



TRUMP ON TRIAL:

A Guide to the January 6
Hearings and the
Question of Criminality

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Executive Summary

President Joe Biden legitimately won a fair and secure 2020 presidential election—and Donald Trump lost.¹ This historical fact has been uncontroverted by any evidence since at least November 7, 2020, when major news outlets projected Biden’s victory.²

But Trump never conceded.³ Instead, both before and after Election Day, he tried to delegitimize the election results by disseminating a series of far-fetched and evidence-free claims of fraud.⁴ Meanwhile, with a ring of close confidants, Trump conceived and implemented unprecedented schemes to—in his own words—“overturn” the election outcome.⁵ Among the results of this “Big Lie”⁶ campaign were the terrible events of January 6, 2021—an inflection point in what we now understand was nothing less than an attempted coup. In March of 2022, a federal district court

1 See *Trump v. Thompson*, 20 F.4th 10, 17 (D.C. Cir. 2021), cert. denied, No. 21-932, 2022 WL 516395 (U.S. Feb. 22, 2022) (“On November 3, 2020, Americans elected Joseph Biden as President, giving him 306 electoral college votes.”).

2 See, e.g., Christina Wilkie & Jacob Pramuk, *Joe Biden Is Projected to Defeat Incumbent Donald Trump in the Presidential Election*, CNBC (Nov. 7, 2020, 2:06 PM), <https://www.cnn.com/2020/11/07/2020-election-winner-biden-final-count-results.html>.

3 Grace Panetta & Oma Seddiq, *Trump Admits His Term Is Ending but Doesn’t Say Biden’s Name or Formally Concede Election Loss in White House Farewell Speech*, BUSINESS INSIDER (Jan. 19, 2021, 5:21 PM), <https://www.businessinsider.com/trump-admits-term-end-no-election-loss-concession-farewell-video-2021-1>; Julian E. Zelizer, *What I Learned When Trump Tried to Correct the Record*, THE ATLANTIC (Apr. 4, 2022) <https://www.theatlantic.com/ideas/archive/2022/04/trump-interview-a-first-historical-assessment/629454/> (“[Trump] ...at one point he said, ‘when I didn’t win the election’—phrasing at odds with his false claim that the 2020 vote was stolen.”).

4 See, e.g., Jan Wolfe, *Factbox: Trump’s False Claims Debunked: The 2020 Election and Jan. 6 Riot*, REUTERS (Jan. 6, 2022, 6:23 AM), <https://www.reuters.com/world/us/trumps-false-claims-debunked-2020-election-jan-6-riot-2022-01-06/>.

5 On December 9, 2020, Trump tweeted “#OVERTURN.” He used that word in several additional tweets between December 9, and when he was banned from Twitter on January 8, 2021. See Donald J. Trump (@realDonaldTrump), TRUMP TWITTER ARCHIVE, <https://www.thetrumparchive.com/>.

6 See Michael Waldman, *Trump’s Big Lie Led to Insurrection*, BRENNAN CENTER FOR JUSTICE (Jan. 12, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/trumps-big-lie-led-insurrection>.

judge found it was more likely than not that Trump and his counsel violated two federal criminal prohibitions in their efforts to overturn the election.⁷

The issue of criminality is central to the congressional hearings commencing on June 9, 2022, convened by the House of Representatives' Select Committee to Investigate the January 6th Attack on the United States Capitol. Pending the Committee's own interim or final reports, this publication serves as a guide to the hearings and the evidence the Committee and prosecutors may adduce as to whether Trump and his circle committed crimes. The report covers key players in the attempt to overturn the election, the known facts regarding their conduct, and the criminal law applicable to their actions.

The report goes beyond prior analyses to provide the first in-depth treatment of the voluminous publicly available facts and the relevant law, including possible defenses. The report reviews the evidence as to whether Trump as a matter of law conspired with his outside counsel John Eastman, administration lawyer Jeffrey Clark, and others to defraud the United States in violation of 18 U.S.C. § 371, by scheming to block the electoral count on January 6, 2021 and to subvert the Department of Justice's election enforcement work. We similarly review the evidence as to whether Trump and Eastman violated 18 U.S.C. § 1512(c) with their scheme to obstruct the congressional count. While this report is primarily focused on federal offenses, we also note evidence potentially probative of state criminal violations. Fulton County, Georgia is one jurisdiction currently investigating such evidence, and we briefly address the factual and legal analysis attendant to that investigation, which is also the subject of a separate report by some of the authors here.⁸

Our review of well-established law and public record evidence as it exists today leads us to believe that there is substantial evidence of all the essential elements of those federal and state offenses and suggests there is a substantial basis for prosecutors to go forward. This assessment of the currently available evidence does not of course amount to a final determination that Trump or others should ultimately be charged and prosecuted, or that there is proof beyond a reasonable doubt under the standards applied by prosecutors and courts.⁹ The report does not itself make

7 Order Re: Privilege of Documents Dated January 4-7, 2021, at 40, *Eastman v. Thompson*, 22-cv-99 (C.D. Ca. Mar. 28, 2022), ECF # 260 <https://www.courthousenews.com/wp-content/uploads/2022/03/eastman-select-committee-order.pdf> (hereinafter "*Eastman v. Thompson* Order Re: Privilege of Docs").

8 Norman Eisen, Joshua Matz, Donald Ayer, Gwen Keyes Fleming, Colby Galliher, Jason Harrow, & Raymond P. Tolentino, BROOKINGS INSTITUTION, *Fulton County, Georgia's Trump Investigation: An Analysis of the Reported Facts and Applicable Law* (Oct. 2021), <https://www.brookings.edu/wp-content/uploads/2021/10/Fulton-County-Trump-Investigation-Brookings-Report-October2021.pdf> (hereinafter "Brookings Report Re: Fulton County").

9 See U.S. ATTORNEY MANUAL § 9-27.220, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.220> ("The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless (1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution."). We discuss the standards for prosecution in the conclusion.

factual findings—for example, around an individual’s intent, or consciousness of wrongdoing—but rather, evaluates how the law will interpret and characterize such elements in light of publicly reported facts.¹⁰

The decision whether to make criminal referrals rests with the January 6 Committee. The ultimate determination whether to prosecute must be made by the Department of Justice (DOJ)—and for Georgia state offenses, by the Fulton County District Attorney. But the issues bearing on those judgments are among the most important open questions as the Committee holds its hearings and issues its reports, and as prosecutors weigh next steps. This analysis is intended to help readers evaluate those proceedings and publications going forward.

We begin our report, in Section I, by examining the extensive factual record that has emerged since January 6, 2021, thanks in great part to the January 6 Committee’s ongoing investigation. We also draw upon the Senate Judiciary Committee’s now-concluded deep dive into the Trump administration’s effort to subvert the DOJ, as well as court filings, voluminous public reporting by media outlets, and other publicly available sources.¹¹ We focus on facts that go most directly to the key questions in the Committee hearings and possible prosecutions—most importantly, to questions of criminal intent. As many commentators have observed, criminal culpability for attempts to overturn the election may hinge on whether Trump and others honestly believed that Trump won the 2020 election.¹²

We believe that the currently available record supports the proposition that Trump and Eastman—along with others—did know that Trump lost. Based on that record, it is also our opinion that they knew within weeks of Election Day that there was no legitimate pathway to challenge his loss. In particular, we believe the facts support the following relevant inferences, opinions, and conclusions:

Trump attempted to retain power by any means necessary. Trump was personally involved in entertaining, exploring, and even attempting to enact an astonishing array of legally unjustifiable schemes to retain power. His pursuit of power by any means necessary—including endorsing and acceding to violence—is probative of criminal intent. It shows that power was the real goal, and that claims of election fraud were just a means to that end.

10 In so doing, this report, and the opinions, conclusions and analysis contained herein, rely on and assume the accuracy of those facts and assertions contained in official and media reports.

11 Senate Committee on the Judiciary, Majority Report, Subverting Justice: How the Former President and His Allies Pressured DOJ to Overturn the 2020 Election, <https://www.judiciary.senate.gov/imo/media/doc/Interim%20Staff%20Report%20FINAL.pdf> (hereinafter “Senate Report”).

12 See, e.g., Barbara McQuade, *United States v. Donald Trump: A “Model Prosecution Memo” on the Conspiracy to Pressure Vice President Pence*, JUST SECURITY (Feb. 22, 2022), <https://www.justsecurity.org/80308/united-states-v-donald-trump-model-prosecution-memo/> (“Perhaps the greatest uncertainty regarding the case against President Trump is whether he acted with criminal intent. Assuming his alleged actions are sufficient to constitute obstruction, whether President Trump had criminal intent could very well prove to be the decisive question.”).

Trump prepared an unsupported narrative of a stolen election long before November 3. Any assertion that Trump sincerely believed he won is undercut by his repeated announcements, in advance, that he would never accept losing. It is also undercut by his pattern of crying fraud—as he did in both the 2016 primaries and the 2016 general election—when he does not like an election’s results. Past conduct undermines any argument that his post-Election Day claims of fraud were a good-faith response to actual evidence.

Trump told multiple, shifting, mutually inconsistent stories about fraud. In the months after the election, Trump repeatedly changed his story about voter fraud. These fabrications and his inability to present a coherent and consistent narrative support the conclusion that he intended to mislead.

Trump is on the record invoking fraud as an excuse for retaining power. Among other admissions: Trump attempted to coerce both Georgia state officials and DOJ lawyers to “find” votes and to publicize unsubstantiated claims of election fraud as cover for his attempts to retain power. Even if one believes he was a victim of fraud, he cannot intentionally respond with more fraud of his own as a form of self-help.

Trump was repeatedly told by trusted advisors, experts, and courts that there was no fraud. In the months after Election Day, many people close to Trump told him—repeatedly and emphatically—that he lost and that his assertions about election fraud were unfounded. Experts and advisors who publicly and privately assured Trump of the election’s legitimacy included his campaign advisors; DOJ lawyers, including Attorney General William Barr; high-level officials at the Department of Homeland Security (DHS); and Republican state-elected officials.

Trump and his supporters repeatedly failed to adduce evidence of fraud. Over many months and more than 60 lawsuits, neither Trump nor any of his supporters ever produced material evidence of fraud that any court was willing to accept.

After we conclude our review of the factual record, we turn in Section II to the status and procedural posture of the work of the January 6 Committee. We also discuss investigations by the DOJ and by prosecutors in Fulton County into attempts to overturn the election that are relevant to the Committee proceedings and to accountability for the alleged conspiracy.

In Section III we apply the law to the facts, focusing on the two federal crimes that U.S. District Court Judge David Carter, in a March 2022 decision, found that Trump likely committed.¹³ These offenses were advanced by the Committee in its filing with the judge and are central to framing the Committee’s proceedings and likely report.

¹³ *Eastman v. Thompson* Order Re: Privilege of Documents at [5](#).

In Section III.A., we assess the evidence that Trump’s schemes rise to one or more violations of 18 U.S.C. § 371, which creates a felony when “two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy.” The statute criminalizes, among other things, a conspiracy that uses dishonest means to obstruct or impede the lawful function of the U.S. government. We believe the law and facts suggest that this is what Trump and Eastman may have done by conspiring to obstruct the congressional count on January 6. There is similarly strong evidence that Trump and Clark may have violated § 371 by conspiring to subvert the DOJ’s election protection function, seeking to weaponize the DOJ to help Trump retain power. We also consider Mark Meadows’ possible exposure under this statute, and explain the importance of further developing the evidence about his conduct. Together with questions like what exactly transpired during Trump’s 187-minute silence on January 6 and the issue of intent, it is one of the most important tasks for the Committee.

In Section III.B., we analyze possible violations of 18 U.S.C. § 1512, whose subsection (c)(2) forbids attempts to corruptly obstruct or impede an official proceeding. Subsection § 1512(k) forbids a conspiracy to obstruct or impede an official proceeding. We apply the law to the facts and conclude that there is a strong case that Trump and members of his circle—including, most prominently, Eastman—may have violated § 1512(c)(2) and (k) through their scheme to stop or delay the congressional count of electoral vote certificates on January 6, 2021.

Section III.C.1. then briefly enumerates some other federal offenses for which Trump and those around him might be investigated—including violations of 18 U.S.C. § 241 (prohibiting conspiracies against voting rights), § 18 U.S.C. 610 (prohibiting coercing federal employees to engage in political activity), and 18 U.S.C. § 595 (prohibiting federal administrators from interfering with presidential elections).

While this report focuses on potential federal offenses, ongoing state and local investigations provide important context for the Committee proceedings. So, in Section III.C.2., we look at some possible state criminal claims, using the example of the Georgia offenses under investigation by the Fulton County District Attorney.¹⁴ As is well known, in a recorded phone call on January 2, 2021, Trump demanded that Georgia Secretary of State Brad Raffensperger “find 11,780

14 For an extended treatment of these potential Georgia offenses, see Brookings Report Re: Fulton County. For a succinct analysis, see Norman Eisen, Donald Ayer, Gwen Keyes Fleming, & Joshua Matz, *Trump Is Going Back to Georgia. Did He Break the Law There?* WASHINGTON POST (Sept. 24, 2021, 4:27 PM), <https://www.washingtonpost.com/outlook/2021/09/24/trump-georgia-election-law/>.

votes”—exactly one more than the margin of Joe Biden’s 11,779-vote victory.¹⁵ That call, and other Trump administration pressure, may well have violated Georgia criminal laws that prohibit—among other things—solicitation of election fraud and intentional interference with the performance of official election duties.

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

In Section IV, we turn to several additional defenses, explaining how they might be developed and why they appear unavailing. Among other things, we explain why there is likely no free speech defense here; why Trump will probably fail if he seeks shelter behind an advice of counsel argument; and why Eastman and other attorneys will likely not succeed if they defend their behavior as mere zealous advocacy on behalf of a client.

This report analyzes powerful evidence supporting the elements of potential criminal charges against Trump and some of his closest allies. We expect the Committee to elaborate on that evidence in its work (as well as considering possible remedial legislative responses, which we also discuss). In our conclusion, we discuss why holding the former president accountable for his actions to subvert our democratic system is important for the health of our democracy. We also discuss why we believe there is a strong basis for the January 6 Committee to refer Trump, Eastman, and Clark—and potentially others—to the DOJ for investigation, and why the evidence warrants the DOJ’s strong consideration for prosecution.

