. You also — just want to follow up on the — the — confirming that your office, as you testified on direct examination, follows both state and federal law when determining candidate eligibility?

A. Yes, that's correct.

Q. And even if the federal qualifications may [p.156]

not be spelled out elsewhere in state statute, correct?

A. Yes, that's correct.

Q. And on direct examination, we also had a colloquy about the Twenty-Second Amendment and what your office would do if George W. Bush or Barack Obama submitted a statement of intent. And you testified at that time that you would escalate that.

What — and Mr. Gessler, I think, asked you some questions about what that — what “escalating” means.

In that situation, when you would escalate that question, if it were to be determined by the Office that the — George W. Bush or Barack Obama was ineligible based on federal constitutional qualifications, would you keep them off the ballot?

A. If that was the determination, yes.

Q. And conversely, if, for some reason, somebody — you kept them off the ballot and somebody challenged that eligibility or the Secretary's determination to keep

JA664

them off the ballot and a court decided that they should be placed on the ballot, what would your office do?

A. We would certify the name to the ballot.

MS. TIERNEY: I have nothing further.

[p.157]

EXAMINATION

BY THE COURT:

Q. So, Ms. Rudy, you can — if you don't know the answer to this, it's totally fine.

But what would you do if — well, first of all, is it your understanding that if the Secretary of State's Office, the ballot access team all the way up to the Secretary of State, wanted to add a checkbox for — to address the Twenty-Second Amendment so it said, you know, You haven't been — you haven't been President more than two terms, would that be within — is your understanding something that the Secretary of State's Office could do?

A. Yes.

Q. And then my other question is similar.

If — if Barack Obama were to — or President Clinton were to submit a statement of intent and check all the — well, check the boxes that are on there, regardless of what they are, and sign it, and nobody filed a lawsuit, in your estimation — well, just what would the process be given that presumably whoever's reviewing that would know that President Clinton had already been President twice?

A. Again, it's hard to speak to hypotheticals, but certainly the ballot access team would

[p.158]

escalate that through the legal team to the Deputy Secretary for guidance. But given that that is an objective, knowable fact, it is unlikely that we would certify that candidate's name to the ballot.

JA665

THE COURT: Okay. Did anybody have any follow-up questions to mine?

MR. GESSLER: Of course, Your Honor.

FURTHER EXAMINATION

BY MR. GESSLER:

Q. Ms. Rudy, I just want to ask you a question.

So — so the Court asked you a question, and you said — with respect to the term limit. And you said if it's an objective, knowable fact, you would feel comfortable or you would predict that it would be likely that the Office would not allow that person to appear on the ballot.

Is that correct?

A. In the situation that we discussed, yes, that's correct.

Q. Right. And because the two-term limits, that's an objective, knowable fact, correct?

A. Yes. We know that they've served two terms.

Q. Right. So you know this case is about the [p.159]

Fourteenth Amendment, correct?

A. That's correct.

Q. And is it your understanding that Congress can remove any disability to holding office under the Fourteenth Amendment?

A. I understand that.

Q. Okay. And would you agree with me that sitting here today, even if a court, whether in Colorado or elsewhere, were to hold that President Trump was disqualified, even in that highly unlikely situation, would you agree with me that it is not an objective, knowable fact as to whether or not Congress would, in the future, remove that disability?

MS. TIERNEY: Objection, Your Honor. I don't think the witness can testify to that.

JA666

THE COURT: I'll let her testify to the extent she knows the answer, but she's not designated as an expert on the subject.

A. I really can't speak to how our office would handle that situation.

Q. (By Mr. Gessler) Okay. Let me ask you this:

Would you agree with me that it's not an objective, knowable fact, sitting here today, how Congress will react in any way between now and the

[p.160]

presidential election in 2024?

A. I would say that, as with any area of law, it's impossible to know how a legislative body will act looking into the future.

Q. Okay.

A. I can't speak to how they will behave.

MR. GESSLER: Great. Thank you very much.

THE COURT: Does anybody else have any follow-ups?

MR. KOTLARCZYK: No, Your Honor.

MS. TIERNEY: No, Your Honor.

MS. RASKIN: No, Your Honor.

THE COURT: Okay. Great.

Thank you so much for your testimony, Ms. Rudy.

THE WITNESS: Thank you.

THE COURT: Am I correct in understanding that Ms. Rudy was the petitioners' last witness?

MS. TIERNEY: Your Honor, we — thank you, Your Honor.

We have one witness who is testifying out of order on Friday. That's Mr. Heaphy.

THE COURT: Okay.

MS. TIERNEY: And we also have some exhibits that we are reworking to submit, the January 6

[p.161]

findings in particular, so that we are submitting only those Your Honor has found to be admissible to clean up the record a little bit.

And then we may want to highlight additional documents that are already admitted into evidence that we might submit.

But other than those three items, Mr. Heaphy, the January 6 findings, and some additional highlighting, we are completed.

THE COURT: Okay. Mr. Gessler, do we have anything we need to discuss before you call your first witness?

MR. GESSLER: Yes, Your Honor.

We would like to move for a directed verdict. We understand that Mr. Heaphy is going to be testifying on Friday, but it's our understanding that he's testifying at the request of this Court specifically for the admissibility of the January 6th Report, and for purposes of our directed — our motion for directed verdict, we will assume that the January 6 Report is fully admissible.

And so we would like to move for directed verdict and have the opportunity to make that case, Your Honor.

THE COURT: Okay. Are you prepared to do

[p.162]

it right now?

MR. GESSLER: I am, indeed.

THE COURT: Well, good.

MR. GESSLER: Thank you, Your Honor.

So we move for directed verdict under Rule 50 here, and we are moving on very focused grounds. Specifically with respect to the — whether or not President Trump incited anything under the Brandenburg standards under the First Amendment.

JA668

And so basically for purposes of this, we are accepting everything that the petitioners have provided in evidence, as well as we're accepting for — obviously for limited purposes, the admissibility of the January 6 Report.

So I just want to walk through the evidence, what you've received, apply what our very straightforward and well-established legal standards, and we believe this case warrants dismissal at this point because petitioners have not made out their case on this issue.

So as the Court knows, there have been a number of arguments raised with respect to Section 113 and 1204. This directed motion is not involving that.

There have been a number of arguments we've presented with respect to the interpretation

[p.163]

of Article 3— I'm sorry, Section 3 of the Fourteenth Amendment. This directed motion is not focused on that.

What it is focused on is the Brandenburg standards, the definition of incitement.

Our argument under Section 3 is that President Trump has to engage in an insurrection. Petitioners have argued that incitement can constitute engage. Although for overall purposes, we don't accept that, we disagree with that argument, for purposes of the directed motion, we will operate on that premise.

So the evidence that the Court has received so far and in totality has been the January 6 Report or portions of the January 6 Report.

It received evidence from Officer Hodges, and he testified to activities, the violence and things that happened at the Capitol. He did not testify to President Trump's actions.

Representative Calwell [sic], he testified to activities that happened at the Capitol as well, from his

perspective. He did not testify to President Trump's activities beyond simply saying he heard the speech. And Representative Calwell, of course, testified to things in prior — in prior years.

Mr. Pigeon testified — again, very similar to Officer Hodges — activities at the Capitol.

[p.164]

You have Professor Banks, who testified as to what President Trump's authorities were to mobilize the National Guard on January 6. He did not testify to President Trump's actions at all.

You have Professor Magliocca, who testified as to the meaning of Section 3. He did not testify to President Trump's actions. And importantly, he did not testify as to the meaning of intent or the applicability of the Fourteenth Amendment, so his testimony for purposes of this motion is — is not relevant.

And you heard from Ms. Rudy, who testified as to the Secretary of State's authority. Of course, much different than President Trump's actions.

So basically there's two — two things: One is information from the January 6 Report, and the second is Professor Simi's — Professor Simi's testimony with respect to far right-wing extremists.

Neither one of those shows that President Trump, in any manner, in any way, incited an insurrection, incited violence, incited a riot. Not at all. Under the well-established Supreme Court standards of *Brandenburg v. Ohio*.

This case is entirely, petitioners' case is entirely a case about President Trump's speeches, his

[p.165]

speech, his Twitter, to video. That's the entire body of their evidence, and that's the entire body of evidence from the January 6 Report.

They don't allege that President Trump was — you know, had meetings with the Proud Boys or Three Percenters. They don't allege that he, you know, carried a knife or a rifle or marched at the head of a column towards the Capitol. They don't argue that he engaged in any of those sort of physical overt actions.

It is all speech. That's the entire body of their case.

And if you remember, the petitioners sort of had this chart up here towards the end of Professor Simi's testimony, and he talked about this speech and that speech — oh, there it is, over in the corner there. All of that stuff that President Trump did. And, of course, they sort of have a pejorative: Memory A, the punch in the face or the body slam or the stand back and stand by.

But those are all things that President Trump said. Every one of them is about him saying something or not saying something. He didn't condemn activities in Georgia or Charlottesville. He didn't — didn't say something. So it's all speech.

We've submitted the speech standards under

[p.166]

Brandenburg v. Ohio, but I'm going to talk briefly — I don't want to be too pedantic, but I'm going to talk about some of the applicability, okay? And particularly Professor Simi's testimony.

So Professor Simi was very clear. He testified that he was not opining about President Trump's intent. He said: I'm not in President Trump's head. I don't know what his intent is.

JA671

He said, What I can say is that I think his behavior is characteristic of communications with right-wing, far-right-wing extremist groups. And he was very clear that President Trump's speech was interpreted in a particular way by these right-wing extremist groups.

And as you remember, I questioned him. You know, we had all these sort of fight or fight in the streets from figures, political figures other than President Trump.

And I asked him: Well, were those right-wing extremist communications?

And he was very clear: It depended. It depended upon the relationship, the patterns of behavior and things like that as to how right-wing extremists would interpret the comments.

So really his testimony was, President Trump said stuff and right-wing extremists

[p.167]

interpreted it in a certain way. And specifically when he said right-wing extremists, he referred to those three groups.

He also said that — so the characteristics of these communications are in common with normal political speech. He talked about the communication methods. You know, what he called doublespeak and front door/back door.

And I'm sure he made us all feel uncomfortable that when we go in for a job interview versus when we talk to our significant other, we are engaging in doublespeak, or maybe front stage/back stage, I don't — but one of those methodologies. So he testified about that.

But the important thing he said was that all of these forms of communication, all these methods of communication, you know, call-and-response and things

JA672

like that, are common in political discourse, are commonly used in political discourse.

And the difference with far right-wing extremists is that they're — is that they couple it with violence. That was — that was sort of what he said.

And, of course, he was very clear that many of these people interpreted President Trump's comments.

[p.168]

So that's the — that's how Professor Simi testified.

So let's apply that to the law. Okay. And — and I will talk about a few things.

So the *James v. Meow Media, Inc.*, that's 300 F.3d 683. And that's in the Sixth Circuit.

And in that case, the — the argument was that basically there was sort of an ongoing process of developing a method of communication and that after a while, the person hearing the communications was the — was conditioned to respond in a certain way.

Now, the Court was very clear, and I'll quote it, said: "This glacial process of personality development is far from the temporal imminence that we have required to satisfy the Brandenburg test."

So you have to have the temporal instance — or imminence.

So all of the stuff that Professor Simi talked about does not meet First Amendment standards. All the prior conversations, the years, the pattern of development, that has been explicitly rejected, rejected by the courts.

It has to be imminent, okay? And it can't be communication that — whether — even if it advocates — and we're not — none of these

[p.169]

communications advocate it, which I'll get to that — but it has to be imminent.

And so Professor Simi's framework of this pattern of behavior, it may apply to how people received those communications, but it doesn't constitute First Amendment standards. And we think those standards are very, very clear.

The Court also said that — that the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it, absent some showing of a direct connection between the speech and imminent illegal conduct.

So even if speech advocates something, even if it encourages it, the tendency to encourage it is itself not an absent reason — absent a showing of a direct connection between the speech and the imminent illegal conduct. So there has to be a direct connection.

So President Trump saying, "Come on January 6, will be wild," that is not a direct connection between the speech and imminent illegal conduct. And that's, we submit, pretty straightforward case law.

Now —

THE COURT: And I'm sorry, that's still the —

MR. GESSLER: James v. Meow Media. And [p.170]

they have a number of citations in there. The pincite is page 698, Your Honor.

And they cite Ashcroft v. Free Speech Coalition and McCoy v. Stewart in the quotation block that I'm referring to.

But it's a great case. I suggest it for everyone in the audience to read.

The second case — and I'm not going to be awfully pedantic. I don't want to provide an entire legal brief here. But I am going to talk about a couple things.

JA674

Two more cases: Hess v. Indiana, and I believe we cited, that's a U.S. Supreme Court case from 1973. And there, there has to be ". . . evidence, or rational inference from the import of the language, that [the] words were intended to produce, and likely to produce, imminent disorder . . ." Okay?

They —

THE COURT: So, Mr. Gessler, would you just slow it down —

MR. GESSLER: Certainly, Your Honor.

THE COURT: — a little bit.

MR. GESSLER: I'm mindful of time. I guess that's why I'm talking quickly.

THE COURT: No, I'd rather you slow it [p.171]

down so I can actually absorb what you're reading —

MR. GESSLER: Fair enough, Your Honor.

THE COURT: — versus —

MR. GESSLER: Let me —

THE COURT: If you could start again with Hess v. Indiana.

MR. GESSLER: The Hess v. Indiana, that's 414 U.S. 105. Okay?

And Hess says there have to be a couple things: There has to be intent; in other words, words have to be intended to produce, and they have to be likely to produce imminent disorder. And they could not be punished by the state on the ground that they had a tendency to lead to violence.

So the — so you have to look at the import of the words, their direct meaning, not a particularized, coded meaning.

And, in fact, Professor Simi never testified that President Trump intended; in fact, he disavowed any testimony of President Trump's intent.

And Professor Simi was very clear that the words used, no matter who's using them, whether it's the term "fight" or something else, have an impact on the listener depending upon the circumstances. It's all contextual.

[p.172]

Here's the last case, and I think this case is really dispositive here. And the case is *Nwanguma v. Trump*. *Nwanguma v. Trump*. And that's spelled N-w-a-n-g-u-m-a, v. Trump. And that's 903 F.3d 604.

And this is why this case is so dispositive. This was a rally involving President Trump, the same one who's here today. And he spoke at this rally.

And this is described in the case.

And President Trump spoke for about 35 minutes. And Nwanguma, she attended the rally with the intention of peacefully protesting, okay?

And her behavior precipitated directions from President Trump to the crowd on five different occasions during that speech. For her and a few of her colleagues to "get 'em out of here." That's what he said: "Get 'em out of here."

And you, the Court, heard video of how President Trump delivers those comments, types of comments, not this video in particular. They said, "Get 'em out of there."

And in response, what happened is the crowd, members — this is quote, ". . . members of the audience assaulted, pushed and shoved plaintiffs . . ."

[p.173]

and one of them was actually punched in the stomach. And the argument was that the — that this implicitly encouraged the use of violence.

Now, President Trump said a few other things. He said once, after his five "get 'em out of here," he said: But don't hurt 'em. Actually, the case doesn't say "but." It

JA676

says, “Don’t hurt ‘em,” is what President Trump said. Okay?

And what the Court did, a couple things. The Court said even if the “get ‘em out of here” could have viewed as implicitly encouraging unwanted physical touching, so the Court didn’t accept that it implicitly — didn’t rule that it implicitly said.

Even accepted, the charge in Kentucky law that this case was — was inciting to riot, so it was incitement and riot, both of which we urge are lesser standards than here, but certainly incitement.

And the Court said the notion that Trump’s direction to remove a handful of disruptive protesters from among hundreds or thousands in attendance could be deemed to implicitly incite a riot is simply not plausible.

Even in those circumstances — and this is, Your Honor, why I was very careful to submit a very specific hypothetical to Professor Simi when I was asking

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him questions.

I asked him: Well, if President Trump were to say five times, “get ‘em out of here,” and this crowd, even if it were filled with right-wing extremists and then later — and said it five times as opposed to only one time, the “don’t hurt ‘em” — so I went through this — I went through this exact hypothetical.

And even Professor Simi, he hedged a little bit and he said: Well, it still sort of depends on context, okay? And — and so he — even he wasn’t quite willing to say: Yes, that was an incitement to violence.

But the Court here is very clear. That is not an incitement. Here, it says, “incitement to riot,” okay, and the Court focuses on the “incitement” prong of that.

JA677

Even there, the Court was very clear, that is not incitement.

And then the Court specially went on and said: “. . . especially where any implication of incitement to riotous violence is explicitly negated by the accompanying words, ‘don’t hurt ‘em.’ If words have meaning, the admonition ‘don’t hurt ‘em’ cannot be reasonably construed as an urging to ‘hurt ‘em.’”

So what the Court did there is the
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Court — and I don’t want to say the Court rejected Dr. Simi’s thesis, because the Court didn’t say, Well —

THE COURT: Did Dr. Simi testify in this case?

MR. GESSLER: No. I’m sorry, Professor Simi. Did I say “Doctor”?

THE COURT: Well, you said “Doctor” and then I said “Doctor,” and I’m sure —

MR. GESSLER: He may be a doctor, too.

THE COURT: — I’m sure he has a doctorate.

MR. GESSLER: I don’t believe he did. But — I don’t believe he did.

But what I’m saying is, Professor Simi has said, Well, the words can be reasonably interpreted there.

The Court doesn’t accept that framework for a First Amendment analysis, which is what controls here.

So I’m not saying he’s wrong. I mean, right-wing extremists have — they very well may usually do that.

But I’m saying from a constitutional objective standard, what the Court does is the Court looks at the objective words. Okay?

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The Court went on as part of its ruling and it said: “. . . the fact that audience members reacted by using force does not transform Trump’s protected speech into

unprotected speech. The reaction of listeners does not alter the otherwise protected nature of speech.”

So in other words, the courts, and we, look at the objective meaning, the plain language of terms. We do not look at how those terms may be interpreted by the audience. Okay?

And they later said in that same case, “It is the words used by the speaker that must be at the focus of the incitement inquiry, not how they may be heard by a listener.”

So, again, we look at the words itself. Okay?

And then — and the case sort of cites the substantial amount of case law. I’m not going to cite all that because I do want to keep this motion short.

So we’re not talking a difficult leap of faith to understand the applicability of *Nwanguma v. Trump*.

In fact, I would submit that the petitioner — or the plaintiffs in *Nwanguma v. Trump* used — I don’t know — exactly know what the argument,

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but I’m assuming very similar arguments to petitioners here because they talked about the objective use of the words. The Court rejected how they’re interpreted by listeners. You have to look at the words themselves.

In that case, the, you know, “get ‘em out of here,” even that, the Court was unwilling to accept as incitement. And the Court was very explicit, saying that it was negated.

And, of course, we have other courts talking very much about the incitement, and we cited some of that in our motion, even particularly provocative, directive language, very foul language in the cases directed at audiences and even that far more — far closer in time than what we have here was treated as not imminent.

So under the imminence standard, absolutely nothing that President Trump said prior to January would constitute incitement. And the most they've been able to come up with is the "will be wild" tweet. That's the most they have been able to come up with.

THE COURT: Well, what about the Ellipse speech?

MR. GESSLER: I'm getting there.

THE COURT: Okay.

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MR. GESSLER: I'm fixing to get there.

THE COURT: Okay.

MR. GESSLER: But I said prior to January 6.

THE COURT: Oh, I'm sorry, I missed that.

MR. GESSLER: Okay.

So what I'm saying is, that's a pretty easy analysis. Under the imminence prong, none of that stuff counts.

Which brings the petitioners' case to one item, which is the Ellipse speech. And absolutely nothing in there, nothing in there, none of Trump's, President Trump's words were a call to violence.

And look, if the Nwanguma court says: Big crowd, protesters in there, crowd angry, "get 'em out of here" five times, direction to the crowd, focused on that person or those few plaintiffs, demanding that they be removed, "get 'em out of there," if the Court doesn't accept that as a call to riot, as incitement, there is no way that when President Trump says, "We need you to fight for our country, we need you to march down on the Capitol," there is no way that is incitement.

And then, of course, the peaceful and patriotic. Now, look, the petitioners have seemingly developed an argument that: Well, he didn't explicitly

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say, “be peaceful and patriotic.” President Trump merely said, “I know you’ll go down there peacefully and patriotically.”

But he emphasized “peacefully” and he emphasized “patriotically” in that speech. And under the same —

THE COURT: When you say “emphasize,” you mean, in what way?

MR. GESSLER: Well, he — he made strong words, he talked about it vociferously, and it was towards the end of the speech in the penultimate “what we are here to do today. I am with you, I am going to go down there with you, peacefully and patriotically.”

And — you know, and so he created a common sense of purpose as the, you know, penultimate culmination of his speech. That’s why it was towards the end.

And so that certainly negates as well any violent intent.

So the words themselves, the objective meaning and objective use of the words, there is no call to violence. And everything that Trump says, “fight,” is a common, common political metaphor meaning a political fight.

And Trump, on multiple occasions, says:

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We’re going to go down there and we’re going to give our Representatives courage, we’re going to demand that Vice President Trump — Pence do the right thing. And obviously I’m paraphrasing.

I’m happy to repeat the speech if the Court wants, but you have it in front of you, a transcript. And you can look at those words. And under an objective meaning of those words, none of them, none of them are incitement.

Then the last argument that they make is that President Trump failed to do enough to stop the riot once

it started. Okay? So they have sort of three — within the world of speech, the evidence, they sort of have three components:

First component is all the stuff in advance of January 6. Doesn't meet the imminence test.

Second component they have is the January 6 speech, and they say that's what incited. And even their own evidence, even quoting from the January 6 Report, the January 6 Report says the violence started well before President Trump finished his speech. So that part of the violence, he certainly didn't incite with the January 6 speech.

And then their argument is, Well, he failed to stop the ongoing violence. And that's

[p.181]

inaction, which has never been held to cause incitement.

And even — and it's not an overt, voluntary act. There's no evidence of that. And even this Court has required specific intent. And there's no intent that President Trump's absence — what they call an absence; I mean, we dispute that factually. There's tweets in there where he says, Be peaceful, stay peaceful, and then a video. I mean, three communications.

And, of course, they say that's not enough. And under the Brandenburg standards, though, it's not even close to enough. That's not incitement.

So that's our motion for directed verdict, Your Honor. The Court has not yet ruled on these First Amendment issues, and obviously we're asking the Court to rule on it at sort of what I always call half-time motions.

But it has been pretty thoroughly briefed, and the reason I waited was to see what evidence. I mean, maybe they had evidence that Trump was on the phone with Proud Boys, saying, Go — I mean, maybe they were to

bring some evidence in there that, you know, he was sitting in a room and they were plotting out, you know, where people were going to stand and do it, but there's none of that. It's all speech.

[p.182]

And so even on the grounds of speech, what President Trump did that day is not incitement under very well-established First Amendment principles, Your Honor.

THE COURT: Are you prepared to respond now, or do you need a few minutes to regroup or —

MR. MURRAY: Your Honor, we're happy to start now, but I think, you know, given the time, it might be better to give us a few minutes over lunch.

THE COURT: So this is where I am, is that I'd like to rule after lunch. And we did start 20 minutes late today, so I think Mr. Gessler spent about 15 minutes.

So if you think you can respond at the same amount of time, we would just probably break at 12:30 to 1:30 for lunch.

MR. MURRAY: That's fine, Your Honor. Thank you.

THE COURT: Okay.

MR. MURRAY: As we just heard from Professor Magliocca, to have engaged in insurrection means any voluntary act by word or deed in furtherance of the common unlawful purpose of the insurrection.

The Fourteenth Amendment is not limited to incitement. It includes any voluntary conduct including specific acts of encouragement that further that common

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end.

President Trump was not just a part of the insurrection on January 6. He was the leader of the insurrection. He summoned the mob with repeated

tweets identifying January 6 as the time to descend on the Capitol.

We've seen from both the written evidence and the testimony of Professor Simi the effect that Trump's statements and tweets in advance of January 6 had on mobilizing violent extremists to come to the Capitol ready to fight.

And he did that using violent language. Just hours after he tweeted, "Come to DC, will be wild," he retweets from a right-wing extremist website a video chanting, "Fight for Trump," over the course of over a minute just to be sure that his supporters would have no doubt what his intentions were.

Second, his lies gave the mob their common purpose. Beginning well before the election and leading up to it, he repeated claims that the only way he could lose the election was if it was stolen. And immediately on election night, he began repeating those same claims, even after court after court rejected his lies and even after advisor after advisor told him there was no basis for those claims of fraud.

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He created a false and desperate expectation in his supporters that the only way, by January 6, they could overturn the results of what they thought were a stolen election was through force and violence.

Third, he incited the mob with his speech at the Ellipse. And President Trump repeatedly wants to suggest that his speech was all about being peaceful and patriotic, but here's what we know.

We've introduced findings from the January 6 Report showing that President Trump had been briefed well in advance of his speech on the Ellipse on the fact that tens

of thousands of his supporters refused to go through the magnetometers because they were armed.

Despite knowing that, Trump used violent language, referring to “fight” or some version of that 20 times. He told his supporters: They get to go by a very different set of rules because fraud was involved.

That is an implicit call to violence that based on a long-standing pattern of call-and-response that he had developed among his supporters, he knew and his supporters knew were intended as a command to go beyond the normal rules of political engagement.

He told them, “You do not take back our country with weakness,” and he repeatedly painted a

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target on the backs of Vice President Pence and members of Congress.

And he told the mob, not only that they should go to the Capitol, commanding them to go, but told them he would be right there with them because he knew that telling them that would encourage them to go to the Capitol prepared for violence. That’s classic incitement.

The cases that President Trump cites are fundamentally distinguishable. The Nwanguma case was a case where Trump simply said, “Get ‘em out of here,” with no violent rhetoric. The plaintiffs in that case identified no other context that suggested that his words were likely to be taken as a command to violence at the time.

That is not what we have here. We have months of contacts showing what Trump was telling his supporters to do on January 6 and why they were supposed to be there.

JA685

And nobody in that case said, “Fight like hell,” and, “Fight, fight, fight.” This is a fundamentally different situation.

Fourth, Trump incited the mob during the attack with his 2:24 tweet against Mike Pence. This was an hour after he learned that the Capitol was under

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violent attack and that members of Congress and the Vice President’s lives were in danger and he told them: Mike Pence didn’t have the courage to do what needs to be done. USA demands the truth.

In context, “USA demands the truth” means: The mob that is pounding on the doors of the Capitol demand the truth. They are not going to stand for the certification. They’re going to stop it.

At the very least, a reasonable fact finder could draw these inferences about what Trump intended in issuing that tweet.

And fifth, Trump refused to summon a federal law enforcement response to stop the mob or to call the mob off until it was clear they were not going to be successful in disrupting the certification.

The evidence we’ve introduced, including findings from the January 6 Committee, make clear that it was — that after 4:00, it was clear that the certification was not going to be disrupted. Members of Congress had reached safety. Reinforcements had arrived through no effort of President Trump’s, and the insurrection was starting to wind down.

And it was at that point, and that point only, after three hours of watching TV, that President Trump finally told his supporters to go home.

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Now, President Trump's defense is that this is just inaction, this isn't action. But it's a very well-established principle of law that inaction can support a finding of wrongful conduct when there is an affirmative duty to act.

When does an affirmative duty to act arise? Well, number one, when there's a legal duty to act.

President Trump swore an oath, the most powerful oath anywhere in the Constitution, to preserve, protect, and defend the Constitution. That is a legal duty to act.

And you also have a legal duty to act when you've set the events in motion, and certainly we've seen that President Trump did that here.

And we're prepared to provide additional authority in our proposed findings of fact and conclusions of law demonstrating that these are the kinds of circumstances where there is a duty to act.

But what else does his inaction show? It shows that he intended the results of the insurrection, that he intended that the insurrection achieve its ends, because when everybody is telling you you have to do something and you're the most powerful person in the world and you do nothing, that tells us you want them to

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succeed.

I'm pulling up Plaintiffs' Exhibit 78, some of the findings from the January 6 committee.

And if we go to page 150 — excuse me, page 46, Finding 150, which the Court has previously said was admissible.

Evidence from the Committee's investigation showed that the President, when told that the crowd was chanting, "Hang Mike Pence," responded that perhaps Vice President Pence deserved to be hanged. And

President Trump rebuffed pleas from Leader McCarthy to ask that his supporters leave the Capitol, stating: Well, Kevin, I guess these people are more upset about the election than you are.

What clearer evidence of specific intent to incite and aid an insurrection could you ask for?

President Trump's defense is that the First Amendment protects his conduct here. But we've seen that his conduct was not just incitement, his conduct was speech adjacent to criminal conduct. Mobilization, organization.

We've also seen that his conduct falls within the words of the Fourteenth Amendment. And so Trump's argument appears to be that the First Amendment displaces the Fourteenth Amendment, but there's no legal

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authority for that at all. And as we've laid out in the opposition to President Trump's antiSLAPP motion, that simply cannot be right.

The Fourteenth Amendment does not impose any criminal penalty. It simply provides an additional qualification for office, and there is nothing unconstitutional about enforcing that qualification even if the insurrection activity comes by word.

But in any event, the standard for incitement is clearly met here.

Number one, President Trump advocated, explicitly or implicitly, unlawful violent action. We've seen that he called for the crowd to fight, to fight like hell, to go by a very different set of rules.

We've also heard evidence providing context for what those words meant to Trump and to his supporters through a long-standing pattern of call-and-response in

JA688

which he could speak in coded language because his supporters would understand exactly what his coded language meant. That was the testimony you heard from Professor Simi.

And I would direct the Court's attention to the 7th Circuit case in *United States v. White*, 610 F.3d 957 [sic], in which the Court said that threats or incitement need not be in explicit terms; they can be

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also in coded language that is intended and understood as a command to violence.

And that's exactly what we saw with President Trump's speech on the Ellipse, and that's exactly what we saw in his tweet on 2:24.

And, of course, the second prong of the incitement standard is that the speech was likely to incite imminent lawless action.

And of course that was true here. Of course, you have a crowd of tens of thousands of people, half of whom refused to go through the magnetometers because they were armed or carrying prohibited items. Those are from the findings in the January 6 Report that we've introduced.

This is like summoning a mob out in front of someone's house where everyone has pitchforks and torches, and you don't say, "Go burn down the house," but you give a speech that makes it pretty clear to everybody exactly what you're telling them to do. That's classic incitement.

So then Trump's last defense is, he didn't intend it. He incited insurrection accidentally.

But, of course, intent can be inferred from circumstances and from conduct, and the Court doesn't have to check their common sense at the door when

[p.191]

determining what Trump intended by his words and his deeds. And you have to look at the whole context and not just take one word of a speech out of context.

We heard Professor Simi testify about Trump's long-standing pattern of encouraging and praising political violence and cultivating a relationship with violent extremists.

There's a reason we haven't seen political violence on this magnitude in the US in response to speeches by President Obama or President George Bush or Nancy Pelosi or Mitch McConnell. Other leaders don't talk this way, and they don't keep talking this way when they see how their violent supporters respond to the words they utter.

Now, we saw Trump retweeting the warning by a Georgia election official, Gabriel Sterling, about how someone was going to get killed as a result of his violent rhetoric and his refusal to call off his supporters, and we saw that his response to that explicit warning was to double down. And that's not the action of someone who is concerned about violence.

How else do we know what Trump intended? He thought Vice President Pence deserved it. Finding 150 that we've previously looked at.

We also saw his tweets after the attack on

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January 6: These are the things that happen when an election is unceremoniously ripped from his victims. He was praising the violence, "Remember this day forever," because he was in league with the insurrectionists.

And we saw what he was saying even years later, that fraud allowed suspending all rules, including the Constitution of the United States. That was his mental

state on January 6, and that was his mental state even years later.

He has violated his oath. He engaged in insurrection.
Thank you.

MR. GESSLER: Do you want any more argument from me, Your Honor? I'm not insulted if you say no.

THE COURT: I think we should — oh, you want to say something?

MR. KOTLARCZYK: If I may, Your Honor.

THE COURT: Well, Mr. Kotlarczyk, you have said so little, unlike some other folks, that I'm going to give you a chance.

MR. KOTLARCZYK: Your Honor, it's just nice to say something other than my name and "no questions."

Just very briefly, Your Honor.

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Rule 50 is inconsistent with a 113 action. The idea behind a 113 is we get an expedited resolution of this process, we get it all bundled up, and it goes up on appeal for the Supreme Court to consider whether they want to hear it or not.

I think if you consider how this could play out if the Court were to entertain a Rule 50, is if the Court were to grant the Rule 50, we could end up in the Supreme Court on the three-day expedited appeal.

Supreme Court could say, Actually — you know, after allowing for briefing and all that, say: Actually, you know what, we think the district court erred, it should not have granted the Rule 50. Let's go back down.

We then have a whole half of this case we would still have to try, and all of a sudden January 5 is looking really close when the Secretary is going to have to make a certification decision.

So I would point the Court to Rule 81 of the Colorado Rules of Civil Procedure, which say that when a special statutory proceeding — which 113 undoubtedly is — provides its own procedures and the Rules of Civil Procedure are inconsistent with the special statutory proceeding, the Court should follow the procedures of the special statutory proceeding and not

[p.194]

those of the Rules of Civil Procedure.

Rule 50 talks about a directed verdict. There's not a verdict at the end of a 113 action, Your Honor. There's an order directing substantial compliance with the election code.

So we just think that this Rule 50 motion is procedurally improper and should be denied on that ground.

Thank you.

THE COURT: Okay. I'm going to take it under advisement and hopefully have something to say in response when we reconvene at 1:30 today.

And, Mr. Gessler, you'll be prepared with your first witness?

MR. GESSLER: Yes, Your Honor.

Last housekeeping thing.

For tomorrow, we have a witness who needs to start at 1:00, so if we can just do that as part of the planning process, I want to give you that well in advance.

(Siren interruption.)

THE COURT: Well, you've gotten it three times already today, your —

MR. GESSLER: That's a notice to pay particular attention to what I'm saying, Your Honor.

[p.195]

THE COURT: Okay. Okay. We will — why don't we just make it 1:35, we'll be back.

MR. GESSLER: Okay.

(Recess taken from 12:32 p.m. until 1:40 p.m.)

THE COURT: You may be seated.

So turning to the motion for directed verdict, motion for directed verdict may be granted only when the evidence considered in the light most favorable to the opposing party compels a conclusion that reasonable persons could not disagree as to the evidence or to the inferences which could be drawn from the evidence and when no evidence has been presented that could sustain a verdict against the moving party.

The Court must consider the evidence and the reasonable inferences from the evidence in the most favorable way to the nonmoving party.

Here, in this case, I tend to agree with — Mr. Kotlarczyk is correct that this — it would be inappropriate to grant a Rule 50 motion given the expedited proceedings.

However, even if it was appropriate, I would deny because the motion brings up significant legal issues, many of which have never been decided by any court.

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For instance, essentially one of President Trump's arguments is that the First Amendment displaces the Fourteenth Amendment, or at the very least, the Court needs to interpret the Fourteenth Amendment with a First Amendment overlay.

The petitioners argue that I should apply the Fourteenth Amendment on its face and that it is not subject to or somehow a lesser amendment than the First Amendment.

JA693

There is clearly a conflict. On the one hand, you have people in the 1800s being disqualified for writing a letter to the editor. Clearly speech. On the other hand, you have a body of law holding the standards for finding incitement are very high and the speech needs to be very specific.

The Court is not prepared today to reconcile those two bodies of law.

Similarly, on the one hand, Intervenor Trump argues the Court cannot look at statements that are in a glacial pace to find incitement.

However, the petitioners argue that I can look at those statements for context and to infer intent and the plan for incitement they contend was caused by the January 6 speech.

Trump argues that the January 6 speech
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does not meet the standard of incitement, but then I have Professor Simi stating that based on the relationship that was built, the words were coded. Petitioners argue and have cited cases that the Court will look at coded languages when determining incitement.

To be clear, I'm not deciding any of these issues. I'm denying the motion for directed verdict because in order to grant the motion for directed verdict, I would have to decide many legal issues that I am simply not prepared to decide today.

Further, I think I will be better informed to decide the legal issues when I have more of a factual context, which I expect I will have after the presentation of intervenors' case.

So I will address the First Amendment issues brought up in your motion for directed verdict when I make my final findings of facts, conclusions of law, and all the other

legal arguments that I need to decide between now and then.

Is the intervenors, I think we were going to start with President Trump? Are they ready to call their first witness?

MR. GESSLER: Yes, Your Honor, we are.

Would you like a quick entry of appearance, or is this morning's entry adequate for you?

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THE COURT: Do we have new people who need to enter their appearance?

MR. GESSLER: Yes, we do, Your Honor.

So on behalf of President Trump, Mr. Geoffrey Blue will also be here today.

THE COURT: Okay.

MR. GESSLER: And he and Mr. Shaw will be handling our witnesses today, Your Honor.

THE COURT: Oh, I'm sorry, because we heard from Mr. Blue yesterday. You mean just they hadn't entered an appearance today?

MR. GESSLER: Yes, Your Honor.

THE COURT: And then what about — are you calling the witness today that had the issue with the lawyer needing to be —

MR. SHAW: Yes, Your Honor.

Mr. Jesse Binnall is on, and I believe he was admitted — it was not clear to me whether he was admitted just by the Supreme Court and waited for you to admit him or whether you have already admitted him.

THE COURT: I think that — he hadn't filed a motion, but I think he subsequently filed — he did it in exactly the backwards order. He got approval from the Supreme Court and then he filed a motion, but I believe that he has been approved by the Supreme Court

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and that we have granted the motion.

MR. SHAW: Great. So he is on the WebEx.

THE COURT: Okay. And so is he — is it — your very first witness the one that he's representing the witness himself?

MR. SHAW: Yes, Your Honor.

THE COURT: Okay.

The witness is going to be on WebEx?

MR. SHAW: Yes, Your Honor.

THE COURT: Okay. We need to turn the screen around so the court reporter can see the witness speak.

Will you call your first witness.

MR. SHAW: Yes. We would call Kashyap Patel.

(Appearing via WebEx.)

THE COURT: And, Mr. Patel, can you hear us?

THE WITNESS: Yes, ma'am, I can.

THE COURT: Okay. We're going to need to turn up some volume majorly. I could hear you but just barely.

THE WITNESS: I'll endeavor to speak up, Your Honor.

THE COURT: Okay. So that amount, which

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you probably thought were shouting, was just about the perfect amount, so definitely speak up.

THE WITNESS: Will do.

MR. SHAW: Did you want to swear the witness, Your Honor?

THE COURT: Yeah.

KASHYAP PATEL,

having been first duly sworn, was examined and testified as follows:

THE COURT: Great.

JA696

DIRECT EXAMINATION

BY MR. SHAW:

Q. Mr. Patel, thank you for interrupting your visit with your family to be with us today.

Let's briefly discuss your background.

Am I correct that you're a recovering lawyer?

A. Yes.

THE WITNESS: And, Your Honor, thank you for letting me appear remotely. I really appreciate the accommodation. I have not practiced law in maybe close to a decade.

Q. (By Mr. Shaw) Well, did you ever practice law? You imply you did. When did you practice law?

A. When I first graduated law school in 2005,
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I served as an Assistant Public Defender in and for Miami-Dade County, and later went on to serve as an Assistant Public Defender for the Southern District of Florida.

And thereafter, I transitioned to the Department of Justice's National Security Division, where I served as a terrorism prosecutor, and served one more counsel role thereafter on Capitol Hill.

Q. Okay. And when you were at — and when you were at the Department of Justice, did you also serve as a legal liaison to the Department of Defense?

A. Yeah. My duties while being a terrorism prosecutor, I was the selected representative to be the DOJ liaison to a Joint Special Operations command embedded with Special Forces units to work on collaborative global targeting operations.

THE COURT: So is there any way to get him to be a little bit louder without making him doing whatever he just did?

JA697

MS. BILA: That's what I was trying to do, Your Honor.

THE COURT: Yeah.

MS. BILA: And it doesn't seem as if I'm able to without the feedback.

THE COURT: So, Mr. Patel, if you can just [p.202]

kind of lean in —

THE WITNESS: Yeah.

THE COURT: — it will be good. You're — I can hear you, but it's kind of going in and out.

THE WITNESS: Yes, ma'am.

THE COURT: Perfect.

Q. (By Mr. Shaw) Okay. How long were you at the Department of Justice?

A. Approximately four years.

Q. Okay. And when did you leave the Department of Justice?

A. When I left the Department of Justice, I went on to serve as senior counsel and the National Security Advisor to the House Permanent Select Committee at the United States Congress, where my duties were to run the counterterrorism platform oversight operations and also serve as the lead chief investigative counsel for the investigation into Russian active measures.

Q. Okay. And am I correct in thinking you were with the House from about 2017 to 2019?

A. Yes, that's correct, just about early 2019.

Q. Okay. And then where did you go after — or in early 2019?

A. Thereafter, I transitioned to the White [p.203]

House's National Security Council.

JA698

And I would shortly, after going over to the White House, become the Senior Director for Counterterrorism, where I ran the counterterrorism policy platform for then-President Trump, along with the hostage portfolio, counter-narcotics, counter-human trafficking, and a slew of other counterterrorism-related matters.

Q. Okay. And how long did you stay in that position?

A. On and off for two years, over two years. The role was broken up by one temporary duty assignment where I served as the Deputy Director of National Intelligence over at the Office of the Directorate of National Intelligence, where our duties were to oversee the 17 intelligence organizations, along with providing the presidential daily briefing to the President and his Cabinet.

I would return to the White House after four or five months at ODNI, and I would finish the administration's term as Chief of Staff over at the Department of Defense.

Q. And who were you supporting as Chief of Staff?

A. At the time, it was Acting Secretary of Defense, Christopher C. Miller.

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Q. And when did you finish up your term as Chief of Staff to the Acting Secretary of Defense?

A. We both had our terms expire on January 20, 2021, at high noon.

Q. And what do you do now?

A. I have a multiple — roles. I'm a consultant. I have a national security practice. I'm the senior fellow at the Center for Renewing America and National Security.

I serve on the board of TMTG Technology Company. I'm the Senior Advisor to President Trump for national security defense and intel. And I also have a 501(c)(3) charity, where I serve as the President of the Kash

Foundation, where we have multiple lines of efforts giving away money to those in need.

Q. Okay. I'd like to focus on your time as Chief of Staff to the Acting Secretary of Defense.

And I'd like to show you what's been marked as Exhibit Number 1027, which I believe is either already in or has not been objected to.

MR. SHAW: Is there any objection to that?

MR. GRIMSLEY: I believe it's in, but there's no objection.

THE COURT: Okay. 1027 is admitted if it hadn't already been.

[p.205]

(Exhibit was admitted into evidence.)

MR. SHAW: Okay. Could you put that up, please, Joanna.

Colin, can you let me in? Thank you.

Q. (By Mr. Shaw) Okay. So looking — can you see — can you see Exhibit 1027, sir?

A. I don't think so, unless I'm —

THE COURT: I can't see it, either.

MS. BILA: One second.

A. Now I see it.

Q. (By Mr. Shaw) Okay. Great. If you need it to be scrolled, just let us know.

But do you know what that document is?

A. It's a part of one of the Department of Defense's timelines we created encapsulating our involvement in and around the events of January 6, 2021.

Q. Okay. If you would look at the third bullet point under the heading "Sunday, January 3, 2021."

A. Yes.

JA700

Q. Okay. It reads: "A/SD and CJCS meet with the President: The President concurs in the activation of DCNG to support law enforcement."

Do you see that?

A. Yes, I do, sir.

Q. What does the abbreviation A/SD stand for [p.206]

in DOD parlance?

A. Acting Secretary of Defense.

Q. And that would be Acting Secretary of Defense Miller for whom —

A. Yes, sir.

Q. — you were working at the time?

A. Yes.

Q. What about CJCS?

A. It's the Chairman of the Joint Chiefs of Staff. And at the time, it was Chairman Mark Milley.

Q. And what do you understand DCNG to mean?

A. That is the abbreviation for the Washington, DC National Guard Bureau. Every state has its own National Guard, and since DC is a federal complex, they have their own National Guard.

Q. Okay. So what do you understand this entry to be conveying?

A. We had a meeting at the White House, as indicated by the timeline, on January 3 about events wholly unrelated to this regarding national security.

And at that meeting, President Trump brought up the possibility of utilizing National Guard forces for the upcoming voting confirmation process, and that bullet point refers to his authorization, which we captured in this timeline.

[p.207]

Q. And the purpose — was the purpose of that to support local authorities and law enforcement?

A. The purpose of National Guard has always been, my understanding, is to support local law enforcement when a request is made through their chain of command, which would be the governor, or the mayor since it's Washington, DC, or the Capitol Police Chief since we're talking about the Washington — the Capitol Building itself in those grounds in Washington, DC.

Q. Okay. Now, I'd like to show you Exhibit 1031, which has also been previously admitted.

MR. SHAW: So, Joanna, if you could put that up, and let's start with the cover page.

Q. (By Mr. Shaw) Sir, do you recognize this as the November 16, 2021 report of the Department of Defense Inspector General regarding his review of the Department of Defense's role, responsibilities, and actions to prepare for and respond to the protests and its aftermath at the U.S. Capitol campus on January 6, 2021?

A. I do.

Q. Okay. And since it was prepared November 16, 2021, that would have been during the Biden administration, correct?

A. That is correct.

[p.208]

Q. Okay. Were you interviewed for that report?

A. I was not.

Q. Okay. All right.

MR. SHAW: Joanna, if you could put up page 15 now, please. It's actually the numbered page 15, so it may be different than the 15 on the document.

There you go. Thank you.

JA702

Q. (By Mr. Shaw) So let me direct your attention to Table 1, starts on page 15, and then we'll carry on to page 16, which we'll get to in a minute.

Do you recognize that as a chronology of significant events leading up to January 6?

A. Yes, in general.

Q. Okay. And let me direct your attention to the second entry for December 31, 2020.

Do you see that entry?

A. Yeah, I got it.

Q. Okay. Does it discuss a DC RFA to the DCNG for January 5 through 6, 2021, for — and I'm paraphrasing — traffic control and crowd control at metro stations and response capability?

A. Yes, I see that. That's what's reflected there.

Q. Could you please explain what you

[p.209]

understand that entry to mean.

A. An RFA is a request for assistance, which is the formal verbiage when an appropriate level officer or Secretary submits a request for National Guard assistance.

And as is documented here, that RFA went specifically to the Washington, DC National Guard for the very specific duties of performing traffic control at intersections and crowd control at metro stations.

When the requests for National Guard are provided, they are also, as is notified here, granted with specificity as to what they're requesting, not just generally people. And that's encapsulated by this bullet point here.

And M.G. Walker at the time was Major General Walker, the head of the Washington, DC National Guard.

Mr. McCarthy was the Secretary of the Army at the time. The Secretary of the Army controls the entire

National Guard org structure for the United States of America.

Q. And this RFA, or request for assistance, was that coming from the DC local government?

A. Yeah. That's what all those letters stand for.

[p.210]

Q. Okay. And so if I understand that correctly, the DC local government was requesting a limited number of DC National Guard members.

Is your recollection about 340; is that — is that right?

A. Specifically, it was 346. The request came in through Mayor Bowser's office, who was mayor of Washington, DC at the time, and the specific request was not just with numbers, but what their assistance was to be utilized for, which was our practice when receiving a request. We needed to know how to arm, kit, and man our troops.

And in this instance, they would not be armed, if I recall correctly. They would be wearing the bright yellow vest and assisting in traffic duties and possibly wearing protective gear, but that would be about it, from my recollection.

MR. SHAW: Okay. Now, if you could switch to page 16, Joanna.

Q. (By Mr. Shaw) And I would direct your attention to the second entry for January 3, 2021, sir.

A. I got it.

Q. And that entry reads, "Mr. Miller and General Milley attend a White House meeting. At the end of the meeting, the President asked about election

[p.211]

protest preparations, and Mr. Miller tells him, quotes, we've got a plan and we've got it covered."

Do you see that?

JA704

A. Yes, sir.

Q. Okay. Do you understand that to be the same January 3 meeting discussed in the Department of Defense timeline we reviewed a few minutes ago?

A. It's one and the same.

Q. And did you attend that meeting?

A. I did.

Q. Okay. Did you attend in your capacity as the Acting Secretary's Chief of Staff?

A. I did.

Q. Was it common practice for you to attend meetings at the White House when the Acting Secretary attended?

A. Almost every one.

Q. Do you remember where that meeting took place?

A. In the Oval Office.

Q. Can you tell us what was discussed at that meeting?

A. Mostly no, because it was involving a matter of national security that I'm not at liberty to discuss here, but it had nothing to do with these events.

[p.212]

And then at the back end, as this timeline notates, there was a discussion briefly about National Guard forces and the upcoming protest.

Q. And so according to the timeline we just looked at, the Acting Secretary told the President, "We've got a plan, and we've got it covered."

Was there any other —

A. Yes.

Q. — or any further detail discussed at that meeting?

A. Yeah. I don't remember exactly the verbiage, but having — as you walk through prior to January 3, specifically on December 30 and 31, requests for National Guard coming in, our practice under the law, as we

understood it, was we needed presidential authorizations for it.

During this conversation, the President authorized 10- to 20,000 National Guardsmen and women to be utilized, if necessary, around the country to provide assistance to local law enforcement.

Q. So as of that January 3 meeting, was there any doubt in your mind that the President was on board with DOD using whatever National Guard resources were needed in its discretion?

MR. GRIMSLEY: Objection. Leading.

[p.213]

A. No, he authorized it.

THE COURT: Sustained.

Why don't you ask the question again, please.

MR. SHAW: Sure.

THE COURT: And, Mr. Patel, you need to — before answering, if there's been an objection — which you may not have heard — you need to let me rule, okay?

THE WITNESS: I'm sorry, ma'am, I didn't hear that. Okay.

THE COURT: I think you need to — in order for him to hear your objection, you're going to have to move the speaker over so he can —

MR. SHAW: The mic, she means.

Q. (By Mr. Shaw) Did you have any doubt, as you left that January 3 meeting, that the President was on board with DOD using whatever National Guard resources were needed in its discretion?

MR. GRIMSLEY: Objection. Leading.

THE COURT: Sustained. Try again.

Q. (By Mr. Shaw) At the conclusion of that January 3 meeting, what was your impression of the President's position on the use of the National Guard?

JA706

MR. GRIMSLEY: Objection —

A. We had all —

[p.214]

MR. GRIMSLEY: Objection. Calls for speculation to the President's intent.

THE COURT: He can — he can respond to the extent he had an impression.

Objection —

THE WITNESS: Yes, Judge.

THE COURT: — overruled.

THE WITNESS: Sorry.

A. My understanding from that meeting was that the President had authorized the National Guard troops we needed, and under the law as we understood it for National Guard purposes, we had Step 1 of a two-step process.

And so we had everything we needed — because this is what we do all the time — to go execute Step 2 of the plan while leaving, which is why Secretary of Defense Chris Miller said, "We've got a plan, and we've got it covered." That's what we do. We do reps and sets.

Q. (By Mr. Shaw) To your knowledge, did anyone at DOD over the coming days or certainly at — let me strike that.

To your knowledge, did anyone in DOD leadership over the coming days ever suggest more or different authority was needed from President Trump in

[p.215]

order to utilize the National Guard troops?

MR. GRIMSLEY: Objection. Lacks foundation.

MR. SHAW: I asked about his knowledge, Your Honor.

THE COURT: Overruled.

You can answer if you have an answer.

JA707

A. Under our practice, we would consult with the Office of the General Counsel at the Department of Defense, along with the White House Counsel's Office, for any legal requirements we might need.

But from my perspective and my conversations with the Secretary of Defense and the Chairman and the Secretary of the Army, we had what we needed to initiate under the law the first 0, 1, 2, 3 phases, as we call them, for the employment, deployment, and activation of the National Guard.

Q. (By Mr. Shaw) At that meeting, did you understand President Trump to have limited DOD's authority to deploy National Guard troops in support of the civil authorities in any way?

A. No. Just that the number was 10- to 20,000, so if by chance we needed more, we would have gone back to the Commander in Chief.

Q. Let's go back to Exhibit 1031, page 16,
[p.216]

which I think we were already on.

And let me direct you to the third entry from the bottom, which reads: January 5, 2021 — I'm sorry.

Okay. "January 5, 2021, during the evening, the President calls Mr. Miller to discuss the upcoming rallies. Mr. Miller told us that the President told him to, quotes, do what's required to protect the American people."

Do you understand that to be referring to deploying National Guard troops?

A. Yes.

Q. Was there anything else you can think of that might have been referring to?

A. No, because Secretary of Defense Christopher Miller and I spoke about that conversation and we —

MR. GRIMSLEY: Objection. Hearsay.

THE COURT: Sustained.

Q. (By Mr. Shaw) When you and Secretary Miller spoke about that conversation, was it in order to take a course of action?

A. We didn't need to take a further course of action. We had already implemented our processes under the President's authorization under the law as we [p.217] operated.

So this was just another presidential statement, but we didn't need it. We had what we needed.

Q. Were detailed operational plans for deployment of the National Guard discussed with the President?

A. No. That's — I can't think of a time where we ever would do that.

Q. Why not?

A. While the President is the Commander in Chief of the armed forces, the duties through multiple, what we call fragos, fragmentary orders and the like, are delegated down to the SecDef, which is the National Command Authority, down to further delegations to the Secretary of the Army.

The President is — we go to the President for authorizations we need and keep him abreast of any issues we think important that rise to his attention, but we have career professionals in place to perform those logistical preparatory works, such as activating the National Guard and running drills.

Q. Between January 3 and January 6, were you personally paying attention to the National Guard issue?

A. Yes.

Q. In what way?

[p.218]

A. Well, as the individual charged with not just being the Chief of Staff for the Assistant Secretary of Defense but for the entire Department of Defense, and his office, I was directly responsible underneath the Secretary to ensure any orders he gave were followed.

And I was in, maybe not every single meeting, but probably close to all of them regarding National Guard forces, their employment, deployment, and activation.

Q. Did you attend meetings with law enforcement agencies at which the topic was discussed?

A. I think I was at the FBI Washington field office one time with then-acting — or then- — excuse me, then-Deputy Director Mark D'Antuono, if I recall correctly.

Q. Were you aware of and following communications with the local authorities about the subject of the National Guard?

A. What we did, because the Secretary of the Army is our point person, Secretary McCarthy was the direct liaison in the field with law enforcement and Mayor Bowser's office. That was our established practice. That was the established practice going back to the summer of 2020 specifically and before that, and that was his job.

[p.219]

So there was no need for us to directly engage. We had our appropriate military personnel and their staffs coordinating directly with local law enforcement.

Q. Okay. And so just to close this out, to your knowledge, did any senior DOJ leader ever state, in words or substance, that they felt they needed more or different authorization from President Trump before they could deploy National Guard troops to keep the peace on January 6?

A. No.

JA710

Q. Okay. So Department of Defense, based on what you're telling us, felt they had authority to use National Guard troops, and President Trump had been clear that he wanted DOD to do what was necessary to protect the American people.

So why didn't we have 10,000 National Guard troops suited up and armed, guarding the Capitol on the morning of January 6?

A. Well, there's a multitude of reasons, but namely under the law as was — as the Department of Defense was operating under pursuant to guidance by the Office of General Counsel and the White House Counsel's Office and probably the last hundred years of National Guard authorities, step one was a Commander in Chief's

[p.220]

authorization, which we had.

Step two was a request by the governing body, the local governing body, which is usually governor. But in this instance, it's the mayor since it's Washington, DC, and/or the heads of the Capitol Police Bureau because we're talking about the Capitol Building.

Absent those requests, we were under the advisement of our legal counsel's offices that we could not activate the National Guard.

We could and did everything we could up to the legal limit to try to begin the processes of getting these folks ready in case that request came in. And what I mean by that is people forget the National Guard is very part-time military. They're doctors, they're lawyers, they're teachers, they're husbands, they're wives, they're fathers, in the community. We have to go get them.

And then after the request is made, we can do that and bring the authorities in that we have in the Office of the

JA711

Secretary of Defense to bear. But absent the request, we could not fully launch that process.

Q. Did part of the process involve reaching out to the local authorities to see if they wanted National Guard involvement?

[p.221]

MR. GRIMSLEY: Objection. Leading.

THE COURT: Overruled.

A. Normally, no. Normally, the request would come in.

But in this instance, the Secretary and I, along with others, felt this matter was important enough that we ordered the Secretary of the Army, after that authorization came in on January 3, to begin engagements with Mayor Bowser and the Capitol Police, who he had already been speaking to on other matters that we've discussed here.

And we wanted to make them aware that the President authorized 10- to 20,000 National Guard, and we wanted to ask them if they had a request. It was sort of a — it was a proactive, preemptive measure. If they needed it, we could begin that big lift; that is, moving thousands of human beings across the country.

Q. (By Mr. Shaw) And why is — what is your understanding of why DOD is reluctant to deploy National Guard without a request from local authorities?

A. My understanding is historically, how the Department is operated is they do not want to deploy uniformed military officers into and around the United States without the appropriate legal authorities because one of the bedrock principles of having a

[p.222]

civilian in charge of the military is that there is no military sort of hijacking of local governmental offices and powers.

And I think that's the way, from my understanding, that the departments — Department of Defense has operated its National Guard with that history in mind.

Q. And if the local authorities explicitly tell DOD that they don't want the National Guard deployed, what would DOD's reaction be?

A. We, under the advice of our general counsel's office, the White House Counsel's Office, along with other agencies and departments who all agreed, that absent a request, we would not move the National Guard process forward because we had — or our lawyers had made the determination that based in history and law and precedent, that that would not be an appropriate maneuver for the Department to undertake unilaterally.

Q. So the Secretary of the Army had reached out to local authorities, both in the DC government and at the U.S. Capitol Police. What was the response?

A. I'm paraphrasing, but I think the documents have been made public. Mayor Bowser wrote a letter herself approximately January 4 or 5 — I don't have the exact day — declining further requests for

[p.223]

National Guard services outside of the 346 National Guardsmen we had already sent her.

And as far the Capitol Police go, it's encapsulated in multiple people's timelines, including the Chiefs — or excuse me, testimonies from the Chiefs of the Capitol Police and the Capitol Police timeline itself, where the Sergeant at Arms declined the chief of police's request for a National Guard request.

JA713

And, thus, those two were our answers, as we understood it, from the two governing authorities as far as January 5 and into January 6 from a timeline perspective.

Q. Okay.

MR. SHAW: Could you put up Exhibit 1028, please.

And I believe this is another one to which there's been no objection, but I do not believe it's yet been admitted, so I would like to move that this one be admitted if it hasn't yet been.

MR. GRIMSLEY: No objection.

THE COURT: 1028 is admitted.

(Exhibit 1028 was admitted into evidence.)

Q. (By Mr. Shaw) And, Mr. Patel, I would ask you if you recognize this letter?

A. I do.

[p.224]

Q. And what is it?

A. It's a letter from — excuse me, if you can just scroll down. One second. I just want to confirm the bottom.

MR. SHAW: If you could scroll down.

A. Okay, thank you.

It's the letter I referenced from Mayor Bowser, I believe on January 5, to the Department of Defense, where she specifically stated, "We would not be requesting any additional National Guardsmen and Women."

And that was her letter to us. That was the declination of a request, and so we were on standby.

Q. (By Mr. Shaw) Okay. Did there come a time when the local authorities asked that the National Guard troops be deployed?

JA714

A. When you say “local authorities,” can I just ask for clarification: Do you mean the mayor or — or line-level agents?

Q. Well, if that’s an important distinction from your perspective, why don’t you explain what you mean.

A. Well, sure. We always listen to our operators in the field, our partners in the field; here, police officers, both at Metropolitan Police Department,

[p.225]

which is DC, and the Capitol Police Department. We’ve known these folks for a long time, worked with them for decades.

And so we always have these personal relationships where we’re getting our own communications, saying — and a lot of those folks said, you know, We would really like National Guard assistance, but there’s a chain of command.

And as this letter speaks to the top of the chain of command for the mayor and, conversely, the Capitol Police timeline, and the Chiefs’ testimony speaks for them, there was a declination by the commanding authorities respectively, even though the will of the folks doing the work on the ground was slightly different.

Q. Okay. Well, did there come a time when the commanding authorities for the — for DC local government and/or the Capitol Police requested National Guard support?

A. It was on the afternoon of January 6, and I believe you have the timeline which has some of the delineation specifically.

MR. SHAW: Well, let’s — let’s put up that timeline.

Q. (By Mr. Shaw) And you can point us to

[p.226]

anything on there that you think is useful.

JA715

MR. SHAW: So if you put up page 16 —

Q. (By Mr. Shaw) Which timeline do you want? Do you want the DOD timeline?

A. There's another one with times on it, but I can — I think the D- —

MR. SHAW: Go to the other timeline.

A. Yeah, the DOD one. Sorry. If you just scroll down a little.

MR. SHAW: Scroll down.

A. Yeah, there you go.

So that is the — not everything that happened, of course, but some of the highlights that were happening during the day.

And you can see specifically at 1422, at 2:22 in the afternoon, the Secretary of the Army had a phone call with Mayor Bowser and her deputy mayor and MPD leadership to assess and discuss the current situation on the ground. There was no forthcoming request at that time.

And then Mayor Bowser, later in that afternoon, would make such a request. And as soon as that request was made, it was relayed back to the Office of Secretary of Defense, but we had already preemptively delegated authorities out to expedite the process.

[p.227]

But what most people don't understand is, we can't just have thousands of men and women ready immediately to deploy and employ and activate.

So once we got that go, we had, thankfully, already staged to the limit of the law where we could, and so we probably cut the time down by half. And essentially what ended up happening was the fastest cold start of the United States Military domestically since World War II.

JA716

So while we always wish to have done it faster, the timeline in which we did it was pretty amazing given what the men and women had to do on the ground.

Q. (By Mr. Shaw) Some people now say that the National Guard should have been deployed earlier.

Was any delay in deploying the National Guard attributable, in your mind, to a need for additional or different authority from President Trump?

A. No.

Q. Why not?

A. Well, the President has a piece of it, and we had that piece. And so as I said, we — we acted on that piece proactively, went to the Mayor, went to the Capitol Police. We discussed the responses.

You know, Monday morning quarterback, of
[p.228]

course, we — we wish we had gotten those requests earlier and, you know, things like no-climb fence structures could have been put in ahead of time. But those authorities — I think it's important to note that the head law enforcement authority of the day was DOJ, not the Department of Defense.

It should never be the Department of Defense domestically. And them, along with DHS and the Capitol Police, have measures, such as no-climb fences, that they could have installed, and, you know, I don't know why; those questions have to be asked of them.

Q. Okay. And given President Trump's statement to Acting Secretary Miller the evening before that he should do what's required to protect the American people, was there any doubt in your mind about what President Trump wanted done?

A. No.

MR. GRIMSLEY: Objection. Leading.

JA717

THE WITNESS: Sorry.

THE COURT: Sustained.

Q. (By Mr. Shaw) Given that statement, were you uncertain about what needed to be done or what President Trump wanted done?

A. No. I knew exactly what needed to be done, and we did it.

[p.229]

Q. Was there, to your knowledge, any uncertainty among DOD leadership about what the President wanted done?

A. No.

Q. Did anyone in senior DOD leadership or anyone at all at DOD, to your knowledge, convey to the President any request that afternoon for more or additional authority or authorization or say there was a problem that required his attention to get National Guard troops deployed?

A. To my knowledge, no, but we wouldn't have needed to have done that. We had the 20,000 authorization, so anything inside of a numbers count for 20,000 — just to give you an example, the DC National Guard comprised of 2,500 soldiers, give or take 50. So we would bring in the rest from other regions in the country.

But even the amount of soldiers we put into Washington, DC, it was the largest uniformed occupation of DC since the Civil War. So I didn't think we were going above 20,000.

Q. Did you testify before the January 6 Select Committee?

A. I did.

Q. Were you questioned in a public hearing?

[p.230]

A. No. They declined my request for a public hearing.

JA718

Q. And what sort of hearing were you questioned in?

A. What we call closed-door. Attorneys, members of the Committee, my counsel. That's it.

Q. Was your testimony public when given?

A. No.

Q. Did you tell them what you've told us today about the President and the deployment of National Guard troops?

A. I believe so.

Q. Did the Committee ever call you to testify about those issues in public session?

A. No.

Q. Did you ever review the Committee's final report?

A. In large part, but not — I don't think I could say I read every single page.

Q. Okay. Did you look to see if you were mentioned in the report?

A. With me and my counsel — a little background. We had an agreement with the Committee that my testimony — since I was the first individual subpoenaed by the January 6 Committee, we felt it

[p.231]

appropriate that the transcript should be made public at some point.

And after months-long negotiations, they refused to do so and published their final report, and to my memory, it had been excluded. And our counsel took that up with the January 6 Committee staff as to why the agreement had been violated, and I think on the eve of the dissolution of the Committee, my transcript was the last one released.

MR. SHAW: I have no further questions for you, sir. Thank you very much.

JA719

CROSS-EXAMINATION

BY MR. GRIMSLEY:

Q. Good afternoon, Mr. Patel.

A. Hello, sir.

Q. I started my career as a federal public defender as well, so . . .

I want to start with the day, January 6.

You were not at the White House on January 6?

A. I believe the entirety of the day, we were in the Pentagon.

Q. You were at the Department of Defense, correct?

A. Yes, the Office of the Secretary of

[p.232]

Defenses.

Q. And you didn't speak with President Trump on January 6?

A. I'm sorry?

Q. You did not speak with President Trump on January 6?

A. I don't believe I did.

Q. You did not attempt to reach out to President Trump that day?

A. I don't recall doing that.

Q. President Trump, to your knowledge, did not try to reach out to you or others at the Department of Defense?

A. He did not — well, try, I'm not sure, but he may have spoken to other DOD leadership that day.

Q. To your knowledge, though, you have no knowledge of any such communication?

A. I don't believe so.

Q. You are aware that President Trump knew of the attack on the Capitol by 1:21 p.m. on the afternoon of January 6, correct?

JA720

A. Well, I'm not really sure when he knew of it. We didn't exchange communications on it.

Q. Well, you reviewed the January 6 report; is that correct, sir?

[p.233]

A. Some of it, yes.

Q. And you saw in the January 6 report, Finding 315, that the Committee found that President Trump knew the attack was underway as of 1:21 p.m. that evening?

A. Well, that's what the Committee found, but that doesn't mean that's what I said or I —

Q. You have no — you have no reason to dispute that, though, do you, sir?

A. The — well, I don't know what your reference — can you show me that piece?

Q. Yes.

Can you see my screen. Or no?

A. I see you, sir. I don't see . . .

Q. How about now?

A. Okay. Okay.

Q. And you see there Finding — it's actually: 316 "By 1:21 p.m., President Trump was informed that the Capitol was under attack."

Do you see that?

A. I see it.

Q. You have no basis to dispute that, do you, sir?

A. Nor confirm it. I will just accept what is written.

[p.234]

Q. And you said you had no communications that you recall with President Trump that day?

A. As best as I can recall.

Q. And you don't know who President Trump may have spoken to that day, do you?

A. No.

JA721

Q. You don't know — so you can't say that President Trump reached out at any point in time to DHS that day while the Capitol was under attack?

A. "To DHS." Like the Secretary, or just anyone over there?

Q. Well, to your knowledge, during the attack, President Trump didn't make any calls to DHS, FBI, DOJ, MPD, Capitol Police, correct?

A. When you say "any" — yeah, "any calls," I'm not sure.

If leadership was called, I would have been notified because we would have been on the call.

Q. But leadership was not called; you were not notified of any such call by President Trump to any of those other federal law enforcement authorities?

A. That I'm aware of.

Q. And during the attack, President Trump didn't attempt, to your knowledge, to speak with Secretary of Defense Christopher Miller?

[p.235]

A. I don't — maybe there was a phone call, but I'm not sure. We were — we were occupied executing the deployment of the National Guard.

Q. Sir, you have no basis for saying that there was a call between President Trump and Christopher Miller that day?

A. I don't know that there was or there wasn't.

Q. Now, there was nothing preventing President Trump from sending out a tweet between 1:21 p.m. and 4:17 p.m. telling supporters who were at the Capitol to go home, was there?

A. I don't know —

MR. SHAW: Objection. Foundation.

A. — how his Twitter account works.

JA722

THE COURT: I'm sorry, I couldn't hear your objection.

MR. SHAW: Objection. Foundation.

MR. GRIMSLEY: I'll rephrase.

Q. (By Mr. Grimsley) There's no authority you're aware of, sir, that would have prevented President Trump from sending out a tweet between 1:21 p.m. and 4:17 p.m. telling the people to go home from the Capitol?

A. Not being the social media genius, I guess [p.236]

he could tweet.

Q. And you're aware of no authority that would prevent him from doing that, correct?

A. No, but I'm not the legal expert.

Q. Well, you testified earlier a little bit about the history of the Department of Defense and how they utilize the DC National Guard, and you said — I wrote it down: All the time and decades, they had done it this way.

Did you say that?

A. Yes, I've — that's what the record reflects.

Q. Prior to November 9, 2020, you had never worked at the Department of Defense?

A. That's not true.

Q. When did you work at the Department of Defense, sir?

A. That was my third tour at DOD over my government career.

Q. You had never been in the position of Chief of Staff to the Secretary of Defense before, had you?

A. No, I only served that role once.

Q. You had never been responsible for deploying the National Guard?

[p.237]

A. Prior to what date?

JA723

Q. November 9, 2020.

A. I had not, no, right.

Q. So you were at the — you were at the Defense Department as Chief of Staff from November 9, 2020, and that was after the election, correct?

A. Yes.

Q. That was after the election had been called by media outlets for President Biden, correct?

A. I think most media had.

Q. And then you stayed at the Department of Defense only until January 20, 2021, right?

A. Yes.

Q. So you had less than three months in the position Chief of Staff at the Department of Defense, correct?

A. Yeah.

Q. Now, I want to talk about your testimony about 10- to 20,000 troops being authorized.

You testified during direct that you attended a meeting in the Oval Office on, you say now, January 3, where President Trump, you say, authorized 10- to 20,000 National Guard troops.

Is that right?

A. Yeah, it's about — it's about January 3, [p.238]

but I think the timeline is accurate on it.

Q. And then you said — you also testified that after the meeting, DOD, somebody reached out to Mayor Bowser and Capitol Police saying, We've got all these people we can deploy, do you want them?

A. That would have been the Secretary of the Army, yeah.

Q. So you didn't do that, did you?

A. No. We gave the instruction.

JA724

Q. You didn't witness the Secretary of the Army do that, did you?

A. Witness him do what? Sorry.

Q. Reach out to anybody at the Mayor's office or the Capitol Police.

A. No, I didn't witness him. He went and then reported back to us.

Q. He reported back to you that he actually had talked to them?

A. Yeah. That's how the chain of command works.

Q. Finally, you testified that Mayor Bowser and the Capitol Police rejected the offer, and you point to that January 5 letter.

Right?

A. For Mayor Bowser, yes.

[p.239]

Q. I want to dig into each one of those, first starting with the meeting where you say 10- to 20,000 troops were authorized.

A. Okay.

Q. And you said definitively that it was on January 3. I think you even pointed to a bullet point at one point saying it was January 3.

Is that correct?

A. Yeah, in the timeline.

Q. Well, let's pull that up.

And this is Exhibit 1027.

This is the timeline?

A. Yep.

Q. And you pointed to that third bullet on January 3, correct?

A. I think counsel did, but yeah, okay, sure.

JA725

Q. And you've already testified that you provided testimony, and it was deposition testimony to the January 6 Committee?

A. Yes.

Q. That was under oath?

A. Yeah.

Q. Much closer in time to the actual events than we are here today?

A. Yeah.

[p.240]

Q. And you had actually brought with you to that deposition the DOD timeline.

Do you remember that?

A. Well, there's multiple DOD timelines that I brought, yes.

Q. Yes. But this was one of them, and you brought another one, too, correct?

A. At least one other, yes.

Q. And you remember you were asked about when a meeting or — when a meeting took place where you said that 10- to 20,000 troops were authorized?

A. Right, yeah.

Q. Do you remember what you said?

A. Not off the top of my head.

Q. I want to take you to page 43 of your deposition.

A. Uh-huh.

Q. And go to line 12.

A. Yeah.

Q. Sorry. Go to 38. Go to line 2.

A. Yeah.

Q. And you're discussing there an article from Vanity Fair; is that right?

A. They were asking about it.

Q. And according to the article: "We're

[p.241]

like, ‘We’re going to provide any National Guard support that the District requests,’” Miller responded. “And [Trump] goes, ‘You’re going to need 10,000 people.’ No, I’m not talking bullshit, he said that.”

A. Okay.

Q. And then you answer: Oh, so you remember stuff like that.

So going off just memory — and we can go back to the article when you bring it up — there was a meeting with the President of the United States, Acting Secretary Miller, and some others. And then you couldn’t even remember who else was at the meeting, could you?

A. I could definitively tell you, as I did them, what Cabinet officers were there. I thought that was the important thing.

Q. Yeah, but I think you talked about the Joint — Chairman of the Joint Chiefs of Staff being there earlier today?

A. Yeah.

Q. Yeah. And you were asked these questions in your deposition.

Did you remember the Chairman of the Joint Chiefs of Staff even being at that meeting?

A. Yeah.

Q. No. What does it say here:

[p.242]

“And some others I can’t recall off the top of my head”?

A. So you’re specifically pointing to a line of questioning about the article. The article doesn’t encapsulate the broadness of your question.

I specifically stated at least five other times in that deposition that the Chairman of the Joint Chiefs of Staff

JA727

was present, along with the Secretary of Defense, the Chief of Staff, the President of the United States, myself and White House Counsel, and others.

Q. Let's go to page 43 of your deposition, line 12:

"Do you remember if General Milley was at that conversation?"

"Sorry, which one?"

"The January 5, this conversation regarding the 10,000 troops."

"To the best of my memory, we usually were in the Oval Office meetings with a number of folks, so it was — he could have been. I just don't recall."

Were you asked that question and did you give that answer?

A. Yeah, for a January 5 meeting.

Q. So you're saying that there was a January 3 meeting and a January 5 meeting now where

[p.243]

10,000 to 20,000 troops were discussed?

A. No. I'm saying there was multiple meetings in the Oval Office during that week and before, and this individual is reading, again, from either an article or a date he picked.

As I said in the previous document you showed me, I said specifically it was January 4th or 3rd or 5th at that time; that was the best I could recall.

Q. So you had the timeline then. This was at the end of 2021. You were talking about dates.

You couldn't remember whether it was the 3rd, the 4th, the 5th; and now you're saying definitively it was the 3rd that corresponds to that bullet point?

A. I'm saying there was a meeting on the 3rd definitively. I'm saying you can't correspond it to a specific bullet point because you're citing media articles

JA728

that this prosecutor was asking me about at a specific time and setting.

Q. I want to go back to the timeline, sir.

There's no mention of 10- to 20,000 troops anywhere in that timeline, is there?

A. No.

Q. There's no mention of 10- to 20,000 troops anywhere in that IG report you discussed, correct?

[p.244]

A. Not that I'm aware.

Q. Well, you looked through it both before your deposition and presumably today, no?

A. I looked through some of the timeline. I didn't read the entire 600-page IG report.

Q. Well, you think your lawyers or the people asking you questions would have looked for that if it were in there?

A. You can ask them.

Q. They didn't ask you about that, though, did they?

A. I'm not going to tell you what I talked to my lawyers about.

Q. Okay. Now — well, Mr. Trump's lawyers are not your lawyers, right?

A. No.

Q. Did you prepare with them?

A. I prepared with my counsel.

Q. You didn't talk to them at all?

A. My counsel had discussions with them.

Q. So let's look at that third bullet point, January 3, 2021.

You say that, that bullet point:

"President concurs in activation of the DC National Guard to support law enforcement."

[p.245]

That refers —

A. Yes.

Q. — to 10- to 20,000 troops?

A. In part, yeah.

Q. Well, you know that the DC National Guard doesn't have 10- to 20,000 troops?

A. Right. Thank you for making my point.

Q. Yeah. And it says, "the activation of the DC National Guard," not other National Guard units, correct?

A. Yeah.

Q. And there was a request, though, that had come in on December 31, as you can see in that timeline, for DC National Guard assistance, right?

A. 346 people for traffic control.

Q. Traffic control, and there was a 40-person quick reaction force as well, right?

A. Yeah, the QRF is staged off-site.

Q. And that's mentioned on December 31, 2020, that entry, the request?

A. I don't see the QRF in this timeline, but if it's there in a different place, it's there.

Q. And you see then that January 3, after that, refers to the President concurring in the activation of the DC National Guard, and the 340 troops

[p.246]

and 40 quick reaction force would have been with the DC National Guard?

A. Yeah.

Q. And then January 4, it talks about 340 troops and a quick reaction force as well?

A. Uh-huh.

Q. You see that?

JA730

No mention —

A. Yeah.

Q. — of 10- to 20,000 National Guard troops?

A. No.

Q. Now, is there any documentation anywhere that you can point to at all, official documentation saying that 10- to 20,000 troops were authorized?

A. I don't have it on me, but it's in the internal DOD memorandums delegating authorities to the Secretary of the Army, the DC National Guard, and our Adjutant Generals and the Major General in charge of the entire National Guard force. I don't have those memorandums.

Q. Where is that document, sir?

A. It's not one document. They're at the Department of Defense.

Q. And was that produced to the January 6 Committee?

[p.247]

A. I asked them to get it. They didn't get it.

Q. You've seen no public documentation anywhere at any point in time that's out and available to the public that says 10- to 20,000 troops were authorized?

A. When you say "documentation," by whom?

Q. By anyone.

A. I've seen lots of media articles saying that that is exactly what happened.

Q. Well, you've seen media articles quoting yourself, sir.

A. I'm not the only one they quote. You asked the question if I've seen it in anyone and anywhere, and I've seen it with dozens of people and scores of articles.

Q. Do you have any of those articles on you, sir?

A. No, but if you've got the Internet, we can look it up.

Q. Now, you remember the Vanity Fair article we talked about?

A. In part.

Q. I'm showing you what's been marked as Exhibit 292.

[p.248]

Do you see that article there, sir?

A. Yes, sir.

Q. Is that the Vanity Fair article?

A. Yeah, I'll take your word for it. I can't — it's kind of like —

MR. SHAW: Objection, Your Honor. This was not timely disclosed to us as a cross-examination exhibit.

MR. GRIMSLEY: I believe it was. We have it marked as an exhibit.

MR. SHAW: This was not on the list given to us by the deadline on Sunday. We received it this morning apparently.

MR. GRIMSLEY: Well, you all have supplemented the exhibit list quite a number of times shortly before, so —

THE COURT: This is for impeachment. Overruled.

Q. (By Mr. Grimsley) Now, there was a reporter from Vanity Fair who was actually embedded with you all for some period of time in the transition?

A. Yeah.

Q. And that reporter then wrote an article that was published shortly after the Biden administration took over; is that right?

[p.249]

A. I'll let the article reflect the date. I don't have it off the top of my head.

JA732

Q. And there is a discussion of when there was a meeting where you say 10- to 20,000 people were — were authorized, January 5?

A. That's what it says Christopher Miller said, according to that report.

Q. Yeah. And you read that article, and you didn't correct them at all, did you?

A. I didn't read the article. When?

Q. When the Vanity Fair article came out with your name in it about you with a guy embedded, you didn't read the Vanity Fair article?

A. I had my Office of Communications read the article, but we — we get 1,000 articles a day. No, I can't read them all. I'm sorry.

Q. You get 1,000 articles a day about you from Vanity Fair?

A. Not me, but I'm not the important part. I've got bigger functions to do at the Department of Defense, like Operation Warp Speed, the no-fail mission, withdrawing out of Afghanistan, saving American hostages, and securing our border. I don't care what Vanity Fair says.

Q. Well, sir, you, to be fair, were not at

[p.250]

the Department of Defense when the Vanity Fair article came out?

A. I don't know. You keep showing me a piece of the article, I have no idea when it came out.

Q. Well, the reason January 5 is kind of important is Mayor Bowser sent her letter on the 5th, didn't she?

A. Okay.

Q. And you say that there was this meeting where stuff was authorized, 10- to 20,000 troops, there's no record of it. You then — somebody went from the Department of Defense to Mayor Bowser's office to the Capitol Police

JA733

requesting if they need some assistance. And then on January 5, Mayor Bowser writes a letter back.

Right?

A. You say there's no record of it, but okay.

Q. Okay.

A. The rest is there.

Q. Writes a letter back on January 5.

Do you know what time of day she wrote that letter back, sir?

A. I don't.

Q. Let's look at Exhibit 1031.

In the DOD IG report, it says that she wrote the letter at 2:27 p.m.

[p.251]

Do you have any reason to dispute that?

A. No.

Q. And in the Vanity Fair article we just looked at, it says in the evening — where you say 10- to 20,000 troops were authorized, it was in the evening of January 5?

MR. SHAW: Objection. Mischaracterizes the testimony.

A. Also, it's Christopher Miller in the article, not me.

THE COURT: Hold on.

THE WITNESS: Sorry.

THE COURT: Overruled.

A. The paragraph you showed me in Vanity Fair was Christopher Miller speaking.

Q. (By Mr. Grimsley) Yeah. And it says, "On the evening of January 5. . ."?

A. Right. Then it says, "Miller recalled"; "Miller said." It doesn't say I said.

Q. So you think Mr. Miller's talking about a different meeting?

A. I don't know. You can ask him.

JA734

Q. Is there any record, public record that you've seen documenting a request or an offer from President Trump or the Department of Defense to

[p.252]

Mayor Bowser or the Capitol Police of 10- to 20,000 troops?

A. We would not have made the request. We would have presented them with the authorization, which we did through the Secretary of the Army.

Q. And it's — there's no record of that in any of the timelines we looked at, sir, 1031, 1027?

A. Of Secretary Army going there?

Q. Yeah. And offering 10- to 20,000 troops.

A. I don't know if that's in the timeline or not, but he went there and reported back to us, and that's why we didn't mobilize.

Q. There's no record of that, though, in the timeline, correct, sir?

A. In the timeline — yeah, the timeline speaks for itself. But it's not exhaustive. That was never the purpose of the timeline.

Q. So it's not exhaustive, but you put in stuff about 340 troops but not 10- to 20,000 troops?

A. No, because at the time, that was the specificity with numbers at which we had for actual deployment.

Q. Now, you've said that this meeting took place now on January 3, maybe it's on January 5, there's two meetings.

[p.253]

But you've also been out there talking about how there was a meeting on January 4, haven't you, sir?

A. Yeah. As I've said, I've testified to the best of my ability. We had a lot going on. If I'm off by a day, you

JA735

know, sue me. But I'm telling you what happened to the best of my ability.

That doesn't change the fact that the authorization came in before and it was relayed to the appropriate officials in DC and the Capitol Police. It was declined, and we acted when their request finally came in on January 6.

So if you want to argue with me about January 3, 4, and 5, I guess we can keep doing this.

Q. Well, sir, it's kind of important because you're pointing to a timeline and saying it was on January 3. Then there's an article saying it was January 5. Then there's something else saying it's January 4. You on interviews. And then there's a letter that's sent on January 5, which you say is a response to a request or an offer from DOD.

So the timing does matter, sir.

MR. SHAW: Objection.

Q. (By Mr. Grimsley) Doesn't it?

MR. SHAW: Objection. That question

[p.254]

mischaracterizes testimony and mischaracterized the article. It was argumentative.

THE COURT: You can redirect on all those. Overruled.

A. Maybe it's important to you. That's why you're asking about it.

Q. (By Mr. Grimsley) Do you recall what Secretary Miller said about whether there had been 10,000 troops ordered to be deployed?

A. There were never 10,000 troops ordered to be deployed.

Q. Just authorized?

A. Right.

JA736

Q. But you do recall that Christopher Miller said there was no such order?

A. I don't — I don't understand what you're asking. When would Christopher Miller, this Acting Secretary of Defense — if you can point me to a time saying this statement about an order for 10,000 people.

Q. I'm going to show you the January 6 report. This is page 95 of the report.

A. Uh-huh.

Q. And there's a finding specifically on this issue:

"Some have suggested that President Trump

[p.255]

gave an order to have 10,000 troops ready for January 6th. The Select Committee found no evidence of this. In fact, President Trump's Acting Secretary of Defense Christopher Miller directly refuted this when he testified under oath."

"Committee Staff: To be crystal clear, there was no direct order from President Trump to put , troops to be on the ready for January 6th, correct?"

"No" —

A. Right.

Q. — "Yeah. That's correct. There was no direct — there was no direct order."

A. That's absolutely right. There was no order because that would have been unlawful as we understood it.

There was an authorization. There is a huge difference.

Q. Okay. Now, sir, you're the current — what's your current job for President Trump?

A. I'm a Senior Advisor for National — for National Security and Defense.

Q. And how long have you been in that position?

JA737

A. About a year.

[p.256]

Q. You're advising President Trump on what he might do during a second administration?

A. On policy and other matters.

Q. And are you paid by the Trump organization?

A. No.

Q. Nothing?

A. The Trump organization does not pay me.

Q. Sorry. Are you paid by President Trump or any representative of his?

A. I can work with my counsel on who exactly pays me, but I don't think those are — either of those two are them.

Q. Does any organization affiliated with President Trump currently pay you?

A. Yes.

Q. What?

A. It's one of his PACs.

Q. What PAC?

A. I believe it's Save America.

Q. How much does President Trump's Save America PAC pay you per month?

A. 15,000.

Q. How much has President Trump's Save America PAC paid you since you began working?

[p.257]

A. It's been maybe a year, maybe just under, so whatever that adds up to be.

Q. Over \$200,000?

A. If it's over a year, yeah, but I don't think so. I would have to check the math.

Q. And you'd get a position in the second Trump administration, do you think?

JA738

A. I don't know.

Q. Have you discussed that with him?

A. Not really.

Q. Now, you have written a few books, haven't you?

A. A children's book and a new book, yes.

Q. And the children's book is actually about President Trump?

A. Yes, in part.

Q. And what's the name of that book?

A. It's a series called "The Plot Against the King."

Q. And Trump is the "King," "King Donald"?

A. Yeah. It takes place in medieval times. It's about Russiagate for kids.

Q. And the first book, the villain is Hillary Queenton?

A. Yeah.

[p.258]

Q. King Trump is accused of being a shifty knight — or accused by a shifty knight of —

A. Right.

Q. — cheating to get the throne.

You're in the story, you're a wizard who protects —

A. Yes.

Q. — Donald Trump?

A. I think it's more portrayed as protecting the truth, but, sure, it's a children's book. Go for it.

Q. And Trump said he wants to put that book in every school in America?

A. I think he posted about it, yes, if that's what you have the quotes to being.

Q. And you actually have a website, fightwithkash.com?

A. It's one of my websites.

Q. And you sell swag on that site?

A. I do it for charitable giving.

JA739

Q. And I just want to look at some of those.

And you sell various swag, I think you sell OMB, or “Orange Man Bad,” swag there?

A. Yeah, when you say “swag,” merchandise.

Q. Merchandise.

A. Yeah.

[p.259]

Q. What does “Orange Man Bad” stand for?

A. It’s just one of the things you see on the media describing President Trump, so we thought it would be a good way to make money and give it away. We’ve given away hundreds of thousand of dollars to children and veterans and active-duty military in need.

Q. And “Orange Man Bad” refers to liberals who don’t like President Trump, right?

A. I think that’s one way — well, you can tell me, I don’t know.

Q. And you wrote another book called “Government Gangsters”; is that right?

A. I did.

Q. And “Government Gangsters” is about your view that there’s a cabal or deep state out there that is trying to ruin our country?

A. It’s not my view. In the book, it’s outlined per their actions.

Q. And you write the book about the deep state, right?

A. In part.

Q. Is this proceeding part of the deep state?

A. No. It’s a law enforcement proceeding.

Q. Am I part of the deep state?

A. I don’t know. I don’t really know you.

[p.260]

Q. Is the Judge part of the deep state?

JA740

A. I think the Judge is beyond reproach, but if you want to get into it, we can.

Q. Frankly, sir, you think that all liberals or liberal leadership are evil, right?

A. That's — that's outrageous. I worked more in the Department of Justice for Deputy Attorney General Sally Yates than I ever did in a Republican administration. We've meted out wonderful cases in the National Security Administration. I worked as a public defender for eight years executing due process.

So if you want to make that globalization because the cameras are on, you can go right ahead. But I don't believe that.

(Video playing.)

Q. (By Mr. Grimsley) And that was you in an interview, sir?

A. Yeah, talking about specific leadership, not everybody.

Q. Now, you also serve currently on the board of directors for the Trump Media Group; is that right?

A. I do.

Q. And how long have you served in that position?

A. Probably a year and change, maybe.

[p.261]

Q. And the Trump Media and Technology Group owns and runs Trump's social media platform, Truth Social?

A. I think, yeah, in part.

Q. And how much are you paid as a director on the board of directors for Trump Media and Technology Group?

A. Zero.

Q. Who else is on that board with you?

JA741

A. If I could just ask my counsel if I'm allowed to publicly relay that. I don't know if that documentation is public or not. If I am, I'm happy to tell you.

Q. I'll tell you that it's in the Secretary of State filings from Florida.

A. Okay. If it's public, then it's myself, Dan Scavino, Donald Trump, Jr., and I think former President Trump, I think, if my memory serves me.

Q. And former President Trump is the chairman of the board?

A. I think that's his title.

Q. Devin Nunes is President and CEO, correct?

A. Yeah.

Q. How often do you all meet?

A. As needed.

[p.262]

Q. When is the last time you met?

A. Maybe a month ago. I'm not really sure.

Q. Now, you had testified on direct that the FBI could have sent troops out to protect the Capitol on January 6; is that right?

A. Well, not troops, but 1811 agents, federal law —

Q. So federal law enforcement officers, right?

A. Right.

Q. And the FBI reports ultimately up to the President?

A. To the DOJ as Attorney General, and then to the President.

Q. So up to the President, though?

A. Well, every Cabinet Secretary does.

Q. And you're not aware of the President making any phone calls to DOJ to authorize release to the FBI or FBI agents on January 6?

A. No. What my concern was, was that Director Christopher Wray was on none of the leadership calls and that DOJ had been designated the lead law enforcement agency for January 6 and was not taking the appropriate preemptive measures to secure the Capitol grounds.

[p.263]

So we were working internally to try to get them there, but unfortunately they never did. The — us, the DOD, did not have that primary role.

Q. And Christopher Wray is one of the members of the deep state that you identify in “Government Gangsters,” right?

A. I think Christopher Wray is one of the members, as a director of the FBI, that we’ve caught lying, so yes, in part.

Q. And who are the other members of the deep state that you’ve identified in “Government Gangsters”?

MR. SHAW: Objection, Your Honor. At some point, this is just irrelevant.

THE COURT: Why don’t you move on, Mr. Grimsley.

MR. GRIMSLEY: Thank you.

Nothing further, Your Honor.

THE COURT: Does the Colorado Republican Party have any questions?

MS. RASKIN: No, Your Honor, we do not.

MR. KOTLARCIK: Not for the Secretary, Your Honor.

THE COURT: Any redirect, Mr. Shaw?

MR. SHAW: Just a couple of quick questions, Your Honor.

[p.264]

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. SHAW:

Q. Mr. Patel, to your mind, is there anything inconsistent with the President telling you on January 3 that he thought that he was authorizing 10- to 20,000 troops and then telling you on January 5 that you're going to need 10,000 troops?

A. No.

Q. To your understanding, would Department of Defense typically, when it reaches out to local authorities, offer a specific number of troops? Or would it offer to provide what local authorities need?

A. Well, that's part of the conversation. We would say: Here's the — here's the cap so far. What are you having? A Super Bowl? A parade? A protest? What are you anticipating? What's the threat analysis, intelligence landscape? And then we work back and forth.

And if it superseded the threshold, we'd go back and get the appropriate authorization.

So there's always a back-and-forth.

MR. SHAW: I don't have any further questions for you, sir. Thank you very much for your time.

THE WITNESS: Thank you.

[p.265]

THE COURT: Mr. Patel, thank you for your testimony today. You're released.

THE WITNESS: Thank you, Your Honor.

MR. SHAW: So our next witness is also on WebEx, Your Honor.

THE COURT: Okay.

MR. SHAW: We just need to get her lined up, unless the Court wants to take a short break.

THE COURT: Well, is she on standby?

MS. BILA: She's logging in right now, Your Honor.

JA744

MR. SHAW: She's logging in right now.

THE COURT: Okay. Great. Let's just do at least the direct of her unless — yeah, let's at least get her started.

And who is this witness?

MR. SHAW: This would be Katrina Pierson, Your Honor.

THE COURT: Okay.

MR. SHAW: P-i-e-r-s-o-n.

MR. OLSON: Your Honor, while we're waiting, there's one issue.

We've been informed that somebody is live-streaming the Court proceedings on the Internet without permission to record it and sort of doing

[p.266]

commentary as it goes. They're beyond the scope of who's there.

I mean, I don't know how to get in touch with them, but maybe an admonition, and if they're watching, that they can't do that without permission might be appropriate.

THE COURT: And we know that they're not part of the expanded media coverage?

MR. OLSON: Yes, yes.

THE COURT: Do we know what organization it is?

MR. OLSON: It appears to be an individual, Your Honor, but there were like 7,000 people watching them.

Ms. Tierney informed us it is now 8600. It's Ashley Epp.

THE COURT: Ashley Depp?

MR. OLSON: Epp, E-p-p.

THE COURT: Well, so I — I want to make it clear that there are very specific statutes and rules in place in the state of Colorado for videotaping proceedings, and there's a process. It only applies to actual media outlets,

JA745

and you need to request and be granted permission to record any proceedings.

So to the extent that there's anybody
[p.267]

currently recording proceedings, you are in violation of the Court's orders, and if you continue to do so, you will be in further violation of the Court's orders.

MR. SHAW: Your Honor, I assume you don't mind if I don't show up on the video feed.

THE COURT: No, that's fine.

MR. SHAW: Okay.

THE COURT: But is Ms. Pierson on?

MS. BILA: Doesn't appear yet. She has said she is logging in.

THE COURT: Okay.

Any word on status?

MS. BILA: She's trying.

MR. SHAW: We live in an age of miracles.

Okay. I believe she's on the screen.

THE COURT: Do we have a way of making her be the

—
MR. SHAW: Now we're taxing my technological capabilities.

So, Joanna, do we have a way of making her central?

MS. BILA: I believe she'll go central once she starts speaking.

THE COURT: Ms. Pierson, can you hear us?

THE WITNESS: Yes, I can hear you.

[p.268]

THE COURT: There we go.

Ms. Pierson, can you raise your right hand, please.

KATRINA PIERSON,
having been first duly sworn, was examined and testified
as follows:

JA746

DIRECT EXAMINATION

BY MR. SHAW:

Q. Ms. Pierson, would you please tell us a little bit about your background.

A. Yes. I'm originally from Texas. I have a biology degree from UT Dallas. I worked in healthcare for about 14 years, wrapping that up as a neuroscience administrator for a Level I trauma hospital. And then made my way into politics.

Q. And how did you make your way into politics?

A. I started out on the ground as a grassroots organizer here locally in Texas and became one of the original founders of the Tea Party movement, which grew into a broader array of political activities at the local level, the state level, and the federal level.

And then began to do larger events, in electing congressmen, senators, and ultimately United States President.

[p.269]

Q. And who is that United States President?

A. Donald John Trump.

Q. How did you first become aware of Mr. Trump as a political figure?

A. Well, a little-known fact about Mr. Trump is that he had spoken to Tea Party rallies about five years before he actually ran for President. So I've known about him for a while.

I saw him in South Carolina in 2015 or — at the end of January, and I told him that I heard a rumor that he was thinking about running. And I told him then that if he did, I would help him, and he would win.

And that's how it all began.

Q. And what happened next in terms of your involvement with his campaign?

JA747

A. Well, from there, I saw him a couple of times, and then over the summer when he officially filed, he began calling me after my media appearances. I had been doing national television for about seven years at that point.

He would just call and thank me for his support, ultimately asked me to join his 2016 campaign as his spokesperson, so I officially joined the team in 2015 as one of the Trump originals.

Q. So you served as the campaign spokesman
[p.270]

for the first Trump campaign; is that correct?

A. That's correct, the national spokesperson.

Q. And did you serve in that role through the election?

A. I did, yes.

Q. Did you then enter the administration in any capacity?

A. I did not. I was offered Deputy Press Secretary but decided to stay out to help the President's outside super PAC before being called in to the reelection campaign.

Q. In what capacity did you join the reelection campaign?

A. Just as senior advisor. I helped to oversee comms, media, and coalitions.

Q. And what do you mean by "coalitions"?

A. Coalitions is basically grassroots. Different organizations and entities that have a common purpose typically get together for one cause, and we call those coalitions.

Q. Did you have any responsibility for vetting people who wanted to be officially associated with the campaign?

A. There was actually a process for vetting because each coalition, the bigger ones, had boards, and

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individuals who wanted to be formally associated with the campaign had to go through a vetting process to serve on one of those boards.

The vetting process did not extend outside those boards, but to — those who were officially associated with the campaign did have to go through vetting.

Q. And what was the purpose of vetting people who wanted to be officially associated with the campaign?

A. Well, in politics, every group has their, what we call fringe, and they seemed to — a lot of them seemed to come out and join the MAGA movement, many for their own purposes, and we just needed to make sure that we weren't elevating those people in official capacities.

So we were very tight on our vetting process for members who were officially associated with the campaign.

Q. Can you stop those people from supporting the candidate?

A. No. I wish we could.

Q. But what can you do?

A. Well, all you can do is to — excuse me — to make sure that, you know, they are not formally associated or affiliated.

If they are, we take measures to — excuse

[p.272]

me — to even issue a cease and desist at some point. Or if you catch them, you know, using the name, whether it's on TV or social media, you take those steps and call a producer and you say, "This person is not affiliated with us, please don't associate them with us."

You go out of your way to try and prevent them from taking, you know, any platform or stage with any of your principals.

JA749

Q. Is it easy to — to police the — the people who are affiliated with the campaign?

A. It's — it's easy when, you know, you have a set system in place. Typically in a campaign, there are processes and protocols in place.

Can you catch everything all the time? No, but it is specifically designed for that reason, just to make sure that you are protecting your principals.

Q. So what did you do after the 2020 election?

A. I went home. I went home back to Texas. I had just lost an aunt, my mother's only sister, I hadn't seen my family in several years, so I had gone home.

Q. What did you do for a living at that point?

A. Well, at that point, they were still, you

[p.273]

know, challenging some of the results, waiting for recounts and such, so through the remainder of December, I was still advising communications coalitions and such for the campaign.

But I do have my own media company where I do engage with press, do communications, as well as broadcast television.

Q. In that connection, did you do any work for a group called Women for America First?

A. I did not do any work for them. I do know them, and they reached out to me with some of the grievances that they were having during their planning of continued protests.

Q. What is the group, Women for America First?

A. That's a group that's run by Amy Kremer with the help of her daughter, Kylie Kremer, and I've known them for more than a decade, and that's one of the reasons why they reached out to me with their grievances.

JA750

Q. Was that one of the fringe groups that you worked to keep away from the President and his campaign?

A. No. In fact, it's quite the opposite. As I mentioned, I have worked with them for years. They're pros. I knew they were doing what they were supposed to be doing, and I trusted that they would continue to — to

[p.274]

be pros and — which is likely why they reached out to me for help.

Q. Were they part of something — sorry, excuse me. Strike that.

Was there a group part of what has sometimes been called the Stop the Steal movement?

A. So it depends on how you're asking that question, if I may. There was a hashtag with "Stop the Steal" that was made up of a much broader coalition of really anybody who wanted to participate. And then there was a separate physical entity called Stop the Steal that was an organization run by Ali Alexander.

So I would say that they were a part of the broader coalition hashtag group, but not the actual Stop the Steal organization.

Q. Did everybody in the broader coalition get along and agree with each other?

A. No. Anytime you're dealing with grassroots, any professional will tell you it's like herding cats, and no, they were essentially fighting each other, and it was pretty intense.

Q. Can you elaborate on that a little bit?

A. Well, there's different ways to approach what was happening at the time. There — a lot of people were upset. There were emotions involved, and, you know,

[p.275]

some groups were using more inflammatory rhetoric than others.

You know, for example, you have the Ali Alexander/Alex Jones faction who are typically known for being over the top in their rhetoric, whether it be conspiracy or just outright chaos.

And then you have those like on the Kremers' side who were just wanting to follow the constitutional process, which is what we've done forever, and encourage people to do what they can in their states to talk to their legislatures.

There was even some discussion about some of those states having recall statutes. I mean, actually following the process that was given to us by our founders.

Q. Did the Kremers' group, Women for America First, create something called the March for Trump?

A. Yes. That was their — so let me back up a little bit.

Because this broader coalition that was fighting with each other, the Kremers then decided to split off from that group because they were just out of control, and they went on their own path and did bus tours, because that's what they had done for years, and their bus tour was called March for Trump.

[p.276]

Q. And where geographically was that bus tour located?

A. I wouldn't know. There's — there was a schedule, I recall, just going across the country. But I don't recall. You may have it, but I don't recall —

Q. I didn't mean specifics.

What I was going for, was it sort of a nationwide or across-the-country —

A. Yes.

Q. — thing?

A. Yes, it was across the country.

Q. And was it your understanding that it was supposed to culminate in a — I guess a demonstration at the Ellipse on January 6?

A. Yes, that's correct. They had did two previous events the same way, except the Ellipse was not a part of the process for the first two events that they held.

Q. Did Ms. Kremer or the Kremers ask you to help out with the January 6 event in any way?

A. So when I was speaking with the Kremers, it was more of them, you know, filling me in on what had been going on, what was happening, less of helping.

I wasn't asked to help, really, until Caroline Wren had reached out to me after the fact and

[p.277]

asked to help because she didn't feel like she was receiving the support that she needed.

Q. Who was Caroline Wren?

A. Caroline Wren is a fundraiser. She was a fundraiser for Republicans, and she was fundraising for President Trump at the time.

Q. And what was the issue that she brought up with you?

A. She had grievances with the Kremers. She insisted that they weren't being team players. She was very upset with them.

She knew that I knew them personally, so she reached out to me to see if I could help sort of mediate what she was trying to do.

Q. And what was Ms. Wren trying to do?

A. Well, initially, she said that they were blocking her speakers from talking or not wanting to work together and just being complicated and difficult.

JA753

And then when I spoke to the Kremers about that, they informed me that the people that she wanted to work with were the Ali Alexanders and those crew.

So when I reached back out to Caroline, I agreed with the Kremers, and I told her that it's a nonstarter.

Q. And by a "nonstarter," what do you mean?

[p.278]

A. Meaning that these two groups were not going to be working together. And the problem was, there were so many people who wanted to speak, and the Kremers had permits for January 5 and 6.

So in an attempt to try and quell all of the chaos in a very diplomatic way, working with Caroline Wren, who was representing her people, and Amy Kremer and Kylie, who were representing their people, came to an agreement to split up those days so that everybody had an opportunity to exercise their constitutional rights.

Q. Was President Trump expected or at least be considered — strike that.

Was there an expectation or a hope that President Trump would speak at the event on the Ellipse on the 6th?

A. I think it's always a hope and an expectation when you're in DC at that time to at least see President Trump, and the fact that he, you know, flew over one of the rallies and drove past another, I think it was fair for people to want to see him in some capacity. But not necessarily to speak until he actually tweeted about it.

Q. And when was that?

A. I don't recall the specific date.

[p.279]

Q. And so if I understand what you're saying, the dates were split up with the Kremers and their group getting

JA754

one date, which was the 6th, and Ms. Wren and her group getting — getting the 5th; is that correct?

A. That's correct.

Q. And which date was — did the President decide he was going to speak on?

A. On January 6.

Q. So the President announced that he would be speaking to the Kremer group; is that right?

A. That's correct.

Q. And what was the reaction among the — the other group that you thought — well, what was the reaction among the other faction?

A. Well, they were very upset, but as soon as he tweeted that he was going to, you know, see you there, I just told everyone involved that whatever they were planning was not happening.

We just needed to figure out, you know, at what capacity he was going to be, if he was going to be speaking. I didn't know at that point what was happening, but I told everybody that if the President is now going to be involved, then everybody's plans are scrapped.

The people who were moved to the 5th did

[p.280]

not take it very well, primarily because Caroline continued to let them believe that they were going to be speaking on the 6th and — because they had been tweeting and posting pictures, talking about sharing the stage with the President.

So I knew that she was misleading the people that were moved to the 5th. So it's fair to say that they were not happy.

Q. And what about the people on the 6th, what was the situation with them?

JA755

A. Well, it was very similar because I could not guarantee anyone a spot on the President's stage because, again, once the President is involved at an event, it becomes his event.

And I expressed that to the Kremers as well. They were a little, you know, hurt about it because they had their own people who have been very supportive of the President who wanted to speak, and I just could not guarantee that they were going to be able to speak.

So they were a little disenheartened because everybody wanted to, you know, share with the President that day, but they understood because that's just how it is when a President is involved. And they just waited for instruction.

[p.281]

Q. So did you take it upon yourself to try to vet the — the group that would be appearing on the 6th at this point?

A. Well, at that point, as soon as I learned that Caroline wanted to put Alex Jones, Ali Alexander, Roger Stone on the stage on the 6th, I immediately began raising red flags because she was telling me that this was approved and it was fine, and I knew that couldn't have been right.

So my initial response was to flag it for the Chief of Staff.

Q. When you say the "Chief of Staff," who do you mean?

A. Mark Meadows.

Q. And what did you tell Mr. — did you reach out to Mr. Meadows?

A. I did. I texted him and asked him to call me because I felt like things were getting a little out of hand —

Q. And approximately —

A. — and I needed guidance.

JA756

Q. — when was this?

A. That was, again, I don't recall the specific date, but it was maybe January 2, 2 or 3, somewhere in there.

[p.282]

Q. Okay. And what was your concern at this point?

A. Well, at this point, she had led me to believe that somebody in the White House had approved that, and I just — I couldn't accept that.

So I reached out to the Chief of Staff to raise that flag. And he did call me, and I expressed to him my concerns about it. And then I was shocked because he, first of all, didn't even know who Caroline Wren was, and then told me that no one had been spoken to about January 6 and he hadn't approved anything.

And so I was a little taken back by that, and that's when he asked me to just take this — this thing over to make sure that it goes off well. And that's when I got more formally involved.

Q. Okay. So let me see if I — if I understand this correctly.

A. Uh-huh.

Q. So you had seen an — indications that Ms. Wren was announcing or telling people that her people would be appearing on the stage with President Trump on the 6th; is that what you're saying?

A. That is correct.

Q. And you thought that was not acceptable; is that right?

[p.283]

A. It was not acceptable because she even leaked it to a conservative media outlet that actually ran her list of people. I even tried to get them to retract it, but they refused.

JA757

Q. And your understanding is that she was telling these — the media and others that — that this had been approved by the White House?

A. Yes.

Q. And that was what led you to contact Chief of Staff Mark Meadows; is that right?

A. That's correct.

Q. And that was on or around the 2nd, correct?

A. That's correct.

Q. Okay. And so Mr. Meadows responded, if I understand you correctly, by saying that nobody at the White House had approved this, to his knowledge, and he asked you to step in and sort things out.

Is that correct?

A. That's correct.

Q. Okay. So what did you do?

A. Well, I went in to — I don't know, I guess I call it campaign mode at that point. The Chief of Staff had asked me to take it over, and that's exactly what I did.

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I told everyone, meaning Caroline Wren and Amy Kremer and their crew, to tell everyone that no one is speaking.

We tried to get together and come up with a reasonable list to submit to the White House, and Caroline just kept pushing for people that I just didn't think were appropriate. And then when she kept pushing and I told her to tell me who approved this at the White House, because I told her that I was going to call the White House, she had mentioned that Scavino knew.

So I was very upset with Dan Scavino. I just couldn't believe that he would approve something like that. So I reached out to the Chief of Staff once again and said, "I'm

JA758

done.” I said, “I’m not going to participate in embarrassing the President, and I’m just out.”

And when I told him that she said that Scavino approved, he said, “Well, then you should probably reach out to Dan.”

And that’s what I did, I reached out to Dan and found out that that was also a lie, and then I felt bad for getting mad at Dan Scavino.

Q. Well, let me just back up for a moment.

A. Uh-huh.

Q. Who was Dan Scavino?

[p.285]

A. Dan Scavino, I think at that point, was Deputy Chief of Staff. He was doing social media for the President, but I think there at the end, he was Deputy Chief of Staff.

Q. Okay. So you were being told by Caroline Wren that her people were being approved by the White House, and you initially thought that there might be some truth to that, so you reached out to Mr. Meadows; is that right?

A. Yes.

Q. And he — and you thought Dan Scavino was the person that was approving this?

A. That’s correct.

Q. And Mr. Meadows put you in contact with Mr. Scavino; is that right?

A. Well, he asked me to reach out to Dan, and I reached out to Dan, yes.

Q. Okay. And when was that?

A. That was either the 2nd or the 3rd. This was all happening very quickly, in a matter of a couple of days, so all of this happened around the 2nd and 3rd and 4th.

JA759

Q. Okay. So if the 3rd was a Sunday, would that — would it have been a Sunday or the Monday that you talked with Mr. Scavino?

[p.286]

A. I believe it would have been Sunday because when he told me with all certainty that that just was not true and he hadn't approved anything from anyone, he suggested that I meet with the President the following day, which would have been that Monday before he left for the Georgia rally.

Q. Okay. And where were you when you had this conversation with Mr. Scavino?

A. At home in Texas. I was really bedridden because I had hurt my back. My age is catching up with me.

Q. So — so did you go to Washington, DC on the Monday?

A. I did. I managed to get on a flight that next morning. I felt like it was important enough to actually sit down with the President to find out exactly what he expected to come from the rally on the 6th, and so I flew right in and went to a meeting.