15 Amy Gardner, *‘I Just Want To Find 11,780 Votes:’ In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor*, WASHINGTON POST (Jan. 3, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html.

I. Facts

Donald Trump's unprecedented campaign to overturn the 2020 presidential election unfolded through a shifting and multifaceted series of strategies and in three chronological stages. Thanks in significant part to assiduous congressional digging, the public record about Trump's efforts is voluminous and still growing. While important questions remain unanswered and new facts seem to emerge daily, the known facts show that Trump tried to retain the presidency even though he knew he had lost a fair and secure election. These facts, especially when viewed in context, illuminate the critical issue of intent and suggest that Trump acted "corruptly" and "dishonestly" within the meaning of the law, and not with a genuine desire to vindicate the popular will.

The first stage of Trump's effort to overturn the election began well before Election Day. Trump telegraphed that he would reject the outcome of any election that he did not win—consistent with his past efforts to question the legitimacy of elections through false fraud allegations. With his allies, Trump spread falsehoods about widespread voter fraud and warned that his opponents would try to "rig" the election. And, by endorsing and valorizing violence, Trump inflamed his supporters and showed that he was willing to deploy extreme measures to obtain and retain power.

With his allies, Trump spread falsehoods about widespread voter fraud and warned that his opponents would try to "rig" the election.

The next phase started after the polls closed on November 3, 2020, and continued until the Capitol invasion on January 6, as Trump and his allies implemented their campaign to overturn the election. Even though Trump's own advisors and confidants told him that he lost a fair and secure election, he and his allies immediately spun out a series of provably false fraud claims in support of strategies ranging from the unethical—such as initiating frivolous litigation—to the likely unlawful, such as plotting to seize vote-counting equipment.

Finally, during the January 6 invasion of the Capitol, insurrectionists tried to accomplish through force what Trump had been unable to do otherwise: halt the congressional electoral count and prevent Joe Biden's victory. Trump failed to take timely action to stop the invasion and effectively ratified the insurrectionists' criminal conduct. Then, in the aftermath of January 6, he deployed a strategy of massive resistance at every turn, attempting to thwart accountability for the invasion and its incitement. He continues to peddle the Big Lie to this day, disrupting and harming our democracy.

A. Groundwork: The Run-Up to November 3

1. Pre-Election Claims of Fraud

Long before the 2020 election, Trump baselessly forecasted fraud and foreshadowed his refusal to concede power.¹⁶ In a July 19, 2020 interview on *Fox News*, Trump pointedly refused to agree to accept the election results: "I'm not going to just say yes. I'm not going to say no."¹⁷ On July 30, 2020, Trump threatened via Twitter to postpone the election—an unprecedented proposal, swiftly rejected by many elected officials from both parties.¹⁸ On August 17—and throughout the run-up to Election Day—Trump insisted that he could not be beaten absent some nefarious scheme: "The only way we're going to lose this election," he claimed, "is if this election is rigged."¹⁹ He said the same thing a week later: "The only way they can take this election away from us is if this is a rigged election."²⁰ And on September 23, at a news conference, Trump refused again to commit to a peaceful transfer of power. "There won't be a transfer," he said. "[W]e're going to have to see about what happens. You know that I've been complaining very strongly about the ballots, and the ballots are a disaster."²¹

16 See generally Kevin Liptak, *A List of the Times Trump Has Said He Won't Accept the Election Results or Leave Office if He Loses*, CNN (Sept. 24, 2020, 9:59 AM), <https://www.cnn.com/2020/09/24/politics/trump-election-warnings-leaving-office/index.html>.

17 Nick Niedzwiadek, *The 9 Most Notable Comments Trump Has Made About Accepting the Election Results*, POLITICO, (Sept. 24, 2020, 6:04 PM), <https://www.politico.com/news/2020/09/24/trump-casts-doubt-2020-election-integrity-421280>.

18 Maggie Haberman, Jonathan Martin, & Reid J. Epstein, *Trump Floats an Election Delay and Republicans Shoot It Down*, NEW YORK TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/us/politics/trump-delay-2020-election.html?action=click&module=RelatedLinks&pgtype=Article>.

19 Donald Trump Speech Transcript Wisconsin August 17, Rev (Aug. 17, 2020), <https://www.rev.com/blog/transcripts/donald-trump-speech-transcript-wisconsin-august-17>.

20 Donald Trump 2020 RNC Speech Transcript August 24, Rev (Aug. 24, 2020), <https://www.rev.com/blog/transcripts/donald-trump-2020-rnc-speech-transcript-august-24>.

21 Allan Smith, *Trump on Peaceful Transition If He Loses: 'Get Rid of The Ballots' And 'There Won't Be a Transfer'*, NBC NEWS (Sept. 23, 2020, 7:11 PM), <https://www.nbcnews.com/politics/2020-election/trump-peaceful-transition-if-he-loses-get-rid-ballots-there-n1240896>.

Trump's false fraud claims grew louder as the election drew closer. According to the former president and his surrogates, mail-in voting—a tried-and-true method in states across the nation—would open the door to “foreign countries” counterfeiting millions of ballots.²² He admitted he was blocking funding for the U.S. Postal Service to stop mail-in balloting.²³ Some Trump supporters alleged that Trump would lead in the original returns but would fall behind as fraudulent ballots were tabulated and his opponents enacted their plan to “steal” the election.²⁴ That drumbeat, warning of a stolen election, sounded throughout the election season, as “stop the steal” became a frequent refrain on Trump's Twitter feed and on those of his biggest supporters.²⁵

Trump's claims of election fraud in the run-up to the 2020 election echoed a strategy that he had repeatedly tried before. In 2016, Trump unexpectedly lost the Iowa presidential primary caucus to Texas Senator Ted Cruz, despite enjoying a polling lead beforehand. Without proof, Trump responded by claiming that he was the victim of fraud, tweeting: “Ted Cruz didn't win Iowa he illegally stole it.”²⁶ Later, he demanded a do-over: “Based on the fraud committed by Senator Ted Cruz during the Iowa Caucus, either a new election should take place or Cruz results nullified.”²⁷ After clinching the Republican nomination, Trump suggested that election rigging was widespread

Trump's claims of election fraud in the run-up to the 2020 election echoed a strategy that he had repeatedly tried before.

22 Joey Garrison, ‘Nonsense’: Election Experts Reject Trump's Claim that Foreign Countries Could Counterfeit Millions of Mail-in Ballots, USA TODAY (June 22, 2020, 11:51 PM), <https://www.usatoday.com/story/news/politics/elections/2020/06/22/voter-fraud-experts-slam-trump-claim-of-possible-counterfeit-ballots/3235242001/>.

23 Deb Riechmann & Anthony Izaguirre, *Trump admits he's blocking postal cash to stop mail-in votes*, ASSOCIATED PRESS (Aug. 13, 2020), <https://apnews.com/article/virus-outbreak-election-2020-ap-top-news-elections-politics-14a2ceda724623604cc8d8e5ab9890ed>. Litigation was filed to “challenge U.S. Postal Service delays and inadequate measures to ensure timely delivery of mail-in ballots. It was successful in doing so. See *Press Statement, NAACP, Public Citizen and LDF Claims Victory in Lawsuit Against U.S. Postal Service to Ensure Timely Delivery of Mailed Ballots* (Dec. 17, 2021), <https://naacp.org/articles/naacp-public-citizen-and-ldf-claims-victory-lawsuit-against-us-postal-service-ensure>.

24 Adam Kelsey, *Trump Adviser Predicts Sunbelt Sweep, Misleads on Post-election Counting*, ABC NEWS (Nov. 1, 2020, 4:15 PM), <https://abcnews.go.com/Politics/polls-show-tight-races-trump-adviser-predicts-sunbelt/story?id=73945929>.

25 DFR Lab, JUST SECURITY, *#StopTheSteal: Timeline of Social Media and Extremist Activities Leading to 1/6 Insurrection* (Feb. 10, 2021), <https://www.justsecurity.org/74622/stopthesteal-timeline-of-social-media-and-extremist-activities-leading-to-1-6-insurrection/>.

26 Nick Gass, *Trump Accuses Cruz of 'Fraud,' Calls for New Iowa Election*, POLITICO (Feb. 3, 2016, 5:13 PM), <https://www.politico.com/story/2016/02/trump-cruz-stole-iowa-tweet-deleted-218674>.

27 *Id.* Trump's behavior after the 2016 Iowa caucus presaged his 2020 attempts to overturn the election. After losing the caucus, Trump reportedly leaned on Iowa's Republican Party chair to reverse the voters' choice and invalidate the results. See Eleanor Hildebrandt, *Yes, Donald Trump Claimed Fraud after the 2016 Iowa Caucuses*, POLITIFACT (Nov. 20, 2020), <https://www.politifact.com/factchecks/2020/nov/20/tweets/yes-donald-trump-claimed-fraud-after-2016-iowa-cau/>.

as his poll numbers dipped.²⁸ Trump also baselessly claimed fraud after losing the popular vote in the general election to Hillary Clinton: “In addition to winning the Electoral College in a landslide,” he claimed, “I won the popular vote if you deduct the millions of people who voted illegally.”²⁹

2. Endorsing Violence

During the 2016 presidential campaign, Trump promised to provide legal defense for thugs willing to “knock the crap” out of protestors at his rallies.³⁰ When violence ensued, he applauded: “And that’s what we need a little bit more of.”³¹

This valorization of violence lasted throughout Trump’s first term in office. He bragged that his supporters were “tough people” who “don’t play it tough—until they go to a certain point, and then it would be very bad, very bad.”³² He failed to condemn the violence perpetrated by far-right demonstrators at the 2017 “Unite the Right” rally in Charlottesville, Virginia, saying there were “very fine people on both sides.”³³ In the summer of 2020, Trump responded to the racial justice protests unfolding in cities across the United States by threatening vigilante response: “When the looting starts,” he warned, “the shooting starts.”³⁴

Trump’s provocative rhetoric peaked in the run-up to Election Day in 2020, in tandem with his increasing invocation of the specter of mass voter fraud. In August 2020, Trump staunchly backed a caravan of his supporters who drove through downtown Portland, Oregon, “firing paint and pellet guns” at Black Lives Matters protestors: “In tweeting a video of the caravan on the move,” the *Washington Post* noted, “Trump called the participants ‘GREAT PATRIOTS!’”³⁵ During a presiden-

28 *US Election 2016: Trump Says Election ‘Rigged at Polling Places’*, BBC News (Oct. 17, 2016), <https://www.bbc.com/news/election-us-2016-37673797>.

29 Terrance Smith, *Trump Has Longstanding History of Calling Elections ‘Rigged’ if He Doesn’t Like the Results*, ABC News (Nov. 11, 2020, 5:24 AM), <https://abcnews.go.com/Politics/trump-longstanding-history-calling-elections-rigged-doesnt-results/story?id=74126926>.

30 Daniel White, *Donald Trump Tells Crowd to ‘Knock the Crap Out Of’ Hecklers*, TIME (Feb. 1, 2016, 3:51 PM), <https://time.com/4203094/donald-trump-hecklers/>.

31 Eric Levitz, *Trump on His Supporters Attacking Protesters: ‘That’s What We Need More of’*, NEW YORK MAG. (Mar. 11, 2016), <https://nymag.com/intelligencer/2016/03/trump-punching-protesters-is-very-appropriate.html>.

32 Justin Wise, *Trump Suggests That It Could Get ‘Very Bad’ If Military, Police, Biker Supporters Play ‘Tough’*, THE HILL (Mar. 14, 2019, 3:18 PM), <https://thehill.com/homenews/administration/434110-trump-suggests-that-things-could-get-very-bad-if-military-police/>.

33 Fabiola Cineas, *Donald Trump Is the Accelerant*, VOX (Jan. 9, 2021, 11:04 AM), <https://www.vox.com/21506029/trump-violence-tweets-racist-hate-speech>.

34 *Id.*

35 David Nakamura, Matt Viser, & Robert Klemko, *‘Great Patriots!’: Trump Lavishes Praise on Supporters Amid Deadly Clashes with Social Justice Protesters*, WASHINGTON POST (Aug. 30, 2020), https://www.washingtonpost.com/politics/trump-biden-kenosha-portland/2020/08/30/42f50c50-ead5-11ea-ab4e-581edb849379_story.html.

tial debate, when pressed to condemn the Proud Boys—the violent group whose members later allegedly conspired to storm the Capitol on January 6³⁶—Trump demurred, instead telling them to “stand back and stand by,” language that the Proud Boys read as an implicit endorsement.³⁷ And, when a pick-up truck caravan of allegedly armed Trump supporters besieged a Biden campaign bus on a Texas highway in October 2020, Trump expressed delight, tweeting “I LOVE TEXAS” along with the video of the confrontation.³⁸

B. The Campaign to Overturn the Election: November 3 through January 6

1. Knowingly False Claims of Fraud

On Election Night, Trump immediately and falsely proclaimed victory, claiming an unspecified “major fraud on our nation.”³⁹ At the same time, prominent Trump allies—including his son Eric and his campaign spokesman—began spinning out the first of many shifting allegations of election fraud.⁴⁰ The Trump campaign, and the then president’s own social media channels, soon began to

36 See, e.g., Ryan Lucas, *Proud Boy Leader Pleads Guilty to Jan. 6 Conspiracy, Agrees to Cooperate with DOJ*, NPR (Apr. 8, 2022, 1:42 PM), <https://www.npr.org/2022/04/08/1091693738/proud-boy-leader-pleads-guilty-to-jan-6-conspiracy-agrees-to-cooperate-with-doj>.

37 Adam Gabbatt, *Trump’s Refusal to Condemn White Supremacy Fits Pattern of Extremist Rhetoric*, THE GUARDIAN (Sept. 30, 2020, 10:39 PM), <https://www.theguardian.com/us-news/2020/sep/30/trump-white-supremacy-extremist-rhetoric>; Kathleen Ronayne & Michael Kunzelman, *Trump to Far Right Extremists: Stand Back and Stand By*, ASSOCIATED PRESS (Sept. 30, 2020), <https://apnews.com/article/election-2020-joe-biden-race-and-ethnicity-donald-trump-chris-wallace-0b32339da25fbc9e8b7c7c7066a1db0f>.

38 Katie Shepherd, *Trump Cheers Supporters Who Swamped a Biden Bus in Texas*, WASHINGTON POST (Nov. 2, 2020), <https://www.washingtonpost.com/nation/2020/11/02/trump-caravan-biden-bus/>.

39 Colby Itkowitz, *Trump Falsely Asserts Election Fraud, Claims a Victory*, WASHINGTON POST (Nov. 4, 2020), <https://www.washingtonpost.com/elections/2020/11/03/trump-biden-election-live-updates/>. And see *President Trump Remarks on Election Status*, C-SPAN (Nov. 3, 2020) <https://www.c-span.org/video/?477710-1/president-trump-remarks-election-status> (“This is a fraud on the American public. This is an embarrassment to our country. We were getting ready to win this election. Frankly, we did win this election.”). Some of the substance of the paragraph that follows was drawn from several of the authors’ own amicus brief in *Trump v. Thompson*, No. 21-932 (Jan. 4, 2022).

40 See, e.g., Isaac Stanley-Becker, Tony Romm, Elizabeth Dwoskin, & Drew Harwell, *Trump’s Campaign and Family Boost Bogus Conspiracy Theories in a Bid to Undermine Vote Count*, WASHINGTON POST (Nov. 4, 2020), <https://www.washingtonpost.com/technology/2020/11/04/election-results-misinformation/> (“Eric Trump tweeted a video... that purported to show someone burning ballots cast for his father. The materials turned out to be sample ballots, and Twitter quickly suspended the original account that circulated the misleading clip... And the campaign’s spokesman, Tim Murtaugh, claimed without evidence that crowd control at a processing center in Detroit was an effort to thwart Trump’s chances of reelection.”); Kevin Liptak, *Trump Seeks to Delegitimize Vote Even as His Campaign Says Math Will Turn His Way*, CNN (Nov. 4, 2020, 8:47 PM), <https://www.cnn.com/2020/11/04/politics/trump-election-results/index.html>.

amplify this misinformation.⁴¹ “Stop the steal” echoed over and over on Trump’s Twitter feed and those of his supporters.⁴² Trump himself took to Twitter 75 times leading up to January 6, 2021 to claim the election was “rigged.”⁴³ These false allegations were backed by a propaganda machine disseminating conspiracy theories of fraud allegedly perpetrated by everyone from Detroit voters to deceased Venezuelan dictator Hugo Chávez.⁴⁴

There is overwhelming evidence that Trump was not merely mistaken or misled.⁴⁵ In fact, Trump’s own experts and allies told him repeatedly that there was no game-changing voter fraud.⁴⁶

Trump’s own campaign told him there was no fraud. According to Trump senior campaign advisor Jason Miller, soon after the election, a campaign data expert told Trump “in pretty blunt terms” that he was going to lose.⁴⁷ Deposed by the January 6 Committee, Miller himself testified that he

41 See Alex Wayne, Mario Parker, & Mark Niquette, *Trump Campaign to Run Ads Promoting Effort to Overturn Election*, BLOOMBERG (Dec. 11, 2020), <https://www.bloomberg.com/news/articles/2020-12-11/trump-campaign-to-run-ads-promoting-effort-to-overturn-election>.

42 DFR Lab, JUST SECURITY, #StopTheSteal: Timeline of Social Media and Extremist Activities Leading to 1/6 Insurrection (Feb. 10, 2021), <https://www.justsecurity.org/74622/stopthesteal-timeline-of-social-media-and-extremist-activities-leading-to-1-6-insurrection/>.

43 William Cummings, Joey Garrison, & Jim Sergent, *By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA TODAY, (Jan. 6, 2021) <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> (tallying 75 times that Trump claimed the election was “rigged” on Twitter, between May of 2020 and January 6, 2021).

44 See, e.g., Juana Summers, *Trump Push to Invalidate Votes in Heavily Black Cities Alarms Civil Rights Groups*, NPR (Nov. 24, 2020, 6:26 AM), <https://www.npr.org/2020/11/24/938187233/trump-push-to-invalidate-votes-in-heavily-black-cities-alarms-civil-rights-group>; *Pearson v. Kemp*, No. 1:20-CV-4809-TCB, 2020 WL 7040582 (N.D. Ga. Nov. 29, 2020) (federal case brought by plaintiffs who alleged, without proof, that a Hugo Chavez-designed software system, manipulated by Iran and China, somehow manipulated swing state ballots.).

45 *Eastman v. Thompson* Order Re: Privilege of Docs at 34 (“President Trump and Dr. Eastman justified the plan with allegations of election fraud—but President Trump likely knew the justification was baseless, and therefore that the entire plan was unlawful. Although Dr. Eastman argues that President Trump was advised several state elections were fraudulent, the Select Committee points to numerous executive branch officials who publicly stated and privately stressed to President Trump that there was no evidence of fraud.”).

46 *Exhaustive Fact Check Finds Little Evidence of Voter Fraud, but 2020’s ‘Big Lie’ Lives On*, PBS NEWS HOUR (Dec. 17, 2021 6:30 PM), <https://www.pbs.org/newshour/show/exhaustive-fact-check-finds-little-evidence-of-voter-fraud-but-2020s-big-lie-lives-on> (“Well, in the end, we found it was just shy of 475 potential cases of voter fraud in those six states, which would not have made a difference in the outcome of the 2020 presidential election.”); Rosalind S. Helderman, Jacqueline Alemany, Josh Dawsey, & Tom Hamburger, *New Evidence Shows Trump was Told Many Times There Was No Voter Fraud – But He Kept Saying It Anyway*, WASHINGTON POST (Mar. 3, 2022, 8:09 PM), <https://www.washingtonpost.com/politics/2022/03/03/trump-election-jan-6/>.

47 See Congressional Defendants’ Brief in Opposition to Plaintiffs’ Privilege Assertions, p. 5, *Eastman v. Thompson*, 22-CV-99, (C.D. Ca. Mar. 3, 2022), ECF # 160 (hereinafter “Cong. Defs. Opp. to Pl. Eastman’s Privilege Assertions”) (citing to Miller deposition).

repeatedly told Trump there was no evidence of game-changing fraud.⁴⁸ And, in an internal memo dated November 19, 2020, Trump campaign officials concluded that claims about fraud relating to voting machines were false.⁴⁹

The intelligence community told Trump there was no fraud. On November 12, 2020, the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency announced that there was no evidence of fraud: "The November 3rd election was the most secure in American history.... There is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised.... While we know there are many unfounded claims and opportunities for misinformation about the process of our elections, we can assure you we have the utmost confidence in the security and integrity of our elections, and you should too."⁵⁰ This DHS assessment was apparently backed by the Director of National Intelligence, who in December of 2020 gave a classified briefing to DOJ lawyer Jeffrey Clark, advising him that there was no evidence of foreign interference with the vote.⁵¹

The DOJ told Trump there was no fraud. On December 1, 2020, Attorney General William Barr acknowledged publicly that the DOJ had seen no evidence of fraud "on a scale that could have effected a different outcome in the election."⁵² Reporting indicates that, in private meetings with Trump, Barr used stronger language. In one account, Barr told Trump on December 1 that the DOJ had investigated and debunked fraud claims: "We've looked into these things and they're nonsense."⁵³ Another account has Barr telling Trump that his claims about election fraud were "bullshit."⁵⁴

48 *Id.*

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

50 Joint Statement from Election Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

51 Katelyn Polantz, Zachary Cohen, & Evan Perez, *How a Trump Environmental Lawyer Tried To Weaponize the Justice Department To Help the President*, CNN (Aug. 6, 2021), <https://www.cnn.com/2021/08/06/politics/doj-clark-trump-election/index.html>.

52 Katie Benner & Michael S. Schmidt, *Barr Acknowledges Justice Dept. Has Found No Widespread Voter Fraud*, NEW YORK TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/12/01/us/politics/william-barr-voter-fraud.html>.

53 John L. Dorman, *Trump Started Speaking in the Third Person During a Heated Discussion with Bill Barr Regarding the Election Results, Book Says*, BUSINESS INSIDER (July 31, 2021, 9:49 AM), <https://www.businessinsider.com/trump-spoke-third-person-barr-election-conspiracy-theories-discussion-book-2021-7>. Barr recounts his post-election interactions with Trump in further detail in his 2022 book. See William Barr, *One Damn Thing After Another: Memoirs of an Attorney General* (2022).

54 Jesse Byrnes, *Barr Told Trump that Theories About Stolen Election Were "Bulls---": Report*, THE HILL (Jan. 18, 2021, 7:56 AM), <https://thehill.com/homenews/administration/534672-barr-told-trump-that-theories-about-stolen-election-were-bulls-report/>.

Barr was not the only DOJ leader who explicitly told Trump that the election outcome was untainted by fraud. In a December 27 phone call, Acting Deputy Attorney General Richard Donoghue told Trump: “Sir, we’ve done dozens of investigations, hundreds of interviews. The major allegations are not supported by the evidence developed.... We are doing our job. Much of the info you’re getting is false.”⁵⁵ On December 28, Donoghue gave Jeffrey Clark the same message: “The investigations that I am aware of relate to suspicions of misconduct that are of such a small scale that they simply would not impact the outcome of the Presidential Election.... Despite dramatic claims to the contrary, we have not seen the type of fraud that calls into question the reported (and certified) results of the election.”⁵⁶ And in an Oval Office meeting on December 31, 2020, Acting Attorney General Jeffrey Rosen and Donoghue told a group including Trump and Meadows that the DOJ “operated based on facts and evidence,” and that replacing the DOJ’s leadership “would not change the outcome” of the election.⁵⁷

State-level Republicans told Trump there was no fraud. The calls were not just coming from inside the house. For example: in his January 2, 2021 phone call with Georgia Secretary of State Raffensperger, Trump attempted to purvey the myth that Atlanta tabulators had illegally produced and counted suitcases full of illicit ballots. Raffensperger debunked that myth, explaining that his investigators had reviewed video of the entire scene and found no fraud. But when Raffensperger offered to share the link to the video, Trump refused to investigate further. “I don’t care about the link,” he told Raffensperger. “I don’t need it.”⁵⁸

So multiple, credible sources—including multiple partisan allies—told Trump there was no justification for attempts to overturn the election. Meanwhile, no countervailing evidence was ever presented. None of the more than 60 lawsuits filed by Trump and his supporters revealed any credible evidence of material fraud, and no claims of fraud were sustained by any court.⁵⁹ Audits of swing-state results—some commissioned and directed by Trump’s ideological allies—repeatedly

55 Rebecca Beitsch, *Anger and Insults: Documents Show DOJ Pushed Back Bluntly at Trump Effort*, THE HILL (Mar. 3, 2022, 3:06 PM), <https://thehill.com/policy/national-security/596769-anger-and-insults-documents-show-doj-pushed-back-bluntly-at-trump/>.

56 Senate Report at 22.

57 Senate Report at 28.

58 Amy Gardner & Paulina Firozi, *Here’s the Full Transcript and Audio of the Call Between Trump and Raffensperger*, WASHINGTON POST (Jan. 5, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html.

59 William Cummings, Joey Garrison, & Jim Sergent, *By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>.

demonstrated that he lost a fair and secure election.⁶⁰ And Trump and his closest allies repeatedly failed to bring forth any proof of fraud. For instance, on January 2, 2021, Trump and his lawyers spoke on a Zoom call with 300 state legislators, urging them to intervene to reverse the election. But Michigan State Senator Ed McBroom later told reporters that Trump and his team did not provide “any evidence to substantiate claims” of voter fraud.⁶¹

While Trump and his allies spread baseless claims of fraud, they also contemplated, and attempted to implement, multiple schemes to retain power.

2. Schemes to Retain Power

While Trump and his allies spread baseless claims of fraud, they also contemplated, and attempted to implement, multiple schemes to retain power. Those included:

Continued Threats and Encouragement of Violence. Above, we discussed President Trump’s actions, in advance of Election Day, foreshadowing the possibility of political violence. The weeks after November 3 saw the first fruits of that harvest, with Trump supporters aiming threats at

60 See, e.g., Daniel Funke, *Fact Check: Arizona Audit Affirmed Biden’s Win, Didn’t Prove Voter Fraud, Contrary to Trump Claim*, USA TODAY (Sept. 28, 2021, 11:05 PM), <https://www.usatoday.com/story/news/factcheck/2021/09/28/fact-check-arizona-audit-affirms-biden-win-doesnt-prove-voter-fraud/5846640001/>; Michigan Secretary of State, Press Release, *Post-Election Audit Report Confirms Accuracy and Integrity of Michigan’s Election* (Apr. 22, 2021), <https://www.michigan.gov/sos/0,4670,7-127--557605--,00.html>.