Q. Okay. Now, if Mr. Meadows and Mr. Scavino — well, let me ask you this:

Did you express your concerns about these speakers to Mr. Meadows and Mr. Scavino?

A. Oh, absolutely. I expressed my concerns to anyone who would listen.

Q. Okay. What did you tell Mr. Meadows and

[p.287]

Mr. Scavino were your concerns about these speakers?

A. I mean, I think Alex Jones, I mean, the name itself is a problem. I think I believe I sent some — either some tweets or some articles where there was some incendiary language that Ali Alexander was specifically using.

JA760

I had seen some video clips of some of the previous rallies or protests that he was speaking at, and it was very inflammatory as well.

So I just sort of listed off a couple of my concerns, and they just essentially agreed with me, and, I mean, it's a problem.

And then that's why Dan was like, "Just come sit with the President and figure out what he wants." And the primary reason you do that is because once the President makes a decision, it's done. At least that's how it should be.

Q. Okay. And just — I got your concerns with some individual speakers.

But more — more generically, what was your concern about having the kind of speakers you disapproved of on the stage with the President?

A. So there — I had mentioned before that there were two previous events leading up to the one at January that the Kremers had informed me that there

[p.288]

were issues.

For example, you know, there were media reports after the first — I think they called it the "Million MAGA" whatever they called it, and there were reports of fights or violence that had been there. You know, we had just spent, you know, several years of Trump supporters being attacked.

Then there was also a situation regarding Alex Jones himself, who tried to rush the stage at one of their previous events, and my concern was whether they tried to cause any problems or — you know, these guys don't care. They just, they want attention, they want notoriety, they just want the chaos, and I was just concerned with

JA761

emotions being high and the number of people that were likely going to be there, that we needed to be on alert.

Q. So if I understand you correctly, you just wanted to keep these kind of troublemakers off the stage with the President; is that your — is that what I'm understanding?

A. Not only did I not want them on the stage, I didn't want them anywhere around. I just think that those — those actors are really bad actors. They're in this for, you know, their own personal, selfish reasons, and they just don't care about the damage that they

[p.289]

cause.

Turns out I was right.

Q. Okay. So you had had this discussion with Mr. Meadows, and did he share your concerns?

A. He did. I mean, I think that's why he told me to just take it over.

Q. Okay.

A. You know, it was just too much to even deal with at that point, so . . .

Q. And you had a similar discussion with Mr. Scavino; is that correct?

A. That's correct.

Q. And did he share your concerns?

A. He did, yes.

Q. And so he — did he help you set up a meeting with the President for the next day?

A. Yes. Dan set me up to go see the President that afternoon, the following afternoon.

Q. Okay. So where was the meeting you had with the President?

A. It was in the President's dining room, which is right off the Oval Office.

Q. Okay. And about what time was that?

JA762

A. That was probably around 3:00, 3:30, because I know he was leaving for the Georgia rally after

[p.290]

the meeting.

Q. Okay. And about how long did that meeting last?

A. Maybe a half hour, maybe 45 minutes. I think I was out of there by 4:00, so . . .

Q. Okay. Can you describe the scene?

A. If — it's — it's a small room with a long table. There are two entries coming into the President's dining room: One from the Oval, one from the hallway. And the President was sitting at the head of the table working on papers. He had folders and he was making calls.

I came in and sat to his right. So the entry from the Oval Office and the hallway were out of my field of vision because I was facing him at the head of the table.

And then at that point, I believe Max Miller had come and sat across from me. Bobby Peety had come in through the hallway door because I turned and saw him. I knew they were getting ready to go to the rally.

And then there was just people that come in and out, whether they're bringing the President something or picking up something to — to finish off for the day.

[p.291]

Q. Okay. Who were the main participants in the — in the meeting?

A. Myself, the President, and Max Miller sat across from me. We were the only ones at the table.

Occasionally people would come in through the hallway and make comments. I don't remember who all came through. It was just a typical day at the White House.

Q. Okay. Who was Max Miller?

JA763

A. Max Miller worked for advance for the President. I don't know his title there at the end, though.

Q. Okay. And if I understand what you've been saying earlier, the — from your perspective, the purpose of the meeting was to get the President's input on — on who he wanted at the event on the 6th and, you know, what kind of event he wanted; is that fair?

A. That's fair.

Q. Okay. Did you come in there with, I don't know, an agenda, talking points, anything like that?

A. I did make an agenda for the meeting, just to make sure that I covered the points that I wanted to cover.

Anytime you meet with the President, you can get off topic and talk about other things. So it was

[p.292]

my way of having my little bullets to make sure that I was able to communicate clearly what I thought.

Q. Did you wind up using that set of talking points in that meeting?

A. I didn't use all of the talking points. I use it as a guide in our discussion. But I did express my concerns.

Q. Okay. And what was the President's reaction to your expression of concern?

A. Well, it's — it actually was not as difficult as I thought because I thought I was going to have to run through everything. I didn't have to because the moment that I showed him a list of people that, you know, wanted to speak, he just didn't want everybody to speak.

And so before I could even get to my concerns, he had already essentially nixed everyone from the list, including his family, so that told me, as someone who knows him and his mind and his heart, that he was looking for more of an official event.

JA764

So it was — it was more of a, you know, hybrid of an official event. He was speaking at the Ellipse on White House grounds as the President, but he still wanted the rally feel because he just wanted music so people could sing and dance and be happy, like a

[p.293]

rally. So it just turned into a hybrid event, which actually made me relieved.

Q. So did you discuss with them any of the people that you were specifically concerned about?

A. I did. I waited until the end because he himself looked through a list and just ultimately decided that he didn't want anybody to speak.

So by the end, he just decided that the permit holder could speak, I could introduce them. He wanted elected officials to speak. Again, that official feel of that part of his event.

And then at the end, because he was just — he just seemed shocked that everybody wanted to speak, and I just had to keep explaining to him, "Of course, everybody wants to be on your stage."

And so at the end, I did ask him specifically if he wanted Rudy Giuliani. He said, "No, he needs to be preparing."

I said, "Did you want Roger Stone?" And he said, "No."

And I asked, "Do you want Ali Alexander?" And his response was, "Who?" So he didn't even know who Ali was at that point.

And I had never brought up Alex Jones because, again, that was just a nonstarter.

[p.294]

That was just my way of confirming that Caroline had been lying, and I was just relieved now that I have the

President's decision that I can now take back to everyone and hopefully shut it all down.

Q. So what else was discussed during this meeting?

A. After that, he had asked me, you know, if people were going to the Capitol because the previous marches, he wasn't aware of, and he was kind of frustrated that nobody had told him about the previous marches because wherever his people are, he wants to be there.

That's just something that's always been a thing for him, even when he was initially assigned Secret Service. I remember the first couple of times, he just walked straight to the crowd to take pictures and selfies and sign autographs. Secret Service had a heart attack.

So, you know, he did the flyover and the driveby on the first two. This time, he expressed wanting to speak to them and asked me if they were going to the Capitol.

I let him know that there were some groups that were going to the Capitol, that had been planning to go to the Capitol, and I had told him there were some that weren't, but the one thing that both groups agreed

[p.295]

on is they wanted to see him.

And he said, "Well, you know, are we expecting any trouble?"

And I said, "Well, there have been some incidents at some of the previous rallies."

And he said, "Well, we should call the National Guard."

And Max Miller said, "Well, we should only call the National Guard, you know, if we expect a problem."

And he said, "No, we need to call the Guard to make sure there isn't a problem," and then he looked up and said, "Let's get 10,000 National Guard."

JA766

And I don't know who was standing behind me, but he was speaking to somebody. He goes, "That's it." He goes, "Let's just have 10,000 National Guard, and then that way, we won't have any problems."

Q. Did you give any testimony to the January 6 Select Committee?

A. I did, yes. I spent a total of probably around 19 to 20 hours through interviews, as well as sworn testimony.

Q. Did you give public testimony?

A. I did not.

Q. So was it — it was in private session?

[p.296]

A. Yes, that's correct.

Q. During your interviews in a private session, did you discuss the — the matters we've talked about today?

A. Yes.

Q. Did you talk specifically about your meeting with the President?

A. Absolutely, yes.

Q. Did you talk about his willingness and decision to exclude problematic speakers from the event on the Ellipse?

A. Yes.

MR. OLSON: Objection. Leading and mischaracterize testimony.

THE COURT: Sustained.

Q. (By Mr. Shaw) Did you talk about your discussion with him about excluding people like Ali Alexander from the speaker list?

A. Did I discuss it with the Committee?

MR. OLSON: Objection. Leading.

Q. (By Mr. Shaw) Yes.

A. Yes.

THE COURT: Sustained.

JA767

Try to not ask leading questions.

Q. (By Mr. Shaw) Did you talk about the —
[p.297]

about his mentioning 10,000 National Guard troops?

MR. OLSON: Leading.

THE COURT: Sustained.

Why don't you ask her what you talked — what she talked about.

MR. SHAW: Well — well, I've already asked, did — did she testify about the matters we've discussed today, and she said yes. So I guess that covers that.

Q. (By Mr. Shaw) Did the Committee call you to testify at any public hearing?

A. No.

Q. To your knowledge, does the Committee's report include any of the information you provided about those topics in its findings?

A. Not to my knowledge.

MR. SHAW: I have no further questions for you at this time. Thank you.

THE COURT: Ms. Pierson, we are going to take a break, so can you make sure you're available again in 15 minutes, at 4:10 in Colorado?

THE WITNESS: Yes, Your Honor.

THE COURT: We're in recess.

(Recess taken from 3:55 p.m. until 4:10 p.m.)

[p.298]

THE COURT: You may be seated.

So we're getting all sorts of complaints, like I have any control, that people can't hear on C-SPAN, so . . .

But I have trouble hearing you, Mr. Shaw, so if everybody can try to speak up. I think the issue is that maybe only the lawyers are on — are — actually have the microphone, but anyway, we'll do what we can do.

JA768

Are you still there, Ms. Pierson?

THE WITNESS: Yes, Your Honor, I'm here.

THE COURT: Great.

So you're still under oath.

And it looks like you should be able to see Mr. Olson;
is that correct?

THE WITNESS: Which one is — yes.

THE COURT: He'll be asking you questions.

THE WITNESS: Yes, yes, yes.

THE COURT: He'll be asking you questions, okay?

THE WITNESS: Thank you.

MR. OLSON: May I proceed, Your Honor?

THE COURT: Yes, you may.

MR. OLSON: Great. Thank you very much.

[p.299]

CROSS-EXAMINATION

BY MR. OLSON:

Q. Good afternoon, Ms. Pierson.

A. Good afternoon.

Q. I want to talk with you about, you mentioned a
couple times Ali Alexander and Alex Jones.

Do you sometime refer to them as "the crazies"?

A. I absolutely do.

Q. Okay. And you know that — or you said that Trump
likes the crazies, right?

A. Yes, and I also defined "crazies" as being those who
viciously defend him in public.

Q. Right. Which includes Alex Jones and Ali
Alexander, right?

A. You could put them in that group, I suppose.

Q. Great.

Now, Trump went on Alex Jones' radio show shortly
after he announced his candidacy for President, right?

A. I don't know. It's possible.

JA769

Q. Okay. Trump gave Alex Jones a VIP pass to his selection at the Republican National Committee — at the Republican Convention when he was the Republican nominee, correct?

[p.300]

A. Not that I'm aware of.

Q. Okay. But you still have a great deal of loyalty to Trump, don't you?

A. Define "loyalty."

Q. Well, you would never betray him, would you?

A. Well, I wouldn't betray anyone.

Q. You call yourself one of "the believers," right?

A. Absolutely.

Q. Okay.

A. Everybody on the 2016 primary campaign were the believers, yes.

Q. Okay. And you view your job in that role as protecting the President, right?

A. You protect your principal regardless of who it is, yes.

Q. Yeah, so your job is to protect — your job is to protect the President, right?

A. Yes.

Q. Now, I want to talk about this claimed conversation about the National Guard.

Now, was Kash Patel in that conversation?

A. No.

Q. Okay. Was the Chairman of the Joint

[p.301]

Chiefs of Staff in that conversation?

A. No.

Q. Was Mark Meadows in that conversation?

A. No.

JA770

Q. Okay. Was any senior leadership from the Department of Defense in that conversation?

A. Not that I'm aware of.

Q. Okay. But Max Miller was in that conversation, right?

A. Yes.

Q. Okay. And you said that day, that you and Max Miller killed the National Guard, right?

A. That is incorrect.

Q. Let me show you a tweet — or a text message exchange between you and Mr. Miller.

MR. OLSON: Plaintiffs' Exhibit 265, Your Honor. I need to share my screen first.

I'm sorry, Ms. Pierson.

THE WITNESS: I've got nothing but time.

MR. OLSON: And I guess I need permission to share my screen.

Thank you very much.

THE COURT: We're getting better at this as we proceed, so . . .

MR. OLSON: I'm still getting the same
[p.302]
message.

THE CLERK: Try now.

MR. OLSON: Yes.

Q. (By Mr. Olson) Do you see on the screen, Ms. Pierson, a text of Monday, January 4, 4:08 p.m.?

A. Yes.

Q. Okay. And if we go down to the bottom, you can see — and I'll call it out so you can see it:

There's a GPO stamp saying it's authorized —
"Authenticated U.S. Government Information."

Do you see that?

A. Yes.

JA771

Q. And I'll represent to you this is from Mr. Miller's phone that he turned over as part of the January 6 investigation.

And you'll see at the top, it's Monday January 4.

Do you see that?

A. Yes.

Q. And then because — do you have an iPhone? Do you know how it works, the text colors?

A. I do, yes.

Q. Okay. So if this is from his phone, your statements are on the left in gray and his are on the

[p.303]

right in blue, right?

A. Correct.

Q. Okay. So he says to you, "You did a great job killing some of those speakers."

What you talked about earlier, right?

A. Correct.

Q. And now let's go down, and you say, "Hallelujah, praise the Lord Jesus, amen."

Mr. Miller says, "Haha, question, but man, he thinks a million people are coming."

Right? You had that exchange?

A. Yes, I see it.

Q. And then you say, "I tried to help manage expectations."

And then he says, and I'll highlight it here: "You did, and just glad we killed the National Guard."

Do you see that?

A. I see that.

Q. And then you heart-emoji'd that statement, right?

A. Yes.

Q. You didn't say, "No, we didn't," did you?

A. No.

JA772

Q. You just said, "Didn't get a picture"?

[p.304]

A. Yes.

Q. Right?

And then this text exchange goes on for a little bit. We'll come back to it in a little bit.

But now I want to turn to the security concerns that you mentioned in your direct testimony.

But I was kind of surprised because I didn't hear you say that the security concerns you were worried about were risks to Trump supporters. That was your security concern, wasn't it?

A. That was one of my concerns, yes.

Q. Well, in your interview with the January 6 Committee — which that transcript's been made public, right; you know that?

A. That's correct.

Q. No one's keeping it a secret, are they?

A. Not that I'm aware of.

Q. Okay. The only security concern you mentioned was security concerns to Trump supporters, right?

A. I think — I believe I mentioned concerns generally, but when they asked for an example, that is one that I gave.

Q. Well, let's look at that, Ms. Pierson.

I'm going to pull up your interview that

[p.305]

you had with representative of the January Committee, this public interview.

Now, but before I do that, before you did that, you knew that it was unlawful to provide false information to Congress, right?

A. That is correct.

Q. Okay. So you're under oath here today.

JA773

You had a similar obligation at that time, right?

A. That is correct.

Q. Okay. So I'm pulling up page 124 of Exhibit 264, and I'm going to bring the screen out.

Is that big enough for you to read?

A. Yes, it is.

Q. So the question that you were asked was, talking about the National Guard. It says:

"What specifically did you tell the President or Mr. Miller about security concerns that you had for that day — for the day?"

Right? Do you see that?

A. Yes.

Q. And then if we go down, you have two paragraph of answers.

A. Uh-huh.

Q. And you talk about some physical assaults

[p.306]

there were, conflicts between Black Lives Matter and those other guys, I don't even remember who they all were, countless reports —

A. Yes.

Q. — of people being attacked at some of these marches or rallies or whatever you want to call them.

Now, were you referring here to the November and December rallies you talked about briefly?

A. Yes.

Q. The ones where Trump either visited in a motorcade to express his support and then the other one, he flew over in Marine One and did two laps, right, around —

A. Yes.

Q. — over the protest and everyone —

A. I don't know how many laps, but he flew over —

Q. Yeah.

A. — yes.

Q. But everyone in the protest thought that was pretty great that the President expressed support that way, didn't they?

A. Yes.

Q. Okay. And then so going back to your [p.307]

answer, you say:

“There is high potential that on top of all the previous encounters that specifically Trump supporters have run into with being attacked pretty much anywhere.”

Right?

A. Uh-huh.

Q. Did you —

A. Correct.

Q. — identify any other concern, security concern, other than Trump supporters?

A. I spoke to the Committee investigators on more than one occasion, so I had expressed all of my concerns, yes.

Q. Okay. That wasn't quite my question, Ms. Pierson.

Are you telling us that there's a written record of you telling people under oath that you expressed concerns about the security of the Capitol?

A. I didn't have anything to do with the Capitol, so I don't know what you're referring to.

Q. Okay. I'm just asking what you testified to.

Have you ever testified under oath that — or being in trouble for lying like you are to Congress,

[p.308]

that you had security concerns about the Capitol?

A. I had concern — security concerns about the rally.

JA775

Q. Okay. So that's a no, you have never told anyone that you had security concerns about the Capitol, did you?

A. I mentioned the bad actors who had previously caused concerns at other capitols.

And why I was concerned generally and specifically, if you go to the next line where you highlighted, it says:

"So there was concern that, you know, people would come and try to start trouble."

And that was my concern. That is a general concern.

MR. OLSON: Your Honor, I move to strike as nonresponsive.

THE COURT: Overruled.

Q. (By Mr. Olson) But can you — I want to ask a very simple question, Ms. Pierson:

Have you ever testified that you had a security concern about the Capitol where you mentioned the Capitol?

A. I don't recall specifically because my concerns were general.

[p.309]

Q. Okay. Now, did the White House tell anyone publicly that Trump was going to call on people to march with him to the Capitol on the Ellipse speech?

A. Did the White House say publicly that he was? I'm not aware.

Q. Okay. In fact, you knew that Ms. Kremer did not have a permit to march to the Capitol, right?

A. That is correct.

Q. And that because of that, if the National Park Service found out about a march to the Capitol, she would get in trouble, right?

A. That is what she expressed to me, yes.

Q. Yeah. And, in fact, you've never seen a permit to march to the Capitol, have you?

JA776

A. I have not. I was not involved in the permitting process.

Q. And you've never seen any written proof at the time that any agency outside of the White House knew of Trump's plan to tell the crowd to march to the Capitol, do you?

A. I'm not aware of the White House plans.

Q. Okay. But you've never seen anything yourself?

A. No.

Q. Okay. Now, on — I want to turn to events [p.310]

later in the day on January 6.

In the moment, what you said was, "Trump asked for a Civil War," right?

A. Note that I'm aware of.

Q. Well, let's look at your texts.

And what I want to do, this is a text between you and Brad Parscale. It's Exhibit 263.

Do you see that?

A. I do, yes.

Q. And you see the date here, I'll just highlight one. Is it big enough for you to read, by the way?

A. Yes, sir.

Q. Okay. So this is January 6 in the evening, right?

A. Correct.

Q. And there's — it goes back and forth. I want to give a little context to make sure we get your text exactly right.

What Mr. — and who is Mr. Parscale at this time?

A. He's the former 2020 campaign manager.

Q. Right. But he had a pretty good idea of how Trump communicated to his supporters, right?

[p.311]

MR. SHAW: Objection. Foundation.

A. I can't speak for Brad Parscale.

JA777

THE COURT: Overruled.

Q. (By Mr. Olson) Well, Mr. Trump put him in charge of his campaign, right?

A. Actually, he fired Brad Parscale.

Q. Well, a lot of people have been fired by Mr. — by Mr. Trump.

But at some point, Mr. Trump put Mr. Parscale in charge of his campaign, right?

A. Correct.

Q. Okay. And so what Mr. Parscale says to you on January 6 is:

“That was a sitting President asking for a Civil War.”
Right? That’s what he says?

A. That’s what he says.

Q. And then you talk about — you say:

“Lincoln actually suspended habeas corpus.”

And it’s kind of hard to follow the thread because it looks like you’re each texting to each other — this happens to all of us, right — you’re texting while someone else is responding, so it doesn’t always match up. But I want to make sure you see the

[p.312]

full exchange.

“A sitting President asking for a Civil War.”

You respond:

“This one?”

And then you say:

“Lincoln actually suspended habeas corpus.”

And then Mr. Parscale says:

“Well, he better be right.”

And then let’s turn to see what you say on the next page. You say:

“He asked for a Civil War.”

You see that?

JA778

A. Do you see what I said after that? “Don’t overdramatize.”

Q. Right. But you said, “He asked for a Civil War,” right?

A. Responding to Brad Parscale, yes, that’s correct.

Q. Yeah. Now, we can all agree that President Lincoln never asked for a Civil War, did he?

A. Did he ask for it? Or did he actually do it?

Q. Ask for it.

[p.313]

A. What’s your question?

I don’t know. I wasn’t around back in Lincoln’s time.

Q. Okay. But the “he” you’re referring to right here, when you say, “He asked for Civil War,” that is Trump, right? What you’re saying is Trump asked for a Civil War, right?

A. No. What I’m saying is Brad was overdramatizing by saying he asked for a Civil War. You have to read the entire text, sir.

Q. Well, that’s what we’re doing.

A. Well, you’re not doing it because you stop at, “He asked for a Civil War.” You completely ignore the rest of the text in that line.

Q. I’m just — I’m just putting your words in context.

A. But you can’t put my words in context —

Q. Excuse me —

A. — unless you’re —

Q. Excuse me —

A. — using —

Q. Ms. Pierson —

A. — the actual text.

Q. I’m sorry, I didn’t mean to interrupt, but I want to make sure we’re efficient.

[p.314]

And I'm showing everybody your text, we're talking about your whole text. If there's anything else you want me to show, I'm happy to do it.

But you said on January 6, "He asked for a Civil War, don't overdramatize," right?

A. Yes.

Q. Okay.

A. In response to his text.

Q. Now, also on January 6, while the insurrection was underway, you knew full well that the mob's purpose was to come for the Capitol, right?

A. I don't know that I would know their purpose. I wasn't in on their plans.

Q. Well, you said —

A. But it was pretty clear, watching it unfold, what was happening.

Q. Right. But you said on January 6 that the mob came for the Capitol, right?

A. Do you have that to show me?

Q. Sure.

A. I would need to see the context.

MR. OLSON: This is Exhibit 258, Your Honor.

Q. (By Mr. Olson) And this is a text with you and Taylor Budowich.

[p.315]

And I'm pronouncing that name right? Or can you pronounce so I get it right?

A. Yes. That's correct.

Q. "Budowich"?

A. That's correct.

Q. Okay. And you're texting back and forth during the insurrection on January 6, right?

A. During the protest, that's correct.

JA780

Q. Is — and Taylor, at 2:08, says to you:
“Get out of the city, night is going to be tough.”

Do you see that?

A. I do see that, yes.

Q. And then you respond, there’s another text on the next page, but the first part of your text is:

“I don’t think they’ll riot.”

And then you say:

“They came for the Capitol.”

Do you see that?

A. And then I say:

“So crazy.”

Q. Yeah.

A. Yes, I see it.

Q. And — and then I want to talk about a text exchange you had with Mr. Miller.

[p.316]

And within hours of these events occurring, you knew pretty quickly that police officers were injured and someone had been killed, right, in this attack on the Capitol?

A. I wouldn’t have known until it was reported.

Q. But you knew that day, right, like most Americans, that someone had been killed?

A. Yes, later that evening, yes.

Q. Okay.

A. I did hear.

Q. And so the next day, after you knew that someone had been killed and many police officers had been injured, you were making jokes about the insurrection, weren’t you?

A. I don’t recall.

Q. Well, let’s look at —

A. It was all —

JA781

Q. — what you said.

A. — so surreal.

Q. This is back on your text exchange with Mr. Miller.
And if we see here, again you're in gray on the left?

A. Uh-huh.

[p.317]

Q. And this is — this is a picture that you sent, where
you say:

“Definitely not a Trump supporter, no chance.”

And now I want to talk about the exchange on January
7 in the morning, right?

So the morning after the Capitol was attacked, you
sort of posted a meme, right:

“2020 is finally over. That was the craziest year
ever. 2021, but wait, there's more.”

And remind me, that's an infomercial guy, Bob
somebody, what's his name?

A. I don't remember his name, but yes.

Q. He's the guy that sells you stuff on late night TV,
right?

A. Yes.

Q. Okay. So this is what you said, unprompted to Mr.
Miller.

And then the next day — or sorry, the text consider —
exchanges, and he says:

“Never too soon.”

And then you send the picture of — now — of someone
carrying out a Capitol — you say — and you say:

“You have to admit that seeing Nancy

[p.318]

Pelosi's lectern being carried out, carried away by a
Trump supporter is pretty damn funny.”

Right?

A. Yes, it was hysterical.

JA782

Q. And this was less than 24 hours after our Capitol had been attacked, after a speech by Mr. Trump, right?

A. That's correct.

MR. OLSON: No further questions.

THE COURT: Mr. Shaw, do you have any redirect?

MR. SHAW: No, Your Honor, I have no further questions.

THE COURT: Thank you for your testimony, Ms. Pierson. You are released.

THE WITNESS: Thank you, Your Honor.

MR. OLSON: Actually, Your Honor, can we move in a couple of exhibits, I'm sorry.

It's the text exchange, is Exhibit 265 and 263.

THE COURT: Any objection?

MR. SHAW: No, Your Honor.

THE COURT: 263 and 265 are admitted.

(Exhibits 263 and 265 were admitted into evidence.)

[p.319]

MR. BLUE: Your Honor, our next witness is — sorry, Amy Kremer. I had to get my head around it.

And she's on the East Coast. She is available now if you would like to — would like to proceed, but she would prefer to go first thing in the morning because it's now 6:30 her time.

THE COURT: And you have another —

MR. BLUE: No.

THE COURT: — witness?

MR. BLUE: No, she would be the only — we would be breaking if we did not bring her up, call her now.

THE COURT: We have — you have a pretty long witness list, and I just want to make sure that we're going to wrap up and take into account that Mr. Heaphy also needs to testify.

JA783

So I'm willing to go to 5:30 as — as planned, but I just want to — I don't want to be told tomorrow or Friday that we're not going to finish because we are breaking early on a bunch of days.

MR. BLUE: Your Honor, I understand. We think we'll be — we'll be able to finish by then, but if you're concerned about it, I do not mind putting her on now.

THE COURT: I really leave it to you

[p.320]

because I have no idea how long you'll take or — with any of your witnesses.

MR. BLUE: So can you just give me two minutes and I'll get back to you?

THE COURT: Okay.

MR. OLSON: I just want to confirm with Mr. Gessler since he is lead counsel, but I'm pretty sure he's fine with this. But let me check.

(A pause occurred in the proceedings.)

MR. SHAW: Your Honor, if we could go off the record for a moment?

THE COURT: I'm not sure what that means given that we're on TV, but okay.

(Discussion off the record.)

MR. BLUE: Your Honor, we're not concerned about finishing. We should be able to finish the four fact witnesses tomorrow that we have left: Kremer, Bjorklund, van — Flein — thank you — Flein, and Buck, Congressman Buck.

And then that should be easily done tomorrow. And then on Friday, we expect to have our expert in the morning. And we would be done at that point.

THE COURT: Okay. I'm sorry, you said Flein, Bjorklund, Buck, and —

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MR. BLUE: Kremer.

THE COURT: Kremer.

So are you not calling Congressman Nehls?

MR. BLUE: No, we actually have — we're not going to be calling Congressman Nehls, and we're not calling Mr. van der Veen.

THE COURT: Oh, okay. Well, sounds like we should be in good shape, then.

MR. BLUE: Yeah, I think we'll be in fine shape.

THE COURT: Okay. So we will recess for the day and reconvene tomorrow at 8:00 a.m.

MR. BLUE: Thank you, Your Honor.

(WHEREUPON, the within proceedings were adjourned at the approximate hour of 4:39 p.m. on the 1st day of November, 2023.)

* * * * *

JA785

DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO
1437 Bannock Street
Denver, Colorado 80203

Case Number 2023CV032577, Courtroom 209

CERTIFIED STENOGRAPHER'S TRIAL
TRANSCRIPT

TRIAL DAY 4: November 2, 2023

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAHER,
KATHI WRIGHT, and CHRISTOPHER
CASTILIAN,
Petitioners,

v.

JENA GRISWOLD, in her official capacity as
Colorado Secretary of State, and
DONALD J. TRUMP,
Respondents,

and

COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE, and DONALD J. TRUMP,
Intervenors.

The trial in the above-entitled matter commenced
on Thursday, November 2, 2023, at 8:01 a.m.,
before the HONORABLE SARAH B. WALLACE,
Judge of
the District Court.

This transcript is a complete transcription of
the proceedings that were had in the

JA786

above-entitled matter on the aforesaid date.

Stenographically reported by:

Lisa A. Knight, RDR, CRR, RSA

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PROCEEDINGS

THE COURT: We're on the record in 2023-CV-32577, Norma Anderson versus Jena Griswold and Intervenor, Colorado Republican State Central Committee and Donald J. Trump.

May I have entries of appearance.

MR. GRIMSLEY: Good morning, Your Honor. For Petitioners, Sean Grimsley, Eric Olson, Nikhel Sus, Jason Murray, Martha Tierney, and Mario Nicolais.

MR. BLUE: Good morning, Your Honor. Geoff Blue on behalf of Intervenor, Donald J. Trump. With me is Scott Gessler, Jacob Roth, and Justin North and Joanne Miller.

MS. RASKIN: Good morning, Your Honor. Jane Raskin on behalf of the Republican State Central Committee. And with me are Mick Melito, David Moelker, and Robert Kitsmiller.

THE COURT: Great.

MR. KOTLARCZYK: Good morning, Your Honor. Michael Kotlarczyk from the Attorney General's Office on behalf of Respondent Jena Griswold, in her official [p.9] capacity as Secretary of State. With me at counsel table is Deputy Secretary of State Christopher Beall.

THE COURT: Okay. Thank you. You're having technical problems, Mr. Blue?

MR. BLUE: Yeah. I have multiple monitors that I use, and apparently the computer is trying to put my second monitor up there. So I need to turn off that. And I did it so long ago, I don't remember how I did it, so it's going to take me a few minutes.

THE COURT: Okay.

(Pause.)

MR. BLUE: All right. I think we're good, Your Honor.

THE COURT: Okay.

MR. BLUE: And before we start, Your Honor, I just want to give you — we have three witnesses today. We're going to start with Ms. Kremer, and we have Tom — four witnesses today. I'm sorry. Four witnesses.

THE COURT: It just keeps [p.10] growing.

JA791

MR. BLUE: Yeah. No. We have Ms. Kremer and we have Mr. Van Flein and then we have Mr. Bjorklund and then Congressman Buck today.

THE COURT: Okay.

MR. BLUE: We actually expect to be done fairly early in the afternoon: 2 or 3 o'clock.

THE COURT: Okay. And then is the Colorado Republican Party going to be calling any witnesses?

MS. RASKIN: Your Honor, we haven't made an absolute final decision, but I think it likely we will not.

THE COURT: Okay.

MR. BLUE: We have our expert tomorrow morning, Mr. Delahunty. He'll be on first thing tomorrow.

THE COURT: And will the Plaintiffs have any — will the Petitioners have any rebuttal case?

MR. GRIMSLEY: We're not sure yet at this point, Your Honor, but we are scheduling Mr. Heaphy for 1 o'clock tomorrow [p.11] afternoon, or thereabouts.

THE COURT: Okay. On that, it sounds like we're going to have time. I think it might make sense, if people want to do closings, to do closings on Friday, if the parties want to. So why don't we talk about that after your expert.

MR. BLUE: Okay.

THE COURT: Because we previously talked about doing closings after the fact or not at all.

MR. BLUE: We talked about doing them ten days from now, on Wednesday, the 15th. Your Honor, if you remember, part of the reason for doing the closings then, though, was to give you your 48 hours.

THE COURT: Yeah.

MR. BLUE: And we're not doing our findings of fact and conclusions of law until next Wednesday, so you would be way was to give you that ability.

THE COURT: Yeah. But at the same time, I thought that the general [p.12] consensus was that the parties could waive the 48-hour requirement.

So why don't we readdress that sometime later today. If that's no longer the parties' position, then I think it would make sense to do the closings later. But there's a chance, I guess, theoretically, I — well —

MR. BLUE: And I'm not the one doing the closings, so that would be Mr. Gessler having that conversation.

THE COURT: Okay. I'm not trying to rush people, but just thinking if we have time reserved and people still have a view that we can waive the 48-hour requirement, that it might make everybody happier just to be done with me for the time.

So anyway, is — it looks — this "Kremer" or "Kremerer"?

MR. BLUE: Kremer. The Intervenor, Donald J. Trump, calls Amy Kremer.

THE COURT: Okay. Ms. Kremer, can you hear us?

THE WITNESS: Yes, ma'am, I [p.13] can.

THE COURT: Will you raise your right hand, please. AMY KREMER, having been first duly sworn to state the whole truth, testified as follows:

DIRECT EXAMINATION BY MR. BLUE:

Q. Good morning, Ms. Kremer. How are you doing?

A. Good morning. I'm good. How are you?

Q. Doing well. Thank you. So could you please start with telling us a bit about your history in politics.

A. Yes. I am — I started — I'm one of the founders of the modern-day Tea Party back in 2009. I've never been in politics before. I'm a former flight attendant. And I got engaged then, and we came together over Twitter and started the modern-day Tea Party movement.

JA793

Tea Party Patriots was actually founded in my kitchen. And I was with [p.14] Tea Party Patriots for a while. And then I left and joined the Tea Party Express and spent — I guess I was there until 2014-2015.

And we just — I mean, honestly, the Tea Party movement started, you know, we were opposed to government spending with the Bush administration. And then Obama got elected, we were fighting Obamacare. Government taking over healthcare. And we just mobilized people across the country.

Q. And then — so after the Tea Party — you worked with the Tea Party. What did you do next?

A. Then in 2016, I started Women for Trump. I was one of the earliest supporters out there, doing press and rallying the troops for President Trump as a grassroots activist. And we did that in 2016.

Q. And then after President Trump was elected, what happened? What did you do next?

A. So then in 2019, I founded Women for America First. And that was to focus on policy and the legislative agenda [p.15] and pushing the America First agenda.

Q. And who runs Women for America First?

A. I do. We have a board.

Q. And who else is a part of it?

A. Jennifer Hulse and then Kylie Jane Kremer.

Q. And does Women for America First have any social media accounts?

A. We do.

Q. And who runs those?

A. There's a number of us that run them.

Q. So different people have access to those? Is that what you're saying?

A. Yes.

JA794

Q. And did there come a time that you worked with an organization called Angel Families?

A. Yes. It wasn't the organization, but in 2019, when President Trump was — wanted to declare an emergency and use the funds for a border wall, and the government was shut down and everybody was talking about the effect on, you know, the government workers. They're [p.16] going to run out of their healthcare, paychecks, and whatnot.

And there are a number of Angel Families. And Angel Families are families who lost a family member to an illegal immigrant.

So we gathered the Angel Families and went to Washington, D.C., to give President Trump some support. And we just want the border secure. And so we —

Q. All right. I'm sorry. I didn't want to go that far. I just wanted to finish up with your — where you've been in politics leading up to the election.

A. Oh, I'm sorry.

Q. No. That's okay.

A. Okay.

Q. All right. So let's move to the election of 2020. And can you tell us kind of what happened and how you started getting involved after the 2020 election.

A. Yeah. So 2020 was a crazy year, as we all know, from COVID. And so nothing seemed normal. And then the night of the election, I think Trump was winning big. [p.17] And then you go to bed and wake up the next morning, and it's totally flipped.

And so it was obvious something was going on. These states stopped counting. And there were a number of states that stopped counting. And there was something going on. And people knew it across the country.

JA795

And so we started — nobody was doing anything. The campaign wasn't doing anything. The RNC wasn't doing anything. I mean, there was nobody. And so I did what I do, and that's mobilize people and bring people together.

And so I came together with a group of people, a coalition, and we — people started going to their state and showing up, standing together, and demanding election integrity.

Q. And at that point — at some point did you decide that you needed to head to Washington, D.C.?

A. Yes. Well, it was obvious that there was something going on. And so Washington, D.C. — you know, people can go [p.18] to their state capitols, but not everybody can go to Washington D.C. But a lot of people wanted to go to Washington, D.C.

We could not get a permit for the Saturday after the election. We couldn't get one that quick. And so we applied for a permit for Saturday, November 14th — so a week and a half later. And we had a rally that Saturday.

Q. And who was the organizing force behind that rally on November 14th?

A. It was Women for America First.

Q. So your organization; right?

A. Yes.

Q. And what was the plan for that rally?

A. The plan was — it was pretty simple. Like I said, we were working with this coalition. And we wanted everybody involved and engaged.

And so we were going to have a rally at Freedom Plaza. And then we were going to march to the Supreme Court and have a stage there, where we had

speakers there. And that would — ay the end of that program, [p.19] that was it.

MR. BLUE: Hold on just a second, Ms. Kremer.

Your Honor, do you want us to wait until we get a better — have her picture up? Or can we just continue?

THE COURT: Oh. You know, I don't —

MR. BLUE: My assumption is she has a bandwidth issue on her end, but I don't know.

THE COURT: It's weird.

(A discussion was had off the record regarding technology issues.)

THE COURT: Ms. Kremer, for some reason, the screen that the court reporter is looking at doesn't have you — a picture of you, and so she can't read your lips, which is part of the whole process.

So we're going to continue, but if you could talk slowly and articulate, then we'll see if we can proceed. If she's still having trouble, we may have to take a break and figure out what's going on.

THE WITNESS: Okay. Yes, [p.20] ma'am. Thank you.

MR. BLUE: Oh. Apparently there was a setting on my computer that was — that tells you how technically savvy I am, or not.

THE COURT: Is there a way where you could make it so she is the primary...

(A discussion was had off the record regarding technology issues.)

BY MR. BLUE:

Q. So, Ms. Kremer, you dropped off again for some reason, so we'll see what happens.

A. I can see y'all fine.

JA797

Q. It's that the court reporter doesn't see you, is what the issue is. But we'll work through this.

A. Okay.

Q. Okay. So we just talked about the plan. You said there was a coalition of people, of groups, involved in the November 14th rally. Correct?

A. Correct.

Q. Can you tell us who was in that [p.21] coalition?

A. There was Brandon Straka, Ali Alexander, Tea Party Patriots, Moms for America. I'm trying to think who else. Scott Presler was involved.

Q. So it's fair to say then that there was a fairly large coalition of groups and people; right?

A. Yes. It was a large coalition. Eagle Forum was one.

Q. And so when you went — so you started at Freedom Plaza. Who were your speakers at Freedom Plaza that day?

A. Oh, my gosh. Well, our team, and then the influencers and coalition that we — that we had brought together.

So I think it was, like, an hour-and-a-half program. And you think you're going to be short on speakers, but we always have way more.

Q. And then after Freedom Plaza, I think you said that you marched down to the Supreme Court of the United States. Is that correct?

A. Yes, we did. [p.22]

Q. And you had more speakers there; correct?

A. Correct.

Q. Now can you describe the rally at Freedom Plaza.

A. Yeah. I mean it was huge. And people came from everywhere. And these are patriotic, freedom-loving citizens that really just dropped everything in their lives,

at a moment's notice, to come to Washington, D.C., because they felt like the election had been stolen.

So there's a lot of love there. Love of God, love of country, love of each other, and a lot of patriotism. And so it was very joyful. Singing, dancing, that sort of thing.

Q. And was there any violence that occurred during the rally at Freedom Plaza?

A. No.

Q. And so y'all marched down to the Supreme Court. And can you similarly describe the crowd as they marched up to the Supreme Court.

A. I mean, the crowd was very [p.23] happy, like I said, and people dancing and singing and whatnot. And we got to the Supreme Court, same type of atmosphere.

I mean, these are happy people. They're there because they want to be — they want to be there. And they're extremely happy. And they love this country. So it was the same atmosphere at the Supreme Court.

Q. So it was the same atmosphere from Freedom Plaza, during the march, and at the Supreme Court as well; correct?

A. I didn't march up there with the group. I went after the group. So I can't say what, you know, the — but, yes, these are — when they got there, it was the same type of atmosphere.

Q. Great.

THE COURT: I'm sorry. This is in, like, mid-November?

MR. BLUE: November 14th, Your Honor.

And if we could play Exhibit 1025, please.

(Pause.)

[p.24]

BY MR. BLUE:

JA799

Q. Ms. Kremer, we're having some technological difficulties again, so hold with us.

A. It's okay.

(Video played.)

Q. So, Ms. Kremer, you just saw that video; correct?

A. Yes.

Q. Okay. Can you tell us what's happening there?

A. Well, that video is actually from December 12th, the second rally that we had. But, I mean, it's the same — same type of atmosphere. There were just more people December 12th. And we didn't have the flyover.

But that, what we were watching, was Faye Kaegel [phonetic], who was with Women for America First, singing the national anthem. And they're singing along, and all of a sudden here comes Marine One, the President. And as you saw that, he flew over twice. And the crowd loved it. They went nuts.

[p.25]

Q. And you didn't take that video, did you?

A. No.

Q. But you were there when that was happening; correct?

A. Yes. One of my team members took it.

Q. And that is a fair — that's a fair and accurate representation of what was occurring at that time; correct?

A. Yes.

MR. BLUE: Your Honor, I'd like to move admission of Exhibit 1025.

THE COURT: Any objection?

MR. GRIMSLEY: I question the relevance of it, but we'll let it in.

THE COURT: 1025 is admitted.

(Exhibit 1025 was received into evidence.)

JA800

THE COURT: But I just want to make clear: So that was on December 12th; is that right?

MR. BLUE: Yeah. And we'll reference back to it when we get to the December 12th rally, because we'll be talking [p.26] about that in a few minutes.

THE COURT: Okay.

BY MR. BLUE:

Q. Now, Ms. Kremer, do you know a man named Vernon Jones?

A. I do.

Q. And can you tell us who he is?

A. Yes. He is a politician here in Georgia who is a Democrat, and then left the party and became a Republican. He ran for governor here in the state of Georgia. He was in the state legislature before that.

Q. And did he speak at the rally at the Supreme Court on November 14th?

A. Yes, he did.

Q. And was there anything specific that he said that you thought was relevant or notable?

MR. GRIMSLEY: Your Honor, objection.

We tried to get in other speeches from the Ellipse that day, on January 6th, including from Rudy Giuliani and John Eastman. The other side objected strenuously. That was far more relevant, [p.27] I think, to what President Trump was doing, since he was referencing those two.

So we'll object to any reference to other speeches.

THE COURT: Sustained, unless we want to open up the door to other speeches.

MR. BLUE: Well, what we're asking to have put in the record would just go to the state of mind of the crowd and what was happening in the crowd.

JA801

MR. GRIMSLEY: As would the Rudy Giuliani and John Eastman speeches, Your Honor.

THE COURT: Yeah. I think you can ask her what the state of the mind of the crowd was without having her repeat what the speeches said, which is clearly hearsay.

And you've objected, and I've sustained your objections on what other people said at the January 6th rally.

MR. BLUE: Okay. Thank you, Your Honor.

BY MR. BLUE:

Q. So, Ms. Kremer, did anything [p.28] notable happen as the November 14th rally was wrapping up?

A. Well, so we were at the Supreme Court. And as the speeches were going on, Congressman Louie Gohmert was there, and he kept bringing up new members of Congress: Lauren Boebert, Nancy Pelosi [phonetic], and a few others popped up.

And it was November, and so the sun was starting to go down. And the Supreme Court Police kept saying, "You need to wrap it up. You need to wrap it up." And he finally said, "You need to wrap this up because Antifa is over there at the church, and we're not going to be able to keep y'all separated. And you need to get out of here before dark."

And so we wrapped it up because we wanted people to be safe.

MR. GRIMSLEY: Your Honor, I would move to strike the testimony about what she was told by an officer. That is being offered for the truth of the matter asserted.

THE COURT: Sustained.

[p.29]

BY MR. BLUE:

JA802

Q. So, Ms. Kremer, when you — was there a specific reason — without referencing anybody else, was there a specific reason you were trying to wrap it up before dark?

MR. GRIMSLEY: Same objection, Your Honor.

THE COURT: We'll see if she can answer without just saying what people told her.

A. We wanted — I mean, this was our rally. Our name was on the permit. And we wanted to know that people were safe. We didn't want to put our supporters in a dangerous situation. And we knew there were agitators, and so we wanted everybody to get out of there.

And that was simply it. It was to keep our supporters safe.

Q. And when you wrapped up, what happened? Did you go back to your hotel at that point?

A. Yes. People —

Q. And did — go ahead.

A. I was going to say, people [p.30] dispersed and, I mean, I guess went to the train station, hotel, buses, whatever. We went back to the hotel.

Q. And which hotel were you in?

A. We were in The Willard.

Q. And did something happen back at the hotel that night?

THE COURT: Okay. I'm just getting a little bit confused here.

Are we talking about November —

MR. BLUE: We're still on November 14th.

THE COURT: Okay. Sorry.

MR. BLUE: Yes. Fair enough, Your Honor.

MR. GRIMSLEY: And, Your Honor, I'd object to the relevance of what happened back at The Willard hotel on

November 14th. It has nothing to do with Trump or any of the issues in this case.

THE COURT: I have no idea one way or the other, but I'm going to let her testify.

MR. BLUE: Thank you, [p.31] Your Honor.

BY MR. BLUE:

Q. So can you — Ms. Kremer, I'll repeat the question.

Can you tell us what happened at The Willard hotel that night?

A. Yes. The Willard hotel was attacked by Antifa and Black Lives Matter. They were throwing Molotov cocktails into Cafe du Parc, the cafe/restaurant that is there in the hotel. And then they shut down the hotel because then they started shooting fireworks at the building.

So The Willard shut down. And nobody could go in or out. And so it was that way for a number of hours, probably three or four hours.

Q. And are you aware of any violence perpetrated by any of the members — any of the people who attended the November 14th rally?

A. No, I'm not.

Q. So after the November 14th rally, it's my understanding that y'all did a bus tour. Is that correct?
[p.32]

A. Yes.

Q. And what was the name of that bus tour?

A. March for Trump.

Q. And where did you go?

A. We started out in south Florida, and we ended up in Washington, D.C., on December 12th, for the next rally. We went to a number of the swing states. I can't remember the exact route.

Q. And who organized that?

JA804

A. Women for America First. My team.

Q. And was the coalition that was involved in the November 14th rally, were they involved in the bus tour?

A. So, no, they weren't.

Some of them were, and supported us and came to our events and whatnot. But that core group of Ali Alexander, that — we stopped working with him right after that very first rally —

Q. And why is that?

A. — so he was not — I'm sorry.

Q. I'm sorry. I talked over you. [p.33] I shouldn't do that. Please finish what you were saying.

A. We stopped working with him right after that first rally. And he —I mean, we cut off all communication because he was out online attacking us and whatnot.

So we just went and did our thing. We went and did what we know to do. And that is to mobilize people, rally people across the country. That's what Tea Party is for us. That's what we did with Tea Party Express. I don't even know how many bus tours we did.

Q. And over that time, did you hold rallies in various cities during that tour?

A. Yes, we did. As I said, we went through a number of those states, and we held rallies in those states.

Q. And can you describe the crowds at those rallies?

A. I mean, it was — you know, it's the same type of atmosphere like we just saw on the Freedom Plaza rally. The people come there. They're happy. They want to be [p.34] part of this. And they love their country. And they love President Trump. And they really believed that the election was stolen, so they wanted to have their voice heard.

JA805

Q. And are you aware of any violence by any members — any people who came to your rallies as supporters during the bus tour?

A. There was nothing perpetrated by our supporters, but there was — there were incidents where we were attacked.

Q. And can you give us a few examples of those?

A. Yeah, so —

MR. GRIMSLEY: Your Honor, may I just have a standing objection to the relevance of attacks on them by other organizations?

MR. BLUE: Your Honor, this is going to be relevant to kind of how — first of all, it's relevant to the crowds and what the expectation is of the people attending the rallies. So that's very relevant.

And to the security — any security concerns were not about the people [p.35] who were attending the rallies, but the other people who were counter-protesters.

THE COURT: Okay.

MR. GRIMSLEY: I'm not sure it would be relevant in any event. But if that were true with regard to the January 6th rally, I might see the relevance, but to rallies predating January 6th, I don't.

THE COURT: My assumption is that it's a precursor to what happened on January 6th and that — I don't know — maybe that's why people brought weapons, so they could defend themselves. We'll find out.

But I'm going to let the Intervenors put their case on. So you may have a standing objection. And I'm going to let them put their case on.

So it's overruled.

MR. GRIMSLEY: And I will stop standing then.

BY MR. BLUE:

JA806

Q. All right. So, Ms. Kremer, continue, please.

A. I'm sorry. I forgot where we were.

[p.36]

Q. You had talked about various attacks on the — on your supporters — on the supporters who were coming to your rallies, and you were talking about what those were.

A. Yeah. So we did a rally in Nashville, one of the suburbs outside of Nashville. And we had four security guys with us. And they would stand — I mean, they were doing what they needed to do.

And so there was a guy standing, like, in the back of the crowd, and one of our security guys noticed he had a Molotov cocktail. And so Greg, our security detail, I guess tackled him, got the Molotov cocktail away from him. And they arrested him. The police arrested him.

So he was going to throw that into the crowd. That same rally, there was somebody that ran over Greg's foot, and Greg maced him. And then he hit a car, and the police came and arrested him.

We were in Nashville another time — and this was before Christmas — and we were doing a can food drive at a shopping [p.37] center parking lot. And here comes somebody with a sharpened screwdriver to stab us. And, again, our security detail handled it.

I mean, they tried to run us — you know, a number of times they tried to run us off the road, so — all over the country. But we had our security detail and a car in front and back, and so, I mean, we were —nothing ever happened from that. But those are the kind of things that happened.

Q. Thank you.

And, again, did your — did the supporters who were at the rallies engage in any violence?

JA807

MR. GRIMSLEY: Objection. Foundation.

A. No, not to my knowledge.

BY MR. BLUE:

Q. Thank you.

THE COURT: Overruled.

MR. BLUE:

Q. And so let's move on to December 12th. December 12th, y'all ended up in Washington, D.C., again; is that correct?

A. That's correct.

[p.38]

Q. And can you just — and that was going to be another rally. Can you describe what the plan was for that rally?

A. It was the same plan as November 14th, that we got a permit for Freedom Plaza. We were going to march to the Supreme Court. We had a stage at the Supreme Court. Do the same type of program, some of the same speakers. I think we had new speakers too. And that was it.

Q. And were any of the former members of the November 14th coalition who you had cut ties with, did any of them speak at the December 12th rally?

A. No, they did not. I mean, I wanted at that point to keep ourselves away from the crazies, the agitators, like Ali Alexander and Alex Jones. And so we had cut ties. We were having nothing to do with them. And they were not — we didn't invite them to speak.

Q. And what kind of people came to the December 12th rally?

A. The same type of people that were there before. Exactly the same. Some [p.39] of the same people were there. And then, of course, new people.

But again, just freedom-loving Americans. I mean, people came — you know, single people, married people. Sometimes three generations: the grandparents, the parents, and the children. I mean, it's a family-friendly type of atmosphere. And so it was the same type of people. Joyful crowd.

Q. And did you take any precautions with your buses in — on December 12th?

A. Yeah, so, I mean, we were concerned because we knew that Antifa was — again, they were there. They were trying to instigate, agitate. And because of what they did the night of — we didn't have a bus on November 14th, and they attacked the hotel.

So my concern was that — December 12th, we had two buses with us. And these are big buses that are very expensive. And my concern was that the buses would be attacked and vandalized.

So we actually parked the buses in Arlington, I believe, so that they would [p.40] be safe and not right there in the open for attack.

Q. Great. Thank you.

And was there any violence at the rally on December 12th?

A. No, there was not.

Q. And we showed a video earlier, which was Exhibit 1025, that was from that rally. And that was a good representation of the crowd during the rally on December 12th?

A. Yes. That was December 12th. And it was an amazing day.

Q. And did anything happen as you were leaving the rally — as you were leaving Washington, D.C., later that week?

JA809

A. Yeah, so we were — we were actually going to do — we were going to take a big card to Metro PD to say thank you for your service. And on the way there, the bus was attacked. Somebody started throwing burritos at the bus and attacking us.

And so one of our security guys got out and handled it. And then we were on our way.

Q. So I want to jump forward now [p.41] — well, let me just — after December 12th, you continued the bus tour; isn't that right?

A. Yes. We did continue the bus tour. We took a break there and traveled to the West Coast. Some of the team did not go home, because we're in the middle of Christmas. So we did a couple of events, went to the West Coast, took some days off, and then started off from the West Coast.

Q. And at that point — at what point did you decide to head to Washington, D.C., for January 6th?

A. Well, we had planned, like, in November, as this was all happening — even before, I think, our November 14th rally, you know, we looked at the dates and said we need to be in D.C. on these three dates.

I mean the day we were there, November 14th. And then we picked December 12th, the Saturday, because we wanted as many people to come on the weekend as we could. And I think it was — December 14th was the day that the states were going to certify their slate of electors, and so we picked December 12th. [p.42]

And then January 6th was the day that the electoral college certification would happen.

So we had decided that — I mean, we knew that this movement — it was a movement, and we knew that those were the three dates. And so that's when it was decided.

JA810

Q. And who was in charge of organizing the rally on January 6th, when you first started planning it?

A. So when we first started planning it, it was — we were going to do the exact same thing. What we did worked. And it was two beautiful days, you know, with great events. And so we were going to do the same thing: Back at Freedom Plaza; march up to the Supreme Court; hold an event, you know, at the Supreme Court, maybe with speakers, and then wrap it up.

But —

Q. And so — I'm sorry. When you first started planning it, was President Trump expected to speak?

A. No.

Q. And then did there — let's [p.43] step back a bit. I'm sorry.

So before President Trump agreed to come speak at the rally, where was it planned to be held?

A. Originally it was going to be at Freedom Plaza, just like the other two.

Q. And then —

A. But then —

Q. And then at some point there came a time that President Trump agreed to speak; isn't that correct?

A. Yes. They — Trump's campaign reached out and said, "Would you mind moving your January 6th rally to the Ellipse and possibly having the President speak?"

Well, of course. I mean, absolutely. But — and it was a security thing, you know. And, I mean, I would — common sense, I mean, that — Freedom Plaza, there was no way the Secret Service was going to let him come there. There are open buildings and whatnot all around. But I think it was — we moved it to the Ellipse because they could control that environment, and he was safer

there. So we just applied [p.44] for the permit for the Ellipse.

Q. And how did the organization or the planning for the speech change when it was — after President Trump agreed to speak?

A. So before I committed to doing it, I went to my team and said, “Okay. We have an opportunity. They want to move to the Ellipse. And it’s possible that President Trump is going to come speak. But I want everybody to, you know, weigh in on it.”

Because if you do something with the White House, we’re probably, you know — they’re going to take control and whatnot, and Secret Service. And I just need to know my team’s on board.

And they’re like, “Absolutely. Why would we not.”

And so what happened was, logistically, it was different because we had a much bigger stage. The National Park Service required flooring. And, you know, then they — the Secret Service, I guess the magnetom — I can’t even say it.

Q. Metal detectors?

[p.45]

A. Yeah, the metal detectors.

So logistically, it was different, but — and so what we did was when Caroline Wren had come to me — Justin Caporale, with the Trump campaign, actually came to me first and asked me to talk to Caroline about — Caroline. And I said we would. And then we agreed to move it to the Ellipse. We did the permits.

And then all of a sudden, Caroline is trying to take over our event and put these wacko speakers up there that we had already cut out, the Ali Alexanders and Alex Jones of the world.

JA812

And so it was a power struggle. And Caroline thought it was her event. I mean, she tried to hijack our event. At the end of the day, that's what it was.

Q. And let me just stop you and direct you a little bit more.

THE COURT: And if you could just try to speak a little bit slower, that would be great, since the court reporter can't see you.

THE WITNESS: Okay. Sorry.

[p.46]

BY MR. BLUE:

Q. So was the — Ms. Pierson's testified earlier, so we don't need much detail, but could you tell us how this dispute was resolved with Caroline Wren?

A. Right. So when she — Caroline stepped into a hornet's nest. She had no idea what she was getting into with all these different people. And it was just a mess and people arguing. And so Katrina was brought in to smooth everything out and try to get everybody on the same page.

And so the morning, actually, of — go ahead.

Q. And so at some point she went — it's your understanding that she went to the White House to resolve the speaker issue; correct?

A. Right.

So we said, you know, "Alex and Ali are not speaking." And she's insisting, "Yes, they are."

And so what we did is Katrina combined — because they had one list and we had one list. And Katrina combined the list. [p.47] And she went and met with the President, with the list.

Q. Thank you.

And when you're talking about "Katrina," you're meaning Katrina Pierson; right?

JA813

A. Yes, Katrina Pierson.

Q. And what happened — we don't need to go into too much detail, but what is your understanding of what happened at the White House with regard to the list?

MR. GRIMSLEY: Objection. Hearsay.

THE COURT: Sustained.

MR. BLUE: Okay.

BY MR. BLUE:

Q. So did you go to the speech — let's talk about the speech and the rally on January 6th. Were you there?

A. Yes, I was.

Q. Could you describe what it was like?

A. It was cold as hell, number one. But it was the same type of atmosphere. You know, people had come from all over the [p.48] country. And they were concerned because they believed the election had been stolen.

And, I mean, same type of thing. You know, it was very, very uplifting, patriotic, and just full of love. I mean, happy people dancing and just waiting to see their President.

Q. And what kind of people were there?

Were there individuals? Families?

What kind of people were at this event?

A. I mean, I would say — I mean, all — you know, many types of people. We had elderly people there. We had blue collar workers there. We had professionals there. There were donors there. It was, you know, just a wide variety of people that were there.

Q. And were you there for President Trump's speech?

A. Yes.

Q. And can you describe the reaction of the crowd while he was speaking?

[p.49]

A. Well, these people love President Trump, and so they couldn't wait to see him. And, I mean, they're cheering for him. And, you know, when he does these speeches, he plays off the crowd. And they're very reactive.

And so it was the same type of thing. It's the same type of thing that you would see at a Trump rally.

Q. And were you seeing any anger in the crowd?

A. No. No. I mean, no, not at all.

Q. And as you were listening to President Trump, did you get — did you get the feeling that he was telling people to storm the Capitol?

A. Absolutely not. Absolutely not.

Q. And when he talked about fighting, what was your understanding of what he meant?

Was he looking for physical fighting or was he looking for political?

A. No. He was, like —[p.50] metaphorically. You know, political. I mean, we say "Fight like hell" all the time or, you know, "Never back down," "Continue to fight." I mean, that is not physical fighting. That's metaphorical.

Q. And so as President Trump was making his speech — I want to kind of do this again — and making the statements about fighting, how was the crowd reacting to that?

A. I mean, I can't remember specifically, but I'm sure they — cheering him on; you know, agreeing with him and encouraging him, that sort of thing.

Q. And then after President Trump finished speaking, what was the emotion of the crowd that you could see?

JA815

A. I mean, people were happy. They came there, you know — the President was there. They came there to see their President. Many people never have been to Washington, D.C., so it was like a highlight of their life. And people were just happy that — the whole event, it was a fantastic event, and lots of love.

Q. Okay. We're going to play a [p.51] few videos for you here.

MR. BLUE: Could you pull up 1023, please.

(Video played.)

BY MR. BLUE:

Q. So Ms. Pierson [sic], have you seen that video before?

A. Ms. Kremer.

Q. I'm sorry. Ms. Kremer. I apologize. Have you seen that video before?

A. Yes, I have seen that video.

Q. And do you know who took that video?

A. One of my colleagues.

Q. And were you there?

Did you see that scene, with the "YMCA" playing?

A. I wasn't right there when the video — where they took that video, but yes, I was there at the Ellipse. That was after it was over and people were leaving.

Q. And was that an accurate representation of the mood of the crowd as [p.52] they were leaving?

A. Yes. Absolutely. Very happy.

MR. BLUE: I'd move to admit Exhibit 1023.

MR. GRIMSLEY: No objection.

THE COURT: 1023 is admitted. (Exhibit 1023 was received into evidence.)

THE COURT: I think we've lost —

MR. BLUE: She's back.

Can we do 1022 now.

(Video played.)

BY MR. BLUE:

Q. So, Ms. Kremer — we had to turn the volume off on one of the computers so we didn't get the echo.

That is — that's another video of the people leaving the rally on January 6th; isn't that correct?

A. I didn't see another video. It didn't come up on my screen. I'm sorry.

Q. All right.

THE COURT: I saw it. And I will take judicial notice that was a video of [p.53] January 6th.

MR. BLUE: So we don't want to play it again.

MR. GRIMSLEY: If you could play it again, that would be great, so she can see it.

MR. BLUE: You want to see it? All right.

THE COURT: So I'm just wondering — and I don't profess to be technical at all, but it seems like it works better when — on Joanna's computer than yours. Is there any way to just have —

MR. BLUE: It actually is on her computer, and it's being cast into the WebEx from her computer.

(A discussion was had off the record regarding technology issues.)

MR. BLUE: We just won't enter that exhibit. We have the other video that you saw. We don't need this video. They're basically the same, so...

THE COURT: I was just thinking, moving forward —

MR. BLUE: Well, I don't have [p.54] any more exhibits, so this solves the problem, by dropping that exhibit.

MR. GRIMSLEY: What was that exhibit number?

MR. BLUE: 1022.

BY MR. BLUE:

JA817

Q. Ms. Kremer, just to finish up here. It was — can you again describe the mood of the crowd as they left the Ellipse on January 6, please.

A. People were happy. They — I mean, it was a fantastic event. They got to hear their President. And they love him. And so it was just a happy, joyful occasion. And you could see it on people's faces.

Q. Great. Thank you very much.

MR. BLUE: I have no more questions, Your Honor.

THE COURT: Cross-examination?

MR. GRIMSLEY: Yes, Your Honor. Briefly.

CROSS-EXAMINATION BY MR. GRIMSLEY:

Q. Good morning, Ms. Kremer.

A. Good morning.

[p.55]

Q. Is it still morning for you?

A. Yeah, for another hour.

Q. At the Ellipse, for the speech, you were actually standing at the stage; right?

A. Right. I was standing off to the right of the stage.

Q. And it was pretty cold.

A. Very cold.

Q. And you wanted to get out of there, basically, once the speech was done.

A. Yes.

Q. And you did get out of there once the speech was done. You went back to the hotel, The Willard?

A. Yes. But I was one of the last ones there.

Q. But you didn't march to the Capitol or go along with the people who were marching to the Capitol in that Exhibit 1022 that we, in this courtroom, saw. But you did not?

JA818

A. No, I did not march to the Capitol.

Q. I'd like to show you [p.56] Exhibit 165, starting at 1:43 in the video, and see if you saw this.

(Video played.)

Q. Now, Ms. Kremer, were you able to hear what they were saying there?

A. I've never seen that video before. And when you're asking me what and who was saying, the people that were holding the camera or the crowd?

Q. The people holding the camera, the people in the crowd around them. Have you seen that video before?

A. I have not seen that video before.

Q. That video is from the Ellipse during the speech; correct?

A. If you say so.

Q. Now you were standing on the side of the stage, so you weren't out beyond where the magnetometers were, were you?

A. No, I was not.

Q. And you didn't have good visibility into who was out there beyond the magnetometers, did you?

A. At that time, no. But when [p.57] I spoke on the stage, I could see it was a sea of people and American flags and Trump flags as far as I could see. But did I see their faces? No.

Q. And there were people — well, you recall the setup. There was some people inside the magnetometers and some people outside the magnetometers that didn't come in?

A. Yes. That's correct.

Q. And from your vantage point, you couldn't tell whether those individuals outside the magnetometers were armed?

A. No.

JA819

Q. You had talked about some wackos, I think you referred to them. Alex Jones and Ali Alexander?

A. Yes.

Q. And why do you call them “wackos”?

A. I mean, they just — you know, Ali — they’re flamethrowers; you know, bombastic bomb throwers — and I mean metaphorically — and agitators. They want to get everybody riled up.

[p.58]

And so I’m not like that. I don’t like that. And I just didn’t want them to be part of it.

Q. You do know that even if they didn’t speak that day, both of them encouraged their supporters to come to the Ellipse speech on January 6th.

A. Okay. I mean, I assume they did. But they were also trying to undercut all of our efforts, so — holding events at the same time in another location. And so, I mean, I don’t know what they were doing.

Q. And you have no idea whether and to what extent their supporters were standing outside the magnetometers and were armed, do you?

A. No.

Q. And you have no idea whether President Trump had been in communication with Ali Alexander or Alex Jones prior to the Ellipse speech, do you?

A. No, I don’t. But I know that he chose for them not to speak on the stage that day.

Q. Well, he had originally wanted [p.59] them to, but then there was a reconciliation and the decision was made that they wouldn’t speak, but —

A. I don’t think he wanted —

MR. BLUE: Hold on just a second, Ms. Kremer.

Go ahead. Finish your question, and then I will do my objection.

BY MR. GRIMSLEY:

Q. Somebody wanted them to speak that day, and there was a reconciliation at some point; right? There was a decision made that they wouldn't speak?

MR. BLUE: So, Your Honor, I just want to make sure that the question is not that President Trump wanted them speak, but that somebody did.

Is that correct?

BY MR. GRIMSLEY:

Q. Somebody, to your knowledge, did. Maybe you don't know who. Correct?

A. Caroline Wren wanted them to speak. She was working with them. It was Caroline Wren. And when Katrina merged the list and went to the President, he said no.

[p.60]

Q. All right. You're familiar with a group called the Proud Boys?

A. I am now.

Q. The Oath Keepers?

A. I am now.

Q. The Three Percenters?

A. I am now.

Q. You don't know whether and to what extent any individuals from those groups were present at the Ellipse that day, do you?

A. I have no idea.

Q. And they could have been standing outside the magnetometers, armed and ready to go to the Capitol; right?

A. I mean, I guess they could have.

Q. I'd like to play Exhibit 1022, which was the exhibit that counsel, during direct, attempted to play. Hopefully

JA821

you can see it this time. And I want you to listen around 20 seconds in, what you can hear some people say.

A. Okay.

(Video played.)

Q. Did you hear the person yell [p.61] "1776" and then "whoop"?

A. Yes.

Q. Now, you weren't there marching the Capitol. You were going back to The Willard or already back at The Willard at that point?

A. Yes, I went back to The Willard.

Q. So you don't know what that person meant when that person says "1776 whoop," and while somebody is carrying a Don't Tread on Me flag?

A. No.

Q. Now you had said that individuals at these rallies were patriotic, freedom-loving citizens. And I think you may have referred to them in one of your Tweets as happy warriors.

I'd like to show you Exhibit P-94, a clip from that.

MR. GRIMSLEY: P-94-A, please.

(Video played.)

BY MR. GRIMSLEY:

Q. Were the individuals attacking the police officers in that video patriotic, freedom-loving citizens and happy warriors?

[p.62]

A. I would say those that were doing that, no.

Q. Okay.

MR. GRIMSLEY: Let's play 94-B, please.

(Video played.)

BY MR. GRIMSLEY:

JA822

Q. Were the individuals you saw there attacking the Capitol and chanting “Hang Mike Pence” patriotic, freedom-loving citizens and happy warriors?

A. I would say no, they weren’t. But, I mean, I can’t speak to who was there and what everybody was doing. I mean, it’s the first time I’ve seen that video.

Q. You were at The Willard at that time, huh?

A. Yes.

MR. GRIMSLEY: Let’s play 94-C, please.

(Video played.)

BY MR. GRIMSLEY:

Q. Ms. Kremer, the individuals you saw in that video, were those patriotic, freedom-loving citizens and happy warriors?

[p.63]

A. I can’t speak to everyone in that crowd, but the people that were — that breached the Capitol, no, they were not happy warriors.

Q. And they were not patriotic, freedom-loving citizens either, were they?

A. No.

Q. And that’s true of everybody who breached the Capitol; correct?

A. What’s the definition of a “breach”? Because people went into the Capitol, and they were invited in. The doors were open, and they were invited in.

Q. Did it look like, in that video that you just saw, P-94-C, that any of those individuals had been “invited in”?

A. No.

Q. So all of those people you just saw in P-94-C, you would agree are not patriotic, freedom-loving citizens or happy warriors?

MR. BLUE: Objection, Your Honor. Calls for speculation.

MR. GRIMSLEY: She was asked [p.64] many questions about the mood of the crowd and who was there and grandmas and grandpas and —

THE COURT: Overruled.

MR. BLUE: Your Honor, if I just may, just to make a record on that in response, please.

She was — she has made very clear that she was at The Willard when these videos were taken and not there when those videos were taken; whereas, when — the previous questions were about a rally and other rallies that she was actually present at.

THE COURT: Overruled. She can answer. If she's not able to answer, then she won't.

BY MR. GRIMSLEY:

Q. So you were back at The Willard. You were watching this on TV. Not these videos in particular, but you were watching on TV what was happening at the Capitol, weren't you?

A. I mean, we had the TVs on, and they started covering it on the news. And, [p.65] I mean, I wasn't sitting there glued to the TV because we didn't — we didn't know what all was going on and how bad it was. And then when they started reporting on that, yes, we were watching.

Q. And you were pretty much glued to the TV once they started reporting on it; right?

A. I mean, I was sitting in a room with a TV, but there were people coming in and out. I mean, our entire team were there. You know, we ordered food. So I wouldn't say
I was glued to the TV, no.

JA824

Q. But to be honest, you were aghast at what you saw happening at the Capitol, weren't you?

A. Yes, I was.

Q. It was an awful, awful attack on the seat of our democracy.

A. Yes.

Q. And you saw in that last set of videos that at 2:24, President Trump sent out a Tweet referring to Mike Pence. Did you see that in the video?

A. Yes.

[P.66]

Q. And you heard the individual who you've acknowledged is not a patriotic, freedom-loving citizen reading that Tweet over a bullhorn to the crowd?

A. Well, I didn't see him read —speaking through a bullhorn. I mean, I don't know if that — if it was added to it. I wasn't there. I didn't see it. But somebody was saying that.

Q. And the individual over the bullhorn, at least from what it looked like on the video, if it wasn't doctored, was reading off Vice President Pence —President Trump's Tweet about Vice President Pence.

MR. BLUE: Objection. Calls for speculation.

THE COURT: Sustained.

BY MR. GRIMSLEY:

Q. And because you were at The Willard, you had absolutely no idea how the crowd reacted to hearing or reading President Trump's 2:24 p.m. Tweet about Vice President Pence?

A. No. I mean, I wasn't there, so [p.67] I didn't — I couldn't speak to that.

Q. You have to agree that if somebody sent a Tweet like that, as President of the United States, at 2:24 p.m.,

knowing that the Capitol was under attack, that's a despicable thing to do.

MR. BLUE: Objection, Your Honor. Argumentative.

MR. GRIMSLEY: They went into President Trump's intent.

THE COURT: Overruled.

A. I can't speak to what the President did.

BY MR. GRIMSLEY:

Q. But you would agree that it's a despicable thing to do, to send out a Tweet like that if you know the Capitol is under attack and Vice President Pence is in the Capitol building.

A. Can I see the Tweet again, please?

Q. Yes. It will just take a minute to pull it up.

A. I'm sorry.

Q. No. That's perfectly fine.

[p.68]

MR. GRIMSLEY: Pull up P-94-B, and just pause it.

MR. BLUE: Excuse me. She asked to see the Tweet.

MR. GRIMSLEY: 49-B has the Tweet on it.

MR. BLUE: Oh, okay. I thought you were just going to do a video. Sorry.

MR. GRIMSLEY: No.

BY MR. GRIMSLEY:

Q. So there's the Tweet, Ms. Kremer.

A. Okay.

Q. And you agree that if you knew the Capitol was under attack at 2:24 p.m., as the Commander in Chief — and you also knew that Vice President Pence was in the Capitol — that this is a despicable Tweet to send out.

A. Well, I don't know when the President learned about what was going on at the Capitol, number one. And I don't know if he knew that Pence was there or not.

JA826

He was stating what he believed — I mean, those were his beliefs. Those were [p.69] his beliefs, and he stated it. You may not like it, but that's what he put out.

Q. Now, you personally — we've already said this — believe that the attack on the Capitol that day was a horrifying event. Right?

A. Yes.

MR. GRIMSLEY: And if you could pull up P-267, please.

BY MR. GRIMSLEY:

Q. And this is a Tweet, I think, from you on January 6th at 6:24 p.m.

A. Right.

Q. And you say, "I think today signified the end of the Republican Party."

A. Right.

Q. And you have a photo of the crowd basically heading into the Capitol; right?

A. I have a photo with a sea of people. I don't know that they were heading into the Capitol, but there was a sea of people.

Q. Why did you say, "Today signified the end of the Republican Party"? [p.70]

A. Because actually that day —the RNC had done nothing through this entire time, the two months, eight weeks, whatever it was. The RNC had done nothing. They had not reached out to us for support. They had, you know, not come to speak at our rallies —absolutely nothing — but yet they were fund-raising off of election integrity.

And then that day, which was a big day, Ronna McDaniel — no one was there from the RNC. They were

on Amelia Island at the Ritz Carlton for their winter retreat.

So people already are mad at the Republican Party. And I said, “You know, I think today signified the end of the Republican Party.”

Q. So your view is it was a bad day for the Republican Party not because there was an attack on the Capitol, but because the RNC wasn’t there?

A. I think there are two different things. I mean, I can think — I can think that it was a horrible attack on the Capitol, and the RNC has nothing to do with that.

Q. Now, you, to this day, believe [p.71] that anyone who thinks there was an insurrection on January 6th is an idiot.

A. There was no insurrection.

MR. GRIMSLEY: Pull up P-273, please.

BY MR. GRIMSLEY:

Q. And is this a Tweet from you on January 1st, 2022?

A. Yes.

Q. It’s a jitter. I didn’t even know that was a thing, so I apologize.

A. Yes.

Q. And you say, “There was no insurrection on January 6th. And if you think there was, you’re an idiot. The ‘insurrection narrative’ is nothing more than psychological warfare being perpetrated on the American people by the Deep State to distract from the coup that happened on November 4th, 2020.”

Did you write that?

A. I did write that.

Q. So your view is there was no insurrection on January 6th, but there was a coup on November 4th, 2020, because [p.72] President Trump was not elected President.

JA828

A. There was no insurrection on January 6th. There was a riot on January 6th. There was no insurrection.

Q. Okay. You weren't there?

A. Excuse me?

Q. You were not at the Capitol that day?

A. No.

Q. What about the coup on November 4th, 2020? What are you talking about there?

A. I was talking about, metaphorically, they stole an election. So metaphorically, they were taking out a sitting President.

Q. Who stole the election, exactly?

A. We don't know who stole the election. I mean, it happened in a number of states. And we don't know.

Q. Shadowy figures?

A. I can't speak to that. We don't know.

Q. Do you know how they stole the [p.73] election?

A. I mean, there were a number of things that happened with the election that were inconsistent. Officials breaking the laws. And it would be — you know, different states have different laws. Different things happened in different states.

So you would have to speak specifically to that state. And I'm not an expert on these state laws.

MR. BLUE: Excuse me, Your Honor. I have to object. We're getting way beyond the direct examination now.

MR. GRIMSLEY: This is bias.

THE COURT: Yeah, this goes to credibility.

MR. GRIMSLEY: Absolutely.

THE COURT: He can continue.

BY MR. GRIMSLEY:

Q. You're not an expert on state laws, but courts are; right?

A. I would hope so.

MR. GRIMSLEY: Pull up Finding 164 in Plaintiffs' Exhibit 78. So 78.51.

[p.74]

BY MR. GRIMSLEY:

Q. Do you see a set of findings there?

A. I do. I can't read them.

MR. GRIMSLEY: If you could blow up Finding 164, please.

MR. BLUE: Your Honor, again, this is way beyond the direct. And she was talking about — basically her testimony today was talking about the people that were coming to the rallies and what she was seeing.

We are now getting into all sorts of other areas. And I know you said this is credibility, but I'm not sure how —

THE COURT: Well, she testified at the beginning of her testimony that the reason that they were having all the rallies was because the election had been stolen. So it's not actually beyond the scope of the direct.

Plus, I gave you free reign to ask her about anything you wanted, and he can probe into that both for bias and to show prejudice and credibility.

[p.75]

MR. BLUE: Thank you, Your Honor.

MR. GRIMSLEY: Your Honor, sorry. I'm going to march over to this table to ask this question because, for some reason, it's not showing up on my screen.

BY MR. GRIMSLEY:

Q. You see Finding 164? And this is from the January 6th Committee.

A. Yes.

Q. Its final report. It says, "In total, the Trump campaign and allies of President Trump filed 62 separate

lawsuits between November 4, 2020, and January 6, 2021, calling into question or seeking to overturn the election results. Out of 62 cases, only one case resulted in a victory for President Trump or his allies, which affected relatively few votes, did not vindicate any underlying claims of fraud, and would not have changed the outcome in Pennsylvania. 30 of the cases were dismissed by a judge after hearing on the merits.

“In every state in which claims [p.76] were brought, one or more judges specifically explained as part of their dismissal orders that they had evaluated the plaintiffs’ allegations or supposed proof of widespread election fraud or other irregularities and found the claims to be entirely unconvincing.”

You have no basis for disputing that finding, do you, ma’am?

A. I’m not a lawyer. I don’t play one on TV. But I will say that a number of cases were thrown out on technicalities, and they never got to the evidence part of the hearing or they weren’t heard. Here in Georgia, there was a lawsuit filed. And when it was finally put on the calendar, it was too late. So it was irrelevant.

Q. How many of the 62 cases referred to in Finding 164 were thrown out on technicalities?

A. I don’t know.

Q. And do you understand that all of these 62 cases had been decided prior to January 6th?

[p.77]

A. If you say so.

But, again, the Georgia case, it wasn’t even heard. So...

4 Q. There were Georgia cases that were heard, though, weren’t there?

A. Excuse me?

JA831

Q. There were cases in Georgia that were heard, weren't there?

A. I'm not sure, but I know the main case was not heard.

MR. GRIMSLEY: Pull up Plaintiffs' Exhibit 271, please.

BY MR. GRIMSLEY:

Q. And do you see this is a Tweet that you sent out just last week?

A. Yes.

Q. In fact, I think it would have been Saturday. So less than a week ago; right?

A. Yeah. Yeah, it was right after Pence dropped out of the presidential race.

Q. And you say, "Question on Pence. Do you think he was in on the coup to remove President Trump?"

You wrote that; right?

[p.78]

A. I did write that.

Q. You can't possibly believe that's true.

A. I don't think Pence was ever on Team Trump. You can go back to 2018, and I was in the media raising hell because Vice President — all this Russia collusion story was going on, and he wasn't defending the President. He was part of the campaign, and he wasn't defending him. And I was on CNN saying, "Where in the hell is the Vice President?"

So I don't know what Pence was doing. I have no idea. But on January 6th, we didn't want to overturn an election or overthrow the government. All we wanted was for the evidence to be laid out and heard, where they could test it.

And what we were asking for Mike Pence to do was to delay for ten days so that the states could get their

stuff together and then, you know, have the certification. Just a delay. And he chose not to do that.

Q. Well, do you know whether he, [p.79] in fact, had constitutional authority to do such a thing?

A. I believe he did.

MR. GRIMSLEY: If you could, please pull up —

A. And that's why they —

MR. GRIMSLEY: — Plaintiffs' 252.

THE COURT: I'm sorry, Ms. Kremer. Were you finished with your answer?

BY MR. GRIMSLEY:

Q. And I apologize if you were not.

A. No. Go ahead.

THE COURT: Okay.

BY MR. GRIMSLEY:

Q. This is Plaintiffs' 252. This is a Tweet from you, re-Tweeting something from President Trump, on January 5th, 2021.

And the Donald J. Trump Tweet says, "The Vice President has the power to reject fraudulently chosen electors." And then you re-Tweet, "Just do the right thing @VP."

[p.80]

A. Right.

Q. Your basis for believing that President — or Vice President Pence had the power to reject fraudulently chosen electors was because Donald Trump told you that.

MR. BLUE: Objection. Misstates the exhibit.

THE COURT: She can answer. Overruled.

A. We just wanted Pence — what we were asking for is to delay it for ten days to give the states the time to get stuff together, and then at the certification, lay all the evidence out there.

JA833

If the evidence was there and it couldn't, you know, be certified, then you proceed from there.

BY MR. GRIMSLEY:

Q. No, I understand that's what you're saying, ma'am. I'm asking about why you had the belief that that was within Vice President Pence's authority to do that.

And I'm pointing you to this Tweet, Plaintiffs' 252. And you have Donald J. Trump on January 5, 2021, saying, [p.81] "The Vice President has the power to reject fraudulently chosen electors." And then you re-Tweet that. Correct?

A. I did re-Tweet that, yes.

Q. And you're not a lawyer. The reason you believe that Vice President Pence had the ability to reject fraudulently chosen electors was because President Trump told you that.

A. No, President Trump didn't tell me that. And I don't have the U.S. Constitution in front of me, but I believe that he had the authority to delay the electoral — to delay the certification.

Q. You did your own constitutional analysis?

A. I didn't do my own constitutional analysis. But I read and discussed a number of things with people. And that is why, in the dark of night, with a big omnibus bill, they changed the law so that this wouldn't happen again.

Q. They changed the law to make clear that the Vice President did not have the ability to do what you're suggesting.

[p.82]

A. So you're saying that he didn't have the ability to delay for ten days?

Q. Let's move on.

When you heard the next day, or after that, that attackers at the Capitol were chanting "Hang Mike

Pence,” did you regret having sent the Tweet that is Plaintiffs’ 252?

A. No.

Q. Now you’ve said that, I think in your interview before the January 6th Committee, that you didn’t like, personally at least, to use language like “Freedom or death,” that type of kind of inflammatory language that you attributed to people like Ali Alexander.

A. Did I say that?

Q. Do you remember testifying about that?

A. Can you show me where I testified about that?

MR. GRIMSLEY: Could you go to page P-241, page — I’m sorry —Exhibit Plaintiffs’ 241, page 27.

[p.83]

BY MR. GRIMSLEY:

Q. So this is a bit of a long — if you could go — starting at line 12. And we don’t have to read it out loud. I’ll let you read that. And let me know when you’re done with that. Line 12 to 25.

A. Okay. Hold on. It’s running off my...

(Document[s] reviewed.)

Okay. Where do you want me to read to?

Q. From lines 12 to 25.

A. Yes. Okay. I’ve read them.

Q. Okay. Let’s go to the next page and blow up the top.

And if you could — well, so on the next page, you were asked: “Okay. All right. So the type of language he would use, I think he said ‘victory or death,’ that —”

You said: “Yes, that language.”

And you’re talking about Ali Alexander here?

A. Yes.

Q. And the question then is:

[p.84]

“Yeah, using language like that gave you a concern about, as you said, inciting. And I guess it wasn’t the way you spoke about things, I guess. Is that right?”

And your answer: “Yeah, I’m not — I’m not like that. And, I mean, I guess I would probably be — I’m passionate. I’m very passionate, and, I mean, I can get people fired up. But I’m not going to go out there and say ‘victory or death.’ I mean, that’s just — to me, that’s ridiculous. And you don’t know if somebody is going to take it seriously. Right? Literally. So I’m not a fan of that.”

Did you give that answer in your interview?

A. I did.

Q. And you were concerned that — from the page before, that rhetoric like that could incite people to violence?

A. I don’t think that is helpful. Yes.

Q. And you actually said “inciting” on the page before.

A. Right.

[p.85]

Q. So rhetoric like that can incite people to violence?

A. If that’s what I said.

Q. Now you’d be especially worried if somebody as powerful and as popular as the President of the United States used rhetoric like that, wouldn’t you?

A. I mean, a number of people use rhetoric like that. I personally do not.

Q. But given your concerns that such rhetoric could be viewed as inciting violence, you’d be quite concerned that somebody who had the biggest bullhorn probably in the history of the world saying things like that.

JA836

A. I would never be concerned about President Trump inciting violence. He wouldn't do that. That's not how he is.

Q. Let's go to Plaintiffs' 148, page 49, the Tweet at the bottom.

And you see there on December 26, 2020, "If a Democrat presidential candidate had an election rigged and stolen, with proof of such acts at a level never seen before, the Democrat [p.86] senators would consider it an act of war and fight to the death."

Do you see that?

A. I do.

Q. That's the type of rhetoric that would concern you could incite violence?

A. I mean, he was using that metaphorically there, "fight to the death." Just like we're going to fight for freedom or whatever.

I don't think he was inciting violence there.

Q. Well, he didn't say "freedom." He said "death."

A. Right. And I'm saying, he was saying metaphorically.

But, look, there have been many things that the President of the United States has said that I didn't agree with. So I'm not going to agree with everything he says. But I do not think he would ever incite violence or get his people to do that. That's just not him. That's not the way he is.

Q. Well, you're not inside his [p.87] mind, are you, ma'am?

A. I'm not inside of his mind. But I know him.

Q. And you've not been a part of every conversation that he's been a part of?

A. No.

Q. Now put aside President Trump.

JA837

Do you know that in the lead-up to January 6th, some organizers of the January 6th rally were using language like “victory or death,” the very language you said you wouldn’t use?

A. Can you show me that? Are you saying our people? Who is saying that?

Q. Let’s look at Plaintiffs’ 254, please.

And you see that that is a Tweet from Women for America First from January 2nd, 2021. And it’s re-Tweeting news about Senator Cruz circulating a letter calling for the rejection of electoral college results until a 10-day emergency audit can be conducted to examine unprecedented allegations of voter fraud.

Do you see that?

[p.88]

A. Yes.

Q. Read what your organization said as it re-Tweeted.

A. It says, “Victory or death. William Barret Travis @Ted Cruz.”

MR. GRIMSLEY: No further questions.

THE COURT: Any redirect?

MR. BLUE: Yes, Your Honor.

Could we go back to Exhibit 148, page 49, please. Could you blow up the bottom one, please, so we could read it better.

REDIRECT EXAMINATION

BY MR. BLUE:

Q. Ms. Kremer?

A. Yes.

Q. Isn’t President Trump in this Tweet talking about how Democratic senators would react?

A. Yes.

Q. And he is not telling his supporters to react this way?

A. Right.

Q. Now you had strong views on the [p.89] 2020 election, about whether it was stolen, don't you?

A. I do.

Q. And you were the organizer of a bunch of rallies leading up to January 6th and on January 6th, weren't you?

A. Yes.

Q. And you did everything in your power to keep all those things peaceful, didn't you?

MR. GRIMSLEY: Objection. Leading.

THE COURT: Sustained.

BY MR. BLUE:

Q. How did you make sure — what did you — how did you want your rallies to go forth? What was your plan for them?

A. We are — all of my rallies — I mean, I've never had any violence, from Tea Party days up through this point. I mean we are peaceful, happy warriors. And that's just not who we are —

Q. Thank you.

A. — so I wanted it to stay that way.

[p.90]

Q. Thank you, ma'am.

MR. BLUE: No more questions.

MR. GRIMSLEY: And one housekeeping matter. We'd like to move to admit Trump's Exhibit 1022, which they had tried to play and then we played in our cross-exam.

MR. BLUE: We won't object.

THE COURT: 1022 is admitted.

(Exhibit 1022 was received into evidence.)

THE COURT: Did anybody else have any questions for Ms. Kremer?

MS. RASKIN: We have none, Your Honor.

MR. KOTLARCZYK: No, Your Honor. Thank you.

THE COURT: Ms. Kremer, thank you so much for your testimony today. You are released.

THE WITNESS: Thank you, ma'am. Have a good day.

MR. BLUE: So, Your Honor, our next witness is Tom Van Flein. He will be remote as well.

[p.91]

THE COURT: Why don't we — so you can get set up and make sure he's actually there, we'll take our morning break a little bit early and reconvene at 10:55 — 9:55.

MR. BLUE: Great. Thank you very much, Your Honor.

(Recess taken.)

THE COURT: Before we proceed, it's my understanding that there continues to be streaming of these proceedings by individuals or entities who have not received permission from the Court.

I am reading from Chief Justice Directive 2303, put out by the Colorado Supreme Court, which specifically says that "Unless a court grants express permission or unless otherwise governed by this directive, no proceeding may be published, livestreamed, or recorded other than for the official court record."

I have given express permission to every single entity who made a timely request, and that was an actual media entity. So to the extent that those who are watching [p.92] are doing so in violation of this court order, I, again, reiterate that is not — it is prohibited under Colorado law.

JA840

Okay.

MR. BLUE: I was surprised to hear that again. I thought it would have been taken care of.

THE COURT: Yeah, well...

MR. BLUE: Go figure.

Apparently I'm no longer connected to WebEx. Do you see me in the room?

(A discussion was had off the record regarding technology issues.)

MR. BLUE: We're going to try it this way, Your Honor.

THE COURT: Okay.

MR. BLUE: We'll see what happens.

THE COURT: Yeah. I mean, I see them.

MR. BLUE: Yeah, I see him up there. He just won't be able to see me.

THE COURT: Okay. And he actually — [p.93]

MR. BLUE: I guess maybe he can from that camera.

THE COURT: Yeah, if he sees what I see, he can see you, so ...

MR. BLUE: Okay. Great.

THE COURT: Who is the witness?

MR. BLUE: Mr. Van Flein.

THE COURT: Mr. Van Flein, can you hear me?

THE WITNESS: I can hear you, Your Honor.

THE COURT: Okay. And we can hear you as well. Just make sure to speak up. Okay?

THE WITNESS: Yes.

THE COURT: Can you raise your right hand.

TOM VAN FLEIN, having been first duly sworn to state the whole truth, testified as follows:

DIRECT EXAMINATION

BY MR. BLUE:

Q. Thank you for making time for us today, Mr. Van Flein.

A. Absolutely.

[p.94]

Q. And just try to be — stay fairly close to the microphone so the court reporter can hear you, if you don't mind.

A. All right. And I'll try to speak up.

Q. Thank you very much. Thank you, sir.

So, Mr. Van Flein, can you tell us what your job is currently.

A. Currently I am general counsel and chief of staff for Congressman Gosar from Arizona.

Q. And how long have you been in that position?

A. Since approximately 2012.

THE COURT: I'm sorry. You said Congressman Gosar?

THE WITNESS: Congressman Gosar, yes. G-o-s-a-r.

BY MR. BLUE:

Q. G-o-s-a-r, is that what you said?

A. I did. Yes.

Q. Thank you.

On January 6th, were you in [p.95] Washington, D.C.?

A. I was.

Q. And at some point did you go to the Ellipse for the rally that was there?

A. I did. I did get to the rally about 8:30 in the morning.

Q. And why were you going to the rally that day?

A. Well, we had been invited to attend. And it was merely to show support at a rally, basically, and listen to the speakers. There was obviously an electoral count

proceeding later that afternoon, and this rally was, I think, done in anticipation of that, to highlight what was going on in Congress that afternoon.

THE COURT: I'm sorry, Mr. Van Flein. You said "we had been invited." Were you — did you attend with somebody else that you were referring to?

THE WITNESS: I did. I went with Congressman Gosar. And my wife was there as well.

BY MR. BLUE:

Q. And had the rally started when [p.96] you arrived?

A. No. We got there prior to — as people were setting up. We were backstage for a while as the guests and speakers were showing up, and they were doing pre-rally setup still and getting ready. I don't think it started until a little bit after 9:00, and we were there by 8:30.

Q. And how late did you stay?

A. I stayed there until approximately 10:40, I would say.

Q. And so did you see President Trump speak?

A. No. I saw most of the speakers up until him. I maybe missed one prior to him.

Q. Can you describe the rally for us, in terms of what the crowd looked like to you?

A. To me, the crowd looked like a typical, middle-aged...

It was raining and cold that day, but people were in a good mood. People were singing. People were listening to

music. They were broadcasting music over the [p.97] loudspeakers. It was pretty festive.

Q. Thank you.

And did you take any videos that day?

A. I did.

Q. And did you take a video of Vernon Jones speaking?

A. I believe I did. Yes.

Q. Okay.

MR. BLUE: Could we play Exhibit 1082.

MR. SUS: Objection. Your Honor. This is irrelevant for the same reasons previously raised with respect to other speakers at the January 6th rally.

MR. BLUE: Your Honor, we're not presenting the video to show Vernon Jones speaking. It actually shows the crowd as he's speaking. And the point is to see the crowd.

MR. SUS: Same objection, Your Honor.

THE COURT: Well, I'm going to let it in, but, you know, I may revisit the Eastman/Giuliani —
[p.98]

MR. BLUE: Like I said, this is not about showing the speaker.

THE COURT: I understand.

I've overruled the objection.

BY MR. BLUE:

Q. Just a minute here, Mr. Van Flein. We're working through the technology to get the video up.

A. All right.

(Video played.)

Q. So, Mr. Van Flein, in that video, you panned around to the crowd. Was that a good — was what the crowd looked like in that video a good representation of what you saw when you were there that day?

A. It is a perfect representation of what I saw.

Q. And can you describe, again, for us how you viewed the crowd that you saw in the video?

A. The crowd that I saw and was next to —

JA844

THE COURT: You're going to have to speak up or get closer to the microphone, Mr. Van Flein. Sorry.
[p.99]

THE WITNESS: Okay.

A. The crowd that I saw, that I walked through on my way there and walked through on the way out and was next to, was just that way. They were cheering. They were chanting "USA." Sometimes they broke out in singing or praying. And it was, like I said, more like a festival than a rally. There was no anger.

BY MR. BLUE:

Q. And did you see any hate or anger among the crowd at all?

A. Not when I was there.

Q. And at any point — and you said you left the rally around 10:45. Is that correct? Did I get that time right?

A. Give or take, yeah. Give or take. That's pretty accurate.

Q. And then you walked back to the Capitol; is that correct?

A. We actually got a ride back. We left — we walked over to where the Department of Interior Building was and then got a ride to the Rayburn Building, actually; not the Capitol.

[p.100]

Q. And did you see anything notable on the way back to the Capitol?

A. On the way back, no. Things were still very calm. There were, you know, isolated groups of people walking. I think some going still in the direction of the rally, to attend the rally; some going the opposite direction. But on the streets at that moment, there was nothing.

JA845

Q. And did you see anybody with BLM shirts at any time on that — during that morning?

A. I did. Later on that morning, I walked over to Capitol Hill Starbucks and was walking back. I was on the south side of Independence Avenue. And on the north side, there were a couple gentlemen wearing BLM T-shirts — or shirts, rather. Maybe not T-shirts, but BLM shirts. And they seemed aggravated and loud.

Q. And were they kicking signs or anything along those lines?

A. They did, indeed. And they were chanting loudly. And just seemed visibly agitated. And that was — they [p.101] were — by the time I saw them, we were by the — approximately by the Jefferson Library of Congress, which is right across the street from the Capitol.

Q. Thank you.

MR. BLUE: Your Honor, I have no more questions for this witness. But we would like to move admission of 1082.

THE COURT: Any objection?

MR. SUS: Was 1082 the speech?

MR. BLUE: The video we just saw, yeah.

MR. SUS: On the understanding that this would allow the other speeches from the January 6th rally, Your Honor. We believe that if this speech comes in, then the other speeches should come in as well.

THE COURT: I'm not going to rule on that, but I will offer the — I will admit 1082, not for the truth of what's being said, but for the reaction of the crowd.

(Exhibit 1082 was received into evidence.)

MR. BLUE: Thank you, Your Honor.

[p.102]

CROSS-EXAMINATION

BY MR. SUS:

JA846

Q. Good afternoon, Mr. Van Flein.

A. Good afternoon.

Q. So there were thousands of people at the Ellipse rally; is that fair to say?

A. That is fair to say.

Q. And you had no way of knowing what each one of those thousands of people were doing throughout the day, did you?

A. No.

Q. And you had a limited vantage point. You were only able to tell what the people in your immediate area were doing at any given moment; right?

A. Absolutely.

Q. And about how long were you at the Ellipse rally?

A. Approximately two hours.

Q. And what was the time frame there?

A. Roughly 8:30 to 10:30 or 10:45, in that range.

Q. Okay. And you testified that [p.103] the crowd that you saw at the Ellipse rally, at least from your vantage point, was peaceful. Is that accurate?

A. That is accurate.

Q. Are you aware that the Secret Service confiscated hundreds of weapons from rally attendees that passed through security that day at the Ellipse rally?

A. I'm aware that that was debunked. It is my understanding that that was not true.

Q. Well, let me show you some findings from the January 6th Select Committee.

MR. SUS: Can we pull up Exhibit 78, Finding 107.

BY MR. SUS:

Q. Can you see that on your screen?

A. Yes.

Q. So do you see that the list of confiscated weapons included 242 canisters of pepper spray?

JA847

A. I see that.

Q. Do you see that it includes 269 [p.104] knives or blades?

A. I see that as well.

Q. 18 brass knuckles?

A. I see that.

Q. 18 Tasers?

A. I see that.

Q. 30 batons or blunt instruments?

A. Yes.

Q. 17 miscellaneous items, including scissors, needles, or screwdrivers.

Do you see that?

A. I do.

Q. And were you also aware that the — are you aware that the Secret Service observed members of the crowd wearing tactical gear, such as ballistic helmets, body armor, and military-grade backpacks?

A. That may be. I saw none of that. I will say, as for the

Finding 107 here, the only thing that is concerning are the brass knuckles, which are contraband, and the gas masks. Why anyone would bring a gas mask suggests they had some advanced knowledge that there might be tear [p.105] gas or some chemical to be sprayed.

But as far as pepper spray, a knife, a Taser, these are commonly used by many people, particularly women, in Washington, D.C., for self-defense and whatnot. None of that is illegal or wrong.

Q. So you acknowledge that if people had gas masks there, they probably had some forewarning that there would be tear gas there, deployed that day?

A. Yeah, I would find that concerning. I found it concerning that members of Congress were not warned

of these findings. Apparently this was known as much as a day or two in advance, and none of —I don't think I would have had Congressman Gosar at a rally if we knew there was a potential for violence.

Q. Now, Mr. Van Flein, you said you didn't see President Trump speaking that day. Did you?

A. Not live. I caught some of it in my office. We had to go to the office. We were preparing for the objections under the Electoral Count Act of 1887. And so we [p.106] still had some work to do for that, which is why we had to get back to the office.

The electoral counting is done alphabetically by state, and Arizona was one of the first ones to be called. So we had to be ready to go by 1 o'clock.

Q. Understood. Okay.

So I want to show you some of the crowd's reactions to President Trump's speech at the Ellipse.

MR. SUS: Could we pull up Exhibit 165, starting at time marker 1:43.

(Video played.)

BY MR. SUS:

Q. Mr. Van Flein, did you see that video?

A. Yes, I just did.

Q. Did you hear members of the crowd yell, "Storm the Capitol," "Invade the Capitol building," "Take the Capitol"?

A. Yes.

It sounds like they've been speaking with Ray Epps. That's exactly what he said.

Q. And did that appear to be a [p.107] video from the Ellipse on January 6?

A. It did. Absolutely.

Q. But you didn't hear anything like that at the Ellipse rally that day when you were there?

A. No.

As you mentioned earlier, there were thousands of people, perhaps a hundred thousand people there. It wouldn't shock me if there's somebody who's a moron who would say something like that in a crowd of a hundred thousand.

But overwhelmingly that crowd was peaceful and patriotic and attending a rally for their President.

Q. So, Mr. Van Flein, do you know Ali Alexander?

A. I've met Ali. Yes, I have.

Q. And do you know that Mr. Alexander founded an organization called Stop the Steal, LLC?

A. I don't know the legal structure, but I'm aware it was Stop the Steal.

Q. You know that Mr. Alexander [p.108] organized Stop the Steal rallies after the 2020 election?

A. Yes, I'm aware of that.

Q. And you told ProPublica in 2021 that you were in regular contact with Mr. Alexander in the period after the 2020 election, didn't you?

A. Yes. He organized probably at least three Stop the Steal rallies in Phoenix, Arizona.

Q. And was that with Representative Gosar?

A. I'm not sure if all of them were with Representative Gosar, but I think Representative Gosar spoke at least once or twice at those rallies, along with other elected officials.

Q. You told ProPublica that, "Ali was very talented and put on some very good rallies on short notice, and that they had a, quote, 'great turnout.'"

Is that right?

A. Yes.

This is about Arizona. He is talented.

[p.109]

JA850

Q. Okay. About how many communications did you have with Mr. Alexander between election day 2020 and January 6th, 2021?

A. I do not know that.

Q. Would you say, if you had to ballpark it, dozens?

A. Are we talking, like, phone calls, text messages, and in-person meetings? All communications?

Q. All of the above.

A. I would say at least a dozen.

Q. At least a dozen.

Are you aware of the violent rhetoric that Mr. Alexander used in Stop the Steal rallies leading up to January 6, 2021?

A. I'm aware of fiery rhetoric by many people who speak — in all political spectrum. And they probably said some fiery rhetoric as well.

Q. Let me give you some examples — did you finish your answer?

A. Yes.

Q. Okay. Let me give you some examples. Did you know that during a Stop the Steal rally outside of the Georgia State [p.110] Capitol in November 2020, Mr. Alexander urged the crowd to, quote, storm the Capitol with him?

A. Yeah, I was not aware of that.

Q. Did you know that in a different Stop the Steal rally in front of the Georgia governor's mansion in November 2020, Mr. Alexander goaded the crowd by saying, "We'll light the whole shit on fire"?

Are you aware of that?

A. No.

Q. Did you know that Mr. Alexander told the crowd at a Stop the Steal rally at the U.S. Capitol on January

5th, 2021, that, “We must rebel. I’m not even sure we’re going to leave D.C. We might make this Fort Trump”?

A. Where is — can you read that again?

Q. Sure.

The quote is from January 5, 2021. And Alexander said, “We must rebel. I’m not even sure I’m going to leave D.C. We might make this Fort Trump.”

[p.111]

A. Again, I’m not sure I understand what he’s saying there, but — we must make what for Trump?

Q. Did you know that Mr. Alexander was part of a group chat in which he communicated with Proud Boys leader Enrique Tarrio and Oath Keepers leader Stewart Rhodes between election day 2020 and January 6, 2021?

A. I am not part of that chat, so I’m not aware of it.

Q. Did you know that Mr. Alexander was in contact with those two individuals?

A. I was not aware.

Q. Did you know that on the morning of January 6, 2021, at 3:13 a.m., Mr. Alexander Tweeted, “First official day of the rebellion”?

MR. BLUE: Excuse me, Your Honor. This is — I apologize.

We are way beyond the scope. I’ve been kind of letting it go because I understand that we’re trying to kind of allow things to happen, but we are way beyond the scope. And this sounds purely like an [p.112] attempt to get all sorts of statements made by Mr. Alexander in front of you, as opposed to actually asking questions that he’s going to give an answer to that’s going to help the Court.

MR. SUS: Your Honor, if I may. I will connect it up to January 6 with the next question.

JA852

THE COURT: Okay. I'll allow one more question. But I agree, that this is going a bit far afield.

MR. SUS: Okay.

BY MR. SUS:

Q. But, Mr. Van Flein, you were unaware of that Tweet by Mr. Alexander?

A. Yeah. I'm not aware of that. I think you should probably ask him those questions.

Q. You were in communication with Mr. Alexander on January 6th, weren't you?

A. I would say "probably." We had to confirm, you know, where we were going to be and stuff like that.

Q. In fact, you exchanged more than a — I'm sorry. Were you talking?

[p.113]

A. Yeah. I was just going to say, I don't know specifically what we said unless I — unless you have a, you know, printout of a text message or something. But I'm sure I was in contact with him that morning.

MR. SUS: Mr. Hehn, please pull up Exhibit 167.

BY MR. SUS:

Q. So, Mr. Van Flein, I'll represent to you that this is a compilation of text messages to and from Mr. Alexander that was publicly released by the January 6th Select Committee.

And if we zoom in on the bottom corner here, you'll see that there's a GPO seal, showing that this is an authenticated U.S. government record.

Do you see that?

A. I do.

MR. BLUE: Excuse me, Your Honor. I still don't see the connection to the direct exam.

JA853

MR. SUS: This is about Mr. Van Flein's communications on January 6th with an individual who was involved in [p.114] organizing rallies that day.

THE COURT: Yeah, I'm just going to — let me see what happens with this, and then you can move to strike if no connection is made. Okay?

MR. BLUE: Yes. Thank you, Your Honor.

BY MR. SUS:

Q. So let's look at the text messages.

And just to note here that some of the text is garbled and the commas appear as apostrophes. So we'll try our best to read it. And, Mr. Van Flein, if you have any trouble, just let me know.

THE COURT: But these aren't texts with Mr. Van Flein, are they?

MR. SUS: They are.

THE COURT: Oh. Okay.

BY MR. SUS:

Q. So if we could go to page 34.

MR. BLUE: Excuse me, Your Honor. I don't see how they are —

THE COURT: I think we're just looking at the first —
[p.115]

MR. BLUE: Oh, okay. His name is coming up now. Okay.

MR. SUS: Yeah.

BY MR. SUS:

Q. So we're on page 34. And there's a text at 5:36 a.m. on January 6th. And Mr. Alexander texted you. "Nonspeaking members of Congress need to be there by 8:30. We don't have a shuttle. I will make sure they have security escorts walking back to the Capitol when it is time for session."

JA854

Do you see that?

A. Is that from me?

Q. That is from Mr. Alexander to you.

A. Okay.

Q. And you two were communicating that morning about members of Congress attending the Ellipse rally that day; is that right?

A. That's what this appears here.

I will object that these are my text messages. I was never notified. I was never subpoenaed for this. I was never given a chance to object to the disclosure of this [p.116] text message. I don't know if it's authentic. I'm not authenticating this, because this is the first I've ever seen this.

Q. So, Mr. Van Flein, as I mentioned and as I represented to you, this is authenticated information released by the January 6th Select Committee, and it's been stamped by an official GPO seal. So this is an official government record.

A. What I'm telling you is the communications are not authenticated. I didn't authenticate this. I don't know if this is accurate. I don't care who put a stamp on there.

This information, this text message, if it is authentic, was not obtained lawfully. I was never served with a subpoena and —

Q. Do you deny that —

THE COURT: Mr. Van Flein, we're going to move on because he is allowed to ask you questions about this document. Okay. And we understand that you didn't release these records, but they apparently [p.117] were released by Mr. Alexander.

BY MR. SUS:

Q. So, Mr. Van Flein, going back to what the text message says. You two were communicating here about

JA855

members of Congress attending the Ellipse rally that day. Is that about right?

A. Yes.

Q. So members of Congress needed security escorts because there was a potential for violence on that day; isn't that right?

A. There's a potential for violence every day, when you're an elected official. There are many leftists and others who make threats to members of Congress. And other people make threats to members of Congress.

So having security — we have security briefings regularly. You have to go through security just to go into the Capitol and go into any of the office buildings. So dealing with potential violence is something that all elected officials have to be aware of.

[p.118]

Q. So let's go to page 35, to the text message at 5:37 a.m.

Mr. Alexander wrote to you here, "We want 30 members minimum."

And you responded, "Okay."

Do you see that?

A. I see this.

Q. Okay. And then to the next text, also on page 35, at 5:46 a.m. You wrote to Mr. Alexander, "The objections are getting signed. They want a wet signatures instead of autopen. The doc can be signed quickly."

Do you see that?

A. I do.

MR. BLUE: Objection, Your Honor. Now we're getting into issues about the actual certification of the votes as opposed to the rally, which is what he talked about.

JA856

MR. SUS: So, Your Honor, my understanding was there was a one-touch rule with these witnesses. And we get to ask all questions we want of the witnesses, particularly relating to the events of [p.119] January 6th, while they're on the stand.

We aren't able to recall the witnesses, so we believe that this is fair game. And it's also within the scope of direct because Mr. Van Flein testified about his activities on January 6th and his connection to the rally that day and Representative Gosar's activities that day.

THE COURT: He also specifically testified that he had to get back to the office to work on exactly what these text messages are about.

So I'm going to overrule the objection. And you can address any of these things on redirect. Okay?

MR. BLUE: Thank you, Your Honor.

BY MR. SUS:

Q. So, again, you were referring in this text message to Representative Gosar's objections to the counting of Arizona's electoral college votes that day.

Is that right?

A. This is correct.

Q. And let's go to page 35 again, [p.120] at 5:48 a.m. on January 6th.

Mr. Alexander texted you, "Can we send an e-mail to the entire House Freedom Caucus if they all need to be at the Ellipse? POTUS wants force."

Do you see that?

A. I see that.

Q. And you responded, "Will ask now."

Do you see that?

A. Yes, I see this.

Q. So, Mr. Van Flein, is it fair to say you were coordinating with Ali Alexander on January 6?

A. I was in communication with Ali, yep.

Q. And these text messages show that he asked you to do things and then you did them.

A. Well, I'm not sure if that e-mail ever went out. I said I would ask. I might have contacted the executive director for the Freedom Caucus; I may not have. But I don't know if that's a fair statement.

The text says, "Will ask now." [p.121] Whether I did ask now, I'm not sure I did.

Q. So you may have just lied to him. Is that what you're suggesting?

A. No. What I'm saying is there's a lot going on that day, and I can't always get to everything that people want me to get to.

Q. So, Mr. Van Flein, I want to skip past the rally and talk about when you were at the Capitol building. You started texting with Mr. Alexander again, didn't you?