61 Jacqueline Alemany, Emma Brown, Tom Hamburger, & Jon Swaine, *Ahead of Jan. 6, Willard Hotel in Downtown DC was a Trump Team ‘Command Center’ for Effort To Deny Trump the Presidency*, WASHINGTON POST (Oct. 23, 2021, 5:51 PM), https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html. Also notably: In June of 2021, a New York appellate court suspended Rudy Giuliani’s law license, citing “uncontroverted evidence that [Giuliani] communicated demonstrably false and misleading statements to courts, lawmakers and the public at large in his capacity as lawyer for former President Donald J. Trump... These false statements were made to improperly bolster Giuliani’s narrative that due to widespread voter fraud, victory in the 2020 United States presidential election was stolen from his client.” *In re Rudolph W. Giuliani, An Attorney*, No. 2021-506, 2 (N.Y. App. 1st Div. Jun. 24, 2021) [https://www.nycourts.gov/courts/ad1/calendar/List_Word/2021/06_Jun/24/PDF/Matter%20of%20Giuliani%20\(2021-00506\)%20PC.pdf](https://www.nycourts.gov/courts/ad1/calendar/List_Word/2021/06_Jun/24/PDF/Matter%20of%20Giuliani%20(2021-00506)%20PC.pdf).

election officials across the country who resisted efforts to overturn the election.⁶² Those threats devolved into lawbreaking and violence well before January 6. Trump supporters took part in two protests that turned violent in Washington, D.C. in the weeks after the election. At a rally on the evening of November 14, 2020, multiple police officers were injured and nearly two dozen arrests were made.⁶³ And on December 12, 2020, eight District police officers were injured in a riot stemming from a “Stop the Steal” protest that led to more than 30 arrests.⁶⁴

Trump knew about these violent rallies. He actually flew over the December 12 rally, for instance, in Marine One.⁶⁵ But he still urged his supporters to come to the Capitol on January 6. On December 19, 2020, he tweeted: “Big protest in D.C. on January 6th. Be there, will be wild!”⁶⁶ On December 26, 2020, he followed up: “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

62 For instance: On December 6, amid persistent Trump claims that the Michigan election was somehow fraudulent, armed vigilantes surrounded the home of Michigan’s Secretary of State, Cassidy Johncox, *Michigan SOS Jocelyn Benson Says Armed Protesters Gathered Outside Her Detroit Home*, CLICK ON DETROIT (Dec. 6, 2020, 5:50 PM), <https://www.clickondetroit.com/news/local/2020/12/06/michigan-sos-jocelyn-benson-says-armed-protesters-gathered-outside-her-detroit-home/>. Similarly, President Trump tweeted about Georgia Secretary of State Brad Raffensperger persistently after Election Day. On Thanksgiving Day, he declared Raffensperger an “enemy of the people” for insisting upon the integrity of Georgia’s election. Adam Payne, *Trump Called Georgia Secretary of State Brad Raffensperger an ‘Enemy of the People’ Exactly Two Years After He Said He’d be ‘Fantastic’*, BUSINESS INSIDER (Nov. 27, 2022, 6:04 AM), <https://www.businessinsider.com/trump-calls-raffensperger-enemy-of-people-over-baseless-election-claims-2020-11>. Reflecting an ominous pattern that would recur many times over the weeks that followed, President Trump’s attacks on Raffensperger sparked threats of death and violence. One such message warned that “the Raffenspergers should be put on trial for treason and face execution.” Jake Lahut, *Georgia’s Republican Secretary Of State And His Wife Received Texts Telling Them They Deserve ‘To Face A Firing Squad’ As Trump Escalated His Attacks On Election Results*, BUSINESS INSIDER (Nov. 19, 2020, 11:23 AM), <https://www.businessinsider.com/georgia-secretary-of-state-and-his-wife-receive-death-threats-2020-11>. Nonetheless, President Trump continued his assault on Raffensperger. President Trump’s attacks were so concerning that Gabriel Sterling, another Republican election official in Georgia, publicly warned: “Mr. President... Stop inspiring people to commit potential acts of violence. Someone’s going to get hurt, someone’s going to get shot, someone’s going to get killed.” Stephen Fowler, *‘Someone’s Going To Get Killed’: Ga. Official Blasts GOP Silence On Election Threats*, NPR (Dec. 1, 2020, 10:55 PM), <https://www.npr.org/sections/biden-transition-updates/2020/12/01/940961602/someones-going-to-get-killed-ga-official-blasts-gop-silence-on-election-threats>.

63 Marissa J. Lang, Michael E. Miller, Peter Jamison, Justin Wm. Moyer, Clarence Williams, Peter Hermann, Fredrick Kunkle, & John Woodrow Cox, *After Thousands of Trump Supporters Rally in D.C., Violence Erupts when Night Falls*, WASHINGTON POST (Nov. 15, 2020), <https://www.washingtonpost.com/dc-md-va/2020/11/14/million-maga-march-dc-protests/>.

64 Lauren Koenig, *Several People Stabbed and 33 Arrested as ‘Stop the Steal’ Protestors and Counterprotestors Clash in Washington, DC*, CNN (Dec. 13, 2020, 6:13 PM), <https://amp.cnn.com/cnn/2020/12/12/us/stop-the-steal-protest-washington-dc-trnd/index.html>.

65 Alan Feuer, *New Focus on How a Trump Tweet Incited Far-Right Groups Ahead of Jan. 6*, NEW YORK TIMES (Mar. 29, 2022), <https://www.nytimes.com/2022/03/29/us/politics/trump-tweet-jan-6.html>.

66 Donald J. Trump (@realDonaldTrump), TRUMP TWITTER ARCHIVE (Dec. 19, 2020, 1:42 AM), <https://www.thetrumparchive.com/>.

evidence. They should be ashamed. History will remember. Never give up. See everyone in D.C. on January 6th.”⁶⁷ On January 1: “The BIG Protest Rally in Washington, D.C., will take place at 11.00AM on January 6th ... Stop The Steal!”⁶⁸ He and his campaign backed his words with deeds: They helped to plan and fund the rally, donating more than \$4.3 million to organizers.⁶⁹ According to *Washington Post* reporting, Mark Meadows “was repeatedly briefed on the event and even made a request for the programming”⁷⁰ and “provided guidance,”⁷¹ as well as allegedly attending a December 21 meeting between Trump and GOP representatives in which the attendees discussed voter fraud and plans for January 6.⁷² Testimony from a Meadows aide also shows that the Secret Service warned Meadows that the rally could devolve into violence.⁷³

Meritless Litigation. In the weeks that followed November 3, 2020, Trump and his allies filed more than 60 legal challenges to the election results,⁷⁴ losing all but one—and the solitary victory neither demonstrated fraud nor had any impact on Trump’s electoral loss.⁷⁵ Even Trump-appointed judges

67 Donald J. Trump (@realDonaldTrump), TRUMP TWITTER ARCHIVE (Dec. 26, 2020, 8:14 AM), <https://www.thetrumparchive.com/>.

68 Donald J. Trump (@realDonaldTrump), TRUMP TWITTER ARCHIVE (Jan. 1, 2021, 2:53 PM), <https://www.thetrumparchive.com/>.

69 Alex J. Rouhandeh, *Trump Campaign Paid More Than \$4.3 Million to Jan. 6 Event Organizers*, NEWSWEEK (Aug. 30, 2021, 5:16 PM), <https://www.newsweek.com/trump-campaign-paid-more-43-million-jan-6-event-organizers-1624359>.

70 Jacqueline Alemany, Josh Dawsey, & Beth Reinhard, *Backstage Drama at Jan. 6 Rally for Trump Draws Interest of House Committee*, WASHINGTON POST (Feb. 25, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/02/26/trump-pierson-wren/>.

71 Michael Kranish, *Inside Mark Meadows’s Final Push to Keep Trump in Power*, WASHINGTON POST (May 9, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/05/09/inside-mark-meadowss-final-push-keep-trump-power/>.

72 Meadows tweeted about the meeting: “Several members of Congress just finished a meeting in the Oval Office with President @realDonaldTrump, preparing to fight back against mounting evidence of voter fraud. Stay tuned.” See *Id.*

73 Defendant’s Motion for Summary Judgment, Exhibit P at 4, *Meadows v. Pelosi*, 21-CV-3217 (D.D.C. Apr. 22, 2022), ECF 15-17 (hereinafter “Defendant’s Motion for Summary Judgment”). And see Aaron Blake, *The Two Significant New Jan. 6 Disclosures from Mark Meadows’s Aide*, WASHINGTON POST (Apr. 25, 2022, 12:15 PM), <https://www.washingtonpost.com/politics/2022/04/25/cassidy-hutchinson-mark-meadows/>.

74 William Cummings, Joey Garrison, & Jim Sergent, *By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>. The States United Democracy Center, of which one of the authors of this report is executive co-chair, represented state officials in several of these lawsuits. A list of these and other cases is available on the States United [website](#).

75 See Alanna Durkin Richer, *Trump Loves to Win but Keeps Losing Election Lawsuits*, ASSOCIATED PRESS (Dec. 4, 2020), <https://apnews.com/article/donald-trump-losing-election-lawsuits-36d113484ac0946fa5f0614deb7de15e>. Trump’s lone win came in *Donald J. Trump for President, Inc., v. Boockvar*, No. 602-MD-2020 (Comm. Ct. Pa. Nov. 12, 2020). There, the Pennsylvania Secretary of State had issued guidance to local election boards, instructing them to give absentee and mail-in voters three extra days to provide proof of identification. Trump’s campaign sought and received an injunction against the implementation of that guidance, arguing that Boockvar was acting beyond her authority. There was no claim (and no proof) of any voter fraud—only a legal argument about the limits of Boockvar’s power to promulgate election rules.

decisively rejected the suits as backed by neither law nor evidence.⁷⁶ Multiple lawyers representing Trump and his allies have since been investigated or sanctioned for presenting frivolous claims.⁷⁷ As January 6 approached and in the face of the near-universal failure of his litigation strategy, Trump still pressed forward. As late as December 29, 2020, Trump—directly and through a personal lawyer—repeatedly pressured DOJ leadership to file a doomed and meritless Supreme Court brief seeking to overturn the election results in six states.⁷⁸

Invoking National Security Powers. In December of 2020, with his litigation strategy foundering, Trump reportedly considered another troubling stratagem for retaining power: invoking national security powers. Trump took a December 18, 2020 Oval Office meeting with supporters including former National Security Advisor Michael Flynn, who had vocally called for declaring martial law to force an election do-over.⁷⁹ During that meeting, Flynn and others reportedly urged Trump to invoke emergency powers to seize voting machines—which are the property of state and local governments.⁸⁰ Trump reportedly seriously considered their advice, even though White House

76 See, e.g., *Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania*, 830 F. App’x 377, 381 (3d Cir. 2020) (“Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”) See also *Wood v. Raffensperger*, 981 F.3d 1307 (11th Cir. 2020) (“We agree with the district court that Wood lacks standing to sue because he fails to allege a particularized injury. And because Georgia has already certified its election results and its slate of presidential electors, Wood’s requests for emergency relief are moot to the extent they concern the 2020 election.”). See also Aaron Blake, *The Most Remarkable Rebukes of Trump’s Legal Case: From the Judges He Hand-Picked*, WASHINGTON POST (Dec. 14, 2020), <https://www.washingtonpost.com/politics/2020/12/14/most-remarkable-rebukes-trumps-legal-case-judges-he-hand-picked/> (“Brett H. Ludwig, whom Trump nominated to a U.S. District Court in Wisconsin in 2017... called the Trump campaign’s request to have the GOP-appointed Wisconsin legislature pick new presidential electors “bizarre.”).

77 *In re Rudolph W. Giuliani*, at 2, 30 (explaining that Giuliani had “communicated demonstrably false and misleading statements to courts, lawmakers and the public at large in his capacity as lawyer” and emphasizing that “[t]he seriousness of [Giuliani’s] uncontroverted misconduct cannot be overstated”); see also *In re Rudolph W. Giuliani*, Order, App. D.C., No. 21-BG-423 (July 7, 2021); *King v. Whitmer*, 556 F. Supp. 3d 680, 688 (E.D. Mich. 2021). (sanctioning Lin Wood, Sidney Powell, and seven others and explaining, “[i]t is one thing to take on the charge of vindicating rights associated with an allegedly fraudulent election. It is another to take on the charge of deceiving a federal court and the American people into believing that rights were infringed, without regard to whether any laws or rights were in fact violated. This is what happened here”).

78 Senate Report at 26.

79 Toluse Olorunnipa, Josh Dawsey, Rosalind S. Helderman, & Emma Brown, *Trump Assembles a Ragtag Crew of Conspiracy-Minded Allies in Flailing Bid to Reverse Election Loss*, WASHINGTON POST (Dec. 21, 2020), https://www.washingtonpost.com/politics/trump-assembles-a-ragtag-crew-of-conspiracy-minded-allies-in-flailing-bid-to-reverse-election-loss/2020/12/21/d7674cd2-43b2-11eb-b0e4-0f182923a025_story.html.

80 Jonathan Swan & Zachary Basu, *Inside the Craziest Meeting of the Trump Presidency*, AXIOS (Feb. 2, 2021), <https://www.axios.com/2021/02/02/trump-oval-office-meeting-sidney-powell?deepdive=1> (“The words ‘martial law’ were never spoken during the meeting, despite Flynn having raised the idea in an appearance the previous day on Newsmax, a right-wing hive for election conspiracies. But this was a distinction without much of a difference. What Flynn and Powell were proposing amounted to suspending normal laws and mobilizing the U.S. government to seize Dominion voting machines around the country.”).

lawyers told him there was no legal basis for invoking emergency powers to interfere with the election.⁸¹

Phony Elector Certificates. Trump allies apparently orchestrated an effort to convince Republican electors in seven battleground states to submit false electoral certificates.⁸² These certificates purported to show that Trump had won those seven states—even though final, official counts in each state had shown Biden to be the winner.⁸³ Michigan Republican Party Co-Chair Meshawn Maddock, one of that state’s slate of sixteen fake electors, has explicitly acknowledged that she acted at the behest of the Trump campaign: “We fought to seat the electors. The Trump campaign asked us to do that. I’m under a lot of scrutiny for that today.”⁸⁴ Meadows’ aide Cassidy Hutchinson testified to the January 6 Committee that the White House Counsel’s Office told Meadows and others clearly and directly that the phony elector scheme had no legal legitimacy.⁸⁵

Pressuring State Officials. Trump and his allies relentlessly pressured Georgia officials to reverse Biden’s 11,779-vote victory. That included a November 13 phone call in which Trump ally Lindsey Graham, Republican Senator from South Carolina, reportedly asked Georgia Secretary of State

81 Luke Broadwater, Maggie Haberman, Alan Feuer, & Michael S. Schmidt, *Jan. 6 Panel Examining Trump’s Role in Proposals to Seize Voting Machines*, NEW YORK TIMES (Feb. 1, 2022), <https://www.nytimes.com/2022/02/01/us/jan-6-panel-trump-voting-machines.html>. See also Alan Feuer, Katie Benner, & Luke Broadwater, *Intensifying Inquiry Into Alternate Electors Focuses on Trump Lawyers*, NEW YORK TIMES (May 25, 2022), <https://www.nytimes.com/2022/05/25/us/politics/pro-trump-lawyers-elector-scheme.html>.