MR. BLUE: I renew our objection, Your Honor. We are way beyond direct. Just because he happened to go to the — just because he mentioned that he was going back to the Capitol for the counting of the electoral votes, that wasn't the substance of the testimony.

The substance of his testimony was about what happened at the Capitol — I mean at the Ellipse and the rally. And now we are way beyond that.

THE COURT: Are you going — are you planning on asking him questions about the siege of the Capitol? [p.122]

MR. SUS: Both the siege and the electoral vote objections, which he had already testified about.

And, Your Honor, we would submit that his testimony about the knowledge of violence that day and the attack that day is relevant and within the scope of direct.

And, in fairness, we have no ability to recall this witness and ask him these questions.

MR. BLUE: Your Honor, first of all, let me address the second piece first. They rested their case and didn't call him. And if they had called him, then the one-touch rule would have made it for us to talk to him at that point. It doesn't give them the opportunity to come now.

The second piece is that, again, this was all about what happened at the Ellipse. We're talking about the rally that was coordinated by Amy Kremer and what happened there. And we're not talking —never once did we raise a question about the attack on the Capitol later on that day.

And so he's trying to get in [p.123] all sorts of additional information that didn't even — doesn't even touch his direct testimony.

MR. SUS: So, Your Honor, as a practical matter —

THE COURT: Well, first of all, was he on your witness list?

MR. SUS: He was not on our witness list, no.

THE COURT: Okay. So you weren't going to call him. So the one-touch rule doesn't have any application.

And I'm going to apply the —they gave a limited — very, very limited direct of Mr. Van Flein. You may ask him questions about the electoral count because he, you know, has — he has opened the door when he testified that he had to rush back to go deal with those issues. But he's not going to talk about whatever his reaction may or may not have been to the siege of the Capitol.

MR. SUS: Understood, Your Honor.

[p.124]

BY MR. SUS:

JA859

Q. So I want to talk about Representative Gosar's objections that day to the counting of electoral college votes.

Representative Gosar's objection was based on concerns of alleged voter fraud; is that right?

A. I would say "election irregularities."

Q. You supported and worked on that objection, didn't you?

A. Yes, I did.

Q. And you did so because you think the 2020 election was stolen from President Trump.

A. No, that is not true.

Q. You don't think the election was stolen from President Trump?

A. No, I don't know if that's true. All I — what I worked on was there were reports from elected officials in Arizona, from county and state legislators, indicating that there were multiple irregularities. I don't know if it resulted in stealing the election from Trump.

[p.125]

Q. You're aware that President Trump has claimed that the election was stolen from him, aren't you?

A. I am aware. Yeah, I am aware of that.

Q. So you disagree with President Trump?

A. No. He has his opinion.

MR. BLUE: Objection, Your Honor. Again, we're — we started talking about electoral votes and now we're talking about what President Trump thinks.

THE COURT: I'm going to overrule it. But let's move on, please.

BY MR. SUS:

Q. Last question, though, on this: Representative Gosar won reelection on the same ballot as the presidential ballot for 2020; isn't that right?

JA860

MR. BLUE: Objection, Your Honor. Now we're talking about Representative Gosar's reelection.

MR. SUS: So, Your Honor, this is about the —

THE COURT: He just testified [p.126] that there was voting irregularities, and that's why they were objecting on the Floor of Congress. And his boss was elected in the exact same election. And he can ask him whether he thought that that was also —there was the — whether there was irregularities in that election as well.

MR. SUS: Thank you.

BY MR. SUS:

Q. Mr. Van Flein, do you need me to repeat the question?

A. I believe you asked if Congressman Gosar was elected in the 2020 election as well. And he was.

Q. And did Representative Gosar object to his own reelection on the basis of alleged voter irregularities?

A. No. He did not have any concerns that his election was contaminated with any election irregularities. Most of his voting counties at that time — at that time it was Yavapai, Mohave County, and Yuma County and La Paz County — none of those counties, even in the presidential election, concerns were implicated. It was Maricopa [p.127] County and Pima County where the elected officials in Arizona had the most concern.

In addition, Congressman Gosar got re-elected, I think, by 20-some points in that election, maybe 25 points. It was not close at all; whereas in a close race, any election irregularities can be outcome—determinative.

And in the case of Mr. Biden and President Trump or President Biden and Mr. Trump — however you want to look at that — the election is far closer.

And if there was election irregularity within a 15,000-vote spread out of 2 or 3 million votes cast, it's a lot easier — or a lot more concerning. But when you win by 20 points, it's not as urgent or concerning.

Q. Understood.

President Trump carried the state of Arizona in 2016; isn't that right?

A. To my knowledge, yeah.

Q. And did Representative Gosar object to President Trump's victory in that state in 2016?

[p.128]

MR. BLUE: Objection, Your Honor.

THE COURT: I'm going to sustain the objection. Let's move on, please.

MR. SUS: That was my final question. Thank you, Your Honor.

THE COURT: Any redirect?

MR. BLUE: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. BLUE:

Q. Mr. Van Flein, counsel asked you about the — one of the January 6th Committee findings. Do you remember that?

A. With the Exhibit 107?

Q. Was that Exhibit 107?

THE COURT: I think it was Exhibit 78, Finding 107.

MR. BLUE: Exhibit 78, Finding 107.

BY MR. BLUE:

Q. Do you think the January 6th Committee's findings are credible?

A. No. The work that I saw was very incomplete and

—

[p.129]

THE COURT: Counsel —

BY MR. BLUE:

Q. Hold on.

You're going to have to get closer and speak up, if we're going to hear you.

A. The answer to that question is: I don't think the January 6th Committee was initiating an investigation in good faith. It started with a preordained conclusion, which is not a good way to start an investigation. And they selected evidence that they wanted, in my opinion.

Q. And when you say "they selected evidence that they wanted," why is that a problem?

A. Well, a fair investigation, you would want to consider all evidence and not discard or not even bother to investigate evidence that could run counter to the theory that you started with. Actually, a real investigation wouldn't even start with a theory. It would just start with gathering facts and see where they went.

They started with a conclusion [p.130] and looked for evidence to support that conclusion. That's my fundamental disagreement with how that committee did its job.

Q. Thank you very much, Your Honor — Mr. Van Flein.

MR. BLUE: No more questions, Your Honor.

So I think he's done?

THE COURT: I don't know. I mean, you — if he — you really opened up a whole new thing with this — what his opinions on the January 6th Committee. So if they want to ask him about what the foundation is for those opinions, I'm going to let them.

MR. BLUE: Okay.

THE COURT: I don't know if they want to or not.

MR. SUS: Briefly, Your Honor.

REXCROSS-EXAMINATION

BY MR. SUS:

Q. Mr. Van Flein, what visibility did you have into the process of the January 6th Select Committee?

A. Say that again?

[p.131]

Q. What visibility did you have into the process of the January 6th Select Committee?

A. The visibility I had was what was ever made public. I was not a member of that committee or a member of staff, so I'm only aware of what was made public.

Q. So you have no personal knowledge of the inner workings of that committee?

A. The inner workings? No, I was not on the committee or the committee staff.

Q. Thank you.

A. I will say, for example, that they missed the FBI report that had already gone over this issue —

THE COURT: Mr. Van Flein —

MR. SUS: Your Honor, I would move to strike that answer.

THE STENOGRAPHER: I can't hear him anyway, so...

THE COURT: Mr. Van Flein, we can't hear you. And there wasn't a question pending.

THE WITNESS: Okay. Sorry, [p.132] Your Honor.

THE COURT: Now you want to ask another question? MR. BLUE: Well, I was going to follow up on what he wanted to talk about.

THE COURT: Fine. As long as it's personal knowledge. I'm not really interested in hearing about rumor.

FURTHER EXAMINATION

BY MR. BLUE:

JA864

Q. Mr. Van Flein, you were starting to talk about an FBI report; is that correct?

A. Correct.

And I was mentioning the FBI report because, to me, the FBI had already investigated whether there was any coordination between President Trump and any of the rally organizers, in terms of planning violence or promoting violence or even expecting violence. And they issued a report — Reuters did an exclusive story —

MR. SUS: Objection, Your Honor. This has nothing to do with the January 6th report, and it's completely [p.133] beyond the scope of everything we've discussed today.

THE COURT: It's also hearsay. He's talking about some report that I have never seen and nobody has presented as evidence in this case.

THE WITNESS: It's an August 20, 2021, story by Reuters. They have the report from the FBI saying there's no evidence that the Capitol attack was coordinated by anybody; that it was more or less a spontaneous situation on the ground.

And the January — my point is that the committee never even references this report and findings by the top law enforcement agency in the United States. That was intended to determine the very issue this Court is looking at right now, and that is whether President Trump or some of his people coordinated the violence. And the FBI said no.

That's an August 20, 2021, report and story by Reuters called "Exclusive: FBI finds scant evidence United States Capitol attack was [p.134] coordinated."

BY MR. BLUE:

Q. And so because —

THE COURT: I'm striking all of that testimony.

JA865

If the Intervenors want to put on this evidence of an FBI report, I'm more than happy to consider it, but I'm not going to hear testimony from this gentleman about what some newspaper article said — I've excluded all newspaper articles in this case — and about a report that isn't before the Court.

So I'm striking all that testimony. I'm more than happy to look at the report itself, if the Intervenors want to put that on as evidence.

MR. BLUE: All right. Thank you, Your Honor.

And we have no more questions.

THE COURT: Okay. Anything from the Secretary of State?

MR. KOTLARCZYK: Nothing, Your Honor.

THE COURT: Anything from the [p.135] Colorado Republican Party?

MS. RASKIN: No, Your Honor.

THE COURT: Thank you so much for your testimony, Mr. Van Flein. You are released.

THE WITNESS: Thank you.

MR. BLUE: Your Honor, Mr. Gessler is going to call Mr. Bjorklund here. Joanna Bila is keying up the exhibits for him right now. It may just take a minute or two.

THE COURT: Okay. And am I correct that this will be the last witness this morning?

MR. BLUE: Yes, ma'am.

THE COURT: So it sounds like we'll have a longer break before Congressman Buck testifies?

MR. BLUE: Yeah. He's planning to testify at 1 o'clock.

THE COURT: Okay.

MR. GESSLER: Your Honor, if I may step out to get Mr. Bjorklund.

JA866

THE COURT: Oh. He's here. Great. Thank you.
[p.136]

Mr. Bjorklund, will you please raise your right hand.

TOM BJORKLUND, having been first duly sworn to state the whole truth, testified as follows:

DIRECT EXAMINATION

BY MR. GESSLER:

Q. Good morning, Mr. Bjorklund.

A. Good morning.

Q. Could you please state and spell your name for the record, please.

A. Yes. My name is Tom Bjorklund. And that's B-j-o-r-k-l-u-n-d. Tom spelled like T-o-m.

Q. Okay. Thank you.

And do you live here in Colorado?

A. Forgive me. I'm going to turn this off. I apologize.

Q. Sure.

A. Yes, I do.

Q. Okay. And what do you — what job, or your advocacy, what position do you hold?

A. I'm the owner of Tactical Data [p.137] Solutions, a data company, and a small investment company called Rocking Horse Winners. And I serve as the State Party —

Republican Party Treasurer.

Q. Are you here today on behalf of the Republican Party?

A. No, I'm not here on behalf of the Republican Party.

Q. Okay. Have you had any conversations about the substance of your testimony with Mr. Dave Williams, who is the chair of the Republican Party?

A. No, we have not.

JA867

Q. Okay. I'm going to take you back to the events of January 6th, 2021, and a few days leading up to that.

When did you first learn about a rally being held in Washington, D.C., on January 6th?

A. It was probably mid-December, I heard about it from my brother.

Q. Okay. And did you — and what — and did your brother express an opinion about the January 6th rally?

A. Yeah. Well, he just said that [p.138] there was going to be a big rally for Donald Trump, and he asked if I'd like to meet him up there. He's from Minnesota.

And so I told him I'd think about it, and decided to go.

Q. Okay. And when did you decide that you wanted to go?

A. Well, as soon as he mentioned it, I wanted to go, but it was just a matter of logistics, trying to figure out if I could make it work.

THE COURT: Mr. Bjorklund, would you just move a little bit closer to the mic.

THE WITNESS: Yes. Thank you.

THE COURT: Great. Thank you.

BY MR. GESSLER:

Q. Had you been to a rally involving President Trump before?

A. No, not a campaign rally. I went to the Western Conservative Summit, and he was speaking there.

Q. Okay. And had your brother, to your knowledge, been to a rally involving President Trump?
[p.139]

A. Not that I know of.

Q. Okay. And did your brother express an opinion as to why he wanted to go?

JA868

A. Yeah. He's a big Trump supporter, and he just wanted to go and support the President.

Q. Okay. And — so, I'm sorry, when did you decide you wanted to go, roughly?

A. Well, I decided I wanted to go as soon as he asked me, but I just didn't know if I could go. So about a week before is when I finally decided that, hey, I'm going to commit to going.

Q. A week before what?

A. A week before the 6th. So, yeah, like late December. Yeah.

Q. Okay. And why did you want to go?

A. My main reason was I wanted to see my brother.

Q. Okay. And —

A. And go camping.

Q. I'm sorry?

A. And go camping.

[p.140]

Q. And go camping as well.

A. Yeah.

Q. Okay. So when you're thinking of leaving, what did you do to prepare to —before you left?

A. Just, you know, got the camping trailer ready. And I contacted — well, some people said they were going up there, and I contacted them. Decided I'd like to maybe have somebody to ride along with, and asked them if they knew anybody that wanted a ride.

Q. So you drove up there; is that correct?

A. Yes, we drove up.

Q. Did you wind up driving with anyone?

A. Yeah. There was a gentleman named — introduced me to named Travis — and I don't remember his last name, but he needed a ride. And so I told him I would include him in.

Q. Okay. Did you have any conversations with any of your — did you tell your family members that you were leaving?

[p.141]

Did you have any conversations with them?

A. Yeah. I told —

MR. SUS: Objection. Hearsay.

THE COURT: It is hearsay. I'm not sure what the point is, but — or if it's offered for that. Why don't you — let's —

MR. GESSLER: I think we need to hear his answer before an objection is proper, Your Honor.

THE COURT: Not necessarily. It's asking him what somebody — what he told other people out of court. But I'm going to — I'll allow it.

MR. GESSLER: Okay.

A. Yeah. I told my family that I was going up to go to Trump's speech on January 6. And I told — I think I posted it on Facebook, that I was going to go up there.

BY MR. GESSLER:

Q. Okay. And did you have any conversations with your son about whether you were heading to Washington, D.C.?

A. Yes. I told my son I was going.

[p.142]

Q. And what was the substance of those conversations?

A. The main thing, he was concerned about my safety. You know, he was just worried about me.

Q. And why — were you concerned about your safety?

A. Definitely.

Q. And why is that?

JA870

A. Well, I had seen videos of, you know, Beverly [sic] Betty, or whatever her name is. She's an activist for pro-life causes. And somebody in Antifa stabbed her in the back and tried to kill her.

And then I saw a Portland riot. And they followed some Trump supporters and they shot them in the back. Killed him. I saw Rand Paul get attacked by Antifa, Black Lives Matter.

MR. SUS: Objection, Your Honor. Relevance.

THE COURT: What is the relevance?

MR. GESSLER: It goes to his state of mind and the motivation for some [p.143] actions that he took in going up to January 6th.

THE COURT: And why is his state of mind relevant?

MR. GESSLER: If you give me a few more questions, Your Honor, I think I'll tie it up. And if opposing counsel seeks to strike, we can deal with it then, Your Honor.

THE COURT: I'll let you proceed, Mr. Gessler.

MR. GESSLER: Okay.

BY MR. GESSLER:

Q. So based on the concerns you had, did you or your son — did you take any action for preparations before you left?

A. Yeah. My son offered me —it's called a plate carrier. It's a body armor.

Q. Okay.

A. And he wanted me to wear it in case I got shot by Antifa or stabbed or something.

Q. Okay. And what's your son's occupation?

A. He works for the Lone Tree [p.144] Police Department.

Q. Okay. And — okay. Did you, in fact, take that — you called it a plate carrier or body armor?

JA871

A. Yeah.

Q. Did you take that or load it in your vehicle?

A. Yeah, I took it with me. And I put it in the back of the truck, in the backseat.

Q. Okay. How long did it take you to get to Washington, D.C.?

A. Oh, we drove straight through. I left the Denver area, and I picked up Travis, and then we drove straight through. It was about 24 hours or 25 hours, something like that.

Q. Okay. And when you got to D.C., where did you stay?

A. I stayed at a campground maybe 20 minutes from the D.C. area.

Q. Okay. I'm going to play for you a video.

MR. GESSLER: Could you do 1000, please.

[p.145]

BY MR. GESSLER:

Q. I want you to take a look at this video, Mr. Bjorklund.

A. Okay.

(Video played.)

Q. Did you take that video?

A. I did.

Q. So I will submit to you that it may seem like a boring video, but I'm going to ask you: Why did you take this video? What's going on in there?

A. I just saw all these giant buses with Donald Trump stuff. I was actually concerned about the campground, and so I felt kind of relieved that my — the people right behind our camper was a bunch of Trump voters and supporters or whatever. People — old people like her.

JA872

Q. Is this a video of the campground where you stayed?

A. Yes, it is.

Q. Okay. And did you meet any of the people in the campground?

A. Yeah. We went over and said hello. And my brother went over right away [p.146] when he saw their buses, and he met the owner of the buses, and they invited us to a barbecue.

Q. Okay. And can you describe the people that you met.

A. Average age, about 60-plus; and just very friendly. Like tourists. And I guess they paid this gentleman that owned these buses to come out and see Donald Trump speak.

And so we had a big barbecue. Very friendly. And, yeah, it was a good — kind of a good time.

Q. Okay.

A. And we were hungry.

MR. GESSLER: Your Honor, I'd move to admit Exhibit 1000, please.

MR. SUS: No objection.

THE COURT: 1000 is admitted.

(Exhibit 1000 was received into evidence.)

BY MR. GESSLER:

Q. Okay. And can you describe, sir, the — you said there's a big barbecue. Can you describe the atmosphere?

[p.147]

A. Yeah. It was just — we were just having fun. It was a big party. And he had gazillions of burgers. And I actually helped flip some burgers for him while he ran around, the owner of the buses.

JA873

We talked about his business model and stuff like that, which is something I'm always interested in.

Q. And to your knowledge, why — I mean, why were all these people there in Trump buses?

MR. SUS: Objection, Your Honor. Calling for speculation and hearsay.

THE COURT: If he has an understanding as to why people were there, he can testify as to that.

A. Yeah, there was a — it was a tour bus caravan, and they were all just there to see Donald Trump's speech. And that was pretty much it.

BY MR. GESSLER:

Q. Okay. So is it fair to say you slept overnight, then, at that location that you videoed?

[p.148]

A. Yeah. Behind that is my camping trailer. Yeah.

Q. Okay. And what day was that video taken?

A. That was on January the 5th.

Q. Okay. So tell me about the next morning of January 6. I'm assuming at some point you woke up.

A. (Nodded head up and down.)

Q. And then what did you do at that point?

A. Yeah, I got up. And we just took all of our gear and equipment and other things and then I locked it in the back of the truck, because my camper is a popup, like a tent, and so I didn't feel like things were secure there, so I just crammed everything into the truck and locked it up. And then we took my brother's car to the D.C. area.

Q. Okay. Let me back up just one second.

So when you say you took your brother's car, did you, at some point while you're traveling from Denver to Washington, D.C., meet up with your brother?

[p.149]

JA874

A. Yeah. He actually met me at the campground. I set up the tent and everything, and then they arrived after I did all the work.

Q. So you didn't travel with him. He met you there.

A. Yeah.

Q. Okay. So the body armor that you had brought with you, what did you do with that?

A. I left it in the truck.

Q. And why did you leave it in the truck?

A. It was kind of heavy. And it's just — I just felt like it wasn't going to add to any type of warmth, which was my main concern. It was pretty cold that morning.

And I just felt like I wasn't there to cause trouble. And I thought if I wore body armor, it would maybe make me a target. And so I decided to leave it.

Q. Okay. And then when — so you got in your brother's car. What did you all — was there anyone with you, you and your brother?

[p.150]

A. Yeah. My brother brought a friend — or I guess somebody who worked for him and who was a huge Trump supporter. And his name was Scott. And —

Q. I'm sorry. What was his name?

A. I think it was Scott. Yeah. Sorry.

And, yeah, we just got in the car. We actually did some repairs to the trailer because it kind of bounced around. But, anyway, they did that. They're in construction, so they helped me fix some stuff. And then we got in the car and left.

Q. Okay. And where did you go?

A. We drove directly to the Capitol. And we found a small parking lot right by the — it's called The Tides Pond or The Tides Pool, I think is what it's called. And we parked right there.

JA875

There was maybe a 25-car lot. It wasn't very big. And it was just lined up. And it was right across — directly across from the Washington Monument — the big, tall Washington Monument.

Q. Had you been to D.C. before, [p.151] prior to this?

A. Never been to D.C., no. That was the first and only time.

Q. Okay. And then where did you go after you parked?

A. We tried to connect with some people that I had gotten in touch with. And they were all over the map and it was hard to find them, so we just hung out by the big Washington Monument.

Q. Okay. And when you say “we hung out,” who was “we”?

A. Just my brother, his friend Scott, and myself.

Q. Okay.

A. I'm sorry. It was Steve. I apologize. It was Steve.

Q. Okay. And why did you go to the Washington Monument area?

A. I guess just that big, tall thing was calling to us.

So we hung out there. And there was a lot of people there. And it looked like the Ellipse area was really packed, and we just — I don't really like [p.152] big crowds so I didn't — we just hung out by the Monument.

Q. So is it fair to say you were there to listen to President Trump's speech?

A. Oh, yeah. We were there definitely to listen to speeches, yeah.

Q. Okay. And from your position near the Washington Monument, did you think that you were able to listen to the speech?

JA876

A. Yeah. They had big microphones — speakers set up so we could hear what was going on. And then we listened to some of the speeches and —

Q. Okay.

MR. GESSLER: Can you play Exhibit 1001, please.

(Video played.)

BY MR. GESSLER:

Q. Did you take that video?

A. I did.

Q. Okay. And how did you take that video?

A. With my iPhone and — yeah, I just panned around. I'm obviously not a very good photographer.

[p.153]

Q. And is that sort of where you were standing to listen to the speeches?

A. Yeah. That's exactly where we were.

Q. Okay. And do you know who was speaking in the background there?

A. I think that was Donald Trump Jr., I'm pretty sure —

Q. Okay. Yeah.

A. — if I remember.

MR. GESSLER: And I'd like to move to admit Exhibit 1001, please, Your Honor.

MR. SUS: No objection.

THE COURT: 1001 is admitted.

(Exhibit 1001 was received into evidence.)

BY MR. GESSLER:

Q. And can you describe what the crowd was like or the people in the crowd.

A. Very friendly. There were —it was diverse. There was a lot — there was actually a big line of people that said Asians for Trump, and they were really super nice. And, you know, we were talking to [p.154] them.

JA877

Everybody was there having a good time, listening to the speeches.

Q. Okay. What was the temperature like outside?

A. It was freezing cold. It was windy. And, yeah, it was very cold.

Q. Okay. Can you give us a sense of how big the crowd was there at the Ellipse?

A. I'm guessing, like, if you looked at the whole crowd, maybe 350,000.

Q. Okay. Let's look at Exhibit 1002, please.

(Video played.)

Q. Did you take that video?

A. I did.

Q. So what's going on in there?

A. Well, we — all these motorcycles pulled up, and I thought it was pretty cool, so I took out my camera and started filming. They're on Harleys.

And then the horses came up. And I believe that was Park Police. And my brother was saying, "God bless you guys." And there was a woman there; you can hear her [p.155] in the background. And people were just kind of, you know —

THE COURT: Mr. Bjorklund, would you just mind orienting for me where you were versus where the speeches were happening?

I know you said you could hear them on speakers, but, like, how far were you from where the action was happening?

THE WITNESS: Yeah. The speeches were kind of boring, and so we just decided to walk across the street from the Washington Monument. And we went over to —

JA878

I think there's a World War II museum. There was a monument there, and we wanted to see that. So we just walked over there to take a look.

And then that's where the Park Police were. So it was very close to where we were actually at. You could see the monument right there where we had been standing.

THE COURT: And how far was the monument where you were in the original video from where the speeches were taking place?

[p.156]

THE WITNESS: It was probably a hundred yards or couple hundred yards, maybe. A couple football fields.

THE COURT: So a few football fields?

THE WITNESS: Yeah.

THE COURT: Thank you. Sorry. I'm just not oriented.

MR. GESSLER: I was planning on going there next.

THE COURT: Sorry.

MR. GESSLER: No. No. No. This is fine. I want to make sure: Do you have a good understanding, Your Honor?

THE COURT: I'm highjacking your direct.

MR. GESSLER: He's an open book — Mr. Bjorklund.

But I want to make sure: Do you have a sense of comfort having a sense of where he was?

THE COURT: And was the crowd continuous from the Monument to where the speeches were taking place?

THE WITNESS: Yeah. It was [p.157] very packed. It was less so by the Monument. I think most of the crowd wanted to be closer to Donald Trump. And, you know, I wanted to be more away from the crowd.

THE COURT: Go ahead. Sorry, Mr. Gessler.

MR. GESSLER: Oh, no, problem, Your Honor.

JA879

Your Honor, I'd move to admit Exhibit 1002.

MR. SUS: No objection.

THE COURT: 1002 is admitted.

(Exhibit 1002 was received into evidence.)

BY MR. GESSLER:

Q. Okay. And then after sort of looking at the — I'll call it motorcade and the horses, did you move back to listen to the speech?

A. Yeah. We went back — we wanted to hear Donald Trump, so — and there were, like, a whole string of people before. So we went back across the street because we wanted to hear Donald Trump's speech.

MR. GESSLER: Okay. Can you [p.158] play Exhibit 1003, please.

(Video played.)

BY MR. GESSLER:

Q. So is that you in the video?

A. Yeah. That's a selfie.

Q. So it looks like — as though you have a hoodie on and a cap. Why are you wearing the hoodie like that?

A. Actually, I didn't have enough layers. And so we found a vendor, and I bought that hoodie at the — at one of the vendor tables. It was really cold, so I put that on.

Q. Okay. And was that a — who was speaking?

A. That was Donald Trump speaking — or Senior.

Q. I'm sorry?

A. Senior. The President.

Q. Okay. And how would you describe the crowd and the crowd's reaction?

A. It was entertaining. We were laughing because he was saying some really funny things. So we were just cracking up. It was hard to hear that stuff that he was — [p.159] throughout the speech saying things that we

JA880

were — just made us laugh. We were just having fun, hanging out.

Q. When you say “we were having fun, hanging out,” who are you referring to when you say that?

A. Well, my brother, Steve. And we just talked to all the people around. Everybody was pretty happy and just being there, listening to the speech.

Q. Was there sort of laughter in addition to yourselves?

Were other people sort of laughing at what —

A. Definitely.

Q. — some of what President Trump said?

A. Yeah. Definitely. It was very entertaining.

Q. Okay.

MR. GESSLER: I'd move to admit Exhibit 1003, Your Honor.

MR. SUS: No objection.

THE COURT: 1003 is admitted.

(Exhibit 1003 was received [p.160] into evidence.)

BY MR. GESSLER:

Q. Okay. Now, did you listen to the entire speech?

A. No. Near the end — he said that we were going to go down to the Capitol. And he said, you know, he wanted us to go down to the Capitol and, you know, peacefully make our voices heard, or something to that effect.

And then we decided, well, let's go find a bathroom. And that was pretty much our main mission at that point.

Q. And did you succeed in that mission?

A. Yeah. We found a public restroom, and then we went back to the car and — so, yeah.

Q. So you said you looked for a bathroom and then went back to the car. How long did that take, roughly?

JA881

A. Probably 15, 20 minutes, 30 minutes, something like that.

Q. Okay. Okay. And from the car, did you all make a decision to, in fact, go [p.161] to the Capitol?

A. Yeah. We went to the — we went to the car. My brother was complaining that his knee was hurting, and so he said he'd like to — he wanted to go. And I was kind of of the same opinion, like we can —you know, we've seen the speech and let's take off. It's really cold.

And so my brother — he heated up the car, and then Steve said he really wanted to see the Trump speech down at the Capitol. And he was really adamant. He said he didn't drive all the way from Minnesota to miss out on Trump's, you know, speeches.

So then my brother said he would stay in the car, smoke cigarettes; and he said he would wait around for us, and he understood if we wanted to go.

So I just went along with Steve, and we started walking towards the Capitol.

Q. Okay. Let's go to Exhibit 1004.

I'm sorry. This is a photo, Exhibit 1004. I may have to ask you to back [p.162] up in your testimony.

What's that a photo of?

A. Just the crowd looking at the — I think they're headed — they're looking at the Ellipse. And I just wanted to kind of get a sense of the crowd. This was after we, I think, came back from the bathroom. So, yeah.

Q. Okay. Did you take this photo?

A. I did.

Q. Okay.

MR. GESSLER: I'd like to move to admit this Exhibit 1004.

MR. SUS: No objection.

JA882

THE COURT: 1004 is admitted.

(Exhibit 1004 was received into evidence.)

THE COURT: You said this was at the Ellipse still?

THE WITNESS: Yeah. I think it's looking towards the Ellipse, I believe. Yeah.

THE COURT: From the Washington Monument?

THE WITNESS: Yes.

[p.163]

BY MR. GESSLER:

Q. Let me ask you again: Was this during the speech or was this after you had gone to the car and come back?

A. I believe it was after. I think that's — yeah. Oh, actually it might have been during the speech because there was still a lot of people there.

Q. Okay. Can you orient us? Was this before you started walking to the Capitol?

A. Yes.

Q. Okay. Let's go to Exhibit 1005, please. This is another photo. Did you take this photo?

A. Yeah. These were taken insuccession, so...

Q. Okay. So is it fair to say this is another photo of the crowd?

A. Yeah.

Q. Looking towards the Ellipse?

A. Yeah.

Q. Okay.

MR. GESSLER: I'd move to admit this photo, Your Honor.

[p.164]

MR. SUS: No objection.

THE COURT: 1005 is admitted.

(Exhibit 1005 was received into evidence.)

BY MR. GESSLER:

Q. And finally Exhibit 1006, please. Okay.

JA883

So this is a different type of photo than what we just saw. Did you take this photo?

A. Yeah, I did.

Q. And what's going on? Describe how you took the — you know, what was going on when you took the photo? And what's in the photo, please?

A. I took a picture of the Capitol and just — there was some people going down that direction, so I snapped a picture. I thought it was — I just wanted to get a picture of the Capitol.

Q. Okay. And when did you take this photo in relation to the other stuff you've talked about?

A. I believe that was right before we started heading down there.

[p.165]

Q. Okay. So you've already been to the car at this point; is that correct?

A. Yeah. Yeah.

Q. And you're starting to walk down to the Capitol?

A. Uh-huh.

Q. Okay. And this is what you saw?

A. Yep.

Q. Okay.

MR. GESSLER: Your Honor, I'd move to admit Exhibit 1006, please.

MR. SUS: No objection.

THE COURT: 1006 is admitted.

(Exhibit 1006 was received into evidence.)

BY MR. GESSLER:

Q. Okay. Let's look at Exhibit 1007, please.

(Video played.)

Q. Okay. Did you take that video?

A. Yes, I did.

JA884

Q. And when did you take that video in relation to the last photo we saw?

A. That was immediately following [p.166] that last photo. And we just were heading down to the Capitol building.

Q. Okay.

MR. GESSLER: I don't know if there's any more detail to ask beyond that, Your Honor.

BY MR. GESSLER:

Q. I mean, can you describe — were you talking to people on the way?

A. Oh, yeah. We were talking to different people. And there were some newspapers that were out, and we were — we had picked up some of them, and we were handing them out to people.

And that was Steve's idea. There was a bunch of newspapers, so he grabbed them. I told him to save me one.

Q. Okay. And in your conversations with people, can you sort of describe the atmosphere, their behavior.

A. Yeah. We were just casually going towards the Capitol building. And we were, you know, hoping to hear Donald Trump speaking down at the Capitol.

Q. Okay.

[p.167]

MR. GESSLER: I move to admit Exhibit 1007, Your Honor.

MR. SUS: No objection.

THE COURT: So that was 1007?

MR. GESSLER: Yes, ma'am.

THE COURT: 1007 is admitted.

(Exhibit 1007 was received into evidence.)

BY MR. GESSLER:

Q. So this is a photo. Did you take this photo?

A. Yeah. I kept just trying to get a sense of the big crowd coming behind us. And we were pretty late, and that crowd was still coming. So that was a huge crowd.

So the Capitol would be directly behind me. And I'm looking at the Washington Monument.

THE COURT: What do you mean when you say you were "kind of late" or "pretty late"?

THE WITNESS: Well, we spent a lot of time looking for a bathroom after Donald Trump said to go down to the Capitol.

And then we went to the car and we warmed up, which took a while. And then [p.168] we — yeah, so it was — I mean, we weren't in a big rush to get down there.

BY MR. GESSLER:

Q. Do you have an estimate of time, you know, what time this was roughly after the — in relation to the speech or time of day?

A. I'm thinking that it was around 12:20, something like that. 12 o'clock. Noon.

Q. Okay. I'm going to represent to you that that there's a fact in this case that President Trump's speech ended around 1:10.

A. Oh.

Q. Does that help you orient us to what time this —

A. Yeah, I guess it was closer to 2 o'clock.

Yeah, I was on Mountain Time. Sorry. All my pictures have Mountain Time on them.

Q. Okay. So what time do you think this was, roughly?

A. It was probably around [p.169] 2 o'clock —

Q. Okay. Okay.

A. — Eastern Time.

Q. Okay.

JA886

MR. GESSLER: Your Honor, I'd move to admit Exhibit 1008.

MR. SUS: No objection.

THE COURT: 1008 is admitted.

(Exhibit 1008 was received into evidence.)

BY MR. GESSLER:

Q. Let's look at Exhibit 1009, please.

So this is another photo. Did you take this photo?

A. Yeah. It was following that first one. I just zoomed in on the crowd and the Washington Monument.

Q. Okay. So at this point, your back is to the Capitol; is that correct?

A. Yes.

Q. Okay. And then you're facing the Washington Monument?

A. Um-hmm.

Q. Okay. And this is what you [p.170] saw; correct?

A. Yep.

Q. Okay.

A. That's all those people heading to the Capitol.

Q. Okay.

MR. GESSLER: I'd like to move for the admission of Exhibit 1009.

MR. SUS: No objection.

THE COURT: 1009 is admitted.

(Exhibit 1009 was received into evidence.)

BY MR. GESSLER:

Q. Okay. Let's move to Exhibit 1010, please.

(Video played.)

Q. So did you take that video?

A. I did.

Q. Okay. And just tell me what that's a video of.

JA887

A. That was a video, that we were getting really close to the crowd that was at the Capitol building. And I just did a pan around. And then — that's what that was.

Q. Okay. And, again, who were you [p.171] with at the time?

A. I was with Steve.

Q. Okay. And were you talking to people in the crowd?

A. Yeah. Yeah, we were just small talk all the way down there.

Q. Okay. And can you describe sort of the atmosphere or people's reactions or emotional state?

A. Yeah. Some people were talking about the votes that were going on inside. You know, I heard a couple of people had radios and — like, AM radios, and they were listening to speeches or whatever. But people were just generally talking.

Steve obviously doesn't like Mike Pence.

Q. So when you say "Steve obviously doesn't like Mike Pence," you heard someone in there say, "I hate Mike Pence"?

A. Yeah. That was Steve.

Q. Okay. And then let's look at Exhibit 1011, please

—

MR. GESSLER: Oh, I move to admit Exhibit 1010, Your Honor.

[p.172]

MR. SUS: No objection.

THE COURT: 1010 is admitted.

(Exhibit 1010 was received into evidence.)

(Video played.)

MR. GESSLER: Let's start that video over. I want to make sure that, Your Honor, it doesn't seem that there's sirens in the video. Those are in the background.

JA888

(Video played.)

BY MR. GESSLER:

Q. Okay. Did you take that video?

A. I did.

Q. Okay. Now I'm going to ask you some questions. So are you closer to the Capitol than the last video?

A. Yeah. We — on our way there, we heard these explosions. And Steve said, "Hey, they're lighting off fireworks." And so we were looking in the sky. We were looking for, you know, fireworks, but we didn't see any fireworks.

We thought that it was in honor of Trump speaking, and we thought we were [p.173] late to the speech. So we kind of just got closer to the crowd. And then I shot that video. And then a guy with a bullhorn telling people to get — to go closer to the Capitol and that — you know, we say "Back the Blue," and he used in expletives about our uniformed police officers.

Q. So when you say you said that you Back the Blue, what do you mean when you said that?

A. We are — I mean, pretty much the crowd, I believe, and myself, you know, we respect law enforcement.

Q. I'm sorry. Say that again.

A. We have a respect for law enforcement.

Q. Okay. You have to lean into the mic to talk.

A. Okay.

Q. And so there's a person — we heard a person with a megaphone. You spoke with that person?

A. No, I didn't — well, perhaps. I mean, not really. He was yelling things at us, and I just kind of told him where to go.

[p.174]

Q. So you yelled back at him?

JA889

A. Yeah.

Q. Okay. And maybe without describing any expletives or anything, can you give a little more detail what you yelled back at him?

A. Yeah. He was yelling for us to go into the crowd. And that's where we saw there was tear gas. And he mentioned that they were tear gassing us, and he was telling people to go into the crowd.

And I said, "Screw you," is what I said, so...

Q. Okay. So did you go closer to the crowd at that point?

A. No.

Q. Okay. And why not?

A. I don't like crowds.

Q. Okay. And you said there was tear gas and whatnot?

A. Yeah.

Q. What did you see?

A. I saw the — at that point, we realized they weren't fireworks; they were police officers, and they were shooting into [p.175] the crowd and big explosions going off right in the middle of a bunch of people.

And this guy is yelling, "Go into the" — you know, "Go over there." And I'm, like, that's stupid.

Q. Okay.

A. So...

MR. GESSLER: I'd move to admit Exhibit 1011, Your Honor.

MR. SUS: No objection.

THE COURT: 1011 is admitted.

(Exhibit 1011 was received into evidence.)

BY MR. GESSLER:

Q. Okay. Let's go to Exhibit 1012.

(Video played.)

JA890

Q. Okay. Did you take that video?

A. I did.

Q. Now where were you in relation to the Capitol at this point?

A. I was on the — I'm not sure the directions there, but I was on the — beside the Capitol. I went opposite of what that guy was yelling — and he told us we were going the wrong way — but I went — [p.176] there was some, it looks like, temporary bathrooms that were set up. And we walked over that way. And I just was coming around the side of the Capitol.

Q. Okay. So I'm going to orient you. So you're walking earlier with the Washington Monument behind you and the Capitol in front of you. And when you said you went to the side of the Capitol, did you go to your right or left?

A. I went to the right. Um-hmm.

Q. Okay. And so you're wrapping — walking around the Capitol at this point?

A. Yeah. And I'm behind the temporary bathrooms they had set up.

Q. Okay. And then you heard a —well, it sound like there was a big bang in there.

What's going on with that?

A. Yeah. They were still shooting flash-bangs and tear gas into the crowd, and so I didn't want to be there.

Q. Okay. At this point did you see any violence? Anyone hurting anyone else?

[p.177]

A. Only the Capitol Police —that's all I could see from where I was at —just shooting, you know, flash-bangs and stuff at people.

JA891

Q. Okay. And from what you could see from where you were, you know, what were people in the — that you were able to see or in the crowd doing at that point?

A. A lot of them were in disbelief. And they were, you know, just saying, “I can’t believe they’re shooting at us.” And people were just talking about what was — you know, what was going on.

And I just, you know, felt like they just — they obviously don’t want us in that spot.

Q. Okay. Were people in your area of the crowd moving towards the Capitol? away? stationary?

What were they doing as far as movement goes?

A. Most people were just standing there. They weren’t moving towards the Capitol. You know, I avoided the big crowd. So, you know, they were shooting. They [p.178] clearly didn’t want people over there, so I didn’t go over there.

And I was — and at that point, I lost Steve somehow. I don’t know where he went. I turned around, and he was gone.

Q. Okay. So at this point you were alone?

A. Yeah.

Q. Okay.

MR. GESSLER: Your Honor, I’d move to introduce Exhibit 1012.

MR. SUS: No objection.

THE COURT: Exhibit 1012 is admitted.

(Exhibit 1012 was received into evidence.)

BY MR. GESSLER:

Q. Okay. Let’s go to Exhibit 1013, please.

(Video played.)

Q. Did you take this video?

A. I did.

Q. Okay. And where were you at this point?

JA892

A. That was just directly in front [p.179] of those temporary bathrooms.

Q. Okay. Still — how about in relation to the Capitol?

A. It's — yeah, near the scaffolding. So it was, again, on the right side of the Capitol. And I looked — I tried to get a view of the scaffolding where a lot of people were. And so I just took that video.

Q. Okay.

MR. GESSLER: Your Honor — well, first, let me move to admit Exhibit 1013.

MR. SUS: No objection.

THE COURT: 1013 is admitted.

(Exhibit 1013 was received into evidence.)

MR. GESSLER: Your Honor, I'm probably about ready to move into a different section of testimony. And I don't think there's any way we'll finish — it's highly unlikely we'll finish Mr. Bjorklund before noon.

If I may suggest, as a humble suggestion only, that perhaps we could break [p.180] now. We could have Congressman Buck testify at 1 o'clock. We could resume Mr. Bjorklund after that. And I'm confident we will be out well before — probably well before 4 o'clock, maybe even before 3 o'clock today.

THE COURT: Okay. You don't think that you can finish your direct examination by noon?

MR. GESSLER: I can try. I think it's probably unlikely. So that why I just wanted to make a suggestion, Your Honor.

THE COURT: I'm fine with breaking from — we will break from 11:30 to 1:00. We'll hear Congressman Buck, and we'll then resume with Mr. Bjorklund.

Is that okay with you, Mr. Bjorklund?

THE WITNESS: Sure.

THE COURT: Any objection?

MR. GRIMSLEY: No, Your Honor. Just one quick issue to raise related to something that was suggested earlier.

THE COURT: Okay.

[p.181]

MR. GRIMSLEY: We had talked about the possibility of doing closing arguments tomorrow. And it's the Petitioners' view that we should put them off until a later date, once the findings of fact and conclusions of law have been submitted, because I think at that point in time, the arguments of both parties will have been fully joined.

And Your Honor may have questions on some of the legal issues and some of the findings of fact at that point. And we believe at that point in time, it would be good to have the closing arguments.

We just effectively had closing arguments yesterday. And I don't know if that would be too much more robust or fulsome than that if we had them again tomorrow. And I'm not sure they would incorporate all of the legal issues that you would want perhaps to hear on. So it would be our position to put it off.

THE COURT: And, Mr. Gessler, how about you?

MR. GESSLER: I think that [p.182] makes sense, actually, Your Honor. We don't have any objection to that at all.

THE COURT: An agreement?

MR. GESSLER: I will note that I think opposing counsel has been able to cooperate pretty well on this case. I hope we have.

MR. GRIMSLEY: It's actually true. You don't see it behind the scenes, but I think it's been true.

THE COURT: Ms. Raskin, are you okay with that as well?

JA894

MS. RASKIN: Absolutely fine with that.

THE COURT: Mr. Kotlarczyk?

MR. KOTLARCZYK: That's fine with the Secretary, Your Honor.

THE COURT: Okay.

MR. GRIMSLEY: And one last thing, Your Honor, just on the that Reuters report. I was a little stunned to hear that there was some August 2021 FBI report.

That was just a Reuters article, not a report — just to let you know — quoting unnamed sources. Just as [p.183] that shouldn't come in, nor should The Washington Post article from January 30th, 2021, saying that the FBI had found coordination amongst groups come in, so...

MR. GESSLER: I don't think we have a big objection to that.

It certainly explains Mr. Van Flein's state of mind, but we're not looking to insert that for the truth of the matter asserted, Your Honor.

THE COURT: Okay. Well, I think I struck that testimony.

So we will reconvene at 1:00 p.m. with Congressman Buck. And I just ask that we be ready to go with him, from a technical standpoint.

MR. GESSLER: That's another reason why I thought it would be a good reason to break now, so we can wrestle with the technology before 1 o'clock, to make sure we're good.

THE COURT: I think the key is just not to have Mr. Blue's computer involved. But I say that with no real knowledge.

[p.184]

MR. BLUE: I wouldn't disagree with you.

JA895

THE COURT: Okay. So we'll be back at 1 o'clock.
We're off the record.

(Recess taken.)

THE COURT: Congressman Buck, can you hear me?

THE WITNESS: Yes.

Oh. You heard me? Great. Okay.

THE COURT: Yeah. Could you raise your right hand, please.

CONGRESSMAN KEN BUCK, having been first duly sworn to state the whole truth, testified as follows:

DIRECT EXAMINATION

BY MR. GESSLER:

Q. Good afternoon, Representative Buck.

A. Good afternoon.

Q. Thank you for being here.

I'm going to ask you some questions, as you well know, but I'd like to start with just a little bit about your current position and your background.

[p.185]

So could you tell the — for the record, your current position.

A. Yeah. I'm a United States Congressman for the 4th Congressional District of Colorado.

Q. And how long have you been a congressman?

A. Almost nine years. Eight years and ten months.

Q. Okay. And when were you first elected into Congress?

A. I was elected in November of 2014.

Q. Okay. And what did you do prior to that?

A. Before that, I was the elected district attorney in the 19th Judicial District, which is Weld County.

Q. And how long did you serve in that position?

A. I served as district attorney for ten years.

JA896

Q. Okay. And then prior to being elected as district attorney, what did you do?

[p.186]

A. I actually worked for Hensel Phelps Construction Company in a nonlegal position for two-and-a-half years.

And before that, I was with the U.S. Department of Justice for 15 years; 3 years in Washington, D.C., and 12 years in the U.S. Attorney's Office in Denver.

And I also taught at the University of Denver Law School in the evenings. I'm not sure if the title was adjunct professor, but it was something along those lines. I was a — I taught at the graduate law program, and I also taught for the law school criminal procedure.

Q. Okay. Thank you very much.

So I want to direct your attention to the events around January 6th and the electoral vote, the electoral count.

Where were you on the afternoon — in the afternoon of January 6th?

A. I was on the Floor in the U.S. House.

Q. Okay. And why were you there? What was going on?

A. There was a procedure to [p.187] certify the votes from the November 2020 election.

Q. Okay. And had you done that before, as a congressman?

A. Yes. So I'm trying to think.

For the 2016 election — I was not here for the 2012 election, so 2016. And that was my second time, 2020.

Q. Okay. And can you describe what the process is that Congress follows for the electoral vote count.

A. Sure.

So the vice president presides, and he orders the envelopes to be opened. And the clerk in the House

JA897

opens the envelopes. It's a joint hearing. The Senate is in the House chambers, and we have a joint hearing. The envelopes are opened, and the electoral votes from each of the states in alphabetical order is announced.

Q. Okay.

A. That's how it's supposed to work generally, I guess.

Q. Okay. And what role does the — does Congress play?

[p.188]

Are you merely bystanders to that? Or does the Congress play a role in that process?

A. It depends who you ask. In my opinion, we have a very ministerial function of sitting there and opening envelopes.

I assume that at the time the Constitution was written, it was meant to make sure that the votes were opened in public so that the public would have some assurance of the integrity of the votes being counted.

But we are not counting votes, and we are not opening envelopes. We are sitting there.

Q. Okay. And now is there a process for objections?

A. There is a process for objections based on the statute passed around the time of the Civil War, where people can make objections.

Again, my understanding is that the statute is there in case there is a dispute of electors — certified electors coming from a state capitol.

[p.189]

Q. Okay. So I want to go back to January 6th, 2017. Were there any objections on the Floor at that time?

A. Yes, there were. There were six or seven objections made to different states' electoral count.

Q. And can you describe what happened.

A. I can.

Jim McGovern from Massachusetts — a congressman from Massachusetts, stood up and objected to the votes. I think it was Alabama. And then there were five other objections — clear objections to particular votes.

Then the last objection, the seventh one, Maxine Waters from California — I don't know if she objected, but she just asked if a senator will agree to object with her.

So the only way that a proper objection can be made is if a House member and a senator both object. And in '16 — and in years past, frankly — there have never been, to my knowledge, a senator who has [p.190] objected. At least in this century, no senator has objected with the House member in the — in '16, into '17. January 6 of '17, no senator agreed to object.

Q. So all the objections were from House members?

A. All the objections were from House members. And they were not heard because it wasn't properly made.

Q. Okay. If a senator — just from a process standpoint, if a senator agrees to the objection, then what happens?

A. Then — this is based on memory; I'd have to have the rules in front of me. But by memory, the objection then is recognized. The Senate goes back to their chambers. The House — there's, I think, an hour of debate, a half hour from each side. And then there's a vote on whether the objection should stand or not. And then the Senate comes back and convenes with the House. And the next envelope is opened, and the process is continued.

JA899

Q. Okay. Let's go to January 6th, 2021. Were there — when you were on the [p.191] House Floor, were there any objections?

A. Yes.

Q. Okay. Can you describe what happened?

A. Yeah. I know Paul Gosar objected to — he's from Arizona — a congressman from Arizona. He objected to the Arizona electoral count. And the Vice President asked if — Vice President Pence asked if there was a senator who agreed. And I believe it was Ted Cruz who agreed on that.

And the objection was proper. And so the Senate then went back to their chambers to debate, and the House started the process of debating that.

Q. Okay. So were you in the House as part of that debate?

A. I was in the House. It was unclear to me whether I would be speaking or not.

It was during COVID, and so the House had rules on how many seats had to be between each member when they're on the House [sic]. There were actually members in the gallery, so it was — people were very spread [p.192] out.

But my guess is there are only — probably half the members were actually in the House, on the House Floor, at the time. Most members were back in their offices.

Q. Okay.

A. Or at least — maybe not most, but a large number of members were back in their offices.

Q. Okay. And did anything unusual happen that day?

A. Oh, yeah. It was unusual.

Q. I'm trying to give you open-ended questions. Can you describe what happened?

A. Sure.

The — so I — we have — we're permitted to have phones on the House Floor. I was not getting a signal, so I didn't know what was going on outside the House Floor.

But the first thing that I knew, a police officer — uniformed officer came — actually, no. I think the first thing that happened was a security detail escorted Speaker Pelosi off of the dais. And [p.193] she was escorted out. And then, of course, everybody is murmuring about what happened.

And then it may have been Jim McGovern who took over, but a Democrat member of the majority took over and was acting Speaker at that point.

A few minutes later, a police officer came to the microphone and said that tear gas had been dispersed. And we were advised that there was tear gas — or gas masks, I guess, under our seats, and we should deploy those gas masks, which seems a little odd, because we continued to have the debate.

But she may have also said that the Capitol had been breached. I'm not sure if she said that, but there was clear indication that there was a danger at that point.

I can remember within seconds of that happening a member from the Democrat side, up in the balcony area of the gallery, yelled out, "This is your fault."

And I'm sitting there, without any context for what's going on because [p.194] I don't have anything, a text from my staff, or the ability to go online and figure out what was going on.

Q. Okay. And then did you — so were you actually debating while wearing gas masks?

A. No. I don't think anybody put their gas mask on. And at that time, it was more of milling around and

JA901

trying to figure out, you know, what the threat was and what would happen next.

Q. Okay. And then did the security — did the Capitol Police or security respond in any way to a perceived threat?

A. Yes. So after that and after a few minutes of that — maybe longer, maybe 10, 20 minutes — a police officer came back to the podium and said that we would be clearing the House Floor. And that's when I saw officers, both uniformed and plain clothes, take positions.

I sit typically — in that day, I was sitting near the center aisle. And for some context for the Court, that's the aisle [p.195] the President walks down to give the State of the Union address. And it typically divides the two parties.

But I was sitting close to the aisle. And that center door has — there are big wood doors on the outside, but then the doors on the inside — there is glass above the door on the inside.

Q. Okay. And so what did the security police do?

Were they security or police? How should I describe them?

A. They are uniformed — they are sworn officers.

Q. Okay.

A. So, yes, police.

Q. So what did they do?

A. Well, they took up positions. And as members started leaving, I actually took my coat off. There were some — my jacket off. There were some members who were moving furniture over to block the door. And the officers, I know at one point, had drawn their weapons.

My memory also is: After the [p.196] members had moved some furniture over, there was a popping sound. And it was the glass over the door. And someone had

popped that glass. And that's when — maybe that's when the officers drew their weapons. It's hard to — in a room like that, it's hard to tell exactly what that noise came from.

I could see the glass, and so I knew, but it almost sounded like a bullet at first. And so the officers had drawn their guns and were securing that door.

Q. Okay. Now did you personally feel threatened?

How did you feel about — perceive what was going on?

A. Well, you know, I had felt kind of stupid afterwards because at the time, I took my jacket off, and I was there to help the police officers. I had no idea whether there were ten people in the building or a thousand people in the building.

So when we started to — when the police started to clear the building — at the same time, there were police officers behind the wall of the — the front wall of [p.197] the House chambers. There were police officers who were clearly milling around and securing the other entrances to the House. And I could see that from my seat.

But I — when we started to clear, I put my jacket back on. I was one of the last to leave the House Floor. And the officers actually came over to me — I was down in the middle aisle at this point, and they said, "It's time to go."

Nobody was, you know, yelling or screaming, but it was clear that it was a very serious situation.

Q. Okay. And what was your view of the sort of capabilities of the Metro Police — I'm sorry, of the security officers?

A. The Capitol Police, you know, they — there were probably six, seven of them that were there at that one

door. And they — it appeared to me, with their weapons and unknown threat to me at that point, that they were in control of the House Floor based on the number of officers, probably 30 to 40 officers around the House — well-armed [p.198] officers.

Q. Okay. And what was your perception as to — let me ask you this: Was anyone that you saw shot?

A. No. In fact, I didn't even hear the shot. But the shot would have occurred while I was there because, like I said, I was one of the last to leave the House Floor.

But I understood later that a lady had tried to breach the House chambers through the Speaker's lobby coming in over the door, and she was shot and killed.

Q. Okay. So from your perspective, the way the security officers were operating, what did they — were you able to infer any sense of what their protocols are based on their behavior?

A. Yeah, I think based on my experience in law enforcement and what I saw them doing, their goal/their function was to make sure that there wasn't a hostage situation, to make sure that no members were going to be hurt or taken by whatever the mob was.

[p.199]

Obviously they have earpieces in. They're aware of what's going on. But they were there to secure the Floor until the members left. And as soon as the members left, I could see the officers leaving the House at that point.

Q. Okay.

A. The House Floor, I should say.

Q. And why do you think they left the House Floor?

A. Because I don't think — I think the threat that they were — and, again, this is — I'm speculating, but the threat that they were there to minimize was the

JA904

threat of injury to members and staff. And once that had been accomplished, they were withdrawn.

Q. Okay. Are you aware of any sort of breaches or occupations of the Capitol prior to this event?

A. During the summer of 2020, there were riots. And the rioters had attempted to break through the barricades, and, in some cases, had broken through the barricades. Much smaller groups of people.

[p.200] But clearly they were, you know, protesting. And the goal was to breach the Capitol at that point.

There was also an instance in 2016 — I believe it was June of 2016 — where there was a mass shooting. And I don't remember which one. It may have been a school shooting. The Democrats wanted the — the Republicans were the majority. The Democrats wanted to have gun control bills heard. Speaker Ryan refused to bring those to the Floor, and the Democrats occupied the Floor at that time.

The Speaker ordered that the C-SPAN coverage of the Floor end. And they — the Democrats began to livestream from their phones. There was some — it wasn't really a fight, though there was certainly some intimidation, some pushing and shoving around, whether the Democrats would control the Republican side of that — of the Chamber.

We had a couple — at least one Navy SEAL, a couple of veterans who ended that pretty quickly when they went over to [p.201] the microphones. And so the Dems stayed on their side to engage in that protest.

Q. Was the House able to continue its duties that day?

A. No. It was shut down.

Q. Okay. Let me ask you the — if you're aware of how the police reacted when there were outsiders who came in to the Capitol, I think you had testified, in 2020.

A. Yeah. I don't think they ever breached the Capitol. The protesters were typically protesting in the evenings around the Capitol. The barricades — and they're fairly weak barricades — that were set up. They're kind of — they look almost like the — something that you put your bicycle in in a rec department or something. They weren't, you know, very sturdy barricades.

But some of the protesters may have breached that particular perimeter, but, to my knowledge, they never got into the Capitol.

Q. Okay. Okay. Let me turn your attention to after the events of January 6th.

[p.202]

So are you aware of the January 6th Select Committee that was — that ultimately conducted a form of an investigation into the events of January 6th?

MR. NICOLAIS: Objection, Your Honor. This is beyond the scope of what the congressman was provided for. Specifically, he was provided to testify about his experience as a sitting member of Congress at the Capitol on January 6th, 2021.

MR. GESSLER: Your Honor, I think we had verbally as well told the Court that we'd have two congressmen — obviously one, we can't — who are going to testify about Congressional procedures, including the January 6th Committee.

That's an event here. And you've specifically asked for evidence about the January 6th Committee. That's why Mr. Heaphy is going to be testifying, although he was not placed on the Petitioners' witness list.

So that's in response to that as well.

JA906

THE COURT: We have two options [p.203] here. We can either take Mr. Nehls' declaration, and I can admit that into evidence, which would then deprive the Petitioners a chance to cross. Or we can allow Mr. Buck to testify about something that wasn't disclosed, and you can cross-examine.

Which is your preference?

MR. NICOLAIS: If I can have just a moment, Your Honor.

THE COURT: Sure.

(Pause.)

THE COURT: Just one moment, Congressman Buck.

THE WITNESS: Judge, I don't have a preference, if you're asking me the question.

THE COURT: I wasn't. But I'm assuming you're willing to testify about this additional subject.

THE WITNESS: Of course.

MR. NICOLAIS: Your Honor, I think we're fine if the congressman wants to testify about that, as long as we're able to ask him about post-January 6th events as [p.204] well.

THE COURT: I'm not sure what post-January 6th events.

MR. NICOLAIS: They would probably revolve — reference January 6th. As long as we had some leeway in asking him questions.

THE COURT: It's hard for me to rule on giving you leeway when I have no idea what that will be. But let's proceed with his testimony and play it by ear.

MR. GESSLER: Just so you know, our position, Your Honor, we're going to ask Representative Buck about the January 6th Committee and its processes. And we certainly agree that's fair game for cross-

examination. But any events after January 6th that even reference January 6th, we'll probably object if it goes beyond the scope of our direct, certainly, Your Honor.

THE COURT: Well, I'm just going to rule as the objections come.

MR. NICOLAIS: Fair enough. In that case, we would accept Congressman Nehls' declaration instead.
[p.205]

THE COURT: Let's hear what Congressman Buck has to say. And you're going to get a fair chance to cross-examine him.

BY MR. GESSLER:

Q. Representative Buck —

THE COURT: Before we go —before we move on to that, I'd like to ask him just one question about his prior testimony.

MR. GESSLER: Sure, Your Honor.

THE COURT: So, Congressman Buck, could you see — when you were in the Chambers and you said that, you know, the police officers were all putting up barricades, et cetera, and you — could you see what was going on in the hallway? Or were you kind of just in a vacuum at this point, in the sense that you see them seeming to prepare for something, but don't know what's going on outside the room?

THE WITNESS: Yeah, that's what I mentioned earlier. I felt kind of stupid taking my jacket off and getting ready for a fight because I didn't realize until I got [p.206] back — actually, we were moved to a committee room after we were brought off the Floor.

I have young staff, and I was concerned about them. And so I came back to my office rather than the secure committee room, and I saw on TV what was going on.

And I thought, “Oh, my goodness. There are a lot of people out there.”

THE COURT: Thank you.

BY MR. GESSLER:

Q. Congressman Buck, if I may ask you: How did you get from the Capitol back to your office?

A. There’s a series of tunnels underneath the Capitol building that connect — the House offices, the Senate offices, the Library of Congress are all connected with a series of tunnels. And that’s how the police escorted us, through those tunnels.

Q. Okay. Thank you. So let’s turn to the January 6th Committee. To your knowledge, how does the — how are members of committees through the normal process chosen?

[p.207]

A. So what happens is — I can give the January 6th as an example. But the Speaker announces that there will be a January 6th Committee. There will be X number of Democrats — I don’t know if it was eight or nine Democrats on the committee. There will be, I think she said, five Republicans on the committee.

And at that point, she started naming the Democrats — within, you know, a week or ten days, she started naming the Democrats for the committee. And the leader — Republican leader at the time — we were the minority at the time — the Republican leader, Kevin McCarthy, named five Republicans.

I know three of the names. Jim Jordan, Jim Banks, and Kelly Armstrong were named to that committee. Speaker Pelosi then denied Jim Jordan and Jim Banks and said they would not be seated on the committee.

And at that point, the minority leader, Kevin McCarthy, withdrew all five names and refused to have

anybody from the Republican Party sit on the committee.

[p.208]

The next move, Speaker Pelosi announces that Liz Cheney would co-chair the committee. Obviously Liz Cheney, a Republican, would co-chair the committee.

And within a couple of weeks after that, Adam Kinzinger then was named to the committee by Speaker Pelosi. So there were this group of Democrats — seven, eight, nine — and two Republicans who were seated on the committee.

Q. Okay. And do you know Representative Cheney or Kinzinger?

A. I know them both very well.

Q. Okay. And your thoughts of them?

A. Well, my thoughts in terms of the January 6th —

Q. Let me ask you this: What's your relationship with them?

When you say you know them, if you have a relationship with them?

A. We'll, I've had a long relationship with Liz Cheney. I worked for Dick Cheney on the Iran-Contra investigation back in 1986 and '87. I knew Liz before she ran for Congress [p.209] from Wyoming and was, you know, in contact with her pretty consistently as she served here in Congress.

Adam less so. I was on the Foreign Affairs Committee, he was on the Foreign Affairs Committee, so we saw each other during committee work and had some conversation, but he was not a particularly close friend or colleague.

Q. Okay. So they were appointed to the January 6th Committee.

JA910

To your knowledge, what were their views towards the January 6th events when they were on the committee?

A. So after January 6, Speaker Pelosi — understand the time frame. We've got January 6, and then January 20th is the inauguration for the new president.

Between January 6 and January 20th, Speaker Pelosi announced an impeachment proceeding against President Trump. And there was actually a vote on the Floor. Both Liz Cheney and Adam Kinzinger voted for impeaching President Trump.

I think of the 200 some-odd [p.210] Republicans, maybe 10, 12 voted for impeachment. So it was a fairly small minority. 5 percent of the overall conference voted for impeachment. And they were 2 of the Republicans who voted for impeachment.

Q. Okay. Let me go back to Liz Cheney. I mean, you talked about contact. Do you consider her a friend?

Or how would you describe that?

A. You know, Harry Truman said, "If you want a friend in D.C., get a dog."

I think that Liz and I were, you know, acquaintances; and we, you know, shared stories on occasion. I've never been to her house to eat; she's never been to my house. We haven't seen much of each other, but certainly had a friendly history together.

Q. Okay. So she and Adam Kinzinger were on the Floor. Based on the vote for impeachment as well as any other knowledge you have, did they represent the opinions of the large majority of the caucus?

A. On what subject?

[p.211]

Q. With respect to the events of January 6th.

JA911

A. Well, I don't think they represented the views of most of the Republican conference because most of the Republican conference — 95 percent of the Republican conference did not vote for the impeachment of President Trump and they did.

So in the sense of where they were on January 6th, I think they stood out alone.

Q. Were there other Republicans then who had different perspectives or viewpoints than Representatives Cheney or Kinzinger that did not serve on the committee?

A. Well, the five Republicans who Leader McCarthy assigned to the committee did not serve on the committee and did not share the views of Liz Cheney or Adam Kinzinger.

Q. Okay. I'm going to represent to you that Representative Swalwell testified earlier, and that there was a text from him referring to Representatives Cheney and Kinzinger in which he was saying that [p.212] Representative Cheney and Kinzinger — he was happy that they were on the Democrats' team with respect to the January 6th Committee.

Is that an accurate description from your point of view?

A. You know, I would have a tough time answering that question. They were clearly — they shared the view on impeachment of President Trump for the actions that occurred on January 6th.

I would say that when it came to most of the votes that were before the House, they did not share the views of the Democrats and how they voted on other subjects. But clearly on the January 6th issue, they were — had similar views.

JA912

I don't know. You know, I don't think any Democrat wants to be known as being on a Republican team or the other way around.

Q. Okay. Okay.

Did you perceive any problems — let me ask you this: Were there any other Republicans that served on that January 6th Committee besides Representatives Cheney and [p.213] Kinzinger?

A. No.

I actually called Kevin McCarthy, because of my background as a prosecutor, and I asked Kevin if I could get his permission to seek to serve on that committee because I thought it was important that witnesses were cross-examined and documents were challenged.

And Kevin told me that he did not want me serving on that committee, and he didn't want anybody else serving on the committee — any other Republican serving on that committee.

Q. Why was it important for witnesses to be cross-examined and documents to be challenged?

A. Well, you know, in my experience as a prosecutor, if the defense attorney isn't present and the defendant isn't present, it's not a real fair trial.

In this case, you need to have both sides — you need to have the adversarial system working in order to get accurate and full, complete information for an issue like [p.214] the January 6th investigation.

Q. Did you think that Representatives Cheney and Kinzinger would sort of fulfill that role of — you know, fulfill that role of ensuring that the adversarial process was carried out?

A. Right. I think they both do their best to be fair, but I do think that they were more aligned with a — the result that the Democrats were looking for than, for

example, Jim Jordan or Jim Banks or Kelly Armstrong would have done.

So I think that it was not as adversarial, and it was not as challenging for the evidence as it would have been if the five members appointed by Leader McCarthy or others in the conference were allowed to sit on that committee.

Q. Do you think you would have fulfilled that role had you been on the committee?

A. I would have done my best. I think that it would take more than one person because there were so many documents, so much evidence that was considered. But [p.215] certainly I would have done my best.

I worked, as I mentioned before, for Dick Cheney on the Iran-Contra investigation. We had an adversarial system. And we had a minority report on the Iran-Contra investigation on areas where we didn't agree.

There is no minority report in this — in the January 6th investigation because there was no minority. It was one viewpoint that was shared.

Q. So when — let me ask you that. So Speaker Pelosi, did she — when she rejected or refused to allow certain appointments by Representative McCarthy, in your experience in Congress, was that a normal event?

A. It was not normal in the history of Congress. Speaker Pelosi, on one or two other occasions, had removed members from committees. I know that Marjorie Taylor Greene was not allowed to sit on committees because of statements that she had made before winning her seat for Congress. And I know that Paul Gosar was removed from [p.216] committees.

In the past, it has typically been the party of the person who is alleged to have committed some wrongdoing that removes the person from committee

seats. And I'm not sure in relation to January 6th whether those events occurred before or after.

But the typical process is for the minority party to be able to assign individuals/members to the committee assignments.

Q. Okay. So you said it's never happened in the history of Congress. Did I hear you correct there?

A. Well, I'm not —

Q. To your knowledge?

A. Yeah, to my knowledge, certainly in recent history, it has not happened.

Q. Okay. So observing the January 6th Committee procedures, were, in fact — was, in fact, the evidence that was submitted to the committee subjected to the adversarial process?

[p.217]

A. No.

Q. And why is that? If you could give me a little bit more of a description rather than a two-letter word "no."

THE COURT: Why don't you start with how you know that.

THE WITNESS: How do I know it wasn't?

THE COURT: Um-hmm.

A. Well, I had the opportunity to observe some of the hearings. I have had the opportunity to read parts of the report. And I've had the opportunity to talk to some of the people who were alleged to have done things in the report and heard their side of the story. And they were never questioned.

For example, Jim Jordan was up for the speakership recently. And I went through with him some of the allegations in the January 6 report and then heard his side of the story. Those were not included in the January 6th report.

JA915

And based on the makeup of the committee, the — there wasn't — there wasn't inquiries that I would certainly have [p.218] wanted to make.

For example, what was Speaker Pelosi's role in not having the National Guard present or at least assembled to be present? And what was the Sergeant at Arms' role in that?

There are some areas that I think would have been important to look at to be able to judge President Trump's actions and nonactions in this case.

BY MR. GESSLER:

Q. Do you know if there were any members on the committee who subpoenaed or produced evidence for witnesses that were supportive or sympathetic to the proposition that January 6th was not an insurrection and was not caused by President Trump?

A. So I'm aware that Leader McCarthy — when he made the statement that we would not be assigning Republicans to the January 6th Committee after Speaker Pelosi had denied the assignments to Jim Jordan and Jim Banks, Leader McCarthy said he was going to have a separate investigation, and that investigation would be our side of the story.

[p219]

And there were some witnesses who were — who testified, and there were some documents produced. Not through subpoena but produced. And had those been part of the January 6th report, I think the report would have been more complete.

Q. I'm sorry. The report would have been more?

A. Complete.

Q. Okay. Is it fair to say it would have been more balanced?

JA916

A. I think if you're looking for balance — yes, I think it would have presented both sides.

Q. Okay. Let me ask you about that separate committee real quick.

Did that committee have any subpoena power?

A. It did not.

Q. Did it have any ability to compel the production of documents?

A. It did not.

Q. Or witnesses?

A. No.

Q. Okay.

[p.220]

THE COURT: You're talking about the January 6th Committee?

MR. GESSLER: No, Your Honor. I'm talking about the separate report that Representative Buck referred to that Speaker [sic] McCarthy had created.

BY MR. GESSLER:

Q. Let me just clear up the record, Representative Buck.

A. It's not Speaker McCarthy at the time; it was Leader McCarthy.

Q. I'm sorry. Leader. Yes.

I want to help clear up the record a little bit. So your testimony was that Minority Leader McCarthy had sort of established a separate committee. Correct?

A. I wouldn't call it a "committee" because there were no Democrats on his effort, just as there were — well, I shouldn't say "no Republicans."

There were no Democrats on his effort. There were, I think, Jim Banks and a few others — Kelly Armstrong — were on this other group that was formed to investigate.

JA917

Q. Okay. Let me go back to the [p.221] January 6th Committee.

You said there was no minority report produced by the January 6th Committee. Is that correct?

A. Yes.

Q. Okay. And why is that important?

A. Well, because it provides the other side of the story. It provides context for what one side is alleging. And it is important to have the — I believe the full picture in a situation like the January 6th investigation.

Q. Okay. You had said when you spoke with Representative Jordan that there were things that he said that were much —that were either much different or provided a much different context than what appeared in the January 6th report.

Can you explain that in a little more detail?

A. Sure.

MR. NICOLAIS: Objection, Your Honor. This is hearsay.

THE COURT: Yeah.

[p.222]

MR. GESSLER: Your Honor, we're not introducing anything for the truth of the asserted — for the truth of the matter asserted.

We're introducing information that shows the January 6th Committee had one perspective, and that the perspective that Representative Jordan provided was much different.

So we're using this to demonstrate the incompleteness and one-sidedness. Not one side is true versus the other.

I mean, we have other argument about that. But I'm not looking to get into the contents of either side. It's the difference between the two that matters.

JA918

MR. NICOLAIS: Your Honor, the congressman already testified to the difference. We don't need to get into what Jim Jordan said.

THE COURT: Well, he said that — if I recall, he said that Jim Jordan had a different perspective on something, but I don't think we've heard the details of what [p.223] it is.

So, Congressman Buck, you can tell — if you wouldn't mind just telling the Court what type of disputes Mr. Jordan had rather than just repeating what Mr. Jordan said.

THE WITNESS: Sure.

A. One example would be the report stated that Jim Jordan refused to testify.

Jim's statement was that he was — he received a subpoena, and they were in the process of negotiating a date for his testimony, and then the committee staff never got back to his staff. So he says he was willing to testify. The report says that he was unwilling to testify.

It was — there were a few issues like that. He sent a Tweet — no, I'm sorry — he sent a text to Mark Meadows — I believe it was January 2nd. And in the text, the allegation in the report is that Jim Jordan advocated for the decertification.

And Jim's statement to me was that he attached a Law Review article or a legal analysis, I guess it was — it wasn't a [p.224] Law Review article — a legal analysis to Mark Meadows, Chief of Staff, to examine, in terms of whether they could.

So he says he wasn't advocating, but he was providing information to the White House on that subject.

MR. NICOLAIS: Your Honor, I'll renew my objection to hearsay and move to strike, because he said Jim Jordan says this, Jim Jordan says that.

THE COURT: I'm going to accept the testimony just for the limited purpose that there were things that maybe Mr. Jordan would have liked to have told the House Committee that he wasn't able to.

MR. GESSLER: Thank you, Your Honor.

BY MR. GESSLER:

Q. Representative Buck, let me ask you: Why do you know so much detail or why were you so interested in discrepancies between the committee report? And why did you spend so much time learning about that from Representative Jordan?

A. Jim Jordan was a candidate for [p.225] Speaker. He was actually the Speaker nominee for the Republican Party in the recent Speaker issue that was going on in the last few weeks.

Q. Okay. And so it's fair to say you spoke with him at length about these issues as part of that process?

A. He came to my office one evening in the middle of his time as Speaker nominee, and we sat down for about an hour, an hour ten minutes.

Q. Okay. To your knowledge, were any of the witnesses before the January 6th Committee cross-examined?

A. I don't know that the concept of cross-examination is really part of what the committee process is. There are questions from Republicans, questions from Democrats typically in a committee process. It is not as clear as in a courtroom that one side is cross-examining.

Q. Okay. To your knowledge — in your view and based on your observations attending the committee meetings, were questions placed to witnesses that were

an [p.226] effort or seeking to elicit testimony that was — that ran contrary to the thesis that President Trump caused an insurrection?

MR. NICOLAIS: I'm going to object, Your Honor, because Mr. Gessler has characterized it as Congressman Buck attending the committee. I don't believe Congressman Buck was on the committee.

THE COURT: Congressman Buck, when you talked about attending hearings, were you referring to the public hearings?

THE WITNESS: I didn't attend. I saw some public hearings on television, but I was not in attendance personally.

THE COURT: So is that what you were questioning him about, when he —

MR. GESSLER: His observations, yes.

THE COURT: You can answer.

A. Could you restate the question? I'm sorry.

BY MR. GESSLER:

Q. I don't know if I can. I will try, though.

THE COURT: Maybe if you could [p.227] do it a little less leading, it would also be good.

MR. GESSLER: I'm sorry. A little less?

THE COURT: Leading.

MR. GESSLER: A little less leading. Yes, Your Honor.

BY MR. GESSLER:

Q. Congressman Buck, from your observations of the committee process, do you think there were — can you describe the — whether in — whether the questions that were asked, whether they were postured and how they were postured to arrive at a full investigation?

A. Sure. I think that the questions were typically questions that would demonstrate President Trump's

involvement and culpability in January 6th or elicit answers that would demonstrate his involvement and culpability in the events of January 6th.

As an old trial lawyer, I looked at — listened to a lot of those questions and, probably as most trial lawyers, thought I was [p.228] Clarence Darrow and I could have asked a better question or I could have made — you know, I would have made an objection on hearsay or something at the time.

So I tended not to watch a whole lot of what happened because it didn't seem to me that the process was set up in a way that would sort of elicit the whole truth in those hearings.

Q. Are you aware of any allegations that the committee altered evidence or altered exhibits that it received and then produced to the public?

A. I have heard of those allegations. I have not seen the documents and could not give you a judgment on whether I think those were accurate allegations or not.

Q. Okay.

A. Remember, this is the world of politics. And truth is not closely aligned with political views all the time.

Q. Okay. Well, let me ask you this then: When you say “this is a world of politics,” do you think that the committee report was — meets the description you [p.229] just — meets the description you just described about the relationship of politics and truth?

A. Sure. The purpose of that report was — there was a political purpose to that report, as there is with almost everything in Congress.

And the political purpose was ultimately to win elections and to paint the one side in as bad a light as possible. And that's why, typically, there is a minority report in an investigation like this, so that both sides can

JA922

say, “But this is really what happened. And here are the documents, and here are the phone calls, and here’s the testimony that supports it.”

Q. And it’s your view that that did not happen in this case?

A. It’s my view that the people who would have been most challenging to the evidence and testimony were not seated either by Speaker Pelosi or Leader McCarthy ultimately on the committee.

Q. Okay. With respect to the January 6th report, have you — what’s your [p.230] view on it, from a political standpoint in Congress?

A. Well, I voted to certify the election. I thought what happened on January 6th was obviously bad. It was a riot in the Capitol building. It was meant to disturb a proceeding.

And I felt that the parts of the report that I saw described those things. It went beyond that in other areas. And that’s where I think the cross-examination, in terms of the President’s culpability, would have been important.

Q. And with a deficiency — and why do you think it would have been important?

A. Because I think that in order to be able to judge someone’s — it’s like going into a courtroom as a prosecutor, not having a defense counsel or a defendant. I think in order to be able to judge someone’s culpability, you’ve got to be able to hear both sides of the story.

And in this case, there was not another side. There were people who voted to [p.231] impeach the President because they made a judgment that he had been involved in the January 6th events. And the other side was not present, for one reason or another — was not present to be able to portray the other side of the story.

JA923

Q. Thank you very much, Congressman Buck. I appreciate your testimony today.

MR. GESSLER: I have no further questions.

MR. NICOLAIS: Your Honor, can we have a short break just to discuss some issues?

Obviously this went beyond the scope of what we originally prepared for. We're looking for five or ten minutes.

THE COURT: Sure. Given —I think we're ahead of schedule generally. Let's just take a 15-minute break before cross-examination.

Does that work for you, Congressman Buck?

THE WITNESS: The bells are going to go off soon for voting, but [p.232] I certainly would be available after votes. But hopefully votes are delayed. And I will do my very best to be here.

THE COURT: Why don't we make it 10 minutes then, so we can hope to get you done. But we'll work with your schedule. Okay?

THE WITNESS: Thank you very much.

THE COURT: So we'll reconvene at 5 after 2:00.

(Recess taken.)

THE COURT: Do we know if Congressman Buck is still good or has he gone to vote?

There he is.

Are you still able to testify?

THE WITNESS: I am. Yes.

THE COURT: Okay.

MR. NICOLAIS: Your Honor, before we begin, I want to get this right, to try to make sure we have a full, fair, and accurate process.

I would like to actually ask that we can split our cross-examination. We [p.233] had one attorney preparing to ask Congress Nehls specifically about

JA924

questions. And he was here — number 7 on the witness list —to testify about the selection process for January 6th and go through all of that.

We would like that attorney to cross-examine Congressman Buck on that, and then I'll cross-examine him on what he was actually brought here to testify about and January 6th and what he went into there.

Is that acceptable to Your Honor?

MR. GESSLER: I'm not going to object to that, Your Honor.

THE COURT: Yeah, I think that makes sense, since we — there's been a lot of moving parts here with the witnesses. And it is an expedited proceeding, so I understand that it's been hard to get people to testify.

MR. NICOLAIS: Thank you, Your Honor.

THE COURT: So, Congressman Buck, we're going to do something a little bit unusual.

[p.234]

As you know, as a lawyer, the rule is usually that just one person can do the cross-examination. But since the Petitioners weren't aware until today that you were going to testify about the January 6th Committee, they're going to have one person ask you questions about the January 6th Committee and then another person ask you about the — what they knew to be the subject of your testimony, which was the events of January 6. Okay?

THE WITNESS: Great. Thank you, Your Honor.

THE COURT: So we're starting with Mr. Grimsley.

CROSS-EXAMINATION

BY MR. GRIMSLEY:

Q. Good afternoon, Congressman Buck. How are you?

A. Good afternoon. I'm fine. Thank you.

JA925

Q. You're not familiar with what the predicate requirements for satisfying Colorado Rule of Evidence 803(3) are, are [p.235] you?

A. I would have to read it to be able to tell you that.

No, I'm not, as I sit here right now.

Q. Yeah. It's an exception to the general rule prohibiting hearsay that applies to reports of government investigations.

You're not familiar, as you sit here today, with what the requirements of that provision are?

A. I'm not.

Q. Now I want to ask you about the process for coming up with and appointing the members of the Select Committee.

You know originally the Democrats had sought to create an independent, bipartisan commission to investigate the attack?

A. I believe Democrats and some Republicans sought that, yes.

Q. But the legislation failed in the Senate because of the filibuster. There weren't enough Republican votes in the Senate to overcome the filibuster, so they couldn't [p.236] establish that bipartisan commission; correct?

A. I'm unaware of what happens in the Senate, but I am aware — I believe it passed in the House.

Q. It did pass in the House, because there is not a filibuster in the House.

But you know that it got out of the House and never came back to the Senate; right?

A. I do know that there was not an independent commission formed. Yes.

Q. And you had mentioned, you know, votes a little bit before. I think you talked about the impeachment votes.

JA926

After the bipartisan commission was struck down in the Senate, then there was House Resolution 503 passed to create the Select Committee. Do you recall that?

A. I remember a vote on the Select Committee, yes.

Q. And, you're right, not a whole lot of Republicans voted for it. I think it was just 2. But there were 19 Republicans [p.237] who just didn't vote at all because I think they didn't want to have their vote on the record.

Do you recall that?

A. I don't recall the reason for them not voting. And I don't recall the specific numbers.

Q. All the Democrats voted for HR 503, though.

A. I take your word for it.

Q. And the Select Committee that was established by HR 503 was originally designated so that Speaker Pelosi would appoint 13 members, 5 of whom would be nominated or appointed after consultation with then-Leader McCarthy.

Is that your understanding?

A. That is typically how it works. Yes.

Q. And, in fact, before even Leader McCarthy nominated five individuals, Speaker Pelosi said she was going to appoint Republican Liz Cheney to the Select Committee; correct?

A. I don't remember whether that [p.238 happened before or after, but I do remember Speaker Pelosi making that announcement.

Q. So that would have meant that there would have — instead of eight Democrats and five Republicans being on the committee, there would have actually been seven Democrats and six Republicans, given that Liz Cheney is a Republican. Correct?

A. Well, there would have been eight appointed by the Democrat side and five appointed by the Republican

JA927

side. One of them — one of the Democrat appointees would have been a Republican.

Q. But just doing nose counting, it would have been seven Democrats and six Republicans, unless, for some reason that I can't possibly fathom, the Republicans had appointed a Democrat. Correct?

A. When Speaker — Leader McCarthy made his appointments, there was not a Democrat in that group.

Q. So after Speaker Pelosi said at least that she was going to appoint Liz Cheney, Leader McCarthy nominated five Republicans for the committee. And those [p.239] included Representative Rodney Davis, Representative Jim Jordan, Representative Kelly Armstrong, and Representative Troy Nehls, along with Representative Jim Banks.

Does that sound right?

A. That does sound right, yes.

Q. And Nancy Pelosi did not reject all five names, did she?

A. That's correct.

Q. She only rejected two of the names, and that was Representative Jim Jordan and Representative Jim Banks?

A. That's correct.

Q. Now you do understand — then after she rejected those two, then as I think you said, Leader McCarthy pulled all the nominations down. Right?

A. He withdrew the nominations, yes.

Q. Speaker Pelosi said, "Three of your five are totally fine, and you just need to nominate two others besides Representatives Jordan and Banks." Isn't that right?

A. I don't know if she said that, [p.240] but that was certainly what occurred.

Q. Now you've been a prosecutor?

A. Yes.

Q. You would not appoint a material witness to a case to sit in judgment of that case, would you?

A. I believe that would be a conflict.

Q. And you do understand that while you may not agree, there were many who believe that Representative Jim Jordan was potentially a material witness to the events that happened on January 6th. Correct?

A. I believe many people would draw that conclusion, yes.

Q. And, in fact, he's admitted that he had conversations with President Trump on the day of the attack.

A. I believe there were two conversations with President Trump and two others with Rudy Giuliani on that day.

Q. And Rudy Giuliani and President Trump refused to testify before the January 6th Committee, didn't they?

A. I don't know. I wouldn't be [p.241] surprised if President Trump did. I don't know — I know some witnesses that refused to testify were — there were court proceedings to compel their testimony, but I'm not sure — or to hold them in contempt of Congress. But I'm not sure about Rudy Giuliani.

Q. But at the end of the day, when some of the very most important evidence in the case is going to be what did President Trump say on the day of January 6th and the attack, especially while it was happening, you're not going to seat somebody who has that information to judge the case; correct?

A. Well, if you're asking me or are you asking — obviously Speaker Pelosi felt that way.

Q. I'm asking you, as a former prosecutor, who spoke at length about how the system is supposed to work: Do

you put a material witness who has material information in charge of deciding a case?

A. This is not a court proceeding.

25 The January 6th investigation was not a court [p.242] proceeding. And so what you're asking me, as a prosecutor, would not apply to my experience here in Congress.

I do think that everybody that was seated had evidence because they were all sitting in the Chamber at the time — I'm not sure all of them, but many of them were sitting in the Chamber at the time of the January 6th.

So I wouldn't have an eyewitness to a crime on a jury any more than I would have what you call a "material witness."

But this is not a jury situation. This is a Congressional investigation.

Q. Well, two questions there. First, you had brought up, I think on your direct, kind of your view of cross-examination and the adversarial process and how that's really the way to get at the truth.

But the fact is: This is a Congressional investigation, and they just work a little bit differently than court cases. Right?

A. Much differently.

[p.243]

Q. And then as far as the witnesses and all members of the House being a witness, you're certainly right, that all members of the House were witnesses, at least those who were there that day to the attack on the Capitol. But not all of them had material information about conversations they had had with the President on that day. Correct?

A. That's correct.

JA930

Q. And then Representative Banks was the other person that Speaker Pelosi said could not serve.

And do you recall that Representative Banks issued a press release shortly after he was nominated by Speaker — Leader McCarthy?

A. I do not recall that.

MR. GRIMSLEY: Can we put up Exhibit 184, please. P-184.

BY MR. GRIMSLEY:

Q. And we're going to share the screen here, Congressman. Hopefully you can see it.

(Pause.)

[p.244]

Q. Sorry. It just takes second.

MR. GRIMSLEY: And if you could blow up the document.

BY MR. GRIMSLEY:

Q. Can you read that? If not, I can blow it up further.

A. I don't see any document at this point.

(Pause.)

I've got it now.

Q. Okay. Great.

Do you see that? It's a press release from — and this is, I'll represent to you, taken from Representative Banks's congressional website.

A. I'm reading it right now — do you want me to read the document?

Q. You can read it if you'd like, or I can just ask you some questions about it.

I was going to go to the third paragraph starting, "If Democrats..."

A. I see that paragraph. Yes.

Q. He says, "If Democrats were serious about investigating political [p.245] violence, this committee

JA931

would be studying not only the January 6th riot at the Capitol, but also the hundreds of violent political riots last summer, when many more innocent Americans and law enforcement officers were attacked. And, of course, the committee would not overlook the Good Friday murder of U.S. Capitol Police Officer Billy Evans that was perpetrated by a far-left extremist.”

He then goes on to say in the last paragraph, “Even then, I will do everything possible to give the American people the facts about the lead-up to January 6th, the riot that day, and the responses from Capitol leadership and the Biden administration. I will not allow this committee to be turned into a forum for condemning millions of Americans because of their political beliefs.”

What possible involvement could the Biden administration have had with the events of January 6th?

A. I think you’re going to have to ask Mr. Banks.

Q. Do you see, yourself, that [p.246] President Biden’s administration could have any involvement whatsoever with January 6th?

A. I’m unaware of any.

Obviously their administration was being formed and would be taking over on January 20th. There is a transition period at the Department of Justice, Department of Defense. But I am unaware of any activities that the Biden administration had regarding January 6th.

Q. And you agree that if a committee is constituted to investigate a specific event like January 6th, while a member may want other things investigated, it’s not appropriate to bring those things into discussion.

A. No, I don’t think that’s the case at all.

In a political investigation, it is often brought in what is not happening, what this witness is not testifying

about, or the witnesses that were not allowed to be called. Because, again, it isn't purely a search for the truth; it is a political exercise that is being engaged in to create [p.247] information for elections. That's what the political system is about.

Q. You didn't talk to Speaker Pelosi or any members of the Select Committee who told you that the purpose of their investigation was electioneering, did you?

A. Have I spoken to — no, I have not spoken. But I have been present for nine years in this place. And it's one of the reasons I'm looking forward to not coming back.

Q. I wish that was breaking news here. We can announce it though, I think.

So I want to ask you a little bit about the actual process that the investigative team went through in coming to the conclusions in the January 6th report.

You don't dispute that the January 6th Committee's investigative staff was led by former U.S. attorney?

A. I'm unaware of who led that study.

Q. You don't dispute that the investigative staff included roughly 20 lawyers?

[p.248]

A. I don't — again, I don't have any knowledge of the staff that was put together.

Q. And the only reason I'm asking you this, sir, is I think that President Trump's lawyers have brought you in here to impugn the integrity and the reliability of this report. So I want to make sure I understand what you know about the process for creating it. Okay?

A. (Nodded head up and down.)

Q. You don't dispute that some of the lawyers on the investigative staff were Republicans.

A. Again, I have no knowledge.

JA933

Q. You don't dispute that as part of the investigation, the committee and investigative staff interviewed or deposed more than 1,000 witnesses?

A. I know they deposed many. I'm not sure of the exact number.

Q. You don't dispute that the January 6th Committee and investigative staff collected more than 1 million documents?

A. Again, no knowledge. I wouldn't dispute it.
[p.249]

Q. You don't dispute that the January 6th Committee and investigative staff reviewed hundreds of hours of video evidence?

A. Again, no knowledge.

Q. You don't dispute that the January 6th Committee and investigative staff reviewed more than 60 federal and state court rulings related to the 2020 election?

A. I have no knowledge of how many court proceedings they reviewed.

Q. You don't dispute that the January 6th Committee and investigative staff presented testimony from more than 70 witnesses at 10 live public hearings, do you?

A. Again, I have no knowledge of how many witnesses were called.

Q. You don't dispute that during the investigation, more than 30 witnesses invoked their Fifth Amendment right against self-incrimination?

A. I do not know that number.

Q. You don't dispute that others, including President Trump, refused to testify, asserting executive privilege?

A. I do know that — I had read [p.250] stories about President Trump. I have no knowledge of others who have testified or refused to testify.

JA934

Q. And actually President Trump was asked to testify, and he simply refused; didn't he?

A. The stories that I read indicated that he asserted executive privilege. I'm not sure if there were any other reasons for him not to testify.

Q. He could have come in and cleared all this up. He could have testified before the committee; right?

There's nothing that prevented him from doing so.

A. Look, I don't know that he could have cleared all of this up, as you characterize it. I think that there were a lot of things that happened outside of his scope of knowledge.

There were certainly communications from trials that had occurred in the District of Columbia that a group of people from one of the three groups that was organizing this rally had every intention to move up to the [p.251] Capitol.

I'm not sure the President knew that or didn't know that. But certainly there was activities outside of his scope of knowledge that were occurring during this time frame.

Q. But he certainly — if he wasn't involved with that or didn't know anything about it or hadn't coordinated with them could have come down to Congress and said, "I didn't do it."

A. Well, actually, the way Washington, D.C., is set up and the way the Constitution is set up, Congress is on a hill. And he would have to come up to Congress to testify, but — because the legislative branch is the superior branch, and that's why we overlook the White House. But...

Q. I am very sorry. He could have come "up" to The Hill.

JA935

A. He certainly could have come up to The Hill to testify, yes.

Q. And back to the process. You don't dispute that the [p.252] majority of people who were interviewed by the committee and who testified were Trump administration officials and other Republicans?

A. I don't know whether that — it was a majority or not.

Q. You know that there were a lot of Republicans, though, that testified.

A. I do know that, yes.

Q. And there were a lot of people from within the Trump administration?

A. I'm aware that, yes. There were people from the Trump administration; from the Trump White House, in particular.

Q. And you don't dispute that a majority of the people who testified — not just behind closed doors, because we've heard about these secret deposition transcripts — but at public hearings, the 70-or-so witnesses were mostly Republicans and individuals from the Trump administration.

A. I do not dispute that.

Q. Now, for the depositions and interviews behind closed doors before the public hearings — first, as a prosecutor, if [p.253] you're doing an investigation and you're interviewing a lot of different people for that investigation, you're certainly not going to make the interviews public until your investigation is done, are you?

A. I'm not sure what you're saying.

If I'm a prosecutor in a grand jury, I'm not allowed to make it up public under Rule 6(e).

Q. It's a bad question. I apologize.

If you're a prosecutor and you're doing an investigation and you're out there with your law enforcement agents interviewing people and trying to come up with what happened and figuring it out, you don't release the transcripts of those interviews to the public until you've finished your investigation because doing so might compromise the investigation; right?

A. Certainly it might taint other testimony of other witnesses.

Q. So that's why it's not unusual, if there's an investigation — in this case, [p.254] a Congressional investigation — to wait until the very end of the investigation to release those types of transcripts.

A. You're talking about the private transcripts?

Q. Yes. Sorry.

A. Yeah, my only experience, in terms of Congressional investigations, other than watching the January 6th investigation from a distance, was the Iran-Contra investigation. I was a staffer on that.

We did not release the transcripts at the time that those transcripts were made. We put a report out, a minority report, and released the transcripts sometime later, if at all. Some of them were obviously classified and were not released.

Q. And that's typical; right?

If there are transcripts that have in them classified information, you have to weigh the balance between keeping classified information classified and letting the public see it. And you can err on the side of keeping it classified. Right?

[p.255]

A. Well, actually we don't make that distinction. The Executive Branch makes that decision. And it is not

JA937

based on the balance of interest; it's based on protecting humans and sources and methods.

Q. Now, as far as the interviews and depositions that were behind the scenes during the investigation, you don't dispute that people who were deposed were sworn and deposed under oath; and that people who were interviewed were advised that under 18 USC, Section 1001, they cannot provide materially false or misleading information or otherwise be subject to felony prosecution.

You don't dispute that those things went on.

A. My experience in Congressional hearings is that witnesses are put under oath.

Q. And when they're not, if they're interviews, is it your experience as well that they're told that providing materially false or misleading information to 24 Congress is a felony offense?

A. Yes. And typically sign a [p.256] statement to that effect.

Q. And you don't dispute that except for a few documents implicating national security concerns — the confidential ones we were talking about — the January 6th Committee posted every document, every recorded interview and deposition and every exhibit cited in the January 6th Committee's final report on its official public website?

A. Yeah.

What they didn't post were the questions that weren't asked. And they didn't post the documents that weren't subpoenaed. And they didn't post the interviews that didn't occur.

But in terms of posting everything that they had, yes.

Q. Can you think of any witness that somebody believed had material information for purposes of the

investigation that was not permitted to come and give a deposition or interview?

A. I don't think typically people come and volunteer information. I can think [p.257] of, for example, Jim Jordan who the staff did — according to Jim — I have no personal knowledge of this, but according to Jim, did not — the committee staff did not follow up and ask him the questions. And therefore his — the section of the report on Jim, he alleges, is misleading.

Q. Well, to be fair, this proceeding is not about Jim Jordan. And Jim Jordan's involvement in the insurrection I is not at issue here.

So can you think of any other witness besides Jim Jordan who you think had information they wanted to provide but wasn't able to?

A. I am not aware of how the committee went about choosing witnesses and other potential witnesses that did not give testimony.

Q. Are you aware of any witness that any Republican passed to the investigative staff saying that that individual had material information that the investigative staff did not reach out to?

A. I am aware that it was either [p.258] the Chief of the Capitol Police or the Sergeant at Arms testifying in Leader McCarthy's investigation. And I'm not aware of whether that — those witnesses testified in the January 6th investigation in public or private.

Q. And the McCarthy investigation that you're talking about was the Shadow Committee that conducted an investigation, the committee consisting of the five members that Leader McCarthy had originally nominated for the January 6th Select Committee?

A. I don't know about your characterization of "shadow," but it was a group that Leader McCarthy

JA939

tasked with looking into a group of members looking into the events of January 6th.

Q. And they actually issued a report. Do you recall that?

A. I do not recall ever seeing the report. I remember a press release about a report.

Q. You weren't interested in looking at the report?

A. I am not interested in looking [p.259] at the report, no.

Q. And are you aware of anything in that report from those five Congress people that contradicts anything in the January 6th report?

A. I have no basis to have compared the two.

Q. Now, you don't dispute that the final report of the committee and the findings contained therein were unanimously approved by all members of the Select Committee?

A. I have no reason to dispute that.

Q. And you don't dispute that if a member of the committee disagreed with any finding, that member could have objected?

A. Again, I don't know what their procedures were.

Q. And you mentioned a minority report earlier. Those are common, but they're not required; correct?

A. There is no — typically in the legislation that creates a committee, there is a provision for a minority report. [p.260] I don't know if there was in this legislation or not. I don't recall.

Q. But just because there's a provision that allows for a minority report, a minority report is not required if, at the end of the day, everybody agrees on what the truth is.

A. Of course. Of course.

JA940

Q. Can you — I've asked you about people that may have had relevant information that weren't allowed to provide it.

Can you identify any document that you believe was relevant to the January 6th investigation that the committee did not consider?

A. I'm not aware of that.

Q. And you were asked some questions about the public hearings and how witnesses were questioned in those hearings.

You don't have any idea how the witnesses were questioned during their depositions or interviews?

A. I know the procedure, because I've been involved in an investigation in the House during my time as a congressman. [P.261] I don't know if those procedures were followed by the January 6th Committee.

Q. Now you raised the impeachment — the second impeachment and the vote in the House, I think, on your direct examination.

A. Yes, I did mention it.

Q. You do know that the second impeachment — the vote for the article of impeachment was the most bipartisan vote for impeachment in the history of the United States, do you not?

A. I'm trying to think of how many impeachment votes we've had.

Q. Five.

A. Okay. It was certainly more —in my experience, it was more bipartisan than the first impeachment of President Trump. There was 1 Democrat who voted with the Republicans on the first impeachment; and this vote, there were 10 or 12 Republicans who voted with the Democrats on the impeachment.

JA941

Q. I'll represent to you that it was all of the Democrats and 10 Republicans in the House voted for impeachment. And that [p.262] was more people from the President's party than had ever voted on impeachment before.

Does that sound about right?

A. I accept that. Yes.

Q. And then after the article of impeachment was sent over to the Senate, the Senate voted in the most bipartisan fashion for conviction of any of the, I think, three trials in the history of the United States.

MR. GESSLER: Your Honor, I would object to this.

We certainly talked about the January 6th report. This is about Congress's actions and historical bipartisanship. Well beyond the scope.

MR. GRIMSLEY: Well, I think 80 percent of his testimony was beyond the scope of his disclosure.

MR. GESSLER: That comment notwithstanding — and we certainly understand the perspective of the Petitioners — it's still beyond the scope of the direct.

THE COURT: I'll sustain the objection.

[p.263]

THE WITNESS: Judge, may I interrupt for one moment, please?

THE COURT: Yes.

Do you need to leave?

THE WITNESS: I don't.

Five minutes ago, we had a 15-minute vote called. As is typical in 8 Congress, that means I have 30 minutes left.

And I just wanted to ask the Court if I could, in about 10 or 15 minutes, leave to go walk over to the Capitol.

THE COURT: Yeah. Just tell us when you need to, and we will accommodate your schedule.

JA942

THE WITNESS: Thank you.

MR. GRIMSLEY: Well, I had about five more minutes on the Senate's trial of President Trump, so I will not be asking those, it seems.

So I'll turn it over to my colleague, Mario Nicolais.

CROSS EXAMINATION

BY MR. NICOLAIS:

Q. Congressman, let me start just by saying it's good to see you again. And [p.264] thank you for your eight years and ten months worth of service. And I'm sure you're counting days at this point.

A. I am. Hour

Q. I do not blame you.

Congressman, I want to focus mostly on January 6th and events of that and some of your comments about it.

You had said that you were on the Floor of the House of Representatives maybe roughly around 2:00 p.m. that day.

A. I don't recall the time, but it was afternoon. I know that.

Q. Okay. And you said you were discussing an objection to the certification. Is that right?

A. I believe that the debate had started on the certification, and the Speaker was presiding. I remember she was in the chair and was removed. And that would indicate that she was presiding on the debate, because the Vice President oversees the counting. So he had withdrawn from the House Floor at that point.

Q. Okay. And the objection that [p.265] day there was being discussed involved concerns about voting irregularities or voting fraud in the 2020 election.

A. And, in particular, in Arizona. Yes.

Q. Okay. Now you said that it was unusual — something unusual happened that day, and that you were

interrupted. And there was — an officer came up and spoke with you, and that you knew that there was danger at that point.

Was that your testimony?

A. Yeah, the officer didn't speak to me. The officer addressed the House Floor at that point.

But, yes, I believe what she said was that the House had been breached and that tear gas had been deployed and that we had tear gas masks underneath our seats.

Q. And then you later testified that officers had drawn guns while they were on the House Floor.

A. That's my memory. Yes.

Q. And later you testified that there were shots fired, but you didn't hear [p.266] it.

A. That's correct.

Q. And you testified that there was a mob outside.

A. I testified that when I got back to my office and looked at the TV, that there were many more people in the building and outside the building than I had believed when I was inside the House Chamber.

Q. But you used the term "mob outside."

A. Okay. I — a large number of people, yes.

Q. Okay. You also testified about — you know, that there was a disturbance in the summer of 2020. Was that right? You testified about that?

A. Yes.

Q. Were there ever guns drawn on the House Floor during those — during that event?

A. The protesters in 2020 never breached the Capitol building. And I don't believe there were guns drawn on the House Floor.

[p.267]

Q. Were there ever shots fired in the Capitol, to your knowledge, during that event?

JA944

A. No, not to my knowledge.

Q. What about in 2016?

You said that Congress was shut down because of a mass shooting. I believe that's what you testified to; right? Not in Congress, but elsewhere that was going on.

A. Yeah, I believe it was a school shooting.

The Democrats were trying to bring gun control legislation, and they occupied the Floor, prevented work from being done in 2016. I think it was June of 2016.

Q. Okay. Was there ever any physical danger at that point, do you believe, during that event?

A. If you're asking if there was pushing and shoving, my memory is that there was some typical testosterone acts, but there was certainly no weapon drawn. There was no assault in that sense.

Q. That was between members of Congress pushing and shoving?

[p.268]

A. That was members of Congress sort of more intimidating than really actually pushing and shoving.

Q. Okay. But there were no guns drawn on that day either.

A. That's correct.

Q. And there were no shots fired on that day either.

A. That's correct.

Q. So going back to January 6th.

After there were guns drawn and shots fired, you were evacuated from the House Floor by the USCP.

A. That's correct.

Q. And so you were not able to finish the objection process at that time.

A. That's right. It was delayed.

Q. And when did you finish that objection process?

JA945

A. A few hours later. I don't recall exactly the time frame, but a few hours later, we came back to the House Floor and started — finished hearing the Arizona debate and voted. And then the Senate returned, and we continued the [p.269] process.

Q. Would it — does it sound right that it was about roughly 11:00 p.m. that you voted to certify the election? So you voted against the motion to object certification?

A. I'm sorry?

Q. Does 11:00 p.m. sound roughly right?

A. Yeah, 11:00 p.m. sounds right.

And I voted to certify. So I'm not sure what the — you're saying I voted against the motion to decertify. Yes.

Q. Let me see if I can clarify.

You voted against the objections.

A. That's correct.

Q. Okay. And then was the electoral vote certified on that day, on January 6th?

A. I think it was in the morning of January 7th that the hearing was concluded.

Q. So does it sound roughly right that around 3:00 a.m. on January 7th it was certified?
[p.270]

A. That does sound right, yes.

Q. Okay. Congressman, this August you appeared in an interview on MSNBC with Andrea Mitchell; right?

A. I've appeared a number times. I'm not sure which one.

Q. Well, I'll tell you what. Why don't I play a clip, and maybe that might help you remember.

A. Great.

MR. NICOLAIS: If you would pull up 206, starting at 1:04.

JA946

I'm going to go ahead and ask Mr. Hehn to go ahead and play that. And from 1:04 to about 1:37.

(Video played.)

BY MR. NICOLAIS:

Q. And that was you — correct? —Congressman?

A. Yes, it is.

Q. Do you remember that interview?

A. I don't recall the specific interview, but it was me.

Q. Okay. Fair enough. Fair enough.

[p.271]

So you were saying that the President — you agreed that, “Yeah, I think he does need to call on people to stop violence. To stand down.”

Do you believe former President Trump supporters act sometimes with violence based on his statements?

MR. GESSLER: Objection, Your Honor. Well beyond the direct. Nor is this seeking bias evidence. He's asking Representative Buck's opinion on other people's actions.

MR. NICOLAIS: Your Honor, these are consistent statements with the findings of the January 6th report.

THE COURT: I'm going to overrule the objection.

BY MR. NICOLAIS:

Q. Do you want me to repeat the question, Congressman?

A. Yes, please.

Q. You believe — based on what you were saying there, you believe former President Trump supporters listen to President Trump when he gives them a command.

[p.272]

A. That's a long answer.

So I think — I'm sorry.

JA947

Q. Feel free. Go ahead. Assume it's an open-ended question.

A. Yeah, I struggle with it.

So I think that if President Trump says, "It's your duty to vote, it's your duty to vote," I think that his supporters will listen to that and follow those instructions.

I think if President Trump says, you know, "I want you to go kill somebody," I don't think that his political supporters — being political supporters and not otherwise engaged — would go kill somebody.

So I think it depends on what the order is. And I think it depends on the legality of the order. And I think it depends on the context of the order.

Q. If President Trump, say, asked violent attackers to go home, do you think they would listen to him?

MR. GESSLER: Your Honor, I am, again, going to object.

I mean, our direct exam was [p.273] pretty darn specific to events that happened in the Capitol on January 6th. And —

THE COURT: I'm going to sustain the objection. He basically — Congressman Buck hasn't really said there's anything he disagrees with about the January 6th report. So I'm not sure the fact that he has consistent thoughts is really impeachment.

MR. NICOLAIS: Okay. I'll move on, Your Honor. I can move on.

BY MR. NICOLAIS:

Q. Congressman Buck, yesterday you released a video announcing that you weren't going to seek reelection. Is that right?

A. That is correct.

JA948

Q. And in that video, you said, “Too many Republican leaders are lying to America claiming the 2020 election was stolen, describing January 6th as an unguided tour of the Capitol, and asserting that the ensuing prosecutions are a weaponization of our justice system.”

Did you say that in that video?

A. I did.

[p.274]

Q. And did you also say, “These insidious narratives wreak widespread cynicism and erode America’s confidence in the rule of law”?

Did you say that as well?

A. I did.

Q. What are the lies and insidious narratives regarding the 2020 election and January 6th that you’re talking about?

MR. GESSLER: Your Honor, do I need — may I object again?

This is maybe salacious political material, but it’s beyond the scope of the direct. It’s not for bias. And if we want to avoid this becoming a circus, we should not go into this testimony.

THE COURT: What’s the relevance?

MR. NICOLAIS: Your Honor, it’s relevant because there are questions about January 6th in his statements about January 6th.

Furthermore, he said that the objections were about voter fraud and voter irregularities that they discussed on [p.275] January 6th, all of which was brought up during direct examination.

We should have the ability to go ahead and cross him about his opinions about all of these.

And, I mean, I think, you know, it's — if they didn't want to hear from the congressman about this, maybe they shouldn't have called him.

MR. GESSLER: Your Honor, if they wanted to listen to Representative Buck's opinions about what happened on January 6, if they wanted to listen to Representative Buck's opinions on election fraud, if they wanted to make this case about whether election fraud occurred or not, they could have brought a different complaint, and they could have endorsed Representative Buck as a witness.

The direct exam was on — and we've worked very hard to prevent this from becoming a circus. The direct exam was on the events that happened in the Capitol on January 6th, on that one day, and Representative Buck's experience and — with [p.276] respect to the process of the January 6th Committee.

Now Mr. Nicolais's colleague has done the cross-exam with respect to the latter half of the testimony, which we didn't object to. And so this part of the cross, my guess, is supposed to be on the events that happened in the Capitol that Representative Buck saw on January 6.

We did not turn this into a circus with respect to Representative Swalwell, his political activities, his opinions, his behaviors, which we easily could have.

If this is for — this is not bias testimony, and this is well beyond what we're here for today.

THE COURT: I'm going to sustain the objection. I think that — I'm not sure what — I think it's outside the scope of the direct.

So why don't you move on to your next topic, if you have one.

MR. NICOLAIS: Sure, Your Honor.
[p.277]

JA950

BY MR. NICOLAIS:

Q. Congressman Buck —

THE COURT: Hold on.

Congressman Buck, do you need to go?

He's muted now.

We can't hear you anymore.

MR. NICOLAIS: Congressman Buck, we've had an issue before, where you hit "mute," then the clerk has to unmute you.

THE COURT: How are you for time, Congressman Buck?

THE WITNESS: I've got about five minutes left.

MR. NICOLAIS: Okay. Well, I'll try to see if we can go quickly.

BY MR. NICOLAIS:

Q. Congressman Buck, you testified about speaking with Jim Jordan about his speakership nomination. Right?

A. Correct.

Q. And two weeks ago, on October 17th, you appeared on the television show The Lead with Jake Tapper to discuss that issue as well; is that right?

[p.278]

A. Yes.

Q. And do you remember saying on that show, to Jake Tapper, that "And I think that if we have a presidential candidate who now is leading, who denies that he lost the election and was obviously behind what happened on January 6th..."

Do you remember saying that to Jake Tapper in that interview?

A. I don't remember it, but I don't dispute that I said something like that.

JA951

Q. Well, I tell you what. Let me see if we can refresh your memory a little bit.

MR. NICOLAIS: If you can pull up 269, and start from 0 to 042.

MR. GESSLER: I would object to this on the same grounds as before. And I will continue to do so.