82 Federal prosecutors have acknowledged an ongoing investigation into the fake elector certificates, according to Deputy Attorney General Lisa Monaco. Evan Perez & Tierney Sneed, *Exclusive: Federal Prosecutors Looking at 2020 Fake Elector Certifications*, CNN (Jan. 26, 2022, 6:56 PM), <https://www.cnn.com/2022/01/25/politics/fake-trump-electoral-certificates-justice-department/index.html>. Notably, Donald Trump Jr. apparently advocated for the strategy of promulgating phony electoral certificates in a November 5, 2020 text to White House Chief of Staff Mark Meadows. See Ryan Nobles, Zachary Cohen, & Annie Grayer, “We Control Them All”: Donald Trump Jr. Texted Meadows Ideas for Overturning 2020 Election Before It Was Called, CNN (Apr. 9, 2022, 10:02 AM), <https://www.cnn.com/2022/04/08/politics/donald-trump-jr-meadows-text/index.html>.

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

84 Adam Brewster, *Michigan GOP Co-chair Said Trump Campaign Encouraged Efforts to Give Him State’s Electoral Votes*, CBS NEWS (Jan. 21, 2022, 8:22 AM), <https://www.cbsnews.com/news/trump-campaign-michigan-2020-state-electoral-votes/>.

85 Defendant’s Motion for Summary Judgment, Exhibit G at 6. And see Aaron Blake, *The Two Significant New Jan. 6 Disclosures from Mark Meadows’s Aide*, WASHINGTON POST (Apr. 25, 2022, 12:15 PM), <https://www.washingtonpost.com/politics/2022/04/25/cassidy-hutchinson-mark-meadows/>. Meadows, in his 2021 memoir, defended his efforts to reverse the election results, saying “The facts of fraud were not looked at by the judges and courts,” and that the Supreme Court “would not hear any of President Trump’s many challenges to the election results.” See Mark Meadows, *The Chief’s Chief* (2021) and Michael Kranish, *Inside Mark Meadows’s Final Push to Keep Trump in Power*, WASHINGTON POST (May 9, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/05/09/inside-mark-meadowss-final-push-keep-trump-power/>. As noted in the introduction, more than 60 lawsuits challenging the election results were tossed out or denied, and members of Trump’s administration, including in the DOJ, stated there was no substantial evidence of meaningful fraud.

Brad Raffensperger to—in Raffensperger’s understanding—“find a way to toss legally cast ballots.”⁸⁶ On December 22, 2020, Meadows visited a civic center in Atlanta where state officials were reviewing mail-in ballots as part of a small-sample audit.⁸⁷ When he was unable to enter a secure room where the audit was being conducted, he engaged Frances Watson, the secretary of state’s chief investigator who was overseeing the audit, and obtained her phone number. Meadows also pressed for Georgia officials to share legally-protected confidential voter data with Trump.⁸⁸ On December 28, Clark, apparently after meeting with Trump, drafted a letter to be sent from the DOJ to Georgia officials. The letter claimed that the DOJ had “taken notice” of unspecified election “irregularities” and urged the state to convene the legislature “so that its legislators are in a position to take additional testimony, receive new evidence, and deliberate on the matter consistent with duties under the U.S. Constitution.”⁸⁹

Meanwhile, Trump himself opened a social media front against Raffensperger, tweeting about him repeatedly in the weeks after the election and calling him an “enemy of the people” for insisting on the integrity of the election.⁹⁰ And Trump directly pressured Georgia officials to overturn Biden’s win. On December 5, Trump called Georgia Governor Brian Kemp, urging him “to call a special session of the state legislature for lawmakers to override the results and appoint electors who would back the president at the electoral college.” He also asked Kemp “to demand an audit of signatures on mail ballots,” which Kemp had no legal authority to do.⁹¹

On December 23, Trump called the state’s chief elections investigator after Meadows’ conversation with her the preceding day and seemingly urged her to find voter fraud, telling her: “When the

86 Graham, asked about his conversation with Raffensperger, characterized claims that he was suggesting the secretary of state throw out legally cast ballots as “ridiculous.” See Amy Gardner, *Ga. Secretary of State Says Fellow Republicans Are Pressuring Him to Find Ways to Exclude Ballots*, WASHINGTON POST (Nov. 16, 2020), https://www.washingtonpost.com/politics/brad-raffensperger-georgia-vote/2020/11/16/6b6cb2f4-283e-11eb-8fa2-06e7cb-b145c0_story.html.

87 Michael Kranish, *Inside Mark Meadows’s Final Push to Keep Trump in Power*, WASHINGTON POST (MAY 9, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/05/09/inside-mark-meadowss-final-push-keep-trump-power/>.

88 *Id.*; Linda So, *Trump’s Chief of Staff Could Face Scrutiny in Georgia Criminal Probe*, REUTERS (Mar. 19, 2021, 4:05 PM), <https://www.reuters.com/article/us-usa-trump-georgia-meadows-insight/trumps-chief-of-staff-could-face-scrutiny-in-georgia-criminal-probe-idUSKBN2BB0XX>. Meadows reportedly sought to “get together and work out a plan to address some of what we’ve got with your attorneys where we can we can actually look at the data.” *Id.*

89 Senate Report at 21.

90 Adam Payne, *Trump Called Georgia Secretary of State Brad Raffensperger an ‘Enemy of the People’ Exactly Two Years After He Said He’d be ‘Fantastic*, BUSINESS INSIDER (Nov. 27, 2022, 6:04 AM), <https://www.businessinsider.com/trump-calls-raffensperger-enemy-of-people-over-baseless-election-claims-2020-11>.

91 Amy Gardner, Colby Itkowitz, & Josh Dawsey, *Trump Calls Georgia Governor to Pressure Him for Help Overturning Biden’s Win in the State*, WASHINGTON POST (Dec. 5, 2020), https://www.washingtonpost.com/politics/trump-kemp-call-georgia/2020/12/05/fd8d677c-3721-11eb-8d38-6aea1adb3839_story.html.

right answer comes out, you'll be praised."⁹² On January 2, Trump called Raffensperger directly, demanding that he "find" enough votes to throw the election: "I just want to find 11,780 votes, which is one more than we have because we won the state." If Raffensperger failed to comply, Trump warned, it would be "a criminal offense" and "a big risk to you and to Ryan [Germany], your lawyer."⁹³

Georgia was not the only state where Trump and his allies inappropriately pressed state and local officials to change election results. For instance: After claiming baselessly that "Democrats cheated big time and got caught" in Michigan,⁹⁴ Trump personally called the two Republican members of the Wayne County Board of Canvassers the night before they attempted to rescind their votes to certify the county's election results.⁹⁵ Trump then summoned Michigan's top Republican state legislators to the White House.⁹⁶ The White House also reportedly called Arizona Governor Doug Ducey while he was attempting to certify the state's election results.⁹⁷ Trump apparently called Pennsylvania House of Representatives Speaker Bryan Cutler twice about overturning the state's results.⁹⁸ And Trump's outside counsel Rudy Giuliani toured the country, meeting with officials to push the Big Lie.⁹⁹

92 Amy Gardner, *Recording Reveals Details of Trump Call to Georgia's Chief Elections Investigator*, WASHINGTON POST (Mar. 11, 2021), https://www.washingtonpost.com/politics/trump-call-georgia-investigator/2021/03/11/c532e-a2e-827a-11eb-ac37-4383f7709abe_story.html.

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

94 Natalie Colarossi, *Trump Claims Michigan Can't Certify Its Election Results Hours After the State Does Just That*, NEWSWEEK (Nov. 18, 2020, 2:02 PM), <https://www.newsweek.com/trump-claims-michigan-cant-certify-its-election-results-hours-after-state-does-just-that-1548464>.

95 Kendall Karson, Katherine Faulders, & Will Steakin, *Republican Canvassers Ask To 'Rescind' Their Votes Certifying Michigan Election Results*, ABC NEWS (Nov. 19, 2020, 1:12 PM), <https://abcnews.go.com/US/wayne-county-republican-canvassers-rescind-votes-certifying-election/story?id=74290114>.

96 Heidi Przybyla, Dareh Gregorian, & Adam Edelman, *After Meeting with Trump, Michigan Lawmakers Say They See Nothing to Overturn Biden's Win*, NBC NEWS (Nov. 20, 2020, 12:46 PM), <https://www.nbcnews.com/politics/white-house/michigan-gop-lawmakers-heckled-arrival-white-house-meeting-n1248396>.

97 *Arizona Gov. Ignores White House 'Hail to the Chief' Call, While Certifying Election Results*, WASHINGTON POST (Dec. 1, 2020, 11:18 AM), https://www.washingtonpost.com/video/politics/arizona-gov-ignores-white-house-hail-to-the-chief-call-while-certifying-election-results/2020/12/01/9da0d912-2bff-4f37-86c9-f4a80531db30_video.html.

98 Amy Gardner, Josh Dawsey, & Rachel Bade, *Trump Asks Pennsylvania House Speaker for Help Overturning Election Results, Personally Intervening in a Third State*, WASHINGTON POST (Dec. 8, 2020), https://www.washingtonpost.com/politics/trump-pennsylvania-speaker-call/2020/12/07/d65fe8c4-38bf-11eb-98c4-25dc9f4987e8_story.html.

99 See Stephen Fowler, *Fact Checking Rudy Giuliani's Grandiose Georgia Election Fraud Claim*, GPB (Dec. 8, 2020, 11:24 AM), <https://www.gpb.org/news/2020/12/04/fact-checking-rudy-giulianis-grandiose-georgia-election-fraud-claim> and Ryan Randazzo & Maria Polletta, *Arizona GOP Lawmakers Hold Meeting on Election Outcome With Trump Lawyer Rudy Giuliani*, AZ CENTRAL (Nov. 30, 2020, 7:02 PM), <https://www.azcentral.com/story/news/politics/elections/2020/11/30/republican-lawmakers-arizona-hold-meeting-rudy-giuliani/6468171002/> and Lauren Gibbons, *In Unusual Hearing, Rudy Giuliani Asks Michigan Lawmakers to 'Take Back Your Power'*, MLIVE (Dec. 3, 2020, at 6:21 PM), <https://www.mlive.com/public-interest/2020/12/in-unusual-hearing-rudy-giuliani-asks-michigan-lawmakers-to-take-back-your-power.html>.

3. The Scheme to Obstruct, Impede, and Subvert the Department of Justice

Trump and his closest allies—including, at a minimum, Meadows and Clark—collaborated between November 3, 2020 and January 5, 2021 to weaponize the DOJ in efforts to overturn the election.¹⁰⁰ This scheme ran parallel to Trump’s other efforts—whether merely contemplated or actually implemented—to overturn the election. Key events in that timeline include:

December 1, 2020: Attorney General William Barr met with Trump, reportedly telling him that the DOJ had investigated and debunked fraud claims: “We’ve looked into these things and they’re nonsense.”¹⁰¹ Barr later told an interviewer that Trump was furious at being confronted with the truth, and immediately accepted Barr’s resignation—only to retract the acceptance moments later.¹⁰²

December 14, 2020: The same day Trump announced Barr’s resignation and the Electoral College met to cast each state’s votes pursuant to the Constitution, White House staff sent Jeffrey Rosen—who would serve as Acting Attorney General in Barr’s stead—an email with information purporting to show voting machine fraud in Michigan.¹⁰³

December 15, 2020: Trump hosted Rosen in the Oval Office, reportedly instructing him to file legal briefs supporting Trump allies’ election lawsuits and urging him to appoint a special counsel to investigate claims of election fraud.¹⁰⁴

December 24, 2020 and December 27, 2020: On December 24, Trump called Rosen and pressed him to investigate non-existent voter fraud. On December 27, Rosen conferenced Richard Donoghue, his deputy, into another call with Trump. Donoghue told the Senate Judiciary Committee that

100 This subsection benefitted from the comprehensive and careful [report of the Senate Judiciary Committee](#), cited frequently throughout this report.

101 John L. Dorman, *Trump Started Speaking in the Third Person During a Heated Discussion with Bill Barr Regarding the Election Results, Book Says*, BUSINESS INSIDER (Jul. 31, 2021, 9:49 AM), <https://www.businessinsider.com/trump-spoke-third-person-barr-election-conspiracy-theories-discussion-book-2021-7>.

102 Dareh Gregorian, *Former AG Barr Said Trump Became Enraged After Being Told Election Fraud Claims Were Nonsense*, NBC NEWS (Mar. 3, 2022, 10:25 PM), <https://www.nbcnews.com/politics/donald-trump/former-ag-barr-said-trump-became-enraged-told-election-fraud-claims-no-rcna17750>.

103 Karoun Demirjian & Matt Zapotosky, *New Emails Detail Trump’s Efforts to Have Justice Department Take Up His False Election-Fraud Claims*, WASHINGTON POST (June 15, 2021, 5:13 PM), https://www.washingtonpost.com/national-security/trump-emails-doj-election-fraud-claims/2021/06/15/638ab654-cdc9-11eb-8014-2f3926ca24d9_story.html.

104 Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, NEW YORK TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html>.

Trump claimed the election had been “stolen” and referenced a litany of meritless conspiracy theories, including the claims that Pennsylvania certified 205,000 more votes than were cast and that signature verification in Fulton County showed tens of thousands of illegal votes.¹⁰⁵ As Donoghue recalled it: “His displeasure was clear. He felt that we should be doing things that in his mind, at least, we weren’t doing.” When Rosen told Trump that the DOJ “can’t and won’t just flip a switch and change the election,” Trump responded by telling him to “just say the election was corrupt and leave the rest to me and the [Republican] Congressmen [who would be challenging the Electoral College certification on January 6].” As Rosen remembered it—again in testimony to the Senate Committee—Trump told him that the DOJ should “just have a press conference.”¹⁰⁶

December 28, 2020: Clark—who had already met at least once directly with Trump,¹⁰⁷ without the knowledge of his superiors and in contravention of DOJ policy¹⁰⁸—emailed Rosen and Donoghue, seeking permission to “send letters to the elected leadership of Georgia and other contested states, urging them to convene special legislative sessions in order to appoint a different slate of electors than those popularly chosen in the 2020 election.”¹⁰⁹ The proposed letters would claim that the DOJ had “taken notice” of “irregularities” in the election process.¹¹⁰

Donoghue and Rosen refused, with Donoghue responding by email and rejecting a claim of “fraud that calls into question the reported (and certified) results of the election.”¹¹¹ In a meeting that evening, Clark warned that Trump was considering replacing the DOJ’s leadership, but Rosen and Donoghue held firm.¹¹² They both, as the Senate report put it, “recalled making [it] clear that DOJ would not send the letter, and stressing to Clark that it was not DOJ’s role to serve as election officials and tell states what to do.”¹¹³

105 Senate Report at [14–15](#).

106 *Id.* at [16](#).

107 Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, NEW YORK TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html>.

108 Senate Report at [23](#).

109 *Id.* at [21](#).

110 *Id.*

111 *Id.* at [22](#).

112 Clark has characterized his post-election collaboration with Trump as standard practice for DOJ officials. “Senior Justice Department lawyers, not uncommonly, provide legal advice to the White House as part of our duties. All my official communications were consistent with law.” See Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, NEW YORK TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html>.

113 *Senate Report* at [23](#).

December 29, 2020 and December 30, 2020: Trump, his staff, and his outside counsel repeatedly leaned on Rosen and Donoghue to involve the federal government in partisan litigation to overturn the election. On December 29, purporting to act at Trump’s direction, a White House staffer sent Rosen a draft complaint to be filed at the United States Supreme Court, challenging the outcome of the elections in Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin.¹¹⁴ Again purporting to act at Trump’s direction, Kurt Olson—a private lawyer who represented Texas in its own doomed Supreme Court lawsuit seeking to overturn the election—repeatedly and aggressively pressed Rosen to file the complaint, which Rosen knew lacked legal merit.¹¹⁵ Eventually, Rosen told Trump directly, in a December 30 call, that the DOJ would not sue.¹¹⁶

December 31, 2020: Rosen and Donoghue were summoned to an Oval Office meeting with Trump, Meadows, and Trump administration lawyers. There, Trump complained “that Rosen and Donoghue weren’t doing their jobs and that people were telling him he should fire both of them and install Clark instead.”¹¹⁷

December 29, 2020 – January 1, 2021: Mark Meadows repeatedly called on the DOJ to interfere with the election process and the transfer of power. On at least six separate occasions during that time period, Meadows emailed Rosen seeking investigation of unsupported election fraud conspiracy theories ranging from the claim that 66,247 underage voters had unlawfully cast ballots in Georgia to the bizarre “Italygate” theory, which alleged that an Italian aerospace company conspired with the Central Intelligence Agency (CIA) to switch Trump votes to Biden votes.¹¹⁸

114 *Id.* at [24](#).

115 *Id.* at [25](#).

116 *Id.* at [25–27](#).

117 *Id.* at [28](#). Trump’s pressure campaign had special force because of his track record of firing officials who would not help him overturn the election. For instance: Chris Krebs, the head of the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency, was fired days after releasing a statement saying the 2020 election was secure and untainted by foreign interference. David Sanger & Nicole Perlroth, *Trump Fires Christopher Krebs, Official Who Disputed Election Fraud Claims*, NEW YORK TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/us/politics/trump-fires-christopher-krebs.html>. And, within DOJ, Trump moved to fire B.J. Pak, the U.S. Attorney for the Northern District of Georgia, for Pak’s refusal to investigate nonexistent election offenses. Aruna Viswanatha, Sadie Gurman, & Cameron McWhirter, *White House Forced Georgia U.S. Attorney to Resign*, WALL STREET JOURNAL (Jan. 9, 2021, 9:07 PM), <https://www.wsj.com/articles/white-house-forced-georgia-u-s-attorney-to-resign-11610225840?mg=prod/com-wsj>. Katie Benner, *Trump Pressed Justice Dept. to Declare Election Results Corrupt, Notes Show*, NEW YORK TIMES (July 30, 2021), <https://www.nytimes.com/2021/07/30/us/politics/trump-justice-department-election.html>.

118 Senate Report at [29–33](#).

January 3, 2021: Clark told Rosen¹¹⁹ that Trump intended to replace Rosen with Clark that same day. That evening, the DOJ leadership convened in the Oval Office with Trump and White House lawyers—a meeting that Trump opened, according to Rosen, by announcing: “One thing we know is you, Rosen, aren’t going to do anything to overturn the election.”¹²⁰ The participants debated whether Trump would replace Rosen with Clark—and whether Clark, in turn, would send his contemplated letters to state legislatures. As Donoghue recalled it: “[I]t was difficult to separate the issue of the letter and Jeff Clark being in the leadership position, because it was very clear, and he stated it repeatedly, that if the President made him the Acting Attorney General, he would send that letter. So, it wasn’t as if there was a third option where Jeff Clark would become the Acting Attorney General and the letter would not go. They were sort of one and the same at that point.”¹²¹ Hours into the meeting, Trump backed down—but only when it became clear that DOJ leadership would resign en masse if Rosen were replaced by Clark.¹²²

4. The Scheme to Block or Delay the Electoral Count

As January 6 approached, Trump and his allies began to explore, and tried their best to implement, an alternative scheme to overturn the election. John Eastman, who was then a professor at Chapman Law School, authored two memoranda mapping out that scheme. Eastman wrote the first memorandum, a two-page summary, just after Christmas 2020, and the second memorandum—a six-page expansion—on January 3, 2021.¹²³

The process through which states vote for presidential electors, and Congress counts electors and certifies a presidential victory, is laid out in the Twelfth Amendment and in the Electoral Count Act, 3 U.S.C. §§ 1-21.¹²⁴ On Election Day, each state chooses its presidential electors by popular vote. Then, once votes are counted and a winner is named in each state, each state’s electors meet in their respective states; vote for president and vice president; and a certificate of their votes is sent to Washington, D.C.¹²⁵ The Twelfth Amendment sets out the procedure from that point: “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

119 *Id.* at [35](#).

120 *Id.* at [38](#).

121 *Id.*

122 *Id.* at [39](#).

123 *Eastman v. Thompson* Order Re: Privilege of Docs at [6](#).

124 For an in-depth explainer on the constitutional and legal procedures governing the Joint Session of Congress on January 6, see Joshua Matz, Norman Eisen, & Harmann Singh, STATES UNITED DEMOCRACY CENTER, GUIDE TO COUNTING ELECTORAL COLLEGE VOTES AND THE JANUARY 6, 2021 MEETING OF CONGRESS (Jan. 4, 2021), <https://statesuniteddemocracy.org/wp-content/uploads/2021/01/VPP-Guide-to-Counting-Electoral-Votes.pdf>.

125 3 U.S.C. § 7-11.

of votes for President, shall be the President.”¹²⁶ Neither the Constitution nor the Electoral Count Act makes any provision for delay. The proceeding where Congress and the Vice President open and count these electoral certificates must occur, every four years, on January 6.¹²⁷ And while the act allows congressional representatives to object in writing to electoral slates, and sets out a process for resolving objections, there is no suggestion that the vice president can unilaterally reject electoral votes.¹²⁸

But the Eastman scheme called for Vice President Pence to unilaterally “determine[] on his own” which of the states’ electoral certificates “is valid, asserting that the authority to make that determination...is his alone.”¹²⁹ If Pence discounted enough certificates from Biden-voting states, Eastman explained, Trump would win a majority of the electors who *were* counted, and would thus be reelected. If anyone protested, Pence would send the dispute to the House, where votes would be taken by state delegation. And, as Eastman noted in his memo, “Republicans currently control 26 of the state delegations, the bare majority needed to win that vote. President Trump is re-elected there as well.”¹³⁰ In the alternative, Eastman proposed that Pence could adjourn the January 6 session without finalizing the count, which might throw the election back to (presumably Trump-friendly) state legislatures.¹³¹

It is unclear when Trump was first made aware of Eastman’s scheme. But, at least by January 2, 2021, it appears that Trump had fully bought in. In public and in closed-door meetings, Trump repeatedly and forcefully backed Eastman’s scheme.¹³² On January 2, Eastman joined Trump on

126 U.S. Const., amend. XII.

127 3 U.S.C. § 15.

128 See 3 U.S.C. §§ 5-6, 15.

129 John Eastman, *January 6 Scenario*, <https://s3.documentcloud.org/documents/21066947/jan-3-memo-on-jan-6-scenario.pdf> (last visited Mar. 30, 2022).

130 *Id.*

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

132 Eastman was also one of the schemers in the Willard Hotel war room, joining since-suspended attorney Rudy Giuliani, indicted contemnor Steve Bannon, and others in planning to overturn the election. Jacqueline Alemany, Emma Brown, Tom Hamburger, & Jon Swaine, *Ahead of Jan. 6, Willard Hotel in Downtown DC was a Trump Team ‘Command Center’ for Effort to Deny Biden the Presidency*, WASHINGTON POST (Oct. 23, 2021, 5:51 PM), https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html.

a call with 300 state legislators from battleground states, jointly urging them to “decertify” state results.¹³³ Then, on January 4, Trump and Eastman met with Pence and his team at the Oval Office, pressing Pence “to reject electors or delay the count.”¹³⁴

Eastman and Trump reportedly met with Pence again on January 5 in the Oval Office. Trump pressed hard: “That is all I want you to do, Mike. Let the House decide the election. ... What do you think, Mike?”¹³⁵ And Pence pushed back: “Look, I’ve read this, and I don’t see a way to do it. We’ve exhausted every option. I’ve done everything I could and then some to find a way around this. It’s simply not possible. My interpretation is: No.”¹³⁶ But Trump did not relent, continuing to press Pence through public tweets and a phone call on January 6 where he mocked Pence for “not [being] tough enough” to reject votes or delay the count, and reportedly greeting with approval chants by insurrectionists to hang Pence, stating words to the effect that perhaps Pence should be hung.¹³⁷

On January 6, Eastman spoke directly before Trump at the rally before the Capitol invasion, again trying to sell his plan: “And all we are demanding of Vice President Pence is this afternoon at 1:00 he let the legislators of the state look into this so we get to the bottom of it, and the American people know whether we have control of the direction of our government, or not.”¹³⁸ Trump, taking the microphone, then endorsed Eastman and his plan: “Thank you very much, John... John is one of the most brilliant lawyers in the country and he looked at this and he said what an absolute disgrace that this can be happening to our Constitution... Because if Mike Pence does the right thing, we win the election. All he has to do—all this is—this is from the number one or certainly one of the top constitutional lawyers in our country. He has the absolute right to do it.”¹³⁹

133 *Id.*

134 *Eastman v. Thompson* Order Re: Privilege of Docs at 7.

135 Bob Woodward & Robert Costa, *PERIL* (2021) at 214–215.

136 *Id.*

137 *Eastman v. Thompson* Order Re: Privilege of Doc at 8. *And see* Donald J. Trump (@realDonaldTrump), TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 1:00 AM), <https://www.thetrumparchive.com/> (“Mike can send it back!”); Donald J. Trump (@realDonaldTrump), TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 8:17 AM) <https://www.thetrumparchive.com/> (“States want to correct their votes... All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!”). *See also* Maggie Haberman & Luke Broadwater, *Trump Said to Have Reacted Approvingly to Jan. 6 Chants about Hanging Pence*, *NEW YORK TIMES* (May 25, 2022), <https://www.nytimes.com/2022/05/25/us/politics/trump-pence-jan-6.html>.

138 John Eastman, Speech to the “Save America March” and Rally, C-SPAN (Jan. 6, 2021), <https://www.c-span.org/video/?c4953961/user-clip-john-eastman-january-6-rally>.

139 Donald J. Trump, President, Speech to the “Save America March” and Rally (Jan. 6, 2021), https://wehco.media.clients.elliingtoncms.com/news/documents/2021/01/13/Trump_Jan._6_speech.pdf.

While Trump was speaking, Pence tweeted out a letter refusing to unilaterally throw out slates of electors: “It is my considered judgment,” he wrote, “that my oath to support and defend the Constitution constrains me from claiming unilateral authority to determine which electoral votes should be counted and which should not.”¹⁴⁰ But Trump and Eastman did not let up, continuing to push their scheme even during the Capitol invasion. At 1:24 PM on January 6, Trump tweeted: “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!”¹⁴¹ One minute later, Eastman was reported to have emailed Pence’s counsel, Greg Jacob: “The ‘siege’ is because YOU and your boss did not do what was necessary to allow this to be aired in a public way so the American people can see for themselves what happened.”¹⁴²

C. Invasion and Aftermath: January 6 and Beyond

The January 6 insurrection to disrupt the final electoral vote count and thus stop Joe Biden’s victory and Donald Trump’s loss went forward when the other schemes to overturn the election had come up short. As the D.C. Circuit summarized it: “On January 6, 2021, a mob professing support for then-President Trump violently attacked the United States Capitol in an effort to prevent a Joint

Session of Congress from certifying the electoral college votes designating Joseph R. Biden the 46th President of the United States. The rampage left multiple people dead, injured more than 140 people, and inflicted millions of dollars in damage to the Capitol. Then-Vice President Pence, Senators, and Representatives were all forced to halt their constitutional duties and flee the House and Senate chambers for safety.”¹⁴³ The January 6 invasion itself has been the subject of hundreds

The January 6 insurrection to disrupt the final electoral vote count and thus stop Joe Biden’s victory and Donald Trump’s loss went forward when the other schemes to overturn the election had come up short.

140 Mike Pence (@Mike_Pence), TWITTER (Jan. 6, 2021, 1:02 PM), https://twitter.com/Mike_Pence/status/1346879811151605762?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1346879811151605762%7Ctwgr%5E%7Ctwcon%5Es1_ref_url=https%3A%2F%2F

141 Donald J. Trump (@realDonaldTrump), TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 2:24 PM), <https://www.thetrump-archive.com/>.