If we want to litigate these issues through Representative Buck's opinion, I think we need additional time in this case.

But that's not why we're here. That's not why we called him as a witness. [p.279] If Mr. Nicolais had wanted to go into this area, he could have interviewed Representative Buck and asked him questions along these lines.

THE COURT: I'm going to sustain the objection.

BY MR. NICOLAIS:

Q. Were you talking about Speaker — the nomination of Speaker Jordan at that time with Jake Tapper?

MR. GESSLER: Objection, Your Honor. We'll renew it for the same reasons.

MR. NICOLAIS: They brought up — Your Honor, they brought up the discussion of — the congressman testified to this during direct, about — speaking about the nomination of Jim Jordan. And, in fact, that's when he talked to him about all the information that he got about the January 6th report.

I think we can ask him about things that he said around that nomination period.

THE COURT: Just because he [p.280] said multiple things during a conversation doesn't make them, one, relevant to this case, or; B, not outside the scope of the direct.

MR. NICOLAIS: Okay.

THE COURT: So objection sustained.

BY MR. NICOLAIS:

Q. Congressman, again, I just want to repeat that you had used the phrase “mob” to describe the people outside the building earlier during the direct.

Do you remember saying that?

A. Yes.

Q. And do you remember me asking you about that?

A. Yes.

Q. Have you recently used that term to refer to the people outside on January 6th?

THE COURT: More recent than today?

BY MR. NICOLAIS:

Q. Have you used it — did you use it yesterday?

[p.281]

THE COURT: Sorry.

MR. NICOLAIS: I’m sorry, Your Honor.

BY MR. NICOLAIS:

Q. Did you use the term “mob” to refer to the people outside the building yesterday?

A. Yeah, I did a number of interviews yesterday, and I may have used the term.

It is my feeling of what was going on at the time.

THE WITNESS: And, Judge, I apologize, but I’ve got to run, if that’s okay at this point.

MR. NICOLAIS: I have one more question.

THE COURT: He’s going to have a redirect, so hold on.

Is there any way, Congressman, that you can come back to finish your testimony?

THE WITNESS: I look forward to it. Yes.

THE COURT: Okay. So, [p. 282] Congressman Buck, will you just correspond with Mr. Gessler about how that’s all going to work?

JA953

THE WITNESS: Okay. Great. Thank you very much, Judge.

THE COURT: Thank you so much for your testimony. And we will — it doesn't sound like they have much more, but I think we will need you to come back and finish it.

THE WITNESS: Okay. Thank you.

MR. NICOLAIS: Thank you, Congressman.

Thank you, Your Honor.

MR. GESSLER: Do I have time for one question or

—

THE COURT: Oh, I think — you are released.

MR. GESSLER: My redirect is one question.

THE COURT: I know. But I don't think he was really done.

MR. GESSLER: That's fine, Your Honor.

THE COURT: Let Mr. Gessler [p.283] know when you're available again after the vote.

Thank you. So you can leave.

MR. GESSLER: Your Honor, we'll re-call Mr. Bjorklund to the stand.

THE COURT: Mr. Bjorklund, you're still under oath.

THE WITNESS: Thank you.

THE COURT: Thank you for being so accommodating.

THE WITNESS: Sure.

TOM BJORKLUND, having been previously first duly sworn to state the whole truth, continued to testify as follows:

DIRECT EXAMINATION (Cont.)

BY MR. GESSLER:

Q. Hello again, Mr. Bjorklund.

A. Hello.

JA954

Q. We're going to pick up where —overlap — one moment. We have a tech-break minute.

(Pause.)

Q. Okay. So you can see the screen there?

A. Yes.

[p.284]

Q. Okay. So we had just finished talking about Exhibit 1013. And I'm going to ask that Exhibit 1013 be played again, just to refresh your memory, so we can get back into your testimony.

A. Okay.

(Video played.)

Q. So you remember that video?

A. Yes, I do.

Q. Okay. And if I remember correctly, you said you were towards the side of the Capitol, working your way around the Capitol?

A. Yeah. Going back to our car.

Q. Well, now —

A. Yeah. I believe.

Q. I'm sorry.

Were you headed back to your car or were you still headed around the Capitol at that point?

A. I believe that one was on the way back to the car. I think that's where we left it when we —

Q. I will represent to you that your earlier testimony was that you were [p.285] still walking around the Capitol at that point.

A. Oh, okay. Oh. Yeah. I'm sorry. Yeah.

Q. Okay.

A. Yeah. I'm sorry. Yeah.

Q. Okay. Did you ever go around the entire Capitol towards the — well, what's called the front of the Capitol

but is actually sort of the side opposite the Washington Monument?

A. Yes.

Q. Okay.

A. Yeah. Sorry. That's when I was —

Q. Tell me sort of your — what happened from basically — roughly where that video was to around the Capitol.

A. Well, that right there, they were, you know, firing tear gas in and flash-bangs. And people were chanting “USA.” And obviously I stayed on the side. I didn't go into the big crowd.

But, yeah, I was headed back to the — going around the Capitol, the side of [p.286] it.

Q. Okay. And what did you see as you walked around the Capitol, if anything notable?

A. Just a lot of, you know, people with flags. There didn't seem to be a lot of movement. There was a guy with a bullhorn chanting — or telling people to “Go in” or “Move forward,” and you know, telling people — I noticed that — there was him and there was another person on the other side of this crowd, too, doing the same thing. They had bullhorns. I noticed there was bullhorns on both sides. And people were trying to herd the crowd into that — into where they were firing flash-bangs and tear gas.

Q. And were people in the crowd moving in?

A. From where I saw — I mean, people were dispersing when tear gas and flash-bangs were going off. But I didn't get — I didn't go into that — into the middle of that, so I didn't — I don't know from that point.

From my vantage point, I don't [p.287] know. The people that I saw mostly were just standing there. And I just felt like the police just didn't want people standing

JA956

there and hanging around where they were at. I didn't know why, but I just knew that they weren't very happy about it.

Q. Okay. Let's go to Exhibit 1014, please.

(Video played.)

Q. Okay. So that's another video.

Where are you right now?

Did you take this video?

A. I did. This is my video. And this is the U.S. House of Representatives on the front of the Capitol. So if you're facing the front of the Capitol, it would be on the left side of that.

Q. Okay. And if you're facing the Capitol, what's to your back?

A. Street car — police cars. There was, like, a pull-through; you know, like a road.

Q. Okay. Where is the Washington Monument — I'm just trying to orient ourselves. Where's the Washington Monument [p.288] in relation to this?

A. Sure. It would be on the opposite side of that building. So I had already come around where those trees are. Actually, I came right through those trees and around.

And there's a little parking lot there, and there was a whole bunch of police cars. And I walked right through them. And there was a whole bunch of police that were — they were grabbing duffle bags and stuff.

And I said, "Hi, guys." And they didn't stop and chat. And they — but they — I walked right through the center of them and right through their cars.

I mean, they were grabbing stuff out of their cars and stuff. And I just went right through their cars, and they didn't say anything to me at all.

JA957

Q. When you said “hi” to them, did they say anything to you?

A. Nope. Didn’t say hi back.

I just said, “Hi, guys.” And they didn’t say a word.

[p.289]

Q. I mean, did they hear you?

How close were you?

A. Oh, yeah. No. I was maybe from me to the recorder.

Q. I’m sorry. From you to?

A. From me to the madam here. 15 feet — I don’t know. 10 feet.

Q. Thank you.

When you say “From me to this other person” —

A. Yeah.

Q. — it’s sort of hard to see in the record.

A. Oh. My apologies.

Yeah, I’d say I probably came within 5 feet of the guy. He just walked right by me with a duffle bag.

Q. Okay. And are there any police officers in that photo?

A. Yeah. There are — this is —when I first rounded the corner, the police officers are in green. And you can see some with the orange — the yellow on their vests.

They were actually staggered —there was more of a formation than there is [p.290] in this view, but they were staggered, like, on one stair and then down the next stair and then up on the same level stair.

And they were staggered in a, like, V formation across that — all the way across. And you can see they’re kind of still there, but they were starting to break formation.

Q. Okay. When you say “across there,” can you be —

JA958

A. Uh-huh. So right where those balconies kind of jut out — I think those are balconies. They might be staircases. I don't know.

Q. Are you talking towards the left side of the photo or right side of the photo?

A. All the way across.

Q. Okay.

A. They were from one side of that little — where those fancy lamps are, they were, like, staggered, going all the way across that.

Q. Okay. So were they sort of forming a line across?
[p.291]

Would people have to cross that line to get up the stairs?

A. Yeah. And there wasn't anybody going up there until — there's one guy that kind of went up to one of the police officers and asked if he could go up and look in the window.

Q. Did you hear that exchange?

A. Oh, yeah. I was right there. I was really close by.

MR. SUS: Objection. Hearsay.

MR. GESSLER: The question, "Can I go up to the window?" is not introduced for the truth of the matter asserted. It doesn't assert anything as truthful. It's simply a witness to a question.

THE COURT: The objection is overruled.

BY MR. GESSLER:

Q. Okay. How did the police react to that question?

A. One officer looked over his right shoulder at the other officer, and that officer shrugged. And he said, "Sure. Go [p.292] ahead."

Q. And then what happened after that?

A. Then they — the police marched off. They walked off the line. And they just went to the left — at this picture, they went to the left. That direction.

Q. And then what did people do?

A. They all just started going up the stairs.

Q. Okay. Did you walk up the stairs?

A. I did.

Q. And what did you see up there?

A. Well, the first thing that I did is I went between the columns, and I went to the left side of the building. And then I put my hand on the Capitol. And I prayed for our country.

Q. Okay. And then after that, what did you — before I ask that next question...

MR. GESSLER: Your Honor, I'd like to introduce Exhibit 1014.

MR. SUS: No objection.

[p.293]

THE COURT: 1014 is admitted.

(Exhibit 1014 was received into evidence.)

4 BY MR. GESSLER:

Q. So after you did — so what happened — what did you see that happened after that?

A. There were people beating on the windows on the right side over there, by the doors.

And so the doors are — you can kind of see the black, like, void there next to that lamp. On that side is some windows. And they were just banging on the windows, and they were yelling, "Let us in."

Q. How many people were banging on the windows?

A. Maybe three.

Q. Okay.

A. Yeah, probably — maybe four.

Q. Four people?

JA960

A. Yeah.

Q. Okay. And how many people — is that an accurate representation of the number of people that were up there at the [p.294] time, those four people were banging on the windows?

A. Well, at this point, in this picture, there isn't anybody up there. It wasn't until the officer said that we could go up there, then people went up there.

Q. Okay.

A. And then they immediately started banging on the windows —

Q. Okay.

A. — with their fists, like banging and making a lot of noise.

Q. Okay. Did you bang on any of the windows?

A. No.

Q. Okay. What did you see happen after that then?

A. I saw a guy — kind of a scruffy-looking guy — he had a beard and long hair — and he had a metal baton, and he telescoped it out. It was a folding, telescopic, metal baton.

And then he walked right up to the doors — and these windows are, like, probably 2 1/2 inches thick — and he just [p.295] whacked. And all it did was put a little tiny — like a marble would hit it, and it just put a little divot in the window. And then he just kept whacking that window.

And —

Q. Let me interrupt you for just a second.

Which window exactly was he hitting?

A. On the doors. The doors. They were shut, and they have — they were locked. I mean, he — they tried that because they were trying to open them.

Q. Okay.

JA961

A. And he whacked the window.

And then I went — I was over to the right. I was on that right balcony. And then two gentlemen, they had flags. And they took a flag, and they covered over the other guy. And then I heard them smashing the windows.

Q. Which windows did you hear them smash?

A. To the right of that door, there's probably two windows. And I think [p.296] one of those was a break room or something, because I looked — I saw right through the window. It looked like some kind of — like a break room or something that you would have at the office.

Q. Okay. Did you say anything?

A. Yeah. I said, "Dude, not cool."

Q. Okay. Did anyone else in the crowd say anything?

Or what was the crowd's reaction at that point?

A. Well, right before that, a young man came up to me and said that — he said, "Where's your mask?"

And I said, "I'm not afraid of COVID."

And he said, "No. To hide your identity."

And I said, "I'm not doing anything that I need to worry about hiding."

Q. Okay. How did the — how did people in the crowd or the crowd react to those — I guess you said one person breaking a window and another covering him with a [p.297] flag. How did the crowd respond to that?

A. Well, they looked at me, because I was clearly not happy. And then I started to leave and other people started to leave.

Q. Okay.

A. They started walking down. You could tell they were visibly not happy about the — smashing the windows.

JA962

Q. Did you see anyone entering the Capitol?

A. Yes.

Q. Describe that situation.

A. At one point they broke through the window in the break room, and they went through that window. And then within, I don't know, maybe three minutes, the big doors opened.

And they were these big, metal, heavy doors with the 2-inch-thick glass on the doors — or at least 2 inches. And they — inside, I could see the metal detectors, and they were going off. And they were, like, beeping.

And so then I saw them going [p.298] in, and I saw other people coming out.

Q. Okay. Now where were — so that group of police, where were the police at this time?

A. They had already left. They were nowhere around.

Q. Okay. Did you go in the Capitol?

A. No.

Q. And why not?

A. Well, it was tempting. But I saw the metal detectors going off, and I thought, "We're not supposed to go in there."

And so these guys were going through. A gentleman came out. He looked like a professional, maybe — just nice haircut, and he had a young man with him.

And I said, "Did you take a nice tour?"

And he said, "It's really cool in there. You should go in."

And I said, "Dude, there are cameras in there. And I don't think they want us in that building."

[p.299]

Q. Okay. Let's go to the next exhibit, please.

(Video played.)

JA963

Q. Now is that video after you came back down the stairs?

A. Yeah. And I'm standing by the police cars.

Q. Okay. Why did you stand by the police cars?

A. I just felt like that was probably a safe place to be, rather than near where they were, you know, breaking windows. I didn't want any part of that.

Q. Okay. What were the people like around you at that point?

A. Steve actually ended up finding me and meeting up with me through texts or something. We communicated somehow. And I told him where I was. And he came around, and he just stood by me.

And we were standing there by the police cars and making commentary about the people and just, you know, talking about the general crowd and...

Q. Okay.

[p.300]

MR. GESSLER: I'd like to move to introduce Exhibit 1015, Your Honor.

MR. SUS: No objection.

THE COURT: 1015 is admitted.

(Exhibit 1015 was received into evidence.)

BY MR. GESSLER:

Q. Let's go to Exhibit 1016, please.

(Video played.)

Q. So what's going on there?

A. So this was very close to where a bunch of people had come running down the stairs. And they said that they were shooting people inside the Capitol.

Q. And what was your reaction to that?

A. I didn't believe them. I thought that was really stupid. And I just — and then they said it was a little

girl. And I was like, “Oh, yeah. Right. There’s a little girl in the Capitol, and they shot her.”

Q. And so why didn’t you believe it?
[p.301]

A. It just seemed absurd. I mean, people are — they’re milling about. They’re nonviolent, you know, other than people breaking the windows. I didn’t see any weapons. And the police told us that we could go up.

Now, they didn’t — nobody asked if they could go in that I know of, but the police said that we could go up to the windows.

And then I just had a hard time believing that, you know, Back the Blue Trump supporters are going to, you know, go in and do anything that they need to be shot. And I didn’t believe that the police would shoot anybody. I thought that that was absurd.

Q. Okay.

MR. GESSLER: Your Honor, I’d like to —

BY MR. GESSLER:

Q. And did you take this video here?

A. Yes, I did.

Q. And that was what was going on around you at the time?

[p.302]

A. Uh-huh.

MR. GESSLER: I’d like to introduce Exhibit 1016 into evidence.

MR. SUS: No objection.

THE COURT: 1016 is admitted.

(Exhibit 1016 was received into evidence.)

MR. GESSLER: Your Honor, you have a look on your face like you want to ask a question.

THE COURT: No.

JA965

MR. GESSLER: Okay. I want to make sure we're giving you full information.

BY MR. GESSLER:

Q. Let's go to Exhibit 1017, please.

Now what's this a photo of?

A. So this is a gentleman I saw that I really liked his outfit. We were actually leaving. Steve and I said, "Let's get out of here" because we got — I had gotten a text from Muriel Bowser, the mayor, and she said that — it said that they requested that everybody leave the Capitol.

And right before that, my [p.303] brother had radioed and said that the — that Donald Trump said the BP has fallen and not to cause any trouble.

Q. Okay. So —

A. And then he was standing there. I saw him, and he just — he was very happy. He was just a really super nice guy.

And I asked him — I said, "I like your outfit. Can I take a picture?" And I had already taken this picture of him. He didn't know I took it. But he said, "Sure." And then he posed for my picture.

Q. Okay. Let's go to the next exhibit, please.

Okay. Is that the same person?

A. Yeah, that's the same guy.

Q. Now why did you want to take a picture of him?

A. I just — I really liked his outfit. I thought it was really funny, actually, even down to the shoes. He's got red stripes on his left shoe and blue stripes on his other shoe. And then just the whole — you know, his whole — like the way he was put together. And I thought it was [p.304] funny, you know, the pitchfork and he had the 1776 flag, or whatever.

JA966

But a very young, you know, vibrant guy and very friendly. Just super nice guy. I could tell, I just liked him instantly.

Q. Okay. Did you chat with him at all?

A. Yeah. I just I said, "Hey, that's a pretty cool outfit."

And, you know, he said, "Thanks."

And I asked if I could take a picture. Other people were talking to him too. But he was just standing there. That's all he did, was he just stood there the whole time. He didn't — I didn't see him leave or anything.

Q. Okay.

A. But we were on our way out. We were splitting.

MR. GESSLER: Your Honor, I would like to introduce Exhibits — which one is that? 1016 and 1017 — I'm sorry, -17 and -18, Your Honor.

[p.305]

MR. SUS: No objection.

THE COURT: 1017 and 1018 are admitted.

(Exhibits 1017 and 1018 was received into evidence.)

BY MR. GESSLER:

Q. Okay. So you said that you received a call from your brother.

A. Um-hmm.

Q. What exactly was that about?

A. Well, he said he wanted to —he wanted me to, like, text or, you know, tell him what was going on.

My phone was down to, like, 5 percent at this point. It had very, very little battery life left. And so I was — that's probably — partly why I was so sparing in the pictures and things, because even when we arrived, I think I started at 50 percent, and my phone was rapidly going down.

JA967

But he had said that, yeah, Trump — he said Trump said to be peaceful. And that's what he commented. And somebody else from not even there said, "Oh, that's a [p.306] really tall order." You know. And that guy was not even at the Capitol, as far as I could tell, because he kept asking for information on what was going on, that same guy, same voice.

Q. When you say the "same voice," what do you mean by that?

A. We had this app called Zello. And it was like a walkie-talkie. And there was probably 60 people that were on it. And we were just talking back and forth, like what was — it was part of our caravan. We used that to caravan over.

And it was part of that USEIP group that put that all together. And they invited me to join them since I was going to drive up there.

Q. Okay. Now you said you got a text from Mayor — the D.C. mayor. Is that correct?

A. Yeah. It was, like, an emergency broadcast type of text. It just came across my phone, and it said, "Please leave the Capitol."

Q. Okay. So what did you do then?
[p.307]

A. Left the Capitol.

Q. Let's go to Exhibit 1019.

(Video played.)

MR. GESSLER: I'm sorry. That's sideways, Your Honor. Is there any way we can turn it around or — okay.

BY MR. GESSLER:

Q. Can you describe what's going on in here?

JA968

A. So this is — we were on our way out. And that was the same scene. That's why I got confused when I came in,

because this is almost exactly like the other one, because I was actually leaving at that point. And so I just wanted to get a sense of the crowd and what was going on.

Q. Okay. So in relation to the Capitol, is it fair to say you were retracing your steps?

Where were you exactly?

A. Yeah. We were retracing — actually, we had come — I had, like, cut through the trees when I went through, but then we actually came back around on the [p.308] sidewalk. And then we were headed — we wanted to get into the middle of The Mall so we could find out way back to the Washington Monument and find our car.

Q. Okay.

A. And I just took that quick — you know, and my videos get shorter. And obviously I'm not a very good photographer, but that was just a quick snap — sense of what was going on.

Q. Okay. At this point here, did you see any violent behavior? Or how was the crowd behaving?

A. None, really. They were — everybody was just milling around. People were walking around the side that we had just come from, and other people were going and — you know, just coming and going, walking around, like, you know — and I didn't hear any more flash-bangs or tear gas or anything, so — but we were leaving because we got a text to say to leave.

Q. Did you see any police at that point?

A. No, I didn't see any police at [p.309] all from here on out.

Q. Okay. Let's go to Exhibit 1020.

JA969

MR. GESSLER: And while we're doing that, Your Honor, I'd move for admission of Exhibit 1019.

MR. SUS: No objection.

THE COURT: Exhibit 1019? Is that the right number?

MR. GESSLER: Yes, ma'am.

THE COURT: Exhibit 1019 is admitted.

(Exhibit 1019 was received into evidence.)

MR. GESSLER: Okay. Can you play that, please.

(Video played.)

BY MR. GESSLER:

Q. And what's happening in that video?

A. Well, this is the first time I got as close as I did to the bleachers in the big crowd. But we were — that was us just leaving.

And I just took that video because I thought I saw those people up [p.310] there. And, you know — and originally we actually thought that Trump was going to be speaking in that area when we heard fireworks. We thought Trump was going to be up on that — there was, like, a platform up there.

But, you know, when we saw the flash-bangs and stuff — so, I mean, that's — I just wanted to get a view of that. By this time, it was obvious that Trump was not going to show up and give a speech.

MR. GESSLER: Your Honor, I'd move to introduce Exhibit 1020.

MR. SUS: No objection.

THE COURT: Exhibit 1020 is admitted.

(Exhibit 1020 was received into evidence.)

BY MR. GESSLER:

Q. So what did you do after that?

JA970

A. We just hoofed it back to the Monument. We listened to our — you know, the comms. There was somebody talking about — their father was elderly and needed a ride, and he was worried about him because [p.311] he couldn't walk, and he was worried about him walking back with the — I remember that part.

But, yeah, it was right in there. And we were just on our way back to the — back to the car.

Q. Okay. And then did you go directly to the car?

A. Yeah — well, yeah, we went to the car and had a little rally with my brother, who was waiting for us at the car. And it was just Steve and I going back.

Q. I'm sorry. When you say "Steve and I going back," going back where?

A. Back to the car, to the Washington Monument. We went to the Monument; and from there, we went to our car, which was across from the Monument.

Q. Okay. I'd like to turn to Petitioners' Exhibit 207.

MR. GESSLER: Could you bring that up, please.

BY MR. GESSLER:

Q. Okay. So I'm showing you what's been marked as Exhibit — Petitioners' [p.312] Exhibit 207. I want you to go to the second paragraph. And it says a newspaper reported that you were driving to Washington and that you announced that you were to "Go into the fray."

A. Um-hmm.

Q. And it says that you announced that in a Facebook post —

A. Yep.

Q. — that you were driving to "Go into the fray."

Did you, in fact, write that on a Facebook post?

A. Yes, I did.

Q. And what did you mean by that?

JA971

A. I went — we were concerned about Antifa and Black Lives Matter, you know, attacking people. And, you know, it's something that I consistently saw at Trump rallies or anything where there was Trump involved.

There were violent, left-wing radicals trying to hurt people. And I was concerned about that. But I decided to go anyway.

[p.313]

Q. So when you were referring to “the fray,” what were you referring to there?

A. Just that I expected that we were going to encounter people that were violent towards the group.

Q. Okay. So I'd like you to —

MR. GESSLER: Let's go to this page. Third page of the exhibit there. Scroll down a little bit further. Okay. Right there.

BY MR. GESSLER:

Q. So if you look at that, it says that you said that you saw people in black bloc coming down The Mall path carrying Trump flags upside down. You knew something was up.

And then it goes on to say, “But still the people who blindly followed agent provocateurs' instructions should have known better. Everything about that moment screamed this is a setup.”

Do you see that?

A. Yep.

Q. Did you write that?

A. I did.

[p.314]

Q. What did you mean by that?

JA972

A. Well, I saw people that were —like the guys with the bullhorns, and they were trying to push people into the Capitol and trying to make people — herd them in.

And so that was my observation of that point, where they had the bullhorns. And there were people that had — like that guy that asked me why I wasn't wearing a mask, he seemed out of place. He didn't seem like a Trump guy.

And then there were other people that I felt like that just — there was actually — I met a gentleman named — he called himself Jaden X. And he had been —when I was standing in front of the police cars, he was on my right-hand side. And there was kind of a small crowd around him. And Steve asked me — he goes, "What's that guy doing?"

I said, "That guy is Antifa."

And he goes, "How do you know?" He goes, "What do you think they're saying?"

I said, "I don't know. I'm going to go find out."

[p.315]

So I walked over there. And this guy was saying that he had video of a woman getting shot. And I asked him, "Can I see it?"

And he said, "I just played it for these guys, and I have to go." And everybody else there was like — they were shocked. They were all talking about what they had witnessed.

And he said, "I have to go, but take a picture of my phone. And I will post this to Twitter." And he said, you know, "You can find the video on Twitter." He said, "It probably won't be up very long, but you can witness it on Twitter."

JA973

So I took a picture of his phone. And it said Jaden X. And it had words like “revolutionary” and, you know, all of that.

And so I went back to my friend, Steve, and I said, “Yep, he’s Antifa.”

Q. Okay.

A. And that’s what I was talking about with the black bloc.

[p.316]

And he didn’t have any Trump gear. And he — I had just a weird feeling about him.

Q. Okay. And then towards the bottom, it says, “But when it became apparent what was transpiring at the Capitol, including a large trail of blood that I had to step over, I decided to leave.”

Did you write those words?

A. I did.

Q. And is there anything you want to add to the fact — to the statement that you said, “when it became transparent what was transpiring at the Capitol” — we’ll get to the trail of blood in a second — “I decided to leave”?

A. Well, vandalism.

Q. Okay.

A. You know, things that I didn’t come there for and things that I didn’t agree with.

It was very clear to me that this wasn’t what — you know, what was planned. And I just felt like, you know, people were just acting stupidly. And [p.317] I really felt like — I really felt like this actually was counterproductive to what Trump was trying to do.

Q. Okay. Now you say there that it included a large trail of blood that you had to step over.

What’s that about?

JA974

A. So right where that gentleman was standing with the pitchfork and the flag and the stars and stripes, right down below him was a sidewalk. And it went up to the side of the Capitol.

And there were these pretty good-sized — maybe silver-dollar size, maybe bigger — splashes of blood. And it went from the — it went from the curb all the way up to the side of that Capitol building. There was, like, a ramp for wheelchair access. And that had blood all the way up to that. And it was quite a lot of blood.

And then there was a man standing there, and he said he got video of a young girl being wheeled out on a stretcher. And it was at that point that I believed somebody did get shot.

[p.318]

And he had video — he showed me — of the gurney coming out. And this girl — and his comment was, “What? She was, like, 95 pounds, and they shot her. And this is in our United States Capitol.”

Q. Okay. And was that one of the things that — when you say it became apparent what was transpiring, is that one of the reasons you left?

A. Definitely.

And right before that, that Jaden X — and there was another man with a — he had a blue hoodie on and his hat on backwards. And he was telling people to go in and take revenge because somebody had been shot. And he was trying to get people to go into the Capitol.

And that’s when I was like, these guys are just — they’re, like, agent provocateurs. They’re not — this is not intended. This is all wrong.

Q. Okay. So you’ve come here to testify today. Have you done it under subpoena?

A. No. I came on my own.

[p.319]

Q. And why did you come here?

A. I just felt like it was important that the truth get out of what I saw. I don't believe that there was any kind of insurrection. I think this is a ridiculous narrative. And

—

MR. SUS: Objection, Your Honor. Move to strike this characterization. It's irrelevant.

THE COURT: The objection is overruled.

A. Yeah, I just felt like it's kind of an insult to insurrectionists around the world because, you know, Republicans just being mad about an election hardly rises to the level of an insurrection.

And I wanted to just make that clear, that that's a political narrative. And I recognize that I probably was in an area that I shouldn't be. And I felt like I didn't care.

BY MR. GESSLER:

Q. Didn't care about what?

A. That — what the consequences are, because I think the truth is more [p.320] important.

Q. When you say "the consequences are," the consequences of what?

A. Well, you know, I guess there was grassy areas that I wasn't supposed to walk on that I did.

And, you know, I didn't have any — there were no signs or anything. But, you know, after the fact, they've arrested people that were in the area that I was. And I feel like I'm a little bit nervous about that.

Q. And why are you nervous about that?

A. Because I just feel like they're trying to take revenge on people who disagree.

And, you know, the whole narrative that there's an insurrection is so absurd that — but I know that people

JA976

are married to that position, and they want to make an example of people like me just for walking on the grass.

And —

Q. So what do you — you earlier [p.321] testified you don't care about the consequences.

When you say — what consequences are you concerned about?

A. Well, I've seen a lot of video of people, like, getting their doors kicked in and FBI showing up and, you know, pulling people out of the their houses and putting handcuffs on them.

And, you know, I don't want that for me or my family. But the truth needs to come out because, in polite words, it's BS.

Q. Okay.

MR. GESSLER: I have no more questions, Your Honor.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. SUS:

Q. Good afternoon, Mr. Bjorklund.

A. Good afternoon.

Q. You're the treasurer of the Colorado Republican Party; is that right?

A. Yes, I am.

Q. And you understand that the [p.322] Colorado Republican Party is a party to this lawsuit?

A. Yes, I do. I understand that.

Q. And you understand that President Trump is a party to this lawsuit?

A. Yes, I do.

Q. And you're here today testifying as a witness on behalf of President Trump; is that right?

JA977

A. I'm testifying as a witness to the truth. That's why I'm here.

Q. But you appeared on President Trump's witness list. You understand that; right?

A. I've never — I'm not a party to seeing the witness list. I don't know what — who is on the witness list.

Q. You're a supporter of President Trump, aren't you?

A. I am mildly a supporter.

Q. You went to his rally at the Ellipse, didn't you?

A. Yeah. I went to see my brother.

Q. Do you think the 2020 election [p.323] was stolen from President Trump?

A. I don't have any proof of that. I don't know.

Q. You're aware that President Trump has stated that the 2020 election was stolen from him.

A. Yeah, I'm aware that he stated that.

Q. So do you think he's wrong?

A. It's a possibility that he's right and it's a possibility that he's wrong.

Q. So you can't say one way or the other whether President Trump is right about the 2020 election being stolen?

A. For sure, no, I can't say that.

Q. Are you a member of a group called the U.S. Election Integrity Plan founded in Colorado in November 2020?

A. No, I am not.

Q. Were you ever a member of that group?

A. No, I was not.

Q. You were never affiliated with that group?

A. They put me on their chat room [p.324] because we were all traveling to the Capitol. And I wanted to go on a

JA978

caravan, and I asked if they knew somebody that — you know, just to share a ride.

Q. So you don't share that group's views that the 2020 election was stolen?

A. I don't know what all their views are. I don't know.

Q. You were just part of their chat because they added you?

A. They added me because I testified to the Colorado House of Representatives. And they had asked me to join their chat, especially when I told them that I was going to see my brother at the Capitol, and I kind of just wanted some company.

MR. GESSLER: Your Honor, I don't mean to interrupt the cross-exam —although I guess it's good because there's noise in the background — Representative Buck said he would be available at 4 o'clock my time, but it has to be quick. I wanted to give everyone notice.

[p.325]

THE COURT: Okay. Thank you.

BY MR. SUS:

Q. Let's talk about your experience on January 6th.

A. Okay.

Q. So you traveled from Colorado to D.C. for the rally on the Ellipse on the 6th; is that right?

A. Yes, I did.

Q. And you drove from Colorado to D.C.; is that right?

A. I drove a big pickup truck hauling a gigantic trailer. Right.

Q. That's about an 1800-mile drive, isn't it?

A. It's a long drive. Yep.

Q. Twenty-four, twenty-five hours. Is that what you testified?

JA979

A. Yeah. That's about right. Twenty-five — probably twenty-five. Maybe even twenty-six hours. It was a long drive.

Q. And you'd never been to D.C. before?

A. Never.

Q. So let's talk about the Ellipse [p.326] rally.

It's fair to say there were thousands of people there.

A. Hundreds of thousands.

Q. So you actually testified there were 350,000 people there.

A. It's just a guess, but, yeah, very —

Q. That's just a guess, though.

A. Sure.

Q. Okay. You had no way of knowing why each one of those thousands of people were at the Ellipse rally, did you?

A. No, I wouldn't have any way of knowing. I mean, I assume he asked people to show up to his last speech, and that's why they were there. That's why I was there.

Q. Okay. And you had no way of knowing what each one of those thousands of people were doing throughout the day, did you?

A. Of course not.

Q. And by the same token, you have no way of knowing what each person at the Capitol building was doing throughout the day [p.327] on January 6th? Did you?

A. No, I wouldn't know — yeah, I certainly didn't have an insight into everybody.

Q. And you didn't know why each person was at the Capitol building that day.

A. Right. I imagine they're on a spectrum.

Q. Now you testified that the crowd you saw at the Ellipse rally was joyful and happy. Is that right?

JA980

A. Yep. For sure.

Q. Did you know that the Secret Service confiscated hundreds of weapons from rally attendees who passed through security at the Ellipse rally?

A. I didn't know that, no.

Q. Let me show you some findings from the January 6th Select Committee on this point.

MR. SUS: If you could pull up P-78, Finding 107.

BY MR. SUS:

Q. Do you see that on your screen?

A. Um-hmm.

[p.328]

Q. And so this shows that the confiscated weapons includes 242 canisters of pepper spray. Do you see that?

A. Oh. I see. Uh-huh.

Q. 269 knives or blades. Do you see that?

A. Yeah.

Q. 18 brass knuckles?

A. Um-hmm.

Q. 18 Tasers. Do you see that?

A. Yeah. Yeah.

Q. 30 batons or blunt instruments. Do you see that?

A. Um-hmm.

Q. 17 miscellaneous items like scissors, needle, or screwdrivers. Do you see that?

A. Sure. Um-hmm.

Q. Do you know members of the crowd were wearing tactical gear, like ballistics helmets, body armor, military-grade backpacks?

A. I saw that. Sure. Um-hmm.

Q. So you saw that. That's consistent with your memory of the events.

[p.329]

A. Yes. Uh-huh.

Q. Okay. Do you have any reason to dispute these — do you have any knowledge to dispute these figures here?

A. I don't have any knowledge of what they confiscated. I wasn't a part of their confiscation effort.

Q. Does that seem like — do these seem like items that people bring to a rally that's joyful and happy?

A. Yes.

Q. Okay.

A. Especially when — in light of the other rallies that I've seen in Seattle and other rallies that they went to to support Donald Trump, and they were attacked — violently attacked and some people were murdered.

And so, yeah, I think that most people were concerned about the violence that were perpetrated on people just because they supported Donald J. Trump.

Q. All right. I want to show you some of the crowd's reactions to President Trump's rally at the Ellipse.

[p.330]

MR. SUS: Let's pull up Exhibit 166.

(Video played.)

BY MR. SUS:

Q. Mr. Bjorklund, did you hear the members of the crowd yell, "Storm the Capitol," "Invade the Capitol building," "Take the Capitol"?

A. I didn't hear anybody say, "Take the Capitol."

Q. I'm sorry, Mr. Bjorklund. My question was: In the video I just played for you —

A. Oh.

Yes, sir. I heard that in the video. Uh-huh.

Q. But your testimony is you didn't hear that when you were at the Ellipse rally?

A. No. I was by the Washington Monument. I wasn't probably near that far down. Definitely not that close.

JA982

Q. But you agree that the image here is — appears to be from the Ellipse rally on the 6th?

[p.331]

A. Yeah, it appears to be. Um-hmm.

Q. Okay. So does this look like a — does a joyful crowd talk about storming the Capitol, taking the Capitol, invading the Capitol building?

Is that joyful and happy?

A. I don't know. I have no idea.

Q. Okay. So let's take a look at some of the videos and photos that you have provided in this case and that we went over.

MR. SUS: If we could pull up Exhibit 1007, which has already been admitted. And go ahead and play.

(Video played.)

MR. SUS: You can stop the video right there.

BY MR. SUS:

Q. So, Mr. Bjorklund, this is after Trump's speech; is that right?

A. Yes, it is.

Q. And you watched President Trump's whole speech? You stayed to the end?

A. No, not quite.

Q. Okay. So would you say this is [p.332] after 1 o'clock?

A. Yeah.

Q. Okay.

A. Yeah.

Q. And the video shows folks walking away from the Ellipse, away from the Washington Monument towards the Capitol building.

A. Right down The Mall. Um-hmm.

Q. And that's what you did, too; right?

A. Yes.

JA983

Q. You were at the Ellipse and walked toward the Capitol building.

A. That is correct.

Q. Okay.

MR. SUS: Let's pull up Exhibit 1010, which has been previously admitted.

(Video played.)

MR. SUS: All right. Let's stop the video.

23 BY MR. SUS:

Q. So, Mr. Bjorklund, did you hear the man say, "Pence defies Trump" in the [p.333] video?

A. Actually I — no, I didn't hear that part. I heard the other part.

MR. SUS: Can we pull it back to 25-second mark?

A. Sorry.

MR. SUS: All right. Stop.

(Video played.)

BY MR. SUS:

Q. Did you hear that?

A. Yeah.

Q. Okay. And this is — so this is after 1 o'clock. Like this is probably 1:10, 1:15 — right? — because this is after the previous video that we had seen.

A. Yeah. That's probably about right.

Q. All right. So the man says, "Pence defies Trump."

MR. SUS: Can you continue playing the video.

(Video played.)

MR. SUS: All right. Stop.

BY MR. SUS:

Q. So the man said, "Pence defies [p.334] Trump. I hate Pence." Is that right?

A. Yeah.

Q. And are you aware that Vice President Pence had announced by this point that he would not delay or

overturn the election results, as the President had urged him to do at that point?

A. Yeah, it's possible. There were people that had radios — like, AM radios and stuff. And they were playing just what was going on. People were commenting about — like, Lauren Boebert speaking or different people. But we didn't — I didn't have any direct — I didn't have any direct knowledge of that.

Q. Understood.

MR. SUS: So let's pull up Exhibit 1018, which was previously admitted.

BY MR. SUS:

Q. And I just want to quickly confirm: That man is holding a pitchfork in the picture; is that right?

A. Yeah.

Q. Okay.

MR. SUS: Let's pull up [p.335] Exhibit 1015. And let's just pause it right there.

BY MR. SUS:

Q. So this is another video that you recorded on the Capitol ground; is that right?

A. Yes.

Q. And this is the east side of the Capitol building? Is that what you previously testified?

A. I'm not — I'm sorry. I don't — let me think about the map for a second.

It's on the front side of the Capitol. I don't know if that's east or west or — I don't really know.

Q. Let me ask you: Is it the same side that faces the Washington Monument or is it the other side?

A. It's the other side.

Q. Other side.

A. I thought it was the back, because I came — clearly I went through the front because it was the most

JA985

prominent pictures I know. I thought that was the front. And this turns out to be the front of [p.336] the Capitol.

Q. And so I will represent to you that the video files you produced, some of them had digital timestamps on them. And this video said it was from 12:23 Mountain Time, 2:23 Eastern Time.

Does that sound right to you?

A. Yeah, that is. Yeah, it does. Um-hmm.

Q. So you had said that you had been exposed to tear gas, and you had seen flash-bangs when you were at the Capitol. Is that right?

A. Yes, I saw tear gas — or I coughed a little bit, so I assume the —tear gas. And there were flash-bangs. And that was on the other side of the Capitol with all the bleachers.

Q. How much earlier did that occur in relation to this video?

How much longer before this video were you exposed to the tear gas?

A. I'm going to guess, like, 30 minutes maybe.

Q. Okay. So after there were [p.337] flash-bangs and tear gas deployed, you continued to stay at the Capitol grounds. You didn't leave.

A. I didn't go where the police didn't want us.

Q. Okay. And so looking at the video, do you see the crowd bunching up on the stairs there in front of the Capitol building?

A. Yeah. It looks like they're getting ready to take a big picture.

Q. Are you aware that the doors at the top of those stairs were breached by the mob just one minute after this video was shot, at 2:24 p.m.?

A. No knowledge of that whatsoever.

MR. SUS: Let's pull up Exhibit 23, page 682.

BY MR. SUS:

Q. This is a finding from the January 6th report. Do you see that?

A. Uh-huh.

Q. Okay. And you have no reason to dispute that finding?

[p.338]

A. I don't know. I don't have any — I don't have enough knowledge to dispute it if I wanted to.

Q. Understood.

MR. SUS: Okay. And let's go back to the video, 10:15, and let's play the video.

(Video played.)

MR. SUS: Let's pause the video.

BY MR. SUS:

Q. Did you hear the people chanting "Our House"?

A. Yes, I did.

Q. Did you hear people chant that throughout the day?

A. Down there at the Capitol, I heard people chanting that, yes.

Q. Okay. And you had testified earlier that you didn't go inside because you understood the police didn't want you to go inside. Is that correct?

A. Yeah. When I saw those metal detectors and the people smashing windows, obviously I didn't want to be a part of that.

[p.339]

Q. And so, again, this was from 2:23 p.m.

Are you aware that at 2:28 p.m., about five minutes later, the mob breached the police line on the west side of the Capitol?

A. Describe the "west side of the Capitol."

JA987

Q. On the opposite side of the building from where you were.

A. Oh. That's the west?

I didn't have any clue. I wasn't anywhere near what that — I don't have any knowledge of that.

Q. And, Mr. Bjorklund, you testified that the crowd that day, at least the ones you observed, respect law enforcement. Is that what you said?

A. Yes.

Q. So I'm going to show you some body camera video from a police officer that's already in evidence.

MR. SUS: If we could please pull up Exhibit 15.

MR. GESSLER: Your Honor, I apologize for interrupting. It's about [p.340] three minutes to 4:00.

Could we pause this just a second so Representative Buck can finish?

Again, I apologize. I'm not trying to break up your cross.

THE COURT: We kind of told Congressman Buck that we would work with is schedule.

MR. SUS: Understood.

THE COURT: And I apologize to you, Mr. Bjorklund. Would you mind just waiting out in the hall until we finish up with Congressman Buck?

I think — what are we looking at? Ten minutes, probably?

MR. SUS: For me? For Buck?

MR. GESSLER: Three or four minutes from us on redirect, Your Honor.

THE COURT: Mr. Nicolais, how long do you think we have with Mr. Buck?

MR. NICOLAIS: Your Honor, I don't see foresee more than five minutes.

THE COURT: Okay.

JA988

So, Mr. Bjorklund, we'll probably call you back in maybe 10, [p.341] 15 minutes. Thank you for your cooperation.

(Pause.)

THE COURT: Mr. Sus, do you have an estimate of how much longer you have with Mr. Bjorklund?

MR. SUS: I'd say five to ten minutes, at the absolute most.

THE COURT: Okay. Great.

(Pause.)

THE COURT: Welcome back, Congressman Buck. You're still under oath.

THE WITNESS: Thank you.

THE COURT: You sounded a little bit soft, so speak up.

THE WITNESS: Will do.

THE COURT: Perfect.

CONGRESSMAN KEN BUCK, having been previously first duly sworn to state the whole truth, continued to testify as follows:

CROSS-EXAMINATION (Cont.)

BY MR. NICOLAIS:

Q. That's one more hour down, Congressman.

I'll be very brief. Before, when you were testifying during your direct [p.342] examination, you said the mob meant to disturb a proceeding.

Do you remember saying that?

A. Yes.

Q. And what proceeding was that?

A. It was the electoral vote count on the House — on the Floor in the Capitol building.

Q. And you repeated that again yesterday. In fact, you said, "I think going to the courts is one thing. Trying to move the mob from The Mall up to the House Floor

and interrupting the Congressional proceedings, whole different issue.”

Do you remember saying that yesterday?

A. Yeah, I said that in relation to some of the members of Congress sending out social media messages to that regard.

Q. I’m sorry. I’m referring to an interview you gave yesterday with Andrea Mitchell.

You said that you were referring to that as a — talking about members of Congress?

[p.343]

A. Yes.

Q. I’ll tell you what. I don’t remember you actually saying that. So I would like to —

MR. NICOLAIS: If you don’t mind, Your Honor, if we could bring up P-311 and start from 1:15 to 2:50 — actually, you can start with 2:34 — well, maybe — start with 1:15 to 2:50.

MR. GESSLER: Your Honor, I’ll object to this. This is a different video than the one we saw earlier. Again, well outside the bounds of the direct, well outside the bounds of what Representative Buck has discussed. And I’ll incorporate my earlier objections, Your Honor.

THE COURT: Response?

MR. NICOLAIS: This is being offered for impeachment purposes, Your Honor. He just testified he was saying it about Congressional members, and I think that this video will show that it was not.

THE COURT: Well — but I know. But I think the objection is really that the question is about — the premise is outside [p.344] the scope.

MR. NICOLAIS: Oh. Sure.

But I think, very clearly, he just said that he remembered saying during his direct it was meant to

disturb a proceeding. And the quote is regarding interrupting the Congressional proceedings.

I think that it goes directly to what he said during his direct examination. And it goes to directly what he was brought here to talk about originally, which was what happened on January 6th.

MR. GESSLER: Your Honor, if I may —

THE COURT: Let me just — can I — let me read the — what his testimony — the questions in his testimony was.

(Pause.)

THE COURT: So he's already testified that the mob he was referring to was the mob that tried to disturb the electoral count vote on the — on the Floor in the Capitol building.

And then you said, "And you've said this whole thing about the mob before." [p.345] So I'm missing the connection here.

MR. NICOLAIS: Well, I think the important part here is they're interrupting the Congressional proceedings. Now he just said, in answer to that, when I was asking him about the content — the context, he said — well, he was talking about — and maybe I can clarify with him. I thought he said he was talking about, Well, Congressional members or —

MR. GESSLER: If I may, Your Honor.

The fact that Representative Buck has testified to is that members from the outside referred to as "a mob" interrupted the proceedings.

If Mr. Nicolais wants to try to impeach that point to prove that members of the mob did not — which I don't think he wants to do.

THE COURT: You're trying to get him now to say that he blames President Trump for that, or he said that

in the Andrea Mitchell report. And I already said that was beyond the scope.

[p.346]

MR. NICOLAIS: Oh. I'm sorry, Your Honor. That was a different interview that he gave. That was with Jake Tapper. I'm not trying to introduce that.

This is another interview. But my understanding was he was talking about Congressional members.

If he is testifying that it was — the members of the mob were from outside and they were trying to interrupt the Congressional proceedings, that's accurate, then.

THE COURT: That's certainly what I understand.

Is that your testimony, Congressman Buck? That the mob or members of the outside that were trying to disturb the electoral count?

THE WITNESS: Yes, Your Honor. It was nonmembers that were trying to come into the Capitol building to disturb the electoral count.

MR. NICOLAIS: Okay. If that's what he testified to, I have no further questions, Your Honor.

[p.347]

THE COURT: Okay. Wow. We short-circuited something. Huh?

THE WITNESS: That's great.

REDIRECT EXAMINATION

BY MR. GESSLER:

Q. Congressman Buck, I will try to be mercifully brief.

You were asked, and answered, about trust in the process. And you said you trusted judges. You trusted juries. You trusted the judicial process.

Do you remember testifying to that?

JA992

A. That may have been one of the videos that was played. But, yes, I do trust those institutions to search for the truth.

Q. And why do you trust them?

A. Because I think that's the system of justice that I participated in for 25 years, as a prosecutor, and before that, as a lawyer, and after that, as a lawyer.

I am — I believe we have an adversarial system set up in the courts that does, in fact, search for the truth. There [p.348] wasn't — there were times when I didn't necessarily agree with some of the motions to suppress and the rulings on those motions, but I certainly felt like the defendant's rights were protected, and we were on a search for truth.

Q. Does that trust also apply to Congress?

A. No. No. There — the Congressional proceedings are political, and they are not a search for the truth. They are a search to promote different political views.

The members who are chosen for the committees are chosen because they raised a certain amount of money, because they have engaged in political activities that have been beneficial to the Speaker or to the Leader. And the process is not in any way similar to what happens in courts.

Q. And does your trust apply to the January 6th Committee?

A. I think in the case of the January 6th Committee, it is not only a political committee, but it also is a [p.349] political committee that is lacking the viewpoint of those that did not believe that President Trump committed an impeachable offense on January 6th.

Q. Thank you, Representative Buck. Thank you very much for your time today. And we appreciate you interrupting your schedule.

JA993

MR. GESSLER: I have no further questions, Your Honor.

THE COURT: Any questions from the Colorado Republican Party?

MS. RASKIN: No questions, Your Honor.

MR. KOTLARCZYK: No questions for the Secretary, Your Honor.

THE COURT: Okay.

Thank you so much for your testimony, Congressman Buck. You are released.

THE WITNESS: Thanks very much, Judge.

THE COURT: Let's start back up at 4:20. And hopefully we'll still be done well in advance of 5:00.

(Recess taken.)

[p.350]

THE COURT: Mr. Bjorklund, you're still under oath.

THE WITNESS: Thank you.

MR. SUS: Ready to proceed, Your Honor?

THE COURT: Yes. Please.

TOM BJORKLUND, having been previously first duly sworn to state the whole truth, continued to testify as follows:

CROSS-EXAMINATION (Cont.)

BY MR. SUS:

Q. Mr. Bjorklund, we watched a video of you outside the Capitol at 2:23 p.m.

Do you recall watching that video?

A. Yeah.

Q. And then I told you that five minutes later, the police line on the other side of the Capitol building was breached by violent rioters.

Did you hear me say that?

A. Yes.

JA994

Q. So you also said January 6th wasn't an insurrection. Is that right?

A. Exactly.

[p.351]

Q. And you think Antifa did it.

A. There was no insurrection.

Q. So you think Antifa is responsible for attacking more than 140 law enforcement officers at the Capitol on January 6th.

A. When I was in high school —

Q. It's yes or no question, Mr. Bjorklund.

A. — I read a lot of Louis L'Amour. Louis L'Amour. And he talked about crowds, and that it's very easy to turn a crowd who has some anger issues and turn them. And...

Q. So, Mr. Bjorklund —

A. So I believe it was like somebody with a bridle.

Q. Mr. Bjorklund, you testified earlier that the crowd around you respected law enforcement. Is that right?

A. The ones around me did. Yep.

Q. All right.

MR. SUS: Let's play the video.

(Video played.)

[p.352]

BY MR. SUS:

Q. Is that man Antifa?

A. I have no idea who that man is.

Q. All right.

MR. SUS: Keep playing the video.

(Video played.)

BY MR. SUS:

Q. That man who just attacked a police officer, is that Antifa?

A. I have no idea who that is.

JA995

Q. Is that respect for law enforcement?

A. He seems angry.

Q. I'm going to show you another video.

MR. SUS: Could we pull up admitted Exhibit 20.

(Video played.)

MR. SUS: Let's pause the video.

BY MR. SUS:

Q. Is that respect for law enforcement?

A. Obviously they weren't — they [p.353] weren't respecting their line. No.

Q. Can you point me out Antifa in that crowd?

A. I have no idea which ones are and which ones aren't.

MR. SUS: Keep playing the video, please.

(Video played.)

MR. SUS: Let's pause the video.

BY MR. SUS:

Q. Mr. Bjorklund, do you see the man attacking the police officers in the video?

A. Yeah. I saw him hitting the shield.

Q. Is that respect for law enforcement?

A. No.

Q. Do you see any Antifa in that video?

A. Possibly.

MR. SUS: Please play the video.

(Video played.)

[p.354]

BY MR. SUS:

Q. Mr. Bjorklund, the truth is that none of those people are Antifa. They were a mob sent by Trump to attack the Capitol building. Isn't that true?

A. Not the instructions I got.

Q. Not the instructions you got?

Is that what you said?

JA996

A. Yeah.

Donald Trump said to go down and peacefully make your voices heard. That's what I heard.

Q. You see those people with —

A. They clearly are not doing that.

Q. You see those people with MAGA hats and Trump flags chanting "Stop the steal," attacking police officers, trying to break into the Capitol building to stop the certification of an election?

Why would Antifa do that?

Why would Antifa stop the certification of an election?

MR. GESSLER: Objection, Your Honor. Argumentative.

[p.355]

THE COURT: Please respond to — the objection overruled.

BY MR. SUS:

Q. Why would Antifa break into the Capitol building to stop the certification of the election for Joe Biden?

Aren't they on Joe Biden's side?

Why would they do that?

A. Because it actually derailed a more intelligent plan. This is obviously not an intelligent plan. And the plan that I understood it was, that they were going to challenge electors. They were going to have a legal process.

Q. And then it turned into this, didn't it?

Didn't it turn into this?

A. Yes, as mobs can be turned into — people who are angry can be turned into a mob, just like they did at the Denver — you know, Aurora Police Station where they chained up and threatened to burn the building down.

MR. SUS: Your Honor —

[p.356]

A. And they were not charged with insurrection.

MR. SUS: Your Honor, I have no further questions for the witness. But I will move to admit 166, which is a video of the crowd's reaction to President Trump's speech.

MR. GESSLER: Your Honor, I've lost track of the various objections and whatnot with respect to this particular one, but we would certainly object. This has not been authenticated or validated by this witness. It's not appropriate, based on this testimony, to introduce this as an exhibit.

MR. SUS: So two things, Your Honor. Two witnesses have verified that the scene in that video accurately depicts the Ellipse as those folks — as those witnesses recall them. Mr. Bjorklund and Mr. Van Flein both confirmed that.

And Your Honor also allowed in other video of the crowd's reaction to speeches at the Ellipse. And so this video shows the crowd's reaction from a different time period.

[p.357]

THE COURT: Is this —

MR. SUS: No. No, Your Honor.

Could you pull up 166, please?

MR. GESSLER: And while they're looking for that, I believe certainly all the stuff we sought to introduce, the videos were made by eyewitnesses or an eyewitness validated it.

THE COURT: Is your objection on authentication?

MR. GESSLER: Yes, Your Honor.

THE COURT: Overruled. The exhibit is admitted.

(Exhibit 166 was received into evidence.)

MR. SUS: All right. Thank you, Your Honor.

JA998

REDIRECT EXAMINATION

BY MR. GESSLER:

Q. Mr. Bjorklund, I just have a very brief question.
So one of the videos —

MR. GESSLER: If we could clear that video, please.

THE COURT: I think it's —

MR. GESSLER: Thank you.

[p.358]

BY MR. GESSLER:

Q. So one of the videos — if you need me to replay it,
I will, but one of the videos, there's someone that said, "I
hate Pence."

Do you remember?

A. Yeah.

Q. And do you know who said that?

A. Yeah. I believe it was Steve.

Q. And Steve was?

A. He was the gentleman that traveled with my
brother to see Donald Trump speak.

Q. About how much time did you spend with Steve on
January 6th?

A. Just at the campground, we had dinner. We went
to the barbecue. Yeah, just — probably, I don't know, 24
hours maybe.

Q. Okay. During that time, both before and on
January 6th, did Steve engage in any violent behavior?

A. Not at all.

Q. Did he express any violent sentiments to you?

[p.359]

A. No.

Q. Okay. Did he have any violent viewpoints or —
that you were aware of at all?

A. No. He never — he never mentioned anything
about doing violence or doing any harm to anyone.

Q. Okay.

MR. GESSLER: I have no further questions, Your Honor.

THE COURT: Any questions from the Colorado Republican Party?

MS. RASKIN: No questions.

MR. KOTLARCZYK: No questions from the Secretary.

THE COURT: Okay. Let's just —you're released, Mr. Bjorklund. Thank you so much for your testimony.

Let's just talk schedule for a moment. I know that you have Mr. Delahunty. Is that correct?

MR. GESSLER: Yes, Your Honor. One more witness. We've prepared to put him on at the start of tomorrow's proceedings.

THE COURT: I'm just trying to [p.360] figure out when that should be.

MR. GESSLER: And we don't anticipate him — I hope it's not two hours, but I certainly don't think it would be more than two hours.

THE COURT: Okay.

MR. GESSLER: Certainly from our direct testimony.

MR. GRIMSLEY: And then, Your Honor, we have Mr. Heaphy, who we're planning for 1 o'clock remotely tomorrow afternoon.

You asked about rebuttal witnesses earlier. We may direct Mr. Heaphy, in part rebuttal, given the recent attacks on the January 6th Committee report.

THE COURT: Okay.

And then what about the Colorado Republican Party? At one point you were planning on calling witnesses.

MS. RASKIN: Your Honor, we don't plan to call any witnesses.

JA1000

THE COURT: Okay. So if we're going to start at 1:00 with Mr. Heaphy, who [p.361] it sounds like will be the last witness, when should we start tomorrow to make sure we get through Mr. Delahunty and have an opportunity for a break?

MR. GRIMSLEY: I think it's probably going to be 8:00, given your estimate of a direct, given our estimate of a cross.

MR. GESSLER: I'm fine starting at 8:00, Your Honor. I hope it's not that long, but —

THE COURT: How about 8:30?

MR. GESSLER: 8:30 works for us too, Your Honor.

MR. GRIMSLEY: 8:30 works for us, too.

THE COURT: Be a little more civilized.

Okay. So we will resume at 8:30 with Professor Delahunty, and then we will do Mr. Heaphy at 1:00. And that sounds like it will conclude the proceedings until closing arguments, which everybody wants to do on the 15th.

MR. GRIMSLEY: Your Honor, as [p.362] Ms. Tierney had said earlier, we will be submitting revised versions of the January 6th findings.

So we will take out ones that you have already said are not admitted. We may take out ones that you ruled are admissible but we don't need.

So we'll submit that. And there may be a few minutes — maybe five to six minutes — of video that we would submit as well. And I think Ms. Tierney referenced that as well.

THE COURT: Okay. I see.

So you're going to offer to admit revised January 6th findings. And then you may want to play some video that hadn't already been played?

MR. GRIMSLEY: Correct.

JA1001

THE COURT: Okay. And the parties should also — at some time before the findings of facts, conclusions of law are due, should work together to make sure everybody agrees on what exhibits have been admitted.

And actually — probably it [p.363] would be good if you do that before we end on Friday, so that if other exhibits need to be offered, you can get that taken care of.

MR. GESSLER: Okay. Yeah.

Your Honor, just as a heads-up. I've not spoken with Petitioners about it, but there was an exchange between President Trump and now-President Biden and a moderator during a debate.

There was a snippet that we're going to ask to introduce more of that, a fuller amount of that same video, and perhaps the transcript as well.

So I know we're going to be asking to introduce that. We'll chat with Petitioners about it.

THE COURT: The Proud Boys question?

MR. GESSLER: Yes, ma'am.

THE COURT: Okay. That's it. We can kind of take care of all of that housekeeping after Mr. Heaphy, since my docket is clear for the day. And we can also talk about how you're going to make an actual record in this case, so that if it goes to [p.364] the Colorado Supreme Court, that it exists, which is going to — you're going to have to do things with all these exhibits other than just ask me to admit them. Especially the videos.

MR. GESSLER: Fair enough, Your Honor.

THE COURT: Okay. The Court's in recess.

(Time noted: 4:36 p.m.)

In the Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, ET AL.,

Respondents.

On Writ of Certiorari to the Colorado Supreme Court

JOINT APPENDIX VOL. III OF IV (JA1002-JA1319)

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Petition for Writ of Certiorari Filed: Jan. 3, 2024

Certiorari Granted: Jan. 5, 2024

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The following opinions, decisions, judgments, and orders, constitutional, and statutory provisions have been omitted in printing this joint appendix because they appear on the following page in the appendix to the Petition for Certiorari:

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JA1002

DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO
1437 Bannock Street
Denver, Colorado 80203

Case Number 2023CV032577, Courtroom 209

CERTIFIED STENOGRAPHER'S TRIAL
TRANSCRIPT

TRIAL DAY 5: November 3, 2023

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAHER,
KATHI WRIGHT, and CHRISTOPHER
CASTILIAN,
Petitioners,

v.

JENA GRISWOLD, in her official capacity as
Colorado Secretary of State, and
DONALD J. TRUMP,
Respondents,

and

COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE, and DONALD J. TRUMP,
Intervenors.

The trial in the above-entitled matter commenced
on Thursday, November 2, 2023, at 8:01 a.m.,
before the HONORABLE SARAH B. WALLACE,
Judge of
the District Court.

This transcript is a complete transcription of
the proceedings that were had in the

JA1003

above-entitled matter on the aforesaid date.

Stenographically reported by:

Lisa A. Knight, RDR, CRR, RSA

[p.2]

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[p.3]

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PROCEEDINGS

THE COURT: Are the intervenors ready to present their witness?

MR. GESSLER: Yes, Your Honor. We are. I understand, although I've not been privy to the conversations, there are some evidentiary issues to discuss. I don't know if you want to discuss them now or wait until a little bit later today, Your Honor.

THE COURT: Do they have to do with Mr. Delahunty?

MR. GESSLER: I believe they do not.

MR. MURRAY: Your Honor, the petitioners have one issue related to Mr. Delahunty, just logistically, if I may for a moment.

THE COURT: Sure. Sure.

MR. MURRAY: I didn't want to object—interrupt the direct testimony with extensive objections to Mr. Delahunty. But we do have objections to both his qualifications and his methodology under Rule 702, and we also object to much of his testimony as purely legal opinion rather than history or other helpful expertise.

And we were wondering if we could just get a standing objection on those questions during direct examination and then renew those objections and [p.8] request a ruling after that portion of cross-examination.

THE COURT: Yeah. And I would—most likely what I'll do is defer any 702 ruling until the findings of facts and conclusions of law that I'm going to be issuing. But I certainly want to allow you to make your record, but I am – it's my intention to let Professor Delahunty testify.

MR. GRIMSLEY: Understood. I didn't want to disrupt the proceedings with repeated objections, but I also want to make sure that we've preserved it.

THE COURT: Yeah. So consider it preserved. And you're welcome to, you know, renew the motion— 702 motion at the end of the proceedings today. But in all likelihood, I will just address that in conjunction with my final ruling.

MR. GRIMSLEY: Understood, Your Honor. And if I may, for petitioners today, Jason Murray, Eric Olson, Martha Tierney, Nikhel Sus, Mario Nikolais, and Sean Grimsley.

THE COURT: Okay. And why don't we get—start with an entry of appearance from other—Colorado Republican Party. And we'll let—
[p.9]

MS. RASKIN: Good morning, Your Honor. Jane Raskin on behalf of the Republican State Central Committee. With me are Michael Melito, Nathan Moelker, Bob Kitsmiller.

THE COURT: And why don't we get—why don't we take care of the respondents, and then you can introduce people and tell me what the other issue is we need to deal with.

MR. KOTLARCZYK: Good morning, Your Honor. Michael Kotlarczyk from the Attorney General's Office on behalf of the respondent, Jena Griswold, Secretary of State, in her official capacity. With me at counsel table is Jennifer Sullivan from the Attorney General's Office and Deputy Secretary of State Christopher Beall.

THE COURT: Great. Thank you.

MR. KOTLARCZYK: Thank you.

THE COURT: Mr. Gessler.

MR. GESSLER: Good morning, Your Honor. Scott Gessler on behalf of President Trump. With me is Mr.

Chris Halbohn. I don't know if his pro hac vice has been finished.

THE COURT: It has been.

MR. GESSLER: It has been. So I don't [p.10] expect him to talk, but he may. Mr. Geoff Blue as well, Mr. Jacob Roth, and Mr. Justin North.

THE COURT: And you had an evidentiary issue you wanted to address?

MR. GESSLER: I don't think I want to address it now. We'll do it a little later. I would defer to Mr. Blue. He's had those conversations with opposing counsel.

MR. BLUE: Your Honor, I think it makes sense to just go ahead with Professor Delahunty, and then we'll deal with all these housekeeping matters at the end of the day.

THE COURT: Okay. Oh, okay. We need to take a pause while the court reporter deals with some technical issues.

THE COURT: Let's proceed.

MR. GESSLER: Thank you, Your Honor. For our next witness, we will call Mr. Robert Delahunty.

THE COURT: Will you raise your hand.

ROBERT DELAHUNTY, having been first duly sworn/affirmed, was examined and testified as follows:

THE COURT: Great. Have a seat and just [p.11] make sure to speak into the microphone.

THE WITNESS: Thank you.

DIRECT EXAMINATION BY MR. GESSLER:

Q. Good morning, Mr. Delahunty. So I'm going to be asking you some questions today. And you're here – we've called you as an expert. Let me ask you, have you ever testified – let me start with this. Could you please state and spell your name.

A. Yes. Robert Jay Delahunty, D-e-l-a-h-u-n-t-y.

JA1010

Q. Okay. And, Mr. Delahunty, have you— have you ever testified in court as an expert before?

A. No.

Q. Okay. So this is your first time?

A. It is.

Q. So let me— let me start with asking you a little bit about your professional background. What's your— what's your current position, if any?

A. I am retired.

Q. Okay. As someone who is retired, are [p.12] you— are you involved in any law-related activities?

A. Well, I write articles or other shorter pieces on law

—

Q. Okay.

A. and public policy.

Q. Okay.

A. And in June, late June, a book which I co-authored, a semipopular book, was published. It's called "The Politically Incorrect Guide to the Supreme Court." So that reflects legal writing that I have done—

Q. Okay.

A.—quite recently.

THE COURT: Professor, you're leaning back.

THE WITNESS: Oh, I'm sorry.

THE COURT: Just try to get closer to the microphone.

THE WITNESS: So I'll try to get closer.

THE COURT: You may be able to move the microphone, but make sure you speak into it.

THE WITNESS: Can you hear now?

Q. (By Mr. Gessler) Yeah. Professor, sometimes it's a challenge whether you're supposed to answer me or the Court when you're speaking, but since [p.13] we— since

JA1011

there's a fair amount of media coverage, just try and stay close to that microphone.

A. I will.

Q. Let me ask you to start with your legal background in chronological order. What—what's your education?

A. Well, I graduated in 1968 from Columbia University and had a summa cum laude degree there. I then won a Kellett Fellowship from Columbia to study at Oxford University, England. I studied a subject called Greats, which consisted of two parts, classical history and classical and modern philosophy. And I got first class honors in Greats. I then did a second degree at Oxford University, a bachelor's of philosophy. I wrote a thesis on Aristotle. I then had a career in Britain, both at Oxford and Durham University teaching philosophy. I was tenured at Durham University as what they call a lecturer on the philosophy faculty. That was the equivalent, really, of associate professor in the United States. At that point, about 1980, I decided to return to this country and—to study the law. And I studied the law at Harvard Law School and graduated cum laude from there. And then—this is not [p.14] educational background, but it's the past. I spent three years on Wall Street at a law firm called Sullivan & Cromwell. And then I joined the Department of Justice, the appellate section on Civil Rights Division, in 1986. And then at the start of 1989, the start of the first George H.W. Bush administration, William Barr, later twice Attorney General, invited me to become a staff attorney at the Office of Legal Counsel in the Department of Justice. And so I began working there in early 1989. I don't remember the year, but I was eventually promoted to the Senior Executive Service in the Department of Justice. And from 1989 until 2004, I served primarily in the Office of Legal Counsel, although for about a year, I was the special

JA1012

counsel to the Solicitor of the Department of Labor, the U.S. Department of Labor. He had been a college friend of mine in England. And then I served— I was on unpaid leave of absence but still employed by OLC for a year to be a visiting professor at the Columbus School of Law in Washington, D.C., which was part of the Catholic University of America. And while at St. Thomas—I was there [p.15] from 2004 until the end of 2020. At the end of 2020, I retired, and now I am a fellow for the Claremont Institute Center for the American Way of Life in Washington, D.C., and do—give them legal advice from time to time. And I published an article and a book, a collection of essays I put together. That also came out—

Q. Okay.

A.— in June.

Q. Let me interrupt you for just a moment.

THE COURT: And I'm just—I think the court reporter probably needs a breath. Because that was a crazy long answer.

THE WITNESS: Sorry.

THE COURT: So let's just— I think it helps everybody if you let him kind of guide you through your testimony.

THE WITNESS: Fine.

MR. GESSLER: May I offer that it was also an erudite long answer, Your Honor?

Q. (By Mr. Gessler) Okay. Let me ask you a little bit about your—your time. You said you had—you worked at St. Thomas School of Law—

A. Yes.

[p.16]

Q. from 2004 to 2020. What did you do there?

A. taught constitutional law. And every year I was there— I'm not absolutely certain that I did or did not

JA1013

teach it in the year I was on—half year I was on sabbatical. But constitutional law, including, of course, the Fourteenth Amendment. That, in fact, was the centerpiece of my teaching. And I taught public international law. And one term I gave a seminar on the law of genocide, which is international law.

Q. Okay. During your time in any of these positions—and it looks as though you spent most of your— or a large portion of your career, large chunks, at both the Office of Legal Counsel at the Department of Justice as well as St. Thomas School of Law. Did you have an opportunity to work with historical documents?

A. Oh, yes. Indeed.

Q. Can you describe some of that?

A. Well, I could go on I hope not too much. But let me give you maybe three examples. One of the first assignments I had in the [p.17] Appellate section of the Civil Rights Division of Justice, which would have been in 1986, was to do research into the Civil Rights Act of 1866, which is now codified as section — it's —

THE WITNESS: I'm sorry, Your Honor. I'm blanking on the site.

A. Section 1981 of Title 42 of the U.S. Code. And that involved research including looking at dictionary definitions from the 19th century of the meaning of the term “race.” But that was in connection with an amicus brief that the government eventually did not file in a case called Shaare Tefila versus Cobb. So my whole research led me to draft an amicus brief for the government. That was never filed, but it did, right at the start of my career in the Justice Department, entail research into private documents and into the background of the Civil Rights Act of 1866.

Q. (By Mr. Gessler) Okay.

A. More recently—

Q. I was about to ask you for your second example.

A. Yeah. This was a Law Review article [p.18] published three or four years ago, maybe four or five years ago. I'm interested in the law and Shakespeare, and so I wrote a lengthy article about the law in his play "King John." This entailed the research into the English law of intestacy and bastardy in Shakespeare's period, the Tudor period and the Stuart period. And I made quite extensive use of a database compiled by the University of Michigan, which is called Early English Books Online. It is a collection of thousands of legal and other documents, proclamations, sermons, books of the Tudor and Stuart periods. And so I did that kind of research into English legal history of the early modern period and, indeed, the Middle Ages, because the play is set in the Middle Ages, on the law of intestacy and the law of illegitimacy using those historical materials which were archived at the University of Michigan. And if I am permitted to give another example?

Q. Yeah. Let's do one more example—

A. Yes.

Q. and then we'll move on.

A. Some years ago in the Cornell Law Quarterly, a law journal, I published an article on [p.19] the Declaration of War clause of the —of Article 1 of the Constitution. And I did the primary research or research into other primary materials from English law, English legal cases— I think it was prize law— from the middle of the 18th century, consulting the original case materials.

Q. Okay. Have you written any pieces or articles involving the electoral— the Vice President and the electoral count?

JA1015

A. Yes. In 2022, along with my often-coauthor, John Yoo, who is a professor— chaired professor of law at the University of California at Berkeley, we published an article on the Twelfth Amendment and the— as we understand it, the constitutional authority of Congress to regulate the vote count process in presidential elections, and the constitutional role of the Vice President in the vote count, the count of the electors, presidential electors' votes. Incidentally, that also involved research into materials from the early republic.

MR. GESSLER: Okay. Your Honor, I—to be frank here, we had prepared to provide extensive testimony on Mr. Delahunty's background, but in light of your earlier ruling to keep the proceedings moving, [p.20] at this point I would proffer Mr. Delahunty as an expert in the use of historical documents, legal historical documents, and interpretation of legal statutes arising from that historical analysis on constitutional issues.

MR. MURRAY: And, Your Honor, we would ask that you defer ruling until we have a chance to explore those subjects on cross.

THE COURT: I'm going to—I'm going to accept Professor Delahunty on what sounds to me as a very specific subject, which is the use of historical documents and interpretation of legal statutes arising from historical analysis on constitutional issues. He was a law professor for 16 years and had a lengthy career before then. And obviously, you can cross-examine him, and I will consider that in the weight of his testimony.

MR. MURRAY: Understood.

THE COURT: But at the same time,

Mr. Gessler, I don't want to short-circuit your examination in any way, so you should feel free to ask him whatever you want to ask him for the record.

JA1016

MR. GESSLER: Thank you, Your Honor. Your Honor, I would like to clarify legal [p.21] interpretation of statutes as well as constitutional provisions.

THE COURT: Okay. I was reading from what you said.

MR. GESSLER: That's why I clarified. I am—

THE COURT: But I will expand it to statutes and constitutional provisions.

MR. GESSLER: I'm accepting responsibility for lack of clarity. And, Your Honor, I would also note that we specifically proffered Mr. Delahunty as a rebuttal expert to Professor Magliocca as well. So he'll directly address the items raised in Professor Magliocca's testimony.

THE COURT: Okay. Professor Magliocca, if I recall, was offered as an expert on section— on Amendment 14 and specifically Section 3. I'm not prepared at this point to designate Professor Delahunty as an expert on that specific provision. But you haven't asked me to either.

MR. GESSLER: Okay. Your Honor, we would then seek to proffer him as an expert on the Fourteenth Amendment, as he taught constitutional law for 16 years on the Fourteenth – taught [p.22] constitutional law for 16 years, with a specific focus on the Fourteenth Amendment.

THE COURT: Okay. Why don't we hear a little bit more from him on what he meant when he said that. Because most of the people, it seems like, in the courtroom went to law school. My recollection of constitutional law was that it covered a lot more than just the Fourteenth Amendment. So let's find out what he meant when he said that.

MR. GESSLER: Okay. And, Your Honor, I would also note that we— I mean, to be straightforward with the Court, we obviously raised a 702 objection to Professor

Magliocca. And our view is that all of this, Professor Magliocca's testimony and Professor Delahunty's, is akin to legal analysis and interpretation, which normally tends to be excluded by courts. And we understand that it's here to help you. And we understand also that you recognize there are other published professors in the field that you will look to as well, so . . .

THE COURT: And just on that, I—and maybe this will help with your focus on Professor Delahunty's testimony. [p.23] Professor Magliocca largely talked about historical interpretation and did not—I do not think, in large part, if— and, maybe not if all, he testified as to the law. He testified as to the original documents that he had uncovered in looking at the formation and the purpose of the amendment in the first place. And that was what I found to be helpful.

MR. GESSLER: Okay. And I think you will hear from Professor Delahunty the interpretation of original documents as well.

THE COURT: Great. Thank you.

MR. GESSLER: Okay.

THE COURT: So why don't we just stay—I think it would be helpful for the Court if you could explore further with Professor Delahunty on exactly what work he did on the Fourteenth Amendment and if any of that focused on Section 3.

Q. (By Mr. Gessler) Okay. Professor Delahunty, you said you taught law school for, I believe, 16 years at St. Thomas, and that a substantial focus of your teachings was on the Fourteenth Amendment. Could you provide some more detail on that?

[p.24]

A. Yes, indeed. I would think about half of the course consisted of the study of the Fourteenth Amendment. I

JA1018

was, I think, quite unusual among American law professors in starting the course with the Fourteenth Amendment, and that took over half of the term. Then I gave attention primarily to separation of powers in the final, let's say, 40 percent of the course. And I focused on the Fourteenth Amendment because I agree with the view that it was a second founding, constitutionally speaking. And it was also the focus of a lot of contemporary discussion and litigation, and I wanted to make sure my students were quite well aware of what it meant, what its origins were. I was, I think again, pretty unusual among American constitutional law teachers in discussing in some depth, actually, the Dred Scott case as a background to the ratification of the Fourteenth Amendment, and how parts of Section 1 of that amendment were framed against the backdrop and in connection to the Dred Scott decision. Most constitutional law professors, I think, don't discuss the Dred Scott case, and I did.

Q. And why did you—why did you focus—[p.25] well, what is the Dred Scott case, and why did you focus on that?

A. Well, the relevant part of that—of the opinion of Chief Justice Taney in that case was that African-Americans, even those not held to bondage and slavery, were not and never could be, citizens of the United States. And the naturalization provision of—the citizenship provision, rather, of Section 1 ensures that they all were citizens of the United States, entitled to privileges and immunities of citizens of the United States. So it helps to explicate the meaning of those parts actually of Section 1. I taught the Slaughter-House case every year. And so I am not just focusing on the history of the framing and

ratification of the Fourteenth Amendment, but both the case law—Supreme Court case law before it and after.

Q. Did you also, as part of your course, introduce or teach your students how to view and interpret and analyze historical documents?

A. Well, the Slaughter-House case is itself a historical document, as is the Dred Scott case, so yes. In that sense, yes. But this was a—this was not a course [p.26] in legal history. It was a course in constitutional law. It wasn't a course in historical scholarship generally or even in legal historical scholarship. It was a course largely, mainly dedicated to extricating the meaning of the Fourteenth Amendment.

Q. Okay. Did you introduce some elements of historical legal scholarship to your students and—or did you—and—I'll ask you the next question after that.

A. Not that I recall, no.

Q. Okay. In preparing your courses, did you engage in historical scholarship, looking at some of the history of documents surrounding the formation and ratification of the Fourteenth Amendment?

A. Well, I think only to the extent I've already explained.

Q. Okay.

A. I did not, that I recall, drill into the ratification or framing of the Fourteenth Amendment, no.

Q. Okay.

A. This was a first-year law student course.

Q. I'm sorry. What was that?

A. This was a course for first-year law [p.27] students, and I did not go into—I mean, I discussed the Civil Rights Act of 1866. I don't know if that would kind of answer you or not. But yes—

Q. Okay.

A. – things like that.

Q. Okay.

MR. GESSLER: Your Honor, I would renew my proffer. Does that answer your questions?

MR. MURRAY: Your Honor, we would continue to object. Teaching a first-year law school course does not mean that he's made contributions to the scholarly literature on the history of the Fourteenth Amendment and Section 3 in particular.

MR. GESSLER: Your Honor, if I may, we're going to go through his resume at length this morning, so this may be a while.

THE COURT: Yeah.

MR. GESSLER: This may be a long morning, but we'll do it.

Q. (By Mr. Gessler) Professor Delahunty, I saw that one of your articles is “Is the Uniform Faithful Presidential Elector Act Constitutional?” Do you remember that article?

A. Can you tell me where it appeared and [p.28] when?

Q. It was Cardozo Law School online publication—

A. Oh, yes. Yes, I remember that.

Q. Okay. Can you tell us about your work on that particular case?

A. Well—

Q. On that particular article. I'm sorry.

A. That particular article. It involved going to the meaning of what counted as an elector in—at the—in the framing of the original Constitution, and whether electors, as understood at that period in 1787, were considered to be people who had essentially unfettered freedom to decide whom to vote for in—as the leading figure in the state. So, for example, I found that the King of England was an elector for the emperor of the Holy

Roman Empire. And the framers, as subjects of the King of England before the American Revolution, were probably aware of the King's role as an elector. He was not just the King of England. He was the King of Hanover in Germany. And as such, he counted as an elector for the Empire. And my conclusion, broadly, was that electors in—presidential electors in this country [p.29] had the freedom to vote for a candidate who they were not—who they were not pledged to support. In other words, that they were not bound by state restrictions on their ability as presidential electors to select the candidate who best suited — in their judgment was best suited to be President. That view, which was based on original material, was rejected by the U.S. Supreme Court in the *Chiafalo* case, which upheld the binding quality of the pledges electors made to vote in a certain way. But it was an attempt to clarify, using contemporary dictionaries and so forth, the meaning of what an elector was in the electoral colleges.

Q. Okay. I saw that you also wrote an article on “Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count.” I think we've spoken a little bit about that. Can you tell me what that was about and your use, if any, of historical documents and scholarship?

A. Well, there was extensive use of historical materials, both from the framing period, 1787, and much later. And it wasn't just documents. It was historical practice, such as the role the Vice President had played in the electoral vote count when [p.30] John Adams was in the chair and had—and then George Washington—was George Washington's Vice President. And then Thomas Jefferson as Vice President also oversaw the electoral vote count. They both assumed they had authority to admit or reject—

JA1022

Q. Okay.

A.—contended votes.

Q. Okay. You also wrote an article, it looks, back in 2006 entitled “Executive Power Versus International Law”?

A. Uh-huh.

Q. Can you tell me a little bit about that?

A. Honestly, I don't remember that one. It was, as is the tradition, I think, at OLC—I was certainly steeped in that culture—a defense of presidential power, executive power in wartime. I don't—it's been a long while since I looked at or thought about that. I think, however, it made reference to the prize cases, which is one of the cases that is helpful in construing Section 3 of the Fourteenth Amendment.

Q. Okay. Let me ask you this: In your work, have you—well, let me—let me—before I [p.31] go there. You said you spent time in the Office of Legal Counsel—

A. Yes.

Q.—correct?

A. Yes.

Q. What were your duties or activities there?

A. Essentially, preparing legal opinions, primarily on constitutional law, and reviewing bills before Congress to determine whether in the view of the executive branch the bills included unconstitutional provisions.

Q. Okay. Did you have an opportunity to work with historical documents in those instances?

A. Yes. Yes.

Q. Describe what that—an example or what that process might look like.

A. Well, I remember one frantic weekend when I had to write an opinion on the constitutional validity of President Clinton's appointment of a member of Congress

JA1023

to be our first ambassador to Vietnam since the war in Vietnam ended. And that involved looking at historical practice and opinions going back, as I recollect, at least as far as James [p.32] Madison.

Q. Okay.

A. But it was—how shall I say it?—the meat and potatoes of OLC to—and my work there, to opine on constitutional questions across the board.

Q. Okay. In your work, have you spent time looking at and analyzing records of congressional proceedings?

A. Yes.

Q. Okay. So are you familiar with the 11 congressional reporters—

A. Yes.

Q.—as they were developed then?

A. Yes.

Q. Okay. In your work have you spent time—and if you can describe this—of working with historical legal opinions?

A. Oh, yes.

Q. Have you spent time working with sort of congressional debate issues and historical legal cases—

A. Yes.

Q.—from the 19th century?

A. Yes.

Q. Can you speak on it?

[p.33]

A. Yes, yes.

Q. Okay. Have you spent time over your years of experience working with contemporaneous reports on congressional and public debates involving constitutional issues?

A. Yes.

JA1024

Q. Okay. I think you testified, but I want to confirm, have you spent time analyzing and researching and reviewing historical definitions of words and phrases?

A. Oh, yes. Yes.

Q. Have you spent time looking at sort of historical executive orders and statements as an aid to interpretation of law?

A. Yes.

Q. Okay. Now, you reviewed the congressional debates or records of congressional debates, historical cases, contemporaneous debates, dictionary definitions, and executive orders in rendering your opinion on the Section 3 of the Fourteenth Amendment; is that correct?

A. I'm sorry. Could you repeat that?

Q. That was a very long question.

A. Yes.

Q. In preparing and rendering your opinion [p.34] today, did you rely on congressional — records of congressional debates?

A. Yes.

Q. Okay. And do the records of congressional debates for Article—I'm sorry, for Fourteenth Amendment, Section 3, do they differ in approach or quality or any way that you may be able to describe from congressional records used to interpret other constitutional provisions?

A. No, not that I can see. Maybe there are fewer—less discussion of Section 3 than some other provisions. But, no, in quality—maybe in quantity there's less, but in quality they're the same.

Q. They're all—they're both—they were written in the English language as—

A. Yes—

(Simultaneous speaking.)

THE STENOGRAPHER: One at a time, please.

THE COURT: You need to wait for Mr. Gessler to finish his question before you start answering—

THE WITNESS: I'm sorry.

THE COURT:—because the court reporter can't—
[p.35]

THE WITNESS: Oh, I'm sorry.

MR. GESSLER: Yes. In court we have to be exceptionally polite and never talk over one another.

THE WITNESS: That's fine. I apologize.

Q. (By Mr. Gessler) So in your experience, were they written in the same English language syntax as other forms of 19th century documents?

A. Yes.

MR. MURRAY: Objection. Leading.

THE COURT: Overruled. He's just laying a foundation.

MR. GESSLER: Thank you.

Q. (By Mr. Gessler) And you've discussed your—

MR. GESSLER: I'll even try to be a little bit more open-ended, Your Honor.

Q. (By Mr. Gessler) You've discussed your research of legal cases, historical legal cases. How do those compare with the legal cases that you reviewed and analyzed in preparation of your opinion here today on the Fourteenth Amendment?

A. In no way.

Q. I'm sorry. You say “no way.” How do they differ, if at all?

[p.36]

A. Again, I would have to ask for the question to be repeated, because I've lost it.

Q. So the — so you reviewed a number of — you have in your work over the last three or four decades interpreted historical cases from the 19th century —

A. Yes.

Q.— is that correct?

A. Yes.

Q. And do the four — do the historical cases that you reviewed for the Fourteenth Amendment, in your opinion, do they differ or how do they differ as far as their — in any characteristics? Is their writing, their modes of analysis, do they differ — and if so, how — from the types of cases that you've analyzed in the past from the 19th century?

A. No. Not that I can think of, no.

Q. When you say “no,” does that mean you were not able to identify any types of differences?

A. Not that occur to me.

Q. Okay. In looking at — in looking at reports involving sort of public reports or what we would say are called media reports, newspaper reports of congressional and public debates from the 19th [p.37] century, did those differ in any manner—and if so, describe it—from the types of documents involving public and congressional debates that you reviewed for your opinion?

A. Well, I don't immediately recall reading newspaper articles from the 19th century. But if there were reports of cases, no, they would be equivalent, I think, to a case reporter now.

Q. Okay. And have you had experience reviewing sort of dictionary definitions from the period of the 1860s and 1870s in your work?

A. The case I can recall where I did that was research on the background of the Chiafalo—for a potential filing of amicus brief in Chiafalo versus Cobb.

Q. So in—

A. But, I mean, I also looked at 18th-century dictionaries of the English language, like Dr. Samuel

Johnson's. I think I did that in preparation for—research I did for the piece on the electoral college and the rights of electors to decide independently. So I think I used Samuel Johnson's dictionary of the English language, which was in the 18th century, in connection with the research for that [p.38] article which—in Cardozo.

Q. So your review of—so did you review dictionary definitions for the opinion that you rendered on the Fourteenth Amendment, Section 3?

MR. MURRAY: Objection, Your Honor. No such dictionary definitions are disclosed anywhere in his report.

A. There is a definite reference to—

THE COURT: Hold on.

THE WITNESS: I'm so sorry, Your Honor.

THE COURT: Response?

MR. GESSLER: Your Honor, he was in general viewed as a rebuttal expert to Mr. Magliocca. And to the extent Professor Magliocca relied upon those, we've had Professor Delahunty review Magliocca's testimony, as he is allowed to do, and to render an opinion on that. We're not looking to go substantially outside of Professor Magliocca's report, and nor are we looking to go outside of Professor Delahunty's report if there's an objection specifically to an opinion. But I believe in his report he did mention various definitions. To the extent there is an objection about a specific, we're certainly willing to take that [p.39] up. But as a general matter, the point is that Professor Delahunty has reviewed dictionary definitions, contemporaneous, similar to any ones in this case.

THE COURT: I'm going to let him testify about the dictionary definitions that Professor Magliocca testified about.

MR. GESSLER: Okay.

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THE COURT: If he's talking about different dictionary definitions from the 18th, 19th century that haven't been disclosed, that's another story.

MR. GESSLER: That's fair, Your Honor. Okay.

THE COURT: So objection overruled.

THE WITNESS: May I ask you a question?

THE COURT: Okay. That's not normal, but what's your question?

THE WITNESS: Well, I think a lot hinges on what we mean exactly by a dictionary.

THE COURT: Oh. You can address this—

Q. (By Mr. Gessler) So Professor Delahunty, why don't I ask you a few of those questions. And feel free to ask me. We'll clear it up. [p.40] So in rendering your opinion, you—I think both you and Professor Magliocca discussed an executive order or executive statement, I should say, from President Grant?

A. Yes.

Q. And I want to be a little more concrete here.

In reviewing that executive statement, did that differ from the types of executive orders or executive statements that you've reviewed in the past and worked with from that period of history?

A. No.

MR. GESSLER: Your Honor, I renew my proffer.

MR. MURRAY: We would renew our objection.

THE COURT: Yeah. I'm not sure—he's already been endorsed as an expert in constitutional law and the application of historical documents to 19th-century statute and constitutional provisions. So I'm not sure he needs to be designated as an expert on Section 3, because I'm going to let him testify on what he did regarding Section 3. I don't think that—unlike Professor Magliocca, who has clearly, you know, spent years [p.41] studying it

and is an expert on Section 3—no, I don't think he is. But I don't think it matters because what he's done is he's looked at historical documents, which he's an expert in and is going to hopefully testify as to what his findings were using that expertise regarding Section 3.

MR. GESSLER: Your Honor, we endorse that perspective. I don't know if I could ask to have it admitted into evidence, but we endorse it, Your Honor.

Q. (By Mr. Gessler) Okay. Let's talk about the substance of your opinion, Professor. Did you listen to or review Professor Magliocca's expert testimony on Wednesday?

A. I did.

Q. Okay.

A. The live-streamed testimony? Yes, I both watched it and read the preliminary transcript of it.

Q. Okay. And—

A. In fact, if I might add, I've read his reports thereto. I've read them very closely and several times.

Q. Okay. And so are you prepared to respond to—
[p.42]

A. I am.

Q.—Professor Magliocca's analysis?

A. Yes.

Q. Okay. Let's start as a general matter. He testified that Section 3 of the Fourteenth Amendment is not limited to the events of the Civil War. What do you think of that statement?

A. I do agree with that. I think there are scholars who might dispute that, but after—and frankly, it was—when I was—when this issue of Section 3 began to come up, my attitude was, how can that possibly be? It's clearly confined to the Civil War. But as I delved more closely into the matter, it—I think the better view on—is that it's

not time-bound in that way. It's not restricted to the events of the Civil War or to the people involved in the Civil War. And I think there are three reasons in support of that. One is that the text itself of Section 3 does not, in express terms, limit its application to the Civil War. Second, there is some highly relevant congressional testimony by the framers of Section 3 [p.43] that it was meant to extend into the future. And thirdly, practice, although limited, has been to extend it, apply it to events involving people who had no role whatever in the Civil War.

THE COURT: Professor, can we take a slight pause? I want to talk to the court reporter for a second.

MR. GESSLER: Okay. You want us to take a five-minute break, Your Honor, or . . .

THE COURT: Less time.

(Pause in the proceedings.)

Q. (By Mr. Gessler) So, Professor Delahunty, I want to talk a little bit—we're just going to dive into some of the main subjects here. I want to talk about the definition of

“insurrection.” And Professor Magliocca provided a very specific definition of “insurrection” and looked at historical documents of insurrection examples or events and judicial decisions and the treatment of the law during the Civil War. Can you— what's your review of those documents tell you about the definition of insurrection?

A. Well, some of the materials that he offered are offered overly—quite broad definitions [p.44] of “insurrection.” Some others are narrower ones. So they differ. And in particular, he cites the definition of “insurrection” that is offered—was drafted by Professor Francis Lieber, who was one of President Abraham Lincoln's chief legal advisors during the Civil War. And

Lieber's definition of insurrection appears in Lincoln's General Order Number 100 to the Union Army. And Professor Magliocca says that Lieber was—I don't have his transcript before me, but in effect, the leading legal scholar of his period. And Lieber actually taught at Columbia, which I'm proud of. And in General Order Number 1 [sic], which I have studied and taught about for quite a while, Lieber says — again, I don't have the text right in front of me, but he says in effect an insurrection is a rising of the people in arms. So if you accept Lieber's definition as definitive, or at least very weighty evidence of the meaning of “insurrection,” an insurrection would have to be in arms. Insurrectionists would have to use arms. And that's, I think, inconsistent with [p.45] many, if not all, but anyway many, of the other definitions, including the case law that Professor Magliocca cites. So there's some— “contradiction” is perhaps too strong a word— tension between the accounts of insurrection that some of his sources supply, which don't require that the insurrectionists be armed and Lieber's definition.

Q. Okay. Professor Magliocca also cited to a Webster dictionary definition of “insurrection” in 1828. Do you remember that?

A. I remember that he cites it, yes. And I remember the quotation, yes.

Q. And I'll quote to you that it's a “rising against civil or political authority, the open or active opposition of a number of persons to the execution of a law in a city or state.”

And then he also cited to a John Row dictionary definition of “insurrection” as being identical to the Webster definition. What—what do you make of that interpretation? What's your interpretation?

A. Well, the Webster definition specifically refers, as you quoted, to states and [p.46] counties. Obviously, it's highly relevant, competent evidence about the meaning of "insurrection" in Section 3. But it's by no means identical, because "insurrection," as used in Section 3, must be against the Constitution of the United States. The United States is—

THE STENOGRAPHER: United States is what?

THE WITNESS: Is not—oh, I'm sorry. Is not a state or county.

Q. (By Mr. Gessler) And what's the — when you say "insurrection against the Constitution of the United States," what's the — what's the importance of that distinction?

A. I think that is really crucial because while it is certainly very helpful to know what "insurrection" was understood to mean or likely understood to mean in 18 — from 1866 to 1868, while that's certainly very useful, Professor Magliocca himself emphasizes that there is this important limiting principle which is found in the text of Section 3. It's not just any plain-vanilla insurrection. It's an insurrection against the Constitution of the United States. [p.47] And that's in the text, and it is a critical element of the offense at issue, that the insurrection be an insurrection against the Constitution of the United States. In other words, "insurrection" is not a freestanding term in Section 3. It's coupled with — by Professor Magliocca's own insistence really, it's coupled with that other phrase, "insurrection against the Constitution." So what really needs to be explicated and decided is not the sort of plain vanilla, as I called it, meaning of "insurrection," but the whole phrase, "insurrection against the Constitution of the United States." And there's no, to my knowledge, any

dictionary definition or definition in a legal dictionary of that phrase.

Q. Okay. Professor Magliocca also testified that before 1862 there was no federal crime of insurrection, and that the cases that discussed insurrection were really treason cases. And so, for example, he cited a grand jury charge from the U.S. Circuit Court in Missouri from 1861, which specifically said that “conspiracy and insurrection connected with it must be to effect something of a public nature concerning the U.S.,” and [p.48] that included, quote, “overthrowing the government” or “to nullify and totally hinder the execution of some U.S. law or the U.S. Constitution or some part thereof; or to compel its abrogation, repeal, modification or change, by a resort to violence.” What's your view on the use of that grand jury charge and the importance of that, or lack of importance—

MR. MURRAY: Your Honor—

Q. (By Mr. Gessler)—with respect to defining insurrection?

MR. MURRAY: — I'm going to object again. They've had Professor Magliocca's report in this case for about a month before they submitted the rebuttal report in this case. And the rebuttal report in this case did not discuss any of these sources.

THE COURT: I'm going to overrule the objection. I am, though, going to ask, Mr. Gessler, when you read from the—

MR. GESSLER: Be slower?

THE COURT: — be slower for the court reporter.

MR. GESSLER: I just got that. I'm sorry, Your Honor. I'll calm down and work on being [p.49] slow. My apologies.

THE COURT: You are both offending. You both are hard to understand and hard to report for the court reporter.

MR. GESSLER: I think it's just the slowness of the internet connection, Your Honor. I'm sorry. I'll work on that, Your Honor.

THE COURT: So I think you probably need to repeat the question.

Q. (By Mr. Gessler) So, Professor Delahunty, I gave you a very long quote —

A. Yes.

Q. — from a grand jury charge —

A. Yes.

Q.— from Missouri.

A.— Yes.

Q. Do you need me to repeat that or are you able to—

A. If you could give it to me in abbreviated form. I'm familiar with the — Justice Catron's discussion of the meaning of insurrection quoted by Professor Magliocca.

Q. So it says the “conspiracy and the insurrection connected with it must be to effect something of a public nature.” And it included [p.50] “overthrowing the government to nullify and totally hinder the execution of a law, Constitution, some part of it, or to compel its abrogation, repeal, modification, or change by a resort to violence.” What do you think of that use of that sort of historical document?

A. I think it's relevant to discussing the meaning of “insurrection” as understood — as that term was understood in the immediate run-up to the Civil War. I think it is helpful in that connection, especially because it comes not from a state court or a lower federal court, but from a justice of the U.S. Supreme Court.

Q. And how does that definition compare with other definitions that Professor Magliocca testified to?

A. Well, I can't remember in detail the other definitions, the framing — the phrasing. I just — it's — he says that it's relevant to understanding Section 3, and it is. And is it consistent with other definitions from roughly the middle of to late 19th century? I think it's certainly not in contradiction. But then he said Lieber — no, it's not even in contradiction with Lieber because I think at the very [p.51] end he talks about violence.

Q. So is it a more sweeping definition than some of the other definitions that you reviewed?

A. Probably.

Q. Okay.

A. I mean, “in something of a public nature” is really broad.

Q. Okay. The — Professor Magliocca also discussed the Whiskey and Fries rebellions —

A. Yeah.

Q. — as insurrections. How do they relate, in your view, to the interpretation of the meaning “insurrection against the Constitution”?

A. Well, Professor Magliocca says that they are not the kind of insurrection that is covered by Section 3. And whether that's true or not depends on how you interpret “against the Constitution” in Section 3. He offers his own interpretation. It's not a dictionary definition. It's his interpretation of what “insurrection against the Constitution” means. And he says, under his interpretation of that constitutional clause, the Whiskey and Fries rebellions are not insurrections against the [p.52] Constitution of the United States. I think that depends on the meaning of “insurrection against the United States.” And there could be a broad or narrow

reading of that constitutional language under which both insurrections were against the Constitution of the United States.

Q. And what would that reading be?

A. So Professor Magliocca offers this interpretation, that an insurrection against the Constitution of the United States is an insurrection that interferes with the execution of the Constitution. And the question becomes, well, what is the execution of the Constitution? And in substance, as I understand it. He's saying the execution of the Constitution is interference with the federal government's political branches' and judicial branch's performance of their constitutionally appointed functions, if it interferes with the discharge of their constitutional responsibilities. And he argues that certainly the events of January 6 are interference with the congressional duties assigned by the Twelfth Amendment to, at least minimally, to observe a vote count. Now, on that definition of interfering [p.53] with the execution of the Constitution, it seems to me that there could be many other events that were similarly insurrections against the Constitution, even in the sense of executing the Constitution. For example, if there is an interference with the execution of the judicial — sorry — judicial function of adjudicating cases, clearly a responsibility of the federal judiciary under Article 3, if you interfere with the execution of their constitutionally appointed judicial responsibilities, that would also — by burning down a courthouse or disrupting judicial proceedings, that would also, I guess, under that understanding of “against the Constitution,” be an insurrection against the Constitution or against the execution of the Constitution. Or take another case. The Constitution assigns to the Senate the lead role of debating and deciding on presidential

nominations to principal offices of the United States. So it's appointments to the federal judiciary. If you have a crowd disrupting the Senate's vote on a presidential nomination, that would seem to be an interference with the execution of the Constitution. In fact, you could —d I think, myself, [p.54] under that definition of “interfering with the execution of the Constitution,” that even disrupting the delivery of the mail, which was the issue in the Supreme Court's decision in the Debs case, would count as interference with the execution of the Constitution because the President has the constitutional duty to ensure that federal law is faithfully executed. So you're interfering with the President's execution of his constitutional duty to execute the postal law.

Q. And why do you say the postal service?

A. Well, because Article 1 mentions the postal service. And it's apparently, as Debs understands it, a duty of Congress to execute that power and to create and instruct the President how to administer the statute regarding the post office. So what I'm — to cut it to the chase basically, I think that under even Professor Magliocca's interpretation of “against the Constitution,” disrupting the delivery of the mail is interference with the execution of the Constitution. And you could go on and on with examples of interference with the execution of their responsibilities by the President, by the Senate, by the House, by the courts that would count as against [p.55] the Constitution, as he understands that. So what is meant to be a limiting principle is, I think, a very expansive one, unless you attach a more limited scope to the meaning of — the meaning of “against the Constitution.” On what I think is his understanding, it could — it does cover whether he denounces the Whiskey insurrection and the Fries insurrection.

Q. So that definition also includes intimidation, correct Or are there sources that talk about mere intimidation as the necessary threat for violence for insurrection?

A. I'm sorry. I don't really understand the question.

Q. Okay. Let me move to a slightly different area.

THE COURT: I'm just going to ask you a question. So as I understand it, what you're saying is, is that if you take Professor Magliocca's interpretation of what insurrection is, it's simply that it could just apply to a litany of different

THE WITNESS: Correct.

THE COURT: — things?

THE WITNESS: Yes. Many. Almost all, [p.56] if not all, interferences with the execution of the duties of the President, the Senate, the House, and the federal judiciary.

THE COURT: Okay.

THE WITNESS: It is a —

THE COURT: I assume we'll get to what he thinks the definition — what he thinks it should be.

MR. GESSLER: To the extent that's possible, yes, Your Honor, from the texts.

Q. (By Mr. Gessler) Let me ask you this: Professor Magliocca also testified that the “shall have engaged in insurrection or rebellion” language means any voluntary act in furtherance of an insurrection against the Constitution, including words of incitement. And he based this on judicial decisions and a U.S. Attorney General opinion of Attorney General Stanbery. What's your opinion on the use of Stanbery's opinion on defining what insurrection is?

A. Well, I would have three thoughts, I guess, about that part of Professor Magliocca's testimony and report. First of all, I would say it's a linguistic point. I think

“engage in insurrection” [p.57] has a more restricted meaning than he supposes. Let me give you — this is sort of — speakers of the English language, I think, would think this. If we use a case like engage in hostilities, we probably have in mind combat, not the preparatory actions that would go with engaging in hostilities. I think, to a degree, we would distinguish engaging in hostilities from engaging in incitement, let's say, to hostilities. So that's just a linguistic point. But the backdrop to the Constitution's Section 3's use of “engaging in insurrection,” part of it is the Second Confiscation Act, which I think Professor Magliocca cites, which itself distinguishes between various preparatory or accompaniments of engaging in insurrection or rebellion and engaging itself. That's the language of the Second Confiscation Act. So it — the Act distinguishes between, let's say, inciting an insurrection or rebellion versus engaging in it. Congress had that template before it — and cut it out or at least didn't include all this [p.58] other language. And in Section 3, it narrows it to engagement in insurrection or rebellion, which I think very strongly suggests that it was not covering the same class of activities as the Second Confiscation Act did. So engaging in insurrection in Section 3 has a narrower meaning than the comprehensive, sweeping account of what — of the activities associated with insurrection or rebellion that you can see listed, enumerated, in the Second Confiscation Act. I agree with Professor Magliocca that Attorney General Stanbery's two interpretations of statutes, the — in the Military Reconstruction Acts of 1867, I agree with him that the Attorney General's opinions are certainly good evidence as to the meaning of “engaging in insurrection” in Section 3. They were opinions that were written while Section 3 was being

debated and in the process of ratification, and he actually — Stanbery actually kind of has a section in the first of his opinions dealing with the statutory language of what it means to engage in insurrection. So it's contemporaneous. It's from a high officer of the executive branch. It is about a statute, but it sheds light on what [p.59] “engaging in insurrection” means for Section 3 purposes.

Q. And looking at the Stanbery opinions, what's your view on how he defined “insurrection” and its application to Article — I'm sorry — Amendment 14, Section 3.

A. So I think that Professor Magliocca under-describes what Attorney General Stanbery is writing about when —in the first of these two opinions of the Military Reconstruction Acts. In the first of them, Stanbery has a Section called something like “Engaging in insurrection and rebellion.” But I think it's actually called “Engaging in rebellion and insurrection.” So Stanbery says, okay, this is what he's going to explicate, this language in the statute. And he starts by saying that — engaging in there has — you have to distinguish between active and passive engagement, participation in rebellion. Stanbery, here, is primarily addressing what it means to engage in rebellion, not insurrection. So you have to start, Stanbery says, by distinguishing between active and passive participation. And passive participation in rebellion [p.60] doesn't count under the statute. So that's his first sort of distinction. Then he says there's a distinction to be drawn between voluntary and compulsory or involuntary participation in the rebellion. So not only does the participation have to be active, but it has to be voluntary. If you are coerced to assist the rebellion, that doesn't bring you within the meaning of the statute. So one distinction, active/passive; two, voluntary or compelled. And then he has a third distinction between

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participation in an official capacity and participation in the purely individual capacity. And he has a pretty extensive discussion, Stanbery does, of what official, voluntary, active participation in the rebellion would be. That would include things like being the so-called Confederate states' ambassador to France, okay? That clearly is not being combative, right? But then there's also a discussion of what it means to participate in the rebellion in an individual capacity. And so the statute has to be understood in one way if the charge of engaging in insurrection [p.61] is going to be charged against someone acting in an official capacity and then against someone who is charged with acting in an individual capacity. So to bring you under the statute, you — if you are acting in an individual capacity, it would seem to require different tests from acting in an official capacity. And okay. Let's talk about Professor — President Trump. One thing — if you just map on the interpretations Stanbery offers on —

MR. MURRAY: I'm going to object to any opinion as to what President Trump did or did not do as both undisclosed and outside the scope of his expertise.

THE COURT: I don't know what he was going to say, but I'm going to sustain that objection.

MR. GESSLER: Okay.

Q. (By Mr. Gessler) Let me ask you about Stanbery's definitions as well. You said he was —

THE COURT: Could we go back? I just have some questions.

MR. GESSLER: Sure.

THE COURT: So you kept referring to the statute. What was —

THE WITNESS: It's the Military [p.62] Reconstruction Act.

THE COURT: Okay. And that's what Stanbery —

THE WITNESS: Yes.

THE COURT: — was opining on?

THE WITNESS: Yes. Sometimes called the Reconstruction Act. I think that's probably the more common.

THE COURT: Okay.

Q. (By Mr. Gessler) And you said Stanbery was talking or opining about rebellion primarily?

A. Primarily, yes.

Q. Can you talk a little bit more about the differences, both in his analysis, rebellion versus insurrection, and how that applies to Section 3 of the Fourteenth Amendment?

A. Well, most of Stanbery's discussion, in the first opinion at least, is about the meaning of engaging in rebellion.

Q. And why does that matter?

A. Well, it's not directly on point as to what engaging in insurrection means under the statute. It certainly sheds light. I am not disputing that. 'm just saying it's not directly about engaging in insurrection under the statute. [p.63] So it's certainly helpful, but to cut to the chase, I'm not sure that everything that Stanbery says in connection with engaging in rebellion carries over automatically to engaging in insurrection. The statute which carries over automatically into the meaning of engaging in insurrection is Section 3. These are all steps in the process. And then if someone is charged with engaging in insurrection, it would have to be determined whether that engagement was in an official capacity or an individual capacity. So if it was applied to someone, you would have to ask whether that engagement on his or her part was in an official capacity or an individual capacity, which could be quite problematic to decide legally.

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Q. And why is that? How would Stanbery's opinion, to the extent it's possible to determine, apply to activity in an individual versus official capacity?

A. Well, this is all kind of uncharted territory. But not everything that Professor Magliocca says about Stanbery's opinion — he quotes from it quite at length. But not everything he says immediately translates into every single case. You have to decide whether the language [p.64] he quotes about engaging in rebellion in an official capacity also carries over to whether that is true of someone who engages in insurrection in an individual capacity. So you — before applying his account, Stanbery's account, you have to decide is this person acting in an individual capacity or not? Is he or she acting individually? And does that matter? Does everything Stanbery says about engaging in rebellion in an official capacity immediately carry over into such an engagement in an individual capacity? So construing Stanbery is quite difficult in itself, let alone bringing whatever he says into — about the statute into Section 3.

Q. So did Stanbery provide standards or guidance as to exactly what constitutes or what type of liability attaches for actions in an individual capacity with respect to rebellion?

A. No. I don't think he talks about — at least not in the part headed “Engagement in,” I don't think he talks about the liability to which one is exposed, no. He offers examples more than standards about how to apply the statutory term, but he doesn't discuss the liability to which you're — not on that [p.65] part — doesn't discuss the liability to which someone who is found to have engaged in insurrection is exposed.

JA1044

Q. Does he discuss exactly how to determine whether a person has engaged in rebellion when they're acting in their individual capacity?

A. He does discuss that. And I don't recall exactly the language, but if we just focused on that part of Stanbery's opinion, you'd have to make the threshold decision whether individual capacity or official capacity applies here. But he does offer some language about how you have engaged in rebellion in an individual capacity, yes. What that language is, I don't have directly in hand, but . .

Q. Okay. Now, he also — Professor Magliocca also compared the Stanbery opinions to the Worthy cases from — the Worthy case from North Carolina.

A. Right.

Q. And he said that they were — that they were — the definition for engaging in insurrection was the same in the Stanbery opinions and the Worthy case from North Carolina. What's your opinion on that?

A. Well, Stanbery is talking about a [p.66] statutory term, and the North Carolina opinion, the Worthy case, is talking about Section 3.

Q. And tell me about the Worthy case. When you say talks about Section 3, that was a North Carolina state case

—

A. Right.

Q. — correct?

A. Yes. And it's decided under a state statute that incorporates Section 3 by reference and applies it — North Carolina had operationalized the enforcement of Section 3, at least as to state officials, state offices. Not to federal offices or federal — federal officers or offices. So it's relevant to understand — I don't think it's relevant to understand what engaging in rebellion or insurrection means in the Constitution, Section 3. It's more —

Q. And why is that? Why —

A. It's really more relevant — well, it's not identical with what Stanbery offers, but it's more relevant to the question of whether Section 3 is self-executing than it is, I think, to — if it says the same thing as Stanbery, then it doesn't carry the ball further.

Q. Okay. We'll get to the holding in just [p.67] a minute. But is it your opinion that the — that the definitions with respect to engaging in rebellion differ between the Stanbery opinion and the Worthy case?

A. Not that I can think of, no.

Q. Okay.

THE WITNESS: Excuse me. May I just get a little more water?