142 Aaron Blake, *The Heated Jan. 6 Email Exchange Between Trump’s and Pence’s Lawyers, Annotated*, WASHINGTON POST (Mar. 3, 2022, 1:27 PM), <https://www.washingtonpost.com/politics/2022/03/03/heated-jan-6-email-exchange-between-trumps-pences-lawyers-annotated/>.

143 *Trump v. Thompson*, 20 F.4th at 15–16.

of criminal prosecutions and voluminous reporting, which we will not reiterate. But two aspects of the factual record are particularly relevant here because they go to the possible criminal intent of Donald Trump and his closest allies. First: After fomenting the crowd's anger and steering them to the Capitol, Trump failed to take timely and available steps to stop the subsequent invasion. Second: In the aftermath of the invasion, Trump and his allies persistently refused to cooperate with investigations, even acting in ways that suggest the deliberate concealment of evidence. A third point bears mention as well, although not independently actionable criminally: The Big Lie campaign that produced January 6 did not end on that date. It has metastasized and continued, with ongoing harmful effects.

1. Trump's Inaction During the Invasion

At noon on January 6, Trump addressed his supporters at the pre-insurrection rally, telling them to "fight like hell" and promising to join them in a march to the Capitol: "Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you, we're going to walk down, we're going to walk down.... Because you'll never take back our country with weakness. You have to show strength and you have to be strong."¹⁴⁴ He spoke for more than an hour. While he spoke, the initial wave of insurrectionists crossed police barriers around the Capitol. At 1:05 PM, Speaker Pelosi gavelled the joint session of Congress to order.¹⁴⁵

Breaking his pledge to join the insurrectionists at the Capitol, Trump returned to the White House.¹⁴⁶ But the assault on the Capitol moved forward. Around 2:00 PM, insurrectionists breached the building, and the Secret Service removed Pelosi and Pence to secure locations. House and Senate proceedings were stopped around 2:20 PM.¹⁴⁷ Trump was apparently watching from the White House and was aware that the Capitol had been breached.¹⁴⁸ Nevertheless, instead of calling for calm and demanding that his supporters leave the Capitol, Trump continued to air his grievances, tweeting about Pence's refusal to implement the scheme pushed by Trump and Eastman: "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or

144 Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial>.

145 Kat Lonsdorf, Courtney Dorning, Amy Isackson, Mary Louise Kelly, & Ailsa Change, *A Timeline of How the Jan. 6 Attack Unfolded—Including Who Said What and When*, NPR (Jan. 5, 2022, 5:00 AM), <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when>.

146 *Id.*

147 *Id.*

148 Cong. Defs. Opp. to Pl. Eastman's Privilege Assertions at 12 ("The evidence obtained by the Select Committee indicates that President Trump was aware that the violent crowd had breached security and was assaulting the Capitol when Mr. Trump tweeted.").

inaccurate ones which they were asked to previously certify. USA demands the truth!”¹⁴⁹ Influential Republicans, including Donald Trump, Jr., texted Chief of Staff Mark Meadows calling for Trump to intervene to stop the invasion,¹⁵⁰ but there is no indication that Trump took any action to mobilize help for the overwhelmed Capitol police for hours after the outer barriers were first breached. Determining his exact conduct during this period is one of the most important factual questions the hearings can address. At 3:36 PM, White House press secretary Kayleigh McEnany tweeted that Trump had called out the National Guard.¹⁵¹ At 4:17 PM, 187 minutes after the invasion began, Trump finally tweeted a video at his supporters: “I know your pain. I know your hurt,” he said. “We love you. You’re very special. You’ve seen what happens. You’ve seen the way others are treated. ... I know how you feel, but go home, and go home in peace.”¹⁵² It had taken Trump over three hours to tell the rioters to stop. But in a tweet at 6:01 PM that same evening, Trump was back to rationalizing the invasion and valorizing the invaders: “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... Remember this day forever!”¹⁵³

2. Indicia of Missing Evidence

White House phone logs submitted to the January 6 Committee show a 457 minute gap—from 11:17 AM to 6:54 PM—in the record of “calls placed to or by Trump.”¹⁵⁴ The phone logs were part of a tranche of documents held by the National Archives that the January 6 Committee subpoenaed in the fall of 2021.¹⁵⁵ Trump asserted executive privilege over hundreds of documents including the logs—a claim that he litigated through losses in the federal District Court, the Court of Appeals for

149 Donald J. Trump (@realDonaldTrump), TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 2:24 PM), <https://www.thetrump-archive.com/>.

150 See Dareh Gregorian & Dartunorro Clark, *Jan. 6 Committee Recommends Mark Meadows Face Contempt Charge*, MSNBC (Dec. 13, 2021, 10:44 PM), <https://www.nbcnews.com/politics/donald-trump/jan-6-committee-recommends-mark-meadows-face-contempt-charge-n1285564>.

151 Kat Lonsdorf, Courtney Dorning, Amy Isackson, Mary Louise Kelly, & Ailsa Chang, *A Timeline of How the Jan. 6 Attack Unfolded—Including Who Said What and When*, NPR (Jan. 5, 2022, 5:00 AM), <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when>.

152 *Id.*

153 *Id.* Of course, the evidence that the committee adduces in its hearings may further substantiate the existence of a direct agreement between Trump and one or more ringleaders of the mob, or that he knew about plans to breach the Capitol or even actively engaged in that planning. We will await the development of further facts, if any, in those regards.

154 Bob Woodward & Robert Costa, *Jan. 6 White House Logs Given to House Show 7-Hour Gap in Trump Calls*, WASHINGTON POST (Mar. 29, 2022, 3:42 PM), <https://www.washingtonpost.com/politics/2022/03/29/trump-white-house-logs/>.

155 Todd Ruger, *Supreme Court Allows Release of Trump’s Jan. 6 Documents to Congress*, ROLL CALL (Jan. 19, 2022, 7:30 PM), <https://rollcall.com/2022/01/19/supreme-court-allows-release-of-trumps-jan-6-documents-to-congress/>.

the D.C. Circuit, and finally the United States Supreme Court.¹⁵⁶ The public record shows that Trump made and received calls during that period when official records are silent. At a minimum, there is evidence he spoke by phone during that time with Utah Senator Mike Lee¹⁵⁷ and Minority Leader Kevin McCarthy.¹⁵⁸ And we know of at least two other Trump phone calls that day—one with Vice President Pence, whom Trump was pressing to obstruct the electoral count, and the other with vocal Trump ally and U.S. Congressman Jim Jordan—that do not appear in the call logs.¹⁵⁹

Responding to the gap in the White House phone records and the suggestion that “burner phones” may have been used to circumvent phone logs, Trump released a statement denying any guilty knowledge: “I have no idea what a burner phone is, to the best of my knowledge I have never even heard the term.”¹⁶⁰ But John Bolton, Trump’s former National Security Advisor, told reporters that he had spoken with Trump “about how people have used burner phones to avoid having their calls scrutinized.”¹⁶¹ And Trump himself filed a lawsuit against his niece, Mary Trump, that uses the phrase “burner phones” three times, and which specifically alleges that “burner phones” are used to conceal “tortious, wrongful and/or unlawful” conduct.”¹⁶²

The public record shows that Trump made and received calls during that period when official records are silent.

156 *Trump v. Thompson*, No. 21-A-272 (U.S. Jan. 19, 2022) (denying application for stay of mandate and injunction pending review); *Trump v. Thompson*, 20 F.4th 10 (D.C. Cir. 2021), cert. denied, 21-932, 2022 WL 516395 (U.S. Feb. 22, 2022).

157 Dennis Rombo, *How President Trump Misdialed Utah Sen. Mike Lee While the Capitol Was Under Siege*, DESERET NEWS (Jan. 7, 2021, 3:00 PM), <https://www.deseret.com/utah/2021/1/7/22218897/donald-trump-mike-lee-mis-dial-capitol-siege-congress-electoral-insurrection-moore-curtis-stewart>.

158 Amber Phillips, *Everything We Know About Kevin McCarthy’s Conversations with Trump Concerning the Jan. 6 Attacks*, WASHINGTON POST (Jan. 14, 2022, 12:47 PM), <https://www.washingtonpost.com/politics/2022/01/14/fix-mccarthy-trump-conversations/>.

159 Oriana Gonzalez, *Report: House Panel Finds Gaps in Trump’s Call Logs on Jan. 6*, AXIOS (Feb. 10, 2022), <https://www.axios.com/2022/02/10/jan-6-trump-call-logs-capitol>; Aaron Blake, *The Inexplicable Gap in the Trump White House’s Jan. 6 Records*, WASHINGTON POST (Mar. 29, 2022, 2:08 PM), <https://www.washingtonpost.com/politics/2022/03/29/inexplicable-gaps-trump-records/>.

160 Dylan Stableford, *Trump Says He Has ‘No Idea What a Burner Phone Is’ as Jan. 6 Committee Probes Missing Logs*, YAHOO NEWS (Mar. 29, 2022, 11:56 AM), <https://news.yahoo.com/trump-no-idea-what-a-burner-phone-is-jan-6-call-logs-gap-155605611.html>.

161 Bob Woodward & Robert Costa, *Jan. 6 White House Logs Given to House Show 7-Hour Gap in Trump Calls*, WASHINGTON POST (Mar. 29, 2022, 3:42 PM), <https://www.washingtonpost.com/politics/2022/03/29/trump-white-house-logs/>.

162 Complaint at ¶ 47, *Donald J. Trump v. Mary L. Trump*, No. 2021-53963 (N.Y. Super. Sept. 21, 2021), <https://www.documentcloud.org/documents/21067078-donald-trump-lawsuit-against-mary-trump-and-the-new-york-times>.

3. Post-January 6 Continuation of the Big Lie

The events of January 6 were the logical combination of a systematic attack on the rules governing our election and undue pressure on the officials administering those rules—their referees. The objective was plain: to change the results. That Big Lie-driven pattern did not end when the insurrection was quelled on the 6th. Trump and his allies have continued to press their false and incendiary claims of fraud. As a result, hundreds of election-denying bills¹⁶³ and candidates¹⁶⁴ have sprung up from coast to coast. They represent a campaign to change the rules and change the referees to be able to accomplish in the future what failed on January 6: change the results. Although likely beyond the scope of the alleged criminal conduct that may be the subject of DOJ investigation and prosecution, the context is not complete without considering this ongoing harm. In that sense, the insurrection has not ended.

163 States United Democracy Center, Protect Democracy, & Law Forward, *Democracy Crisis in the Making Report Update: 2021 Year-End Numbers (Dec. 2021)*, https://statesuniteddemocracy.org/resources/decupdate/#_ftn1.

164 *Id.* States United Democracy Center, *Replacing the Refs: Tracking the Trend of Election Deniers Running for State-wide Office in 2022*, <https://statesuniteddemocracy.org/resources/replacingtherefs/> (last updated May 4, 2022).

II. Procedural Posture

Three open investigations are examining whether and how former President Trump and his allies should be held accountable for attempting to overturn the 2020 presidential election. First: The January 6 Committee is building on earlier congressional actions and forging ahead with its inquiry, including hearings in June 2022 and the release of interim and final reports thereafter. Second: The United States Department of Justice has launched hundreds of prosecutions related to January 6, and there are indicia of far-reaching investigations that go beyond ground-level insurrectionists but whose precise dimensions are obscured by the policy against public disclosure of investigative activities that are once again being honored under the current administration. Third: The Fulton County, Georgia District Attorney has convened a special grand jury to investigate interference with Georgia’s vote counting.

A. Prior Congressional Investigations

Congress moved quickly to hold Trump accountable after the January 6 insurrection. The House impeached the former president on January 13, 2021—only a week after the Capitol invasion—and 57 senators voted to convict exactly a month later on February 13, 2021.¹⁶⁵ The House’s Trial Memorandum during that impeachment effort was a powerful assessment, based on the facts known at the time, of Trump’s culpability for the insurrection—including his refusal to accept the election results, his incendiary call for his supporters to “fight” on January 6, and his failure to protect the Capitol during the invasion.¹⁶⁶

165 Politico Staff, *Here’s How the House Voted on Trump’s Second Impeachment*, POLITICO (Jan. 13, 2021, 5:18 PM), <https://www.politico.com/interactives/2021/trump-second-impeachment-vote-count-house-results-list/>; Meg Wagner, Melissa Mahtani, Melissa Macaya, & Veronica Rocha, *Donald Trump Acquitted in Second Impeachment Trial*, CNN (Feb. 13, 2021, 6:06 PM), <https://www.cnn.com/politics/live-news/trump-impeachment-trial-02-13-2021/index.html>.

166 See Trial Memorandum of the U.S. House of Representatives, *In re Impeachment of President Donald J. Trump* (Feb. 2, 2021), https://judiciary.house.gov/uploadedfiles/house_trial_brief_final.pdf.

After Trump was acquitted, Congress moved forward with a multi-track investigation. A first major output came from the Senate Judiciary Committee, which on October 7, 2021 released a careful examination of Trump's efforts—with the assistance of allies including Meadows and Clark—to co-opt and politicize the DOJ. The report, "Subverting Justice: How the Former President and his Allies Pressured DOJ to Overturn the 2020 Election," tells a carefully documented story, backed by citations to deposition testimony from DOJ leadership, about Trump's relentless pressure campaign against the DOJ.¹⁶⁷ One key narrative thread told of Meadows' attempts to pressure the DOJ to investigate bogus fraud claims.¹⁶⁸ Another chronicled Clark's attempts, in close concert with Trump, to coerce Department leadership into sending meritless letters making vague fraud allegations and urging battleground state legislatures to take matters into their own hands.¹⁶⁹

B. The January 6 Committee

Congress' most significant investigation into the attempts to subvert our democracy is still ongoing. The January 6 Committee, formally the Select Committee to Investigate the January 6th Attack on the United States Capitol, was established by the House of Representatives on June 30, 2021 by a vote of 222-190.¹⁷⁰ House Majority Leader Nancy Pelosi (D-CA) appointed six Democrats and one Republican, Representative Liz Cheney (R-WY) to the Committee on July 1, with Representative Bennie Thompson (D-MS) serving as chairman.¹⁷¹ House Minority Leader Kevin McCarthy (R-CA) subsequently named five Republican members to the Committee,¹⁷² two of whom Pelosi rejected due to their outspoken advocacy of Trump's election-fraud claims.¹⁷³ McCarthy then rescinded

167 [Senate Report](#).