MR. GESSLER Go ahead.

Q. (By Mr. Gessler) So you had talked a little bit about “insurrection against the Constitution,” as used in Section 3, correct?

A. Yes.

Q. Okay. What, if any — well, let me ask you this: To what extent do the historical sources allow us to create a specific definition of “insurrection against the Constitution”?

A. Well, I'm not aware of any discussion in Congress or the ratification debates about that limiting principle, against the meaning of the Constitution. I don't know of any.

Q. And so you — you've looked at Professor Magliocca's sort of approach to limiting the Constitution. [p.68] Are you able to create a definition of “insurrection against the Constitution” based on the historical documents?

A. Well, I would say this: I would look to guidance more to the remarks that Senator Jacob Howard makes

in introducing the Fourteenth Amendment to the Senate, which are — those remarks of Senator Howard are cited, I think, twice in Magliocca's report. And I don't have Senator Howard's exact language, though it appears both in Magliocca's report and mine. But Howard says something to the effect that this section of the Constitution is meant to cover actions — to sanction actions that — acts that are — that pose — I just don't have the exact language, but essentially grave — to the — threaten to — I don't — it would help me if I could have —

Q. Let's bookmark that.

A. Okay.

Q. We're going to pull up the language for you in a second.

A. Essentially — that would destroy. “Destroy” was the term Howard used. It would destroy the Constitution. So given Howard's role in the enactment — the ratification, rather, of the [p.69] Fourteenth Amendment, it would seem to me — I would start by looking at Howard's remarks and explicating the phrase, for better words, “insurrection against the Constitution.” And there would be acts that threaten — that destroy the Constitution.

MR. MURRAY: Your Honor, I'm going to object and move to strike the last answer on the grounds that his report never purported to offer any definition of “insurrection” or “rebellion against the Constitution.” This is all completely new testimony.

MR. GESSLER: Your Honor, I don't think he said that Article — I'm sorry, I keep saying “Article” — Amendment 14, Section 3, has to be 14 defined that way. So the starting point is to look at Senator Howard's

viewpoint as an analogy or basis. I don't think he said he has to — that has to be the definition.

THE COURT: Well, did he disclose his opinion on the senator's remarks?

MR. MURRAY: No, Your Honor.

MR. GESSLER: If you could give me just a few minutes, Your Honor, let me look through his report and give you a point.

THE COURT: Can we come back to it?
[p.70]

MR. GESSLER: Sure, Your Honor.

THE COURT: I think we'll probably break in the next 20 minutes, and we can revisit that.

MR. GESSLER: Okay.

Q. (By Mr. Gessler) Professor Delahunty, why — without — we won't discuss Senator Howard's remarks at the moment. But why would you start from that as a foundation, looking at the remarks of a congressional debate?

MR. MURRAY: Same objection.

THE COURT: Well, I don't think he's offering a different definition as he's — as to why he would start looking there. It would be helpful if we could see the remarks. I don't know if that's possible.

MR. GESSLER: We're pulling them up right now, Your Honor.

THE COURT: Okay.

MR. GESSLER: We may even have them. Your Honor, we're going to need to just spend a few minutes on this. If we could come back to it a little bit later.

THE COURT: Okay. I mean, in general, it's been a little difficult to follow what he's [p.71] talking about because he's talking about kind of things that we can't see. So to the extent that we can see the remarks that he's

talking about, et cetera, definitely would be helpful to the Court.

MR. GESSLER: Okay. Your Honor, may I propose a morning break? That will give us a little bit of time.

THE COURT: Sure. Why don't we just break until 10:30 and —

MR. GESSLER: Okay.

THE COURT: — and come back to it.

(Recess from 10:12 a.m. to 10:34 a.m.)

THE COURT: You may be seated. You're back on, Mr. Gessler.

MR. GESSLER: Thank you, Your Honor.

Q. (Mr. Gessler) Professor Delahunty, I've been asking you a little bit about — talking about certain case law to arrive at a definition of “insurrection.” But in your report — and I may have been going about it the wrong way in questioning you. In your report, you talk about difficulties of interpreting Section 3's offense element in defining what it means to have engaged in an insurrection. Do you remember that?

[p.72]

A. Yes.

Q. Okay. And when you say “interpreting Section 3's offense element” — what are you referring to when you say “the offense element” in Section 3?

A. Well, Section 3 has essentially four elements. One of them — it's the language towards the end of Section 3 — identifies the class of people who are subject to potential sanctions under Section 3. That, in my report, I called the

jurisdictional element. Then there's what I've called the offense element. And here I'm following, by the way, Professors Tillman and Blackman. The offense element defines what kind of conduct by the persons whose — who

is subject to Section 3 have engaged in that would trigger liability. And the offense element is the language to which you referred, having engaged in rebellion or insurrection against the Constitution. Then the third element is the disqualification element, which says from what offices the persons who were subject to the section and had committed the offense in question would be thereafter excluded. And then the fourth section is the [p.73] amnesty provision, which empowers Congress to extend amnesty either individually or collectively to those who are jurisdictionally subject to Section 3 and have been found to commit the offense element and would have been excluded from the relevant offices but for the amnesty, if Congress chose to give them one.

Q. Okay. So let's focus on the offense element, which you describe as engaged in insurrection.

A. Uh-huh.

Q. And you've looked at a number of historical sources to try and derive what that meaning is, correct?

A. Yeah.

Q. Okay. And in your report, you talk about the difficulties of arriving at a conclusion, correct?

A. Yes.

Q. Okay. Tell me about why you found it, or currently find it, very difficult to identify a — to reach a conclusion as to the offense element based on the historical sources.

A. Well, it's really this, that I'm not aware of any direct definition of what it means to engage in insurrection against the Constitution. I [p.74] don't believe there's any case law on that. Professor Magliocca proffers his interpretation of what that phrase means. And that, as I have said and testified, it is essentially to engage in interference with the — to commit insurrection against the execution of the Constitution. And that, in turn, is a

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phrase that is opaque, I would say. And really, all of the — I don't offer my own definition of what it means to engage in insurrection against the Constitution of the United States because — other than to gesture towards Senator Howard's remarks because I don't know of any really good source to interpret that. Which, I mean, is — now, my point is to underscore the difficulties a Court would have, or really anybody would have, in interpreting that phrase, which is the crucial phrase, without such guidance, especially from Congress, which could define under Section 5 powers what it means to engage in the insurrection against the Constitution of the United States. Congress hasn't enacted a statute that purports to provide us with that definition. That leads me to the conclusion that the Courts, as a [p.75] matter of Constitutional policy, should defer to Congress and not decide a case on the merits of whether or not someone had engaged in insurrection against the Constitution. There's just inadequate guidance, so far as I can tell, from relevant sources, authorities. So this is really — goes — the difficulty I experience in offering a definition — although Professor Magliocca seems more confident about it. The difficulty I experience I think should—if only for reasons of prudence, but really sort of Constitutionally inflected reasons, lead a Court to abstain from deciding what that phrase means and toss the ball over to Congress to act under Section 5.

Q. Now, Professor Delahunty, I'm looking at our Court, who I think has an inquisitorial look on her face.

MR. GESSLER: Your Honor, if you have a question, I'm certainly willing to defer for a moment.

THE COURT: I'm just trying — do you have examples of situations in which a Court has basically said, “The Constitution's too hard for me to interpret;

therefore, I'm going to let Congress tell me what it means"? [p.76] I'm just — I mean, in general, I think that's exactly the job of the Court, is to interpret the Constitution. And so I'd love to hear from you as to why you think in this instance that what I need to do is say, "It's too hard. Congress, tell me what it means."

THE WITNESS: No, I don't have case law to cite. This really — it sort of broaches the question of whether Section 5 — Section 3 is self-executing or not. It goes more to that as sort of a prudential or, as I said, constitutionally inflected, separation of powers inflected reason.

THE COURT: Okay. So it's really the self-execution —

THE WITNESS: Correct.

THE COURT: — question?

THE WITNESS: Yes.

Q. (By Mr. Gessler) Let me ask you this, Professor Delahunty: You looked at a number of — a number of sources in an attempt to reach a meaningful definition of "engage in insurrection" under Article 3 —

A. Uh-huh.

Q. correct? And you looked at the prize cases. [p.77] Do you remember that?

A. Not in that connection. But I do remember the prize cases, yes.

Q. Now, do you think the prize cases were able to give you sort of a confidence on what the meaning of "engage in insurrection" means?

A. Well, they — they — first of all, the prize cases — which is probably the most important Supreme Court case during the Civil War. The prize cases do help with distinguishing between organized rebellion, rebellion, and insurrection. So, of course, they're relevant in that

connection, in defining what “insurrection” means. It's certainly something, to a degree, less than rebellion. They're helpful in that way. But only so — only so far. I mean, it's not — it doesn't explicate because it wasn't in the Constitution at the time.

THE STENOGRAPHER: What wasn't in the Constitution?

A. The prize cases do not explicate what it means to engage in insurrection against the Constitution, because the Fourteenth Amendment hadn't been ratified. Not until July of 1868. So they're not helpful. They are [p.78] helpful in a general way in suggesting — saying that insurrection is different from a rebellion and something sort of more high grade than a riot, but something lower than a rebellion. An insurrection — I think the Court there says something like insurrections tend, in many, many circumstances, to lead to rebellion, but they don't have to amount to rebellion. So it helps in that way, sort of suggesting a gradient between rebellion, insurrection, and other kinds of disorderly conduct.

Q. (By Mr. Gessler) I'm going to ask you to stay a little bit closer to the microphone when you speak, Professor. I suffer from the same challenge here. And then you also looked at the charges — In re Grand — In re Charge to the Grand Jury, correct? There was a particular case from 1894 from the Northern District of Illinois. Do you remember that?

A. Yeah. I think I do, yes.

Q. Okay And after looking at that, were you able to have any confidence of what “engaged in insurrection against the Constitution” meant?

A. Well, I think that — no, not as to the [p.79] meaning of that precise phrase, no. It does help to understand what “insurrection” meant, at least later in the 19th century.

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Q. Okay. And then you also looked at in the case of Davis, which was a federal judicial opinion talking about how insurrection or rebellion may be committed by giving counsel to enemies or others raising insurrection. Do you remember that?

A. I don't have it before me.

Q. As a general matter?

A. Yes.

Q. And my question really goes to all of these cases that you identify. Do they give you a sense of confidence in creating a definition of what “engaging in insurrection against the Constitution” is?

A. Not really. Engaging in insurrection against the Constitution? Only minimally. They help you understand what “engage” was taken to mean — what “insurrection” was taken to mean.

Q. And even from the prize cases, the most you were able to glean is that insurrection is something more than a riot and something less than a rebellion? [p. 80]

A. Yeah. That's — yes, that's right.

Q. Okay. In your view, looking at the sources and Article — or Section 3 of the Fourteenth Amendment — and I think you've talked about this. But how does — does insurrection equate to insurrection against the Constitution?

A. No.

Q. And why is that?

A. Well, self-evidently, they're different terms. And I agree with Professor Magliocca that some limiting principle should be imported into the term “insurrection” as used in Section 3.

THE COURT: So when you — I understood your testimony before to be that the problem you have with Professor Magliocca's opinion is that he's saying

insurrection against the Constitution is essentially an insurrection against a constitutional proceeding.

THE WITNESS: Against the execution of the Constitution —

THE COURT: The execution of the Constitution. And that those words —

THE WITNESS: An example of what is and what isn't, such as an interference with the execution of the Constitution, yes.

THE COURT: Right. The words “execution [p.81] of Constitution” aren't in there. And I guess that I understand what you're saying is that you don't know what execution — what “insurrection against the Constitution” means without adding those extra words, and that's why you think that Congress needs to decide?

THE WITNESS: Yes.

THE COURT: Okay.

Q. (By Mr. Gessler) Okay. Let me mercifully move on from the subject of insurrection.

A. Okay.

Q. And I'd like to talk a little bit about the doctrine of — or the application of preemption in the enforcement of Section 3 by a state court. And do you remember opining about that in your expert report?

A. Yes. I certainly do remember. This is one of the really crucial issues in this case, and other cases. I opined my — in my report, opined that the meaning of “officer of the United States” as used in Section 3, opined about whether Section 3 is judicially enforceable, whether by state or federal courts, without some enforcement-implementing legislation from Congress. And it opined about what it means, in [p. 82] the Constitutional sense, to have engaged in insurrection against the United States —

Q. Okay.

A. and what difficulties there would be —

Q. So —

A. — without congressional guidance in defining that term.

Q. Okay. So we've covered the difficulties of defining “insurrection.” Let's talk about — let me ask you — we've got two more subjects I'd like to talk about. One is to whom Section 3 applies and whether it's enforceable in state or federal judicial courts. Let's talk about the enforcement provision, if we may, okay? And there were several instances of —several actions that Professor Magliocca believed constituted enforcement. Obviously you have a different viewpoint. Why do you believe that —

THE COURT: Can we start just with what exactly — what provision — what clause in the — in that — in the article he is referring to as the enforcement.

MR. GESSLER: Okay.

[p.83]

Q. (By Mr. Gessler) What's the basis for your view that Section 3 is not enforceable by state or federal courts?

A. Well, it could be enforceable if there were appropriate legislation under Section 5. But just standing alone, I'm not really talking about a clause because —

Q. Let's stay a little closer to the microphone. You're being a professor and moving about to keep the audience engaged, but I'm going to ask you to be glued to that microphone, please.

A. The question is how is Section 3 to be enforced. Can it be enforced by a Court, state or federal, independent of any action by Congress or not by some enforcement mechanism that Congress provides necessary for the enforcement of Section 3? Put it in — simply: Can I just show up at a courthouse one day and ask for Section 3 to

be enforced, or does it have to be some implementing mechanism to enforce Section 3 that Congress has provided?

Q. And what's the basis for your opinion that — that as currently, based on the historical documents, that the Section 3 — I'm sorry — Section 3 is not enforceable absent action from [p.84] Congress?

A. Well, my reasoning is this: First of all, as a general matter, the Constitution should not be understood to provide enforcement actions for its provisions directly, sort of taking the naked Section 3 or a case — there's two cases from the Supreme Court. The Supremacy Clause, which declares that federal law is — the Constitution, statutes, acts of Congress, and treaties — are supreme law. So in these two Supreme Court cases, the latter of which was from 2015, the Court ruled that the Supremacy Clause was not directly enforceable.

MR. MURRAY: And, Your Honor, I'm going to object. To the extent he wants to talk about historical sources, that's one thing, but to the extent that he wants to talk about his interpretation of contemporary judicial precedent, I don't think that's proper here.

MR. GESSLER: I think we'll be able to tie it up, but I'm certainly happy to start with a different approach, Your Honor.

THE COURT: Okay. Because I tend to agree with Mr. Murray. So I'm going to sustain that objection.

MR. GESSLER: Okay.

[p.85]

Q. (By Mr. Gessler) Looking at the historical record, I believe that you referred at one point in your report to the — and as Professor Magliocca — the Griffin's case?

A. Yeah.

Q. Could you explain how that's relevant to the self- or non-self-executing nature of the Fourteenth Amendment, Section 3?

A. Of Section 3? Well, the Griffin's case is decided not so long after the Fourteenth Amendment, including Section 3, is ratified. And I think it helps us to understand what, in the mind of the framers and ratifiers and voters, generally Section 3 was understood to mean. And it's an opinion by the Chief Justice of the United States, Samuel [sic] Chase, that addresses the question of whether Section 3 can be directly enforceable without implementing legislation or whether implementing legislation is required. That's one of the three bases of Chase's opinion. And Chase was not only the Chief — it's not an opinion of the Supreme Court. It's an opinion by Justice — Chief Justice Chase writing cert. But it's soon after the Section 3 is ratified and put into [p.86] the Constitution. And it's by someone who was not only Chief Justice but a very fine lawyer and a politician and potential candidate for the presidency at the time. And it's soon — it's soon after the ratification of Section 3. So I think it's weighty authority as to what Section 3 does and does not do in the absence of action by Congress under Section 5, the enforcement provision of the Fourteenth Amendment. And Chase holds that — it's one of his three holdings — that Section 3 is not directly judicially enforceable. And that strikes me as very powerful evidence. I'm not saying it's a binding precedent. For one thing, it's by a Justice of the Supreme Court alone. It's not — it's not a decision of the Supreme Court. But it strikes me as very powerful evidence as to the original public understanding of what Section 3 did. And there was consideration given in Congress. Even before Chase's opinion in Griffin's case, there was consideration about the

need to enforce Section 3 by acting under Section 5. And that ripened into the enactment in 1870, after Chase's opinion, the enactment of the Enforcement Act of 1870. So Congress sent the signal from Chase [p.87] that Section 3 needed enforcement. There were other reasons even before Chase to think that it needed enforcement. And that is Stevens, who was the departing Speaker of the House, told the House it needed to step up to the plate and enforce — provide legislative mechanisms to enforce Section 3. But it is relevant to the question before the Court here about whether it can, without congressional action, decide whether to reach the merits or whether it needs some congressional action or does it. This applies to both state and federal courts. Now, the Worthy case, I think you mentioned that, and it's certainly pretty prominent in Professor Magliocca's testimony. The Worthy case is a North Carolina case which is decided before Griffin's case. It doesn't take account of it. Certainly, doesn't undercut Chase's opinion, because it's — the Worthy case is decided in January of 1869. Chase's opinion comes down in late July of 1869. If I were a judge in North Carolina and knew of it and studied Chase's opinion in Griffin's case, I would have discussed it in my opinion in Worthy. Worthy came six months after Griffin's case. I would have certainly taken account, positively or [p.88] negatively, but I would have taken account of what the Chief Justice of the United States had to say in Griffin.

Q. What was the Worthy case about? Was that actually a direct interpretation of the U.S. Constitution?

A. Well, as I read it, the court — the North Carolina court is acting under a North Carolina statute that incorporates and makes state law qualifications based on Section 3. It's not direct enforcement of Section 3, per se. It's enforcement of a state statute that takes Section 3,

incorporates it, and applies it to state officials and state offices. Which, of course, a state can do. A state can rule on the qualifications or disabilities or whatever of its own state government officials. That, it can do. And I think that's what North Carolina did, or was attempting to do. So as to whether globally Section 3, per se, is self-enforcing, I don't think Worthy has much — or has any real relevance.

Q. Okay.

A. If you parse out that case closely, I think you see it's acting under North Carolina [p.89] statute.

Q. Now, shortly after Chief Justice Chase issued a decision in the Griffin's case with respect to the self-executing nature, he also ruled in another case, a second Griffin's case that was — I believe Professor Magliocca and others have stated that it contradicts his earlier viewpoint on — or his earlier ruling on self-execution. Can you address that, please?

A. Yeah. The argument that Professor Magliocca and others make is that Chase took inconsistent positions on the enforceability of Section 3 in the Jefferson Davis case from what he said in Griffin's case. First of all, I would say it's not absolutely clear what Chase said, or wrote, in the Jefferson Davis case. That's a dispute among scholars. But I'm going to assume that he was of the view and — that in the Jefferson Davis case, Section 3 was not self-executing. So let's posit that there was a contradiction between Chase in Jefferson Davis and Chase in Griffin. Let's posit that. I don't think that matters, because judges, professors can change their minds, and maybe he did. [p.90] But the real thing to look at is the quality of his judicial reasoning in Griffin's case. We don't really have an account of any judicial reasoning he may or may not have had in Jefferson Davis' case. So we do have this leading

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authority in Griffin's case by a Chief Justice. If he's trapped in some kind of contradiction, does that really matter? Look at the quality of the reasoning in Griffin's case. But in any event, even if we do catch Chase in some kind of opposition, contradiction, I think — even if we think we have, I would say that the two cases are reconcilable because Jefferson Davis' legal counsel appeared to have been threatening to use Section 3 as a defense in Jefferson Davis's — it never happened, but in his forthcoming trial on violating the federal treason statute. So that would have been a defensive use of Section 3. And maybe Section 3 can be used defensively against a charge of criminal treason. I'm kind of — I'm just not sure about that. We don't have any ruling because what happened with Jefferson Davis was that President Johnson pardoned him, and that short-circuited any trial. It just didn't occur. It never happened. Pardoned him from the charge of [p.91] having committed the federal crime of treason. So Jefferson Davis's lawyers were — said that they were planning to use Section 3 as a shield, defensively, to — they sort of thought that Section 3 had displaced or overcome the treason statute, in his respect. Whereas in Griffin, Chase was really saying that Section 3 could not independently, directly, be used as a sword to — on which to base a claim to affirmative relief. And the plaintiff, who was a — he was a prisoner — was seeking federal habeas relief, so affirmative relief, based on Section 3. That would be using Section 3 as a sword. And Chase reasoned it's not self-executing in that sense. And that opinion, Chase's opinion in Griffin's case, was cited affirmatively. And even the sword/shield distinction in it was approved of in a 1979 Fourth Circuit opinion. So Chase's view that the way in which Section 3 was non-self-executing, Chase's view was considered good law until —

at least until 1979. I think it's good law, but so what? But certainly in the minds of federal courts, it was good law as late as 1979. That case is called Coe (phonetic) versus [p.92] City of Covington.

Q. Okay. Did you come across any historical documents or analysis that leads you to conclude that Congress embraced Chase's interpretation of —

A. I think so.

Q. — Section 3?

A. The question of whether various iterations of Section 3 would be self-enforcing or not came before Congress actually pretty early in the process of ratifying Section 3. That is, Stevens, who was kind of the leader in the House of the radical Republicans, said the version of Section 3 he preferred would need congressional implementation. And he reiterated that when leaving Congress in 1868. So there's that. But after Chase — now, to my knowledge, there's no mention explicitly of Griffin in Congress after it came down, but I think it's reasonably safe assume that Congress, after 1869, was aware of an opinion of the Chief Justice of the United States. Much more likely that they knew of In re — Griffin's case than Worthy's case. And after that, Congress decided, yes, we will enact implementing legislation that is — kind [p.93] of reinforces Chase's view. Because it provided in the Enforcement Act of 1870 a mechanism by which a federal district attorney could, in certain cases, bring Section 3 cases against — in court against certain government officials. They excepted senators and members of the House, but against another class of officials, the federal district attorney was authorized by this federal statute to bring enforcement actions in federal courts, federal courts alone. So that was how, as I see it, Congress responded to Chase, even though, to my knowledge, it

didn't explicitly — nobody in the debates that I've seen explicitly refer to Griffin.

Q. So your view is that congressional enactment — the Congress enacted — implemented legislation for Section 3?

A. Pretty soon after, yeah.

Q. And so sort of based on your approach to this historical analysis, your view is that they knew about the Griffin's case or were likely to have known about it?

A. Yes.

Q. And why is that?

A. Well, it's an opinion by the Chief [p.94] Justice.

Q. Okay.

THE COURT: So under this theory, essentially, wouldn't it put the question of whether Fourteenth — whether this provision of the Fourteenth Amendment is even — exists, right? I mean, on Congress — so, I mean, it's essentially giving Congress the power to decide what amendments to apply or not apply?

THE WITNESS: Well, if they're going to be applied

—

MR. GESSLER: Could you please move —

THE WITNESS: Sorry. I'm so sorry. If they're going to apply the sword to seek affirmative relief. I think this action — it doesn't originate with — this congressional interest — doesn't originate with Griffin's case, but it maybe is prompted by Griffin's case. And it, I think, corroborates or reinforces Chase's conclusion that Section 3 is not self-executing in that way.

THE COURT: My question was just a little bit different —

THE WITNESS: Okay.

THE COURT: — which is, if the only way to enforce a constitutional provision such as this is [p.95] through

legislation, then essentially it's leaving — isn't it leaving to Congress to decide whether or not the prohibition exists at all?

THE WITNESS: Yes. I mean, unless you try to implement it in the way North Carolina did, through a state statute that incorporates Section 3 by reference. But direct — because I want to — I really want to be responsive to your question, but —

THE COURT: No, that was —

THE WITNESS: Yes. And, in fact, I think Stevens, at the time, basically was saying — I mean, even earlier than Chase — Stevens, Thaddeus Stevens, was saying, “Hey, Section 3 is a dead letter.” It's a dead letter unless we provide some enforcement mechanism. And, you know, generally speaking, Congress at the time wanted to take charge of the Reconstruction program, and so I think people like Stevens were saying we want to decide how and when and whether — and whether to enforce Section 3 or leave it to be a dead letter. Obviously, Stevens thought that that was a very poor idea, but that's what he was saying. He was warning his colleagues, “We can't let this stay a dead letter.” And so in the Enforcement Act of 1870, [p.96] they basically said, “We're going to leave it a dead letter, at least for now, as applying to people like us, members of Congress. But we're going to make it a live letter when applied to another group of people who aren't in Congress.” There was that threat, that it would be a dead letter and —

THE COURT: And your —

THE WITNESS: — not judicially enforceable.

THE COURT: And your opinion is today it's a dead letter? It's essentially —

THE WITNESS: No, no, no, no, no. My opinion is that it is not judicially enforceable absent either in cooperation

as applied to state officials, which was what North Carolina did, or it's not — it's not enforceable offensively without an act of Congress —

THE COURT: So —

THE WITNESS: — without implementing legislation.

THE COURT: So if Colorado had a statute that adopted Section 3 of the Fourteenth Amendment, is your opinion that then it would be enforceable?

THE WITNESS: It would be enforceable in [p.97] Colorado as applied to state officials, candidates, state offices. Outside of that, I think it's not applicable by state of — by Colorado.

THE COURT: So at the federal level, your opinion is that Section 3 of the Fourteenth Amendment is a dead letter, essentially a nonexistent constitutional provision, because there's no way to enforce it?

THE WITNESS: Well, no, I don't think it's a total dead letter. We don't know whether it could have been used defensively, as Jefferson Davis tried to do, or not. But it — like most of — like much of the Fourteenth Amendment, it requires congressional action to provide the course of action in a — in a court. It's just —

THE COURT: And —

THE WITNESS: I —

THE COURT: Go ahead.

THE WITNESS: So —

THE COURT: I'm just making sure I understand the testimony.

MR. GESSLER: Professor Delahunty, I'm going to ask you to wait until the sirens go by.

THE WITNESS: Oh, okay.

[p.98]

MR. GESSLER: That's one of the unique characteristics of this courtroom.

THE WITNESS: May I proceed?

THE COURT: Yes.

THE WITNESS: So the baseline for understanding the Constitution globally is set by the Supreme Court in these Supremacy Clause cases that I mentioned earlier. That's the default position. The Constitution generally, globally, whether it's Section 3 or the Supremacy Clause, the Constitution is not self-enforcing in the relevant sense. And the Court, in the latter of these two cases, the Armstrong case, explains why the Constitution is not automatically self-enforcing, why it needs guidance. And that is because Congress has to set the policy of the United States. And it can decide whether and how far to enforce constitutional provisions and whether or not — not to. That's the general assumption. The Constitution, as a general matter, is not self-enforcing. So that's the Armstrong case.

THE COURT: Okay.

MR. GESSLER: Your Honor, may I continue, or do you have —

[p.99]

THE COURT: No, of course. I'm sorry to interrupt.

Q. (By Mr. Gessler) So let me — let me ask you about historical examples of Congress refusing to seat members for, you know, what they view as treasonous or rebellious or types of behavior that would fall under the ambit of Section 3. Are those examples of congressional enforcement of Section 3?

A. Well, I don't think they are, because, if I recollect that part of Professor Magliocca's report, these two exclusions occurred before Section 3 was ratified. So in that way, they're not. Now, Congress — well, Congress

has the power to exclude members-elect, and that power is a limited one under Powell versus McCormack. But maybe in this relevant period, close to ratification of Section 3, Congress took a broad view of its powers to exclude members-elect and acted under the provisions in Article 1 rather than the Fourteenth Amendment, enabling it to exclude members-elect —

Q. Okay.

A. — for a good cause. Now, that's been tightened, the exclusionary powers of Congress. We don't know — the [p.100] Supreme Court in Powell versus McCormack specifically withheld opining on the question of whether Section 3 is a disqualification and a basis for congressional exclusion. They withheld that judgment.

Q. Okay. Let me —

MR. GESSLER: Excuse me. One moment, Your Honor. I just need to look at something.

Q. (By Mr. Gessler) Let me move on to a — I'm just checking — double-checking my notes here. Were you able to identify any instances in the historical record of your view where Section 3 was enforced by state officials and state courts, not a — not a state incorporation in a state statute of Section 3 standards, but Section 3 itself directly enforced by state courts?

A. No.

Q. Okay. Let's move on to the third item that you had discussed in your testimony — in your report, in your opinion, with respect to an officer of the United States. Although, before we move there, is there anything else that serves as the basis for your opinion that Section 3 is not self-executing?

A. Well, I've given the basic reasons, including the Fourth Circuit's reference to reliance [p.101] on Chase and application of less — the framework of Chase to the

case before it, which was wrongful discharge acts based on an assumed cause of action directly under the Fourteenth Amendment.

Q. Okay. Let's talk about the phrase "officer of the United States."

A. Well — I'm sorry.

Q. Let me ask a question —

A. Yes.

Q. and then we'll head there. So what — what's your response or your opinion on Professor Magliocca's conclusions that an officer — the phrase "officer of the United States," as used in Section 3, includes the President and Vice President of the United States?

A. Well, I disagree with that conclusion. And the more I looked into that question, the more I was persuaded that he is really wrong. I think that that term is, in essence, a term of art and has a specialized meaning. And this brings me back to the question on whether I had consulted legal dictionaries, like — dictionaries, dictionaries like Noah Webster, on the meaning of "insurrection." There is a legal concordance. Now, is [p.102] that a dictionary? It operates — it looks like a dictionary. It's from 1883, I think by John Lawler [sic]. And it offers legal — legal definitions of various terms, including the term "officer." And it cites supporting case law for its definition. That definition of "officer" has a separate, compartmentalized understanding, definition, of "officer of the United States," okay? Now, this is 1883. It's later than the ratification of Section 3. But it's not too long after the conclusion of the Reconstruction period which is commonly dated to 1876, the election of President Hayes. And so I think it's fair to say that "officer of the United States" was understood by the legal community, the kind of people who would have read this concordance, looked

up the definitions it offers. I think it's fair to say that “officer of the United States” was understood to be a special term needing separate definition from “officer” generally.

Q. And so what — what sources — other sources did you look to define what “officer of the United States” means?

A. Well, there is the language, the text of the Constitution itself. And then there are a long [p.103] variety of Supreme Court opinions, going up to a fairly recent one by Chief Justice John Roberts, defining what “officer of the United States” means for purposes of the Appointments Clause in Section 2. Some of these Appointments Clause cases are roughly around the time of the ratification of Section 3, and they include Supreme Court — sorry — lower court federal cases about the definition of the term “officer of the United States.” And, of course, it — or close — very close cognates to it appear in the Constitution — in the text of the Constitution itself. And so far as possible, it wants to construe these constitutional uses of the term “officer of the United States” to be consistent, to be the same. So the text of the Constitution uses the term in several contexts. And the meaning should, by ordinary rules of construction, be consistent from one such provision to the next. So I think both the text of the Constitution — especially if you assume this rule of consistent meaning and different uses, the text of the Constitution and the Supreme Court case law support the view — strongly support the view that, you know, the term “officer of the United States” means the same [p.104] thing in Section 3 as it means under the Appointments Clause. That — the Appointments Clause is kind of the anchorage, if I may speak that way, of interpreting the meaning of this phrase, “officer of the

United States,” elsewhere in the Constitution, outside the Appointments Clause, including Section 3.

Q. And why is it considered the anchorage?

A. Well, because of the principle — because the case law, Supreme Court cases. Some of it very recent. But also because if the term is to be used in a consistent way through the text of the Constitution, then it's got to mean elsewhere what it means under the Appointments Clause.

Q. Now, did you also look at the Impeachment Clause and the drafting documents involving the drafting of the Impeachment Clause as part of your opinion?

A. I don't know that I looked directly — mean, I didn't look closely anyway at the — the document. I — other than it's cited in court opinions, I don't think I looked at the original pre-17 — pre-1788 documents, no. Did I look at the case law? Yes. And the case law — sorry — well, on the — I did consult [p.105] secondary sources about the process of drafting the impeachment clauses. And the secondary sources show, I think, that, as used in those clauses, the office — “officer of the United States” had a meaning that was designed to exclude the President. The President — there's separate rules about presidential impeachments from impeachments of lower, executive-level officials and federal judicial officials. There's a separate treatment of those officials in the impeachment clause — clauses.

Q. Okay. Let me — you also talked a bit about the — with respect to the jurisdictional language of Section 3 involving the Oath Clause — I'm sorry. We've talked about that in Article 6. Are there any other documents or bases of your opinion that “officer of the United States” includes — or I'm sorry – excludes the President and Vice President?

JA1070

A. Well, I think the language of — that the Constitution uses for prescribing an Article 6 oath is strikingly different from the language the Constitution uses in prescribing a quite separate presidential oath in Section — in Article 2 of the Constitution. There are two oath clauses, an Article 6 [p.106] one and an Article 2, okay? And the Section 3 of the Fourteenth Amendment echos the oath language of Article 6, where those who are subject to it would have to take an oath to support — support — the Constitution. If you go back to Section 3 from the Oath Clause in Section 6, it appears quite obvious to me that they were talking about the class of people who was — who had to take the Article 6 oath, not the people who were talking — that they didn't mean to include the Article 2 Oath Clause. I think that's — now, is there — as Professor Magliocca says, that —and he cites a grand jury charge from the 19th century that allows for some play in the joints as to what the — what it means to take an oath to support the Constitution. There can be — there is, historical sources say, some play in the joints, some elasticity. But so what? That doesn't assimilate the Article 6 language where the President has to swear to preserve, protect, and whatever else it says, the Constitution. You can't just assimilate the language of the Article 2 Oath Clause into the language of the Article 6 Oath Clause. That's beyond play in the [p.107] joints. It's a separate language about how the President — what the President's constitutional responsibilities are.

Q. Now, how do you respond — and I believe Professor Magliocca said, Look, an oath to protect and defend is essentially an oath to support, so they're effectively the same thing.

A. No, I think that's stretching the language much too far. I mean, people who draft constitutional language have

JA1071

to be very, very careful about the terms they use, especially if those terms are used elsewhere in the text of the Constitution. So I think he's going way too far. I once, at OLC, was asked to draft an amendment to the Constitution, and we gave up in the end, it was so hard.

Q. And what's the basis for your opinion that people who draft the — draft constitutional provisions are very careful about the language they use?

A. What's the basis for my opinion?

Q. Yes. And if you could —

A. Oh, sorry.

Q. — explain to me the basis in the microphone, that would be great.

[p.108]

A. Yes. Well, look, there's a principle that Professor Akhil Amar expresses at length in the article called, I think, “Intertextuality” or “Intratextuality,” where he shows that you should, if you are asked to interpret the same term in different occurrences in the Constitution in the same consistent way.

MR. MURRAY: and, Your Honor, I'm just going to object to the extent we're talking about canons of construction among modern scholars as opposed to historical sources.

THE COURT: Sustained.

MR. GESSLER: Okay.

Q. (By Mr. Gessler) So let me ask you did — as a matter of historical analysis and knowledge, did the people who drafted Amendment did they take care about the language they used and understand when they used language that mimics other language or was different than other language?

A. Well —

Q. Let me try rephrasing.

A. — the drafting of Section —

THE COURT: Why don't you re-ask it.

MR. GESSLER: That was a terrible question, I was about to say. [p.109]

THE COURT: I'm going to sustain your own objection to your question.

MR. GESSLER: No, I'm not objecting to my question. I'm simply withdrawing it.

Q. (By Mr. Gessler) So in using the term “officer of the United States” or using an oath to support, versus a different type of oath, the care and usage of language, did the framers of the Fourteenth Amendment pay conscious attention to the very specific words they were using and how that did or did not reflect other usage in other parts of the Constitution?

A. Well, the initiative to draft a new amendment to the Constitution came very early after the Civil War, because it was considered generally, widely that there was need to bring the Constitution up to date. And in particular, a need to get rid of Dred Scott and its holding on citizenship. So the Congress very, very early in its term set out a 15-member joint committee, including members of the House and Senate, to do exactly that. They included some very fine lawyers and very thoughtful people, and the committee considered several draft versions of what later matures into the Fourteenth Amendment, including Section 3. And those [p.110] proposals, which ripened over months by many members of both houses, was sent to the House and Senate for consideration, again by very able lawyers. And do I have proof that somebody sat down one day in the course of these deliberations and said, “We've got to make sure that everything clicks into place”? No? Do I make the assumption based on the care and length of the deliberations that the special — the Select

Committee and houses gave, and the attention that was given to it to determine exactly who was covered, whose jurisdictions were subject? Do I make the assumption that that was given careful consideration to bring that into line with the rest of the Constitution or else depart from the standard meaning? Yes. That is an assumption I would make.

MR. GESSLER: I have no further questions.

Your Honor, if you have any further questions, we'd certainly appreciate the discourse that you may have.

THE COURT: I was just wondering. Professor Magliocca, he showed us some discussion about the enactment of Section 3 of the Fourteenth [p.111] Amendment in which one of the senators stated, you know, "Don't we want to make sure that this applies to the President?" And then somebody responded and said, "Well, it applies in the kind of catchall phrase." And then the gentleman says, "Oh, yeah, I see you're right." So what do you — how do you — how do you — how does that discourse which —

THE WITNESS: That —

THE COURT: — impact your opinion in this?

THE WITNESS: That's Senate colloquy between Senator Reverdy Johnson of Maryland and Senator — I can never remember whether it's Morrill Lot or Lot Morrill — I think it's Morrill Lot of Maine. That colloquy concerns the disqualification clause of Section 3, not the jurisdictional clause. So it is relevant to interpreting from what offices a covered person who has committed the relevant offense will be excluded. That's the start of the language in Section 3. But it doesn't go to the coverage of — the jurisdictional coverage of Section 3. You can't just map on Section — the leading language of [p.112] Section

JA1074

3 about from what offices shall this person be excluded onto who is covered by Section 3.

THE COURT: Okay.

THE WITNESS: It goes more to the — whether the President, the presidency as an office, is included in Section 3 than it goes to the question whether the President is or is not an officer of the United States. So I don't think it's relevant, frankly —

THE COURT: Okay.

THE WITNESS: — to the interpretation of the judicial — the jurisdictional aspect of Section 3.

THE COURT: Thank you. I appreciate that.

MR. GESSLER: Your Honor, we have no further questions. And with that, we will release the witness to opposing counsel for cross. Although I note it's about 11:30.

THE COURT: Yeah. So let's talk for a second about timing. I know we were planning on having Mr. Heaphy at 1:00. Is that a hard time, or does Mr. Heaphy have some flexibility in his schedule?

MR. MURRAY: Well, Mr. Grimsley can talk [p.113] about Mr. Heaphy's schedule.

MR. GRIMSLEY: Your Honor, that's a pretty hard time for him. He teaches class in the evening. And he's on the East Coast, so that's 3:00 his time. So I think it would be fine with us to take him out of order. And as much as I don't want to interrupt the cross-examination, I think it would make sense to do so.

THE COURT: And I guess the question for you, Professor Delahunty, is: Are you available to finish your cross-examination after we take this other witness? Are you available today?

THE WITNESS: Today, yes.

JA1075

THE COURT: Okay. It would be today. It just — we may go till noon and then break for lunch, do Mr. Heaphy, and come back to you sometime later in the afternoon. Is that okay with you?

THE WITNESS: Yes.

THE COURT: Okay. So let's do about a half hour of cross-examination. And if you aren't finished, we'll finish it after Mr. Heaphy.

MR. MURRAY: Yes, Your Honor. Thank you. Let me just make sure we've got — we have the screens here. [p.114] It looks like we're on this one, but not this one.

THE COURT: You may proceed.

CROSS-EXAMINATION

BY MR. MURRAY:

Q. Good morning, Mr. Delahunty. You're not claiming to be an expert in the history of Section 3 of the Fourteenth Amendment —

A. No.

Q. — are you? And certainly Section 3 of the Fourteenth Amendment is not the main focus of your scholarly work, correct?

A. That's true. It has been for very few academics, until recently.

Q. I want to look briefly at some of the things that you have published academic literature on. This is Petitioners' Exhibit 315. Is this your latest CV?

A. Yes. I think it is. I did ask counsel to submit a slightly updated CV.

Q. Yes. And this is the one we received —

A. Yes.

Q. — I think on Wednesday of this week.

[p.115]

A. Okay.

JA1076

Q. On page 3 of your CV, we have some articles and book chapters here, and one of those is a book chapter “Deconstructing the Deep State” —

A. Yes.

Q. — in the book “Up From Conservatism.”

A. Yes.

Q. Do you see that?

A. That's the title. Yes.

Q. And you've also written, for example, “The Major questions Doctrine and the Administrative State”?

A. Yes.

Q. You mentioned some publications on Shakespeare. Is this one of them here?

A. Yes.

Q. And at the bottom, there's another one about Shakespeare's “King Henry” and Just War; is that right?

A. Yes.

Q. You have a lot of publications on foreign affairs and international law, such as “Toward a Concert of Asia?” and “The Crimean Crisis,” and “The Use of Weaponized Drones”; is that right?

[p.116]

A. Well, the first one was accepted for publication, and then I think this publication by the University — by a journal at the University of Pennsylvania was never actually published. It wasn't rejected; I think they just closed down. But, yes, in the — in that sense, it was —

Q. But —

A. rejected for publication, yes.

Q. But — and those were things you wrote?

A. Well, it never got published. I don't know exactly what you mean by it's a big zero, but . . .

Q. Do you mind just speaking a little bit closer —

A. Oh, yes.

JA1077

Q. — to the microphone? Thank you.

A. I mean, I think I gave full disclosure. It was accepted for publication but was not published.

Q. And nothing —

A. Does that make it a big zero? I don't understand.

Q. No. I'm sorry. I may have misspoke. But let me ask you another question. Nothing on this page of your CV relates [p.117] at all to Section 3 of the Fourteenth Amendment —

A. No.

Q. — is that right?

A. That's certainly true.

Q. And I'm not going to go through every item in your CV, but just on the next page we do have some additional articles on things like international law, the laws of war, The Bush Doctrine, Latin America, things like that, correct?

A. Yes.

Q. And, again, there's nothing on this page, no publications, that relate to Section 3 of the Fourteenth Amendment?

A. No. No.

Q. On the next page of your CV, once again there's articles on international relations, on “The Kosovo Crisis,” on “Why American and European Attitudes Towards International Law Differ,” on “Against Foreign Law,” and things like that, correct?

A. Yes.

Q. And, again, on —

A. Well, if I may say, the piece about “Against Foreign Law” is about constitutional adjudication and whether foreign law should be imported into the interpretation of constitutional [p.118] clauses.

JA1078

Q. Understood. And in your article "Against Foreign Law," you weren't discussing Section 3 of the —

A. No, no, no.

THE STENOGRAPHER: If you can please wait until the end of the question for me.

THE COURT: Yeah. So the whole nature cross-examination is that they're usually yes-or-no answers.

THE WITNESS: Okay.

THE COURT: And you kind of know where he's going

—

THE WITNESS: Okay. Yes.

THE COURT: — you're tempted to answer before he finishes. But you've got to wait, just for the court record, okay?

THE WITNESS: Okay.

Q. (By Mr. Murray) And if we go to the next page of your CV, we have a few more articles on things like the Geneva Convention and the President's constitutional authority to conduct military operations and foreign affairs matters; is that correct?

A. Yes.

[p.119]

Q. You've also written on philosophy. For example, you have an article about Descartes, correct?

A. Yes.

Q. And you've written a book on the philosopher Baruch Spinoza?

A. Yes.

Q. But you've never written a book with a central focus on the history of the Fourteenth Amendment —

A. No.

Q. — have you?

A. No.

JA1079

Q. These days you write a lot of political commentary; is that right?

A. Yes.

Q. For example, you write articles and op-eds in Fox News and the National Review and The Federalist?

A. Yes.

Q. For example, you wrote an article with John Yoo entitled "Pushing Back on Cancel Culture." Do you see that?

A. Yes.

Q. And then on the next page, you have a [p.120] number of articles about China and COVID, such as "How to Make China Pay for COVID-19" correct?

A. Yes.

Q. And if we go a few pages down the line, there's articles about things like the South Korean election, the Persian Gambit, and Brexit, correct?

A. Yes.

Q. Do you remember writing an article in The Federalist this summer about why, in your view, Democrats can't ditch Biden?

A. Yes.

Q. In that article, you claimed that Biden was suffering from what you called embarrassingly obvious cognitive decline; is that right?

A. Yes.

Q. In that article, you said that President Biden is "surrounded by the stench of corruption" and you cited evidence from "The Hunter Biden laptop." Do you remember that?

A. Yes.

Q. In that article you also discuss "the pouch of cocaine found in Biden's White House." Do you remember that?

A. Yes.

JA1080

Q. And in that article you referred to the [p.121] Democrats and their deep-state enforcers in the FBI and CIA. Do you recall that —

A. Yes.

Q. — as well? You've never written a peer-reviewed article with a primary focus on the history of the Fourteenth Amendment; is that right?

A. That's correct.

Q. You've never published a peer-reviewed article about Section 3 of the Fourteenth Amendment, correct?

A. No, I have not.

Q. Now, you have published one article talking about Section 3; is that right?

A. Yes. An op-ed.

Q. That was an op-ed in The Federalist in August of this year?

A. That's right.

Q. You'll agree with me that your op-ed in The Federalist was not a work of historical scholarship, right?

A. That's right.

Q. It doesn't cite very many historical primary sources?

[p.122]

A. No.

Q. You've never given expert testimony before, correct?

A. Correct.

Q. I want to ask you a few questions about historical methodology. When you're doing historical work, I think you said on direct that you look at primary sources, correct?

A. Yes.

JA1081

Q. And it's always better to go back and look at the original primary sources than it is to take some secondary source's word for what those primary sources say?

A. That's correct.

Q. Were any of the sources that you discussed on direct examination sources that were uncovered through your own original archival research?

A. No.

Q. In your report, you said that you gave a draft of your report to Professors Blackman and Tillman. Do you recall that?

A. That's right.

Q. And you said that you gave Professors [p.123] Blackman and Tillman a draft of your report because they have "written extensively on the subjects discussed in my report," right?

A. Yes.

Q. Unlike you, Blackman and Tillman have written extensively on the subject of whether the President is an officer on the United States under Section 3 of the Fourteenth Amendment?

A. That is correct.

Q. But you know that not all scholars agree with that view, right?

A. I do.

Q. You know that Professors William Baude and Michael Paulsen disagree with that view?

A. I certainly do.

Q. Did you ever ask Professors Baude or Paulsen to comment on your draft report?

A. No.

Q. You know that Mark Graber disagrees with the Blackman and Tillman view with the presidency — that the President is not an officer of the United States, right?

JA1082

A. Well, I haven't read the Graber piece, but I assume that he is in agreement – or disagreement, rather, with Tillman and Blackman.

[p.124]

Q. You haven't read Mark Graber's piece discussing the history of Section 3 of the Fourteenth Amendment?

A. No.

Q. And so you never asked Mark Graber to comment on your draft report either?

A. No.

Q. But did you ever give a draft of your report to John Vlahoplus?

A. No.

Q. Do you know who that is?

A. Yes. I've seen references to his recent work.

Q. He also wrote an entire article responding to the Blackman and Tillman position that the President is not an officer under Section 3, right?

A. I didn't know that, but yes.

Q. You didn't know about that article and you didn't read —

A. No.

Q.— the article where John Vlahoplus responds directly to the Blackman and Tillman position —

A. No.

[p.125]

Q. — in the context of Section 3?

A. No.

Q. You didn't solicit comments from any scholars who disagree with your opinion on whether the President is an officer of the United States?

A. No.

Q. I want to ask you about some of the sources you do rely on. I want to pull up your report, Petitioners' Exhibit

227. And does this appear to be the expert report that you served in this case?

A. Yes.

Q. Do you recall that in your expert report, you have, starting on page 5, a background to Section 3 of the Fourteenth Amendment?

A. Yes.

Q. And if we scroll through just that, that section is about seven pages long, and it goes until page 12 of your report?

A. Uh-huh. Yes.

Q. In that entire section, you don't cite a single primary source, do you, sir?

A. I don't think so, no.

Q. You do cite to Professor Kurt Lash's recent article on Section 3, though, right?

[p.126]

A. Yes. Yes.

Q. And certainly, you don't cite any original historical research that you've —

A. No. Not on the background. No.

Q. And in this article by Kurt Lash, that's your only citation in your “Background” section, that's a draft paper that hadn't been published yet, right?

A. That's right.

Q. That was actually posted on SSRN just a few weeks ago?

A. That's right.

Q. I want to look briefly at Professor Lash's draft paper, Petitioners' Exhibit 289. Does this appear to be the article from Professor Lash that you relied on?

A. It does.

Q. If we go to page 3 of Professor Lash's article, there's a footnote here, Footnote 5. And it says “A robust

scholarly debate has emerged regarding the proper reading of Section 3 terms such as ‘office’ and ‘officer’ and those who have previously taken an oath as an officer of the United States.” Do you see that?

A. Yes.

[p.127]

Q. And then he cites a number of scholars, right?

A. Yes.

Q. And one — some of the scholars he cites are Josh Blackman and Seth Barrett Tillman who you said you sent your draft report to, right?

A. Yes.

Q. He also cites William Baude and Michael Paulsen, right?

A. Yes.

Q. And he also cites Mark Graber whose paper you said you never read, correct?

A. You mean that particular citation? I have not read his piece on lawfare, no.

Q. And he also cites as a contributor to this robust scholarly debate Gerard Magliocca, who you understand is petitioners' expert in this case who testified earlier this week, correct?

A. Yes. Yes.

Q. Professor Lash does not list you as having made any contributions to the robust scholarly debate about the proper meaning of “office” and “officer” under Section 3; is that right?

A. That's right.

Q. If we go to page 48 there's another p.128] footnote, and it's a long footnote. I'm not going to ask about the substance of what the sources are talking about. But I just want to ask you, do you see in Footnote 218 Professor Lash cites an opinion reported in The Times-Picayune —

A. Yes.

Q. – and a jury charge —

A. Yes.

Q. — reported in The Tennessean?

A. Yes.

Q. And at the end of that footnote, Professor Lash says, “My thanks to Gerard Magliocca for the pointer to these opinions,” correct?

A. Yes.

Q. Nowhere in Professor Lash's article is there an acknowledgment given to you for any contribution that you've made to the historical record on Section 3, correct?

A. That is correct.

Q. And, in fact, Professor Lash's article doesn't cite you anywhere in his draft article —

A. No.

Q.— is that right?

A. He does not.

[p.129]

MR. MURRAY: Your Honor, at this point we would renew our motion to exclude the testimony under Section 702.

THE COURT: I'm going to deny the motion. As I said, Professor Delahunty has expertise in reviewing historical documents and applying them to constitutional provisions. And his lack of a scholarly contribution to Section 3 in particular I don't think excludes him from testifying on opinions that he's testified to today.

MR. MURRAY: Thank you, Your Honor. At this point I'm going to move on to the substance of his opinions, but I know we only have a few minutes left. So I wanted to see if you wanted me to start with that or if you want to just break for lunch now.

THE COURT: Why don't you start since we're running a little behind today. We'll go for about 10, 15 minutes and maybe take a little bit shorter lunch.

MR. MURRAY: Sure.

Q. (By Mr. Murray) Mr. Delahunty, I believe you said on direct that the Fourteenth Amendment was — that you begin your constitutional [p.130] law classes with the Fourteenth Amendment; is that right?

A. Yes.

Q. And you called —

A. Actually, I — that's probably what I said. I began it with Dred Scott typically.

Q. Dred Scott and then a discussion —

A. Correct.

Q. — of the Fourteenth Amendment?

A. Yes.

Q. And you referred to the Fourteenth Amendment as a second founding —

A. Yes.

Q.— of our Constitution; is that right?

A. Yes.

Q. The Fourteenth Amendment is not some kind of second-class constitutional amendment. You'd agree with that, right?

A. I do. Well, I wouldn't. See, you can make — what is — may I ask for clarification on the question?

THE COURT: You can ask him to repeat the question, but I'm just going to admonish you again to let him finish his questions before you start to answer.

[p.131]

A. Okay. I don't understand the distinction you're trying to draw, Counsel, between first-class and second-class amendments.

Q. (By Mr. Murray) Well, I'm not sure I do either. I'm just trying to make the point that there's — there's nothing that says the Fourteenth Amendment is somehow lesser than any other constitutional amendment, right?

A. That's right. They stand on an equal plane.

Q. So I want to start by talking about your opinion that Section 3 is ambiguous and that, therefore, it needs congressional enforcement legislation. You'd agree with me that courts interpret ambiguous text all the time, right?

A. Indeed.

Q. Courts interpret unreasonable searches and seizures in the Fourth Amendment, for example.

A. That's right.

Q. And even in the Fourteenth Amendment, they interpret terms like “due process” and “equal Protection” right?

A. Yes.

Q. Are you aware of judicial decisions [p.132] saying that we can't tell what an unreasonable search and seizure is, or due process of law is, unless Congress tells us?

A. No, I'm not aware of any such decisions.

Q. When you teach constitutional law, do you teach *Marbury v. Madison*?

A. Yes.

Q. And that's a case where the Supreme Court, Chief Justice John Marshall says emphatically the province of the judicial branch is to say what the law is, right?

A. It is, yes.

Q. You know that courts interpreted and applied Section 3 pursuant to state law, even before Congress enacted implementing legislation, right?

A. That's true.

JA1088

Q. Your opinion — one of your opinions is that it's difficult to understand how the phrase “insurrection” was defined during Reconstruction, correct?

A. Well, I don't know that it was defined at all, but it is difficult to interpret the term.

Q. But you agree with petitioners that Section 3 remains in force even outside the context of the Civil War? [p.133]

A. I do agree with that. And so state in the report.

Q. And you agree that Section 3 has continuing relevance to any future insurrection —

A. I do.

Q.— or rebellion?

A.— agree with that, yes.

Q. You also agree that insurrection need not rise to the level of an organized rebellion?

A. That is what the Supreme Court says in the prize cases, and I agree with it.

Q. And the prize cases were cases that came up during the Civil War where the Supreme Court said just that, right?

A. Say again?

Q. Where the Supreme Court —

A. Yes.

Q.— said that an insurrection need not rise to the level of a rebellion?

A. Yes.

Q. An insurrection also need not rise to the level of a civil war; is that right?

A. Yes.

Q. You're not saying that a criminal conviction or a guilty plea on a charge of [p.134] insurrection is a necessary condition for a Section 3 disqualification?

A. No.

Q. On direct examination when you were talking about the President's oath versus an oath to support the Constitution, you said that the drafters of the Constitution were very careful with their words; is that right?

A. Yes.

Q. Is it your testimony that they were so careful with their words that they used a term "insurrection" that just had no clear meaning?

A. I — can I — I don't understand. Could you repeat it?

Q. Well, you testified that the framers were careful with their words —

A. Yes.

Q.— but you've also testified that "insurrection" is a sufficiently unclear term that we need Congress to tell us what it means; is that right?

A. Did I testify to that? I don't remember, but I think I probably did, yes. Certainly, that congressional guidance would be helpful, instructive to the courts. Because the term is pretty broad-gauged. There's also the question of whether [p.135] the courts can enforce at all that Section 5, but that's separate from what you asked me.

Q. Can I just ask you to speak into the mic?

A. Yes. The question is a bit complicated because it implicates Section 5 of the Fourteenth Amendment as well as Section 3.

Q. And other provisions of the Fourteenth Amendment, like Section 1, also implicate Section 5, right?

A. Yes.

Q. Now, if I have trouble knowing what a word means, sometimes I go to a dictionary. So let's look at some

JA1090

dictionaries. And this is Petitioners' Exhibit 144, the appendix and materials that we looked at with Professor Magliocca. Page 785, I believe you testified about Webster's on direct but we didn't look at it. Webster's in the antebellum period defined "insurrection" 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," correct?

A. Yes.

Q. Webster's was not the only dictionary in [p.136] the antebellum period that defined "insurrection" in just this way, was it?

A. I think that Webster — Webster's definition is the essence of it. Maybe not word for word. Particularly, "the execution of law in a city or state" was widely accepted, maybe even followed.

Q. You cite some cases in your report as well, and I just want to pull that discussion up. Plaintiffs' Exhibit 227 is your report. And if we go to page 71, there's a discussion of a Georgia Supreme Court case in 1868 called *Chancely versus Bailey*. Do you see that?

A. Yes.

Q. And in *Chancely versus Bailey*, the year that the Fourteenth Amendment was ratified, the Georgia Supreme Court said: "If the late war had been marked merely by armed resistance of some of the citizens of the state to its laws or to the laws of the federal government, as in the case of Massachusetts in 1789 and in Pennsylvania in 1793, it would very properly have been called an insurrection, and the acts of such insurgents would have been held as illegal." Correct?

[p.137]

A. Yes.

Q. You also testified on direct about the instructions by Justice Catron that we looked at in Professor Magliocca's testimony. And you called those grand jury instructions helpful in understanding insurrection —

A. Yes.

Q.— is that right?

A. Yes.

Q. And just to make sure we're all looking at the same thing, if we go a few pages in, to 752 of Professor Magliocca's appendix, Justice Catron instructed the jury that “The conspiracy and the insurrection connected with it must be to the effect” — “to effect something of a public nature concerning the United States, to overthrow the government or some department thereof, or to nullify and totally hinder the execution of the United States law or Constitution or some part thereof or to compel its abrogation, repeal, modification, or change by a resort to violence.” That was the instruction that you found helpful, correct?

A. Yes.

Q. Did you also look at how Justice [p.138] Chase — not the Chief Justice, the other Justice Chase — defined “insurrection” in the case of Fries?

A. No.

Q. If we go to page 834 of Professor Magliocca's appendix, this is a case of Fries from the Circuit Court of the District of Pennsylvania in 1800. Do you see that?

A. Yes.

Q. And if we go to page 841, the Court says: “On this general position, the courts are of the opinion that any such insurrection or rising to resist or prevent by force or violence the execution of any statute of the United States for levying or collecting taxes, duties, imposts, or excises or for calling forth the militia to execute the laws of the

Union or for any other object of a general nature or national concern under any pretense as that the statute was unjust, burdensome, oppressive, or unconstitutional is a levying war against the United States within the contemplation of the Constitution.” Correct?

A. Yes.

Q. And that also uses this language we've [p.139] seen earlier about a rising up to resist by force or violence the execution of law, correct?

A. Yes.

Q. I just want to finish this line of questioning by asking about your example where you say that Professor Magliocca's definition of “insurrection against the Constitution” would essentially mean that Section 3 covers any effort to obstruct the mail. Do you remember that testimony?

A. Yes.

Q. Well, that's your interpretation; that's not something Professor Magliocca ever testified about, right?

A. That's right.

Q. Do you remember that when Professor Magliocca gave his definition of “insurrection,” his definition was “a group of persons resisting execution of law by force or threat of force”?

A. Yes.

Q. And do you also recall that Professor Magliocca explained that Section 3 only applies to those who had previously sworn an oath in certain kinds of official capacities?

A. That was my recollection of his testimony, yes.
[p.140]

JA1093

Q. If a person has never been in government and never taken an oath to the Constitution, does Section 3 have anything to do with them at all?

A. Well, that — that's a requirement under the offense element. Who, having taken an oath to support the Constitution, thereafter engaged in some kind of activities.

MR. MURRAY: All right. Your Honor, I think this would be a good time to break for lunch.

THE COURT: Agreed. We will — we will reconvene at 1:00 for Mr. Heaphy. And then we will finish your testimony, Professor Delahunty, after Mr. Heaphy is done, okay?

THE WITNESS: Yes. May I have lunch and speak with my counsel? Or counsel for —

THE COURT: You may absolutely have lunch.

THE WITNESS: But not discuss my testimony?

THE COURT: Under the rules, you're not supposed

—

THE WITNESS: All right.

THE COURT: — to discuss your testimony with counsel.

THE WITNESS: Okay. Thank you, Your [p.141] Honor. Thank you.

THE COURT: But we do want you to eat.

THE WITNESS: Thank you.

THE COURT: Okay.

(Recess from 12:05 p.m. to 1:01 p.m.)

THE COURT: You may be seated.

MR. GRIMSLEY: And has Mr. Heaphy been admitted? Great. And there's just one preliminary issue, Your Honor, when you're set up.

THE COURT: Actually, let me start the video.

MR. GRIMSLEY: So one preliminary matter. Congressman Buck testified yesterday as their witness on the January 6 committee and the report. We would move to strike, then, Congressman Nehls' declaration from the record since we're not getting the opportunity to cross-examine him. They made the choice that they used Congressman Buck rather than Congressman Nehls. He had some things in his declaration that Mr. Buck — or Congressman Buck did not testify about. I don't plan on asking Mr. Heaphy to rebut what's in Mr. Nehls' declaration since it should [p.142] be struck from the record.

THE COURT: I already judicially admitted the testimony — or the January 6 — and considered Mr. Nehls' declaration. So I think to the extent Mr. Heaphy has things he wants to say about that, he should go ahead and say them.

MR. GRIMSLEY: Okay.

THE COURT: But given that I conditionally admitted, you may decide that it's not necessary.

MR. GRIMSLEY: Okay.

THE COURT: But I can't really remove — well, I can. I mean, that's what they say about bench trials — right? — that you can forget what you saw. But I think it would be my preference if you — if Mr. Heaphy has things to say about the Nehls declaration, he probably should.

MR. GESSLER: I'm sorry. Could you repeat that, Your Honor?

THE COURT: I think if Mr. Heaphy has things he wants to say about the — well, first of all, why don't you tell me. Would you like me to consider when I make my final determination on the January 6 report the Nehls declaration?

[p.143]

MR. GESSLER: Yes, Your Honor. And we believe it's proper. You know, the Court doesn't — isn't necessarily — the Court is not required to only confine itself to testimony when determining the admissibility of a report. Obviously, the Court's already made a consideration of it and viewed it, and, you know, so we think that you've already relied on it, obviously, and it should stay in. And I'm guessing you will put the same amount of weight on it that you have already, so . . .

THE COURT: Yes That would be my preference as well.

MR. GRIMSLEY: And I appreciate that, Your Honor. I'll just make the record that yesterday we were given the choice of door one or door two, Nehls' declaration or Congressman Buck.

THE COURT: Yeah. And I made you choose Buck.

MR. GRIMSLEY: And we had to choose Congressman Buck. And so I think, given that you've required us to make Mr. Heaphy available for cross-examination even though he had submitted declaration and we were willing to stand on that, and [p.144] that Mr. — or Congressman Buck has been made available for cross-examination; Congressman Nehls does not — has not suffered the same fate. And so we're happy if Your Honor wishes to consider it but would just urge you to consider it for the weight it deserves.

THE COURT: And I agree. But why don't you — if Mr. Heaphy is ready to respond, why don't you do that. And in my final findings of fact and conclusions of law, I will state one way or the other whether I considered Mr. Nehls' declaration.

MR. GRIMSLEY: Thank you, Your Honor. So would you like to swear Mr. Heaphy in?

JA1096

THE COURT: Yeah. Can we make it so - change the view so we see — he's a little bit bigger? Mr. Heaphy, can you hear me?

MR. HEAPHY: Yes. I can hear you fine, Your Honor.

THE COURT: Okay. So I think you're going to have to do something to get closer to the microphone, because you're very faint.

MR. HEAPHY: Okay. Is this any better?

THE COURT: It's getting better.

MR. HEAPHY: Is that any better? Not really? [p.145]

MR. GRIMSLEY: No.

THE COURT: Not great.

MR. HEAPHY: Okay. I apologize for the technology issue.

MR. GRIMSLEY: You're not the first, Mr. Heaphy.

MR. HEAPHY: Yeah. I just don't know where the microphone is, so I'll have to speak up as long as you all can hear me this way.

THE COURT: Yep. That's — that works, but it's — okay. Yeah. That — that's fine. And we'll let you know if we're having trouble hearing you, okay?

MR. HEAPHY: Okay. I will speak up, Your Honor. I apologize for the faint audio.

THE COURT: Can you raise your right hand, please. TIMOTHY HEAPHY, having been first duly sworn/affirmed, was examined and testified as follows:

THE COURT: Great. Thank you.

DIRECT EXAMINATION

BY MR. GRIMSLEY:

Q. Please introduce yourself to the Court.

A. My name is Tim Heaphy. It's spelled [p.146] H-e-a-p-h-y. And I'm a lawyer at Willkie Farr & Gallagher in Washington, D.C., and I previously served as the chief investigative counsel to the House of Representatives'

JA1097

Select Committee to investigate the January 6 attack on the U.S. Capitol.

Q. So we'll get to the January 6 committee in a moment, but I just want to go over your background a little bit. Where did you go to college?

A. I went to the University of Virginia.

Q. What degree did you get?

A. I got a bachelor's degree. It was an English major. That was in 1986.

Q. Did you go to law school?

A. I did.

Q. Where did you go to law school?

A. I came back from two years off. I came back to UVA and graduated with a JD in 1991.

Q. What did you do after graduating from law school?

A. I was a law clerk to Judge John Terry on the District of Columbia Court of Appeals, and then I worked as an associate at Morrison & Foerster, a law firm in San Francisco.

Q. How long did you work at Morrison & Foerster?

A. For about two years until my wife graduated from graduate school, and we then moved back across the country to Washington, D.C.

Q. What did you do when you went to Washington, D.C.?

A. I was an assistant United States attorney in the District of Columbia. Eric Holder was the U.S. attorney at the time who hired me.

Q. What did you do while you were an assistant district attorney in the District of Columbia?

A. I was there for almost ten years, and I kind of moved through various sections in the office. Tried 65 jury trials. Ultimately, my last assignment was in a gang

JA1098

prosecution unit. I had a 13-month-long racketeering trial, capital case, in federal court in Washington, D.C.

Q. What did you do after leaving the U.S. Attorney's Office in the District of Columbia?

A. I moved to Charlottesville, where I still live, to be an assistant U.S. Attorney in the Western District of Virginia. That was in 2003.

Q. And what did you do when you were an assistant U.S. attorney there? [p.148]

A. What I had done in D.C., investigated and prosecuted a wide array of federal crimes.

Q. After three years in the U.S. Attorney's Office in Virginia, where did you go?

A. I went into private practice. I went to the McGuireWoods law firm which had offices in Richmond and Charlottesville.

Q. What type of work —

A. White-collar defense, criminal defense practice. Sorry, Sean.

Q. No worries. Did you do investigations as well?

A. I did, yes.

Q. And how long were you at McGuireWoods?

A. I was there for a little over three years until I went back into government service in the Obama administration.

Q. What was the government service that you went back into?

A. President Obama appointed me to be United States Attorney for the Western District of Virginia where I had been an assistant, and I was confirmed by the U.S. Senate in October of 2009. And I served in that position as U.S. Attorney until the very end of 2014.

[p.149]

Q. What were your duties as U.S. Attorney?

JA1099

A. I supervised the work of the office, all of the criminal prosecutions and civil cases tried by the 30-or-so lawyers who represented the western part of Virginia.

Q. You said you finished there in 2014?

A Yes.

Q. What did you do after that?

A. Went back to private practice to another Virginia-based firm, Hunton & Williams, where I was splitting time between Richmond and Washington, D.C. I was the chair of the white-collar defense investigations practice at Hunton & Williams.

Q. At some point did you do some work for the City of Charlottesville? Oh, we lost you.

A. Yes. Yes. I live in Charlottesville — lived there this whole time. And in August of 2017, there was a horrific public event at which there were protests and fatalities. And the City hired me and a team from Hunton & Williams to do an independent review of how my own client, the City, prepared for and managed that event, and there were a couple of previous events that summer of a similar nature. And I put together a comprehensive report about the [p.150] Charlottesville events.

Q. Was that event in August of 2017 the Unite the Right rally?

A. Yes, it was.

Q. When did you become involved with the January 6 committee?

A. Not until it was formed. I believe in June or July of 2021, the House passed House Resolution 503 creating the Select Committee. Soon thereafter, there was an effort to put a staff together, and I was one of the first half a dozen people hired to be involved in the leadership of the staff.

Q. What was your official position?

A. Chief investigative counsel.

JA1100

Q. How did you get that position?

A. I spoke to the people that were tasked with putting the staff together. That was largely this — Speaker Pelosi's top aides as well as a couple of people that had already been hired, the staff director and chief counsel to the January 6 committee. I spoke with them and was hired, I believe, in the middle of August. I started, like, August 15 or 16 of 2021.

Q. What were your responsibilities as chief [p.151] investigative counsel?

A. And I should say — I should back up. Chairman Thompson, I spoke to him, and he ultimately made the hiring decision to hire me as chief investigative counsel. So my duties were essentially to run day-to-day investigation. First, hire a lot of people, lawyers and other professionals, to do the work, the fact-gathering of the investigation. And then over the course of the duration of the Select Committee, I supervised the work day to day.

Q. How many lawyers ultimately were there, roughly, on the investigative staff?

A. Yeah, it varied at times, but it was about 20 total lawyers and then a bunch of other professionals — some subject-matter experts, some paralegals, and other professionals that helped contributing to the investigative team.

Q. How did you choose who would be on the investigative staff?

A. Investigative experience. Candidly, I was looking for people that had been investigators, that had interviewed witnesses, that had reviewed large amounts of information to derive what was relevant, whose judgment and character I trusted, that [p.152] had a very strong interest in serving on the committee. So it was really, ultimately, a very talented group.

JA1101

Q. What percentage were individuals from the U.S. Attorney's Office or DOJ, roughly, who had investigative experience?

A. I think out of the 20 lawyers, about three-quarters were former DOJ lawyers at some point in their careers. And that was not an intentional thing. It was more those were the lawyers in my experience who had really developed the skills that were most relevant to the work that we were doing. They could do lots of interviews, could review lots of information, and, again, who had the right ethical approach to the work.

Q. How, if you know, did the investigative staff for the January 6 Select Committee differ from typical investigative staffs?

A. Most of the people that we hired had never worked in Congress before, because, again, Congress really doesn't do these kinds of investigations very often. And therefore, a lot of the lawyers from other congressional committees didn't really have as much investigative experience. The work differed — my understanding — [p.153] Mr. Grimsley, I had never worked on a congressional investigation before, but my understanding was that the only thing different about our process was the involvement of our members. The members of the committee themselves were very involved in the day-to-day turning of the wheels of the investigation. They participated in the interviews. They had up-to-the-minute, sometimes daily, reports on what we were learning. And I think that's different from the normal congressional process where the staff does most of the work, the fact-gathering, and the members, you know, are sort of given that information before a public proceeding.

JA1102

Q. But as you understand it, typically the investigative staff does not include seasoned investigators from the DOJ?

A. I don't believe that that is typical, that's right.

Q. Now, what party affiliation are you?

A. I'm a Democrat. I was appointed by President Obama, and, yes, on record as being a Democrat.

Q. Was there any political litmus test for determining who would be on the investigative staff [p.154] for the January 6 committee?

A. Absolutely not. I, frankly, don't know the political affiliation of most of the people on the staff, unless they said something or did something that would reflect that. That was not something that I ever asked about or was a criterion.

Q. Well, just focusing on people who you did know, were there Republicans on the staff?

A. Yeah. Yes, there were.

Q. Can you give me some examples?

A. Sure. John Wood, for example. John was a Bush-appointed U.S. Attorney. And he actually ran for Senate as a Republican, left the — our staff to do that in 2022, I believe. He came to us through Liz Cheney. Ms. Cheney had another counsel who reported to her directly. Kinzinger had a lawyer, I believe, who was also a Republican. So there were a handful that were. But, again, that was, to my view, sort of incidental to their work and not something that we asked about.

Q. When did your team begin the actual investigation?

A. Right away. You know, we knew all along that we were under a time crunch. We were going to expire at the end of Congress and had just a lot to [p.155] do. So almost immediately upon my arrival in August of '21, we were requesting documents, we are starting to talk to people. I

JA1103

think some of the first transcribed interviews in which I participated were in September of 2021. So very soon after the committee was formed.

Q. What was the — or how long did the investigation last?

A. It lasted up until 11:59 p.m. on January 3 of this year. I mean, again, we used kind of every possible minute to get things done. So it was about 16 or 17 months altogether.

Q. Did you intentionally string out the investigation so that it corresponded with the midterm elections?

MR. GESSLER: Your Honor, I would just object to leading.

THE COURT: Overruled.

A. No, Mr. Grimsley, there was no stringing out. Quite the opposite. We were very focused; we moved as fast as we could. And, frankly, it could have gone on another 16 months and had additional potentially relevant information to try to find.

Q. (By Mr. Grimsley) What was the final [p.156] result of the investigation?

A. The resolution of the Select Committee required us to produce a report that made both factual findings about — the facts and circumstances that gave rise to the attack on the Capitol and make some recommendations to try to prevent similar events in the future. I believe the report — I don't remember the exact date, but sometime in mid-to late December was — it was issued. It's 845 pages. And that's kind of the official record of our — the committee's factual findings and recommendations.

Q. Have you submitted declarations in this matter?

A. I have, yes.

Q. Have you reviewed those two declarations, your opening declaration and your supplemental declaration?

JA1104

A Yes. I did earlier today.

Q. Do those continue to be truthful and accurate, to the best of your knowledge?

A. Yes.

MR. GRIMSLEY: Your Honor, I'm not going to go over the declarations. You have them. I know the intent of this was for cross-examination. [p.157] But I do have some questions for Mr. Heaphy regarding rebuttal issues.

THE COURT: Okay. So you would like me to consider the declarations that he submitted?

MR. GRIMSLEY: Yes.

THE COURT: Okay.

MR. GRIMSLEY: Thank you, Your Honor. Just to short-circuit this rather than go into it at length, since you've seen them.

Q. (By Mr. Grimsley) Now there has been some suggestion by Congressman Nehls in his declaration — well, first of all, have you reviewed Congressman Nehls' declaration in this case?

A. Yes, I have.

Q. Now, he suggests that the January 6 report is somehow compromised by virtue of the fact that the committee presented doctored evidence at the hearings. Are you familiar with that allegation?

A. I am, from Congressman Nehls' deposition and some public reporting on that issue, yes.

Q. What is your response to the assertion that evidence was doctored?

A. I strongly disagree with that characterization. As I said in my declaration, there [p.158] was a text message that I believe a member of the committee used during one of our public proceedings which incorrectly indicated that a particular sentence from a text message ended as opposed to continued. A period was inserted instead of an

ellipsis. And when that was called to the committee's attention through our spokesperson, we acknowledged the mistake. It was a mistake, not an attempt to doctor evidence or mislead. I think there was also some allegation that there was video or audio that was doctored. Again, I strongly dispute that. There were some times where we used in public proceedings silent Capitol police surveillance footage and then dubbed over that contemporaneous police radio transmissions in time — in real time to correspond to the images in the surveillance footage. And I don't consider that to be doctoring them. It's simply putting two pieces of evidence taken contemporaneously together. So that — unless I'm forgetting something from Congressman Nehls' declaration, I believe those were the two allegations that I would dispute.

Q. Those are the only two. [p.159] Did you ever hear any allegation that other evidence was doctored somehow?

A. No. I don't think so. I mean, those specifics, I recall. No, I'm not remembering any other specific accusation of doctoring.

Q. How many pieces of evidence were actually presented — and I don't need an exact number, but just ballpark — during the public – ten public hearings?

A. Pieces of evidence, broad term. You know, we played clips of depositions, we showed documents or images that had been obtained. Hundreds or even thousands over the course of the hearings. And then the hearings were a subset of what we actually presented in the actual report. So I think the report indicates exactly with more specificity than I can recall how many documents were able to obtain, how many witnesses we

JA1106

interviewed. All of that is detailed with more specificity in the report.

Q. Now, there was a question raised yesterday about whether or not the January 6 committee had interviewed leadership from the Capitol Police. Did the January 6 committee interview leadership from the Capitol Police, including Chief [p.160] Sund?

A. Yes, we interviewed six or eight or ten even senior officials with the Capitol Police, including Chief Sund.

Q. Were there any interviews or depositions that were kept confidential and not released to the public?

A. Yeah. There were a handful of national security-related witnesses, primarily people that worked in some — and continue to work in sensitive positions inside the White House that we agreed that we would not release the identity of those witnesses or the transcript because public release would be debilitating to them individually and to the safety and security of the White House complex. So there were a handful, three to four, I think, of those transcripts that we did not release for that reason.

Q. Other than that small number of transcripts you did not release for national security purposes, were there any other interview transcripts or deposition transcripts that were not ultimately made public?

A. I don't believe so, no.

Q. Now, do you recall that the committee [p.161] took a deposition of a person named Kash Patel, former chief of staff to Acting Secretary of Defense Christopher Miller?

A. Yes. I was personally present for that and participated in the questioning of Mr. Patel.

Q. Was his deposition transcript kept confidential somehow?

JA1107

A. No. I believe it was released and made public along with all the others at the end of our investigation.

Q. Was there any effort to keep his deposition transcript secret for a longer period of time?

A. No. Absolutely not.

Q. Was it the very last one released?

A. No, not that — again, there was no rhyme or reason to the order in which they were released. We did them all at the end. And I don't remember even when his — we released them 10, 15, or 20 or 30 at a time over those last few days of the committee's existence. So I just don't know — but if your question was there an intentional effort to hold his to the end? Absolutely not.

Q. Did Mr. Patel ever reach out to ask to [p.162] provide testimony at a public hearing?

A. We never dealt with Mr. Patel directly. He was represented. I believe Gregg Sofer at Husch Blackwell was his lawyer. And I don't remember Mr. Sofer ever making a request for Mr. Patel to testify at a public hearing.

Q. Now, as an experienced investigator, why might an investigative team wait to release transcripts to the public until the end of an investigation?

A. Any kind of investigation is hampered if you're unable to discern what a witness is providing for personal knowledge versus things the witnesses may have heard from other sources. So it's very important to try to prevent the public release or the sharing in any way of information that you're learning during the investigation, because it makes it easier to sort of ensure that you're getting personal knowledge. So we didn't release either publicly or to witnesses what other witnesses said, even who other witnesses were, because we wanted to ensure that what we were getting from each witness was a

JA1108

product of his or her memory, not something that they read in a transcript or saw in a news report. [p.163] And that's pretty standard. That was not a unique practice of the Select Committee. That's always — that's the way I've always done it.

Q. Now did the Department of Defense produce documents to the January 6 committee?

A. Yes. A lot of documents. A lot of agencies did, but Defense included.

Q. Did the Department of Defense refuse to produce or withhold documents, relevant documents, that had been requested by the committee?

A. No. They were completely cooperative.

Q. Would the request for documents that the January 6 committee sent to the Department of Defense have covered documents, if they existed, showing that President Trump had authorized 10- to 20,000 National Guard troops to be on the ready?

MR. GESSLER: Objection, Your Honor.

A. I'm not aware.

THE COURT: What's the objection?

MR. GESSLER: Your Honor, my understanding is that — well, first of all, this is calling for speculation. And secondly, it's beyond the scope of our understanding of what this witness is here for is to describe the processes of the January 6 commission, not to rebut the testimony of earlier [p.164] witnesses or earlier pieces of evidence. He is a — he was called by the Court essentially for the January 6 commission, not to be used as a witness on the petitioners' behalf. Had we — we probably would have prepared for a cross-examination if we had known that his testimony would be used in a substantive manner in this case.

THE COURT: Well, yesterday they advised the Court that they were going to call him as a rebuttal, specifically to the testimony of Mr. Patel and Ms. Pierson. And so his testimony certainly isn't a surprise to me. And I don't think that the question is speculative. Mr. Patel testified that there were documents showing this authorization and that they must not have been produced by the Department of Defense. And what I believe Mr. Grimsley is asking is, if those documents existed, you know, was there any understanding of these were withheld. So that's a long way of saying the objection is overruled.

MR. GESSLER: Thanks, Your Honor.

Q. (By Mr. Grimsley) So let me repeat the question. [p.165] Would the document requests that were sent to the Department of Defense have been broad enough to cover any documents that the Department of Defense had showing records of an authorization by the President for 10- to 20,000 National Guard troops to be on the ready?

A. Absolutely. And there was no such document produced.

Q. Now, did you attend Mr. Patel's deposition?

A. I did.

Q. Did you investigate the many assertions made by Mr. Patel in that deposition?

A. Both before and after. We asked him about conversations that other witnesses had relayed to us that they had with him. And then we continued to, as you do in every investigation, attempt to corroborate assertions. So, yes, we plugged in the questions and answers for Mr. Patel into the evolving body of work of the Select Committee.

Q. Were you able to observe Mr. Patel's demeanor during the deposition?

A. Yes.

JA1110

Q. Based on your investigation, including [p.166] the deposition of Mr. Patel, do you have an opinion as to Mr. Patel's character for truthfulness or untruthfulness?

MR. GESSLER: Objection, Your Honor.

MR. GRIMSLEY: Rule 608(a) allows this.

MR. GESSLER: He's asking for opinion testimony. And I'm not sure Mr. Heaphy is an expert on judging character. He certain hasn't been qualified by the Court.

MR. GRIMSLEY: Your Honor, Colorado Rule of Evidence 608(a) allows for extrinsic testimony by individuals about a witness and specifically allows them to provide an opinion as to that witness's character for truthfulness or untruthfulness. Mr. Heaphy has a basis for doing so, and he is allowed to do so. I'm certainly willing to provide the Court with legal authority. If the Court would like briefing on this, I think that would be fine, and we can take the testimony and then just decide afterwards whether it be stricken. But this is squarely within the confines of Rule 608(a).

THE COURT: I'm going to — I'm going to sustain the objection. You may ask him what parts of his testimony they were contradicting by other [p.167] evidence. But I'm not going to let you have him opine on whether or not he thinks that Mr. Patel is a truthful person.

MR. GRIMSLEY: Okay.

Q. (By Mr. Grimsley) Mr. Heaphy, did your team investigate the claim that the President had authorized 10- to 20,000 National Guard troops to be on the ready?

A. Absolutely. Yes, we did. We elicited testimony about that from Mr. Patel's boss, the Acting Secretary of Defense, Chris Miller, who I believe testified on the record that there was no such order authorizing the deployment of 10,000 or any other number of National Guard troops.

JA1111

Q. Did you see —

MR. GESSLER: Your Honor, we would object to that as hearsay and ask that it be stricken.

MR. GRIMSLEY: our Honor, this was part of the investigation. I was asking precisely what you had said I could ask him about.

MR. GESSLER: It — the report is hearsay. he comment — any information within the report about those statements is hearsay. The witness's statement is — you know, the testimony — the statement that the witness is testifying to is [p.168] hearsay. It's intended to prove the truth of the matter asserted, and it's an out-of-court statement. If we had subpoena power and adequate time, we would be able to talk to former Secretary of Defense Mark Meadows — or I'm sorry — Chief of Staff Mark Meadows. But — I'm sorry, Your Honor. It's —

THE COURT: Miller.

MR. GESSLER: I'll get the right name yet. Secretary of the Army Miller. But it is hearsay, Your Honor.

THE COURT: I've already accepted the finding that they could find no evidence, including for Mr. Miller, about the 10 to 20,000 — 10 to 20,000 troops. So I'm going to sustain the objection that the testimony is cumulative.

MR. GRIMSLEY: No further questions on direct, Your Honor.

MR. GESSLER: Just one moment.

THE COURT: You should go now, while we have pictures.

MR. GESSLER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GESSLER:

Q. Good afternoon, Mr. Heaphy. [p.169] Is it — and I apologize. Do you pronounce your name Heaphy or Heaphy? I've heard it both ways.

JA1112

A. Yeah. It's Heaphy with a long A. Thank you for the clarification.

Q. Okay. Thank you very much. So let me ask you a little bit about your experience. So have you had experience running large investigations?

A. Yes. I was a U.S. Attorney — assistant U.S. Attorney where I ran large investigations and a U.S. Attorney where I supervised them. The Charlottesville investigation was substantial and actually similar. So, yes, before taking this position, I had supervised other investigations.

Q Okay. And were those investigations — would it be fair to say they were grand jury investigations —

A. Some were and —

Q. — mostly?

A. — some were not.

Q. Okay. Did you supervise large grand jury investigations? [p.170]

A. I did, yes, as a prosecutor, many.

Q. Okay. So I think in your — in your declaration you had talked a little bit about sort of the number of documents and number of witnesses that the Select Committee called. Do you — do you recall that?

A. Yes.

Q. Okay. And it talked about, you know, maybe 1,000-or-so witnesses and a million or-so documents, those types of numbers, correct?

A. Yes.

Q. And do you have experience, for example, in grand juries in investigations of that size?

A. I don't believe I've ever had a grand jury investigation that had quite that many witnesses or documents. No. This was probably a new peak in terms of volume of information.

JA1113

Q. Would it be fair to say — did you work in grand jury investigations with over 100 witnesses?

A. Yes.

Q. Okay. And would it be fair to say that you worked in grand jury investigations of over 100,000 documents?

A. Definitely. Yes.

Q. Okay. And would you — you'd agree with [p.171] me that those are — I guess, would you agree that those are substantial numbers of documents and witnesses?

A. I mean, it's all relative, but yes.

Q. Okay.

A. You get into the hundreds of thousands, I would agree with you that that's substantial.

Q. Okay. And did any of those investigations result in indictments?

A. Yes.

Q. Okay. And after that indictment, you take that case to court, I assume, correct?

A. Someone does, yes.

Q. And when I say you, I speak in the collective, your office?

A. Yeah.

Q. Okay.

A. Yes, that's right. Yes.

Q. And did you ever go to the judge and say, Judge, we have a lot of witnesses, well over 100 witnesses, and we have over 100,000 documents, and so therefore, you should accept these as true for — and you need not accept any more for a conclusion of guilt?

A. No. The majority of — when you say [p.172] grand jury investigation, that is simply a first step in a criminal case. And a judge, himself or herself, cannot make a summary finding. It's a jury decision, and it has to be proven at a much different standard, beyond a reasonable

doubt. So the procedural posture of the criminal process would not allow for what you're suggesting.

Q. Right. And part of the reason for that is because that evidence would be subjected to the adversarial process. Would you agree with me on that?

A. Yes.

Q. Okay. So you don't just take the evidence, as hard as — the Court doesn't take the evidence, despite how hard a prosecution office may work at it, simply at face value, but requires it all to be subjected to the adversarial process, correct?

A. In a criminal case before a defendant can be convicted, that is a higher standard of proof than that which applies in a grand jury. Grand jury is probable cause. Guilt in a criminal case is guilt beyond a reasonable doubt, and that's a higher standard.

Q. But for a Court to make that [p.173] determination from a procedural standpoint, it has to subject that evidence to the adversarial process, correct?

A. It is — adversarial process, yes —

Q. Okay.

A. — is available in a criminal proceeding. Not in a grand jury proceeding.

Q. Now, you had talked a little bit about the House members — the members of the Select Committee, their involvement in the committee's activities, correct?

A. Yes.

Q. Okay. And then how it differs from your understanding of the normal process, correct?

A. Yeah. Anecdotally, I think our members were more involved in the investigative process than they typically are in other congressional committees.

Q. Okay. And it sounds like — and I'm asking you to repeat some of your testimony, but I just want to make

JA1115

sure I'm clear. So you talked, for example, about Mr. John Woods as a member of the investigatory staff, correct?

A. He was a co-leader of one of our five investigative teams —

[p.174]

Q. Okay.

A.-yes. He was more senior than other lawyers and very much involved.

Q. And you received his name through a — a reference from Representative Cheney. How did that work?

A. Yes. I believe Ms. Cheney introduced John to me as a potential staffer and asked me to speak with him. And when I did and got to see his qualifications, we hired him to co-lead the gold team. And he also had kind of collateral duty of being counsel to Ms. Cheney.

Q. And Representative Kinzinger also recommended an attorney, correct?

A. I think with Mr. Kinzinger his lawyer was already on the staff, and Kinzinger asked if he be sort of designated as — his collateral duty was to be counsel to Mr. Kinzinger. He was a lawyer who came to us from the Central Intelligence Agency named Steve Dubai (phonetic).

Q. And so did he represent Representative Kinzinger in the — did he have an attorney-client relationship with Representative Kinzinger at the same time he was a staff member on the committee?

A. He was staff member on the committee [p.175] exclusively, but part of his responsibility was to sort of be Mr. Kinzinger's counsel. So he had separate conversations with Mr. Kinzinger of which I was not part of.

Q. Okay. Now, you said normally — and I'm just trying to get a sense of the extent of your knowledge. You said normally congressional committees don't include sort of

JA1116

seasoned investigators of the type that you appointed or hired on the committee; is that correct?

A. Perhaps a generalization, but my anecdotal impression is that the sort of professional background of the lawyers that we hired on the Select Committee is atypical for congressional staff. Congressional staff lawyers are generally, like, policy people and experts on policy, whereas I was looking more for investigative experience. And there are people in Congress with investigative experience, but not as much as in the Department of Justice.

Q. Okay. Now, I think your — in your declaration you talked a little about the members and the purpose of the committee. What was the purpose of the committee? [p.176]

A. To find the facts and circumstances that informed the insurrection, the attack on the Capitol, and to make recommendations to try to instill — motivate changes in law that would make similar attacks in the future less likely.

Q. And the members themselves, is it your belief that they went into the committee with an open mind as to the conclusions of the committee?

A. They were present for the event, so they certainly had some preconceived sense of what happened. But in terms of the overall findings for the committee, yes, I do believe that they were open-minded as to where the facts would lead as we conducted the investigation.

Q. Okay. And was one of the conclusions of the committee that President Trump engaged in an insurrection?

A. Yes.

JA1117

Q. Okay. So was Representative Bennie Thompson, he was — was he the chair, am I correct, of the committee, or a co-chair?

A. Yes.

Q. Okay.

A. He was the chairman, yes.

Q. Okay. I'd like to show you what's [p.177] Exhibit 1084.

MR. GRIMSLEY: And, Your Honor, I believe these are going to be tweets that were sent by members of the committee at some point after January 6. We would object. The — Mr. Heaphy does not have personal knowledge of these. They have not been authenticated. But in any event, if the insinuation is that somehow only the members of the committee had a preconceived notion as to Mr. Trump's involvement, we would like the opportunity on redirect to show the many members of the Republican caucus who also had a similar view after January 6.

THE COURT: I'm going to allow you to show the tweets, so the objection is overruled to the extent it's objecting to the tweets.

MR. GESSLER: Okay. Thank you, Your Honor. Could you show Exhibit 1084, please. Oh, boy. I can't even read that myself. May I use your computer here?

MR. GRIMSLEY: Yes.

MR. GESSLER: Okay.

MR. GRIMSLEY: You can come stand over here.

[p.178]

MR. GESSLER: We're just having some technological fumbling on my part, Mr. Heaphy. apologize.

Q. (By Mr. Gessler) So, Mr. Heaphy, do you see this — do you see this exhibit?

A. Yes.

JA1118

Q. Okay. And do you see that that was sent by Representative Bennie Thompson?

A. I see some tweets that he issued, it looks like, on January 6, the day itself, yes.

Q. Okay. And do you see where he tweeted “Trump fed this vile monster” — I’m sorry. Said, “Fed this monster with his vile and dangerous talk.” Do you see that?

A. I do.

Q. Okay. Is it your view that that statement is consistent with going into the January 6 committee with a fair and open mind?

A. I think there were things that were obvious on January 6, like what Congressman Thompson said. But the facts and circumstances that gave rise to those events was uncertain, and that was the task of the committee. So, yes, I don’t consider that statement to be one that’s closed-minded at all.

[p.179]

Q. And if I remember correctly, the committee — one of the things that the committee concluded was that President Trump, himself, was responsible for events — for the violence that occurred on January 6; is that correct?

A. President Trump and others, the conspirators, yes.

Q. Okay. And so I’d like to — we scrolled down a little bit. I’d like you to look at that second tweet where it says “The events of today” — referring to January 6 — “are the inevitable result of the tyrannical and idiotic leadership of Donald Trump.” In your view, would you view those as consistent with someone entering into these — an investigation with a fair and open mind?

A. Yes. Again, it depends on what you mean by fair and open mind. There were some things that were obvious on January 6. But the overall view of what facts and circumstances informed those events was very much an

open question and was the primary task of the committee. So, yes, I would consider Chairman Thompson to be open-minded throughout the course of the investigation.

[p.180]

Q. Okay.

MR. GESSLER: Could we go to Exhibit 1085, please?

Q. (By Mr. Gessler) And do you see that first tweet where it says "Former President Trump has to be held accountable for his actions that precipitated the riot at the U.S. Capitol on January 6"? Do you see that?

A. I do.

Q. And is, in your view, that statement consistent with someone going into this investigation with an open mind?

A. Same response. Yes.

Q. Okay. And you see where he wrote on January 29, it says "Donald Trump threatened our entire democracy by instigating this attack on our nation's Capitol." Do you see that?

A. I do, yes.

Q. And you say that when Representative Thompson said that President Trump threatened our democracy by instigating — he instigated the attack, that he's entering into the investigation and deliberations with an open mind?

A. I don't think he's open-minded about [p.181] that fact, but he's certainly open-minded about the scope of the investigation. I think that fact was obvious on January 6 —

Q. That Donald Trump —

A.— that it was plugged into —

Q. I'm sorry. I apologize.

A. Go ahead.

Q. Go ahead.

THE COURT: Please finish your answer.

JA1120

A. So — yeah. You start any investigation with certain things you know and certain things you don't know. The fact that President Trump instigated the attack was obvious on January 6 just from his words on the — during his speech on the Ellipse. We were plugging those facts into what motivated them, how he reacted to them, the facts and circumstances and the response of law enforcement and otherwise. So just because certain facts are sort of obvious at the beginning of an investigation doesn't mean that the investigation has reached a conclusion or is closed-minded. So, again, to answer your question, I don't believe that that statement reflects that there was a — you know, that he was — I think your term was “closed-minded.” While certain facts were, in his [p.182] view, established, we still needed to plug them into a much broader context.

Q. (By Mr. Gessler) Do you think from those statements that Representative Thompson could be fair and impartial in his investigative approach for January 6?

A. Absolutely. And he was throughout, throughout the entire investigation.

Q. Okay. You see where Representative Thompson in his tweet included this sort of block statement that says “He summoned the mob, assembled the mob, and he lit the flame of the attack.” Do you see that?

A. I do.

Q. Okay. And it's your view, I'm assuming, that that is fully consistent with him being fair and impartial with respect to investigating President Trump's culpability or non-culpability for the events of January 6?

A. We were not investigating the culpability or non-culpability of any one person. We were investigating the facts and circumstances that informed the attack on the Capitol. Certain things were obvious at the beginning;

JA1121

other things were not. So in terms of his overall approach to [p.183] the investigation to fill out all of the relevant facts and circumstances, I don't believe he was in any way biased or had a preconceived notion.

Q. So you said there were certain facts that were obvious at the start of the investigation. And I believe — and I just want to make sure I'm correct — that one of the facts that was obvious at the start of the investigation was that Donald Trump instigated the violence. Is that correct?

A. Donald Trump talked about violence directly, yes, during his speech on the Ellipse.

Q. So is that a yes to my question?

A. I'm sorry. Repeat the question.

MR. GESSLER: Could the court reporter please repeat the question?

THE COURT: Yeah.

(Previous question was read back.)

THE WITNESS: I'm sorry. I could barely hear. What was it again?

THE COURT: Yeah. I can read it. I'm going to read it because you can't hear the court reporter because she doesn't have a microphone. So the question was “So you said there were certain facts that were obvious at the start of [p.184] the investigation, and I believe — and I just want to make sure I'm correct — that one of the facts that was obvious at the start of the investigation was that Donald Trump instigated the violence; is that correct?”

A. Yes. Donald Trump said, “You have to fight like hell or you won't have a country anymore.” That was something that was stated at the Ellipse, which did, in fact, instigate violence. So, yes, the answer to that question would be yes.

JA1122

Q. (By Mr. Gessler) Okay. Let's go to Exhibit 1086. Was Representative Lofgren a member of the commission?

A. She was a member of the Select Committee, yes.

Q. I'm sorry. The committee. My apologies. So I'm going to show you what's designated as Exhibit 1086. And in that — are you able to see that?

A. Yes.

Q. Okay. And I ask you that because at the moment I can't see you. But we'll continue from the [p.185] video. I can certainly hear you. And she says in the last sentence of that tweet, "Trump incited this, and he's a threat to the security of our country." Is it your testimony that that statement is consistent with being fair and impartial in the investigation?

A. Yes.

Q. Okay.

MR. GESSLER: Let's go to Exhibit 1087.

Q. (By Mr. Gessler) And this, it looks like at the top, is an official press statement from Ms. Lofgren. And in it she says that —

MR. GESSLER: Can you scroll down just a little bit? Excuse me one moment, Mr. Heaphy.

Q. (By Mr. Gessler) She says — if you see that paragraph that begins in italicized font towards the bottom — towards the bottom of it: "Today we don't need a long investigation to know the President incited right-wing terrorists to attack Congress" — "the Congress to try to overturn constitutional government." And it's your view that that statement is consistent with Ms. Lofgren being fair and [p.186] impartial on the committee; is that correct?

A. Yeah. Like — I would characterize that and every — and all of these tweets as essentially sort of hypothesis

JA1123

based on observations at that point that certainly informed the investigation. But I don't consider them to represent a closed mind about those facts and circumstances. Same answer as I had with Chairman Thompson's tweets.

Q. Okay.

A. Yes, they certainly had opinions at the beginning based on observations that I would call hypotheses that were a starting point. But we were comparing everything we learned to those hypotheses. That's what happens in an investigation.

Q. Okay. I'm going to go through a number of additional exhibits. We'll go through them quickly. I'll ask you the same questions. I assume you'll give me the same answers. And we'll—

A. Yeah.

Q. — try to —

A. Yeah. You provided these to me earlier today, and I've seen them all. And, yes, I will have the same answer to all of the member tweets reflecting this perspective.

[p.187]

Q. Okay. So let's do this since we personally, on our side, didn't provide them. I'm just going to go through the exhibits, and I'm going to say “Is that one of the exhibits you saw to which you would provide the same answer if I read you parts of the exhibit?” Can we do that?

THE COURT: So I'm not going to put this into evidence. It's being used for impeachment. So if you want me to hear the impeachment, you're unfortunately going to have to walk through it.

MR. GESSLER: Let's walk right through it then. Let's go to Exhibit 1088, please.

JA1124

MR. GRIMSLEY: And, Your Honor, I would object to this being impeachment because it's not impeaching the witness's testimony at all.

THE COURT: Well, yes, it is. It's impeaching his — he says that everybody was fair and open to any possibilities of where the investigation could lead. And Mr. Gessler is saying, no, they weren't. I think that's proper impeachment.

MR. GESSLER: Thank you, Your Honor.

Q. (By Mr. Gessler) So do you see this [p.188] exhibit here?

A. I do, yes.

Q. So it says “While we were performing our duties, the President of the United States in an unconscionable act of sedition and insurrection incited a violent mob to attack the Capitol.” Do you see that?

A. I do.

Q. And in your view is that consistent with someone being fair and impartial in an investigation?

A. I think that was Mr. Schiff's hypothesis informed by events that he observed, but does not reflect him or others to have a closed mind.

MR. GESSLER: Okay. Let's go to Exhibit 1095, please.

Q. (By Mr. Gessler) One moment, Mr. Heaphy. And it says — towards the end of the first paragraph, it says “Aguilar spoke on the House floor to call on his Republican colleagues to uphold their oaths of office by holding the President accountable and supporting impeachment.” So here is where Representative Aguilar is asking others to hold the President accountable and support impeachment. [p.189] And then later in the next paragraph, it says “When the President sent a mob to the Capitol radicalized by his lies about the assault on free

JA1125

and fair elections to stop the counting of the electoral votes, he made it clear that he poses a grave threat to our democracy.” In your view, that statement is also consistent with Representative Aguilar being fair and impartial in the investigation into January 6?

A. Yeah. The reference of impeachment is instructive because there was a proceeding in Congress seeking to impeach the President based on the same — some of the same facts that were at issue in our investigation. And I think all nine members had already voted that he should be impeached when that proceeding took place before the committee even started. So, yes, they had made some preliminary determinations, hypotheses, based on what they saw; but, again, wanted us to plug that into and test against all of the evidence that we were finding. So I don't believe Mr. Aguilar or any of the others had made any conclusion other than that preliminary one informing that impeachment veto.

Q. Okay. Do you see where it says [p.190] Representative Stephanie Murphy — I'm showing you 2 tweets from her. Was she a member of the Select Committee?

A. Yes, she was.

Q. Okay. And here she says “the President incited a violent insurrection against our democracy, proof he's unable to uphold the Constitution.” Is that statement consistent with her being fair and impartial in this investigation?

A. Yes. I believe so.

MR. GESSLER: Okay. Let's go to Exhibit 1099, please. And scroll down, please.

Q. (By Mr. Gessler) Okay. So this says that “The nine impeachment managers will present” — this is the second-to-the-last paragraph. “The nine impeachment

JA1126

managers appointed by the House of Representatives will present overwhelming evidence of the facts of former President Trump's incitement of the violent insurrection that took place in and around the Capitol on January 6, 22, 2021."

Is that statement consistent with Representative Raskin's ability to be fair and impartial as a member of the committee?

[p.191]

A. Yes. Same response. Mr. Raskin led the impeachment proceeding as the chief prosecutor, if you will. But I don't believe that made him closed-minded about the overall facts and circumstances that gave rise to those actions.

Q. Okay. So even though he said there was overwhelming evidence," and even though he said there was overwhelming evidence that President Trump had incited a violent insurrection, and even though he actually led the prosecution of President Trump, you're saying that he was — he remained fair and impartial in determining the conclusion in investigating and coming up with conclusions on the January 6 Select Committee; is that correct?

A. Yes, because the goal of the January 6 committee was not about the culpability of any one person. It was about the overall facts and circumstances that informed the attack. All of the various components of it. The President's incitement of a violent insurrection was one among hundreds of facts and circumstances that were considered. And even that, if there had been contrary evidence, we would have presented that. So I don't believe any of these [p.192] statements about this one fact among many represent that any of our members were, to use

JA1127

your term, “closed-minded” in the approach to the investigation.

Q. I'll represent to you that I have not used “closed-minded,” but I'm not going to object to your characterization. Let's go to the next —

A. Oh, I apologize.

MR. GESSLER: Let's go to the next exhibit, 1101, please.

Q. (By Mr. Gessler) So here it says — and this is a remark from — I'll represent to you that this is a remark from Representative Luria. Did Representative Luria serve on the commission — I'm sorry, on the committee?

A. Yes, on the committee, she did.

Q. Okay. And here it says that — “encouraged and emboldened by President Trump.” Do you agree with me that that statement indicates that President Trump encouraged and emboldened people, that that's the meaning of that phrase?

A. I believe that's what Ms. Luria intended, yes.

Q. Okay. And it's your belief that that [p.193] statement is consistent with the investigation – with the fair and impartial investigation by the January 6 committee; is that correct?

A. Yes.

Q. Okay.

MR. GESSLER: Let's go to Exhibit 1105, please.

Q. (By Mr. Gessler) And this looks like an official statement from Representative Cheney; is that correct?

A. I think so, yes.

Q. Okay. And did Representative Cheney serve on the Select Committee?

A. She was the vice chairwoman of the Select Committee.

Q. Okay.

MR. GESSLER: And scroll up just a little bit. I'm sorry, scroll down.

Q. (By Mr. Gessler) And so do you see where it says "The President of the United States summoned this mob, assembled the mob, and lit the flame of this attack. Everything that followed was his doing. None of this would have happened without the President"? Do you see where it says that?

A. I do, yes. [p.194]

Q. And is that statement consistent with Representative Cheney approaching the — approaching the workings of the Select Committee in a fair and impartial manner?

A. I believe Ms. Cheney was always fair and impartial, yes. And I apologize for using the wrong term before, "closed-minded." All of the members were fair and impartial throughout the process.

Q. Okay. There is no apology needed, although I appreciate that.

MR. GESSLER: Let's look at Exhibit 1106, please.

Q. (By Mr. Gessler) And this looks like a official statement from Representative Kinzinger; is that correct?

A. I think so, yes.

Q. Okay. And if you look at sort of the second — I'm sorry — the third paragraph, the final paragraph I'll say, where it says "There is no doubt in my mind that the President of the United States broke his oath of office and incited this insurrection." Do you see where it says that?

A. Yes.

[p.195]

Q. Okay. And is that statement consistent with approaching the workings of the commission in a fair and impartial manner?

JA1129

A. I believe so, yes. And this also re-reminds me that all — I think all of these statements that you're showing me were put forth at the time of the impeachment proceeding. And they were declaring their position on impeachment. "I will vote" — I believe he says in this very statement, "I will vote for impeachment." So they had made it — he had made a personal decision that with what he had seen and had been presented was sufficient to vote in favor of impeachment. Our lens was much broader —

Q. Okay.

A.— in terms of — and had a very different standard. So I don't believe that it — Mr. Kinzinger or any others were anything other than fair and impartial —

Q. So let's talk about —

A.— in that.

Q.— let's talk about that impeachment proceeding for a second. So the impeachment proceeding, is it [p.196] your understanding that the Articles of Impeachment were whether or not President Trump had engaged in an — in an insurrection; is that correct?

A. Yeah. I was not involved in that, and don't remember the specific allegations in the Articles. Generally, my belief is they believed he was unfit to continue service, but I just don't recall the specific Articles of Impeachment.

Q. Okay.

A. I think they did involve insurrection, but I just don't recall.

Q. Okay. I'm going to represent to you for purposes of my question, in fact it did include a vote on whether or not President Trump incited an insurrection. And you said that all members of the commission had voted yes on the impeachment question; is that correct?

JA1130

A. I believe that's right, yes.

Q. Okay. Do you know how many — do you know, roughly, what the vote was overall?

A. I don't —

Q. Okay.

A. — recall. I — I'm sorry. I don't recall. I think all Democrats and some Republicans [p.197] voted for impeachment.

Q. Okay. I'm going to represent to you that there were 232 votes in favor of impeachment, which constituted 54 percent of the voting members. And I'm going to represent to you that 197 members voted no, which constituted 46 percent. What percentage — just to be sure again, what percentage of the members of the Select Commission voted no on the impeachment?

A. I don't believe any of our members had previously voted no. I believe all of them are in that 54 percent majority that voted yes.

Q. Okay. So would you agree with me, then, that with respect to the perspective that President Trump incited an insurrection, that 46 percent of the members of Congress, their points of view were not represented on the committee?

A. That assumes that everyone who voted no voted true to their conscience and their personal belief. And I'm not certain I can say that that was accurate. I think a lot of people voted no when they actually thought he should have been. That's my personal opinion.

Q. Okay. Now, did the committee have any minority — any staff that was controlled by a [p.198] minority opinion? Let me back up a little bit. Is it your understanding that congressional committees normally have a majority staff and a minority staff?

A. Yes.

JA1131

Q. Okay. And your commission did — and your procedures for the Select Committee did not have a separate minority staff; is that correct?

A. We had one staff, that's right. There was not a majority and a minority.

Q. Okay. Were there any — do you know of any other commission in — or I'm sorry — committee — and I understand the limitations of your testimony earlier. But are you aware of any other committee in congressional history or modern congressional history that lacked a second minority staff?

A. I just don't know. There may be, but I just — I don't have any personal knowledge of a point of comparison.

Q. Okay. Let's —

MR. GESSLER. One moment, please. Excuse me just one moment, please, Your Honor. I'm going to pull up what's been marked as Exhibit 1108.

Q. (By Mr. Gessler) Do you see that?

[p.199]

A. I do.

Q. Okay. Let's go to the third page of that, the top of the third page. Do you see the paragraph that begins with "There was a lot of advance intelligence about law enforcement"? Do you see that?

A. I do. Yes.

Q. And that's a quote. And I believe the article quotes you. Did you make that statement?

A. I did.

Q. Okay. And you said there was a lot of intel in advance that was pretty specific, and "it was enough, in our view, for law enforcement to have done a better job," correct?

A. Have done a better job, yes.

Q. Okay.

JA1132

A. I still believe that to be accurate.

Q. Okay. And that advance intelligence was about the potential for violence at the Capitol, correct?

A. Yes.

Q. Okay. Now, when you say “advance intelligence,” did you mean intelligence reports [p.200] appearing before January 6?

A. Yes.

Q. Okay. Do you remember how far in advance, by any chance? I mean, the spectrum of advance knowledge, do you have any memory? I'm trying to get a sense.

Was it, you know, one hour before the start of January 6? Was it two years before the start of January 6?

Can you provide a time frame there?

A. Yeah. I can try — I can tie it very specifically to a tweet from President Trump on December the 19th where he made a very first reference to January 6 and encouraged people to come to the Capitol and said “Big protest in D.C. Be there. Will be wild.”

It was immediately thereafter that the intelligence started showing people's intent to come and the potential for violence. That was the spark really that ultimately erupted in violence on January 6.

Q. Okay. And so you started receiving lots of intel after that tweet, correct?

A. I —

Q. Or various law enforcement agencies [p.201] received that intel after — after that tweet?

A. Yes.

Q. Okay. Okay. And let's go to the ninth page.

Okay. Now, you see — okay. Do you see where it says “One of the tips entered in Guardian on December 27 came from a person who was reading traffic on a website called the TheDonald.win, a hive of January 6 rhetoric.”

JA1133

Do you see that?

A. I do.

Q. Okay. What was Guardian?

A. Guardian was an FBI system in which field agents submit information into a central database. And they're called guardians. The tips themselves are called guardians.

And the FBI, I believe, received 50, 55 guardians that were all placed under that CERTUNREST umbrella. And I believe that this piece from TheDonald.win was one such guardian.

Q. Okay. And it says:

"They think they will have a large enough group to march into D.C. armed and will outnumber the police so can't be stopped,' the tipster wrote. 'They believe that since the election was [p.202] stolen that it's their constitutional right to overtake the government, and during this coup no laws apply . . . Their plan is to kill people. Please take this tip seriously and investigate further.'"

Was that one of the pieces of evidence or one of the — was that the tip that was entered into Guardian on December 27?

A. That was one of many tips that were entered into the Guardian system. I don't recall this one specifically, but I — I know that was December 27. But that sounds consistent with the kind of information that was starting to emerge in — in between December 19 and between — and the attack on the Capitol.

Q. Okay. Now, did you or the committee form an opinion that there was a — that there were plans for violence that were made in advance of January 6?

A. Yes. I believe the Proud Boys, the Oath Keepers, there were multiple people in the crowd that did have very

JA1134

specific plans to commit acts of violence at the Capitol on January 6.

Q. Okay.

A. And I'm sorry. I believe there have been criminal convictions to that effect, seditious [p.203] conspiracy, which requires a use of force, in criminal courts, separate and apart from this committee process.

Q. Okay. Now, let me ask you this: This article also says — this article also says — and I'm looking for the quote, but I'll simply ask you — that the final commission reports downplay the failures of other — of law enforcement agencies to fully prepare for January 6.

Do you agree with that conclusion in the article?

A. No. No. We published every interview that we did with law enforcement and otherwise. There were several appendices to the report as well that detailed law enforcement failures. So I don't believe anything was downplayed in the report.

Q. Okay.

A. I'll say that the report puts together the whole facts and circumstances. Failures of law enforcement was a context, but it took nothing away in our view from the proximate cause of the event, which was President Trump inciting the mob.

That law enforcement failures made violence, unfortunately, more prevalent, but it did not detract from the overall conclusion that the [p.204] causation of the attack was the President's statements and the whole conspiracy to disrupt the transfer of power in the joint session.

Q. Okay. And that causation was one of the obvious facts that members of the commission and yourself concluded had occurred even before the January 6 Select Committee began its investigations, correct?

JA1135

A. I guess I would call it more of a — an hypothesis with which we started. It was what they already decided at least preliminarily through the impeachment process. But we were continually testing our evidence against that hypothesis. It did not change. It ultimately reinforced our conclusions —

Q. So —

A. — over the course of our investigation.

Q. So let me ask you this. And we —obviously, this transcript will be used as part of the proposed findings of fact and conclusions of law and used by the judge.

But I'll represent to you that earlier in your testimony you stated that the fact that President Trump instigated was viewed as a fact as —that was obvious on January 6; is that correct?

A. At the beginning, yes, it was obvious. [p.205] But I would classify it as an obvious fact which gave rise to an operating hypothesis that informed the approach to the investigation. Continually tested by evidence.

Q. So you're saying that it began as an obvious fact, it then became a hypothesis, and then it resulted in the same conclusion at the end of the committee's work; is that correct?

A. No. It never changed. It was — it's something that was obvious from the events of the day, from people that were there. It was the hypothesis that began the investigation. It informed the impeachment proceeding.

But I'm saying we tested it, as you always do in an investigation, against other facts as they emerge. And it never changed. The hypothesis was not rebutted or disputed, so there's no evolution.

But it was, to be clear, tested and plugged into a much more fulsome body of work beyond what had been obvious

at the time of those tweets and the impeachment proceeding.

Q. Okay. So, Mr. Heaphy, you were — you were appointed by President Obama as a U.S. Attorney, correct?

25 A. Yes.

[p.206]

Q. And President Obama was and, I believe, still is a Democrat, correct?

A. Yes, he is.

Q. Okay. And you were appointed to the January 6 committee as an investigator by Representative Pelosi; is that correct?

A. Well, Chairman Thompson made the decision, but, yes, the Speaker was involved in the hiring of the senior staff.

Q. Okay. And both former—Speaker Pelosi and Representative Thompson, they were both Democrats, correct?

A. Yes, that's correct.

Q. Okay. Have you ever been appointed to a position by a Republican?

A. I don't think so. No.

Q. Okay.

A. No. I've only been appointed —

Q. In fact, you were fired — I'm sorry. Did I cut you off? Please complete your question [sic]. I apologize.

A. No. If you want to talk about the firing, I'm happy to.

I was removed in my position as University counsel by a Republican attorney general [p.207] who defeated an incumbent Democrat. I was an assistant attorney general of Virginia as University counsel. And without explanation, without — over the objection of my client, the

JA1137

University — the new Republican attorney general terminated my leave of absence while I was working on the Select Committee.

Q. Thank you, Mr. Heaphy. You just saved me a few questions, so I appreciate that openness.

Now, Mr. Heaphy, you've made a number of political contributions over the years, correct?

A. Yes.

Q. Okay. I'll see if we can short—circuit a number of questions.

But have you ever — have you ever made contributions — have you made any contributions to Democrats?

A. Yes.

Q. In fact, almost, if not all, of your contributions have been to Democrats, correct?

A. I think so. I don't know for sure, but I — I don't recall right now making a contribution to a Republican.

Q. I'm sorry. Did you say you don't recall making a contribution to a Republican?

A. I do not.

[p.208]

Q. Okay.

A. I was talking about Mr. John Woods when he ran for Senate. I just don't think I — I don't believe I did.

THE STENOGRAPHER: Can he repeat that name?

THE COURT: Can you repeat? What was the name of the person that you considered making a contribution to?

A. John was a staffer on — of the January 6 committee, and he left to run for the Senate in Missouri. I may — I just don't know if I gave him money or not. I took a huge pay cut to be on the Select Committee, so I may not.

JA1138

But — yeah. To back up — so to be clear, I'm a Democrat. I've given money to Democrats my whole life. That's right.

Q. (By Mr. Gessler) Okay. Are you currently investigating or seeking the possibility of being appointed as a federal judge?

A. No.

Q. Okay. Have you had any conversations with anyone about seeking a federal judicial appointment?

MR. GRIMSLEY: Objection.

[p.209]

A. I have had conversations with so many people. I'm not interested in being a federal judge. With all due respect to judges, no, I —

Q. (By Mr. Gessler) I am not insulted by that answer. It's a difficult job.

MR. GESSLER: One moment, please.

Mr. Heaphy, thank you very much for your time today. I have no further questions —

THE WITNESS: Thank you.

MR. GESSLER: — right now.

THE WITNESS: Thank you.

THE COURT: All right. Any redirect?

MR. GRIMSLEY: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. GRIMSLEY:

Q. Mr. Heaphy, I think you may have answered this question.

But you had answered in response to many questions about statements and tweets that had been issued in kind of the January 2021 time frame that they were hypotheses that were tested.

How were those hypotheses tested by the investigative staff on the January 6 committee?

JA1139

A. We compared them to what we were hearing from other witnesses, what we were seeing in [p.210] documents, from what we were learning from our review of open—source material. Every investigation starts with a hypothesis. It's just the nature of it. It's the suspect in a criminal investigation. Sometimes that's reinforced; sometimes that's rebutted.

So it's hard to answer that question, Mr. Grimsley, because literally everything we did was always plugging in, continuing to synthesize, and comparing it to our understanding of facts and circumstances.

Q. And if you had found evidence that contradicted that hypothesis, what would you have done?

A. Absolutely, we would have found it as such. We would have made that clear. When I was hired by the chairman, he gave me an instruction that was reinforced throughout, which is follow the facts and circumstances, wherever they lead. And that's what we tried to do. We followed them.

They ended up affirming the hypothesis, but that was a constant reassessment in the course of our work.

Q. And after over a year of investigation and discussions with the numerous witnesses that you all had and the review of documents and video, what [p.211] was the — in testing that hypothesis, what was the conclusion of the January 6 committee with regard to President Trump's culpability in the January 6 attack?

A. Well, over the course of our hearings in the report, the conclusion we found as fact was that there was an intentional, multipart plan led by the President and facilitated by him and others to disrupt the joint session and prevent the transfer of power.

It's palpable throughout our hearings, and it's explicitly stated in our report.

Q. And what were your conclusions about whether . . .

THE COURT: I'll ask you to start over.

Q. (By Mr. Grimsley) What were your conclusions about whether President Trump incited a violent insurrection on January 6?

A. His incitement of violence was the final step of that multipart prong to try to disrupt the transfer of power. We reinforced the hypothesis of his incitement. It broadened from just his words at the Ellipse, "Fight like hell or not have a country anymore," to a much broader pattern, which inciting the mob was just one final desperate step.

Q. Now there has been some suggestion that the January 6 committee was populated by Democrats and [p.212] RINOs who had already prejudged President Trump's guilt.

Are you familiar with other members of Congress who had also made statements in the weeks and months after the attack on January 6 regarding President Trump's culpability, including Republicans?

A. Yeah. I believe our hearings featured some statements by Leader McCarthy and Senator Minority Leader McConnell and other Republicans essentially agreeing that the President bore every responsibility and incited the violence. Those things came up soon after the events in the course of the impeachment proceedings.

MR. GRIMSLEY: Are you just waiting?

MR. GESSLER: (Nodding head.)

Q. (By Mr. Grimsley) You had mentioned that Speaker McCarthy said that President Trump, in the days after the attack, bore responsibility, correct?

MR. GESSLER: Your Honor, I am going to object —

A. Yes.

MR. GESSLER: — to this line of

JA1141

questioning. I asked him his understanding with respect to actual members of the committee, because [p.213] we're talking about the processes of the committee, not processes or political opinions people may have had outside of the committee. Those are not relevant nor part of my questioning, nor do we think appropriate for part of the direct exam.

MR. GRIMSLEY: Well, there was a suggestion, Your Honor, that if one held a certain opinion shortly after January 6, they were closed—minded and wouldn't change it. But I think Speaker McCarthy — or former—Speaker McCarthy is a pretty good example of somebody whose opinion may have changed over time.

THE COURT: I think that you can bring in hearsay to impeach, but I'm not sure that you can bring in hearsay to rehabilitate the impeachment. Plus, I really don't — so I'm going to sustain the objection.

MR. GRIMSLEY: That's fine, Your Honor. I'll move on. I think the point is made.

Q. (By Mr. Grimsley) You were asked some questions about Exhibit 1108, which was an article, I think published earlier this year, in which you gave some quotes or at least there were some things you said were quoted in.

Do you recall that?

[p.214]

A. I do.

Q. And do you recall there being some effort to use the quotes from that article to suggest that the January 6 committee had somehow omitted key evidence?

A. Yes. I think Congresswoman Greene used a clip — a link to that interview and suggested that the January 6 committee found that the law enforcement was at fault. And I rebutted that in my first and only series of tweets.

The only time I've ever actually tweeted something was a direct response to her in the wake of that NBC report.

MR. GRIMSLEY: Can we put up Plaintiffs' Exhibit 320, please.

MR. GESSLER: Your Honor, I guess I would object to this. The question was did he agree with the statement in that article. He said no, did not authenticate it, did not endorse it, and that was sort of the end of it.

MR. GRIMSLEY: I think the article was brought up to suggest that there were other — yes, exactly.

THE COURT: Dissent among the ranks.

Q. (By Mr. Grimsley) Do you see Plaintiffs' Exhibit 320?

[p.215]

A. I do.

Q. Was that one of the tweets, your 15 minutes of fame on Twitter, where you sent out a tweet following the publication of the article?

A. Yeah. I think I actually opened my account that day for this purpose. And there were maybe three or four successive statements that directly addressed my statements in that article.

And, yes, this looks like the first or one of the series of tweets that — it looks like February 5, I see was the date.

Q. Could you read this tweet, please?

A. “President Trump and his co—conspirators devised and pursued a multipart plan and prevent the transfer of power” — that should be “to prevent the transfer of power.”

“He incited the crowd on January 6 and failed to act during the riot despite being able to do so. He and his enablers bear primary responsibility for the attack.”

Q. And I'll ask you to read just a little more slowly, because I'm going to ask you to read a second one too.

A. Okay. I'm sorry.

MR. GRIMSLEY: Can you put up exhibit — [p.216] Plaintiffs' Exhibit 321.

A. It says:

“I recently spoke to NBC news about law enforcement planning for January 6. Since that interview, some have used my comments to suggest that law enforcement could have prevented the riot. That is false. The proximate cause of the attack on the Capitol was President Trump.”

Q. (By Mr. Grimsley) And finally, I want to ask you some questions about intelligence that was gathered prior to January 6, following December 19, and specifically the Guardian platform that you had talked about during cross—examination, okay?

A. Sure.

Q. Was the committee ever able to discover or find out what specific intelligence was communicated to the President that the FBI had gathered?

A. No. Unfortunately, I can't say how much, if any, of those guardians or other intelligence was briefed to the President. We did have testimony that on the morning of January 6, the President was directly informed about the presence of weapons in the crowd. We had evidence that the night before he commented to a group of White House staffers, “They're [p.217] very depressed. They're angry.”

So there's some evidence of his awareness of danger or the potential for violence before his speech on the Ellipse. But I can't say, Mr. Grimsley, that we were able to determine that he was directly briefed about any of that intelligence. That was one of the many things that we just could never get to the bottom of.

JA1144

Q. Was there some evidence about what Mr. Trump was told at the Ellipse about individuals having weaponry?

A. Yes. We had testimony that he was told about weaponry, that he actually asked that the magnetometers be moved, and saying “These people aren't here to hurt me.” That he was very specifically made aware by staff of the presence of weapons in the crowd and proposed, actually, that people bring weapons into the event.

Q. So I want to look very quickly at one of the pages you were shown from Exhibit 1108.

MR. GRIMSLEY: And if we could go to page 9, please.

Q. (By Mr. Grimsley) And this will be the same, I think, quote from the Guardian, from the tipster that you were asked about.

[p.218]

MR. GRIMSLEY: If you could blow up the second—to—last paragraph, please.

Q. (By Mr. Grimsley) And do you recall being asked a question about this very specific — or this very piece of evidence?

A. Yes.

Q. And the tipster says “They think they will have a large enough group to march into D.C. armed and will outnumber the police so they can't be stopped.”

The quote goes on: “They believe that since the election was stolen, that it's their constitutional right to overtake the government, and during this coup, no U.S. laws apply. Their plan is to literally kill. Please, please take this tip seriously and investigate further.”

Do you see that?

A. I do.

JA1145

Q. And did you review the President's speech at the Ellipse on January 6 as part of the investigation?

A. Yes. Absolutely. Consistent message: The election was stolen, constitutional right to overtake the government, different rules apply, different laws apply.
[p.219]

I may be confusing that speech with other speeches, but the “no rules apply, different rules apply” is consistent with the President's rhetoric.

Q. Let me put up the speech.

MR. GRIMSLEY: So Plaintiffs' Exhibit 1029, page 14. Blow up the top, please.

Q. (By Mr. Grimsley) And this is from — this is a transcript of the Ellipse speech. And President Trump says:

“The Republicans have to get tougher. You're not going to have a Republican party if you don't get tougher. They want to play so straight. They want to play so 'Sir, yes, the United States, the Constitution doesn't allow me to send them back to the states.' Well, I say 'Yes, it does, because the Constitution says you have to protect our country and you have to protect our Constitution, and you can't vote on fraud, and fraud breaks up everything, doesn't it?' When you catch somebody in a fraud, you're allowed to go by very different rules.”

How does that compare to that piece of intelligence taken from the Guardian inside of Exhibit 1108?

A. Very, very close. The President [p.220] repeatedly talked about the election being stolen, about actual support, and did confirm to them that, in fact, different rules apply. Saying that to an angry mob of people on the Ellipse incited violence.

MR. GRIMSLEY: No further questions.

JA1146

THE COURT: Okay. Let's recess until — let's make it 3:05, so 20 minutes, and we'll finish up with —

MR. GRIMSLEY: Just for the record —

THE COURT: Oh, sorry.

MR. KOTLARCZYK: No questions for this witness, Your Honor.

MS. RASKIN: No questions.

THE COURT: Thank you, Mr. Grimsley.

MR. GRIMSLEY: Yes.

THE COURT: Now that Mr. Kotlarczyk is sitting all alone, it's really easy to forget you. It's like you're at the kids' table.

MR. KOTLARCZYK: This is the appropriately sized table for these chairs, Your Honor. The others have the, you know, much higher tables.

THE COURT: Okay. So we'll go back on the record at 3:05 to finish up with Professor Delahunty.

[p.221]

MR. GRIMSLEY: Can we excuse Mr. Heaphy? I apologize.

THE COURT: Thank you, Mr. Heaphy. Well, first of all, Mr. Heaphy, I've been mispronouncing your name all week, so I apologize for that.

THE WITNESS: Honest mistake, Your Honor. It's okay.

THE COURT: You are released.

THE WITNESS: Thank you.

(Recess from 2:43 p.m. to 3:07 p.m.)

THE COURT: You may be seated. Professor Delahunty, you're still under oath.

THE WITNESS: Sorry, Judge?

THE COURT: You're still under oath.

THE WITNESS: Yes, yes. I know. Thank you.

JA1147

MR. MURRAY: And, Your Honor, I just wanted to flag for the Court that after Mr. Delahunty's testimony we'll have just five to ten minutes of sort of evidentiary housekeeping matters if that's all right.

THE COURT: Yeah. We — I'll want to talk about a few things about the proposed findings of [p.222] facts and conclusions of law, so . . .

MR. MURRAY: Thank you.

CONTINUED CROSS—EXAMINATION

BY MR. MURRAY:

Q. Mr. Delahunty, did you speak with anybody about your testimony since you were last on the stand?

A. No.

Q. When we talked before lunch, we had just been discussing your testimony that Section 3 is ambiguous. And we finished talking about the meaning of the phrase “insurrection.” So now I want to turn our attention to your opinion about the meaning of the phrase “engaged in” —

A. Yes.

Q. — “insurrection.”

Now, do you recall talking about opinions by Attorney General Stanbery?

A. Yes.

Q. And I believe you called Attorney General Stanbery's opinions good evidence about the meaning of Section 3?

A. Yes.

Q. Now, at the time that Attorney General Stanbery issued these opinions, that was in 1867, [p.223] right?

A. Yes. This was before the ratification of Section 3.

Q. 1868 was before the states ratified Section 3 but after Congress had enacted legislation proposing Section 3 to the states, right?

A. Yes.

Q. Let's pull up Attorney General Stanbery's first opinion. This is on page 788 of Professor Magliocca's appendix.

You talked about how the Reconstruction Acts were a statute.

A. Yes.

Q. So I just want to look briefly at this. The sixth section of the Reconstruction Acts provides, among other things, "No person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the third article of said constitutional amendment" —

A. Yes.

Q. — correct?

A. Yes. That's what it says.

Q. So the Reconstruction Acts incorporated fully Section 3 of the Fourteenth Amendment? The [p.224] language was — the applicable language was identical, correct?

A. I think — I think in reading this, that's what it says. It says "No person shall be eligible to the office under any such provisional governments" —

THE STENOGRAPHER: Would you please use the microphone?

THE WITNESS: Yes. I'm sorry.

A. "No person shall be eligible to any office under any such provisional governments."

Well, that's not the language of Section 3. It's talking there about offices — state offices under former Confederate, now provisional, governments. So there's that difference.

JA1149

Q. (By Mr. Murray) Well, to be clear, though, this is saying that people would be disqualified from holding office under Section 3.

A. Yes.

Q. And so when we're talking about engaged in insurrection or rebellion, that phrase was the phrase he was interpreting among others here —

A. Yes.

Q. — correct?

A. I think it's fair to say that — well, [p.225] the text of the statute itself incorporates the well, the jurisdictional provision of Section 3.

Q. Do you recall testifying in your direct examination about official versus individual capacity?

A. Yes.

Q. And I think the point you were trying to make was that it wasn't totally clear what kinds of conduct were disqualifying in an official capacity versus in an individual capacity?

A. That seems to be Stanbery's opinion, yes.

Q. I want to look at that discussion in Stanbery's opinion.

A. Okay.

Q. If we go to page 799 of the appendix, there's a discussion here at the top.

“All those who in legislative or other official capacity were engaged in the furtherance of the common unlawful purpose or persons who, in their individual capacity, have done any overt act for the purpose of promoting the rebellion may well be said in the meaning of this law to have engaged in rebellion.”

Do you see that?

A. Yes.

Q. And then the paragraph after that gives [p.226]

some examples of what might be considered engaging in rebellion in an official capacity.

A. Yes.

Q. And then later on in that page in the —at the bottom, Stanbery says “So much for official participation. I now recur to what amounts to individual participation in the rebellion.”

Do you see that?

A. I do.

Q. And that's at the bottom of page 799.

If we go to the top of page 799 — and really that whole page is about individual participation in rebellion, correct?

14 A. I'm not sure —

THE STENOGRAPHER: I can't hear you. I'm sorry.

A. What page did you say the previous one was?

Q. (By Mr. Murray) Well, we just looked at the bottom of page —

A. 7 —

Q. — 799.

A. And then —

THE STENOGRAPHER: I can't hear you.

A. And then what follows.

[p.227]

MR. GESSLER: Your Honor, may I approach the witness just to readjust the screen and the microphone to help out a little bit?

THE COURT: Yeah. Of course.

A. Okay. So this —

THE STENOGRAPHER: One moment.

THE COURT: Okay. When you lean in, it's getting all that feedback. So let's try to . . .

Does that help, Professor?

THE WITNESS: I hope it helps everybody else. It helps me, yes. Thank you, all.

JA1151

MR. BLUE: Remember to speak into the microphone.

THE WITNESS: Oh, thank you, all.

A. I'm sorry?

Q. (By Mr. Murray) So at the bottom of page 799 —

A. Yep.

Q. — Attorney General Stanbery transitions from the subject of official participation —

A. Yes.

Q. — to individual participation —

A. Yes.

Q. — is that correct?

A. Yes.

[p.228]

Q. And then the following page, page 800 —

A. Yes.

Q. — there is a discussion of what it means to have engaged in individual participation —

A. Yes.

Q. — and rebellion?

A. Yes.

Q. And on page 799, Stanbery says “It requires some direct overt act done with the intent to further the rebellion.”

Do you see that?

A. He says that's a necessary condition of bringing the party within the purview and meaning of this law. Not sufficient. He says it's a necessary condition.

Q. Well, sir, later in that same passage —

A. Yeah.

Q. — he says “But wherever an act is done voluntarily and in aid of the rebel cause, it would involve the person and it must work disqualification under this law.”

JA1152

That was Attorney General Stanbery's interpretation, correct?

A. Yes.

Q. I want to turn to page 804 of Professor [p.229] Magliocca's appendix. And just highlighting that now we're talking about Attorney General Stanbery's second opinion.

Do you see that?

A. Yes.

Q. And if we look at page 815 of that opinion — I just wanted to direct your attention to the second—from—the—bottom paragraph there where Attorney General says that “While forced contributions are not disqualifying, voluntary contributions to the rebel cause, even such indirect contributions as arise from the voluntary loan of money to rebel authorities or purchase of bonds or securities would work disqualification,” correct?

A. Are we talking about the second highlighted —

Q. Yes.

A. — language? That's what he says, yes.

Q. And then later on that page, he specifically says “When a person has, by speech or writing, incited others to engage in rebellion, he must come under disqualification,” correct?

A. Yes. But here he is talking about those who are subject to disqualification as — because of their actions in an official — in official [p.230] capacities. “Discharge” — “Officers who, during rebellion, discharge official duties not incident to” — or like being an ambassador, a purported ambassador, to the Confederacy, to France — those people are not, in his judgment, subject to disqualification in light of actions such as speech or writing that incited others to engage in rebellion.

JA1153

So here he is talking about action in an official capacity. I don't know if that, in his view, translates into a disqualification for actions done in an individual capacity.

Q. Well, sir, the first sentence of this says that "Officers during the rebellion discharged official duties not incident to war but only such duties as belonged to a state of peace and were necessary to the preservation of order and the administration of law are not to be considered as thereby engaging in rebellion or disqualified," correct?

A. I think what he has in mind there is that the use of law enforcement officials on the level of constable, let's say, who are keeping the peace in some county in the Confederacy. And in doing — in keeping the peace locally, they're engaging in official duties but not official duties incident to [p.231] war. So that's the class of the person there.

Q. Correct. In the first sentence he's saying this is the class of persons that are not disqualified, and in the second sentence he says "When a person has, by speech or writing, incited others to engage in rebellion, he must come under disqualification," correct?

A. Well, I take that to refer to incitement by speech or writing in the discharge of official duties.

Q. But nowhere in that sentence does it say "in the discharge of official duties" —

A. Well, if —

Q. — correct, sir?

A. — you read it in the context with the immediately preceding sentence, that strikes me as the clear implication.

Q. That's your interpretation —

A. Yes —

Q. — correct?

A. — it is.

Q. In your report, you didn't discuss any of the pre—
Civil War treason cases about incitement, did you?

A. No.

[p.232]

Q. This is page 44 of Professor Magliocca's appendix.
And here we're looking at “Charge to the grand jury
treason from the Circuit Court in the Eastern District of
Pennsylvania in 1851.”

Do you see that, sir?

A. I do.

Q. If we look at page 46 — and by the way,
this is from Judge Kane charging the grand jury.

Judge Kane says “There has been, I fear, an erroneous
impression on this subject among a portion of our people
if it has been thought safe to counsel and instigate others
to acts of forcible oppugnation to the provisions of a
statute to inflame the minds of the ignorant by appeals to
passion and denunciations of the law as oppressive,
unjust, revolting to the conscience, and not binding on the
actions of men. To represent the Constitution of the land
as a compact of iniquity, which it were meritorious to
violate or subvert, the mistake has been a grievous one. ”

Do you see that?

A. Yeah.

Q. And do you see at the end of that paragraph Judge
Kane instructs the grand jury that “Successfully to
instigate treason is to commit it”?

[p.233]

A. Yes.

Q. But you didn't consider that in your report in this
case —

A. No —

Q. — correct?

A. — because it's about treason and, in particular, about levying war. So if this case is relevant, I think it's relevant to a part of Section 3 that does not appear to be at issue, and that is the part that refers to aid or comfort to the enemy.

So that doesn't really speak to the meaning of insurrection or insurrection against the Constitution.

Q. Your opinion —

A. He refers to —

Q. Sorry. Go ahead.

A. Well, show me where it talks about insurrection other than in the context of treason. Can we go back to the first page?

Q. Let me just ask you a question. Is it your opinion that incitement was enough to have levied war against the United States for purposes of the Treason Clause — let me finish —but was not enough to have engaged in insurrection under Section 3? Is that your opinion?

[p.234]

A. I don't know the answer to your question.

Q. I want to move to the subject of self—execution —

A. Yeah.

Q. — that you testified about on direct examination.

You know that states can enforce federal constitutional provisions through their own procedural rules —

A. Yes.

Q. — correct?

A. Yes.

Q. That would include, for example, Section 1 of the Fourteenth Amendment, right?

A. In — as a shield.

Q. Well, certainly, a state could pass legislation providing remedies for violations of due process or equal

protection, correct? There's nothing unconstitutional about that?

A. Not that I can see, no.

Q. You're not an expert in Colorado election law, fair to say?

A. No. That's very fair to say.

Q. And you're not here to offer an opinion [p.235] as to whether Colorado law grants a right of action to enforce federal constitutional qualifications in presidential primaries?

A. I have not read any Colorado law, statutory law.

Q. Let's just briefly discuss Griffin's case.

A. Yes.

Q. So Griffin was convicted of a crime in Virginia; is that right?

A. Yes.

Q. And he was convicted of a crime by a state court judge who presumably was disqualified under Section 3?

A. Very likely — yes.

Q. And so then Griffin brought a federal habeas petition in federal court, arguing that his conviction should be overturned because the judge was disqualified under Section 3?

A. Yes.

Q. And on direct examination, you said that Griffin's case had kind of three separate holdings.

Do you recall that?

A. Yes. Alternative holdings, yes.

Q. One of the holdings denied habeas relief [p.236] to Griffin on the basis of the de facto officer doctrine.

Do you recall that?

A. Yes.

Q. And as I understand it, the de facto officer doctrine essentially said this judge was, in fact, in that office at the

time, even if perhaps not lawfully so, and we're not going to allow a collateral attack on the conviction of someone who was convicted by a de facto judicial officer.

A. Yes.

Q. Was that the reasoning?

A. Essentially, yes.

Q. And the Court also denied relief based upon the scope of habeas relief available under federal law, right?

A. Yes.

Q. So just so we're all clear, Griffin's case did not involve a party invoking state procedural rules to enforce federal qualifications, correct?

A. Right.

Q. Do you know what year Griffin's case was decided?

A. I think it was decided in late July 1869.

[p.237]

Q. What was the status of Virginia in 1869?

A. Well, there is another attorney general opinion — I think it is the second opinion of Stanbery, but I'd have to confirm that — that discusses the powers of states not yet admitted — readmitted to the Union.

And the tenor of that, maybe, the clear language, is to the effect that the powers of the Union Army, Union military are very circumscribed, but they are part and parcel of the provisional government of the state. And the provisional government has, basically, all powers that an unreconstructed state would have, barring those that are expressly conferred upon the military.

Q. But Virginia was under federal military occupation in 1869, right?

A. I don't know, but — I don't know. I think so, but I — I have not confirmed that.

Q. And, in fact, Virginia didn't get readmitted to the Union until 1870? Do you know that?

JA1158

A. No, but I will take that representation as correct.

Q. I want to turn to your opinion that Section 3 does not cover the President.

A. Well — sorry.

[p.238]

Q. Oh, well, that the President is not an officer of the United States.

That's your opinion, correct?

A. Yes.

Q. Before this case, before you became an expert in this case, you had previously suggested that Section 3 does cover the presidency.

Do you remember that?

A. Well, I — what I said and what I think you're referring to was that there is support for the view that it does not — the jurisdictional language. I didn't use that term, but that Section 3 does not include the President as the subject — as subject to the section.

THE COURT: Can you — can you move the microphone back next to you?

THE WITNESS: Like that?

THE COURT: Yeah. Thank you.

Q. (By Mr. Murray) You addressed this issue in your article — your op—ed in The Federalist in August of this year —

A. That's right.

Q. — correct? And in that op—ed, you said —

A. May I qualify what I just said?

[p.239]

I addressed this issue in a sentence in passing, basically to take it off the table by saying I did not really want to discuss the issue any further.

Q. Understood. And in that portion of your article, you said that “Although Section 3 does not explicitly refer to

JA1159

Presidents or presidential candidates, comparison with other constitutional texts referring to officers supports the interpretation that it applies to the presidency too.”

Were those your words —

A. Yes.

Q. — back in August?

A. Yes.

Q. Your article from The Federalist in August of this year certainly didn't argue that the President was not covered by Section 3, right?

A. That is correct.

Q. You wrote that article in August of this year, before you were hired by Donald Trump as a paid expert in this case, right?

A. Yes.

Q. Since the time you wrote that article in The Federalist, you've been paid about \$60,000 —

A. Yes.

[p.240]

Q. — by Donald Trump for your work —

A. Yes.

Q. — in this case?

I want to pull up the language of Section 3 just so we're all clear on offices and officers. And let's start with offices.

So no person shall hold any office, civil or military, under the United States if they are disqualified and have not received amnesty —

A. Yes.

Q. — correct?

A. Uh—huh.

Q. You agree that the presidency is an office under the United States, don't you?

A. I take no position on that. That is disputed among scholars. I think Professor Lash does not believe that that

language applies to the presidency as an office. Other scholars, maybe the preponderance, think it does. It is the subject — that language of the colloquy that I think the judge questioned me about earlier, the colloquy between Senator Reverdy Johnson and Senator Morrill Lot.

So I don't take a position on the —that, whether the presidency as an office is covered or not. I haven't — [p.241]

Q. So you're not going to tell us today whether the presidency is an office under the United States?

A. That's right. I haven't formed a scholarly opinion about that.

Q. Well, sir, you know that the Constitution repeatedly refers to the office of the presidency, don't you?

A. That's one of the reasons I would be inclined to think that that language does apply to the office of the presidency.

Q. You would be inclined to that view, or you don't know?

A. Well, they're consistent statements.

Q. Let's look at Petitioners' Exhibit 235. This is just the U. S. Constitution.

And Article 2 is the portion of the Constitution that defines the powers of the presidency, right? Or at least one of them? And the executive branch?

A. Well, if that's the President of the United States with the executive power. I mean, does the President have powers outside of Article 2? That —

Q. No, no. I think we're — I'm just [p.242] saying that Article 2, at least in part, sets out the powers of the executive branch, correct?

A. Yes. I'm trying to think whether Article 7 refers to the President, to — the powers of the President, to respond fully to your question.

JA1161

Q. Understood. But I just want to highlight a little bit of language here in Article 2.

In Section 1 it says that the President shall hold his office during the term of four years, right?

A. Yes.

Q. And it refers to eligibility for the office of President?

A. Yes.

Q. And being eligible to that office?

A. Yes.

Q. And it talks about the removal of the President from office and the duties of that said office?

A. Yes.

21 Q. And the President, in fact, before he takes — enters on the execution of his office, he has to take his oath, right?

A. That's right.

Q. You know that the Twelfth Amendment also [p.243] refers to the presidency as an office?

A. Yes.

Q. And despite all that, you're not going to offer an opinion that the presidency is an office under the United States?

A. No, I am not.

Q. Well, let me ask you this: You agree it was well understood that Section 3 would not allow Jefferson Davis to become the President of the Union after the Civil War unless he got amnesty, right?

A. Well, if the language that we're discussing in Section 3, the disqualification or liability language, includes the office of the presidency, then Jefferson Davis would clearly have been disqualified from holding that office because, as a senator from Mississippi and perhaps

JA1162

in other connections, he had taken the Article 6 oath to support the Constitution.

Q. Correct. And you understand that after the Civil War it was incredibly well understood that Jefferson Davis could not be the President of the Union unless he received amnesty, right? You recall seeing some of that evidence?

A. It was well — may well have been well understood, but there was a — okay. Yes. Certainly, [p.244] it was what he desired. There's no question of that. And this was the worry that Senator Johnson raised and Senator Lot sought to allay by pointing to the liability or disqualification clause.

Q. And that colloquy that you're referring to —

A. Yes.

Q. If we go to page 477 of Petitioners' Exhibit 144, this colloquy between Mr. Johnson and Mr. Morrill is what you're referring to?

A. Yes.

Q. And you, in your report, said that this colloquy may tend to show that the presidency is an office covered by Section 3, right?

A. An office covered by the disqualification liability language of Section 3.

Q. And you would agree that in the debates about amnesty after the Civil War, one of the main arguments against blanket amnesty was that it would be absurd to allow Jefferson Davis to be the President of the United States, and if you granted amnesty for everybody under Section 3, then Jefferson Davis would become eligible to become president.

Have you seen all that historical evidence?

[p.245]

JA1163

A. Well, there may have been people who thought that, but they would have been wrong if an office — the office of the presidency is covered by the language that Senator Morrill posed. Whatever they thought, he would have been disqualified —

Q. Yes, and —

A. — because he falls within the jurisdictional element of Section 3, which is having taken an oath to support the Constitution.

Q. So even though everybody at the time knew that Section 3 disqualified Jefferson Davis to be President, you don't think that's good enough evidence to take a position as to whether or not the presidency is an office that is covered by Section 3's —

A. No, because this is a matter of active scholarly dispute. Kurt Lash, Professor Lash, and Professors Blackman and Tillman do not think that the language which the two senators here are discussing comprehends the office of the presidency.

Q. And they also don't think it's enough that the presidency is referred to as an office about a dozen times in the Constitution?

A. Apparently not.

Q. Let's talk about oaths.

I believe you testified on direct that [p.246] you thought there's a difference between an oath to support the Constitution of the United States and the President's oath.

Do you recall that testimony?

A. Yes.

Q. And I believe you said that the President's oath to preserve, protect, and whatever else it says, isn't an oath to support the Constitution, right?

JA1164

A. It obviously was, contextually, a different oath. And it's in a different article of the Constitution as well.

Q. Okay. It's preserve, protect, and defend the Constitution, right? That's what the President has to do?

A. That is — he is required to take that oath and, having taken it, to carry it out.

Q. And they use different words, but you would certainly agree with me that preserving, protecting, or defending the Constitution of the United States, as a practical matter, includes an obligation to support it, right?

A. I don't think it is relevant whether, as a practical matter, it requires to support the Constitution. As a practical matter, sure.

[p.247]

But we're not talking about practical matters. We're talking about the actual language of the Constitution. The actual language of Article 6 is palpably different from the Oath Clause in Article 2. Palpably different.

Q. And, sir, are you going to take the position — well, strike that.

Preserving, protecting, and defending the Constitution of the United States may not be limited to supporting it but certainly includes supporting the Constitution, right?

A. As a practical matter, yes. But, again, I don't see the real relevance of that because constitutional language is crafted carefully and precisely so as to achieve the intended objects. And I do not believe that the framers of Section 3 were careless in their draftsmanship.

It may be that there are some formulations of the Article 6 oath or its equivalent that vary linguistically slightly, but there's a palpable difference between the language of the Article 2 oath and the language of the

JA1165

Article 6 oath. I think that linguistic difference, which is a substantial one, supports the view that the President is not comprehended under the disqualification [p.248] language of Section 3 because he does not take an oath which members of Congress do to support the Constitution. He takes a different oath and has ever since George Washington was inaugurated in 1788. And I think the framers of the Section 3 understood that perfectly well.

Q. Sir, we talked about dictionaries earlier. And you testified on direct that in some of the historical research you've done in the past, you've looked at a dictionary by Samuel Johnson.

Do you remember that?

A. To the best of my recollection, I did, yes.

Q. Yeah. And you cited Samuel Johnson because that dictionary in the late 1700s was considered kind of one of the gold standards for lexicography and definition, right?

A. Yes, if maybe not the unique dictionary of the English language.

Q. All right. So let's pull up Petitioners' Exhibit 280. This is Samuel Johnson's fifth edition, which I will represent to you is from 1773.

And I want to look at how Samuel Johnson defined "defend," that word that appears in the [p.249] Article 2 oath, okay?

A. Yes.

Q. "Defend: To stand in defense of. To protect. To support."

A. Right.

Q. Do you see that, sir?

A. Yes.

Q. I want to go back to our Section 3.

JA1166

Your position is that you're not going tell us whether the presidency is an office under the United States, but you know that the President is not an officer of the United States —

A. I am —

Q. — is that your testimony?

A. I am very confident that the President, for this purpose, is not an officer of the United States. And I rest that position on the occurrence of that term, that specific term, that exact language, in other parts of the Constitution and judicial interpretation of that language in other parts of the Constitution from — up to the time of Chief Justice John Roberts' opinion in the Free Enterprise case.

There's a consistent body of judicial opinion from the Supreme Court and other lower courts concerning the meaning of “officer of the United [p.250] States” elsewhere in the Constitution. And some of that case law is around the time of the ratification — discussion and ratification of Section 3.

Q. Okay, sir. And you talked about some case law on direct examination as well. And I believe that you said that some of those cases were about the Appointments Clause, which you said was the anchorage of the meaning of the phrase “officer,” right?

A. Yes.

Q. Let's look at the Appointments Clause. Our Constitution, again, on page 7.

The Appointment Clause says that “The President shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States” —

A. Yes.

Q. — correct?

A. Yes.

Q. And the President can't appoint himself, right?

A. No. That's because he's not an officer of the United States.

[p.251]

Q. Well, he's certainly not an “other” officer of the United States, right?

A. Well, not being an officer of the United States, he can't be an “other” officer of the United States.

Q. Right. But if we're talking about the Appointments Clause, and the Appointments Clause is talking about “other officers of the United States,” clearly the Appointment Clause couldn't cover the President even if he was an officer, right?

A. Well, let me refer again to Chief Justice Roberts' opinion in the Free Enterprise case where he explains the language that's at issue right now in the Appointments Clause as indicating this, that the Constitution establishes quite clearly a distinction — it's a fundamental distinction in the Constitution — between those who are elected to their offices like the President and those who are appointed to the offices, like the Secretary of State or the Chief Justice or other officers of the United States.

And that's why — and that fundamental Constitution distinction, which is reflected here between elected and appointed, is — that's recognized and established in the case law.

Q. All right. So let's look at that. I [p.252] want to look — let me ask you this first.

You know that President Trump has previously argued that he is an officer of the United States, correct?

JA1168

A. I do not know that. But if I wanted a constitutional interpretation of that language, he would not be the first person to whom I would look.

Q. Fair enough. But let's look at it anyways. Petitioners' Exhibit 287.

I'm showing you "President Donald J. Trump's Memorandum of Law in Opposition to the People of the State of New York's Motion for Remand."

Do you see that on your screen?

A. I do.

Q. Okay. And the way this case came up is that there was a criminal prosecution of President Trump that then got removed to federal court. President Trump tried to remove it to federal court.

A. Yes.

Q. And then the district attorney of New York tried to remand it back to state court, right?

A. I'll take your word for it.

Q. Okay. If we go to page 8, legal argument, point one: "The President is an officer of [p.253] the United States who can remove cases to federal court."

Do you see that?

A. I do.

Q. Later on — and this is page 2 of the motion itself, numbered page 2 — there's a citation to Josh Blackman and Seth Barrett Tillman.

And do you imagine that those are the same scholars that you had cited in your direct testimony?

A. Yes. They're the same. I'm confident.

Q. And President Trump says, "Well, this argument that elected officials, including the President, are not officers of the United States has been advocated by these professors for some time. To our knowledge, it has never been accepted by any Court."

Do you see that?

A. Yes.

Q. And if we go to the next page — well, actually, at the bottom of this page there's a Footnote 1. And they're citing some articles, and then the footnote continues on page 2.

And President Trump says, “To be clear, we mean no disrespect to either of these fine [p.254] academics, but their views on this matter are idiosyncratic. See, e. g. , Our Next President at 5 through 6 (collecting the contrary views of numerous scholars) and of limited use to this Court.”

Do you see that?

A. Yeah.

Q. Did you know that this brief also specifically addresses the Free Enterprise case that you were just talking about?

A. No, I didn't know that. I have not read the New York lawyer's brief.

Q. Well, on the next page, page 4, there's a citation to Free Enterprise Fund, and that's the case you were just referring to, right?

A. Yes.

Q. And it says that case addresses the President's removal power under the Article 2 Appointments Clause?

A. Yes.

Q. And then it says later “It is clear that the Supreme Court was not deciding the meaning of 'officer of the United States' as used in every clause of the Constitution, let alone in every statute of the United States code. Rather, the Court was simply describing the meaning of 'other officers of the [p.255] United States' as used in U. S. Constitution, Article 2, Section 2, Clause 2.”

Do you see that?

JA1170

A. Yes.

Q. And then that paragraph goes on to say obviously the President cannot appoint himself, and so other officers of the United States, as used in Article 2, Section 2, Clause 2 must be a reference to nonelected officials, right?

A. Uh—huh.

Q. And then President Trump says, “This stray line in Free Enterprise Fund says nothing about the meaning of 'officer of the United States' in other contexts such as the relevant context the Court must consider here,” correct?

A. Yes.

Q. I want to take us back to the 19th century now.

A. Uh—huh. Did you want me to speak to this or no?

Q. No. Your counsel can ask you questions about that if they'd like.

A. Okay.

Q. Let's go back to the 19th century. Petitioners' Exhibit 144 again, Magliocca's materials.
[p.256]

And we're going to go back to Attorney General Stanbery's first opinion.

A. Yes.

Q. You're aware that he also addresses officers of the United States, correct?

A. In the statutory context.

Q. Yeah. In the context of the Reconstruction Acts applying Section 3, disqualification?

A. Yeah.

Q. And Attorney General Stanbery says, “This brings me to the question who is to be considered an officer of the United States within the meaning of the clause under consideration? Here the term 'officer' is used in its most general sense and without any qualification as legislative

JA1171

or executive or judicial. And I think as here used, it was intended to comprehend military as well as civil officers of the United States who had taken the prescribed oath," correct?

A. Yes.

Q. And did you know that Attorney General Stanbery also addressed the meaning of "officers" in his second opinion?

A. Yes.

[p.257]

Q. Page 811. Excuse me. Page 814. "Officers of the United States. As to these, the language is without limitation. The person who has at any time prior to the rebellion held any office, civil or military, under the United States and has taken an official oath to support the Constitution of the United States is subject to disqualification."

Do you see that?

A. I do.

Q. So here, Stanbery isn't drawing a distinction between office, officers, and those who hold offices, correct?

A. Not that I can see.

Q. Did you know that Attorney General Stanbery also referred to the President as an officer?

A. I don't — I think he said that, though he wasn't there purporting to interpret the language of Section 3. My recollection is that he said that a military governor of a not—yet—readmitted state, if he usurped powers that were not his, would be placed himself on a higher footing than the President, who is, if I remember the language, not to be considered — who is merely an executive officer of the United States. I think that's what it says. It doesn't appear on the screen, but I think you have to [p.258] read

what Stanbery is talking about here in construing the statute in light of what he says elsewhere.

Q. Yeah. And your opinion or what you just said — you actually — you quoted it spot—on. And that was from the same second opinion —

A. Yeah.

Q. — of the — on the Reconstruction Acts, correct?

A. Yes.

Q. Andrew Johnson was president when the Fourteenth Amendment was ratified, right?

A. Yes. He issued the proclamation that it had been ratified.

Q. And he also issued other presidential proclamations, correct?

A. He did.

Q. And in some of those proclamations, Andrew Johnson referred to himself as the chief executive officer of the United States?

A. He did. He referred to himself as the chief executive officer of the United States.

Q. Do you know whether other presidents during the 19th century were referred to as the chief executive officer —

A. I think —

[p.259]

Q. — of the United States?

A. — it probably was a common way of referring to the President and may still be now.

Q. In the 19th century, it was a common way to refer to the President — to refer to him as the chief executive officer of the United States.

You would agree with that?

A. A common way. Not common in connection with the interpretation of the Appointments Clause, however. And,

JA1173

indeed, the “chief executive officer of the United States” is a different term colloquially from the term “officer of the United States” as used in various places in the Constitution, principally Article 2's Appointments Clause.

So I don't consider that evidence of not — it's not really terribly relevant, if it's relevant at all, which I doubt, to the interpretation of the Constitution in any of its parts that uses the term “officer of the United States.”

Q. So you —

A. I think that the focus needs to be not on how “officer” or “officer of the United States” even is understood in statutory context, in official proclamations, in colloquial usage. The question before the Court is how is it understood for purposes [p.260] of the framing ratification and later understanding of Section 3. Legal terms and ordinary uses of language cannot simply be mapped on to the constitutional language.

Q. You don't think it was relevant in interpreting the phrase “officer of the United States” as used in Section 3 in the 1860s to look at what people in the 1860s thought “officer of the United States” meant?

A. Not given the language of the original Constitution of 1788, no, I do not think it is particularly relevant at all. It's a legal term, constitutional term of art.

Let me give you —

Q. And —

A. — an example of what I mean.

Q. Well, let me ask you a question, sir, and then you can answer my question.

So you wouldn't think it was relevant that Presidents Jefferson, Jackson, Van Buren, Harrison, Polk, Taylor, Fillmore, Buchanan, Lincoln, Grant, and Garfield were all also referred to as the chief executive officer of the United States?

JA1174

A. No, I don't. And let me give you an example.
[p.261]

Q. I'm just going to — that was just ayes—or—no question. If you want to —

A. Okay.

Q. — expound, I'm sure —

A. I just said —

Q. — your counsel can follow up on it.

A. — I don't think that it's particularly relevant.

Q. And therefore, you didn't look at any of that historical evidence in your report, correct?

A. The Constitution says what it says. And you interpret one clause of the Constitution in connection with other terms that use the same language or extremely close language.

Q. Okay. But you would agree with me that the original Constitution was ratified roughly 80 years before Section 3 of the Fourteenth Amendment —

A. Yes.

Q. — right?

A. Yeah.

Q. Okay. Right now we're in the 117th Congress.

Do you know which Congress was the Congress that enacted legislation proposing [p.262] ratification of Section 3?

A. It was proposed in 1866.

Q. And what number Congress was that?

A. I don't remember that.

Q. So you're not aware that it was the 39th Congress

—

A. I —

Q. — one of the most famous Congresses in American history, that proposed Section 3?

A. Well, I'm grateful to be reminded.

JA1175

Q. And so you also didn't think it was relevant that the 39th Congress repeatedly referred to the President as the chief executive officer of the United States?

A. Again, unless — no. I don't think it's particularly relevant. I mean, may I finally give the example that I need to underscore my claim that it's not relevant?

Q. Sure.

A. Article 2 says that the Senate shall advise and consent to presidential nominations to certain offices, and the Senate shall advise and consent to treaties.

Well, if you took those words, “advise and consent,” in their ordinary meaning outside the [p.263] context of the Constitution, then the Senate would have to consent to every treaty and consent to every presidential nomination.

The Senate doesn't always consent to treaties or nominations, right? So I deduced from that that the term “advise and consent” was a term of art as used in the Constitution.

My recollection — I never studied this deeply — but my recollection is that the term “advise and consent” was used as a term of art in English law and then entered our Constitution in 1788 with the understanding that that was the legal meaning of advise and consent, not — clearly not the only — not at — not understanding of the term “advise and content” that those words had in common acceptance.

Q. And because of your view about constitutional interpretation and methodology, you didn't think it was relevant to see how the 39th Congress that enacted the Fourteenth Amendment used the phrase “officers of the United States,” correct?

A. Not particularly relevant, no.

Q. And so if I were to show you ten pages from the congressional Globe of the 39th Congress that repeatedly referred to the President as an officer of the United States again and again and again, and these [p.264] were the very same people who enacted Section 3 of the Fourteenth Amendment, you wouldn't think any of that was relevant, would you, sir?

A. They're proposing the language of Section 3 against the backdrop of the Constitution that had been in existence for — what? — 80 years and as that constitutional language would have been understood even before 1868. Well before 1868.

Q. So there's some sort of technical term—of—art meaning in the phrase “officers of the United States” that was different from the way that everybody was actually using those phrases in public during the ratification or during reconstruction? That's your testimony?

A. No. I don't want to characterize it that way.

MR. MURRAY: All right. I have no further questions. Thank you.

THE COURT: The court reporter would like a five—minute break, so . . .

MR. GESSLER: My questions are going to be less than that, Your Honor.

THE COURT: I know, but I think she needs —

THE STENOGRAPHER: My computer froze.

[p.265]

MR. GESSLER: That's a non—negotiable five minutes. I understand, Your Honor.

(Recess from 4:00 p. m. to 4:06 p. m.)

THE COURT: You may be seated.

Mr. Gessler, the floor is yours.

MR. GESSLER: Okay. Thank you, Your Honor.

REDIRECT EXAMINATION

JA1177

BY MR. GESSLER:

Q. Professor Delahunty, I'm going to ask you to grab that microphone and get it close to you there.

So you were asked some questions about your opinion with respect to the payments you were receiving in this case, correct?

A. Yes.

Q. Okay. Do you remember having a conversation with me about a version of the Fourteenth Amendment that was introduced into the House of Representatives by Representative McKee?

A. Yes.

Q. Okay. And you remember I said — and that particular version said — specifically spoke to the portion of the Fourteenth Amendment involving the — the first phrase, the one involving “under [p.266] the” — “office under the United States.”

And that first version introduced by Professor McKee — I'm sorry — Representative McKee — specifically said not — specifically included the President and Vice President of the United States. Do you remember that?

A. Yes.

Q. And you remember I was pretty enthusiastic about that provision and thought that that should be included in your expert report? Do you remember that?

A. You were.

Q. I was very enthusiastic.

A. Yes.

Q. And did you include it in your expert report?

A. No.

Q. Why not?

A. Because I thought it was irrelevant to the use of the term “officer of the United States” in the disqualification language. I thought it just wasn't really —

Q. And —

A. — relevant evidence.

[p.267]

Q. And at the time —

A. Not relevant at all.

Q. I'm sorry. And at the time you refused to include it, did you know that you were receiving compensation for putting together this report?

A. I'm not sure that I — I don't know the answer. I think — I don't know the answer.

Q. Okay. Did you understand that you were getting paid for —

A. Yes.

Q. — your work —

A. Yes.

Q. — by the — by President Trump?

A. Yes.

Q. Okay. Now, do you earn your living as a testifying expert witness?

A. No.

Q. Do you —

A. Not at all.

Q. Do you have plans to market yourself as a testifying

—

A. Absolutely not. No.

MR. GESSLER: No further questions, Your Honor.

THE COURT: Mr. Delahunty, you are [p.268] released. Thank you so much.

THE WITNESS: Thank you, Your Honor.

THE COURT: So I think that there was some additional evidence that the petitioners wanted to offer; is that correct?

JA1179

MR. OLSON: Yes, Your Honor. We've, I think, reached agreement on — each side has a few more things we would like to put in —

THE COURT: Okay.

MR. OLSON: — to make sure we can complete the record. And I think they have three things. We have three documents and a handful of videos, total running time of less than ten minutes.

THE COURT: Okay.

MR. OLSON: Would you like to do that now?

THE COURT: Yeah. Let's —

MR. OLSON: Okay.

THE COURT: — let's take care of everything.

MR. OLSON: Great. And first — and then a couple other just quick notes.

Exhibit 78 is the findings of the final report of the January 6 Select Committee that we would like to submit. We mentioned we were going to reduce [p.269] the size of those findings, even ones you deemed admissible, because the evidence came in through other ways.

Our plan, if it's okay with Your Honor, is to use the weekend to look at the transcripts and then submit, when we submit the final exhibits to you, the shortened version of that Exhibit 78, if that's okay with Your Honor.

THE COURT: Yeah. That's fine. When you do so, will you just make sure that you make a notation as to whether the intervenors agree that — I know that they object to them all, but that they agree that those are ones that I've otherwise held —

MR. OLSON: Yeah.

THE COURT: — admissible, et cetera.

MR. OLSON: Yeah. Great. We will do that.

THE COURT: Without waiver, Mr. Gessler, all the arguments you've made about January 6.

JA1180

MR. GESSLER: Thank you, Your Honor.

MR. OLSON: Secondly, just a clean—up on the transcript. When we qualified Dr. Simi as an expert, I think the transcript reflects his testimony — he was admitted as an expert on political extremism “excluding” a bunch of specific things, and [p.270] I think it should say “including.”

I offered him as an expert on political extremism, including how extremists communicate, his interpretation of January 6 vis—à—vis his expertise in extremism, and extremism communication. We just want to be clear that that second phrase is part of what he was qualified as an expert on.

THE COURT: So would you say the transcript — you mean do you think it was just mistranscribed or did you misspeak or . . .

MR. OLSON: I think you misspoke, Your Honor.

THE COURT: Oh, I misspoke. Okay. I'm sure I meant to say “including” —

MR. OLSON: Okay. Great.

THE COURT: — because I wouldn't exclude the very things he was going to testify about.

MR. OLSON: Yeah. That — we just wanted to clarify.

And then there are a few portions of admitted documents that Your Honor hasn't seen. Our proposal would be just to call those out in the proposed findings rather than show them to you right now. But we're happy to show them to you right now if you want to see them before we submit the proposed [p.271] findings, but really welcome guidance from Your Honor.

THE COURT: I didn't really follow. So there's . . .

MR. OLSON: A few portions of some admitted documentary evidence —

THE COURT: Okay.

JA1181

MR. OLSON: — that we have not shown on the screen.

THE COURT: Okay.

MR. OLSON: We would like to reference those portions in the proposed findings of fact. But because it's admitted evidence, our proposal would be just to reference it in the findings of fact rather than show you the documents now, but if you'd like, we can have a slideshow and look at the documents.

THE COURT: No. If the — if what you want to cite in the proposed findings of fact and conclusions of law is from an admitted exhibit —

MR. OLSON: Yeah.

THE COURT: — that we just haven't talked about, I consider that to be evidence —

MR. OLSON: Okay.

THE COURT: — that's been admitted.

MR. OLSON: Great. Thank you. That was our understanding too. Thank you, Your Honor, for the [p.272] clarification.

So now, let me turn to the, I guess, just two documents that we would like to move for admission. Again, these are not objected to.

And just to make it move and be a little more interesting, I'll put the first page of the document on the screen. But I'm not going to walk through the whole document.

The first is Exhibit 30.

THE COURT: Okay.

MR. OLSON: Give me one second, Your Honor.

You would think by Friday we'd have this figured out, so my apologies.

All right. Here we go.

JA1182

The first, Your Honor, is a — in fact, we move for the admission of the artisanal flowers.

I'm just glad it made it this long.

Thank you very much.

First is Exhibit 30. It's a Government Accountability Office report on the Capitol attack. And we're mainly — exhibit — offering it for —there's a table on page 24 that we'll reference in our findings of fact.

The next is Exhibit 157, which is the [p.273] readout from the teleprompter that Donald Trump saw during the Eclipse [sic] speech. And so this differs from the actual speech in ways that we'll discuss, but this is what was on the prepared remarks for Donald Trump. And if you see at the bottom, it's an official government record from the General Accounting [sic] Office that you'll see along the bottom left.

Turning to the — so we move for the admission of Exhibits 30 and 157.

THE COURT: Okay. So 30 I know has been stipulated to.

Do the — does President Trump object to 157?

MR. GESSLER: Your Honor, we don't. We're going to argue its lack of relevance with respect to weight, but I guess we're — both counsel are following the rule of the big bucket of evidence. And so under that, you know, we'll — we'll argue it has little if any bearing, but as far as its authenticity and to the extent the Court wants to accept its relevance, we don't object.

THE COURT: Okay. So how about the Colorado Republican Party? Any objection to those two exhibits?

MS. RASKIN: No objection.

[p.274]

MR. KOTLARCZYK: No objection, Your Honor.

THE COURT: Okay. So 30 and 157 are admitted.

JA1183

(Exhibits 30 and 157 admitted into evidence.)

MR. OLSON: Thank you. Now turning to the videos, Your Honor. The first is Exhibit 58.

(Video was played.)

MR. OLSON: And I'll just go through all of the video exhibits and move for the admission at the end, Your Honor, if that's okay.

THE COURT: Okay.

MR. OLSON: The next is Exhibit P—62 —or Exhibit 62, Plaintiffs' Exhibit 62.

(Video was played.)

MR. OLSON: And, Your Honor, this was on August 24, 2020, and you can see at the bottom, a speech at the Republican National Convention.

The next video —

MR. GESSLER: Eric, can I just make a comment on that one?

MR. OLSON: Yeah.

MR. GESSLER: Your Honor, we do not object to this as statements from President Trump. [p.275] What I would ask — and I'll just go through these one—by—one — is that we nonetheless have a right to introduce the entire speech if necessary, because there's a few editing — there may have been a former Colorado Secretary of State wildly applauding — wild applause of his in the background during that convention.

THE COURT: And you want to make sure that that's part of the record?

MR. GESSLER: Exactly, Your Honor. So — but, yeah, we may want to include the entire — or additional portions.

MR. OLSON: Yeah. And we, of course, have no objection.

THE COURT: That's fine.

JA1184

MR. OLSON: Yeah. And the first one we watched was May 8 — P—58 was a May 8, 2019, speech in Florida, in the Florida Panhandle.

The next is P—64 — Plaintiffs' — or Petitioners' Exhibit 64.

(Video was played.)

MR. OLSON: And this was — P—64 was on 23 September 23, 2020.

Our next video is P—67 from November 1, 2020, in Michigan. And this speech is referring to [p.276] the Trump train with a bus. I can show the setup video that Trump had retweeted if you'd like, Your Honor. This was — the truck surrounded the Biden bus on the Texas interstate, then Trump retweeted the video.

THE COURT: Have I seen that?

MR. OLSON: Yes, but let me show it. It's P—71. I'll start with that. So this is a tweet — this is a video that Trump retweeted.

(Video was played.)

THE COURT: Well, I had missed what was actually happening, so thank you.

MR. OLSON: You're welcome. And so, if you recall, he retweeted that video saying — “I love Texas” was on top.

And then this is a video in Michigan shortly after this event where he talks about this event. It's Exhibit P—67.

(Video was played.)

MR. OLSON: The next video is from Miami, Florida, October 23, 2015, Petitioners' Exhibit 127.

(Video was played.)

MR. OLSON: The next video is Exhibit —Petitioner Exhibit 134 from a CNN town hall. We'll [p.277] provide the date shortly. I don't have that on my notes.

(Video was played.)

JA1185

MR. OLSON: And, Your Honor, Mr. Murray informs me this is from May 10, 2023.

And our last video is from an August 9, 2016, speech in Wilmington, North Carolina.

THE COURT: Okay. What number?

MR. OLSON: 159.

(Video was played.)

MR. OLSON: And, Your Honor, this — it goes on, but the portion that we wanted to introduce was the portion on the Second Amendment piece.

So those are the videos that we'd like to move into evidence: Petitioners' Exhibits 58, 62, 64, 67, 127, 134, and 159.

THE COURT: Any objection, Mr. Gessler?

MR. GESSLER: Your Honor, for the record, you know, we always have objections on relevance, but for the standards before this Court, we recognize any of those objections go to the weight. We're not going to dispute the authenticity or, you know, the admissibility in that sense, Your Honor.

THE COURT: Okay. The Republican Party?

MS. RASKIN: No objections.

[p.278]

MR. KOTLARCZYK: No objection, Your Honor.

THE COURT: Great. So 58, 62, 64, 67, 127, 134, and 159 are admitted.

(Exhibits 58, 62, 64, 67, 127, 134, and 159 admitted into evidence.)

THE COURT: And had 71 already been admitted, the Biden bus one?

MR. OLSON: Yes. It had already been admitted.

THE COURT: Okay.

MR. OLSON: And with that, subject to submitting the revised Exhibit 78, which is the findings from the January

6 committee, I think that's the evidence that we plan to present in this hearing. Thank you very much, Your Honor.

THE COURT: Okay.

MR. GESSLER: Thank you, Your Honor. We have three additional exhibits that I believe petitioners have agreed to — or agree to the admissibility of as well.

First is the full video exchange for the presidential debate involving Proud Boys. So we'll play that very briefly.

THE COURT: Okay.

[p.279]

MR. GESSLER: 1083, please.

THE COURT: And do we have an exhibit number for this?

MR. GESSLER: That's 1083, Your Honor.

THE COURT: Okay.

(Video was played.)

MR. GESSLER: Your Honor, I don't mean to interrupt this argument, but we're seeking — we don't need to listen to any more. It's for that relevant part that we had there, but it will be the entire — that portion of the video.

Next is a transcript from this same debate. This is the full transcript. We're only seeking to introduce it for purposes of the portion of that Proud Boys — I'll call it the Proud Boys exchange that you just saw.

THE COURT: And that is what number?

MR. GESSLER: And that's Exhibit 1080.

THE COURT: Okay.

MR. GESSLER: And then lastly, there's a transcript of President Trump's remarks the day after — and that's Exhibit 1081 — before a Marine One departure. We're not able to locate a video. We're not really sure it exists.

THE COURT: The day after what?
[p.280]

MR. GESSLER: The day after the Proud Boy debate exchange.

And if you could scroll down a little bit, please.

Okay. And the question is “Mr. President, can you explain what you meant last night when you said that the Proud Boys should, quote, stand back and stand by?”

“The President: I don't know who the Proud Boys are. I mean, you'll have to give me a definition because I really don't know who they are. I can only say they have to stand down, let law enforcement do their work. Law enforcement will do the work more and more. As people see how bad this radical liberal Democratic movement is and how weak —the law enforcement is going to come back stronger and stronger.

“But again, I don't know who Proud Boys are. But whoever they are, they have to stand down. Let law enforcement do their work.”

And then it goes on a little bit. But that's what we'll be seeking to introduce our — we seek to introduce as well. And that's Exhibit 1081.

THE COURT: Okay.

MR. GESSLER: And with that, Your Honor, [p.281] we rest with respect to our evidence as well.

While I have the podium, I know that there's a standing order or request from the Court within two days of the close of evidence to provide arguments to whether 113 has to be decided within two days. I believe we've discussed that but I just, from a housekeeping standpoint, want to do — to point that out. And I think that was your order of October 2, which was about a lifetime ago.

I assume we have resolved that, but I at least wanted to draw it to your attention from a formal standpoint.

JA1188

THE COURT: Okay. So 1080 — well, first of all, do the petitioners object to 1080, 1081, and 1083?

MR. OLSON: No, Your Honor.

THE COURT: Republican Party?

MS. RASKIN: We do not object.

THE COURT: Secretary of State?

MR. KOTLARCZYK: No objection.

THE COURT: Okay. So 1080, 1081, and 1083 are admitted.

(Exhibits 1080, 1081, and 1083 admitted into evidence.)

THE COURT: On the issue of [p.282] Section 1—1—113, the hearing is now concluded. It will be continued until oral arguments on November 15. I think it was at 3:00, from 3:00 to 5:00 — for closing arguments from 3:00 to 5:00?

MR. GESSLER: I believe that's correct, Your Honor.

THE COURT: And everybody believes that that's enough time to conclude the closing arguments?

MR. GESSLER: I don't know if there's ever enough time, Your Honor. But, I mean, I think both counsel are prepared to make their case with an hour of time allotted to them. At least we are. I assume the sage and concise counsel on the other side are as well, Your Honor.

MR. GRIMSLEY: We will be.

THE COURT: Okay. So on the proposed findings of fact, which are due on November 8, just a few comments.

All the proposed — all the propose findings should have cites either to the record or to the law. If possible, the Court would appreciate receiving just full transcripts for the days versus clips of what's being cited. So if that can be

24 arranged, that would be helpful.

This is specifically to you, [p.283] Mr. Gessler. Can you please put your citations in the text and not in footnotes?

MR. GESSLER: Yes, Your Honor. We'll abide by that guidance.

THE COURT: Well, the hope is is that I'm going to cut and paste them, and it's hard to do with the footnotes.

MR. GESSLER: I understand. No problem, Your Honor.

THE COURT: So it's to your benefit. To that end — to that end, if the parties could please try to avoid rhetoric in the proposed findings of fact and conclusions of law. The idea and hope is that I'm going to use them, and if they're very argumentative, that's difficult to do.

So if you can just lay out the case —the facts that you think have been established and the law that you think you have applied in a manner in which a Court might rule, that would be the most helpful to me, especially given the limited time that I'm going to have between submission and November 17, which is when the time will talk — the time will —when my rulings are going to be required to be submitted under the 1—1—113.

And if you can — I'm not going to make page limitations, but I just request that people be judicious with length so that I have time to actually process them, read any cases I haven't already read, et cetera, in the limited time between November 8 and November 17.

And then I just want to make sure. So first of all, Mr. Kotlarczyk, do you anticipate that the Secretary of State will be making any proposed findings?

MR. KOTLARCZYK: I do, Your Honor.

THE COURT: Okay. And will they just be on very discrete issues?

MR. KOTLARCZYK: Your Honor, we haven't had a chance to fully confer with my client since we're concluding the hearing now, but I would anticipate proposed findings specifically around Ms. Rudy's

testimony, documentation practices at the Secretary of State's office, and some of the legal issues that I think we've briefed previously.

THE COURT: Okay. So if you could just try to — that's fine. I'm — I just don't — I just don't want a lot of duplication. But I understand that you're kind of a lone wolf in this process. And so if you can just do as everybody else is and try not to make them too long, that would be great.
[p.285]

MR. KOTLARCZYK: I would wager, Your Honor, than mine will be substantially shorter than other parties in the case, but there are some important institutional interests that the Secretary of State wants to vindicate through this process.

THE COURT: Well, and I'm absolutely not — she's the respondent in the case. She obviously has the right to submit proposed findings of facts and conclusions of law, so . . .

MR. KOTLARCZYK: Thank you.

THE COURT: Okay. And can the Republican Party and President Trump coordinate and submit one set?

MR. GESSLER: I think this would be the first time in history that President Trump and the Republican Party have stated in court that they will cooperate. But we will do that, Your Honor. Of course.

MS. RASKIN: Yes. We can do that.

THE COURT: Okay. Great. So I will expect to see three submissions. No page limits, but just please don't go overboard.

MR. GESSLER: Your Honor, would you like us to coordinate so that we have a unified submission on behalf of President Trump and the Colorado [p.286] Republican Party?

JA1191

THE COURT: Yeah. That's what I — I'd like —

MR. GESSLER: Okay.

THE COURT: — one submission —

MR. GESSLER: Okay.

THE COURT: — if possible.

And then on the exhibits, you need to —you're going to have to submit all the exhibits that have been offered and not admitted — I'm not sure if there are any. But if you've offered them and I excluded them, they need to be submitted as that with a cover pleading.

And then if they've been offered and admitted, they need to be under a separate pleading, and they need to be submitted. And this is online.

Understanding that the videos are going to probably have to be, you know, like, a page, like, video, submit it to the clerk's office separately or something like that. But in order to have a clear record, you're going to have to do that on the judicial electronic filing system.

And then I think the best thing to do is for the videos if each side can submit the videos that were both admitted and offered and not admitted on, [p.287] like, flash drives so that the clerks — and the clerk's office, I believe, will accept that that way. But showing them to me or handing them to me doesn't cut it and won't make it to the Supreme Court if and when this gets appealed.

MR. OLSON: Just one question on that, Your Honor.

Is it your — it's a little complicated here because we have the anti—SLAPP motion. We filed a bunch. The was a motion practice for the admission of evidence before it was officially offered in court.

So for the exhibits offered but not admitted, just confirming for us, that includes information that we tried to use on the anti—SLAPP motion that you then

said you would not admit into evidence? Or is it just what happened this week in terms —

THE COURT: So, I mean, did the anti—SLAPP motion include videos and stuff?

MR. OLSON: The anti—SLAPP motion, I don't — it referenced videos. I don't know that we included videos.

MR. GRIMSLEY: I think we did.

MR. OLSON: Oh, we did. Okay. Yes, it did include videos.

[p.288]

THE COURT: Okay. So the extent that the — those exhibits — the ones that you filed, that's fine. If you — if you were — if part of the support for the anti—SLAPP motion was videos, then those should probably be submitted to the clerk's office as the videos in support of the anti—SLAPP motion.

MR. OLSON: All right.

THE COURT: And then, in my view, this is totally different. And so any videos — any exhibits or videos that were presented and admitted in this hearing need to be separately submitted.

MR. OLSON: Okay. Thank you, Your Honor.

And then just on the transcripts, would you like the transcripts with the filings on Wednesday? I think we're going to receive the final ones on Monday. Would you like them on Monday or do you want to wait with the — when we submit our proposed findings of fact and conclusions of law on Wednesday? And do you have a particular format that you prefer them in?

THE COURT: No.

MR. OLSON: Okay.

THE COURT: Not for format. And I plan [p.289] on spending Monday, Tuesday, and Wednesday catching up on my other —

MR. OLSON: Okay.

THE COURT: — 199 cases and probably reading some of the case law and things that have been talked about during the course of the trial. So we'll have plenty to do.

MR. OLSON: Great. Thank you, Your Honor.

THE COURT: Anything from you, Mr. Gessler?

MR. GESSLER: No, Your Honor.

MR. GRIMSLEY: Sorry. One last thing, Your Honor. And I think we forgot sometimes that the Secretary of State and the Republican Party are parties here. So in the closing arguments, I still assume two hours will be fine, but if we find out they have robust closing arguments they'd also like to present, we may get back to you.

MR. KOTLARCZYK: I don't anticipate robust closing arguments, Your Honor. If they're mindful of the Court's advisement that we are on the same clock, in advance of the 15th, we will huddle internally and I'll confer with the petitioners if we want to take any of their time.

[p.290]

THE COURT: Okay. And why don't you —you know, if you huddle and they say, “We really need the full hour,” and you need 20 minutes of your own —and that goes the same for the Colorado Republican Party. If you feel like you've got something that you need to say outside of what President Trump is saying and you need a little bit of extra time, just get in touch with us so that we can — you know, we can start a half hour earlier if we need to.

MR. KOTLARCZYK: Understood.

THE COURT: I don't want to deprive you of making your arguments.

MR. KOTLARCZYK: Thank you, Your Honor.

THE COURT: Anything else that we need to address?

JA1194

MS. RASKIN: Not from us, Your Honor.

THE COURT: Well, I want to thank everyone. It's been super helpful. And I really want to — I thank everybody, that I appreciate the decorum that the parties have had throughout these entire proceedings.

I know that this case, like all cases, but maybe particularly, is very deeply felt on both sides. And despite those deep feelings, I feel like the counsel for the parties has been very, very [p.291] professional and has put on a really outstanding presentation of the evidence and the arguments.

So we will continue this hearing until either 2:30 or 3:00 on November 15.

WHEREUPON, the foregoing deposition was concluded at the hour of 4:46 p. m. on November 3, 2023.

JA1

DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO
1437 Bannock Street
Denver, Colorado 80203

Case Number 2023CV032577, Division/Courtroom 209

CERTIFIED STENOGRAPHER'S TRIAL
TRANSCRIPT

TRIAL DAY 6: November 15, 2023

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAHER,
KATHI WRIGHT, and CHRISTOPHER
CASTILIAN,

Petitioners,

v.

JENA GRISWOLD, in her official capacity as
Colorado Secretary of State, and

DONALD J. TRUMP,

Respondents,

and

COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE, and DONALD J. TRUMP,

Intervenors.

The trial in the above—entitled matter commenced
on Thursday, November 15, 2023, at 3:05 p.m.,
before the HONORABLE SARAH B. WALLACE,
Judge of
the District Court.

This transcript is a complete transcription of

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the proceedings that were had in the
above—entitled matter on the aforesaid date.

Stenographically reported by:

Reported by K. Michelle Dittmer, RPR

[p.2]

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[p.6]
PROCEEDINGS

JA6

WHEREUPON, the Court convened at 3:05 p.m., and the following proceedings were held:

THE COURT: Good afternoon. Welcome back.

We are here for the continued Colorado Revised Statute 1—1—113 hearing in the matter of Anderson vs. Griswold, with the intervenors, the Colorado Republican State Central Committee and Donald J. Trump, Case Number 2023—CV—32577.

May I have entries of appearances, starting with the petitioners?

MR. GRIMSLEY: Your Honor, Sean Grimsley, with Eric Olson, Jason Murray, Martha Tierney and Mario Nicolais for petitioners.

THE COURT: Great.

MR. GESSLER: Afternoon, Your Honor. On behalf of President Trump, Scott Gessler. With me is Mr. Geoff Blue and Mr. Justin North.

MR. SISNEY: Good afternoon, Your Honor. I'm Ben Sisney. I'm here with Nathan Moelker in person. Jane Raskin, also with the American Center for Law and Justice, is here remotely. Also here with Michael Melito, Melito Law, and Bob Kitsmiller of Podoll & Podoll.

THE COURT: Great. Thank you.

[p.7]

MR. KOTLARCZYK: Good afternoon, Your Honor. Michael Kotlarczyk from the Attorney General's Office here on behalf of respondent, Jena Griswold. With me today is Secretary of State Jena Griswold and Deputy Secretary of State Christopher Beall.

THE COURT: Great.

Have we, among counsel, talked about the order? I'm assuming we're starting with the petitioners, and then what's next?

MR. GRIMSLEY: I would assume that the Secretary of State would go next because I would imagine that the intervenors would probably want to respond.

THE COURT: Okay. Does that work for you, Mr. Gessler?

MR. GESSLER: That works fine, Your Honor.

And then we just had one question for the — for the time allotment. Do the — does President Trump and the Colorado Republican Party, do they split it or does the Colorado Republican Party get — I think they have maybe 10 minutes of additional time.

THE COURT: I'm not going to cut anybody off, so let's just proceed.

MR. GESSLER: Okay. Well, then, with [p.8] that, we'll probably ask the Colorado Republican Party to go first because they have some airline transportation issues.

THE COURT: Oh.

MR. GESSLER: And then — and then we'll bat cleanup.

THE COURT: Nothing for me to decide on the airline transportation issues, I hope?

MR. GESSLER: We could have that jurisdictional discussion, but I'm not sure that would work. But yeah, they have a flight to catch.

THE COURT: Okay.

MR. GRIMSLEY: And, Your Honor, may I reserve time for rebuttal given that this is a closing argument?

THE COURT: Sure. So why don't we do it this way. Mr. Kotlarczyk already asked for ten minutes, and we'll give approximately ten minutes to the Republican Party, and then up to an hour each for Intervenor Trump and

the petitioners. And if you want to reserve time, that's fine.

MR. GRIMSLEY: We'll see. We'll see where I'm at at the end of the opening of the closing argument.

THE COURT: Do you need us to keep time or —
[p.9]

MR. GRIMSLEY: I can keep it.

THE COURT: Okay.

MR. GRIMSLEY: Good afternoon, Your Honor. I'm sure I speak for everybody here, but on behalf of petitioners, I wanted to thank the Court and the court staff for all of the time and attention that you have put in on this matter, the speed and thoughtfulness with which you have issued your rulings, all while under the brightest of spotlights. We really thank you.

I wish we didn't have to be here. We're here because for the first time in our nation's history, a President of the United States has engaged in insurrection against the Constitution. He spearheaded a multifaceted scheme to stay in power by any means necessary, the scheme culminating in a violent attack on the Capitol on January 6, during the constitutionally mandated counting of electoral votes, and now he wants to be President again.

The Constitution does not allow that.

It's easy to forget that we are governed by a document. There is real fragility to that. The document has no weapons. It commands no armies. Section 3 of the Fourteenth Amendment is one of the few self—defense mechanisms that that document has.

And it stands for the unremarkable [p.10] proposition that a person who takes an oath to support the Constitution and then turns around and attacks it cannot be allowed to take the oath a second time.

Such a person has proven themselves untrustworthy and incapable of ensuring that we remain a country ruled by law and not by men. Through his actions, and his actions alone, Donald Trump has disqualified himself from ever holding office again.

9 I've got some slides here. I also have a
10 board over here, Your Honor. I'm sorry I had to put it way over there. I didn't want to block anybody.

This is a slide that we used in opening. I've tweaked it a little bit. These are the four elements that we said that we would prove and that we have proven. I'm going to talk about the first three today. I understand the Secretary of State is going to talk about the fourth one. And over here, again, we have a board, and I'll be referencing that.

The first element, that President Trump took an oath as an officer of the United States to support the Constitution. There is no dispute that President Trump took an oath. There's a stipulation to that. We all know that.

Now, President Trump, I expect, is going to argue that he was not, as President, an officer of the [p.11] United States or that his presidential oath was not one to support the Constitution. I'll address those incorrect arguments later.

Element 2. January 6 was an insurrection against the Constitution. And there really isn't that much in the way of dispute here, either. That's likely why President Trump waited until the very end of a 177—page findings of fact and conclusions of law to make the argument.

And like I said, we have a board, Your Honor. Over on this board is the standard — and I'll — for both insurrection against the Constitution and engaging in

that insurrection. These are the standards that were put forth by our expert, Gerard Magliocca.

So for insurrection against the Constitution, that is any public use of force or threat of force by a group of people to hinder or prevent the execution of the Constitution.

Now, Trump's expert, Delahunty, offers no alternative definition. He instead argues that insurrection against the Constitution is somehow so ambiguous that this Court needs to defer to Congress.

Delahunty is wrong. He is wrong that ambiguity, even if it existed, would require this Court [p.12] to throw its hands up. It is the Court's fundamental duty to interpret the Constitution and say what the law is. But there is no ambiguity. The historical evidence on this is clear.

Now, before we get to the battle of the experts and what they said on the historical evidence, I want to look at their qualifications because this probably says all you need to know.

On the left we have Gerard Magliocca, who was a fan of the Fourteenth Amendment Section 3 before it was cool to be, and then we have Delahunty on the right.

On the left, we have a professor who has not only been a constitutional scholar for over 22 years, written books and law review articles, but he has two peer-reviewed articles on Section 3 and a book on the Fourteenth Amendment.

He has Section 3 literature that's been cited by two Federal Courts, the Congressional Research Service, and he has testified and been found to be an expert before this case in court on Section 3 of the Fourteenth Amendment.

Delahunty, by contrast, one of the first answers on cross—examination was that he was not claiming to be an expert in the history of Section 3 of the Fourteenth Amendment.

[p.13]

Now, the historical evidence in support of Professor Magliocca's definition is just as clear as the qualifications when you look at the balance.

So Professor Magliocca points to a number of historical sources, the Whiskey and Fries Insurrection, which would have been well—known at the time of the framing, dictionary definitions of insurrection, jury and grand jury charges, and the code of war that was used by the Union Army during the Civil War.

And again, on the right—hand side, what do we have? Delahunty asking this Court to throw its arms up because insurrection is somehow too ambiguous.

Magliocca is correct.

The January 6 events easily meet the definition of insurrection against the Constitution. There was a large group of people that attacked the Capitol on January 6.

This is from Officer Danny Hodges: "There were thousands, I would say." "The size of the mob was the greatest weapon," and that's, on the right, a photo still from the video — from the camera atop the Capitol that day.

Here's testimony from Officer Pingeon: "There were thousands of people coming towards the [p.14] Capitol along Pennsylvania Avenue." So it wasn't just the folks who were at the Capitol to begin with. There were thousands coming up from the Ellipse at the behest of President Trump. The mob used violence and threats of violence. This is from Officer Danny Hodges: "The crowd

attacked me in a variety of ways, punching, kicking, pushing, chemical irritants, beaten in the head. I was pinned and crushed with a police shield.” And we know what that video was.

(Video playing.)

MR. GRIMSLEY: This is from Officer Hodges’ body cam outside the Capitol, and this, even worse, somebody’s phone inside.

(Video playing.)

MR. GRIMSLEY: And this from Officer Pingeon:

“How long were you engaged in hand—to—hand combat?”

“For probably two to three hours.”

“Did you think your life was in imminent danger?”

“Yes, I did.”

And it wasn’t just violence against the [p.15] police officers. It was the threat of violence against members of Congress and Vice President Pence.

Here is testimony from Representative Swalwell:

“How concerned were you for your personal safety at that moment?”

“It was escalating as we went from gas masks to a pen in my hand to a prayer from the chaplain, and it was when the chaplain read that prayer that I finally texted my wife something I did not want to text her.”

And we know what the mob was doing inside the Capitol. This is the mob —

(Video playing.)

MR. GRIMSLEY: — chanting “Nancy,” looking for Nancy Pelosi. That is violence and the threat of violence.

Finally, it’s clear that the mob’s goal and what it did, in fact, do was to disturb a constitutionally mandated proceeding; namely, the counting of electoral votes.

This is testimony from Representative Ken Buck, who was President Trump's witness:

"The mob meant to disturb a proceeding?"

"Yes, the electoral vote count on the [p.16] House."

And the mob did, in fact, disturb that proceeding.

Now, Delahunty suggests that one of the reasons insurrection against the Constitution is ambiguous is because "against the Constitution" is somehow ambiguous. There's a slippery slope here. How do we know at the end of the day what "against the Constitution means."

But this Court doesn't have to engage in fine—line—drawing exercises. There is no doubt that the counting of electoral votes to ensure the peaceful transfer of power under the Constitution is interfering with, hindering, and preventing the execution of the Constitution.

Now, President Trump makes a few arguments about why this is not an insurrection. First, the mob was not organized. Somehow that makes it not an insurrection.

The mob was not armed with guns.

And, most curiously, the people at the Ellipse were happy and milling around, so too at the Capitol.

These are not credible arguments. First, there is no organizational requirement in that definition [p.17] over there, but the mob was organized. Let's look again at some testimony.

This from Officer Pigeon: The equipment that people had on: helmets, goggles, body armor, paramilitary—style gear and equipment.

And on the right you have photos, one from Nate Gowdy and the other a still from the body camera of Officer Hodges.

Then we have video.

(Video playing.)

MR. GRIMSLEY: Coordinated attack on the Capitol working together to try and get in to the portico on the right side where all of those officers are.

“Fight for Trump. Hand up the flag, use it as a battering ram.”

And you remember when Officer Hodges was testifying about fighting with the crowd and how a person came up to him and said, “You need to watch out, people are coming up from the back”?

Here’s what Officer Hodges had to say: “This indicated to me that there was preplanning, coordination, and that they were intentionally encircling the U.S. Capitol.”

And then finally, the January 6 Report, this is Finding 367. And there are many findings like [p.18] this in the report, that this was an organized attack. “While the Proud Boys and other extremists were overwhelming law enforcement at the West Plaza, another group led the attack on security barriers on the East Plaza. A military—style stack of Oath Keepers entered through the Columbus doors as well. This was a coordinated attack.”

Now, as to the assertion that there were no arms so this shouldn’t be an insurrection, again, there’s no requirement for there to be arms to be an insurrection. But there were arms.

As we point out in our Proposed Findings of Fact 119, the mob brought guns, knives, Tasers, sharpened flagpoles, scissors, hockey sticks, pitchforks, bear spray, pepper spray, chemical irritants.

They stole items from the Capitol to use as weapons: Police barricades, scaffolding, construction equipment, trash cans.

They took items off of police officers: Batons and riot shields.

They were armed.

And third, as I said most curiously, the idea that people were happy and milling around. You know, there may have been some Tom Bjorklunds, or Steves, at the event does not change the fact that a large group [p.19] of people attacked the Capitol that day.

The fact that Amy Kramer believed that many of the people at the Ellipse were happy and festive does not change the fact that, A, she didn't even go to the Capitol; she went back to the Willard.

But even when she was at the Ellipse, she could not see out beyond the magnetometers where the people were not so happy.

(Video playing.)

MR. GRIMSLEY: That is almost certainly why what I've just gone through, in the immediate aftermath of January 6, there was bipartisan agreement in both the House and the Senate that the January 6 attack was a violence insurrection.

Indeed, President Trump's own lawyer said as much at the impeachment proceeding.

Element 3. Trump engaged in the insurrection.

Now, I point back to the board again, and we have on it Professor Magliocca's proposed definition of what constitutes engaging in an insurrection against the Constitution: Any overt and voluntary act in furtherance of an insurrection against the Constitution, including

words of incitement, done with the intent of aiding and furthering the common unlawful purpose.

[p.20]

Now, here the dispute between Magliocca and Delahunty is — really comes down to one thing, and that's what Delahunty says: In order to engage, you have to have actually taken up arms, that incitement is not enough.

But Magliocca again has the better of the argument. Here we have the comparison, again on the left, Magliocca. He's got the first and second Attorney General opinions. Now, those are significant because A.G. Stanbery was the person interpreting and guiding the Union Army in the south on what the — conduct would satisfy the disqualification provisions of Section 3.

There were early Section 3 cases in which this was the definition of insurrection, that it did not require actually taking up arms.

There were the pre—Civil War cases, and these are particularly instructive because there, treason was at issue, levying war. In those cases, incitement was sufficient.

And then there were the congressional cases, you'll remember, where the House refused to sit certain members. One of them was the man John Brown — Young Brown from Kentucky who wrote an op—ed.

The other was, I think, Philip Thomas from Maryland, who gave \$100 to his son, who was going off to [p.21] join the Confederate Army. There is no requirement that one actually take up arms.

The only thing Delahunty has on his side is the Confiscation Acts, which were a criminal statute at the time that made it illegal to engage in or incite an

insurrection. He says because incite was used there, wasn't used in Section 3, that it must not be part of Section 3.

But he ignores that that's a criminal statute. Those are often far more specific than the Constitution, as Magliocca testified. Otherwise, we'd have a 100—page—long Constitution.

But more than that, he provides absolutely no evidence, contrary to what you see on the left, that anybody who is drafting Section 3 believed that incitement was somehow insufficient.

He's pointed to no evidence suggesting that anyone drafting Section 3 was relying on the Confiscation Acts.

And he never explains why it would make sense, given the goal of Section 3, to require taking up arms. The people that the framers of Section 3 were most concerned with were the leaders of the Civil War, of the Confederacy, Jefferson Davis, people who never took up arms.

[p.22]

That's why even in 1872, when Congress gave blanket amnesty from Section 3 to most Confederate soldiers, it withheld that amnesty from the leaders of the Confederacy, including Jefferson Davis. There's no requirement that somebody actually take up arms. Incitement is more than sufficient.

Trump's actions constitute engaging in an insurrection against the Constitution. Now, there is no question at all that he took many overt and voluntary acts that furthered the insurrection. He summoned the mob to DC.

This is a slide we used in opening, and it shows all of the tweets that he sent out between December 19, “Will be wild,” and his Fight for Trump video and January 6.

But he also gave them their common purpose, and this is a slide we have not shown. And believe it or not, this is not all the tweets that he sent out dealing with election fraud.

But from November 4 to January 6, he sent out all these tweets, he made numerous speeches where he claimed there was election fraud, repeated assertions of a stolen election.

Now, beyond that, he focused his supporters and the mob’s attention on Vice [p.23] President Pence. Here’s just one example of a tweet. This is from the morning of January 6: “States want to correct their votes which they now know were based on irregularities and fraud. 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.”

And we know that after that tweet, President Trump spent 90 minutes on the Ellipse inflaming his supporters, telling them that they needed to fight or they would not have a country anymore. Telling them to march down to the Capitol, where he would be there with him — with them.

I’m not going to play the speech. We played the speech a bunch of times, but I’m just putting up here some of the things that were contained in that speech:

“You don’t concede when there’s theft involved. Our country has had enough. We will not take it anymore. Because if Mike does the right thing, we win the election. If this happened to the Democrats, there’d be hell all over the country going on. And we fight, we fight like

hell, and if you don't fight like hell, you're not going to have a country anymore."

And most chilling of all: "And fraud breaks up everything, doesn't it? When you catch [p.24] somebody in a fraud, you're allowed to go by very different rules, so I hope Mike has the courage to do what he has to do, and I hope he doesn't listen to the RINOs and the stupid people that he's listening to."

What could that mean, other than a call to lawlessness or violence. You go by very different rules.

Now, you don't need to take my word that this was a call for violence or lawlessness. Professor Simi came in and testified. He was an expert and is an expert on political extremism, including how extremists communicate. And, in fact, this Court qualified him as an expert to testify on his interpretation of January 6 vis—
a—vis his expertise in extremism and extremist communications. Here's what he had to say about the Ellipse speech: "It was a call to violence."

Now, Trump asserts his language was not a call to violence. He was just using strong political rhetoric. The word "fight," even though he used it 20 times, was just metaphorical. He said peacefully and patriotically once, so how on earth could he possibly have been encouraging violence or lawlessness.

Well, Professor Simi explained why. Trump did not conjure his rhetoric out of nowhere. He did not just happen to choose language that would resonate with [p.25] his far—right extremist supporters. He knew precisely what he was saying based on a five—year history of call and response, where he would either call for violence and then not condemn it, or there would be violence and he would actually praise it.

Now, you recall that my colleague, Eric Olson, during the redirect had the flip chart, and he wrote up some of the episodes of the call and response, and there were about five there. There are a lot more than that, and we put that in our proposed findings of fact. But I want to go over it quickly just so Your Honor can see.

So 2015, October, he starts saying —these are protesters — first group, he’s going to be kind of nice to; second group, eh, not so nice; third group, I’ll be a little more violent; fourth group, “Get the hell out of here.”

November of 2015. “Get the hell out of here.” And that’s a protester who actually then got beat up, assaulted, and President Trump goes on the news, I think it was the next day, and saying maybe he deserved to be roughed up.

February 1, 2016: Somebody throws tomatoes, “Knock the crap out of him. I’ll pay for your legal bills.”
[p.26]

February 22, 2016: “Punch him in the face.”

March 11, 2016, in response to violence that his supporters had committed in his name: “Violence sometimes is very, very appropriate,” what he said, and he said, “We need a little bit more of it.”

On August 9, 2016, he’s complaining at a rally about how Hillary Clinton will appoint judges who will take Second Amendment rights away, telling the crowd that if she does that, there’s nothing that can be done, except maybe the Second Amendment people can do some thing about it.

And then August 15, 2017, this is the “very fine people on both sides,” the press conference after the Unite the Right rally, where somebody was killed by a far—right—wing extremist.

I want to stop here for a minute because President Trump, I suspect, and has already, is going to say that we're cherry—picking here, that we're just looking at what he said at the press conference and we're not pointing out what he said the day before at the White House condemning these people.

But I want to show you what couldn't be a clearer example of what Professor Simi called front—stage and back—stage behavior. Front stage, you tell people [p.27] what you know you're supposed to say, you don't really believe it. Back stage, you're telling people what you really think. So let's look at these two statements.

(Video playing.)

MR. GRIMSLEY: And here's the next day.

(Video playing.)

MR. GRIMSLEY: You have what Trump really believes clearly on the right and teleprompter Trump on the left.

It's not surprising then that after the press conference, leading lights in the white supremacy movement actually publicly thanked Donald Trump for his statements. David Duke; longtime neo—Nazi Klansman Richard Spencer; Andrew Anglin, the founder of The Daily Stormer, which is some horrific media board that deals in anti—Semitic and other xenophobic tropes.

So back to the call and response. He praises, in October of 2018, a politician who body—slammed somebody, a reporter, I think.

Somebody at a rally in May of 2019 says to shoot migrants. Makes a joke, says, "You can only get away with that in the Florida Panhandle."

Michigan, some far—right extremist supporters stormed the Michigan Capitol and I think were squatting there. And rather than condemn them, he writes [p.28] a tweet: “The governor of Michigan should give a little and put out the fire. These are very good people. See them, talk to them, make a deal.”

Then there were the protests in Minneapolis after the George Floyd murder. And President Trump says, “When the looting starts, the shooting starts.”

On September 29, 2020, “Stand back and stand by,” to the Proud Boys.

October 30, there’s the Trump Train that surrounds the Biden—Harris bus in Texas, slowing it down, pushing it off the road, injuring people. And rather than condemn it, President Trump says, “I love Texas” and jokes that they were just protecting Biden’s bus because they’re so nice.

And then we have, as we all remember, after the election, December 1, 2020, election official Gabriel Sterling making a public statement, calling on President Trump to condemn his supporters who are threatening election workers in Georgia.

He says that: “Somebody’s going to get hurt, somebody’s going to get killed. President Trump, please do something.”

Now, did President Trump condemn them? No. Did he do nothing? No. He retweets it and doubles [p.29] down on his claims of election fraud. He is, I wouldn’t even call it tacitly, approving of what his supporters are doing and what prompted Gabriel Sterling to give his message.

The Ellipse speech fits this pattern to a T. As Professor Simi explained, “Trump used so many right—

wing extremist tropes that it's simply not credible for him to assert that his words were not a call for violence or lawlessness, or that Trump didn't know what he was saying, or that people in the crowd didn't know what he was saying."

And if there's any doubt about what Trump was saying that day, his former campaign manager, Brad Parscale, put it to rest. This is a text exchange between Katrina Pierson, one of Trump's witnesses here, and Brad Parscale, on January 6:

Parscale: "A sitting President asking for a Civil War."

That's how people that knew Trump took what he said that day.

Now, Trump's speech did not end his involvement in the insurrection. By 1:21 p.m., he knew that there was an attack on the Capitol. Rather than do anything, he chose to let that attack go unimpeded.

Now, you heard from Professor Banks, who [p.30] told you all of the different things that somebody as Commander in Chief could have done that day to put down the attack. Trump did none of those things.

Instead, an hour later, he sent out this tweet, 2:24: "Mike Pence didn't have the courage to do what should have been done to protect our country and our Constitution, giving the 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."

Now, remarkably, nowhere in his 177—page findings of fact and conclusions of law does President Trump mention this tweet. Certainly doesn't give an innocent explanation for it. Because there is none.

But simply ignoring the evidence won't make it go away. The tweet had its predictable effect. It caused the crowd to surge. This is Finding 150 from the January 6 Report, and immediately after President Trump sent his tweet, the violence escalated.

And on the right we have a time—lapse photo or video from the top of the Capitol. This is 2:24, 2:34, ten minutes later, 2:44, 2:45. And then I think that's 2:57.

Given all of this, there's no question [p.31] that Trump committed overt acts in furtherance of the insurrection.

Oh, these are the two tweets that he does cite in his findings of fact and conclusions of law. This is the 3:38 — or the 2:38 tweet and the 3:13 tweet, which he says somehow absolve him of his conduct that day because he says, "Stay peaceful, remain peaceful."

There are a lot of problems with that argument. First, it doesn't change the 2:24 tweet.

Second, there's nothing in either of those tweets telling his supporters to actually go home, and while he does say "Support law enforcement," he doesn't say support the people that he had sicced the mob on, namely, the Vice President or Congress.

And not surprisingly, those two tweets had absolutely no effect on the mob. Finding 134 from the January 6 Report: "Neither of these tweets had any appreciable impact on the violent rioters."

Given all of this, there is no question that Trump engaged in overt and voluntary acts in furtherance of the insurrection. As Professor Simi testified:

"How confident are you in the conclusion that Donald Trump played a central role leading these events?"
[p.32]

“Very confident.”

The only dispute that really may exist on this is whether Trump acted with the requisite intent that day.

Now, the parties disagree about what the intent requirement is for engaging in insurrection and whether — what — to what extent Brandenburg applies coming in from the First Amendment. We addressed those in our briefing, so I’m not going to talk about that today.

I’m just going to assume, for purposes of today’s argument, that President Trump’s intent standard applies, that the Brandenburg incitement intent standard applies, and the reason I’m comfortable doing that is because the evidence of intent is so overwhelming here.

Trump did not give his Ellipse speech that day in a vacuum. It was the last step in a multipronged attempt to stay in power by any means necessary.

It started back in August of 2020 when the polls didn’t look like they were going his way. He starts saying, “The only way we’re going to lose is if the election is rigged.”

Election night, after Fox News calls Arizona for President Biden, President Trump, rather than go out and concede gracefully, tells America that the [p.33] election is being stolen.

He then turns to the courts, where he files bogus lawsuit after bogus lawsuit, using lawyers like Rudy Giuliani and Sidney Powell to lead the charge. He lost 61 out of 62 lawsuits. The only one that he won in Pennsylvania had no appreciable effect on the outcome of the election.

And he did it all while knowing from his top advisors — this is Finding 36 — that the election fraud allegations were nonsense.

Now, when he summoned the mob on December 19, with his “Will be wild” tweet, he had run out of court challenges. His only hope was this fake elector scheme and stopping the certification of electoral votes.

He hoped Pence would go long. He needed him to go along — that’s the only way the scheme works — on January 6, but he needed the mob in DC on January 6 in case Pence was not willing to play ball, in case, to quote Trump from the Ellipse, he needed some courage. Better to have a mob and not need one than to need a mob and not have one.

By late morning January 6 when Trump stepped onto the stage to give his speech, he knew that Vice President Pence was not going to go along. This is [p.34] Finding 321. There was a call in the morning between Vice President Pence and President Trump where Pence told him, “I’m not going along.”

Now, given that call, you’d think that maybe President Trump would have revised his speech to focus on the accomplishments of his administration, because at that point, the gig is up, Vice President Pence isn’t going to do what he needs to do.

Trump did just the opposite. He amped up his speech. He added stuff to it to inflame the crowd. He added stuff to it to inflame the crowd against Mike Pence.

We’ve submitted the teleprompter version of the speech, and you can compare it to what he actually said that day. It is a remarkable difference.

This is some of the stuff that President Trump added after speaking with Pence. And most chillingly, again, the last one. “And fraud breaks up everything, doesn’t it? When you catch somebody in a fraud, you’re allowed to go by very different rules.”

At this point, Trump’s only hope of remaining in office was violence and intimidation. That was the only thing that was going to stop certification of the electoral votes that day.

Making matters worse, Trump knew that many [p.35] in the crowd were armed. This is Finding 105. President Trump was briefed on the risk of violence that morning. And this is testimony below from Tim Heaphy that came in unobjected to.

“We had testimony that he was told about weaponry, that he actually asked that the magnetometers be moved and saying, ‘These people aren’t here to hurt me,’ “ that he waited — “aren’t here to hurt me.”

He also knew at the time that his supporters would listen to him. This wasn’t a lark. He admitted just earlier this year on CNN how his supporters listen.

(Video playing.)

MR. GRIMSLEY: If there was any, again, doubt about his intent that day, you need look no further than what he did after the speech. On the left we have things that Professor Banks say Trump could have done as Commander in Chief to deal with the riot or the attack that day. He did none of them. That was intentional. That was deliberate inaction.

How do we know it was deliberate inaction? This is a tweet he sent out just the day before, January 5, warning Antifa to stay out of Washington: “Law enforcement is watching you very closely.” And then he tags the

Department of Defense and all of those [p.36] federal law enforcement authorities.

The fact that he did not mobilize those same authorities when it was his supporters attacking the Capitol makes clear that he supported them and intended for what they were doing — intended for them to do what they were doing.

Now, there was the 2:24 tweet. We've already talked about that. And I want to repeat again, on the 2:24 tweet, there is no innocent explanation for that tweet. Why, when the Capitol is under attack, Congress and Vice President Pence are in that Capitol under duress, you send out that tweet?

He waited another two hours almost before he sent anything telling his supporters to go home, and that was a statement at 4:17 p.m.

Did he condemn — oh, and by the way, it was not until it was obvious to him that the attack would actually fail that he put out this statement. He waited three hours to tell people to go home, and this is a finding from the January 6 Report, Finding 331: "It was not until it was obvious that the riot would fail that he told people to go home."

The fact that he waited until it was obvious that his plan would not succeed tells you everything you need to know about his intent. And when [p.37] he finally did, he didn't condemn the attackers; he praised them.

(Video playing.)

MR. GRIMSLEY: This fits the five—year call—and—response pattern that Professor Simi talked about to a T. Two hours, almost, later, he sends out a tweet — again, not condemning — saying, "Go home with love and in peace, remember this day forever." That's intent.

And I forgot to add earlier that Trump also, while all of this was going on, the attack, rather than do anything to call it off or stop it, he was calling members of Congress to lobby for them to object to the certification of the election. He was taking advantage of the duress he had created by summoning that mob on the Capitol. This is intent.

And if that all were not enough, look no further than what he was telling people while he was at the Capitol that day. This is Finding 150 from the J6 Report:

“Chief of Staff, Mark Meadows, told White House Counsel, Pat Cipollone, that the President doesn’t want to do anything to stop the violence. Evidence developed in the Committee’s investigation showed that the President, when told the crowd was chanting, ‘Hang [p.38] Mike Pence,’ responded that ‘Perhaps the Vice President deserved to be hanged.’”

And President Trump rebuffed pleas from Leader McCarthy to ask that his supporters leave the Capitol, stating, “Well, Kevin, I guess these people are more upset about the election than you are.”

The only reasonable inference from all of this is that Trump intended to incite the attack on the Capitol on January 6 as the final desperate attempt to hold on to power in violation of the Constitution.

Do we really think that somebody who had engaged in that four—month—long scheme, unlawful scheme to prevent the peaceful transfer of power, suddenly found religion that day, that he would somehow stop short of lawlessness and violence?

He had already decided the Constitution was not an obstacle, telling his supporters they could go by very different rules.

And even years later, Trump continues to express his disdain for the Constitution when it stands in the way of his exerting political power.

This is a Truth Social post from December of 2022, where he's still complaining about the fraud. "Massive fraud of this type and magnitude allows for the termination of all rules, regulations, and articles, even [p.39] those found in the Constitution."

This tweet is exactly why we have Section 3 of the Fourteenth Amendment. People who have violated their oath by engaging in insurrection have shown themselves to be untrustworthy and unworthy of taking the oath again. This right here is what four more years of Trump will look like.

Now, I want to turn briefly to Trump's remaining defenses, and I say "remaining defenses" because Trump argues a lot of the — reargues a lot of the issues that Your Honor has already decided. I'm certainly not going to address those today, and I'm not going to address all these either.

I'm not going to address whether the January 6 Report is admissible. You've gotten a lot of briefing on that. You conditionally admitted it. The testimony during the hearing did not change the predicate requirements for admissibility.

I'm also not going to talk about Trump's inaction, whether it could constitute engagement, but to say we agree that Courts generally should not be second—guessing the Chief Executive and whether he or she uses force.

But this was no normal situation. President Trump lit the fire that was the attack on the [p.40] Capitol. He alone had the powers and authorities to put that attack

down. He violated his duty, which Professor Banks pointed out, to protect this country's national security.

But even if inaction could not constitute, itself, engagement — we've got many other acts on his part — it certainly bears directly on President Trump's intent that day.

So I want to start with the argument that Section 3 somehow does not apply to the President because he's not an officer or because the oath is not one to support the Constitution.

First, Delahunty never explains why it would make sense to exempt the most powerful and, hence, most dangerous of all elected officials from Section 3's reach.

And that's because it doesn't make sense. And the historical evidence, again, is clear: Section 3 was meant to apply to a President.

And this, again, is Professor Magliocca versus Professor Delahunty.

We have the Attorney General opinions, early Section 3 cases, 19th century proclamations, congressional debates, grand jury charges, dictionary definitions; and Delahunty relies instead on a technical [p.41] understanding of what President of the United States or officer of the United States may have meant in the original Constitution, pointing almost exclusively to the appointments clause, which really doesn't apply because that clause talks about other officers of the United States.

And I want again to look at what Attorney General Stanbery said because this bears directly on the question. He said, "An officer of the United States is used in its most general sense and without any qualification."

In his second opinion: “The language is without limitation. The person who has held any office, civil or military, under the United States and has taken an official oath is subject to disqualification.”

Now, the thing is there’s really no dispute about all of the historical evidence that Professor Magliocca relies on. There’s no dispute that at the time of the framing of Section 3, the President was considered to be an officer, no dispute that the 39th Congress regularly referred to the President as an officer, no dispute that the Courts and contemporary jury charges did the same.

No dispute that Attorney General Stanbery thought so. No dispute that the common understanding of [p.42] the word “defend” in the oath to protect — “preserve, protect, and defend” meant support. There’s no dispute that the presidential oath itself in the Constitution requires swearing to faithfully execute the office of the President of the United States.

And there’s also no dispute that when Trump’s not in this courtroom but a different courtroom in New York where it suits his interest there, he argues that the President is an officer of the United States.

This is from the briefing that President Trump submitted in the New York case regarding an issue of removal.

It says: “The President is an officer of the United States, but while this argument that elected officials, including the President, are not officers of the United States has been advocated by these professors,” and he cites Tillman and Blackman, the very ones that now Delahunty cites, “to our knowledge, it has never been accepted by any Court.”

And as to this argument about the appointments clause cases somehow suggesting that the President is not an officer of the United States, here's what Trump argued in a different courtroom:

"The Supreme Court was not deciding the meaning of officer of the United States as used in every [p.43] clause in the Constitution, let alone every statute in the U.S. Code. Obviously the President cannot appoint himself, so other officers of the United States must be a reference to nonelected officials. This stray line in *Free Enterprise Fund*" — the recent Justice Roberts case — "says nothing about the meaning of officer of the United States in other contexts."

And finally, before he was a paid expert for Trump in this case, in August, Delahunty wrote an op—ed, and he says:

"Although Section 3 does not explicitly refer to Presidents or Presidential candidates, comparison with other constitutional texts referring to officers supports the interpretation that it applies to the Presidency, too."

The next defense is a First Amendment defense. And I'm not going to spend a lot of time on that. The only reason I'm addressing it at all is that President Trump seems to think that that is a Get Out of Jail Free card.

And like I said, we have a lot of arguments about why the First Amendment doesn't apply in the way that Trump says it does here. The Fourteenth Amendment is a coequal amendment to the Constitution. If you engage in insurrection, that's [p.44] sufficient. The First Amendment has nothing to say about it.

There are other First Amendment exceptions that apply here. The employment exception, which, oh, by the way, is the one that allows you to require people to take

oaths. The speech in furtherance of a crime exception, that would apply here.

But as I said, we'll just assume that Brandenburg applies. And there are three requirements for Brandenburg: Speech explicitly or implicitly encourage violence or lawless action. It doesn't have to be violence, lawless action. We've already shown that, I've talked about it.

Speaker intends speech will result in violence or lawless action. We've already talked about that.

The only one left is that imminent use of violence or lawless action is the likely result of the speech. Of course it was. Not only is that what actually happened, but he was giving the speech as Congress was beginning to count the electors. He sent people at the speech down to the Capitol to give congresspeople some courage.

And finally, I want to address the argument that it's not for Courts to decide [p.45] disqualification; it's for Congress to decide only after an election.

Now, this argument takes a number of forms that — and, sorry, I turned that off because I'm going to get to that.

The argument takes a number of forms; that Section 3 is about holding office, not running for office; that the Twentieth Amendment somehow comes in and says this is for Congress alone; that Congress has the power under Section 3 to remove a disability, and if you disqualify somebody now, that disables Congress from being able to do that.

These arguments are all wrong.

First, it would make no sense to require waiting until millions of Americans had cast their votes and elected an unqualified candidate to say, "Oops, we need a do—over

here.” Applying the “framers aren’t stupid” canon of construction disposes, I think, of this argument.

Second, the fact that Section 3 requires a two—thirds supermajority of Congress to remove the disability is a textual commitment taking away from Congress the ability to impose the disqualification. How could it be that Congress, by a simple majority, decides whether the qualification or disqualification exists in [p.46] the first place, but it has to vote by two—thirds supermajority in order to remove it?

The disqualification exists at the time Section 3 was ratified without any action from Congress. It exists at the time somebody engages in an insurrection, and Congress has to remove it by a two—thirds supermajority vote.

Trump’s argument also ignores that in the context of presidential elections, states’ powers are at their apex. States’ powers to appoint electors, select the time, manner, and place of electors appointed is left to the discretion of the states.

This is from a recent case, *Chiafalo v. Washington*. It was the faithless elector case. “Article 2, Section 1’s appointment powers give the states far—reaching authority over presidential electors. The Court has described that clause as conveying the broadest power of determination over who becomes an elector. Given the textual commitment of choosing electors to states, states are well within their rights to protect against wasting their electoral votes by keeping a disqualified candidate on the ballot.”

And then now Justice Neil Gorsuch said as much in *Hassan*. He said, “A state’s legitimate interest in protecting the integrity and practical functioning of

[p.47] the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office.”

Fourth, the historical evidence is not with Trump. As I said, the disability existed at the instant Section 3 was ratified. That’s why people began applying for amnesty right away. That’s why courts began right away enforcing it.

And Trump’s argument again would prove too much. Courts in Colorado, California, other states, have long ruled that presidential and other candidates are ineligible because of federal constitutional requirements such as being too young, not being a natural—born citizen.

And then finally, the Twentieth Amendment — the Twentieth Amendment is not about this. The Twentieth Amendment is about a very peculiar situation that there was no remedy for before, and that is if a disqualification came to be after the President was elected or was only discovered afterwards.

That was what the Twentieth Amendment was about, and that’s why the only Court to have addressed this issue rejected the very argument that Trump makes here. Nothing in its text or history suggests that it precludes state authorities from excluding a candidate [p.48] with a known ineligibility from the presidential ballot.

And finally, if Congress wants to remove the disqualification, they are free to do that at any time for President Trump. Colorado is not required to put a disqualified candidate on the ballot and risk disenfranchising millions of its voters on the off chance that supermajorities of both Houses of Congress might

remove that disability in the future. And let's be honest. It's not going to happen.

I'll reserve the remainder of my time.

MR. KOTLARCZYK: Good afternoon, Your Honor. May it please the Court. Michael Kotlarczyk on behalf of Colorado Secretary of State Jena Griswold.

I want to start in a similar place to where Mr. Grimsley started, which is thanking the Court on behalf of the Secretary for the Court's tremendous and the court staff's tremendous investment of time and resources in deciding this matter.

As the Court is well aware, the Election Code requires the Secretary to certify the primary presidential candidates on January 5, 2024, and I'm pretty confident, like everyone else in this courtroom, we fully expect that some appellate process is going to play forward from whatever this Court decides. So in light of that, the urgency with which the Court has [p.49] treated this matter is deeply appreciated.

Fundamentally, Your Honor, this case poses two questions:

Number one, did former President Trump incite an insurrection on January 6, 2021, within the meaning of the Fourteenth Amendment such that he is disqualified from holding that same office again.

And, number two, if so, does the Colorado Election Code permit him to appear on the presidential primary ballot.

As we have stated throughout these proceedings, the Secretary has presented no evidence or argument concerning the first question as to whether President Trump incited an insurrection on January 6. The Secretary has deferred to the other parties to present

their evidence on that issue and leaves that matter in the Court's capable hands to resolve.

Instead, as Colorado's chief election official, the Secretary, in this proceeding, has focused on the second question and sought to provide the Court with guidance as to the meaning of the Colorado Election Code in this unprecedented situation. And it is to that matter that I'll direct my brief remarks today.

In his proposed findings, former President Trump argues that neither the Secretary nor the [p.50] Court have the authority to keep disqualified candidates off the ballot. We disagree.

And to understand why he is wrong, Your Honor, we need to start with the ballot itself. The purpose of a ballot is to elect candidates to office, as the Supreme Court held in the Timmons case that we cited in our papers. And this is true for presidential primaries as well.

In the case of a presidential primary, ballots serve to allocate delegates for a party nominating convention, but in either case, ballots are what voters use to select their candidate. Having candidates who are ineligible to serve in the office they seek frustrates that purpose.

As the Supreme Court stated in *Anderson v. Celebrezze* at 460 U.S. 780, "As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."

The voters of Colorado recognized these principles when they adopted Proposition 107, creating the statewide presidential primary in 2016. Section 1—4—1201 of — which was enacted in Proposition 107, states that the presidential primary process should, quote,

conform to the requirements of [p.51] federal law. This, of course, includes all of the requirements of the United States Constitution.

And Section 1—4—1203(2)(a) states that, quote, Each political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election.

So to conform Colorado's presidential primary process to federal constitutional requirements, if the Court concludes that former President Trump is disqualified from holding the office of President under the Fourteenth Amendment, the Court should order him to be excluded from the ballot.

The contrary view expressed by former President Trump would produce an unreasonable outcome and would disenfranchise Colorado's voters, both of which outcomes are disfavored by Colorado law. According to his view, neither the Secretary nor the Court could exclude, for example, an 18—year—old who submits the necessary paperwork to be President or someone who is not a native—born citizen. But such candidates could never serve as President, so no valid purpose is furthered by including them on a ballot.

As then Judge Gorsuch stated in the Hassan [p.52] case, "Colorado has a legitimate interest in ensuring that only qualified candidates are certified to that ballot" — "to the ballot," and it's the legitimate interest that we seek resolution of in this matter, Your Honor.

So from the perspective of the Election Code, and specifically Section 1—1—113, the question is whether it would be a breach or neglect of duty or other wrongful act if the Secretary certifies a disqualified candidate to

the ballot and whether the Court can enter an order directing the exclusion of such a candidate.

Under 1—4—1204(1), the Secretary is responsible for certifying names to the presidential primary ballot, and the code clearly imposes a duty on the Secretary to exclude certain candidates from the presidential primary ballot. And I'm citing here, Your Honor, to Section 1—4—501, which is made applicable to the presidential primary process through 1203.

The Secretary has to exclude any candidate from the ballot who fails to swear or affirm under oath that he or she will fully meet the qualifications of the office if elected. A candidate who is unable to provide proof that he or she meets any of the requirements of the office related to residency, or who the Secretary herself determines is not qualified to hold the office based on [p.53] residency requirements.

Importantly, a presidential primary candidate who is disqualified under Section 3 of the Fourteenth Amendment is no more entitled to appear on the ballot than one who fails to meet any affirmative qualification for the office of President.

To hold otherwise would be contrary to the electorates' and the General Assemblies' express intent that only qualified candidates may participate in Colorado's presidential primary, and that the Secretary of State's certification of such candidates must conform to the requirements of federal law.

To effectuate that intent, the Election Code creates an express cause of action under 1—4—1204(4) for any challenge to the listing of any candidate on the primary election ballot under Section 1—1—113.

And that's the provision, of course, that the petitioners here have invoked.

When these provisions of Colorado law are read together and harmonized, as they must be, they authorize this Court to act if an election official breaches or neglects a duty or commits or is about to commit another wrongful act.

Now, as the Colorado Supreme Court has recognized, "other wrongful act" is broader than just [p.54] those acts that are breaches of duty.

Former President Trump is thus wrong when he says, on page 37 of his proposed findings, that the Court only has jurisdiction under 113 if the Secretary has a mandatory duty to act in a particular way under the Election Code.

"Other wrongful act" is broader than a mandatory duty to act in a particular way. And in light of the need for the presidential primary process to conform to federal law and for only qualified candidates to participate in the primary, it would be a wrongful act, within the meaning of 113, for the Secretary of State to certify a candidate to the ballot who is disqualified under Section 3 of the Fourteenth Amendment.

In his proposed findings, the former President also makes much of the lack of historical precedent for the Secretary to exclude a candidate from the ballot for failing to meet constitutional requirements.

Your Honor, the Secretary readily concedes that this is an unprecedented situation. But the absence of evidence on this point is by no means evidence of absence. The Secretary frequently must confront unprecedented situations when administering Colorado's elections.

[p.55]

Before the 2016 presidential election, the Secretary of State had never been confronted with rogue presidential electors in the Electoral College, but when the former Secretary was, a division of this Court decided that the provisions of the Election Code that binds the votes of such electors was valid and enforceable.

Before the 2020 presidential election, election officials in Colorado and across our nation had never before confronted widespread, baseless claims of a stolen election. But when they were, those claims were heard and disposed of by numerous state and federal courts.

To be sure, Your Honor, we live in unprecedented times, but the rule of law still controls. And that rule gives courts of general jurisdiction, like this one, empowered by the Colorado Election Code, the full power and authority to consider and decide legal disputes like the one presented here.

For these reasons, Your Honor, the Secretary of State respectfully requests that the Court decide the merits of petitioners' claim under the Election Code.

Thank you.

MR. SISNEY: Good afternoon, Your Honor.

[p.56]

This Court's heard a lot. This Court's been through a lot. So has the court staff. We also appreciate that.

The petitioners, and even the Secretary, with due respect, have complicated things. I would like to bring the Court back to the basics.

More than anything else, this is a case about the law. This is a Section 113 proceeding, intentionally and expressly limited in scope by the Colorado legislature.

The only relief available is for this Court to order the Secretary to comply with the Election Code, or substantially comply.

This is also about Section 1204. We've heard some of that this afternoon. That contains a finite and enumerated list of shalls, ministerial duties with which the Secretary must comply. She has no discretion with that list.

The Colorado Election Code does not contemplate — actually, it does not even allow a discretionary role for the Secretary in determining extra—statutory qualifications in usurpation of the major political party's will.

It includes no vesting of such authority. It gives her no budget for such a pursuit. It sets no guardrails. Her duty is the shalls.

[p.57]

Here's some more of what the law says. According to Section 1203(2)(a), and I quote: Each political party that has a qualified candidate entitled to participate in a presidential primary election — I'd like to emphasize — pursuant to this section is entitled to participate in the Colorado presidential primary election.

In other words, Your Honor, qualifications are still based on what the party, the political party determines.

Section 1201 provides that a legislative intent, the intent behind the provision — the provisions of this Part 12 conform to the requirements of federal law. We just heard that. What I think was omitted —well, it was omitted: “and national political party rules governing presidential primary elections.”

Those are in the record, Your Honor.

But conforming to federal law does not give rise to an independent right, let alone a duty on the part of a state official, to enforce Section 3 of the Fourteenth Amendment. This is distinct from some of the residential requirements we heard about that apply to state candidates.

In fact, the Secretary's representative, Ms. Rudy, acknowledged that the Secretary's role in the [p.58] ballot qualification process has been, as a practical matter, ministerial. Lawyers know what ministerial means as opposed to discretionary for state officials.

Her responsibility under the Election Code is to either confirm that a candidate is affiliated with a major political party according to the statute and is a bona fide candidate, pursuant to that party's rules; or, alternatively, to confirm that the candidate submitted a properly notarized candidate statement of intent. Ministerial. Nothing else. Just that.

That's uncontroverted evidence from the Secretary's representative. It is the political party that is vested with the power to determine its bona fide candidate, not the Secretary.

I run the risk of belaboring that point, Your Honor, but that's a very important point in this case.

I'd like to direct the Court — I won't read it all for the sake of time — Day 3, direct examination of Hilary Rudy, page 116, lines 3 through 7 [sic]. This one I'd like to read:

“Question: What does it mean to be a bona fide candidate?”

“Answer: I don't know what that means to the party.”
[p.59]

“From our perspective, it means that the

party approves that that candidate represents the party.”

Day 3, direct examination of Hilary Rudy, page 97, lines 17 through 21 [sic], quote:

“Our office looks at the information provided in the affidavit itself. And if the affidavit is complete and we have no affirmative knowledge that any of the information is incorrect, then we would qualify that candidate to the ballot.”

Later Ms. Rudy confirms, “The ballot access team doesn’t do” — that’s does not do — “any investigation beyond the review of the paperwork to ensure it’s accurate and complete, and to review the party’s paperwork to ensure that the ‘Approved’ box, as opposed to the ‘Disapprove’ box, is checked.”

That’s Day 3, page 108, lines 10 through 13 [sic].

There’s a few more that the Court heard that I’ll move past for now.

The Secretary’s representative conceded the role for the office is ensuring that the required paperwork is completed, not determining whether substantive affirmations of constitutional qualifications are accurate.

Again, nothing in the statute gives her [p.60] that authority. Such a pursuit certainly requires guardrails, standards, a budget, restraints, due process protections. It’s not in the code. It’s not in the code that 113 authorizes this Court to order that the Secretary can substantially comply with the code. That’s it.

Obviously the question this Court is grappling with today are at issue in other states around the country. It’s not a secret. While, of course, not binding on this Court, Your Honor, both Minnesota and Michigan courts have recognized the same principles. We’re submitting to you

here today the limitations of Election Code, state Election Code.

Grove v. Simon, this is the Minnesota Supreme Court, issued an order last week rejecting efforts to keep former President Trump off the ballot in that state, and I'd like to quote.

“Although the Secretary of State and other election officials administer the mechanics of the election, this is an internal party election to serve internal party purposes.”

That opinion has been filed of record as a notice of supplemental authority. That — that code, the Election Code of Minnesota, is substantially the same as the code that we're dealing with here.

[p.61]

To the argument that the Secretary's oath — this is an argument we've heard — that the Secretary's oath to defend the Constitution vests her with the power to enforce by barring candidates from ballots to enforce Section 3 of the Fourteenth Amendment.

According to Wayne County, Michigan, Monday night, just dismissed a similar case explaining, and I quote: “There is no support for the Plaintiff's position that an oath to support the Constitution of the United States incorporates a duty to enforce a provision such as Section 3 of the Fourteenth Amendment.”

I submit to the Court respectfully, nothing in the Election Code of Colorado does, either.

That Court also held that imposing legal duties on the State Election Commission, the relevant office in Michigan, that are, quote, beyond the scope of the plain language of the statute, close quote, failed to state a claim upon which relief could be granted.

They were asking the Court to infer something into the Election Code so that the state official could enforce it.

This Court has heard the same argument here. I just would like to emphasize, Your Honor, beyond the scope of the plain language of the statute.

I recall in the Secretary's brief, the [p.62] omnibus brief, the Secretary admitted that the statute does not explicitly vest her with the independent authority, I believe, is the — is how it went, but instead, they're asking the Court to infer it into the code.

Then, even more recently, the Michigan Court of Claims — this opinion, I think, was also filed, just dismissed similar cases last night. That court noted that the Michigan Election Code was such that —and I'd like to quote — “such that the Secretary has neither the affirmative duty nor the authority to separately” — I'm going to back up — the authority —”the affirmative duty nor the authority to separately decide whether Donald J. Trump will be placed on the Michigan presidential primary ballot on the ground that he's disqualified under Section 3.”

I submit to the Court that that Election Code provision that's at issue — was at issue in that case before it was dismissed was substantially similar to the code before this Court today.

That Court declined to read something into the statute, something very monumental, borrowing — barring a candidate that a major state political party has decided to place on its primary ballot.

Now, even if this Court were to find a way [p.63] past the limitations of Section 113, 1204 — neither the Minnesota nor Michigan Courts did when they faced an

analogous state law framework — this Court will still be faced with the issue of interpreting the Fourteenth Amendment.

As we briefed extensively — I won't repeat it all here certainly — it is black letter law that constitutional provisions can be self—executing as a defense, not as a cause of action. Very different.

To start, the Fourteenth Amendment as a whole does not create a cause of action. I'd like to refer the Court to the United States Supreme Court opinions cited on pages 68 and 69 of our proposed findings and conclusions. There's one I'd like to read, for example.

Ownbey v. Morgan, 256 U.S. 94 at 112, “. . . it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self—executing remedy.”

Section 5 of the Fourteenth Amendment confers the enforcement power on Congress to determine, and I quote, “whether and what legislation is needed to,” close quote, enforce the Fourteenth Amendment. That's *Katzenbach v. Morgan*, 384 U.S. 641 at 651.

There's a series of circuit cases we [p.64] cited —

THE COURT: Mr. Sisney, I specifically said at the end of — at the end of the last hearing that if the — if the State party wanted to have time at the oral arguments, to ask for it.

Secretary of State's asked for it. The Colorado Republican Party didn't. Then at the beginning of this hearing, you did, and I said you could speak, and I said it would be limited to ten minutes, which is what the Secretary of State did.

You're now at 13, and I — it's just getting late, and I think Mr. Gessler has a lot of time, and all of this has

been briefed. And so if you wouldn't just mind wrapping up, I really appreciate it.

MR. SISNEY: Yes, Your Honor, I apologize. Thank you. Certainly.

In *Bush v. Gore*, the United States Supreme Court held that a state court's order to determine the intent of a voter violated the Equal Protection Clause, in part because, I quote: the absence of specific standard to ensure its equal application.

That absence rings loudly here. What standards will guide the Secretary's pursuit that they are asking this Court to order her to do.

Republican Party of Colorado respectfully [p.65] urges this Court to deny all the relief sought by the petitioners, to dismiss their petition, and enter an order declaring that the Secretary must comply with the code as written, not as certain people wish it to be. This is the law.

Thank you, Your Honor.

THE COURT: Thank you. I appreciate it.

Mr. Gessler, we're just going to — let's start up at 35 after since we've already been going for almost an hour and a half. Let's just take a quick bathroom break, okay?

We'll start with you at 4:35, and you'll get your full amount of time.

MR. GESSLER: Thank you, Your Honor.

(Recess taken from 4:27 p.m. until 4:35 p.m.)

THE COURT: You may be seated.

Go ahead.

MR. GESSLER: If I may stay standing, Your Honor.

So, Your Honor, thank you very much for the ample time here, and we certainly respect all of the hard work that's gone into this.

I don't think I've ever filed such a long brief in my life, 120 pages — or 170—plus pages.

[p.66]

THE COURT: 177, to be precise.

MR. GESSLER: 177. Well, and I felt like, my gosh, we did 177 and they only did 75, but then theirs is single—spaced —

THE COURT: Yeah.

MR. GESSLER: — so it's equivalent.

So let me talk a little bit about the case here. What this case — after we've looked at the evidence, after we've completed this five—day hearing, I think what this case comes down to is whether or not the Court is going to follow the January 6 Report.

This case is about the January 6 Report, to be frank, and what the petitioners have done is they have taken the January 6 Report and tried to get this Court to accept it as evidence, to accept its conclusions, to accept its logic into this case.

Basically, they took the January 6 Report, they pulled a handful of witnesses from the January 6 Report to testify. They pulled curated and, frankly in some instances, edited videos from the January 6 Report. They had Professor Simi rely on the January 6 Report. They had Professor Magliocca rely on the January 6 Report in some of his application.

They cited the January 6 Report, they've relied on it 67 times in their findings of fact, and then [p.67] they refer to it another 4 times. And they've asked this Court to endorse 96 findings.

"Findings," I would almost say, is a somewhat, shall we say, charitable — a charitable characterization. It's

96 conclusions, it's 96 opinions, it's 96 pieces of reasoning that the January 6 presented.

And so what I would say is that the petitioners' case, the foundation of it is — it is rotted, it is a rotten foundation.

The January 6 Report was originally used for political purposes to — as, you know, sort of an election issue, and that has failed. I mean, like it or not, for the authors, President Trump remains a viable and, in many instances, considered leading candidate for the presidency.

They — the authors of the January 6 Report attempted to use it to get criminal charges, certain criminal charges filed against President Trump. That failed. Those criminal charges, for example, incitement of an insurrection, those were never filed, and now the petitioners are trying to use the January 6 Report to get it into evidence.

Excuse me one moment, Your Honor. I need to turn on my timer, of all things. I'll subtract a few minutes, don't worry.

[p.68]

MR. GRIMSLEY: No, 35, so it's right there.

MR. GESSLER: Okay.

And, really, at the end of the day, it is a rotted foundation, and it is another attempt at the January 6 — using the January 6 Report to limit people's ability to vote.

The other technique that they've used, of course, is talking about violence. Anything that smells of violence, that smacks of violence, is all sort of in cahoots with one another, it's violence. Violence is insurrection, that's bad, and so President Trump is responsible for all of it.

The third tool they use is relying on Professor Simi at length, and I'll discuss that. You know, he studied far right—wing extremists, and the goal is to take that — that small group of people and apply to everyone and infer intent to President Trump, frankly without evidence, especially when Professor Simi specifically disavowed that he addressed President Trump's intent. But they want to rely on that anyway.

So I'm going to talk a bit about the January 6 Report. Petitioners didn't, but I think it's pretty important, and we will talk about that, because [p.69] this Court has conditionally admitted it. And so although the decision of admission has already taken place, this Court should not place weight upon these findings absent, absent evidence at this hearing to support those findings.

And there's a lot of those problems where there's these sort of "findings," as I put in scare quotes, without evidence to support it.

I'm going to talk a little bit about the legal standards, and I will lightly revisit the jurisdictional arguments. We briefed those, obviously, 12 pretty thorough. I'll try and be brief on those, but I will say this.

The petitioners are asking this Court to do something that has never been done in the history of the United States. It has not been done when Horace Greeley ran for President, it's not been done when Eugene Debs ran for President. It's not been done for any presidential candidate in the history of our Republic, and the evidence doesn't come close to allowing the Court to do it this time as well.

And with respect to this Court's jurisdiction, I would note that since this case has been filed, there have been three directly on point cases, one from New Hampshire,

the Supreme Court, one from [p.70] Minnesota's Supreme Court, and one from a court in Michigan. This is in addition to all of the other courts that have dismissed this, and those cases have directly addressed or refuted — or I should say ruled directly against — several of the petitioner's jurisdictional arguments.

So I think the Court should look at that reasoning and consider what perhaps I think was fairly characterized as an emerging consensus here within the judiciary across the United States.

And then finally I would ask this Court to step back. At the end of the day, there are serious questions about this Court's jurisdiction. We've raised those and briefed those, okay, but we also — I would also submit that we're talking about whether a presidential candidate of the United States committed an insurrection, engaged in an insurrection. And we're going to try and decide this issue based on a five—day hearing, and you've heard our concerns about the procedures of this hearing.

But at the end of the day, it's a five—day hearing with 17 1/2 hours or so per side, which is basically papered over or underpinned, as one may describe it, with the January 6 Report to determine constitutional rights, issues of first impression in the [p.71] history of the United States with consequences.

I submit that this Court, as the Michigan court said, no matter — you know, no matter how well meaning, no matter how fair, no matter how thoughtful and well intentioned, evenhanded, fair and learned, a court cannot in any manner or form possibly embody the represented quality — concerns and qualities of every citizen in the nation as in this case the Michigan court referred to the

House of Representatives or the Senate. And also noted that judicial officers in states are not empowered.

So we would submit that this Court should — should look at that with a different set of eyes than it has to date.

Let's talk about the January 6 Commission. So we've cited the standards, the legal standards for when a court should consider or admit congressional reports. And among those considerations are whether there is a hearing along the lines of an adversarial hearing and motivational problems that a congressional committee may have.

And the courts have specifically highlighted the fact that for congressional commissions and committees and committee reports, there are partisan considerations. They have said election officials have a [p.72] tendency to grandstand — I don't know where they got that from — a big issue is whether or not the minority joins in the majority, and the court's pointed out that when there are bitter divisions arising from that, that's evidence that it's less — that it's more politics versus policy or truth-seeking, that truly reliable — that a report that's truly reliable on methodological and on procedural levels are unlikely to create these bitter divisions.

So that's all things that this Court should look at.

The January 6 Committee was biased from the start, heavily biased, in fact, overwhelmingly biased. And I know this Court and the petitioners have pointed out there were two Republicans on the Committee.

But that's not the standard. This is not a Republican/Democrat issue that we are looking at here today. The issue we're looking at is whether President Trump engaged in an insurrection. That's the issue.

That was the issue that the January 6 Committee investigated as well. The two Republicans on that committee, along with all of the Democrats on the Committee, were unified in their belief, in their vote, every member had voted that President Trump had incited [p.73] an insurrection. Every one of them voted on that, every one of them said that, every one of them believed it.

And Mr. Heaphy, he testified that for them it was an obvious fact, an obvious fact is what he said. Every member voted on that obvious fact.

Now, if you look at the — and I've — the petitioners will repeatedly cite that, "Well, it was a bipartisan vote on the impeachment."

Well, if you look at the impeachment vote in the House of Representatives, it was a 54 to 46 percent split. And the 46 percent did not — they voted against incitement, that President Trump incited an insurrection. And the number of people that were on the Committee representing 46 percent of the House of Representatives, that viewpoint was zero, none. It was stacked. Lots versus zero was — was the lineup.

Everyone on that committee started from the proposition that it was an obvious fact that President Trump incited an insurrection. They then spent a year and a half looking at it, and lo and behold they came up with a conclusion that he incited an insurrection. No surprise there.

Let us look at the witnesses that talked about the January 6 Committee. So we presented Congressman Buck. I jokingly say Congressman Buck was, [p.74] for us, a witness out of Central Casting. He was a credible witness. He was not and is not and you heard nothing

about him being a fan of President Trump. He's not a President Trump lover, so he wasn't here to cast love upon President Trump.

He is on good terms with Representatives Cheney and Kinzinger. He had worked for Representative Cheney's father and knew the family and knew her. So he didn't consider himself a close friend, but he was not someone who demonized those two Republicans.

He had announced the day before his testimony that he would not seek reelection, so he was a man liberated from political concerns. And, in fact, in many ways, he testified to certain facts the same as Representative Swalwell. He wasn't trying to spin things.

Other things that Representative Buck brought to the table was, he's a member of Congress, obviously, but just as importantly, he is a former staffer of the Iran—Contra commission that investigated the Iran—Contra controversies, and so he knows what a proper investigation looks like.

And if you remember — I was a young adult when this happened, very young adult — but the Iran—Contra was when President Reagan was accused of [p.75] selling arms to Iran so that he could have money to, like, give arms to the Sandinista — to the people fighting the Sandinistas in Nicaragua, so that was the Iran—Contra controversy.

And there were claims and beliefs that President Reagan should be impeached, very — great controversy. Just as much of a hothouse controversy as what the — what Congress faced in early 2021.

And Representative Buck said: Look, we had a majority and we had a minority, and witnesses were fully examined. And more importantly, the minority was able

to call witnesses to — whether bring in new evidence or rebut or to point out the irrelevancy, or whatever those arguments may be, of the majority's witnesses. And not only witnesses, but to obtain facts and documents that — and develop facts and obtain documents that contradicted the majority narrative.

On top of that, Representative Buck was a former prosecutor for about 20 — more than 20 years, and so he knows what an investigation looks like. And he likened the January 6 as him taking witnesses and whatnot and going into court without the defense present, without the defendant and without defense counsel even present. That's how one-sided he viewed it.

He also testified that Congress's goal is [p.76] political, it is political.

And now look, we have this Madisonian government of checks and balances, and that's designed so that, as Madison said in Federalist Number 10, that certain factions and balances will cancel one another out.

And so you even have those checks and balances built into congressional investigations. In other words, you have a majority and you have a minority. And they each bring in their evidence, and then they present their own reports.

Sometimes they agree and when they agree, the courts have said, Well, we're going to give that more credence, far more credence, and we're probably not going to give any credence when they don't agree because then — particularly when there's bitter and sharp divisions, as there have been here.

So there were no checks and balances in that process.

The adversarial process. How do we — how do we have checks and balances in the court procedures? Through an adversarial process. That did not exist in the January 6 Report.

So when you receive a conclusion that the January 6 Report said this happened, that's not part of [p.77] a — that's not part of an adversarial process. In fact, the, quote, judges in that instance, there's the people who decided that, were all very biased from the start.

And, of course, you have the checks and balances of the judicial versus the political process. This is a judicial process. The reason people have faith in courts, the reason we do, the reason we devote our lives to this, is because we have an adversarial process and we believe that with the adversarial process is the best opportunity to determine what the truth of the matter is.

What the petitioners are asking you is to import into this judicial proceeding something that was the antithesis of the adversarial process, was the antithesis of a fair and balanced approach. It was the antithesis of having decision—makers look at this with an open set of eyes. It was the antithesis of that.

And they're asking to import that into what should not ever be a process that has those types of infirmities.

Second, you have Mr. Heaphy. He confirmed, frankly, very critical facts. He confirmed that there was no minority staff. He confirmed that there was no minority report. He confirmed that everyone on the Committee had voted on impeachment to — that [p.78] President Trump incited an insurrection.

He admitted that the Committee was very unusual, and it was basically stacked with prosecutors. He admitted that it was very unusual, the process, because

the members themselves — remember, the members who had already decided what had happened, who already viewed as an operative fact incitement to insurrection — that those members took a leading role and were heavily involved in the processes.

So this was not an instance where a professional staff was allowed to go forward. This was an instance in which they were heavily directed by the members. In fact, not only were they so heavily directed, but one of the staff members represented, as an attorney — and I just don't know how this happens — but as an attorney, he represented Representative Kinzinger as his attorney while also serving as an investigator on the Committee.

So his loyalty was directly to make sure that that Congressman's will was taken care of. If you're an attorney, you've got that duty to your client. And yet he had two duties, which he viewed apparently as didn't — not conflicting as one duty.

Mr. Heaphy also admitted that the volume, the number of documents or the number of witnesses, does [p.79] not equal fairness because he pointed out how, you know, he's done grand jury investigations with lots of documents, but in order — but those still have to be subject to the adversarial process, which, of course, they weren't in the January 6.

And he himself readily admitted he was a Democrat, he's been fired by a Republican, and that he's viewed himself as a partisan and was a political appointee.

We walked through, or I walked through during that cross-examination the — not only the impeachment vote, but the fact that the Committee members had made up their minds. And I certainly respect Mr. Heaphy for working to defend his — the process there,

but he used — he — when I confronted him with those comments, the public comments, he sort of said a few things.

One, he said, Well, it was an operative fact that — or an obvious fact was his — was his testimony, that the — that every one of the Committee members started out with.

Second, he said, Well, it was really sort of a hypothesis, and they really had an open mind. I just don't think that's credible or believable.

And then thirdly, he said, you know, they [p.80] had made some preliminary determinations, hypotheses based on what they saw, but again wanted us to plug into and test that against the evidence we were finding. And then he says, "So I don't believe Mr. Aguilar" — he was referring to Mr. Aguilar, one of the Committee members — "or any of the others made any conclusion other than that preliminary one informing that impeachment veto."

In other words, he viewed the vote that they made as a preliminary conclusion. Well, I disagree with that as well, and here's why. I would submit to the Court that congressmen and congresswomen spend a lot of effort, blood, sweat — maybe not blood — but sweat and tears getting into Congress. It's a big deal. It's hard work. You sacrifice a lot.

And then they get to Congress, and their main job is to vote on things, and this was a seminal vote everyone is looking at. This isn't some preliminary. This is one of the most important votes they took in Congress during that time. In fact, two, Ms. Cheney and Mr. Kinzinger, are no longer in Congress primarily because of these votes they took, I would submit.

So this wasn't some light, preliminary vote that they took. This was something they were committed to, that they were representing their [p.81] constituents on, and that they believed in, and that's why they took that vote.

They took the vote, they control the investigation, and they came up with a conclusion that matches exactly how they voted.

And then, of course, you have Congressman Nehls' affidavit. He basically testified to, I think, some procedural, relatively obvious things.

But at the end of the day, you have bias, you have a committee full of prosecutors, no minority staff, no minority report, no witnesses or evidence that were introduced by anyone who disagreed with the obvious facts that the — that the members — and you have members that were highly involved.

And you had political grandstanding. Much of the video was edited, and Mr. Heaphy admitted that. Much of it was produced for TV production. The timing was suspect. And this report in general was highly controversial, very controversial.

And I'll submit, you know, I mean, I had never read it before. I was shocked at just how bad it was, how shallow it was. I mean, there's lots of conclusory statements there, not a lot of evidence backing them up.

And let's look at a few other things. [p.82] There are factual findings, the evidence in this hearing showed factual findings are suspect based on the evidence in this hearing, based on evidence in this Court.

So stuff that didn't make it in. Mr. Kash Patel, he testified that President Trump authorized, not ordered, but authorized 10— to 20,000 National Guard troops. And not only — and he didn't say, Oh, that's just

something I overheard, you know, once. He talked to Secretary of the Army with it, he followed up, he made sure that there were conversations with the mayor. That was his job, and he testified about that process at length.

Ms. Pierson, she also testified that President Trump talked to about 10— to — wanted 10— to 20,000 National Guard troops to prevent violence. And she said that he — President Trump specifically struck names as far as the speakers.

This is all stuff that didn't make it into the report at all. And that — and that she had security concerns, and much of her interview — and Mr. Patel talked about this as well — never made it in to the January 6 Report.

I think on the National Guard issue, what's really interesting is the — oh, and also Representative Buck testified that Congressman Jordan had [p.83] a much different story that he had presented about whether — his willingness to testify than what showed up in the report.

And this wasn't something that Congressman Buck sort of remembered offhand in the missives of time. He specifically asked Representative Jordan because, you know, Representative Buck was concerned about the election issue. He disagrees with President Trump on that, showing again, his credibility.

And it was just the last week or so before his testimony because he was talking to Representative Jordan about the controversy as — and whether or not Buck could vote for Jordan for Speaker of the House. That was a pretty important conversation and fresh in his mind, and he specifically drilled in to whether or not that happened on the January 6 Report and there was that conflict there.

None of that stuff made it into the January 6 Report.

Then you have a couple others. For example, in the — that was actually refuted, some of the conclusions that were refuted by evidence at the hearing.

So, for example, one of the proposed findings of facts from the petitioners is that Trump also regularly endorsed incendiary figures connected with [p.84] far—right extremists like Alex Jones, Ali Alexander, Steve Bannon, Roger Stone. That's what the finding says.

Well, Professor Simi admitted, recognized, endorsed the fact that President Trump had fired Mr. Bannon. And Ms. Pierson testified that President Trump, when he was striking names off of the list of people to speak, didn't even know who Ali Alexander was and that President Trump specifically struck Roger Stone off the speaker list as well, as well as Mr. — as well as Mr. Giuliani.

So — so the findings of fact are used to sort of create this close collaboration, when the actual evidence in this hearing refuted that, refuted that finding very directly.

Then we have a finding where the Committee says that, you know, Trump knew his claims of election fraud were false. You've heard that argument.

Well, the petitioners' witness, Mr. Swalwell, okay, Mr. Swalwell said, testified that —and I quote him, he said, "It was well—known among myself and my colleagues and the public that President Trump believed that Pence had — that Vice President Pence had the ability to essentially reject the electoral ballots that were sent from the states." That's what Mr. —Representative Swalwell said.

[p.85]

And then another thing about — the Commission says about 25,000 additional attendees purposely remained outside the Secret Service perimeter at the Ellipse — this is on January 6 — and avoided the magnetometers, okay, and that Trump knew that they were armed.

There is no evidence of that. And, in fact, the evidence that you did hear was — and I admit it's one person, because that's all I had time to find —but it was one person, Mr. Bjorklund, who said, "I don't like being in the middle of crowds. I didn't want to go through the magnetometers and I stayed back." That's what he specifically said.

And, you know — and that's also suspect. I mean, you have Amy Kremer saying — I mean, she couldn't tell whether people were armed or not. She had no idea. And yet somehow they're inferring that President Trump was all-knowing and all-seeing and knew all of this, apparently, which no one else did.

Talking about the videos very quickly. They are curated and highly edited videos. Curated means, in the scientific speech, they suffer from selection bias. Cherry-picked. You pick and choose what supports your case.

And they had a TV producer behind it and [p.86] that, in fact, this Court saw there's a recent lawsuit —and I'm not saying that lawsuit's absolutely correct, okay — but the person who sought to intervene said, "Look, I'm suing the petitioners' attorneys" — good luck with that, folks — "I'm suing them because they produced this edited document that had me — that they said I made this speech earlier and it took it out of context and" — yada, yada, yada, they said all that.

So at least we have some evidence about the curation process. It's evidence, of course, we weren't able to explore fully because of the compressed timelines, but that should at least give the Court pause that maybe not all this stuff should be taken at face value.

And, in fact, we're talking taking things at face value. I'll use the example of Professor Simi.

So Professor Simi had that photo of Charlottesville and he said, "Well, that shows right—wing violence."

And I questioned him about it. And I said, "Well, it looks as though there's two people who have — one's sort of got this garb and the other's got a gas mask. Can you tell which one is the far right—wing extremist?" And he couldn't, he couldn't.

I asked him if he could tell who was attacking whom, and — and he couldn't. I asked him, [p.87] "Well, is one, like, stabbing the other or is one grabbing that flagpole from the other or does one hit the other in — in the process of doing" — and he didn't know. He didn't know who was committing violence. He didn't know who was on which side.

And I think that's an example of curated videos, curated photos, absent personal testimony saying, "Yeah, that was me," or "That's something I took."

So when Hodges says, "That's — that's a video that I took," that deserves credibility. I'll give him that. But when you have a video that just says, "This is what it is and this is what happened and this represents what was going on that day," without the opportunity to cross-examine, without the ability to identify the context of it, without the time to look at other — other explanations, that is suspect, and this Court should not place much weight on that.

At the end of the day, we have tests for congressional reports for a reason. Sometimes congressional reports pass those tests and they should be admitted by the Court, and sometimes they fail those tests.

I submit to you that if this one doesn't fail that test for — well, we've already ruled on admissibility. But if the Court places great weight on [p.88] this, then there's no congressional report that ever should be kept out or reduced because — or with little reliance placed on it because this is about as biased and unprecedented and controversial of a process as you can possibly have, and yet that's what the petitioners are relying on.

The second pillar of their case is basically Professor Simi's testimony. And he talked about far—right extremists, and what he did is he described the Proud Boys and the Oath Keepers and the Three Percenters. And I learned a lot, I learned a lot. I will submit that I've spent a lot of time probably talking to groups that may have included those people.

I had heard of the Proud Boys once before or a few times. I knew they were sort of hard core, but I didn't know much. Oath Keepers, I sort of thought they were a vaguely religious group. And I had never heard of the Three Percenters.

Now, my experience is not evidence before this Court, but what I am — the reason I'm saying it is because I was very keenly interested, very keenly interested in how Professor Simi was going to link President Trump to these far right—wing groups because I've — I will submit for the record I've run for a number of public offices and held office, I didn't really [p.89] know about these groups at all. And so I wanted to know how this President all of a sudden knew about

everyone, maybe not all of a sudden. And so I was very keenly focused on that.

And Professor Simi certainly implied, and in some instances almost said that, you know, President Trump was sort of in cahoots with these groups.

But there was no evidence, and I was —there is no evidence, there's no evidence that he intended to speak to them. There's no evidence that he knew how widespread they were. There's no evidence that he didn't even know who they were. There's no evidence to even make those inferences.

And so you look through this and, sure, people can say things, but there's got to be evidence. In fact, the evidence introduced at this hearing is that President Trump did not know of them.

So let's take that debate exchange where President Trump said, "Proud Boys, stand back and stand by." Remember that. And, in fact, the petitioners were questioning Professor Simi about it, and they showed the exchange. And — and I will tease them a little bit.

At one point the question was to Professor Simi, "Proud Boys" — and this is the question — "was he" — referring to President Trump — [p.90] "was he asked a question about the Proud Boys, or did he pick that out of his own brain?"

That was a question to Professor Simi. And that was a false choice. He wasn't asked the question, and he didn't pick it out of his own brain. And to his credit, Professor Simi didn't take the bait on that. He said, "Well, there was some cross—talk and then he used the word 'Proud Boys.'"

Well, what was that crosstalk? The moderator said, “Will you tell these white supremacists and these people to stand down?”

So it was the moderator who used that formulation, “stand down.” And I know President Trump used “stand back,” but pretty similar, the “stand” formulation. And President says, “Well, it’s Antifa’s fault,” and there’s all this back—and—forth, and it’s Joe Biden who suggests Proud Boys are the people. That’s why we included the transcript, and you’re welcome to listen to the video. It’s Joe Biden who uses the word “Proud Boys.”

And so Trump — President Trump says: Well, Wallace, thinks Wallace says stand down, so I say stand by. And then former Vice President, President Joe Biden says “Proud Boys,” so he does what the two of them ask him to do. That’s how he came up with Proud Boys.

[p.91]

And the next day — and we include the transcript of that press conference at Marine One, you know, at the helicopter there, he says, “Look, these white supremacists, I condemn them completely. I don’t even know who the Proud Boys are, but there has to be peace and” — along those lines. So he specifically disavows knowledge of Proud Boys at that time.

Now, the other thing that Professor Simi relies upon, he says, “You know, look, I mean, I observed” — well, let me back up.

Professor Simi is very clear. He says, “My report did not address President Trump’s intent. I’m not in President Trump’s head.” He said that a couple times.

What he did say is, he says, “Well, what President Trump did was characteristic of sort of the speech

patterns and methods of speaking that — that are part of far right—wing extreme conversations and speech.”

And we talked at length about, you know, the use of the 1776, and I asked him these hypotheticals, which, frankly, were a little personal because I’ve used that phrase, and I didn’t know I was talking of Proud Boys or Three Percenters or whoever the heck they were.

And so Professor Simi talked about how —these sort of methods of speech and — and on cross—exam, [p.92]

1 he admitted very readily, he’s not hiding anything, he said, “Look, these characteristics, whether it’s front stage/back stage, or doublespeak,” he says, “we all do it.”

And, in fact, politically, people do it regularly all the time. And conspiracy theorists, he agreed with me, sort of the — you know, Hofstadter, the paranoid — the Paranoid Style in American Politics, there have been conspiracy theorists and — floating around political discourse for a very long time in U.S. politics.

And he said: So all these methods, all these appearance are common to political discourse. So if you’re looking at a politician who uses common political discourse and that common political discourse is similar to what far right—wing extremists use for their political discourse, it’s not a difficult logical leap.

But it’s also a false one. There’s no causality. President Trump is not using these types of speeches that Simi identify, these methods, to communicate with Proud Boys, or whoever. He’s using them because everyone else does, and that’s how people talk. And that’s why we included the video where we have lots of folks, President Biden, Senator Warren, [p.93]

representatives, all using the word “fight,” “fight like hell,” “take it to the streets,” all of that stuff.

So that’s one example of, frankly, what could be many.

Now, Professor Simi, from that, says: Well, President Trump and far—right extremists had a relationship. And my effort to cross—examine him on the Dumb and Dumber movie didn’t work out too well, but you still get to hear that on cross — on closing argument now.

So there’s this scene in this movie played by Jim Carrey, sort of one of the — the protagonists, and he has a crush on a woman. And he travels to meet her and he says to her — and I’m quoting, so pardon the language. He says, “What do you think the chances are of a girl like you and a guy like me, I traveled a long way, at least you can level with me.” He says that to her. He says, “What are my chances?”

She looks at him and she says, “Not good.”

And then he says, “You mean not good as in 1 out of 100?”

And then she looks at him with sort of a mixture of pity and sorrow and perhaps disgust and says, “I’d say more like 1 out of a million.”

And then the character — and a long [p.94] pause, and he smiles and he’s very happy and he says, “So you’re telling me there’s a chance.”

That’s what he says. And he just gives out this big whoop, and she’s just astonished. That’s sort of the scene.

And so to say that President Trump had a relationship with the far right—wing extremists would be analogous to saying that this character had a relationship with this woman or vice versa. There was no

relationship except in one person's head, and that was the character played by Jim Carrey.

A more sinister analogy, more sinister, that's not humorous would sort of be John Hinkley and Jodie Foster. If you remember, John Hinkley was the person who tried to assassinate President Reagan, and the reason he did that is because he had this obsession, this crush on Jodie Foster and wanted to sort of prove himself and do something great.

It would be like saying that they had a relationship. No, there was no relationship there. It was John Hinkley's obsession and Jodie Foster had no relationship with him.

So when Professor Simi says there is a relationship there or there's involvement there with President Trump, no, that's at best unrequited love on [p.95] behalf of the far right—wing extremists who may like President Trump, may be inspired by President Trump, but there's no evidence that it ever went the other way. And to call that a relationship is like calling a stalker and their victim having a relationship. It is just wrong.

Now, let me talk about some of the legal standards and whatnot. Let me start with engage. So engage does not equal incite. They — and we've not — I'm going to phrase this a little bit different. I'm going to try and be a little bit different than our briefings because you've read all that stuff, all right? So — so please pay attention. I'm not just going to repeat myself, I hope.

Engage and incite are two fundamentally different activities. Engage means to participate in an activity, to be involved in it. Incite means to provoke and urge on, to move others to action. They are different activities.

So when you say engage includes incite, you're actually saying that engage includes a fundamentally different activity than the normal meaning of incite, the normal meaning today and, frankly, the normal meaning back then.

And when I say "back then," during the —during that, I mean, there wasn't an issue about [p.96] launching an insurrection when the Fourteenth Amendment came about. The insurrection had occurred, the rebellion, the enemies, the war between the states.

And so Congress, I submit, was looking at engage. And the reason why Professor Delahunty talked about the Confiscation Act of 1862 is because Congress specifically used the word "incite," as well as "engage," and then used a much different formulation for Section 3.

Oh, by the way, the experts. Okay. They are testifying to law, and I'm hopeful that they were helpful for this Court. And they're testifying to the history, and that's what judges do.

And so for them to say: Well, our experts got a bigger resume than your expert, and our experts are really smart and yours isn't, whatever. Okay? We need to look at the actual sources and the reasoning behind it. Okay?

And I like Professor Magliocca. I'm teasing a little bit there.

But when Magliocca testified about what incite — why incite means engage, let's actually — I'm going to zero in on this a little bit. He said, The Reconstruction Acts were — the language was identical to Section 3. And then he looked at Stanbery's opinion, and he — and in that opinion, that AG opinion, he said, [p.97] Stanbery said, "Disloyal sentiments, opinions, or sympathies would not disqualify. But when a person has, by speech

or writing, incited others to engage in rebellion, he must come under the disqualification.” So that’s what he said.

Let’s break that down and put it in context. First he said “incite others to engage.” That’s a little bit different than inciting an insurrection. He’s motivating others to engage in what is already an ongoing insurrection, not to start some one. Well, why would he have that strange formulation?

Here’s why. That shows up in paragraph 16 of the Stanbery report of his advisory opinion, okay? And in that advisory opinion, it’s 12 Attorney General Opinions, 460, I think it’s page 41 and it’s paragraph 16.

And in paragraph 16, he is talking about two types of officials that come under the disqualification. He says — because remember when Delahunty was talking about official, people in their official capacity and individual capacity, and Magliocca was talking about that a little bit, and everybody’s eyes were glazing over?

This is why it’s important, because in the advisory opinion, what happened is, Stanbery is talking [p.98] about two types of officials. He says one type of official is an official whose duties are — duties of the office necessarily had relation to the support of the rebellion.

So what’s that? A naval officer or military officer or a state senator who voted for this or an executive branch. I mean, someone whose job was to further the rebellion.

And then he said there’s a second type of official. And that type of official is someone who discharges their official duties not incident to war, only such duties as belong to a state of peace and were necessary to preservation of order in the administration of law.

So that could be a sheriff or a police officer or a Secretary of State, someone who does their thing whether there is a war or not.

And in the second category is where he makes the statement because there's a lot of other advisory opinions that Stanbery talks about insurrection and what engage is, and this is the only time he uses that formulation.

And the reason he uses that formulation is because then he makes an exception to the second category. He says if you're a Secretary of State — I'm [p.99] teasing — or a sheriff, all right, or a constable and you're using your office as part of your duties, you're inciting others to engage in the rebellion.

In other words, what you're doing is using your official position to urge them to go forth and do things. Then you no longer fall under that category of duties that are not incident to war but, rather, you're disqualified.

That's the context he uses that in. And that's why this whole official and not official and types of official is important.

The next way, this second piece of evidence, the second reason that Magliocca relied upon is he said, Look, there were these examples, John Young Brown, which petitioners mentioned, and Philip Thomas. And what they did is, you know, John Young Brown, he —or one of them, wrote a letter, wrote a letter to the editor, remember that?

In fact, you used that to deny our motion to — our half—time motion. I'm teasing obviously.

But what happened there is he wrote that letter. And Magliocca's testimony shifts. He shifts. And two things

are important to know. One is, the House of Representatives is what disqualified. The House of Representatives said, No, we're not going to seat you, [p.100] using their authority.

But the second thing is that what Magliocca said, and his shift is, they did it because he had provided aid to the Confederacy. A much different standard than incite. The Confederacy is already — the war between the states is ongoing and this is aid.

And that's why — I think it was Philip Thomas who wrote the \$100 check to his son who marched off to Shenandoah Valley or whatever. That was aid.

So it's a different prong, and so now we're shifting these prongs. That's the sum total of Professor Magliocca's testimony.

And compared to that, you have sort of the ordinary meanings, the difference of types of behavior, and you have the Confiscation Act of 1862 where Congress specifically used incite but didn't use engage.

There is no case law supporting Professor Magliocca's interpretation. There's not a lot of case law supporting any of this, to be honest with you.

But — but if you look at some of these recent decisions on justiciability and sort of what's going on there, there's a skepticism of the application, and rightfully so. I mean, towards the end, the petitioners said: Well, you know, the Secretary has all [p.101] of these — this authority and states have all of these authorities based on the Fourteenth Amendment.

The Fourteenth Amendment was passed to limit state authority, not to increase state authority. It was passed to limit, and that's the framework.

Now, for incite, now we'll step back. Engage doesn't equal incite. Let us assume for purposes of argument only and all of these, you know, statements I'll make to say no, we're not bound by that. Let's assume incite is the standard, okay?

What we've — what I want to point out is there is no case law on — or very little on insurrection, pretty much none since — since it was passed. I mean, there's definitions, there's a grand jury charge over there, but, I mean, are there rulings on this? No.

And same with engage. This Court is wading into a brave new world, but the Court is not wading into a brave new world when it comes to standards for incite. Under the Brandenburg standards, there's lots of that.

And we're not saying that the First Amendment, pardon my pun, trumps the Fourteenth Amendment or vice versa. What we are saying, and this we've talked in our brief, the Court is required to harmonize the two, [p.102] when possible, to find a construction that harmonizes the two.

And the Brandenburg standards are what harmonizes it. And Brandenburg standards say: This is when incitement to violence takes place, and this is when incitement doesn't take place. That's what the Brandenburg standards talk about.

And so there's a couple important things. I mean, the Brandenburg standard, the Sixth Circuit has specifically rejected, it's not how a speaker interprets the speech.

All of Simi's approach doesn't find any solace — it's another way of saying it's been rejected — by case law. It's not that the Proud Boys said, "Oh, my gosh, he's speaking to me, so you're telling me there's a chance." That's not the standard. The standard is the intent and

the objective words that are used. It's a plain word meaning.

Now, look, I get it. You know, there could be a code that if there was evidence that President Trump sat down with the Proud Boys and said, "Look, I'm going to give this speech. And when I say the Eagle has landed, go launch your attack." Okay? I mean, there could be a prearranged code. But absent that, which doesn't exist here, it's the plain objective words, [p.103] the objective meaning of the speech.

Let me talk a little bit about causality as well. Unengaged, it has to be — or incite, has to be causality. Look, even the January 6 Report says this, that the violence began well before President Trump finished his speech. So it's difficult to see how the January 6 speech caused this.

Now, I know they've argued, well, then it increased, that 2:24 tweet, and I'll get to that in a second. But the speech itself, there was not causality.

And all of the stuff pre—6, it fails the imminence test, the objective words. And you can say "will be wild" means this, that, or the other. It doesn't mean violence. The objective words do not incite. They simply don't.

Let's talk a little bit about specific intent. There was no intent on President Trump's behalf whatsoever, general or specific. The most one can discern is that he pressured and he wanted other people to pressure Vice President Pence to send the electoral count back to states for ten days.

That's what he said, and you heard him in the January 6 speech: Send it back for ten days. I'm sure it

will change. You know, let's do the right thing. That's what he wanted to do.

[p.104]

I want to talk about the National Guard when it comes to specific intent. Now, the National Guard is important for a couple of reasons because it, frankly, I think destroys their argument that President Trump did a failure to act.

But let's talk about intent. The evidence on National Guard is, frankly, overwhelming. We have two witnesses, Kash Patel, we have Katrina Pierson. And it's corroborated — and this is important — it's corroborated by the text from Max Miller, the petitioners introduced, in which Max Miller says, "Boy" — he says to Katrina Pierson — "it's a good thing we killed that National Guard thing."

Well, why would he say "we killed that National Guard thing"? Well, because it came up in the conversation because President Trump wanted and my — I'm inferring that it freaked everyone out because no one wanted President Trump to mobilize the National Guard because he would be accused of being a dictator and all of this other stuff.

But he certainly authorized it. How can a President who authorizes the National Guard to be used, not on one occasion but on two in front of two audiences, enough to give his staff concern that he's actually going to, you know, push it really hard, he authorizes it and [p.105] Kash Patel follows up on it to prevent violence, how is that an intent to incite?

It is the antithesis. In fact, you know, the mayor of DC put out this letter saying, Don't give me any more National Guard. Well, why would she do that? Well, the

reason she would do that is because the Secretary of the Army talked to her and she was like, No, I don't want this.

In fact, the Capitol Police didn't want it. I think the evidence shows that President Trump was the only political leader in DC that wanted substantial protections to prevent the type of violence that happened on January 6. He's the only one who wanted to sort of flood the zone with troops to make sure that there wouldn't be any violence. Everyone else resisted, everyone else resisted until it started.

And then, of course, the National Guard was mobilized and — because they already had President Trump's authorization. In fact, the National Guard was already — according to Kash Patel, was one of the fastest mobilizations. It happened within a couple of hours of the mayor asking for the National Guard.

I don't know if you know a lot about the National Guard. I used to serve in the Reserves. And mobilizing part-time soldiers, Marines — I'll be [p.106] respectful to Mr. North, who served there — is — is just a hot mess. It doesn't happen in two hours. Unless there has been substantial time pre-positioning people, getting them ready to go to staging points, making sure you have the transportation and equipment and logistics in place, so you can mobilize part-time soldiers from a disparate area in two hours.

That is pretty amazing. And it shows that there were actual steps taken by the military with President Trump's authorization to mobilize the National Guard.

So lots of evidence that he wanted to do that. Eyewitness evidence, confirmed by the tweet that the petitioners themselves brought in that shows President

Trump did not have an intent for violence, but had an intent to make sure there wasn't violence.

All right. I don't have a lot of time left.

Insurrection. I said earlier on that they're just picking something out of the hat for a definition of insurrection, and they point to this definition. If you look at that definition, it differs fundamentally from the definition they put in their Complaint. Paragraph 369, I believe it was.

That was an assembly of persons — and an [p.107] assembly means a group organized for a purpose — acting with a purpose to oppose the continuing authority of the United States Constitution — that's the continuing authority, not ten days — by force. Okay?

So that's a different definition than the one they proposed with Professor Magliocca. And I would urge the Court to follow what the — what the Michigan court just said recently. And the Michigan court — and we filed the supplementary authority just the other day — Michigan court said a lot of great things, rejected a lot of the petitioners' arguments, rejected the Secretary's arguments.

But one of the things that the Court said was: Look, you — we really don't know what insurrection is. There's lots of definitions. In fact, there's as many definitions — I'm trying to find it and I can't —but there are many definitions, as people who want to think deep thoughts about them.

Professor Magliocca is a smart guy, and I'm not saying that his definition is crazy, but it has no authority, it's him making it up, just like anyone else would make it up.

Yeah, the Court said: The short answer is there are as many answers and gradations of answers to each of these proffered examples — one of which was [p.108] insurrection — as there are people called upon to decide them.

The violence at the Capitol. No, the —wasn't armed, the mob wasn't armed. We have Professor Hodges — we had Mr. Hodges — Officer Hodges talking about how the gun unit was looking for firearms. There were no firearms. No one found them.

There's no evidence that Trump knew they were armed. There's no evidence beyond — so there were some — I admit, there are brass knuckles and some pepper spray. But deadly arms? People coming armed to actually cause an insurrection?

That's not a bunch of flagpoles. The way it was used and the way President Lincoln used it when he defined it as an armed insurrection is weapons of war to create force, not makeshift weapons.

And I understand violence is inexcusable. It's really hard to say, Well, you know, there's such violence, but there's not a lot. But that's what the job of the court is to do, to say, Look, this may constitute a riot, but it does not constitute an insurrection.

And that's why we said insurrection needs to be grounded in the context and the understanding at the day when it was drafted and when it was ratified, and that is in the context of a Civil War. You can't ignore [p.109] the fact that 620,000 people were killed, that there was a massive armed conflict, and say, Well, what they really meant by insurrection was intimidation to prevent a law.

No. They were looking at the Civil War, and it was a response to that.

All right. Real quick, Hilary Rudy. As the Colorado Republican Party correctly noted, the Secretary has never enforced anything like this. The Secretary has no administrative procedures in place to make these determinations. It is, in fact, a ministerial.

Look, referring to the form, the Major Party Candidate Statement of Intent for Presidential Primary, remember those three boxes. The title on the form says: Qualifications for office, and in parentheses, you must check each box to affirm that you meet all qualifications of the office, close paren. Okay?

I was surprised — and I'll admit I have a basis for being surprised — that apparently that's just advisory, that's just guidance. And when the Secretary says: All qualifications — and refers to these three boxes — it means something different than when the person signs it and says: I meet all qualifications as prescribed by law.

[p.110]

So apparently when a person signs that form, they mean all the Federal Constitution and that apparently gives the Secretary authority and apparently imports all of the constitutional requirements of the Colorado Election Code.

But when the Secretary said “all qualifications,” it's really just advisory for those three boxes. There really could be more.

That does not bear credibility. And that's because the Fourteenth Amendment is a disqualification. It's not a qualification.

I don't have time to quote from the Michigan case. You're certainly capable of reading it. I'd urge you to

take a look at that because that is good persuasive authority on what's going on and how people are looking at this.

I would also urge you to take a look at the Minnesota court, which rejected the Secretary's authority. And I would urge you to take a look at the New Hampshire decision, which basically said this is a political question.

On the justiciability issue.

Self—executing. Look, there's some disagreement before, there's one exchange in the U.S. Senate about whether or not it was self—executing.

[p.111]

But when Supreme Court Chief Justice Chase in the *Griffins* case says, It is nonself—executing, and Congress immediately responds, there is no further debate in the historical record. Justice Chase's view is dispositive and it is viewed as dispositive.

Very quickly, we have not argued this at length. I think we referred to it slightly, the Amnesty Act of 1812 [sic], I want to at least preserve that argument. The fact of the matter is, Congress did, in fact, provide amnesty going forward, and that law has not been overruled.

Let me end with two last points. I would submit to this Court that the initial framework that the courts used has sort of led it astray on some of these procedural, these jurisdictional arguments.

And the Court early on said that — that it was preparing this case for Supreme Court review, and I think that's laudable. But I think it created a bias to allowing — to reaching a factual hearing because you don't want to dismiss something on a jurisdictional and then it has to go — it comes back and then it has to go

back for a factual hearing, it bounces back and forth. You get everything at once.

And then also I think the Court's exchange with Professor Simi — I'm sorry, not — with [p.112] Professor Delahunty, when you were concerned that Professor Delahunty's interpretation would render the Fourteenth Amendment Section 3 a dead letter, and you talked about that a couple times.

It's not a dead letter if this Court doesn't make a decision. It's not appropriate for this Court's — for this Court to exercise jurisdiction. And stepping back, look, this was a five—day hearing, 17 1/2 hours, importing this whole January 6 stuff.

This is a big issue, and that's a small hearing, as much as I worked at it and the petitioners and yourself did. It does not create a good, thorough, factual record, an adversarial process, nor does it flesh out what these standards are to be able to apply to that. So I think there's some real concerns there.

At the end of the day — and remember I talked about the rule of democracy. I want to turn back to Attorney General Stanbery. And in his advisory opinions, Advisory 12 — Volume 12, 141, page 160 in 1867, the same language.

He said: Where from the generality of terms of description or for any other reason a reasonable doubt arises, that doubt is to be resolved against the operation of the law, against the operation of disqualification. That's what he said.

[p.113]

Two important things. His belief was that it has to be, the standard is beyond a reasonable doubt. So if there's a

reasonable doubt, you have to resolve it in favor of holding an election, the democracy canon.

And the second point was, any ambiguity get resolved that way, because that's, frankly, what we are as a country. We vote on these issues.

Just because, you know, I mean — I guess to put it more crudely, you know, look, when you have a hammer, when the Court system is the hammer, not every problem is a nail. The fact of the matter is that the people get to decide on this.

I would submit that the petitioners' evidence relies — it relies on the January 6 Report. It relies on inferences drawn from the January 6 Report. It relies on the conclusions and the characterizations from the January 6 Report. None of which meet the objective standards of certainly the Brandenburg line of cases as far as what incitement actually means.

None of that meets it unless you buy into the January 6 Report's conclusions. And that ain't evidence. It shouldn't be evidence before this Court.

I think I've come up with my full hour here. Thank God I was able to actually fill it and hopefully intelligently.

[p.114]

I want to thank the Court for its time. I want to thank the Court's staff for its time as well. I know it's been a lot of work. Obviously, as petitioners began, we will end, we're not happy to be here and we don't think we should be.

We would ask the Court to review and reconsider its jurisdictional arguments, but certainly recognize that the easiest way, the most straightforward way is looking at the well—developed Brandenburg standards and saying

that President Trump came nowhere near towards engaging in violence, insurrection, or anything approaching lawless activity.

Thank you very much, Your Honor.

THE COURT: So I'm going to give you a little bit of guidance.

I have no intention of revisiting my prior decisions. I'm — Mr. Gessler may be right and I may be wrong, but that's not what I plan on doing.

I plan on issuing a decision on what was in the hearing, and so to the — I only say that so that you don't spend time addressing some of these things that I've already decided.

MR. GRIMSLEY: And, Your Honor, I don't intend to. I guess one question is, with regard to the J6 Report and admissibility of that, is that one that's [p.115] off the table, or should I address it?

THE COURT: I consider that to be conditionally admitted. When I say conditionally, that meant and always meant that I may reverse myself on —after the hearing.

MR. GRIMSLEY: So I'll keep that brief, and I'll keep these remarks, I think, brief.

There's been consistent complaints about the January 6 Report and the methodology that went into coming up with the findings. The problem is, they haven't come in here and really challenged the veracity of actually many of those findings. They just complain about the process.

President Trump could have come in here and testified. There are other people who could have come in here and testified, but they don't really question, again, any of the findings that we're relying on.

Now, they tried to do it for a couple, I think, during the closing here, but we're not the ones who made up that President Trump knew Ali Alexander and Alex Jones. This is from Katrina Pierson:

"I want to talk with you about, you mentioned a couple of times Ali Alexander and Alex Jones. Do you refer to them as 'the crazies'?"

[p.116]

Yep.

"Okay. And you know that — or you said that Trump likes the crazies, right?"

"Yes, and I also define 'crazies' as being those who viciously defend him in public."

And Professor Simi testified that President Trump went on Alex Jones's show right after announcing his candidacy for President in 2015. We're not making this stuff up. So that finding is not impugned at all.

And then as far as 10— to 20,000 troops? That testimony was not credible. There was no documentation they could point to to support the idea that 10— to 20,000 troops had been authorized.

And you heard Professor Banks say, Yeah, that's a pretty big authorization of troops. You would think you might see some documentation.

And when confronted about it, Mr. Patel said: You know, it's kind of hiding back in the Department of Defense. I didn't have it with me. I couldn't bring it to the January 6 Committee.

It wasn't hiding back at the Department of Defense. The January 6 Committee asked for documents from the Department of Defense. Mr. Heaphy testified that the Department of Defense complied, that the request [p.117] would have covered any such document.

There were no such documents. Mr. Patel's testimony was not credible.

Now, as far as the criticisms of Professor Simi, yeah, he's not inside President Trump's mind. He admitted that. But when pressed repeatedly by my esteemed colleague here —

MR. GESSLER: Mr. Gessler.

MR. GRIMSLEY: — Mr. — I didn't — I was taught never to say opposing counsel's name on the record. I don't know if that's right or wrong.

But my esteemed colleague pressed him, and he said: Yeah, I'm not in his mind, but I have looked at these patterns of communication for my entire career, and these patterns of communication back and forth between President Trump and these right—wing extremists fits that to a T.

And it wasn't just on January 6. It was five years leading up to January 6. And he wouldn't have been allowed to testify on what Trump's intent was or meaning. That's for this Court to decide.

But it's certainly more than a reasonable inference, given the information and the patterns that Professor Simi identified for this Court, to infer that Trump knew exactly what he meant. He knew who he was [p.118] talking to, and he knew what the result of what he said that day was going to be.

And as far as Michigan goes, Your Honor has made your decision on this already. I addressed it without calling it the political question doctrine at the end of my earlier remarks.

I think Michigan just got it wrong. There are not committed textual reasons to think this was left to Congress. It's exactly the opposite. As I said before, it

cannot make any sense to say that Congress by a simple majority has to approve the disqualification, but it takes a two—thirds supermajority to disable it. It just does not make sense.

And finally, they just keep wanting to ignore the 2:24 tweet and what Trump did after the speech. Wasn't in the findings of fact and conclusions of law and despite the promise, they never came back to it in closing.

There is no innocent explanation for that tweet given what President Trump knew was going on.

So petitioners have proven their case on the facts and the law. And as I close, I want to address two rhetorical points that Trump continues to make.

First, Trump argues that petitioners' claims must be wrong because they're unprecedented. They [p.119] point out that no court in the history of the U.S. has disqualified a presidential candidate under Section 3 of the Fourteenth Amendment. They point out that no court in Colorado has disqualified any candidate under Section 3 of the Fourteenth Amendment.

There's a reason for that. Never before in the history of the United States has somebody who engaged in insurrection against the Constitution run for President after having taken an oath to protect that document. Never before in the history of the United States has a sitting President sicced a mob on the Capitol while they were counting electoral votes.

Section 3 of the Fourteenth Amendment was put in place precisely for this reason, that no President before Trump has tested it tells you all we need to know about Trump.

Second, Trump asserts that applying Section 3 is somehow antidemocratic, that it will deprive people the

ability to vote for the candidate of their choice, a candidate who they say is leading in the polls.

Now, qualifications by definition prevent people from voting for who they want. There are probably 30—year—olds out there, probably foreign citizens, maybe an Arnold Schwarzenegger, maybe a Barack Obama or a George W. Bush who's already been President two times, [p.120] but it doesn't matter.

And the argument that Section 3 should not apply because Trump is popular could not be more dangerous. Our founders have made clear time and again that a candidate's popularity does not supersede the Constitution. The rule of law must apply whether a candidate has no chance of winning election or is a potential front runner.

The application of Section 3 is at its most urgent when a person who has desecrated their oath to support the Constitution seeks the highest office in the land. That is when the protection is needed the most.

And enforcing the Constitution does not defy the will of the people. The Constitution itself enables, embodies the will of the people. It is the supreme law of the land and must be enforced even against popular political candidates.

Here's a news flash. President Trump lost the 2020 election. Rather than peacefully hand over power to his successor, as every single outgoing President in the history of our country has done, President Trump chose to do everything he could, say anything he could to hold onto that power unlawfully.

President Trump violated his oath to [p.121] preserve, protect, and defend the Constitution. President Trump engaged in insurrection against the Constitution.

The Constitution is clear. He cannot be President again.

THE COURT: I want to again thank everybody for their high quality presentations and for their professionalism, and I am now officially ending the Section 1—113 proceeding.

Everybody have a great night.

MR. GRIMSLEY: Thank you, Your Honor.

MR. GESSLER: Thank you.

(WHEREUPON, the within proceedings were adjourned at the approximate hour of 5:45 p.m. on the 15th day of November, 2023.)

JA1283
Minute Orders

Case Number: 2023CV032577

Division: 209

Case Type: Injunctive Relief

Judicial Officer: Sarah Block Wallace

Case Caption: Anderson, Norma et al v. Jena Griswold
in Her Official Capacity et al

Court Location: Denver County - District

Order Date: 09/18/2023

JUDGE SARAH B. WALLACE. CTRM 209. FTR 10:03. STAT. ATP ERIC OLSON, MARIO NICOLAIS, MARTHA TIERNEY, SEAN GRIMSLEY, AND JASON MURRAY ATD FOR TRUMP, SCOTT GESSLER AND JUSTIN NORTH; FOR GRISWOLD, MICHAEL KOTLARCYK ATI ROBERT KITS MILLER AND MICHAEL MELITO COURT GRANTS THE MOTION TO INTERVENE. COURT HEARS ARGUMENT ON THE MOTION FOR AN EXPEDITED CASE MANAGEMENT CONFERENCE. COURT SETS 5-DAY HEARING TO BEGIN ON 10/30/2023. COURT ORDERS THAT INITIAL MOTIONS TO DISMISS ARE FILED BY 09/22/2023; RESPONSES DUE BY 09/29/2023; REPLIES DUE BY 10/06/2023. ALL OTHER MOTIONS TO DISMISS SHOULD BE FILED BY 09/29/2023; RESPONSES DUE BY 10/06/2023; REPLIES DUE BY 10/13/2023. PARTIES SHOULD COORDINATE THEIR ARGUMENTS TO REDUCE THE AMOUNT BEING FILED CONCERNING THESE MOTIONS. TO THE EXTENT THE COURT FEELS THE ARGUMENTS MADE IN THE

JA1284

MOTIONS TO DISMISS WOULD BEST BE
DECIDED AT THE HEARING, THE COURT WILL
RESERVE ITS RULING UNTIL THAT TIME.
PARTIES SHOULD WORK TOGETHER TO CREATE
A PROPOSED SET OF DEADLINES THAT WILL
GOVERN THE CASE. ANY DISAGREEMENTS
WILL BE ADDRESSED AT THE STATUS
CONFERENCE SET FOR 9:00 ON 09/22/2023. /CAS

JA1285
Minute Orders

Case Number: 2023CV032577

Division: 209

Case Type: Injunctive Relief

Judicial Officer: Sarah Block Wallace

Case Caption: Anderson, Norma et al v. Jena Griswold
in Her Official Capacity et al

Court Location: Denver County - District

Order Date: 09/22/2023

JUDGE SARAH B. WALLACE. CTRM 209. FTR 9:00. STAT. ATP ERIC OLSON, MARTHA TIERNEY, MARIO NICOLAIS, AND SEAN GRIMSLEY ATD FOR GRISWOLD, MICHAEL KOTLARCZYK; FOR TRUMP, SCOTT GESSLER, GEOFFREY BLUE, AND JUSTIN NORTH; FOR CRSCC, ROBERT KITSMILLER AND MICHAEL MELITO COURT DISCUSSES EXPANDED MEDIA COVERAGE REQUESTS WITH THE PARTIES. COURT SETS ORAL ARGUMENT ON THE SLAPP MOTION FOR 1:30 ON 10/13/2023. COURT ORDERS THAT PTFs DISCLOSE THEIR WITNESS LIST ON 09/29/2023; DEFS SHOULD DISCLOSE THEIR WITNESS LIST ON 10/09/2023; PARTIES HAVE UNTIL 10/23/2023 TO SUPPLEMENT THEIR WITNESS LIST AND PROVIDE A JOINT ORDER OF PROOF. THE ORIGINAL WITNESS LISTS SHOULD PROVIDE ENOUGH DETAIL AS TO WHAT THE WITNESSES WILL TESTIFY TO SO THAT PARTIES CAN MAKE A REQUEST FOR DEPOSITIONS. COURT DENIES REQUEST FOR EXPERT DEPOSITIONS; REPORTS SHOULD BE FULSOME AS EXPERTS WILL NOT

JA1286

BE ALLOWED TO TESTIFY TO ANYTHING OUTSIDE OF THE EXPERT REPORTS. PTFS WILL IDENTIFY EXPERTS AND SUBJECT MATTER BY 09/25/2023; DEFS SHALL IDENTIFY EXPERTS AND SUBJECT MATTER BY 10/13/2023. PTFS WILL PROVIDE EXPERT REPORTS BY 10/06/2023; DEFS SHALL PROVIDE EXPERT REPORTS BY 10/27/2023. PTFS WILL PROVIDE PRELIMINARY EXHIBITS ON 10/06/2023; DEFS WILL PROVIDE PRELIMINARY EXHIBIT LISTS ON 10/16/2023; PARTIES WILL EXCHANGE FINAL EXHIBIT LISTS ON 10/23/2023. PARTIES SHOULD PROVIDE A LIST OF STIPULATED AND A LIST OF NON-STIPULATED EXHIBITS PER PARTY BY 10/23/2023. MOVING PARTY SHOULD PROVIDE THE COURT WITH A COURTESY COPY OF THE MTDS WITH EXHIBITS WHEN THEY ARE FULLY BRIEFED. COURT ORDERS THAT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW BE FILED BY 11/08/2023. COURT ORDERS THAT A BRIEFING ON THE REMAINING EVIDENTIARY ISSUES BE PROVIDED BY EACH PARTY BY 10/20/2023; RESPONSES DUE BY 10/27/2023. COURT ORDERS THAT 702 MOTIONS BE FILED BY 10/16/2023; RESPONSES DUE BY 10/27/2023. PTFS WILL BE ALLOWED TO MAKE 702 OBJECTIONS AT THE HEARING. COURT DENIES REQUEST FOR AMICUS BRIEFS. COURT ENTERS THE PROTECTIVE ORDER SUBMITTED BY PTFS WITH MODIFICATIONS. /CAS

JA1287
**DISTRICT COURT, CITY AND COUNTY OF
DENVER, STATE OF COLORADO**
1437 Bannock Street
Denver, CO 80202

Case No. 2023CV32577

Division: 209

Petitioners:

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAHER, KATHI
WRIGHT, and CHRISTOPHER CASTILIAN

v.

Respondents:

JENA GRISWOLD, in her official capacity as Colorado
Secretary of State, and DONALD J. TRUMP

and

Intervenors:

COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE and DONALD J. TRUMP

**ORDER RE: DONALD J. TRUMP'S MOTION TO
DISMISS FILED SEPTEMBER 29, 2023**

This matter comes before the Court on Donald J.
Trump's Motion to Dismiss, filed September 29, 2023.
Having considered the parties' briefing, the relevant legal

authorities cited, and being otherwise familiar with the record in this case, the Court FINDS and ORDERS as follows:

I. LEGAL STANDARD

A complaint must state a plausible claim for relief to survive a C.R.C.P. 12(b)(5) motion to dismiss. *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016). However, motions to dismiss are disfavored, and may be granted only when, assuming all the allegations of the complaint are true, and drawing all reasonable inferences in favor of the plaintiff, the plaintiff would still not be entitled to any relief under any cognizable legal theory. *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011). Although a complaint need not contain detailed factual allegations, a plaintiff must identify the grounds on which he is entitled to relief, and cannot simply provide “labels and conclusions, and a formulaic recitation of the elements of a cause of action.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint is insufficient if it provides only bald assertions without further factual enhancement. *Id.* at 557.

Whether a claim is stated must be determined solely from the complaint. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). A court may consider only the facts alleged in the pleadings, as well as “documents attached as exhibits or incorporated by reference, and matters proper for judicial notice.” *Denver Post*, 255 P.3d at 1088.

II. ANALYSIS

In his Motion to Dismiss, Intervenor Trump makes the following arguments: (1) the question before the Court is a non-justiciable political question; (2) Section 3 of the Fourteenth Amendment is not self-executing; (3) Congress has preempted states from judging presidential qualifications; (4) Section 3 of the Fourteenth Amendment does not apply to Intervenor Trump; (5) the Petition fails to state a claim that violence constituted an insurrection or President Trump engaged in an insurrection; and (6) the case should be moved to Washington, D.C. under Colorado’s *forum non conveniens* statute.

a. Non-Justiciable Political Question

“In general, the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid.’” *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). A case “involves a political question . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’” *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) In such a case, the United States Supreme Court has held that a court lacks the authority to decide the dispute before it. *Zivotofsky*, 566 U.S. at 195. This exception is narrow. *Id.* A court cannot avoid its responsibility to enforce a specific statutory right because the issues have political implications. *Id.* at 196.

In this case, Intervenor Trump argues that the U.S. Constitution reserves exclusively to the U.S. Congress

the decision as to whether a candidate is unqualified under Section 3 of the Fourteenth Amendment.¹ He does not argue the second basis under the political question doctrine—that a Court is incapable of resolving the question—nor could he. Instead, Intervenor Trump argues the U.S. Constitution reserves exclusively for the United States Congress the power under Section 3 of the Fourteenth Amendment to determine whether a party may take office. In doing so, Intervenor Trump relies on cases that address the question of whether various Presidential candidates (Barack Obama, John McCain, and Ted Cruz) were natural born citizens. He does not cite a case holding that the question before this Court (whether a candidate is barred under Section 3 of the Fourteenth Amendment) is barred under the political question doctrine.

i. Intervenor Trump’s Cases

Intervenor Trump cites the Third Circuit in *Berg v. Obama*, 586 F.3d 234, 238 (3d Cir. 2009) for the proposition that the question of whether Barack Obama was a natural born citizen was a non-justiciable political question outside the province of the judiciary. The Court in *Berg* makes no such holding. Instead, when describing the history of the case, the Third Circuit states, “[w]e also denied that motion, reiterating Berg’s apparent lack of

¹ Intervenor Trump claims that Courts have dismissed “*every* Section Three challenge brought against President Trump—and every other federal candidate or officeholder—arising from the events of January 6, 2021.” Intervenor Trump, however, cites nary a case. Presumably, this is because those cases have been dismissed for lack of federal standing. In this case, C.R.S. § 1-1-113 clearly gives Petitioners standing.

standing and also stating that Berg's lawsuit seemed to present a non-justiciable political question.” *Id.* This Court does not have this order in front of it, in which the Third Circuit apparently stated, “the lawsuit seemed to present a non-justiciable political question.” *Id.* However, even if it did, it appears that whatever the Third Circuit did say regarding the political question doctrine was *dicta*.

In addition to *Berg*, Intervenor Trump cites a series of trial court opinions, and one California appellate opinion, some published, some unpublished, that largely hold or state in *dicta* that the plaintiffs’ claims are likely also barred under the political question doctrine as a question committed to a coordinate political department. The Court addresses the cases Intervenor Trump cites below.

In *Robinson v. Bowen*, 567 F.Supp.2d 1144, 1145 (N.D. Cal. 2008), an elector pledged to a third-party candidate filed a motion for preliminary injunction seeking to remove John McCain from the ballot because he was allegedly not a natural born citizen. The Court denied the motion for preliminary injunction because the plaintiff was not likely to succeed on the merits. *Id.* at 1146. The Court then noted that Article II of the Constitution prescribes the number of presidential electors to which each state is entitled, and the Twelfth Amendment prescribes the manner in which the electors shall elect the President. *Id.* The Court examined 3 U.S.C. § 15 which directs that Congress “shall open, count, and record the electoral votes” and provides a mechanism for objections. *Id.* at 1147. Finally, it turned to the Twentieth Amendment which provides instructions on how to proceed if a president elect fails to qualify. *Id.* Having looked at these various constitutional provisions and statutes, the *Robinson* Court then concluded, without

invoking the political question doctrine, that “[j]udicial review—if any—should occur only after the electoral and Congressional processes have run their course.” *Id.* The course it referred to was a 3 U.S.C. § 15 objection to a candidate and the Twentieth Amendment procedures addressing a failure to qualify. The idea, however, of Court intervention after “Congressional processes have run their course” is directly contrary to a holding that this is a political question—where there is no judicial review permitted.

In *Kerchner v. Obama*, 669 F.Supp.2d 477, 479-80 (D. N.J. 2009), two citizens brought actions against various government officials, including the U.S. Congress, alleging President Obama was not a natural born citizen and seeking to compel Congress to hold hearings, conduct investigations, and take certain actions following said investigations. The Court held the plaintiffs did not have Article III standing. *Id.* at 483. In a footnote, the Court noted that even if there was standing, the case likely fell into “the category of generalized grievances that are most appropriately handled by the legislative branch.” *Id.* at n. 5. It continued that “it appears that Plaintiffs have raised claims that are likewise barred under the ‘political question doctrine’ as a question demonstrably committed to a coordinate political department,” citing to Article II, Section 1 of the U.S. Constitution and the Twelfth Amendment, Section 3. *Id.*

Keyes v. Bowen, 117 Cal.Rptr.3d 207 (Cal. Ct. App. 2010) is the only appellate court opinion cited that has addressed the issue. There, the appellate court held the Secretary of State had no duty to investigate presidential eligibility and extensively cited *Robinson, supra*, for the proposition that “presidential qualification issues are best resolved in Congress.” *Keyes*, 117 Cal.Rptr.3d at 216.

Of the cases Intervenor Trump relies on, the Court in *Grinols v. Electoral Coll.*, No. 2:12-CV-02997-MCE-DAD, 2013 WL 2294885 (E.D. Cal. May 23, 2013) (unpublished), *aff'd*, 622 F.App'x 624 (9th Cir. 2015) had the most extensive analysis. First, it noted that the “natural born citizen” requirement does not designate which branch should address whether the candidate is qualified. *Id.* at *6. It further noted Article II, Section 1 of the Constitution establishes that the Electoral College elects the President. *Id.* It then pointed out that “[t]he Twelfth Amendment empowers the President of the Senate to preside over the meeting between the House of Representatives and the Senate in which the President of the Senate counts the electoral votes.” *Id.* According to the Court, “[t]he Twentieth Amendment empowers Congress to create a procedure in the event that neither the President-elect nor Vice President-elect qualifies to serve as President of the United States [sic].” *Id.* Finally, the Court pointed out that “the Twenty-Fifth Amendment provides for removal of the President should he be unfit to serve.” *Id.* Based on those provisions, the Court held “the Constitution make[s] clear that the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States.” *Id.*

In *Strunk v. New York State Bd. of Elections*, No. 6500/11, 2012 WL 1205117, at *12 (N.Y. Sup. Ct. Apr. 11, 2012) (unreported disposition), *aff'd*, 5 N.Y.S.3d 483 (N.Y. App. Div. 2015) the Court held the framework for the Electoral College and its voting procedures for President and Vice President is found in Article II, Section 1 of the Constitution. More specifically, the Court noted that 3 U.S.C. § 15 dictates “the counting of electoral votes and the process for objecting” to votes. *Id.* According to the

Court, “[n]o objections were made by members of the Senate and House of Representatives, which would have resolved these objections if made.” *Id.*

Finally, in *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *16 (S.D. Miss. Mar. 31, 2015) (unpublished), the Court, relying on *Keyes* and *Grinols*, *supra*, held “this court can find no authority in the Constitution which would permit it to determine that a sitting president is unqualified for office or a president-elect is unqualified to take office. These prerogatives are firmly committed to the legislative branch of our government.”

ii. Petitioners’ Cases

Petitioners primarily cite *Elliot v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016),² *aff’d*, 134 A.3d 51 (Pa. 2016), *cert. denied*, 580 U.S. 867 (2016). There, the Court reviewed Article II, Section 1 and the Twelfth Amendment of the United States Constitution which set forth the procedure by which a person is elected to the office of the President. *Id.* at 650. The Court in *Elliot* described Article II, Section 1 and the Twelfth Amendment as accomplishing the following:

1. vested in the legislatures of the several states, not Congress, the power to “appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of

² The Pennsylvania Commonwealth Court is an appellate court that also has original jurisdiction to hear election cases.

Senators and Representatives to which the State may be entitled.”

2. commanded the electors, once selected, to meet in their respective states, and vote by ballot for two persons, and then to transmit their votes to the nation’s seat of government.

3. commanded, upon receipt, the President of the Senate open the ballots and count the votes in the presence of the members of the Senate and the House of Representatives.

4. provide that only in the case of a tie, or the absence of a majority, does the Constitution allow Congress to choose the President and Vice President.

Id. (quoting U.S. CONST. art. II, § 1, cl. 2).

After reviewing the various constitutional provisions that supposedly support the Court dismissing the case due to the political question doctrine, the Court in *Elliot* concluded that the Constitution does not vest the Electoral College with the power to determine eligibility of a presidential candidate. *Id.* at 650–51. The Court similarly concluded that Congress has no control over the process other than deciding the day on which electors “give their votes.” *Id.* at 651 (quoting U.S. CONST. amend. XII). The Court then compared the provisions regarding Presidential eligibility with those regarding the eligibility of Congress where the U.S. Constitution clearly vests in Congress the power to determine the eligibility of its own members. *Id.* The Court concluded that because the Constitution does not vest any entity of the federal

government with the power to ensure that only persons who are constitutionally eligible become the President, that determination is reserved for the Courts. *Id.*

The only other case the Petitioners cite that squarely addresses this issue is *Williams v. Cruz*, OAL Dkt. No. STE 5016-16, pp. 4–5 (N.J. Off. of Admin. Law Apr. 12, 2016), a New Jersey administrative law decision where the judge examined the various Constitutional provisions and held:

While Congress is the Judge of the Elections, Returns, and Qualifications of its Own Members, including their citizenship . . . Congress is not afforded any similar role in connection with the issue of Presidential eligibility. There is no basis to conclude that the issue of eligibility of a person to serve as President has been textually committed to the Congress.

iii. Analysis

Intervenor Trump argues the weight of the law favors a holding that the political question doctrine precludes judicial review, and that Petitioner can only cite “two idiosyncratic state cases that never received appellate review.”³ The Petitioners, on the other hand, argue nothing in the Constitution commits to Congress and the Electoral College the exclusive power to determine presidential qualifications and that Intervenor Trump’s

³ The Pennsylvania Supreme Court affirmed the decision in *Elliot v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016).

cases are distinguishable because in none of those cases did the plaintiffs bring pre-election suits in state court under a state law authorizing ballot access challenges.

The Court agrees with Intervenor Trump that the weight of cases have held that challenges to an individual's qualifications to be President are barred by the political question doctrine. The Court, however, agrees with Petitioners that most of the cases Intervenor Trump cites involved post-election attempts to remove former President Obama from office and that there is at least some distinction between ballot access cases and removing a sitting President. Further, most of the cases concluding that the political question doctrine applies did so with very little analysis of what the constitutional provisions they rely on provide. For that reason, the Court looks to the specific provisions to determine if they meet the "textually demonstrable constitutional commitment of the issue to a coordinate political department" standard. *Baker*, 369 U.S. at 217.

ARTICLE II OF THE U.S. CONSTITUTION

U.S. CONST. art. II, § 1, cl. 2 provides:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

JA1298

This clause vests the States authority to appoint electors. The Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for President or a President-elect is constitutionally ineligible.

U.S. CONST. art. II, § 1, cl. 3 provides:

The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List 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. 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 shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in

JA1299

chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.

This clause directs that the Electors shall meet and certify a list of whom the Electors voted for and transmit it to the President of the Senate. The President of the Senate shall the open the Certificates and count them. It also outlines what happens if there is a tie. The Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for President or a President-elect is constitutionally ineligible.

U.S. CONST. art. II, § 1, cl. 4 provides: “The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”

This clause says that Congress sets the date that the Electors meet to certify their votes. The Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for President or a President-elect is constitutionally ineligible.

JA1300

U.S. CONST. art. II, § 1, cl. 5 provides:

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

While this clause sets out certain constitutional qualifications, it says nothing regarding what branch of the government shall determine if the candidate meets those eligibility qualifications.

U.S. CONST. art. II, § 1, cl. 6 provides:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

JA1301

This clause addresses what happens when a President is removed and does not address who determines whether a candidate for President or President-elect meets eligibility qualifications.

THE TWELFTH AMENDMENT

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they 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;—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

JA1302

those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. CONST. amend. XII.

JA1303

The Twelfth Amendment modifies Article II, Section 1, Clause 3 and makes it clear that the President and Vice President are chosen separately but together. If there is no majority or a tie for President, the House of Representatives chooses the President. In the interim, the newly elected Vice President will serve as President. While the Twelfth Amendment references the “constitutional disability of the President” and that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President,” the Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for president or a President-elect is constitutionally ineligible.

SECTION 3 OF THE TWENTIETH AMENDMENT

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act

JA1304

accordingly until a President or Vice
President shall have qualified.

U.S. CONST. amend. XX, § 3.

This provision addresses what happens if the President-elect dies or fails to qualify. It also allows Congress to make law to provide for the case when neither the President-elect nor the Vice President-elect qualify. *Robinson*, 567 F.Supp.2d at 1147; *Keyes*, 117 Cal.Rptr.3d at 216; and *Grinols*, 2013 WL 2294885 at *6 cite the Twentieth Amendment for the proposition that it empowers Congress to create a procedure if neither the President-elect nor Vice President-elect qualifies to serve as President of the United States. *See Peace & Freedom Party v. Bowen*, 912 F.Supp.2d 905, 911 (E.D. Cal. 2012), *aff'd sub nom. Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) (“Section 3 [of the Twentieth Amendment] was intended to provide for a then-unprovided for contingency: the selection and succession of the presidency in the event that the president elect, vice president elect, or both could not assume office” (citing 75 Cong. Rec. 3831 (1932) (statement of Rep. Cable))). And Congress did just that when it passed the Presidential Succession Act of 1947, 3 U.S.C. § 19. What Congress has not done is provide for any process to determine whether a President qualifies and what entity is supposed to make that determination. Further, nothing in the text of the Amendment commits to Congress the exclusive authority to render judgment on a presidential candidate’s fitness to be placed on the ballot. *See Lindsay*, 750 F.3d at 1065 (“nothing in the Twentieth Amendment states or implies that Congress has the *exclusive* authority to pass on the eligibility of candidates for president” (emphasis in

original)). However, unlike the other Constitutional provisions relied on by the decisions Intervenor Trump relies on, section 3 of the Twentieth Amendment does include the word “qualify” and suggests that someone or something has decided whether a President qualifies to be President. It is for this reason that the Court has asked the Parties to provide the Court with testimony regarding the historical meaning and interpretation of this Amendment, if such evidence exists.

3 U.S.C. § 15

Finally, the decisions Intervenor Trump cites rely heavily on 3 U.S.C. § 15 for the proposition that there is an objection process when the electoral college votes are counted and that it is during this process that the objections to the qualifications of a President should be made. *Robinson*, 567 F.Supp.2d at 1147 (“It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify”); *Keyes*, 117 Cal.Rptr.3d at 216 (quoting *Robinson*, *supra*); *Strunk*, 2012 WL 1205117 at *12 (“the counting of electoral votes and the process for objecting for the 2009 Presidential election is found in 3 USC § 15. . . . This required the meeting of the joint session of Congress to count the 2008 electoral votes. . . . No objections were made by members of the Senate and House of Representatives, which would have resolved these objections if made. This is the exclusive means to resolve objections to the electors' selection of a President or a Vice President”); *Taitz*, 2015 WL 11017373 at *13 (noting

that the *Keyes* Court cited the Twelfth Amendment and 3 U.S.C. § 15 when it “stated that the Constitution and laws of the United States delegate to Congress the authority to raise and decide objections to a presidential nominee's candidacy”); *see also Oines v. Ritchie*, Dkt. No. A12-1765 (Minn. Oct. 18, 2012) (citing *Keyes* in support of the conclusion that 3 U.S.C. § 15 provides the avenue for challenging constitutional qualifications of presidential candidates).

Congress, however, amended 3 U.S.C. § 15 in 2022. As amended, 3 U.S.C. § 15(d)(2)(B)(ii) provides: “The only grounds for objections shall be as follows: (I) The electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1). (II) The vote of one or more electors has not been regularly given.”

As such, it appears that Congress has disavowed any ability it once had to consider objections other than the two listed above—including any regarding the constitutional qualifications of the President-elect.

SECTION 3 OF THE FOURTEENTH AMENDMENT

No 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, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the

JA1307

Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. CONST. amend. XIV, § 3.

This provision clearly gives Congress the ability to remove a constitutional disability should a person be disqualified under Section Three of the Fourteenth Amendment. However, it says nothing regarding what government body would adjudicate or determine such disability in the first instance.⁴ The Court notes, however, it would be strange for Congress to be the only entity that is empowered to determine the disability and then also the entity that is empowered to remove it.

The Court, having considered the above, declines to dismiss this case under the political question doctrine. A controversy involves a political question when, as is argued here, there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.” *Baker*, 369 U.S. at 217. As the foregoing demonstrates, there is no textually demonstrable constitutional commitment of the issue to a

⁴ Intervenor Trump argues that “Section Three itself contains an exclusive grant of jurisdiction to Congress.” The argument is that if this Court were to disqualify Intervenor Trump from being a candidate, it would strip Congress of the ability to remove the disability. The Court disagrees. If this Court were to disqualify Intervenor Trump, there would be nothing standing in the way of Congress immediately removing that disability. In fact, there is nothing standing in Congress’s way of removing the disability prior to Secretary Griswold or this Court determining whether Intervenor Trump is disqualified in the first instance.

coordinate political department. The text is simply silent as to the specific issue, and arguments by inference, implication, or convention fail to demonstrate the kind of strong “textually demonstrable commitment” necessary for the Court to find the matter nonjusticiable. *See, e.g.*, U.S. CONST. art. I, § 5, cl. 1 (“Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members”); *Powell v. McCormack*, 395 U.S. 486, 548 (1969) (Art. I, § 5, cl. 1 is a “textually demonstrable commitment” to Congress to judge *only* the qualifications expressly set forth in art. I, § 2, cl. 2, and nothing more).

The Court will, however, revisit this ruling when it makes a final ruling following the hearing set to begin October 30, 2023 to the extent that there is any evidence or argument at trial that provides the Court with additional guidance on whether the issue of presidential eligibility has been delegated to the United States Congress. *Baker*, 369 U.S. at 198 (“In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.”)

b. Whether the Fourteenth Amendment Is Self-Executing

Citing a law review article authored by Joshua Blackman and Seth Barrett Tillman, Intervenor Trump argues “Section Three of the Fourteenth Amendment is not self-executing and cannot be applied to support a cause of action seeking judicial relief absent Congressional enactment of a statute authorizing

Plaintiffs to bring such a claim in court.” Intervenor Trump argues that the Blackman and Tillman law review article substantially refutes the law review article authored by William Baude and Michael Stokes Paulsen which the Petitioners cite in their Response causing the authors “to substantially modify their own analysis” and for a well-respected constitutional scholar, Steven Calabresi, to reverse his position on the matter. The Court has reviewed the modifications of the Baude and Paulsen law review article and the modifications do not in any way reverse their positions. Further, the retraction from Calabresi had nothing to do with whether Section Three was self-executing but was rather based on whether Section Three applies to Presidents. This leaves the Court with two law reviews that are over 100 pages each with contradictory conclusions.

Intervenor Trump argues there is “[a]mple precedent” supporting Blackman and Tillman’s conclusion that Section Three was not self-executing. But the only precedent cited is *In re Griffin*, 11 F.Cas. 7 (C.C. Va. 1869) written by Chief Justice Salmon Chase while riding circuit.

The Petitioners, on the other hand, argue that whether Section 3 is self-executing is irrelevant because Petitioners are proceeding under Colorado’s Election Code which provides it a cause of action. The Court agrees. To the extent that the Court ultimately holds that C.R.S. § 1-4-1204 allows the Court to order Secretary Griswold to exclude a candidate under the Fourteenth Amendment, the Court holds that states can, and have, applied Section 3 pursuant to state statutes without federal enforcement legislation. *See, e.g., State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *16 (N.M. Dist. Ct. Sept. 6, 2022) (adjudicating Section 3

challenge under state *quo warranto* law); *Worthy v. Barrett*, 63 N.C. 199, 200–01 (1869) (adjudicating Section 3 challenge as *mandamus* action), *appeal dismissed sub nom. Worthy v. Comm’rs*, 76 U.S. 611 (1869); *In re Tate*, 63 N.C. 308, 309 (1869) (adjudicating Section 3 challenge as *mandamus* action); *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 632 (La. 1869) (adjudicating Section 3 challenge under state *quo warranto* law); *Rowan v. Greene*, Dkt. No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Off. Admin. Hr’gs May 6, 2022) (state administrative Section 3 challenge).⁵

⁵ Intervenor Trump argues that none of the cited cases are relevant as such cases “relied upon state laws patterned after Section Three that applied to state officials.” Not so. In these cases, state law provided the procedural avenue for challenging a candidate’s fitness for office, but the substantive question remained qualification under the Fourteenth Amendment, not merely a state law patterned after Section Three. *See Griffin*, 2022 WL 4295619 at *16 (“The Court therefore concludes that . . . Mr. Griffin became disqualified under Section Three of the Fourteenth Amendment”); *Worthy*, 63 N.C. at 200 (procedural statute in question “provides that no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Article XIV, shall qualify under this act or hold office in this State” (internal quotation omitted)); *Tate*, 63 N.C. at 309 (applying the rule in *Worthy* to bar County Attorneys from office, to wit: “We are of the opinion that he is disqualified from holding office under the 14th Amendment of the Constitution of the United States”); *Sandlin*, 21 La. Ann. at 631–33 (in *quo warranto* proceeding brought under “the intrusion act (No. 156, acts of 1868),” qualification of candidate was assessed under both the “eligibility act, No. 39, of the acts of the State Legislature of 1868, and the third Section of the Fourteenth Amendment to the Constitution of the United States.” Supreme Court of Louisiana held that the eligibility act was not applicable to the proceeding, and that “[t]he inquiry in this case is, has the defendant, under the provisions of the fourteenth amendment to the Constitution of the United States and

c. Whether Federal Preemption Applies

Intervenor Trump argues that federal law has preempted the States from governing ballot access for presidential candidates.

Under the field preemption doctrine, “the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.” *Arizona v. United States*, 567 U.S. 387, 399 (2012).

[Congressional] intent to displace state law altogether can be inferred from a framework of regulation “so pervasive . . . that Congress left no room for the States to supplement it” or where there is a “federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”

Id. (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In support of this argument, Trump cites the Twelfth Amendment, the Twentieth Amendment, and 3 U.S.C. § 15 for the proposition that federal law occupies the field.

Based on the discussion above regarding the political question doctrine, it is unclear to the Court that there is

those of the act of Congress of twenty-fifth June, 1868 [re-admitting secessionist states to the Union, requiring compliance with Section 3 of the Fourteenth Amendment], the legal right to discharge the duties of the office of District Judge of the Eleventh Judicial District.”).

JA1312

any mechanism under federal law to determine whether a candidate for President or President-elect meets the eligibility requirements let alone a framework of regulation so pervasive that Congress left no room for the States to supplement it. The Court declines to dismiss this action based on the field preemption doctrine.

d. Whether Section Three of the Fourteenth Amendment Applies to a President

This is an issue that will be addressed at the hearing set to begin October 30, 2023.

e. Whether President Trump Engaged in an Insurrection

This is an issue that will be addressed at the hearing set to begin October 30, 2023.

f. Forum Selection Clause

Lastly, Intervenor Trump seeks dismissal of the action based on the forum. Colorado law sets out five requirements which all must be met to dismiss on *forum non conveniens* grounds. Pursuant to C.R.S. § 13- 20-1004(1), they are:

1. “The claimant or claimants are not residents of the state of Colorado.” C.R.S. § 13-20-1004(1)(a). Here, all Petitioners are Colorado Residents.
2. “An alternative forum exists.” C.R.S. § 13-20-1004(1)(b). Intervenor Trump has not identified a viable alternative forum. The three forums he suggests are: (1) Congress—but as discussed above, there is no

mechanism by which a Colorado elector can object to Intervenor Trump's qualification to Congress; (2) Criminal Prosecution—Intervenor Trump provides no explanation about how the Petitioners can seek criminal prosecution against Intervenor Trump in Washington, D.C.; and (3) Federal Court in Washington, D.C. But, as Intervenor Trump acknowledges, the Petitioners do not have standing in Federal Court. No adequate alternative forum, therefore, has been identified.

3. “The injury or damage alleged to have been suffered occurred outside of the state of Colorado.” C.R.S. § 13-20-1004(1)(c). The alleged injury, in this case, is having an ineligible candidate on the ballot. That injury will occur in Colorado.

4. “A substantial portion of the witnesses and evidence is outside the state of Colorado.” C.R.S. § 13-20-1004(1)(d). Here, Intervenor Trump concludes this is the case but has not put forth any specific witness that he'd like to attend that is unavailable at trial.

5. “There is a significant possibility that Colorado law will not apply to some or all of the claims.” C.R.S. § 13-20-1004(1)(e). There is no doubt that Colorado election law will play a significant part in any decision this Court renders.

As Intervenor Trump acknowledges, except in the “most unusual circumstances,” a resident plaintiff's choice of forum is honored. *McDonnell-Douglas Corp. v. Lohn*, 557 P.2d 373, 374 (Colo. 1976). In fact, Colorado courts have “extremely limited discretion under this doctrine to dismiss an action filed by a resident plaintiff.” *Cox v. Sage Hosp. Res., LLC*, 413 P.3d 302, 304 (Colo. App. 2017). Here, the Petitioners all reside in Colorado and have exercised their right to object to Intervenor Trump's name being placed onto the ballot under C.R.S. § 1-1-113

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and C.R.S. § 1-4-1204. While Trump argues that they are nominal plaintiffs, he fails to explain who the actual plaintiffs are in this matter.

In short, Intervenor Trump's motion under the *forum non conveniens* statute fails because he has not articulated why this is a "most unusual circumstance," nor has he offered an alternative forum or identified witnesses he cannot call because they won't come to Colorado. Rather, it appears that he is simply objecting to the C.R.S. § 1-1-113 process.

III. CONCLUSION

For all the above reasons, the Court DENIES Intervenor Trump's Motion to Dismiss, filed September 29, 2023.

DATED: October 25, 2023.

BY THE COURT

Sarah B. Wallace
District Court Judge

JA1315
**DISTRICT COURT, CITY AND COUNTY OF
DENVER, STATE OF COLORADO**
1437 Bannock Street
Denver, CO 80202

Case No. 2023CV32577

Division: 209

Petitioners:

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAHER, KATHI
WRIGHT, and CHRISTOPHER CASTILIAN

v.

Respondents:

JENA GRISWOLD, in her official capacity as Colorado
Secretary of State

and

Intervenors:

COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE and DONALD J. TRUMP

**ORDER RE: DONALD J. TRUMP'S BRIEF
REGARDING STANDARD OF PROOF IN THIS
PROCEEDING**

This matter comes before the Court on Donald J. Trump's Brief Regarding Standard of Proof in This Proceeding, filed on October 25, 2023. Petitioners' Response to the Brief was filed on October 27, 2023. The Court, having considered the matter, FINDS and ORDERS as follows:

Intervenor Trump argues in his Brief that even though C.R.S. § 1-4-1204(4) specifies that "[t]he party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence," as a matter of due process, this Court should apply the higher standard of clear and convincing evidence.

Intervenor Trump cites *Santosky v. Kramer*, 455 U.S. 745, 754 (1982) for the test to determine whether a standard of proof in a particular proceeding satisfies due process. The factors are: (1) "the private interests affected by the proceeding;" (2) "the risk of error created by the State's chosen procedure;" and (3) "the countervailing governmental interest supporting use of the challenged procedure." *Id.* The Colorado Supreme Court has also adopted this framework. *People in Interest of A.M.D.*, 648 P.2d 625, 636 (Colo. 1982).

Intervenor Trump argues that applying the *Santosky* test, this Court must apply a clear and convincing standard. First, he argues that the private interests at stake are significant because they implicate the "First and Fourteenth Amendment constitutional rights related to freedom of association." Intervenor Trump points out that the Colorado Supreme Court recognized in *Colorado Libertarian Party v. Sec'y of State of Colorado*, 817 P.2d 998, 1002 (Colo. 1991) that ballot access restrictions burden two fundamental rights: "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political

persuasion, to cast their votes effectively.”¹ (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

Petitioners respond citing the same cases and argue that under *Santosky*, the threshold inquiry is “the individual interests at stake” and that a heightened standard is only required when a “fundamental liberty interest” is implicated. 455 U.S. at 753–56. Petitioners then point out that many Courts, including Colorado, have held that “candidacy for a public office has not been recognized as a fundamental right.” *Colorado Libertarian Party*, 817 P.2d at 1002; *see also Carver v. Dennis*, 104 F.3d 847, 850–51 (6th Cir. 1997); *Supreme v. Kansas State Elections Bd.*, No. 18-CV-1182-EFM, 2018 WL 3329864, *5–6, n. 27 (D. Kan. July 6, 2018).

Applying the government interest factor, Intervenor Trump argues the government’s interest is served in using a higher standard of proof because the government has no interest in keeping qualified candidates off the ballot and a higher standard of proof would help ensure that does not happen. Petitioners respond that this argument puts the cart before the horse because it assumes that Intervenor Trump is qualified. The real governmental interest, according to Petitioners, is the right of the citizens of Colorado to cast a meaningful ballot—i.e., one for candidates who are constitutionally qualified. The Petitioners also urge the Court to discard Intervenor Trump’s repeated references to his popularity because the fact that his supporters want to vote for him

¹ The right of qualified voters “to cast their votes effectively” cuts against a central theme of Intervenor Trump’s position in this case which is that the Congress should decide whether he is qualified after the election has taken place and a hundred million voters have already cast their votes.

does not trump the public interest in only having qualified candidates on the ballot.

Finally, Intervenor Trump argues the risk of erroneous deprivation of his and Colorado voters' rights is heightened due to expedited procedures under C.R.S. § 1-1-113. This has been a repeated mantra of Intervenor Trump.² The Petitioners respond that this is not like the cases described in *Addington v. Texas*, 441 U.S. 418, 427 (1979) or *Santosky*, 455 U.S. at 753 where the risk of error is high because the Defendant was at risk of indefinite solitary confinement based on mental illness or parents were at risk of their parental rights being terminated. According to Petitioners, the injury to Intervenor Trump of not being on a ballot is no greater than that of the public's interest in ensuring that only constitutionally qualified candidates are on the ballot. Petitioners point out that the United States Supreme Court has held that when both parties have "an extremely important, but nevertheless relatively equal, interest in the outcome. . . . it is appropriate that each share roughly equally the risk of an inaccurate factual determination." *Rivera v. Minnich*, 483 U.S. 574, 581 (1987).

Considering all the above and the fact that Intervenor Trump does not point to a single case holding that a heightened standard of proof is required in a ballot access

² The Court notes that at no point during these proceedings has Intervenor Trump articulated what discovery he would need to protect his interests further. Intervenor Trump ignores that while the Court declined to order expert depositions because it held that it would strictly construe C.R.C.P. 26(a)(2) and only allow opinions that were adequately disclosed, it never ruled that it would not consider fact depositions. To the contrary, the Court specifically advised the Parties that after witnesses were disclosed the Court would consider requests for fact depositions. *See* September 22, 2023 Minute Order.

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challenge, the Court holds that under *Santosky*, the Court need not look beyond the fact that Intervenor Trump has failed to identify a fundamental liberty interest. While Intervenor Trump clearly has an interest in being on Colorado's ballot, that interest does not rise to the level of a fundamental liberty interest. *Colorado Libertarian Party*, 817 P.2d at 1002. As a result, the Court need not analyze the issue further.

The Court, therefore, will apply the burden of proof prescribed in C.R.S. § 1-4-1204(4).

DATED: October 28, 2023.

BY THE COURT:

Sarah B. Wallace
District Court Judge

In the Supreme Court of the United States

DONALD J. TRUMP,
Petitioner,

v.

NORMA ANDERSON, ET AL.,
Respondents.

On Writ of Certiorari to the Colorado Supreme Court

JOINT APPENDIX VOL. IV OF IV (JA1320-JA1416)

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Petition for Writ of Certiorari Filed: Jan. 3, 2024

Certiorari Granted: Jan. 5, 2024

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Examining the U.S. Capitol Attack

A Review of the Security, Planning, and Response Failures on January 6



**Committee on Homeland Security and
Governmental Affairs**

U.S. Senator Gary Peters, Chair
U.S. Senator Rob Portman, Ranking Member

Committee on Rules and Administration

U.S. Senator Amy Klobuchar, Chair
U.S. Senator Roy Blunt, Ranking Member

Staff Report

**EXAMINING THE U.S. CAPITOL ATTACK: A REVIEW OF THE SECURITY,
PLANNING, AND RESPONSE FAILURES ON JANUARY 6**

I. EXECUTIVE SUMMARY

On January 6, 2021, the world witnessed a violent and unprecedented attack on the U.S. Capitol, the Vice President, Members of Congress, and the democratic process. Rioters, attempting to disrupt the Joint Session of Congress, broke into the Capitol building, vandalized and stole property, and ransacked offices. They attacked members of law enforcement and threatened the safety and lives of our nation's elected leaders. Tragically, seven individuals, including three law enforcement officers, ultimately lost their lives.

Rioters were intent on disrupting the Joint Session, during which Members of Congress were scheduled to perform their constitutional obligation to count the electoral votes for President and Vice President of the United States and announce the official results of the 2020 election. Due to the heroism of United States Capitol Police ("USCP") officers, along with their federal, state, and local law enforcement partners, the rioters failed to prevent Congress from fulfilling its constitutional duty. In the early hours of January 7, the President of the Senate, Vice President Pence, announced Joseph Biden and Kamala Harris as the President-elect and Vice President-elect of the United States.

C. The Attack

January 6, 2021 marked the most significant breach of the Capitol in over 200 years.⁶⁰ Seven hours elapsed between when the security perimeter was first breached and when USCP declared the building secure.⁶¹ On that day, officers faced violent physical and verbal assaults; three officers, and four other individuals, ultimately lost their lives. The following section provides a high-level overview of the attack on the Capitol and some of the efforts of the brave men and women who worked to repel the attack.

1. Events of January 6

On November 7, with some states still counting votes, the major news networks projected that Joe Biden had secured enough electoral votes to win the 2020 Presidential election. In response, President Trump issued a statement that he planned to pursue legal challenges to election results in certain states.⁶² Nearly all cases were ultimately dismissed or withdrawn. By December 14, all 50 states and the District of Columbia had certified their respective election results, which totaled 306 electoral votes for Biden and 232 for Trump.

⁶⁰ See Amy Sherman, *A History of Breaches and Violence at the US Capitol*, POLITIFACT (Jan. 6, 2021), <https://www.politifact.com/article/2021/jan/07/history-breaches-and-violence-us-capitol/>.

⁶¹ See U.S. CAPITOL POLICE, TIMELINE OF EVENTS FOR JANUARY 6, 2021 ATTACK 8 (2021) (on file with the Committees) (putting the first breach before 1:00 p.m. and securing of the building around 8:00 p.m.) [hereinafter U.S. CAPITOL POLICE, TIMELINE OF EVENTS].

⁶² The Trump campaign and its allies filed and lost dozens of legal challenges to the election. Alexa Corse, *Election Fraud Claims: A State-by-State Guide*, WALL ST. J. (Jan. 6, 2021).

Following the states' certification, President Trump continued to assert that the election was stolen from him. His statements focused on the January 6 counting of the Electoral College votes during a joint session of Congress. The process in Congress on January 6 is based on a federal law that allows Congress to consider objections to a state's certification of its electors. If both a member of the House and a member of the Senate object to a state's certification of electors, it requires a Congressional vote on whether to reject that state's electors. Congress has only voted on objections twice in the 133 years since enacting this statute, prior to 2020. Pro-Trump groups planned rallies for January 6 that President Trump promoted, and on January 5 President Trump announced that he would speak during the "Save America" rally at the White House Ellipse.

On the morning of January 6, thousands of people began gathering across Washington, D.C. Law enforcement agencies, including USCP and MPD, were monitoring the demonstrators as early as 6:00 a.m. and releasing demonstration updates throughout the day.⁶³ Most demonstrators headed to the Ellipse, near the White House, for the "Save America" rally, where then-President Trump would speak. By 10:30 a.m., a USCP demonstration update indicated that somewhere between 25,000 and 30,000 people were at the Ellipse; the 10:30 a.m. USCP update also noted that organizers of the rally planned to march to the Capitol after the President's speech.⁶⁴

In addition to those demonstrators at the Ellipse, other demonstrators headed directly to the Capitol Complex. By 11:00 a.m., USCP was aware of "large crowd[s]" around the Capitol building, including a group of approximately 200 Proud Boys.⁶⁵ Throughout the city, law enforcement agencies were aware of and responding to reports of suspicious packages and individuals with firearms.⁶⁶

President Trump began his address just before noon.⁶⁷ During the next 75 minutes, the President continued his claims of election fraud and encouraged his supporters to go to the Capitol. President Trump's speech is included in its entirety in Appendix B.

Before the President finished his address, crowds began leaving the Ellipse for the Capitol. USCP received reports of "a very large group . . . heading to the U.S. Capitol from eastbound on Pennsylvania Avenue . . ."⁶⁸ By 12:45 p.m. "what look[ed] like a wall of people suddenly arriv[ed] about a block west of the Capitol."⁶⁹ At the same time, USCP received a report of a pipe bomb at the Republican National Committee headquarters.⁷⁰ Law enforcement

⁶³ See U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61.

⁶⁴ See *id.* at 9.

⁶⁵ See *id.*; see also Martha Mendoza & Juliet Linderman, *Officers Maced, Trampled: Docs Expose Depth of Jan. 6 Chaos*, AP NEWS (Mar. 10, 2021) (referencing a group of approximately 300 Proud Boys having gathered at the Capitol before noon on January 6).

⁶⁶ See U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61, at 9–10.

⁶⁷ See *id.* at 10.

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.*; *Examining the U.S. Capitol Attack: Joint Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on Rules & Admin.*, 117th Cong. (2021) (written testimony of Robert Contee III, Acting Chief, Metro. Police Dep't of the Dist. of Columbia).

officials would discover a similar pipe bomb at the Democratic National Committee headquarters shortly after 1:00 p.m.⁷¹ While responding to these explosive devices, USCP officers discovered a vehicle containing a firearm and eleven Molotov cocktails.⁷²

At the Capitol, a large group amassed near the Capitol Reflecting Pool. At approximately 12:53 p.m., individuals within that group picked up one of the metal bike racks that demarcated USCP's security perimeter and shoved it into the USCP officers standing guard.⁷³ This marked the initial breach of USCP's outer security perimeter; crowds began to flow onto the Capitol's West Front grounds.⁷⁴ "All available USCP units" were ordered to respond to the West Front.⁷⁵ Five minutes after the initial breach, Mr. Sund called MPD Acting Chief Robert Contee to request immediate assistance.⁷⁶ Nearby MPD officers began to arrive at the West Front of the Capitol within minutes, where MPD bicycle patrol officers temporarily reestablished a perimeter.⁷⁷ At approximately 1:00 p.m., a USCP Inspector ordered a lockdown of the Capitol Building.⁷⁸ At 1:01 p.m., Mr. Sund also requested assistance from the United States Secret Service.⁷⁹ Mr. Sund has stated that he also sought approval from the House and Senate SAAs to request National Guard support.⁸⁰ As the situation outside continued to deteriorate, inside the Capitol building, Congress was convening in a Joint Session to certify results of the Electoral College vote. Vice President Pence, who presided over the Joint Session, gavelled in at 1:03

⁷¹ See U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61, at 12. As a precaution, USCP cleared residences and businesses near the Republican and Democratic National Committee headquarters. USCP also ordered the evacuation of two office buildings nearest to the location of the explosive devices: the Cannon House Office Building and the James Madison Memorial Building of the Library of Congress. *Id.* at 12–13.

⁷² See *id.* at 12.

⁷³ See *id.* at 11.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*; GOV'T OF THE DIST. OF COLUMBIA, TIMELINE OF PREPARATIONS FOR, AND THE RESPONSE TO, THE LARGE-SCALE DEMONSTRATIONS IN WASHINGTON, D.C. ON JANUARY 5–6, 2021 4 (on file with the Committees) [hereinafter GOV'T OF THE DIST. OF COLUMBIA TIMELINE]; *Examining the U.S. Capitol Attack: Joint Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on Rules & Admin.*, 117th Cong. (2021) (written testimony of Robert Contee III, Acting Chief, Metro. Police Dep't of the Dist. of Columbia). In his own testimony before the Committees, Mr. Sund did not indicate when he called Acting Chief Contee. He did, however, state that by 12:50 p.m., he understood the situation to be "deteriorating rapidly" and at 12:53 p.m. called an MPD Assistant Chief to request assistance. *Examining the U.S. Capitol Attack: Joint Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on Rules & Admin.*, 117th Cong. (2021) (written testimony of Steven Sund, Former Chief, U.S. Capitol Police); Steven A. Sund, Responses to Questions for the Record (Apr. 6, 2021) (on file with the Committees).

⁷⁷ GOV'T OF THE DIST. OF COLUMBIA TIMELINE, *supra* note 76 (arriving at 1:03 p.m., five minutes after the initial request); *Examining the U.S. Capitol Attack: Joint Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on Rules & Admin.*, 117th Cong. (2021) (written testimony of Robert Contee III, Acting Chief, Metro. Police Dep't of the Dist. of Columbia); Joint Committee Interview with USCP Inspector (May 27, 2021).

⁷⁸ Joint Committee Interview with USCP Inspector (May 27, 2021); Media Release, U.S. Capitol Police Labor Comm., Capitol Police Officers "Leadership Betrayed Our Mission," (Jan 27, 2021), <https://www.scribd.com/document/492350885/Read-U-S-Capitol-Police-Labor-Committee-statement> [hereinafter USCP Labor Comm. Media Release].

⁷⁹ See U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61, at 12.

⁸⁰ *Examining the U.S. Capitol Attack: Joint Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on Rules & Admin.*, 117th Cong. (2021) (written testimony of Steven Sund, Former Chief, U.S. Capitol Police).

p.m.⁸¹ President Trump concluded his speech at 1:10 p.m.⁸² At 1:12 p.m., the two chambers separated and began to debate objections to the certification of Arizona’s Electoral College votes.⁸³

After overrunning USCP’s security perimeter on the West Front of the building, rioters pressed towards the Capitol building—climbing the inaugural platform and scaling walls.⁸⁴ The only remaining security perimeter consisted of the USCP officers positioned around the grounds, who were overwhelmed and outnumbered. USCP officers attempted to hold back the rioters with chemical munitions, such as oleoresin capsicum (“OC”) spray, more commonly known as “pepper spray.”⁸⁵ Muriel Bowser, Mayor of Washington, D.C., called the Secretary of the Army, Ryan McCarthy, at approximately 1:34 p.m. to seek National Guard support.⁸⁶ By 1:49 p.m., rioters had breached the Upper West Terrace.⁸⁷ At 1:49 p.m., Mr. Sund called William Walker, DCNG Commanding General, to request immediate assistance.⁸⁸ At the same time, MPD declared a riot at the Capitol.⁸⁹ Two minutes later, at 1:51 p.m., Mr. Sund activated USCP’s mutual aid agreement with National Capital Region law enforcement entities.⁹⁰ At 2:00 p.m., then-Assistant Chief Pittman also ordered a lockdown of the Capitol Building.⁹¹

Rioters continued to push toward the Capitol building, reaching the Rotunda steps by 2:06 p.m. and the House Plaza by 2:08 p.m.⁹² Ms. Pittman then expanded the lockdown to cover the entire Capitol Complex.⁹³ At 2:10 p.m., rioters breached the final barricade on the West Front and northwest side of the Capitol, quickly approaching an entrance near the Senate chamber.⁹⁴ Also at 2:10 p.m., House SAA Irving and Senate SAA Stenger issued an emergency declaration on behalf of the Capitol Police Board and formally approved requesting National Guard assistance.⁹⁵ A minute later, rioters smashed through first-floor windows on the Capitol’s south side, making a hole big enough to climb through; a stream of protesters entered, with two

⁸¹ William M. Arkin, *Exclusive: How Officials’ Fear of Donald Trump Paralyzed Intelligence Agencies, Led to Capitol Riot*, NEWSWEEK (Jan. 21, 2021).

⁸² See U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61, at 13.

⁸³ U.S. SENATE SERGEANT AT ARMS, TIMELINE OF EVENTS FOR JANUARY 6, 2021 ATTACK REGARDING SAA DOORKEEPERS OPERATIONS 2 (2021) (on file with the Committees).

⁸⁴ Cf. U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61, at 11–12, 14.

⁸⁵ See *id.* at 12.

⁸⁶ OFFICE OF THE SEC’Y OF DEF., DEP’T OF DEF., TIMELINE FOR DECEMBER 31, 2020 – JANUARY 6, 2021 3 (2021) [hereinafter DEP’T OF DEF. TIMELINE]. According to the Department of Defense, Mayor Bowser’s call came at 1:34 p.m. The Office of the Mayor indicated to the Committees that Mayor Bowser did not speak to Secretary McCarthy until after 1:49 p.m. See GOV’T OF THE DIST. OF COLUMBIA TIMELINE, *supra* note 76, at 4.

⁸⁷ See U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61, at 14.

⁸⁸ *Id.*

⁸⁹ GOV’T OF THE DIST. OF COLUMBIA TIMELINE, *supra* note 76, at 4.

⁹⁰ See U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61, at 14.

⁹¹ See *id.* at 15.

⁹² See *id.*

⁹³ See *id.* at 16.

⁹⁴ Lauren Leatherby & Anjali Singhvi, *How Trump’s Call to G.O.P. Lawmakers Fit in the Timeline of the Capitol Riot*, N.Y. TIMES (Feb. 13, 2021).

⁹⁵ U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61, at 16.

individuals kicking open a nearby door to let others into the Capitol.⁹⁶ According to reports, officers attempted to disperse the group with pepper balls and smoke bombs.⁹⁷

At 2:13 p.m., two minutes after rioters breached the building, the Senate went into recess.⁹⁸ At 2:14 p.m., USCP Officer Eugene Goodman redirected rioters away from the Senate chamber.⁹⁹ Vice President Pence and congressional leaders were evacuated to secure locations.¹⁰⁰ An order to lock down the House and Senate chambers was issued at 2:15 p.m.¹⁰¹ The House declared a brief recess at 2:18 p.m.¹⁰² All active USCP Civil Disturbance Unit (“CDU”) platoons were deployed to either the House side of the Capitol or the Rotunda.¹⁰³

After receiving the Board’s 2:10 p.m. authorization, Mr. Sund urgently requested National Guard support. During a teleconference around 2:30 p.m. with Pentagon officials and D.C. government officials, including Mayor Bowser, Director of the D.C. Homeland Security and Emergency Management Agency Dr. Christopher Rodriguez, and Acting MPD Chief Contee, Mr. Sund pleaded for immediate backup.¹⁰⁴ According to the testimony of Mr. Sund, Acting MPD Chief Contee, and Commanding General Walker, officials from the Department of the Army at DOD headquarters—particularly Lieutenant Generals Walter Piatt and Charles Flynn—responded that it was not their best military advice to support the request because they did not “like the optics of the National Guard standing a line at the Capitol.”¹⁰⁵

At 2:43 p.m., rioters broke the glass of a door to the Speaker’s Lobby, a hallway that would have given the rioters direct access to the House chamber.¹⁰⁶ When the rioters tried to lift Ashli Babbitt through the opening, a USCP officer fatally shot her.¹⁰⁷ Less than ten minutes

⁹⁶ Marc Fisher et al., *The Four-Hour Insurrection*, WASH. POST (Jan. 7, 2021).

⁹⁷ *Id.*

⁹⁸ Dalton Bennett et al., *41 Minutes of Fear: A Video Timeline from Inside the Capitol Siege*, WASH. POST (Jan. 16, 2021).

⁹⁹ *Id.*

¹⁰⁰ Ashley Parker et al., *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, WASH. POST (Jan. 15, 2021).

¹⁰¹ See U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61, at 16.

¹⁰² Dalton Bennett et al., *supra* note 98.

¹⁰³ See U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61, at 17.

¹⁰⁴ See *id.*

¹⁰⁵ *Id.* See also *Examining the U.S. Capitol Attack: Joint Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on Rules & Admin.*, 117th Cong. (2021) (written testimonies of Steven Sund, Former Chief, U.S. Capitol Police, and Robert Contee III, Acting Chief, Metro. Police Dep’t of the Dist. of Columbia); *Examining the U.S. Capitol Attack – Part II: Joint Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on Rules & Admin.*, 117th Cong. (2021) (testimony of William Walker, Commanding Gen., Dist. of Columbia Nat’l Guard) (“So the Army senior leaders did not think that it looked good, it would be a good optic. They further stated that it could incite the crowd.”). The Army official alleged to have made the comment has denied doing so. See *Examining the U.S. Capitol Attack – Part II: Joint Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on Rules & Admin.*, 117th Cong. 57 (2021) (testimony of Robert Salesses, Senior Official Performing the Duties of the Ass’t Sec’y for Homeland Def. & Global Sec., Dep’t of Def.) (“General Piatt told me yesterday that he did not say anything about optics.”).

¹⁰⁶ See U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61, at 18.

¹⁰⁷ See *id.* at 17. On April 14, DOJ announced that it had closed its investigation into Ms. Babbitt’s death, citing insufficient evidence to support a criminal prosecution of the USCP officer. Press Release, U.S. Attorney’s Office

later, rioters breached the Senate chamber.¹⁰⁸ In the House chamber, USCP officers barricaded the door with furniture and drew their weapons to hold off rioters.¹⁰⁹ The last Members were evacuated from the House chamber by 2:57 p.m.¹¹⁰

After 3:00 p.m., additional reinforcements from federal agencies began to arrive, and USCP turned to extracting and securing congressional staff.¹¹¹ A number of agencies and entities provided assistance, including DHS; the FBI; the Bureau of Alcohol, Tobacco, Firearms and Explosives; the Montgomery County Police Department; the Arlington County Police Department; the Fairfax Police Department; and Virginia State Troopers.¹¹² With this help, USCP secured the Senate and House chambers, along with the basement, subways, first floor, and crypts by 4:28 p.m.¹¹³ DCNG personnel began arriving at the Capitol at approximately 5:20 p.m.¹¹⁴ By 6:14 p.m., USCP, DCNG, and MPD successfully established a security perimeter on the west side of the Capitol building.¹¹⁵

At 8:00 p.m., after completing a sweep of the Capitol grounds with partner law enforcement agencies, USCP declared the Capitol secure, and the Senate reconvened to resume consideration of the objection to Arizona's electoral votes.¹¹⁶ Shortly afterwards, at approximately 9:00 p.m., the House reconvened.¹¹⁷ After rejecting objections to the counting of electoral votes from Arizona and Pennsylvania, the Joint Session of Congress officially affirmed the results of the Electoral College at 3:42 a.m. on January 7, formally declaring Joseph Biden and Kamala Harris as winners of the 2020 Presidential Election.¹¹⁸

2. Communication with Capitol Staff

Both USCP and the Sergeants at Arms alert employees working at the Capitol Complex about ongoing security threats through the use of automated email alerts, but primary responsibility for security notifications to Senators and Senate staff resides with the Senate SAA. In the days leading up to and around 11:39 a.m. on January 6, the Senate SAA issued a reminder

for the Dist. of Columbia, Department of Justice Closes Investigation into the Death of Ashli Babbitt (Apr. 14, 2021), <https://www.justice.gov/usao-dc/pr/departments-justice-closes-investigation-death-ashli-babbitt>.

¹⁰⁸ See U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61, at 18.

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ See *id.* at 18–20; Joint Committee Interview with USCP Inspector (May 27, 2021).

¹¹² See U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61, at 18–20.

¹¹³ See *id.* at 20.

¹¹⁴ OFFICE OF THE SEC'Y OF DEF., DEP'T OF DEF., MEMORANDUM FOR THE RECORD – RECORD OF EVENTS AND ACTIVITIES OF THE OFFICE OF THE SECRETARY OF DEFENSE AND ACTING SECRETARY MILLER RELATED TO THE CIVIL DISTURBANCE AND EFFORTS TO SUPPORT LOCAL LAW ENFORCEMENT RESPONSE ON 06 AND 07 JANUARY 2021 7 (2021) [hereinafter OFFICE OF THE SEC'Y OF DEF. MEMORANDUM FOR THE RECORD]; *Examining the U.S. Capitol Attack – Part II: Joint Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on Rules & Admin.*, 117th Cong. (2021) (written testimony of Maj. Gen. William Walker, Commanding Gen., Dist. of Columbia Nat'l Guard).

¹¹⁵ DEP'T OF DEF. TIMELINE, *supra* note 86, at 3.

¹¹⁶ *Id.*

¹¹⁷ Shelly Tan et al., *How One of America's Ugliest Days Unraveled Inside and Outside the Capitol*, WASH. POST (Jan. 9, 2021).

¹¹⁸ *Id.*

to staff of “several First Amendment activities” scheduled to take place “throughout the District of Columbia.” The alert reassured employees that USCP and the SAA were “aware of these First Amendment activities and [monitoring] impacts to Congressional activities[, and] [t]o support the safety and security of Senators and staff, [USCP had] additional personnel throughout Capitol Grounds.”¹¹⁹ Although USCP issued several email alerts on January 6, the Senate SAA did not issue any Senate-wide email alerts during the attack.¹²⁰

USCP issued nineteen email alerts between 11:15 a.m. and 7:24 p.m. on January 6—more than half of which were sent before the Capitol Building was breached. Still, those alerts contained little information or context for employees. They simply noted that USCP was investigating suspicious packages, informed employees of road closures, and ordered staff to relocate from the Cannon House Office Building.¹²¹ Although Ms. Pittman ordered a lockdown of the Capitol Building at 2:00 p.m., Capitol employees were not made aware of this until 2:10 p.m. The alert informed staff that no entry or exit was permitted but that staff were still able to “move throughout the buildings.”¹²² At 2:18 p.m., USCP circulated an updated warning:

Capitol Staff: Due to a security threat inside the building, immediately: move inside your office or the nearest office. Take emergency equipment and visitors. Close, lock, and stay away from external doors and windows. If you are in a public space, find a place to hide or seek cover. Remain quiet and silence electronics. Once you are in a safe location, immediately check in with your [Office Emergency Contact]. No one will be permitted to enter or exit the building until directed by USCP.¹²³

USCP re-sent the same message three additional times on January 6—at 3:41 p.m., 4:09 p.m., and 6:44 p.m.¹²⁴ No further context, information, or direction was provided via these automated emergency alert systems. Staff were not informed until 7:24 p.m. that “if anyone must leave,” they could do so via certain doors.¹²⁵

3. Experience of Law Enforcement Officers

Throughout the seven hours of the riot on the Capitol grounds, law enforcement officers faced verbal and “absolutely brutal,” violent physical abuse.¹²⁶ One officer described an interaction with a group of protestors during the evacuation of the Senate: “[W]e stopped several

¹¹⁹ See, e.g., Email from “Notice (SAA)” to Capitol Hill employees (Jan. 6, 2021, 11:39 AM) (on file with the Committees).

¹²⁰ Senate SAA sent alerts to emergency coordinators for individual Senate offices. See, e.g., Email from “Senate Alerts (SAA)” to Senate Office Emergency Coordinators (Jan. 6, 2021, 2:24 PM) (on file with the Committees).

¹²¹ See generally U.S. CAPITOL POLICE, TIMELINE OF EVENTS, *supra* note 61.

¹²² See *id.* at 15–16.

¹²³ See *id.* at 16–17.

¹²⁴ See *id.* at 19, 20, 22.

¹²⁵ See *id.* at 23. According to press accounts, these vague and sparse communications left many Congressional employees who were working on January 6 feeling helpless and fearful. One congressional staffer described how his colleagues were forced to evacuate and shelter in the halls of Longworth for hours, not fully aware of everything that was happening above ground. Katherine Tully-McNamus, ROLL CALL, *Insurrection aftermath: Staffers struggle with trauma, guilt and fear* (Jan. 28, 2021).

¹²⁶ Joint Committee Interview with USCP Inspector (May 27, 2021).

men in full tactical gear and they stated ‘You better get out of our way boy or we’ll go through you to get [the Senators].’”¹²⁷ Recounting initial encounters with the crowd along the metal bike racks, another officer recalled:

[We] did what we could against impossible odds and a volatile crowd which many times threatened us with phrases like “We’re gonna kill you!”, “We’re gonna murder you and then them!”, “You guys are traitors and should be killed!” . . . I felt at this time a tangible fear that maybe I or some of my colleagues might not make it home alive.¹²⁸

Other officers have publicly described instances of racial abuse from the crowd. Many were called “traitors” and “nazis.”¹²⁹ An officer described being “called a pawn of China” and seeing “someone give a Nazi salute to the Capitol behind me.”¹³⁰ Officer Harry Dunn told *ABC News*, “I got called a [N-word] a couple dozen times today protecting th[e Capitol] building.”¹³¹ He also described Black officers feeling targeted because of their race, saying “we fought against not just people that hated what we represented, but they hate our skin color also.”¹³²

Officers responding to the attack suffered a range of injuries in the line of duty. Many officers have recounted repeated attacks with chemical irritants from the crowd, including bear spray and insecticide. One officer stated that he was “sprayed in the eyes with some kind of chemical irritant that was far stronger than any pepper spray I have ever had used against me in training.”¹³³ Other officers reported burns, breathing and lung complications, and their eyes sealing shut from irritation due to repeated exposure to the chemical irritants.¹³⁴ Captain Carneysha Mendoza testified to the Committees that she received chemical burns to her face, which had not healed nearly two months after the attack.¹³⁵

Officers were also physically assaulted with a range of objects thrown from the crowds, pinned against surfaces, and beaten with flag poles and other weapons carried or found by rioters, including frozen water bottles.¹³⁶ For example, rioters disassembled a fence in front of the inaugural platform and used the pieces to assault officers.¹³⁷ One officer described the fear experienced that day, stating, “[a]t one point, I was pushed so hard and crushed in between

¹²⁷ Officer Statement #35 provided to the Committees (on file with the Committees).

¹²⁸ Officer Statement #51 provided to the Committees (on file with the Committees).

¹²⁹ See, e.g., Celine Castronuovo, *Videos Shows Rioters Calling Capitol Police ‘Traitors’*, THE HILL (Feb. 11, 2021).

¹³⁰ Officer Statement #56 provided to the Committees (on file with the Committees).

¹³¹ Pierre Thomas et al., *Capitol Police Officer Recounts Jan. 6 Attack: Exclusive*, ABC NEWS (Feb. 22, 2021).

¹³² Caroline Kelly, *Black US Capitol Police Officer Recounts January 6: ‘They Showed That They Hated Us and They Hated Our Skin Color’*, CNN (Mar. 17, 2021).

¹³³ Officer Statement #46 provided to the Committees (on file with the Committees).

¹³⁴ Officer Statements #48, 46, 52, 53 provided to the Committees (on file with the Committees); Joint Committee Interview with USCP Inspector (May 27, 2021).

¹³⁵ *Examining the U.S. Capitol Attack: Joint Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on Rules & Admin.*, 117th Cong. (2021) (written testimony of Captain Carneysha Mendoza, Field Commander, Special Operations Div., U.S. Capitol Police).

¹³⁶ Joint Committee Interview with USCP Inspector (May 27, 2021); Michael S. Schmidt & Luke Broadwater, *Officers’ Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES (updated May 7, 2021).

¹³⁷ Joint Committee Interview with USCP Inspector (May 27, 2021).

people that I could not breathe. This was a frightening situation.”¹³⁸ Another officer recounted the various types of weapons used by the crowd:

The objects thrown at us varied in size, shape and consistency, some were frozen cans and bottles, rebar from the construction, bricks, liquids, pepper spray, bear spray, sticks of various widths, pipes, bats, some were armed with guns and some had tasers or something similar. I specifically remember being sprayed with bear spray at least 6-8 times while tussling with rioters who were trying to use the bike racks against us as weapons.¹³⁹

Approximately 140 law enforcement officers reported injuries suffered during the attack.¹⁴⁰ The Capitol Police Labor Committee released a statement recounting some of the more serious injuries: “I have officers who were not issued helmets prior to the attack who have sustained brain injuries. One officer has two cracked ribs and two smashed spinal discs. One officer is going to lose his eye, and another was stabbed with a metal fence stake.”¹⁴¹ Patrick Burke, executive director of the Washington, D.C. Police Foundation, reported that one officer suffered a heart attack after being attacked several times with a stun gun.¹⁴²

Three officers lost their lives following the attack. USCP Officer Brian Sicknick, a 13-year veteran and member of the First Responder Unit, was stationed on the West Front of the Capitol, where rioters attacked him with bear spray.¹⁴³ Officer Sicknick passed away at 9:30 p.m. on January 7.¹⁴⁴ Officer Howard Liebengood, a 16-year veteran of USCP, died on January 9.¹⁴⁵ Officer Jeffrey Smith, a 12-year veteran of MPD, died on January 15.¹⁴⁶

Despite the hardships they faced, officers engaged in countless acts of bravery and heroism. One officer noted that, “[t]he officers inside all behaved admirably and heroically and, even outnumbered, went on the offensive and took the Capitol back.”¹⁴⁷ Another officer described a situation where an officer went above and beyond to help out however possible:

¹³⁸ Officer Statement #23 provided to the Committees (on file with the Committees).

¹³⁹ Officer Statement #51 provided to the Committees (on file with the Committees).

¹⁴⁰ USCP reported 73 injured officers, and MPD reported 65 injured officers. Schmidt & Broadwater, *supra* note 136. “Many more sustained injuries from the assault – scratches, bruises, eyes burning from bear mace – that they did not even bother to report.” *Examining the U.S. Capitol Attack: Joint Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on Rules & Admin.*, 117th Cong. (2021) (written testimony of Robert Contee III, Acting Chief, Metro. Police Dep’t of the Dist. of Columbia).

¹⁴¹ USCP Labor Comm. Media Release, *supra* note 78.

¹⁴² Schmidt & Broadwater, *supra* note 136.

¹⁴³ Evan Hill et al., *Officer Brian Sicknick Died After the Capitol Riot. New Videos Show How He Was Attacked*, N.Y. TIMES (Mar. 24, 2021).

¹⁴⁴ Spencer S. Hsu et al., *Two Arrested in Assault on Police Officer Brian D. Sicknick, Who Died after Jan. 6 Capitol Riot*, WASH. POST (Mar. 15, 2021).

¹⁴⁵ Allison Klein & Rebecca Tan, *Capitol Police Officer Who Was on Duty During the Riot Has Died by Suicide, His Family Says*, WASH. POST (Jan. 11, 2021).

¹⁴⁶ Peter Hermann, *Two Officers Who Helped Fight the Capitol Mob Died by Suicide. Many More are Hurting*, WASH. POST (Feb. 12, 2021).

¹⁴⁷ Officer Statement #21 provided to the Committees (on file with the Committees).

A light duty officer in a suit from the Capitol Division . . . came up to me at the Triage site on the [Capitol Visitor Center] landing and asked how he could help. I told him that we needed bottles of water in a bad way for rinsing eyes out. I figured he would go back to the detail where there was a pile, but he instead went to the Senate Carryout and returned with a few cases of water, being carried by him and the Senate Carryout cook, still wearing his white apron and paper hat. They brought us [Smartwater], seriously expensive stuff.¹⁴⁸

Another officer stated that he “saw officers responding to save members and staff in offices,” “saw many officers get sprayed [with] irritants,” and “saw officers standing in the way of the blood thirsty [mob, to prevent them] from achieving their goals.”¹⁴⁹ Describing the aftermath of that day, another officer recounted:

I wandered around the building for a little bit, looking at the wreckage and trying to take everything in before people cleaned up. Doors and windows were broken, and had been barricaded with furniture and display cases. There was broken glass, trash, banners and signs. I went down to the [Lower West Terrace] through the tunnel and it was just trashed. Knives, baseball bats, flag poles, banners, CDU shields, body armor, pants, socks, shoes, hats, uniform items, jackets, wallets, cash, phones, flags and signs littered the ground. Everything was covered in white from the tear gas and I could still smell the pepper spray.¹⁵⁰

¹⁴⁸ Officer Statement #13 provided to the Committees (on file with the Committees).

¹⁴⁹ Officer Statement #35 provided to the Committees (on file with the Committees).

¹⁵⁰ Officer Statement #12 provided to the Committees (on file with the Committees).



Donald J. Trump 
@realDonaldTrump

PETITIONERS'
EXHIBIT

74

So, with the revelation of MASSIVE & WIDESPREAD FRAUD & DECEPTION in working closely with Big Tech Companies, the DNC, & the Democrat Party, do you throw the Presidential Election Results of 2020 OUT and declare the RIGHTFUL WINNER, or do you have a NEW ELECTION? A Massive Fraud of this type and magnitude allows for the termination of all rules, regulations, and articles, even those found in the Constitution. Our great "Founders" did not want, and would not condone, False & Fraudulent Elections!

25.3k ReTruths **81.8k** Likes

Dec 03, 2022, 7:44 AM

Compilation of Tweets from @realDonaldTrump

November 27, 2016

3:30 PM



Donald J. Trump ✓
@realDonaldTrump

...

In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally

3:30 PM · Nov 27, 2016

<https://twitter.com/realDonaldTrump/status/802972944532209664>

November 9, 2018

3:33 PM



Donald J. Trump ✓
@realDonaldTrump

...

Just out — in Arizona, SIGNATURES DON'T MATCH. Electoral corruption
- Call for a new Election? We must protect our Democracy!

3:33 PM · Nov 9, 2018

<https://twitter.com/realDonaldTrump/status/1060993836984324096>

May 1, 2020

8:42 AM



Donald J. Trump ✓

@realDonaldTrump

...

The Governor of Michigan should give a little, and put out the fire. These are very good people, but they are angry. They want their lives back again, safely! See them, talk to them, make a deal.

8:42 AM · May 1, 2020

<https://twitter.com/realDonaldTrump/status/1256202305680158720>

May 24, 2020

10:08 AM



Donald J. Trump ✓

@realDonaldTrump

...

The United States cannot have all Mail In Ballots. It will be the greatest Rigged Election in history. People grab them from mailboxes, print thousands of forgeries and “force” people to sign. Also, forge names. Some absentee OK, when necessary. Trying to use Covid for this Scam!

10:08 AM · May 24, 2020

<https://twitter.com/realDonaldTrump/status/1264558926021959680?lang=en>

May 29, 2020

12:53 AM


Donald J. Trump  @realDonaldTrump · May 29, 2020

...

I can't stand back & watch this happen to a great American City, Minneapolis. A total lack of leadership. Either the very weak Radical Left Mayor, Jacob Frey, get his act together and bring the City under control, or I will send in the National Guard & get the job done right.....

 71.8K

 62K

 212.6K

Donald J. Trump  @realDonaldTrump

...

This Post violated the X Rules about glorifying violence. However, X has determined that it may be in the public's interest for the Post to remain accessible. [Learn more](#)

....These THUGS are dishonoring the memory of George Floyd, and I won't let that happen. Just spoke to Governor Tim Walz and told him that the Military is with him all the way. Any difficulty and we will assume control but, when the looting starts, the shooting starts. Thank you!

12:53 AM · May 29, 2020

Part 1: <https://twitter.com/realDonaldTrump/status/1266231100172615680>Part 2: <https://twitter.com/realDonaldTrump/status/1266231100780744704>

May 30, 2020

10:08 PM



Donald J. Trump ✓
@realDonaldTrump

...

The National Guard has been released in Minneapolis to do the job that the Democrat Mayor couldn't do. Should have been used 2 days ago & there would not have been damage & Police Headquarters would not have been taken over & ruined. Great job by the National Guard. No games!

10:08 PM · May 30, 2020

33.7K Reposts 8,799 Quotes 197.6K Likes 457 Bookmarks

<https://twitter.com/realDonaldTrump/status/1266914470066036736>

July 30, 2020

8:46 AM



Donald J. Trump ✓
@realDonaldTrump

...

With Universal Mail-In Voting (not Absentee Voting, which is good), 2020 will be the most INACCURATE & FRAUDULENT Election in history. It will be a great embarrassment to the USA. Delay the Election until people can properly, securely and safely vote???

8:46 AM · Jul 30, 2020

<https://twitter.com/realDonaldTrump/status/1288818160389558273>

September 17, 2020

7:56 AM



Donald J. Trump ✓

@realDonaldTrump

...

@TrueTheVote There is a group of people (largely Radical Left Democrats) that want ELECTION MAYHEM. States must end this CRAZY mass sending of Ballots. Also, a GIFT to foreign interference into our election!!! Stop it now, before it is too late.

7:56 AM · Sep 17, 2020

<https://twitter.com/realDonaldTrump/status/1306562791894122504>

October 31, 2020

8:41 PM



Donald J. Trump ✓
@realDonaldTrump



I LOVE TEXAS!



8:41 PM · Oct 31, 2020

<https://twitter.com/realDonaldTrump/status/1322700188624932869>

November 1, 2020

8:18 PM



Donald J. Trump ✓
@realDonaldTrump

...

In my opinion, these patriots did nothing wrong. Instead, the FBI & Justice should be investigating the terrorists, anarchists, and agitators of ANTIFA, who run around burning down our Democrat run cities and hurting our people!



Tony Plohetski @tplohetski · Nov 1, 2020

NEW: Very short statement from the FBI confirming that they are investigating incident Friday involving Biden bus.

Record Statement:

FBI San Antonio is aware of the incident and investigating. No further information is available at this time.

8:18 PM · Nov 1, 2020

[https://twitter.com/realDonaldTrump/status/1323072051402350592.](https://twitter.com/realDonaldTrump/status/1323072051402350592)

November 2, 2020

8:02 PM



Donald J. Trump ✓

@realDonaldTrump



Some or all of the content shared in this Tweet is disputed and might be misleading about an election or other civic process. [Learn more](#)

The Supreme Court decision on voting in Pennsylvania is a VERY dangerous one. It will allow rampant and unchecked cheating and will undermine our entire systems of laws. It will also induce violence in the streets. Something must be done!

8:02 PM · Nov 2, 2020

<https://twitter.com/realDonaldTrump/status/1323430341512622080>

November 4, 2020

12:49 AM



Donald J. Trump ✓

@realDonaldTrump



Some or all of the content shared in this Tweet is disputed and might be misleading about an election or other civic process. [Learn more](#)

We are up BIG, but they are trying to STEAL the Election. We will never let them do it. Votes cannot be cast after the Polls are closed!

12:49 AM · Nov 4, 2020

<https://twitter.com/realDonaldTrump/status/1323864823680126977>

November 4, 2020 (continued)

10:04 AM



Donald J. Trump ✓
@realDonaldTrump

...

Some or all of the content shared in this Tweet is disputed and might be misleading about an election or other civic process. [Learn more](#)

Last night I was leading, often solidly, in many key States, in almost all instances Democrat run & controlled. Then, one by one, they started to magically disappear as surprise ballot dumps were counted. VERY STRANGE, and the “pollsters” got it completely & historically wrong!

10:04 AM · Nov 4, 2020

<https://twitter.com/realDonaldTrump/status/1324004491612618752>

10:17 AM



Donald J. Trump ✓
@realDonaldTrump

...

How come every time they count Mail-In ballot dumps they are so devastating in their percentage and power of destruction?

10:17 AM · Nov 4, 2020

<https://twitter.com/realDonaldTrump/status/1324007806694023169?lang=en>

November 5, 2020

9:12 AM



Donald J. Trump ✓
@realDonaldTrump

...

STOP THE COUNT!

9:12 AM · Nov 5, 2020

<https://twitter.com/realDonaldTrump/status/1324353932022480896>

November 8, 2020

9:17 AM



Donald J. Trump ✓
@realDonaldTrump

...

“We believe these people are thieves. The big city machines are corrupt. This was a stolen election. Best pollster in Britain wrote this morning that this clearly was a stolen election, that it’s impossible to imagine that Biden outran Obama in some of these states.

9:17 AM · Nov 8, 2020

58.6K Reposts 24.8K Quotes 366.1K Likes 816 Bookmarks



Post your reply!

Reply



Donald J. Trump ✓ @realDonaldTrump · Nov 8, 2020
...Where it mattered, they stole what they had to steal. @newtgingrich

...

Part 1: <https://twitter.com/realDonaldTrump/status/1325442336957018112>.

Part 2: <https://twitter.com/realdonaldtrump/status/1325442345396039680>

November 9, 2020

2:54 PM



Donald J. Trump ✓
@realDonaldTrump

Nevada is turning out to be a cesspool of Fake Votes. @mschlapp & @AdamLaxalt are finding things that, when released, will be absolutely shocking!

2:54 PM · Nov 9, 2020

<https://twitter.com/realDonaldTrump/status/1325889532840062976>.

November 10, 2020

9:37 PM



Donald J. Trump ✓
@realDonaldTrump



People will not accept this Rigged Election!



Scott Adams ✓ @ScottAdamsSays · Nov 10, 2020

You are being brainwashed to accept the results of the election as fair. You will be told that only bad people are skeptical in this situation, and that you will be held to account for doubting.

9:37 PM · Nov 10, 2020

<https://twitter.com/realDonaldTrump/status/1326353226749386757>.

November 11, 2020

9:03 AM



Donald J. Trump ✓

@realDonaldTrump

...

A guy named Al Schmidt, a Philadelphia Commissioner and so-called Republican (RINO), is being used big time by the Fake News Media to explain how honest things were with respect to the Election in Philadelphia. He refuses to look at a mountain of corruption & dishonesty. We win!

9:03 AM · Nov 11, 2020

<https://twitter.com/realDonaldTrump/status/1326525851752656898>

November 12, 2020

11:34 AM



Donald J. Trump ✓

@realDonaldTrump

...

“REPORT: DOMINION DELETED 2.7 MILLION TRUMP VOTES NATIONWIDE. DATA ANALYSIS FINDS 221,000 PENNSYLVANIA VOTES SWITCHED FROM PRESIDENT TRUMP TO BIDEN. 941,000 TRUMP VOTES DELETED. STATES USING DOMINION VOTING SYSTEMS SWITCHED 435,000 VOTES FROM TRUMP TO BIDEN.” @ChanelRion @OANN

11:34 AM · Nov 12, 2020

<https://twitter.com/realDonaldTrump/status/1326926226888544256>

November 13, 2020

7:50 PM



Donald J. Trump 

@realDonaldTrump

...

Georgia Secretary of State, a so-called Republican (RINO), won't let the people checking the ballots see the signatures for fraud. Why? Without this the whole process is very unfair and close to meaningless. Everyone knows that we won the state. Where is [@BrianKempGA](#)?

7:50 PM · Nov 13, 2020

<https://twitter.com/realDonaldTrump/status/1327413534901350400?lang=en>

November 14, 2020

9:29 AM



Donald J. Trump 
@realDonaldTrump

...

The Consent Decree signed by the Georgia Secretary of State, with the approval of Governor @BrianKempGA, at the urging of @staceyabrams, makes it impossible to check & match signatures on ballots and envelopes, etc. They knew they were going to cheat. Must expose real signatures!

9:29 AM · Nov 14, 2020

34.1K Reposts 6,693 Quotes 167.9K Likes 347 Bookmarks



Post your reply!

Reply



Donald J. Trump  @realDonaldTrump · Nov 14, 2020

...

....What are they trying to hide. They know, and so does everyone else.
EXPOSE THE CRIME!

Part 1: <https://twitter.com/realDonaldTrump/status/1327619653020110850>

Part 2: <https://twitter.com/realDonaldTrump/status/1327619654592892931>

November 14, 2020 (continued)

11:17 PM



Donald J. Trump 
@realDonaldTrump

...

ANTIFA SCUM ran for the hills today when they tried attacking the people at the Trump Rally, because those people aggressively fought back. Antifa waited until tonight, when 99% were gone, to attack innocent #MAGA People. DC Police, get going — do your job and don't hold back!!!

11:17 PM · Nov 14, 2020

41.4K Reposts 9,197 Quotes 231.1K Likes 681 Bookmarks

<https://twitter.com/realDonaldTrump/status/1327828007311073280>

November 16, 2020

8:26 AM



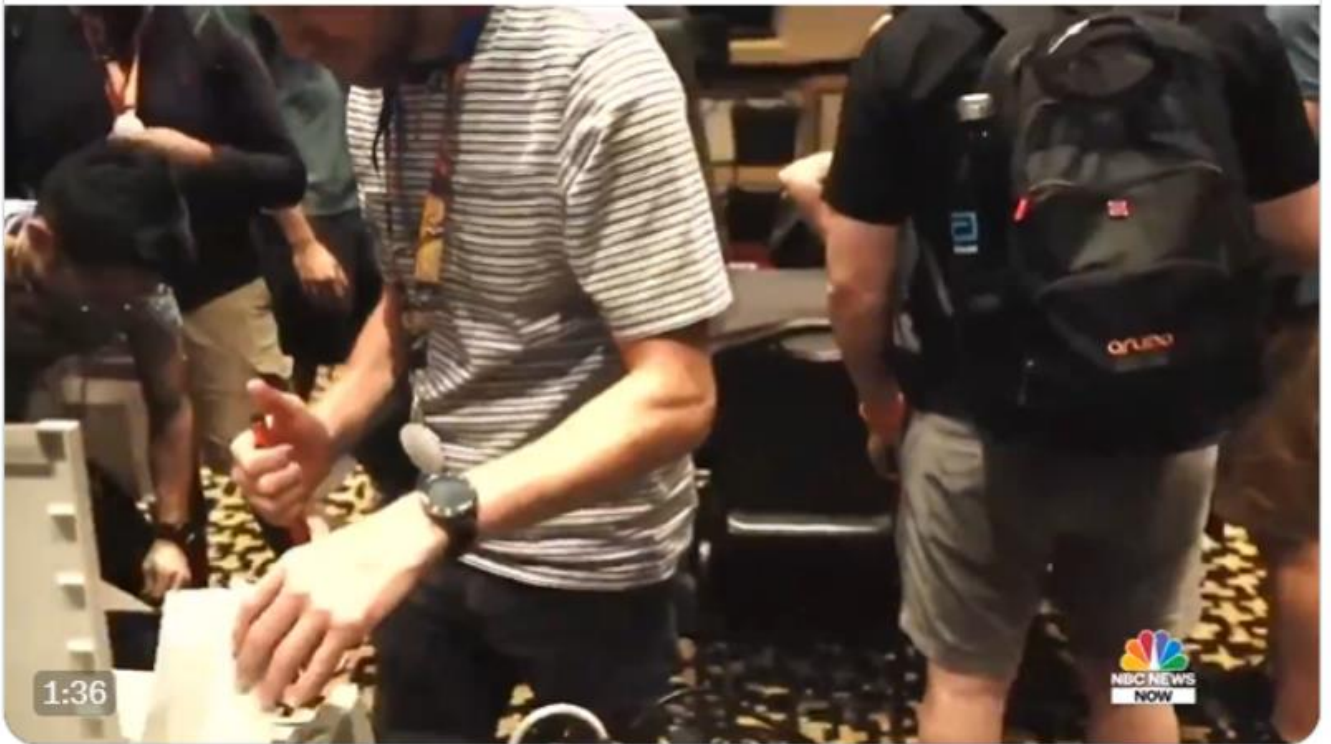
Donald J. Trump ✓
@realDonaldTrump

...

Dominion is running our Election. Rigged!



Donald J. Trump ✓ @realDonaldTrump · Nov 14, 2020

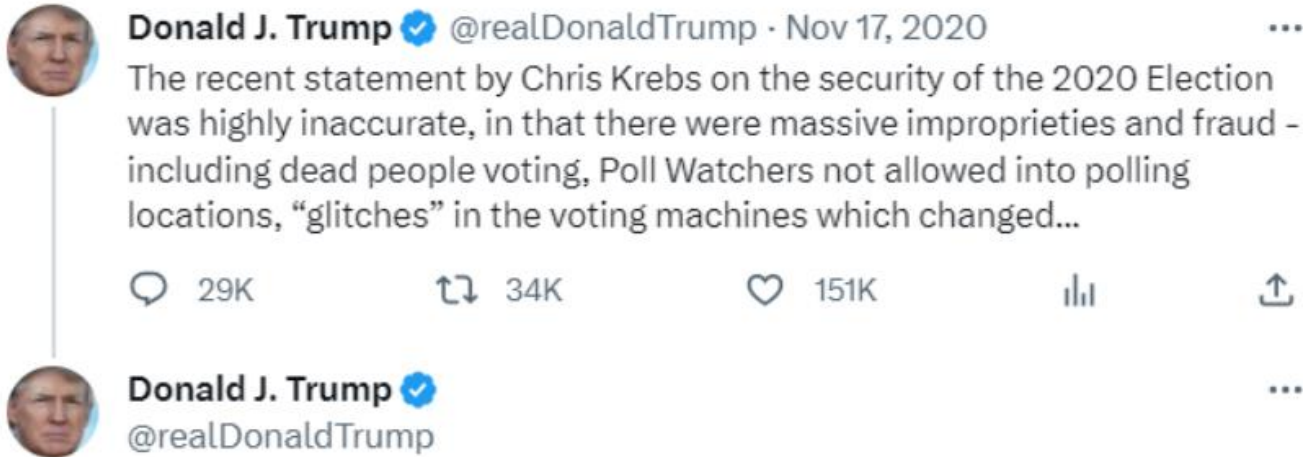


8:26 AM · Nov 16, 2020

<https://twitter.com/realDonaldTrump/status/1328328547598000130>

November 17, 2020

7:07 PM



...votes from Trump to Biden, late voting, and many more. Therefore, effective immediately, Chris Krebs has been terminated as Director of the Cybersecurity and Infrastructure Security Agency.

7:07 PM · Nov 17, 2020

Part 1: <https://twitter.com/realDonaldTrump/status/1328852352787484677>

Part 2: <https://twitter.com/realDonaldTrump/status/1328852354049957888>

November 18, 2020

10:38 AM



"The numbers have not improved, it is still 71% out of balance", stated Wayne County, Michigan, Canvassers. "There is widespread irregularities in poll numbers." There are "more votes than people". The two harassed patriot Canvassers refuse to sign the papers!

10:38 AM · Nov 18, 2020

<https://twitter.com/realDonaldTrump/status/1329086548093014022>

November 19, 2020

8:46 AM



Donald J. Trump ✓

@realDonaldTrump

..

Thousands of uncounted votes discovered in Georgia counties. When the much more important signature match takes place, the State will flip Republican, and very quickly. Get it done! @BrianKempGA

8:46 AM · Nov 19, 2020

<https://twitter.com/realDonaldTrump/status/1329420741553643522>

November 19, 2020 (continued)

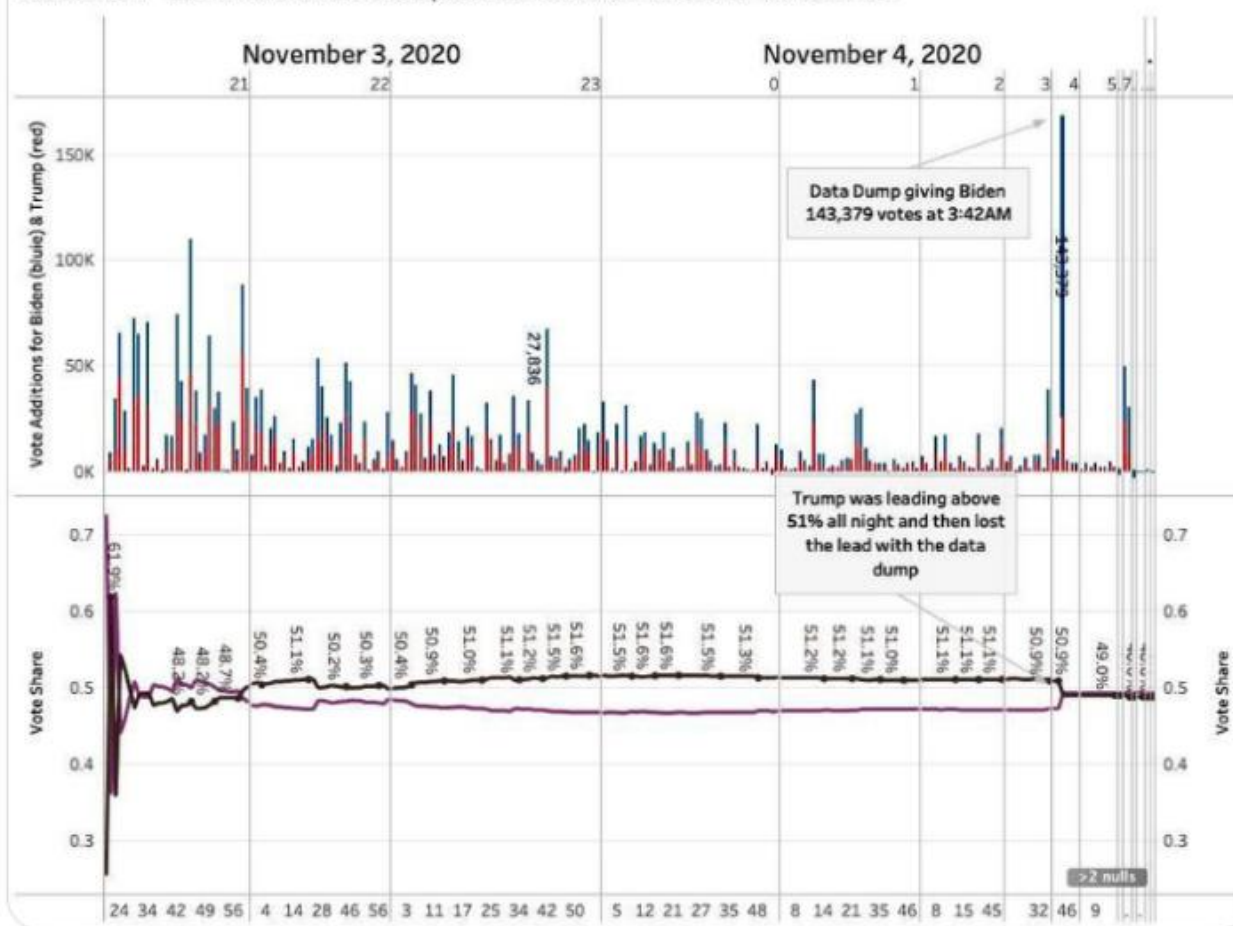
8:49 PM



Donald J. Trump @realDonaldTrump · Nov 18, 2020

Look at this in Wisconsin! A day AFTER the election, Biden receives a dump of 143,379 votes at 3:42AM, when they learned he was losing badly. This is unbelievable!

Wisconsin - Individual Time Stamped Entries from the New York Times

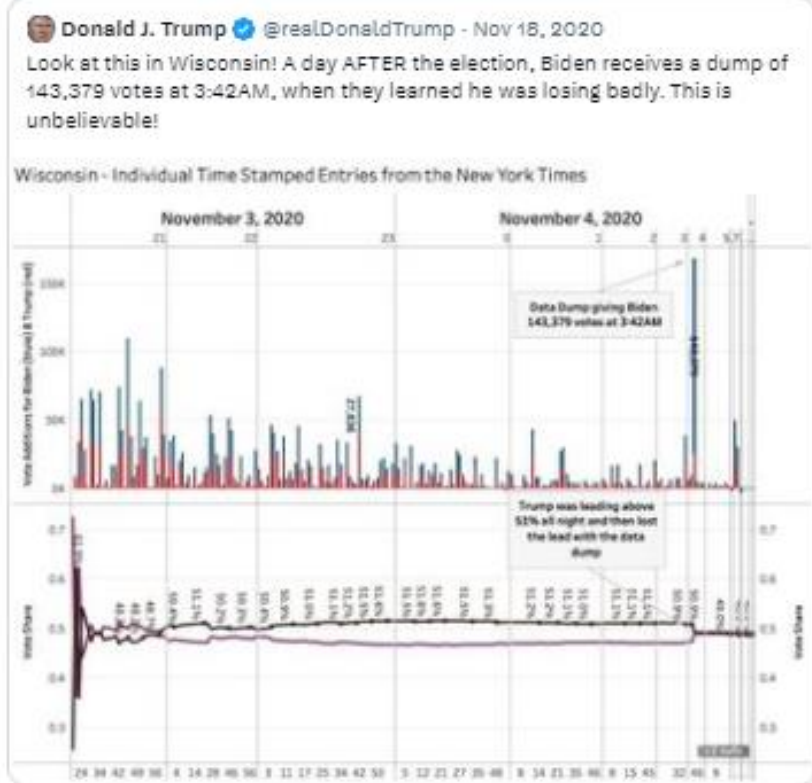
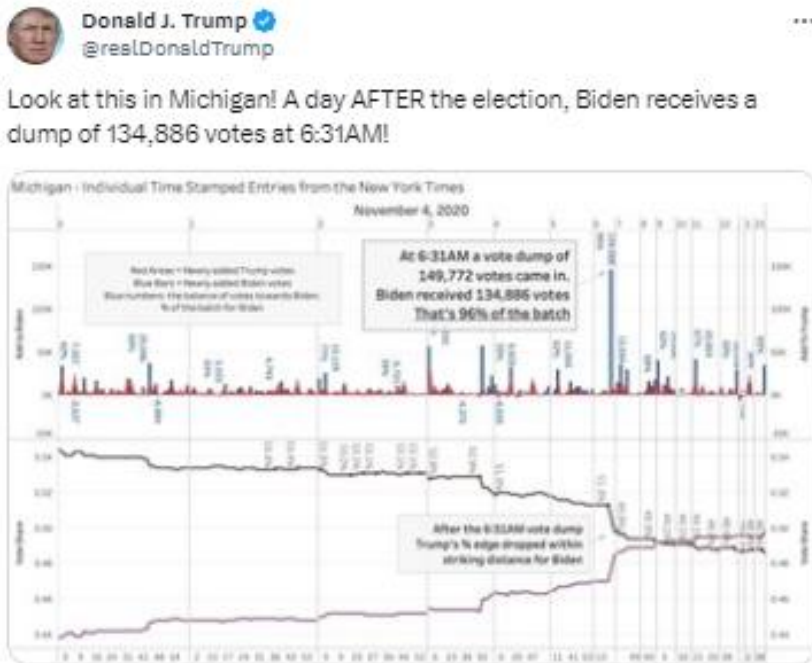


8:49 PM · Nov 19, 2020

<https://twitter.com/realDonaldTrump/status/1329233502139715586>

November 19, 2020 (continued)

8:49 PM



8:49 PM - Nov 19, 2020

<https://twitter.com/realDonaldTrump/status/1329602736053252107>

November 27, 2020

2:35 PM



Donald J. Trump ✓

@realDonaldTrump

...

Biden did poorly in big cities (Politico), except those of Detroit (more votes than people!), Philadelphia, Atlanta and Milwaukee, which he had to win. Not surprisingly, they are all located in the most important swing states, and are long known for being politically corrupt!

2:35 PM · Nov 27, 2020

<https://twitter.com/realDonaldTrump/status/1332407714304110597>

November 30, 2020

8:59 AM



Donald J. Trump ✓

@realDonaldTrump

...

Why won't Governor [@BrianKempGA](#), the hapless Governor of Georgia, use his emergency powers, which can be easily done, to overrule his obstinate Secretary of State, and do a match of signatures on envelopes. It will be a "goldmine" of fraud, and we will easily WIN the state....

8:59 AM · Nov 30, 2020

<https://twitter.com/realDonaldTrump/status/1333410418119864320>

November 30, 2020 (continued)

6:39 PM



Donald J. Trump ✓
@realDonaldTrump

...

Why is he rushing to put a Democrat in office, especially when so many horrible things concerning voter fraud are being revealed at the hearing going on right now. @OANN What is going on with @dougducey? Republicans will long remember!

The Recount ✓ @therecount · Nov 30, 2020

Gov. Ducey (R-AZ) certifies Biden's win in Arizona, and announces he will sign documents today so that Senator-elect Mark Kelly (D) can be sworn in "as swiftly as possible."

(Kelly will be sworn in on Wednesday, per reports. The Senate will then be 52R-48D.)



6:39 PM · Nov 30, 2020

<https://twitter.com/realDonaldTrump/status/1333556242984431616>

November 30, 2020 (continued)

6:40 PM



Donald J. Trump ✓
@realDonaldTrump

...

TRUE!



Christina Bobb ✓ @christina_bobb · Nov 30, 2020
Gov Ducey has betrayed the people of Arizona.

6:40 PM · Nov 30, 2020

<https://twitter.com/realDonaldTrump/status/1333556458575818754>

December 1, 2020

2:31 PM



Donald J. Trump ✓
@realDonaldTrump

...

Hope everybody is watching @OANN right now. Other media afraid to show. People are coming forward like never before. Large truck carrying hundreds of thousands of fraudulent (FAKE) ballots to a voting center? TERRIBLE - SAVE AMERICA!

2:31 PM · Dec 1, 2020

<https://twitter.com/realDonaldTrump/status/1333856259662077954>

December 1, 2020 (continued)

3:49 PM



Donald J. Trump ✓

@realDonaldTrump



Jesse Morgan—a truck driver (subcontractor) with USPS in PENNSYLVANIA...



From **Team Trump** (Text TRUMP to 88022) ✓

3:49 PM · Dec 1, 2020

<https://twitter.com/realDonaldTrump/status/1333875814585282567>

December 1, 2020 (continued)

10:27 PM



Donald J. Trump ✓
@realDonaldTrump



Rigged Election. Show signatures and envelopes. Expose the massive voter fraud in Georgia. What is Secretary of State and @BrianKempGA afraid of. They know what we'll find!!!



Brendan Keefe - Atlanta News First @BrendanKeefe · Dec 1, 2020

"It. Has. All. Gone. Too. Far," says @GabrielSterling with Georgia Sec of State after a Dominion tech's life was threatened with a noose. "Mr. President, you have not condemned these actions or this language....all of you who have not said a damn word are complicit in this."



10:27 PM · Dec 1, 2020

<https://twitter.com/realDonaldTrump/status/1333975991518187521>

December 5, 2020

4:35 PM



Donald J. Trump ✓
@realDonaldTrump

...

But you never got the signature verification! Your people are refusing to do what you ask. What are they hiding? At least immediately ask for a Special Session of the Legislature. That you can easily, and immediately, do. [#Transparency](#)



Brian Kemp ✓ @BrianKempGA · Dec 5, 2020

As I told the President this morning, I've publicly called for a signature audit three times (11/20, 11/24, 12/3) to restore confidence in our election process and to ensure that only legal votes are counted in Georgia. #gapol
[twitter.com/realDonaldTrump...](https://twitter.com/realDonaldTrump/status/1335336916582084614)

4:35 PM · Dec 5, 2020

<https://twitter.com/realDonaldTrump/status/1335336916582084614>

December 5, 2020 (continued)

5:33 PM



Donald J. Trump ✓ @realDonaldTrump · Dec 5, 2020 ...

Between Governor @DougDucey of Arizona and Governor @BrianKempGA of Georgia, the Democrat Party could not be happier. They fight harder against us than do the Radical Left Dems. If they were with us, we would have already won both Arizona and Georgia...



18.5K



21.5K



107.7K



Donald J. Trump ✓ ...

@realDonaldTrump

...We received more LEGAL votes by far. All I can do is run, campaign, and be a good (great!) President – it is 100% up to the states to manage the election. Republicans will NEVER forget this.

5:33 PM · Dec 5, 2020

Part 1: <https://twitter.com/realDonaldTrump/status/1335351629810286592>

Part 2: <https://twitter.com/realDonaldTrump/status/1335351633459310593>

December 7, 2020

10:37 AM



Donald J. Trump ✓ ...

@realDonaldTrump

The Republican Governor of Georgia refuses to do signature verification, which would give us an easy win. What's wrong with this guy? What is he hiding?

10:37 AM · Dec 7, 2020

<https://twitter.com/realDonaldTrump/status/1335971721262796801>

December 7, 2020 (continued)

7:50 PM



Donald J. Trump ✓
@realDonaldTrump

...

RINOS @BrianKempGA, @GeoffDuncanGA, & Secretary of State Brad Raffensperger, will be solely responsible for the potential loss of our two GREAT Senators from Georgia, @sendavidperdue & @KLoeffler. Won't call a Special Session or check for Signature Verification! People are ANGRY!

7:50 PM · Dec 7, 2020

<https://twitter.com/realdonaldtrump/status/1336110929856040960>

December 8, 2020

9:51 AM



Donald J. Trump ✓
@realDonaldTrump

...

Thank you to Speaker Cutler and all others in Pennsylvania and elsewhere who fully understand what went on in the 2020 Election. It's called total corruption!



Rep. Malcolm Kenyatta @malcolmkenyatta · Dec 7, 2020

Speaker Cutler should have told the President to accept the results of the election and knock off the nonsense.

Instead, he joined a letter last week to ask Congress to overturn the electoral college.

The cowardice is stunning. [washingtonpost.com/politics/trump...](https://www.washingtonpost.com/politics/trump...)

9:51 AM · Dec 8, 2020

<https://twitter.com/realdonaldtrump/status/1336322408970559495>

December 9, 2020

8:39 AM



Donald J. Trump ✓
@realDonaldTrump

...

This was not my case as has been so incorrectly reported. The case that everyone has been waiting for is the State's case with Texas and numerous others joining. It is very strong, ALL CRITERIA MET. How can you have a presidency when a vast majority think the election was RIGGED?



SCOTUSblog @SCOTUSblog · Dec 8, 2020

The Supreme Court has rejected a Pennsylvania Republican congressman's request to prevent Pennsylvania from certifying its presidential election results in favor of Joe Biden.

This case is different from the lawsuit filed by the state of Texas this morning.
[twitter.com/AHoweBlogger/s...](https://twitter.com/AHoweBlogger/status/1336666810742149120)

(ORDER LIST: 592 U.S.)

TUESDAY, DECEMBER 8, 2020

ORDER IN PENDING CASE

20A98

KELLY, MIKE, ET AL. V. PENNSYLVANIA, ET AL.

The application for injunctive relief presented to Justice Alito and by him referred to the Court is denied.

8:39 AM · Dec 9, 2020

<https://twitter.com/realDonaldTrump/status/1336666810742149120>

December 10, 2020

9:24 AM



Donald J. Trump ✓
@realDonaldTrump

...

The Supreme Court has a chance to save our Country from the greatest Election abuse in the history of the United States. 78% of the people feel (know!) the Election was RIGGED.

9:24 AM · Dec 10, 2020

<https://twitter.com/realDonaldTrump/status/1337040387349893121>

December 11, 2020

3:28 PM



Donald J. Trump ✓
@realDonaldTrump

...

If the Supreme Court shows great Wisdom and Courage, the American People will win perhaps the most important case in history, and our Electoral Process will be respected again!

3:28 PM · Dec 11, 2020

<https://twitter.com/realDonaldTrump/status/1337494507756072961>

December 11, 2020 (continued)

11:50 PM



Donald J. Trump 
@realDonaldTrump



The Supreme Court really let us down. No Wisdom, No Courage!

11:50 PM · Dec 11, 2020

<https://twitter.com/realDonaldTrump/status/1337620892139081728>

December 12, 2020

12:24

**Donald J. Trump** 
@realDonaldTrump

So, you're the President of the United States, and you just went through an election where you got more votes than any sitting President in history, by far - and purportedly lost. You can't get "standing" before the Supreme Court, so you "intervene" with wonderful states.....

12:24 AM · Dec 12, 2020

20.1K Reposts 6,348 Quotes 129K Likes 395 Bookmarks

 Post your reply! Reply

**Donald J. Trump**  **@realDonaldTrump** · Dec 12, 2020
....that, after careful study and consideration, think you got "screwed", something which will hurt them also. Many others likewise join the suit but, within a flash, it is thrown out and gone, without even looking at the many reasons it was brought. A Rigged Election, fight on!

Part 1: <https://twitter.com/realDonaldTrump/status/1337629305405321216?s=20>

Part 2: <https://twitter.com/realDonaldTrump/status/1337629306919538694>

December 12, 2020 (continued)

9:59 AM



Donald J. Trump ✓

@realDonaldTrump

...

Wow! Thousands of people forming in Washington (D.C.) for Stop the Steal. Didn't know about this, but I'll be seeing them! #MAGA

9:59 AM · Dec 12, 2020

<https://twitter.com/realDonaldTrump/status/1337774011376340992>

11:04 AM



Donald J. Trump ✓

@realDonaldTrump

...

The Supreme Court had ZERO interest in the merits of the greatest voter fraud ever perpetrated on the United States of America. All they were interested in is "standing", which makes it very difficult for the President to present a case on the merits. 75,000,000 votes!

11:04 AM · Dec 12, 2020

<https://twitter.com/realDonaldTrump/status/1337790419875352576>

December 12, 2020 (continued)

1:56 PM



Donald J. Trump ✓
@realDonaldTrump



From **Drew Hernandez** ✓ GP

1:56 PM · Dec 12, 2020

<https://twitter.com/realDonaldTrump/status/1337833603309465600?s=20>

December 13, 2020

5:49 PM

**Donald J. Trump**
@realDonaldTrump

...

Swing States that have found massive VOTER FRAUD, which is all of them, CANNOT LEGALLY CERTIFY these votes as complete & correct without committing a severely punishable crime. Everybody knows that dead people, below age people, illegal immigrants, fake signatures, prisoners,....

5:49 PM · Dec 13, 2020

32.5K Reposts 7,876 Quotes 165.8K Likes 506 Bookmarks



Post your reply!

Reply

**Donald J. Trump** @realDonaldTrump · Dec 13, 2020

...

.....and many others voted illegally. Also, machine “glitches” (another word for FRAUD), ballot harvesting, non-resident voters, fake ballots, “stuffing the ballot box”, votes for pay, roughed up Republican Poll Watchers, and sometimes even more votes than people voting, took....



9,109



17.4K



102K

**Donald J. Trump** @realDonaldTrump · Dec 13, 2020

...

....place in Detroit, Philadelphia, Milwaukee, Atlanta, Pittsburgh, and elsewhere. In all Swing State cases, there are far more votes than are necessary to win the State, and the Election itself. Therefore, VOTES CANNOT BE CERTIFIED. THIS ELECTION IS UNDER PROTEST!

Part 1: <https://twitter.com/realDonaldTrump/status/1338254785666043908>Part 2: <https://twitter.com/realDonaldTrump/status/1338254787020787712>Part 3: <https://twitter.com/realDonaldTrump/status/1338254787675041802>

December 14, 2020

8:57 AM



Donald J. Trump ✓
@realDonaldTrump

...

“Why did the Swing States stop counting in the middle of the night?”
@MariaBartiromo Because they waited to find out how many ballots they had to produce in order to steal the Rigged Election. They were so far behind that they needed time, & a fake “water main break”, to recover!

8:57 AM · Dec 14, 2020

<https://twitter.com/realDonaldTrump/status/1338483200046354434>

2:59 PM



Donald J. Trump ✓
@realDonaldTrump

...

WOW. This report shows massive fraud. Election changing result!



Detroit Free Press @freep · Dec 14, 2020

BREAKING: Judge orders release of report examining Antrim County vote tabulators [freep.com/story/news/pol...](https://www.freep.com/story/news/politics)

2:59 PM · Dec 14, 2020

<https://twitter.com/realDonaldTrump/status/1338574268154646528>

December 15, 2020

12:21 AM



Donald J. Trump ✓
@realDonaldTrump

...

This is BIG NEWS. Dominion Voting Machines are a disaster all over the Country. Changed the results of a landslide election. Can't let this happen. Thank you for the genius, bravery, and patriotism of the Judge. Should get a medal! [twitter.com/KMCRadio/statu...](https://twitter.com/KMCRadio/status/1338715842931023873)

This Tweet is from a suspended account. [Learn more](#)

12:21 AM · Dec 15, 2020

<https://twitter.com/realDonaldTrump/status/1338715842931023873>

December 16, 2020

1:09 AM



Donald J. Trump ✓
@realDonaldTrump

...

“Study: Dominion Machines shifted 2-3% of Trump Votes to Biden. Far more votes than needed to sway election.” Florida, Ohio, Texas and many other states were won by even greater margins than projected. Did just as well with Swing States, but bad things happened. @OANN

1:09 AM · Dec 16, 2020

<https://twitter.com/realdonaldtrump/status/1339090279429775363>

December 19, 2020

1:42 AM



Donald J. Trump ✓
@realDonaldTrump

...

Peter Navarro releases 36-page report alleging election fraud 'more than sufficient' to swing victory to Trump [washex.am/3nwaBCe](https://www.washex.am/3nwaBCe). A great report by Peter. Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!

1:42 AM · Dec 19, 2020

<https://twitter.com/realDonaldTrump/status/1340185773220515840>

9:41 AM



Donald J. Trump ✓
@realDonaldTrump

...

He didn't win the Election. He lost all 6 Swing States, by a lot. They then dumped hundreds of thousands of votes in each one, and got caught. Now Republican politicians have to fight so that their great victory is not stolen. Don't be weak fools!

 **NY Post Opinion** 🌟 📺 @NYPostOpinion · Dec 18, 2020
Stephen Colbert's Joe Biden interview a real joke trib.al/oc4Z7Fi



9:41 AM · Dec 19, 2020

<https://twitter.com/realDonaldTrump/status/1340306154031857665>

December 19, 2020 (continued)

11:30 AM



Donald J. Trump ✓
@realDonaldTrump

...

The Cyber Hack is far greater in the Fake News Media than in actuality. I have been fully briefed and everything is well under control. Russia, Russia, Russia is the priority chant when anything happens because Lamestream is, for mostly financial reasons, petrified of...

11:30 AM · Dec 19, 2020



41.8K



32.4K



126K



545



Post your reply

Reply



Donald J. Trump ✓ @realDonaldTrump · Dec 19, 2020

...

....discussing the possibility that it may be China (it may!). There could also have been a hit on our ridiculous voting machines during the election, which is now obvious that I won big, making it an even more corrupted embarrassment for the USA. @DNI_Ratcliffe @SecPompeo



28.3K



25.3K



112.3K



Part 1: <https://twitter.com/realDonaldTrump/status/1340333618691002368>

Part 2: <https://twitter.com/realDonaldTrump/status/1340333619299147781>

December 19, 2020 (continued)

1:24 PM



Donald J. Trump ✓

@realDonaldTrump

...



1:24 PM · Dec 19, 2020

<https://twitter.com/realDonaldTrump/status/1340362336390004737>

2:59 PM



Donald J. Trump ✓

@realDonaldTrump

...

The lie of the year is that Joe Biden won! Christina Bobb @OANN

2:59 PM · Dec 19, 2020

<https://twitter.com/realDonaldTrump/status/1340386251866828802>

December 20, 2020

12:26 AM



Donald J. Trump ✓

@realDonaldTrump

...

GREATEST ELECTION FRAUD IN THE HISTORY OF OUR COUNTRY!!!

12:26 AM · Dec 20, 2020

<https://twitter.com/realDonaldTrump/status/1340529063799246848?lang=en>

December 21, 2020

7:24 AM



Donald J. Trump ✓

@realDonaldTrump

...

Big news coming out of Pennsylvania. Very big illegal ballot drop that cannot be accounted for. Rigged Election!

7:24 AM · Dec 21, 2020

<https://twitter.com/realDonaldTrump/status/1340996686257254403>

December 21, 2020 (continued)

10:30 AM



Donald J. Trump ✓
@realDonaldTrump

...

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. @KLoeffler and....

10:30 AM · Dec 21, 2020



17.2K



23.7K



110.8K



122



Post your reply

Reply



Donald J. Trump ✓ @realDonaldTrump · Dec 21, 2020

...

....@sendavidperdue will not be able to win on January 5th. unless these people allow Signature Verification in presidential race. K & D need it for their race also, & Georgia spirit will rise to such a high that they will easily bring home a great victory. Move fast @BrianKempGA



8,974



13.2K



72.5K

Part 1: <https://twitter.com/realDonaldTrump/status/1341043284542713857>Part 2: <https://twitter.com/realDonaldTrump/status/1341043285368909824>

December 21, 2020 (continued)

4:48 PM



Donald J. Trump ✓

@realDonaldTrump

...

Two years ago, the great people of Wisconsin asked me to endorse a man named Brian Hagedorn for State Supreme Court Justice, when he was getting destroyed in the Polls against a tough Democrat Candidate who had no chance of losing. After my endorsement, Hagedorn easily won!...

4:48 PM · Dec 21, 2020



15.5K



19.7K



115.8K



195



Post your reply

Reply



Donald J. Trump ✓ @realDonaldTrump · Dec 21, 2020

...

...WOW, he just voted against me in a Big Court Decision on voter fraud (of which there was much!), despite many pages of dissent from three highly respected Justices. One thing has nothing to do with another, but we ended up losing 4-3 in a really incorrect ruling! Great...



15.3K



15.1K



88.6K



Donald J. Trump ✓ @realDonaldTrump · Dec 21, 2020

...

...Republicans in Wisconsin should take these 3 strong decisions to their State Legislators and overturn this ridiculous State Election. We won in a LANDSLIDE!

Part 1: <https://twitter.com/realDonaldTrump/status/1341138407460925440>

Part 2: <https://twitter.com/realDonaldTrump/status/1341138408274595843>

Part 3: <https://twitter.com/realDonaldTrump/status/1341138409092509696>

December 22, 2020

10:29 AM



Donald J. Trump ✓
@realDonaldTrump

...

THE DEMOCRATS DUMPED HUNDREDS OF THOUSANDS OF BALLOTS
IN THE SWING STATES LATE IN THE EVENING. IT WAS A RIGGED
ELECTION!!!

10:29 AM · Dec 22, 2020

<https://twitter.com/realDonaldTrump/status/1341405487057821698>

December 23, 2020

12:08 PM



Donald J. Trump ✓
@realDonaldTrump

...

They are slow walking the signature verification in Georgia. They don't
want results to get out prior to January 6th. They know what they are
trying so hard to hide. Terrible people! @BrianKempGA

12:08 PM · Dec 23, 2020

<https://twitter.com/realDonaldTrump/status/1341792832093364226>

December 23, 2020 (continued)

6:16 PM



Donald J. Trump ✓
@realDonaldTrump

...

After seeing the massive Voter Fraud in the 2020 Presidential Election, I disagree with anyone that thinks a strong, fast, and fair Special Counsel is not needed, IMMEDIATELY. This was the most corrupt election in the history of our Country, and it must be closely examined!

6:16 PM · Dec 23, 2020

<https://twitter.com/realDonaldTrump/status/1341885394124607488>

December 24, 2020

3:43 PM



Donald J. Trump ✓
@realDonaldTrump

...

At a meeting in Florida today, everyone was asking why aren't the Republicans up in arms & fighting over the fact that the Democrats stole the rigged presidential election? Especially in the Senate, they said, where you helped 8 Senators win their races. How quickly they forget!

3:43 PM · Dec 24, 2020

<https://twitter.com/realDonaldTrump/status/1342209260026023940>

December 24, 2020 (continued)

3:56 PM



Donald J. Trump ✓

@realDonaldTrump

...

VOTER FRAUD IS NOT A CONSPIRACY THEORY, IT IS A FACT!!!

3:56 PM · Dec 24, 2020

<https://twitter.com/realDonaldTrump/status/1342212651447967744>

December 26, 2020

8:00 AM



Donald J. Trump ✓

@realDonaldTrump

...

If a Democrat Presidential Candidate had an Election Rigged & Stolen, with proof of such acts at a level never seen before, the Democrat Senators would consider it an act of war, and fight to the death. Mitch & the Republicans do NOTHING, just want to let it pass. NO FIGHT!

8:00 AM · Dec 26, 2020

<https://twitter.com/realDonaldTrump/status/1342817496924086278>

December 26, 2020 (continued)

8:14 AM



Donald J. Trump ✓
@realDonaldTrump

...

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.

8:14 AM · Dec 26, 2020

<https://twitter.com/realDonaldTrump/status/1342821189077622792?lang=en>

8:51 AM



Donald J. Trump ✓
@realDonaldTrump

...

The U.S. Supreme Court has been totally incompetent and weak on the massive Election Fraud that took place in the 2020 Presidential Election. We have absolute PROOF, but they don’t want to see it - No “standing”, they say. If we have corrupt elections, we have no country!

8:51 AM · Dec 26, 2020

<https://twitter.com/realDonaldTrump/status/1342830505163706369>

December 26, 2020 (continued)

9:00 AM



Donald J. Trump ✓

@realDonaldTrump

...

A young military man working in Afghanistan told me that elections in Afghanistan are far more secure and much better run than the USA's 2020 Election. Ours, with its millions and millions of corrupt Mail-In Ballots, was the election of a third world country. Fake President!


9:00 AM · Dec 26, 2020

<https://twitter.com/realDonaldTrump/status/1342832582606598144>

December 26, 2020 (continued)

6:23 PM




Donald J. Trump 

@realDonaldTrump

Time for Republican Senators to step up and fight for the Presidency, like the Democrats would do if they had actually won. The proof is irrefutable! Massive late night mail-in ballot drops in swing states, stuffing the ballot boxes (on video), double voters, dead voters,

6:23 PM · Dec 26, 2020

41.4K Reposts 5,553 Quotes 194.3K Likes 408 Bookmarks








 Post your reply!

Reply



Donald J. Trump  @realDonaldTrump · Dec 26, 2020

....fake signatures, illegal immigrant voters, banned Republican vote watchers, MORE VOTES THAN ACTUAL VOTERS (check out Detroit & Philadelphia), and much more. The numbers are far greater than what is necessary to win the individual swing states, and cannot even be contested....

3,196 10.6K 41.9K




Donald J. Trump  @realDonaldTrump · Dec 26, 2020

....Courts are bad, the FBI and "Justice" didn't do their job, and the United States Election System looks like that of a third world country. Freedom of the press has been gone for a long time, it is Fake News, and now we have Big Tech (with Section 230) to deal with....

10.8K 23.2K 124.3K



Donald J. Trump  @realDonaldTrump · Dec 26, 2020

....But when it is all over, and this period of time becomes just another ugly chapter in our Country's history, WE WILL WIN!!!

22.9K 29.8K 151.8K

Part 1: <https://twitter.com/realdonaldtrump/status/1342974370822692867>

Part 2: <https://twitter.com/realDonaldTrump/status/1342974373632876545>

Part 3: <https://twitter.com/realDonaldTrump/status/1342974375008600070>

Part 4: <https://twitter.com/realDonaldTrump/status/1342974377218994181>

December 27, 2020

12:28 AM



Donald J. Trump ✓

@realDonaldTrump

...

Michigan AG Dana Nessel Pursues Sanctions Against Lawyers Questioning Election [breitbart.com/politics/2020/...](https://www.breitbart.com/politics/2020/12/27/michigan-attorney-general-dana-nessel-pursues-sanctions-against-lawyers-questioning-election/) via @BreitbartNews
These lawyers are true patriots who are fighting for the truth and, obviously, getting very close. AG should be sanctioned. Fight on!



breitbart.com

Michigan AG Dana Nessel Pursues Sanctions Against Lawyers Questioning El...
Michigan Attorney General Dana Nessel is pursuing sanctions against lawyers who questioned the outcome of the November election. | Politics

12:28 AM · Dec 27, 2020

<https://twitter.com/realDonaldTrump/status/1343066231222448130>

December 27, 2020 (continued)

12:36 AM



Donald J. Trump ✓

@realDonaldTrump



Speaking for America!



Donald J. Trump ✓ @realDonaldTrump · Dec 22, 2020

Statement by Donald J. Trump, The President of the United States

Full Video: fb.watch/2ynPrdD81y/



12:36 AM · Dec 27, 2020

<https://twitter.com/realDonaldTrump/status/1343068273827577861>

December 27, 2020 (continued)

5:51 PM

← **Post**



Donald J. Trump ✓
@realDonaldTrump

...

See you in Washington, DC, on January 6th. Don't miss it. Information to follow!

5:51 PM · Dec 27, 2020

<https://twitter.com/realDonaldTrump/status/1343328708963299338>

December 28, 2020

4:00 PM



Donald J. Trump ✓
@realDonaldTrump

...

“Breaking News: In Pennsylvania there were 205,000 more votes than there were voters. This alone flips the state to President Trump.”

4:00 PM · Dec 28, 2020

<https://twitter.com/realDonaldTrump/status/1343663159085834248>

December 29, 2020

8:59 AM

**Donald J. Trump** ✓
@realDonaldTrump

...

"A group of Republican lawmakers in Pennsylvania say 200,000 more votes were counted in the 2020 Election than voters (100% went to Biden). State Representative Frank Ryan said they found troubling discrepancies after an analysis of Election Day data." @FoxNews This is far....

8:59 AM · Dec 29, 2020

32K Reposts 2,606 Quotes 139.9K Likes 233 Bookmarks



Post your reply!

Reply

**Donald J. Trump** ✓ @realDonaldTrump · Dec 29, 2020

...

...more votes than is needed by me to win Pennsylvania, not to mention hundreds of thousands of votes in other categories which increase my already big lead into a landslide. All other Swing States show likewise. WE NEED NEW & ENERGETIC REPUBLICAN LEADERSHIP. This can not stand..

2,032

7,850

35.2K

**Donald J. Trump** ✓ @realDonaldTrump · Dec 29, 2020

...

....Can you imagine if the Republicans stole a Presidential Election from the Democrats - All hell would break out. Republican leadership only wants the path of least resistance. Our leaders (not me, of course!) are pathetic. They only know how to lose! P.S. I got MANY Senators..

11.3K

16.9K

92.7K

**Donald J. Trump** ✓ @realDonaldTrump · Dec 29, 2020

...

....and Congressmen/Congresswomen Elected. I do believe they forgot!

7,513

12.9K

81.7K

Part 1: <https://twitter.com/realDonaldTrump/status/1343919651336712199>Part 2: <https://twitter.com/realDonaldTrump/status/1343919652125241345>Part 3: <https://twitter.com/realDonaldTrump/status/1343919653068943361>Part 4: <https://twitter.com/realDonaldTrump/status/1343919654008356867>

December 29, 2020 (continued)

5:55 PM



Donald J. Trump ✓

@realDonaldTrump

...

When are we going to be allowed to do signature verification in Fulton County, Georgia? The process is going VERY slowly. @BrianKempGA Pennsylvania just found 205,000 votes more than they had voters. Therefore, we WIN Pennsylvania!!!

5:55 PM · Dec 29, 2020

<https://twitter.com/realDonaldTrump/status/1344054358418345985>

December 30, 2020

12:57 AM

**Donald J. Trump** ✓

@realDonaldTrump

...

The Wall Street Journal's very boring & incoherent Editorial fails to mention my big & easy wins in Texas, Florida, Ohio, Iowa & many other states that the @WSJ & other joke polls said I would lose. Also, they fail to mention the fact that I got many Republican Senators elected..

12:57 AM · Dec 30, 2020



9,063



18K



102.5K



109



Post your reply

Reply

**Donald J. Trump** ✓ @realDonaldTrump · Dec 30, 2020

...

....that, quite frankly, didn't have much of a chance, like 7, 8 or 9. The Presidential Election was Rigged with hundreds of thousands of ballots mysteriously flowing into Swing States very late at night as everyone thought the election was easily won by me. There were many....



4,763



13.3K



81.6K

**Donald J. Trump** ✓ @realDonaldTrump · Dec 30, 2020

...

....other acts of fraud and irregularities as well. STAY TUNED!



8,017



13.7K



84K

Part 1: <https://twitter.com/realDonaldTrump/status/1344160786252525568>Part 2: <https://twitter.com/realDonaldTrump/status/1344160787384971264>Part 3: <https://twitter.com/realDonaldTrump/status/1344160788567773189>

December 30, 2020 (continued)

1:49 AM



Donald J. Trump ✓

@realDonaldTrump



New Lott study estimates 11,350 absentee votes lost to Trump in Georgia. Another 289,000 "excess (fraudulent) votes" across GA, AZ, MI, NV, PA, and WI. Check it out! ➡ papers.ssrn.com/sol3/papers.cf...



1:49 AM · Dec 30, 2020

<https://twitter.com/realDonaldTrump/status/1344173684983017473>

December 30, 2020 (continued)

9:26 AM



Donald J. Trump ✓
@realDonaldTrump

...

Hearings from Atlanta on the Georgia Election overturn now being broadcast. Check it out. @OANN @newsmax and many more. @BrianKempGA should resign from office. He is an obstructionist who refuses to admit that we won Georgia, BIG! Also won the other Swing States.

9:26 AM · Dec 30, 2020

<https://twitter.com/realDonaldTrump/status/1344288700851744769>

2:06 PM



Post



Donald J. Trump ✓
@realDonaldTrump

...

JANUARY SIXTH, SEE YOU IN DC!

2:06 PM · Dec 30, 2020

<https://twitter.com/realDonaldTrump/status/1344359312878149634>

December 30, 2020 (continued)

2:38 PM



Donald J. Trump ✓

@realDonaldTrump

...

The United States had more votes than it had people voting, by a lot. This travesty cannot be allowed to stand. It was a Rigged Election, one not even fit for third world countries!

2:38 PM · Dec 30, 2020

<https://twitter.com/realDonaldTrump/status/1344367336715857921?lang=en>

4:38 PM



Donald J. Trump ✓

@realDonaldTrump

...

.@BrianKempGA, his puppet Lt. Governor @GeoffDuncanGA, and Secretary of State, are disasters for Georgia. Won't let professionals get anywhere near Fulton County for signature verifications, or anything else. They are virtually controlled by @staceyabrams & the Democrats. Fools!

4:38 PM · Dec 30, 2020

<https://twitter.com/realDonaldTrump/status/1344397397280088070>

December 30, 2020 (continued)

4:51 PM



Donald J. Trump ✓

@realDonaldTrump

...

We now have far more votes than needed to flip Georgia in the Presidential race. Massive VOTER FRAUD took place. Thank you to the Georgia Legislature for today's revealing meeting!

4:51 PM · Dec 30, 2020

<https://twitter.com/realDonaldTrump/status/1344400646066331648>

January 1, 2021

2:53 PM



Post



Donald J. Trump ✓

@realDonaldTrump

...

The BIG Protest Rally in Washington, D.C., will take place at 11.00 A.M. on January 6th. Locational details to follow. StopTheSteal!

2:53 PM · Jan 1, 2021

<https://twitter.com/realDonaldTrump/status/1345095714687377418>

January 1, 2021 (continued)

3:10 PM



Donald J. Trump ✓
@realDonaldTrump

...

Massive amounts of evidence will be presented on the 6th. We won, BIG!



Josh Hawley ✓ @HawleyMO · Dec 30, 2020

Millions of voters concerned about election integrity deserve to be heard. I will object on January 6 on their behalf

Hawley Statement On Objecting During Electoral College Certification Process on Jan. 6

“Following both the 2004 and 2016 elections, Democrats in Congress objected during the certification of electoral votes in order to raise concerns about election integrity. They were praised by Democratic leadership and the media when they did. And they were entitled to do so. But now those of us concerned about the integrity of this election are entitled to do the same.

“I cannot vote to certify the electoral college results on January 6 without raising the fact that some states, particularly Pennsylvania, failed to follow their own state election laws. And I cannot vote to certify without pointing out the unprecedented effort of mega corporations, including Facebook and Twitter, to interfere in this election, in support of Joe Biden. At the very least, Congress should investigate allegations of voter fraud and adopt measures to secure the integrity of our elections. But Congress has so far failed to act.

“For these reasons, I will follow the same practice Democrat members of Congress have in years past and object during the certification process on January 6 to raise these critical issues.”

3:10 PM · Jan 1, 2021

<https://twitter.com/realDonaldTrump/status/1345100089505755139?lang=en>

January 1, 2021 (continued)

3:34 PM



Donald J. Trump ✓

@realDonaldTrump

...

A great honor!



Kylie Jane Kremer ✓

@KylieJaneKremer · Dec 19, 2020

The calvary is coming, Mr. President!

JANUARY 6th | Washington, DC

TrumpMarch.com



#MarchForTrump #StopTheSteal

WASHINGTON, DC
DEC 19, 2020
MARCH for TRUMP
TRUMPMARCH.COM

Donald J. Trump ✓ @realDonaldTrump · 13h
Peter Navarro releases 36-page report alleging election fraud 'more than sufficient' to swing victory to Trump [was:hex.am/3nea8Ck](#). A great report by Peter. Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!

1 This claim about election fraud is disputed

Peter Navarro releases 36-page report alleging election fraud 'more t...
Director of the Office of Trade and Manufacturing Policy Peter Navarro published a lengthy report Thursday outlining several examples of ...
@washingtonexaminer.com


MARCH for TRUMP
TO DEMAND TRANSPARENCY & PROTECT ELECTION INTEGRITY
**JANUARY 6TH
WASHINGTON, DC**
THE PRESIDENT IS CALLING ON US TO COME
BACK TO WASHINGTON ON JANUARY 6TH
FOR A BIG PROTEST - "BE THERE, WILL BE WILD"
SPECIFIC LOCATION & TIME TBA SOON
#MARCHFORTRUMP
TRUMPMARCH.COM


3:34 PM · Jan 1, 2021

<https://twitter.com/realDonaldTrump/status/1345106078141394944>

January 1, 2021 (continued)

6:27 PM








Donald J. Trump 


@realDonaldTrump

...

Before even discussing the massive corruption which took place in the 2020 Election, which gives us far more votes than is necessary to win all of the Swing States (only need three), it must be noted that the State Legislatures were not in any way responsible for the massive....


6:27 PM · Jan 1, 2021


 9,471
  24.5K
  110.4K
  247
 



Post your reply






Reply





Donald J. Trump  @realDonaldTrump · Jan 1, 2021

...

....changes made to the voting process, rules and regulations, many made hastily before the election, and therefore the whole State Election is not legal or Constitutional. Additionally, the Georgia Consent Decree is Unconstitutional & the State 2020 Presidential Election....






 2,740
  13.4K
  73.6K
 




Donald J. Trump  @realDonaldTrump · Jan 1, 2021

...

....is therefore both illegal and invalid, and that would include the two current Senatorial Elections. In Wisconsin, Voters not asking for applications invalidates the Election. All of this without even discussing the millions of fraudulent votes that were cast or altered!

 7,414
  14.3K
  76K
 


Part 1: <https://twitter.com/realDonaldTrump/status/1345149555390771201>

Part 2: <https://twitter.com/realDonaldTrump/status/1345149556967800832>

Part 3: <https://twitter.com/realDonaldTrump/status/1345149558154797056>

January 1, 2021 (continued)

6:38 PM



Donald J. Trump ✓
@realDonaldTrump



January 6th. See you in D.C.



Donald J. Trump ✓ @realDonaldTrump · Dec 23, 2020
Replying to @realDonaldTrump



6:38 PM · Jan 1, 2021

<https://twitter.com/realDonaldTrump/status/1345152408591204352>

January 1, 2021 (continued)

6:53 PM



Donald J. Trump ✓

@realDonaldTrump

...

Herschel is speaking the truth!



Herschel Walker ✓ @HerschelWalker · Dec 30, 2020

After watching the Ga Senate Hearings, there is no doubt there is serious Election Fraud! The whole world is watching.... so Georgia, we can be leaders by doing what's right.



6:53 PM · Jan 1, 2021

<https://twitter.com/realDonaldTrump/status/1345156316076060674>

January 2, 2021

11:20 AM



Donald J. Trump ✓

@realDonaldTrump

...

Why haven't they done signature verification in Fulton County, Georgia. Why haven't they deducted all of the dead people who "voted", illegals who voted, non Georgia residents who voted, and tens of thousands of others who voted illegally, from the final vote tally?

11:20 AM · Jan 2, 2021



21.5K



33.3K



146.2K



163



Post your reply

Reply



Donald J. Trump ✓ @realDonaldTrump · Jan 2, 2021

...

....Just a small portion of these votes give US a big and conclusive win in Georgia. Have they illegally destroyed ballots in Fulton County? After many weeks, we don't yet even have a judge to hear this large scale voter fraud case. The only judge seems to be Stacey's sister!



10K



17.6K



87.7K



Part 1: <https://twitter.com/realDonaldTrump/status/1345404682655707136>

Part 2: <https://twitter.com/realDonaldTrump/status/1345404684723507200>

January 2, 2021 (continued)

6:15 PM



Donald J. Trump ✓
@realDonaldTrump

...

An attempt to steal a landslide win. Can't let it happen!



Senator Ted Cruz ✓ @SenTedCruz · Jan 2, 2021

.@AP: Cruz Leads 11 GOP Senators Challenging Biden Win Over Trump
[nbcconnecticut.com/news/politics/...](https://nbcconnecticut.com/news/politics/)

6:15 PM · Jan 2, 2021

<https://twitter.com/realDonaldTrump/status/1345508977031974918?lang=en>

9:04 PM



Donald J. Trump ✓
@realDonaldTrump

...



From **Kylie Jane Kremer** ✓

9:04 PM · Jan 2, 2021

<https://twitter.com/realDonaldTrump/status/1345551634907209730>

January 3, 2021

8:29 AM



Post



Donald J. Trump ✓
@realDonaldTrump



Republicans in Georgia must be careful of the political corruption in Fulton County, which is rampant. The Governor, @BrianKempGA, and his puppet Lt. Governor, @GeoffDuncanGA, have done less than nothing. They are a disgrace to the great people of Georgia!

8:29 AM · Jan 3, 2021

https://twitter.com/realDonaldTrump/status/1345723944654024706?ref_src=twsrc%5Etfw

8:57 AM



Post



Donald J. Trump ✓
@realDonaldTrump



I spoke to Secretary of State Brad Raffensperger yesterday about Fulton County and voter fraud in Georgia. He was unwilling, or unable, to answer questions such as the “ballots under table” scam, ballot destruction, out of state “voters”, dead voters, and more. He has no clue!

8:57 AM · Jan 3, 2021

<https://twitter.com/realDonaldTrump/status/1345731043861659650>

January 3, 2021 (continued)

9:20 AM



Donald J. Trump ✓
@realDonaldTrump

...

“Georgia election data, just revealed, shows that over 17,000 votes illegally flipped from Trump to Biden.” @OANN This alone (there are many other irregularities) is enough to easily “swing Georgia to Trump”. #StopTheSteal @HawleyMO @SenTedCruz @Jim_Jordan

9:20 AM · Jan 3, 2021

<https://twitter.com/realDonaldTrump/status/1345736811906273282>

January 3, 2021 (continued)

10:27 AM



Donald J. Trump ✓
@realDonaldTrump

...

I will be there. Historic day!



Kylie Jane Kremer ✓ @KylieJaneKremer · Jan 2, 2021

BE A PART OF HISTORY!

January 6th - arrive by 9AM

White House Ellipse

RSVP @ TrumpMarch.com

#MarchForTrump #StopTheSteal #DoNotCertify



10:27 AM · Jan 3, 2021

<https://twitter.com/realDonaldTrump/status/1345753534168506370>

January 3, 2021 (continued)

1:24 PM



Donald J. Trump ✓
@realDonaldTrump

...

The Swing States did not even come close to following the dictates of their State Legislatures. These States "election laws" were made up by local judges & politicians, not by their Legislatures, & are therefore, before even getting to irregularities & fraud, UNCONSTITUTIONAL!

1:24 PM · Jan 3, 2021

<https://twitter.com/realdonaldtrump/status/1345798202650460162>

1:45 PM



Donald J. Trump ✓
@realDonaldTrump

...

Sorry, but the number of votes in the Swing States that we are talking about is VERY LARGE and totally OUTCOME DETERMINATIVE! Only the Democrats and some RINO'S would dare dispute this - even though they know it is true!

1:45 PM · Jan 3, 2021

<https://twitter.com/realdonaldtrump/status/1345803569438597121>

January 4, 2021

10:07 AM



Donald J. Trump ✓

@realDonaldTrump

...

How can you certify an election when the numbers being certified are verifiably WRONG. You will see the real numbers tonight during my speech, but especially on JANUARY 6th. @SenTomCotton Republicans have pluses & minuses, but one thing is sure, THEY NEVER FORGET!

10:07 AM · Jan 4, 2021

<https://twitter.com/realDonaldTrump/status/1346110956078817280>

10:45 AM



Donald J. Trump ✓

@realDonaldTrump

...

The “Surrender Caucus” within the Republican Party will go down in infamy as weak and ineffective “guardians” of our Nation, who were willing to accept the certification of fraudulent presidential numbers!

10:45 AM · Jan 4, 2021

<https://twitter.com/realDonaldTrump/status/1346120645613150208>

January 5, 2021

10:27 AM



Donald J. Trump ✓

@realDonaldTrump

...

See you in D.C.



Donald J. Trump ✓ @realDonaldTrump · Jan 1, 2021

secure.winred.com/save-america/e...

10:27 AM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346478482105069568>

11:06 AM



Donald J. Trump ✓

@realDonaldTrump

...

The Vice President has the power to reject fraudulently chosen electors.

11:06 AM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346488314157797389>

January 5, 2021 (continued)

5:05 PM



Donald J. Trump ✓

@realDonaldTrump

...

Washington is being inundated with people who don't want to see an election victory stolen by emboldened Radical Left Democrats. Our Country has had enough, they won't take it anymore! We hear you (and love you) from the Oval Office. MAKE AMERICA GREAT AGAIN!

5:05 PM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346578706437963777?s=20>.

5:12 PM



Donald J. Trump ✓

@realDonaldTrump

...

I hope the Democrats, and even more importantly, the weak and ineffective RINO section of the Republican Party, are looking at the thousands of people pouring into D.C. They won't stand for a landslide election victory to be stolen. @senatemajldr @JohnCornyn @SenJohnThune

5:12 PM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346580318745206785>

January 5, 2021 (continued)

5:25 PM



Donald J. Trump ✓
@realDonaldTrump

...

Antifa is a Terrorist Organization, stay out of Washington. Law enforcement is watching you very closely! @DeptofDefense @TheJusticeDept @DHSgov @DHS_Wolf @SecBernhardt @SecretService @FBI

5:25 PM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346583537256976385>

January 5, 2021 (continued)

5:43 PM



Donald J. Trump 
@realDonaldTrump

...

I will be speaking at the SAVE AMERICA RALLY tomorrow on the Ellipse at 11AM Eastern. Arrive early — doors open at 7AM Eastern. BIG CROWDS!



5:43 PM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346588064026685443>

January 5, 2021 (continued)

9:59 PM



Donald J. Trump ✓
@realDonaldTrump

...

BIG NEWS IN PENNSYLVANIA!

The Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

Republican Leader – US House of
Representatives
2468 Rayburn House Office Building
Washington, DC 20515

These provisions were not intended to be used to prevent poll watchers to be allowed to observe, they were "corralled" so far from the canvassing of ballots, that they could not view the activities.

Requests from legislators for independent investigations have been ignored by the administration.

Due to these inconsistent and questionable activities, we believe that PA election results should not have been certified by our Secretary of State.

Members, we ask for more time given the fact that the U.S. Supreme Court is to hear Trump vs. Boockvar in the coming days. We ask that you delay certification of the Electoral College to allow due process as we pursue election integrity in our Commonwealth.

Very respectfully,

Dear Leader McConnell and Leader McCarthy,

As members of the Pennsylvania Senate, we believe in the integrity of the election process. After speaking with our colleagues, a majority of the State Senate is troubled by the many inconsistencies that happened in our Commonwealth during the 2020 election.

Due to numerous unlawful violations taken by Pennsylvania Governor, Tom Wolf; Secretary of State, Kathy Boockvar; and the rogue State Supreme Court, the balance of power was taken from the State Legislature, who by the U.S. and PA Constitutions, set the time, place and manner of holding elections.

Art 77 of 2019 that was signed into law, provides the following clear provisions:

Joe Corman
President Pro Tempore

Kim Ward
Majority Leader

Kelly Ward
Senator, 30th District

Kristin Phillips-Hill
Senator, 28th District



9:59 PM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346652589673345024>

January 6, 2021

1:00 AM

← Post



Donald J. Trump ✓
@realDonaldTrump

...

If Vice President @Mike_Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & even fraudulent numbers in a process NOT approved by their State Legislatures (which it must be). Mike can send it back!

1:00 AM · Jan 6, 2021

<https://twitter.com/realDonaldTrump/status/1346698217304584192>

8:17 AM

← Post



Donald J. Trump ✓
@realDonaldTrump

...

States want to correct their votes, which they now know were based on irregularities and fraud, plus corrupt process never received legislative approval. 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!

8:17 AM · Jan 6, 2021

<https://twitter.com/realDonaldTrump/status/1346808075626426371>

January 6, 2021 (continued)

8:22 AM

← **Post**



Donald J. Trump ✓
@realDonaldTrump

...

THE REPUBLICAN PARTY AND, MORE IMPORTANTLY, OUR COUNTRY, NEEDS THE PRESIDENCY MORE THAN EVER BEFORE - THE POWER OF THE VETO. STAY STRONG!

8:22 AM · Jan 6, 2021

<https://twitter.com/realDonaldTrump/status/1346809349214248962>

9:15 AM



Donald J. Trump ✓
@realDonaldTrump

...

The States want to redo their votes. They found out they voted on a FRAUD. Legislatures never approved. Let them do it. BE STRONG!

9:15 AM · Jan 6, 2021

<https://twitter.com/realDonaldTrump/status/1346822610957561858>

January 6, 2021 (continued)

1:49 PM



<https://twitter.com/realDonaldTrump/status/1346891760174329859?cxt=HHwWhsC7we66j7EIAAAA>

January 6, 2021 (continued)

2:24 PM



Donald J. Trump ✓
@realDonaldTrump

...

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!

2:24 PM · Jan 6, 2021 · Twitter for iPhone

Source 1: <https://web.archive.org/web/20210106192450>

Source 2: <https://fox59.com/news/national-world/1-6-panel-told-repeatedly-he-lost-trump-refused-to-go/> https://scontent-iad3-1.xx.fbcdn.net/v/t1.6435-9/134672109_10159607785642176_8644372029803014794_n.png?nc_cat=110&ccb=1-7&nc_sid=9267fe&nc_ohc=lu5Unmd2QeIAX9ku1c-&nc_ht=scontent-iad3-1.xx&oh=00_AfBQuKx5JW2YmGvBwNqpjGm2Nj3-PAsRkOjiWe5A9NgUA&oe=65180457

2:38 PM



Post



Donald J. Trump ✓
@realDonaldTrump

...

Please support our Capitol Police and Law Enforcement. They are truly on the side of our Country. Stay peaceful!

2:38 PM · Jan 6, 2021

<https://twitter.com/realDonaldTrump/status/1346904110969315332>

January 6, 2021 (continued)

3:13 PM



Post



Donald J. Trump ✓

@realDonaldTrump



I am asking for everyone at the U.S. Capitol to remain peaceful. No violence! Remember, WE are the Party of Law & Order – respect the Law and our great men and women in Blue. Thank you!

3:13 PM · Jan 6, 2021

<https://twitter.com/realDonaldTrump/status/1346912780700577792>

6:01 PM



Donald J. Trump ✓

@realDonaldTrump



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. Go home with love & in peace. Remember this day forever!

6:01 PM · Jan 6, 2021 · Twitter for iPhone

Source 1: https://scontent-iad3-1.xx.fbcdn.net/v/t1.6435-9/135249759_10159608459792176_48918632044549425_n.png?nc_cat=104&ccb=1-7&nc_sid=9267fe&nc_ohc=7CjRiy6fqAsAX-4-m3l&nc_ht=scontent-iad3-1.xx&oh=00_AfDcz9QQfO6u6pLptFvubtHomyKa9S2O--RRrBWjprfPyw&oe=65181A3E

<https://www.npr.org/2022/11/19/1131351535/elon-musk-allows-donald-trump-back-on-twitter>

Source 2: <https://www.npr.org/2022/11/19/1131351535/elon-musk-allows-donald-trump-back-on-twitter>

Source 3: <https://www.usatoday.com/story/tech/news/2021/01/06/washington-dc-protest-twitter-facebook-silence-donald-trump/6569864002/>

This timeline is intended to memorialize the planning and execution efforts of the Department of Defense to address the Violent Attack at the U.S. Capitol on January 6, 2021.

The timeline is as follows:

Thursday, December 31, 2020 (New Year's Eve)

- Mayor Muriel Bowser and Dr. Christopher Rodriguez, D.C. Director of Homeland Security and Emergency Management Agency, deliver a written request for D.C. National Guard (DCNG) support to D.C. Metro Police Department (MPD) and Fire and Emergency Service.

Saturday, January 2, 2021

- The Acting Secretary of Defense (A/SD) confers with the Chairman of the Joint Chiefs of Staff (CJCS) and the Secretary of the Army (SECARMY) on the Mayor's written request.

Sunday, January 3, 2021

- DoD confirms with U.S. Capitol Police (USCP) that there is no request for DoD support.
- A/SD meets with select Cabinet Members to discuss DoD support to law enforcement agencies and potential requirements for DoD support.
- A/SD and CJCS meet with the President. President concurs in activation of the DCNG to support law enforcement.

Monday, January 4, 2021

- USCP confirms there is no requirement for DoD support in a phone call with SECARMY.
- The A/SD, in consultation with CJCS, SECARMY, and DoD General Counsel (GC), reviews the Department's plan to be prepared to provide support to civil authorities, if asked, and approves activation of 340 members of the DCNG to support Mayor Bowser's request.
 - Support provided in response to Mayor Bowser's request includes support at:
 - Traffic Control Points: 90 personnel (180 total/2 shifts); Metro station support: 24 personnel (48 total/2 shifts); Weapons of Mass Destruction Civil Support Team: 20 personnel; and Internal Command and Control: 52 personnel.
 - A/SD also authorizes SECARMY to deploy a Quick Reaction Force (40 personnel staged at Joint Base Andrews) if additional support is requested by civil authorities.

Tuesday, January 5, 2021

- Mayor Bowser delivers a letter addressed to the Acting Attorney General, A/SD, and SECARMY confirming that there are no additional support requirements from the D.C.
- 255 DCNG arrive in D.C. and begin to manage traffic control points alongside local law enforcement.

Wednesday, January 6, 2021

0830: A/SD and CJCS review DoD plan to support law enforcement agencies and request an exercise regarding DoD contingency response options.

- 1130: A/SD participates in table-top exercise regarding DoD contingency response options.
- 1305: A/SD receives open source reports of demonstrator movements to U.S. Capitol.
- 1326: USCP orders evacuation of Capitol complex.
- 1334: SECARMY phone call with Mayor Bowser in which Mayor Bowser communicates request for unspecified number of additional forces.
- 1349: Commanding General, DCNG, Walker phone call with USCP Chief Sund. Chief Sund communicates request for immediate assistance.
- 1422: SECARMY phone call with D.C. Mayor, Deputy Mayor, Dr. Rodriguez, and MPD leadership to discuss the current situation and to request additional DCNG support.
- 1430: A/SD, CJCS, and SECARMY meet to discuss USCP and Mayor Bowser's requests.
- 1500: A/SD determines all available forces of the DCNG are required to reinforce MPD and USCP positions to support efforts to reestablish security of the Capitol complex.
- 1500: SECARMY directs DCNG to prepare available Guardsmen to move from the armory to the Capitol complex, while seeking formal approval from A/SD for deployment. DCNG prepares to move 150 personnel to support USCP, pending A/SD's approval.
- 1504: A/SD, with advice from CJCS, DoD GC, the Chief of the National Guard Bureau (CNGB), SECARMY, and the Chief of Staff of the Army, provides verbal approval of the full activation of DCNG (1100 total) in support of the MPD. Immediately upon A/SD approval, Secretary McCarthy directs DCNG to initiate movement and full mobilization.
- In response, DCNG redeployed all soldiers from positions at Metro stations and all available non-support and non-C2 personnel to support MPD. DCNG begins full mobilization.
- 1519: SECARMY phone call with Senator Schumer and Speaker Pelosi about the nature of Mayor Bowser's request. SECARMY explains A/SD already approved full DCNG mobilization.
- 1526: SECARMY phone call with Mayor Bowser and MPD police chief relays there was no denial of their request, and conveys A/SD approval of the activation of full DCNG.
- 1546: CNGB phone call with the Adjutant General (TAG) of Virginia to discuss support in Washington D.C. TAG said Governor had ordered mobilization of forces at 1532.
- 1548: SECARMY departs Pentagon for MPD HQ.
- 1555: CNGB phone call with TAG of Maryland to discuss support in Washington D.C. TAG said governor ordered the mobilization of the rapid response force. TAG reports Governor had ordered mobilization of the rapid response force at 1547.
- 1610: SECARMY arrives at MPD HQ.

- 1618: A/SD, CJCS, SECARMY, and CNGB discuss availability of National Guard (NG) forces from other States in the region. A/SD gives voice approval for out-of-State NG forces to muster and to be prepared to deploy to D.C.
- 1632: A/SD provides verbal authorization to re-mission DCNG to conduct perimeter and clearance operations in support of USCP. SECARMY to provide public notification of support.
- 1640: SECARMY phone call with Governor of Maryland. Governor to send Maryland NG troops to D.C., expected to arrive on January 7, 2021.
- 1702: Departure of 154 DCNG from D.C. Armory in support of USCP. Arrive at Capitol at 1740, swear in with USCP, and begin support operations.
- 1745: A/SD signs formal authorization for out-of-State NG to muster and gives voice approval for deployment in support of USCP.
- 1814: USCP, MPD, and DCNG successfully establish perimeter on the west side of the U.S. Capitol.
- 1936: A/SD provides vocal approval to lease fences in support of the USCP for security of the Capitol building.
- 2000: USCP declares Capitol building secure.

Note: This document has been updated to more appropriately reflect the characterization of events at the U.S. Capitol on January 6th.