168 *Id.* at 29–33.

169 *Id.* at 19–22.

170 Jacqueline Alemany & Tom Hamburger, *The Jan. 6 Committee: What It Has Done and Where It Is Headed*, WASHINGTON POST (Jan. 4, 2022, 1:31 PM), <https://www.washingtonpost.com/politics/2022/01/04/january-6-committee-explainer/>.

171 Brian Naylor, *Rep. Liz Cheney Will Serve On the Select Committee Investigating the Capitol Riot*, NPR (JULY 1, 2021, 1:44 PM), <https://www.npr.org/2021/07/01/1012203429/rep-liz-cheney-will-serve-on-the-select-committee-investigating-the-capitol-riot>.

172 Alana Wise, *GOP Leader McCarthy Taps 5 Republicans To Serve On Jan. 6 Select Committee*, NPR (July 19, 2021, 8:15 PM) <https://www.npr.org/2021/07/19/1018136264/gop-leader-mccarthy-taps-5-republicans-to-serve-on-jan-6-select-committee>.

173 Mabinty Quarshie, *Pelosi Rejects GOP Picks Jordan, Banks on Jan. 6 Committee; McCarthy Threatens to Pull Out*, USA TODAY (July 22, 2021, 5:59 AM), <https://www.usatoday.com/story/news/politics/2021/07/21/pelosi-rejects-republicans-banks-jordan-jan-6-select-committee/8042839002/>.

all five Republican members,¹⁷⁴ leading Pelosi to appoint Representative Adam Kinzinger (R-IL) to the Committee on July 25.¹⁷⁵

Since then, the Committee has tallied a series of legal victories in its push to gather documents and other material evidence. Most notably, in *Trump v. Thompson*, the Supreme Court ruled in January 2022 against Trump's request to block the National Archives from releasing White House documents to the Committee as part of its investigation.¹⁷⁶ U.S. District Court Judge David Carter ruled similarly in *Eastman v. Thompson*, declaring that Eastman could not shield thousands of emails and documents relevant to January 6 from the Committee.¹⁷⁷ That decision is most important for its finding of likely criminality by Trump and Eastman. Other cases, such as Mark Meadows' civil litigation to block the Committee's discovery, remain pending.¹⁷⁸

The Committee's efforts to secure witness testimony and documentary evidence have been overwhelmingly successful. The Committee says it has conducted more than 860 depositions and interviews and received almost 10,000 documents.¹⁷⁹ Witnesses have included many White House and administration eyewitnesses including the former president's family. When former officials have refused to cooperate, the Committee has secured testimony from their deputies who also observed events.¹⁸⁰ The Committee has also sought information from third parties; for example, in August 2021, the Committee requested records related to January 6 from 15 social media companies, including Facebook, Google, and Twitter,¹⁸¹ and received thousands of documents before the deadline.¹⁸²

174 Kathryn Watson, *McCarthy Pulls All Republicans from January 6 Select Committee After Pelosi Rejects Two Picks*, CBS NEWS (July 21, 2021, 7:14 PM) <https://www.cbsnews.com/news/kevin-mccarthy-jan-6-committee-picks-removed-pelosi-rejects-jim-jordan-jim-banks/>.

175 Daniella Diaz, Melanie Zanona, & Aaron Pellish, *Pelosi Appoints Kinzinger to 1/6 House Select Committee*, CNN (July 25, 2021, 2:38 PM) <https://www.cnn.com/2021/07/25/politics/nancy-pelosi-adam-kinzinger-house-select-committee-mccarthy-republicans/index.html>.

176 *Trump v. Thompson*, No. 21-A-272 (U.S. Jan. 19, 2022). The Supreme Court ruled in favor of the Committee 8-1, with only Justice Clarence Thompson dissenting.

177 *Eastman v. Thompson* Order Re: Privilege of Docs.

178 *Meadows v. Pelosi*, 21-CV-3217 (D.D.C. Apr. 22, 2022), ECF 15-17.

179 Zachary Cohen, Ryan Nobles, & Annie Grayer, *January 6 Panel Has Conducted More than 860 Interviews, with Dozens More Planned*, CNN (Apr. 12, 2022, 2:18 PM), <https://www.cnn.com/2022/04/12/politics/january-6-interview-plans/index.html>.

180 Kyle Cheney & Nicholas Wu, *How the Jan. 6 Panel Broke Through Trump Allies' Stonewalling*, POLITICO (May 9, 2022, 4:30 AM), <https://www.politico.com/news/2022/05/09/jan-6-panel-donald-trump-allies-00030781>.

181 Select Committee to Investigate the January 6th Attack on the United States Capitol, Press Release, *Select Committee Demands Records Related to January 6th Attack from Social Media Companies* (Aug. 27, 2021), <https://january6th.house.gov/news/press-releases/select-committee-demands-records-related-january-6th-attack-social-media-0>.

182 Kathryn Watson, *January 6 Committee Receives "Thousands" of Documents Before Deadline*, CBS NEWS (Sept. 10, 2021, 9:55 AM), <https://www.cbsnews.com/news/january-6-committee-receives-thousands-of-documents-before-deadline/>.

A few key witnesses to the run-up and events of January 6, including some who reportedly helped to or directly organized the day's itinerary,¹⁸³ have rebuffed the Committee's requests to appear or have done so but declined to cooperate during questioning. Eastman and Clark are among those who showed up but asserted their Fifth Amendment right against self-incrimination.¹⁸⁴ Steve Bannon, Mark Meadows, Dan Scavino, and Peter Navarro failed to appear and have been referred by the House to the DOJ for prosecution for criminal contempt.¹⁸⁵ Bannon was charged and will go to trial in August 2022; DOJ has not yet acted on the others.¹⁸⁶

All the while, the panel has continually widened the scope of its investigation, expanding its lens from the core events of January 6 to the component groups and efforts of the months-long campaign to overturn the election.¹⁸⁷ The Committee continues to unearth new facts, and has announced eight hearings for June 2022, with the prospect of a preliminary report later this summer and a final report in the fall.¹⁸⁸ According to some accounts, that report may include criminal referrals to the DOJ.¹⁸⁹

183 Select Committee to Investigate the January 6th Attack on the United States Capitol, Press Release, *Select Committee Subpoenas Organizers of Rallies and Events Preceding January 6th Insurrection* (Sept. 29, 2021), <https://january6th.house.gov/news/press-releases/select-committee-subpoenas-organizers-rallies-and-events-preceding-january-6th>.

184 Kyle Cheney, *Eastman Takes the Fifth with Jan. 6 Committee*, POLITICO (Dec. 3, 2021, 12:11 PM), <https://www.politico.com/news/2021/12/03/eastman-takes-the-fifth-with-jan-6-committee-523712> and Ryan Nobles, Annie Grayer, & Zachary Cohen, *Former DOJ Official Jeffrey Clark Pleaded the Fifth Amendment More Than 100 Times in January 6 Committee Interview*, CNN (Feb. 3, 2022, 8:38 PM), <https://www.cnn.com/2022/02/03/politics/jeffrey-clark-justice-department-plead-fifth-january-6/index.html>.

185 Zachary Cohen, Katelyn Polantz, Ryan Nobles, Annie Grayer, & Whitney Wild, *January 6 Panel Moves to Hold Steve Bannon in Criminal Contempt*, CNN (Oct. 14, 2021, 9:02 PM), <https://www.cnn.com/2021/10/14/politics/steve-bannon-deposition-deadline/index.html>.

186 Claudia Grisales, *Jan. 6 Panel: Former DOJ Official Jeffrey Clark Fails to Cooperate in Testimony*, NPR (Nov. 6, 2021, 10:16 AM) <https://www.npr.org/2021/11/06/1053051380/jan-6-panel-former-doj-official-jeffrey-clark-fails-to-cooperate-in-testimony>.

187 Select Committee to Investigate the January 6th Attack on the United States Capitol, Press Release, *Select Committee Subpoenas "Alternate Electors" From Seven States* (Jan. 28, 2022), <https://january6th.house.gov/news/press-releases/select-committee-subpoenas-alternate-electors-seven-states>.

188 Annie Grayer, Daniella Diaz, & Ryan Nobles, *January 6 Committee to Hold 8 Hearings in June, Chairman Says*, CNN (Apr. 28, 2022, 4:39 PM), <https://www.cnn.com/2022/04/28/politics/bennie-thompson-january-6-committee-hearings/index.html>; Christine Todd Whitman, Norman Eisen, & Joanna Lydgate, *What the January 6 Report Means for the Future of Democracy*, CNN (Jan. 4, 2022, 10:30 AM), <https://www.cnn.com/2022/01/04/opinions/january-6-commission-accountability-eisen-todd-whitman-lydgate/index.html>.

189 Myah Ward, *Cheney Says Jan. 6 Committee Has Enough Evidence for a Criminal Referral for Trump*, POLITICO (Apr. 10, 2022, 11:49 AM), <https://www.politico.com/news/2022/04/10/cheney-evidence-trump-criminal-referral-00024290>; Michael S. Schmidt & Luke Broadwater, *Jan. 6 Panel Has Evidence for Criminal Referral of Trump, But Splits on Sending*, NEW YORK TIMES (Apr. 10, 2022), <https://www.nytimes.com/2022/04/10/us/politics/jan-6-trump-criminal-referral.html>. ("Despite concluding that they have enough evidence to refer Mr. Trump for obstructing a congressional proceeding and conspiring to defraud the American people, some on the committee are questioning whether there is any need to make a referral. The Justice Department appears to be ramping up a wide-ranging investigation, and making a referral could saddle a criminal case with further partisan baggage at a time when Mr. Trump is openly flirting with running again in 2024.")

The Committee is also expected to address legislative remedies. Perhaps the most important of those is a so-called “Electoral Count Act-Plus” package. The Electoral Count Act (ECA), as discussed in Section I.B.4 herein, is found at 3 U.S.C. §§ 1-21. The Act regulates the selection and certification of presidential electors, including by Congress at its meeting every four years on January 6. As we discuss throughout this report, Trump and those around him sought to exploit purported ambiguities in the ECA to advance their scheme. Amendments to the Act that have been discussed include clarifying the exact role of the Vice President, raising the threshold for making an objection from the current requirement of just one member of each body of Congress, and also raising the threshold for sustaining an objection from a simple majority in both houses to a supermajority.

The “Plus” dimension comes in because experts have made the point that the Big Lie campaign that targeted the 2020 election and remains ongoing is much broader than can be addressed by narrow ECA reforms alone. Additional legislative remedies that the Committee may consider include toughening legal consequences for threats against election officials, increasing funding for the security of those officials and elections themselves when they come under hostile threat, and other safeguards against federal or state officials or candidates who attempt to hijack, sabotage, or subvert lawful processes. Such behavior is exemplified by the conduct of Trump and his allies analyzed throughout this report, making the consideration of legislative responses appropriate.

C. The United States Department of Justice

After January 6, the DOJ launched a massive investigation that so far has seen at least 775 defendants arrested. At least 225 of those have pled guilty, and several more have been convicted at trial.¹⁹⁰ With a few notable exceptions—including the seditious conspiracy prosecution of Oath Keepers leader Stewart Rhodes—most of the charged defendants have been relatively low-level insurrectionists and rioters.¹⁹¹ In his speech on the first anniversary of the January 6 attack, U.S. Attorney General Merrick Garland affirmed that the DOJ “remains committed to holding all January 6th perpetrators, at any level, accountable under law—whether they were present that day or

190 Ryan J. Reilly, *FBI Has Names of Hundreds More Jan. 6 Rioters. DOJ Needs More Lawyers to Prosecute Them*, NBC NEWS (Apr. 6, 2022, 4:43 AM), <https://www.nbcnews.com/politics/justice-department/fbi-names-hundreds-jan-6-rioters-doj-needs-lawyers-prosecute-rcna22384>.

191 See Ryan Lucas, *Oath Keepers Face Seditious Conspiracy Charges. DOJ Has Mixed Record with Such Cases*, NPR (Feb. 1, 2022, 7:17 AM), <https://www.npr.org/2022/02/01/1076349762/oath-keepers-charged-capitol-riot-seditious-conspiracy>.

were otherwise criminally responsible for the assault on our democracy. We will follow the facts wherever they lead.”¹⁹²

Federal criminal investigators may be expanding their probe in the direction of Trump and his inner circle. On March 30, the *Washington Post* reported that the DOJ is looking beyond those who participated in the Capitol invasion and into the funding of the Trump-headlined rally that took place before the assault on the Capitol.¹⁹³ That report was followed quickly by news that a federal grand jury has issued subpoenas seeking information about the phony electoral slates that were part of the scheme to overturn the 2020 election.¹⁹⁴

D. The Fulton County Investigation

In January 2022, a Georgia court granted Fulton County District Attorney Fani Willis’ request for a special grand jury to investigate Trump’s efforts to overturn the 2020 election.¹⁹⁵ The Willis investigation has apparently already interviewed 50 people, and her office intends to subpoena an additional 30-plus to the special purpose grand jury, which sits for a longer term than a regular grand jury, is empowered to issue investigative subpoenas, and will release a final report and recommendations to a regular grand jury.¹⁹⁶ The regular grand jury can then indict if appropri-

192 United States Department of Justice, Press Release, *Attorney General Merrick B. Garland Delivers Remarks on the First Anniversary of the Attack on the Capitol* (Jan. 5, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-first-anniversary-attack-capitol>.

193 Devlin Barrett, Josh Dawsey, Jacqueline Alemany, & Spencer S. Hsu, *Justice Dept. Expands Jan. 6 Probe to Look at Rally Prep, Financing*, WASHINGTON POST (Mar. 30, 2022, 5:54 PM), <https://www.washingtonpost.com/national-security/2022/03/30/jan-6-fbi-subpoena-justice/>. See also Dennis Aftergut & Norman Eisen, *The DOJ Finally Seems to Be Moving Toward a Trump Investigation*, SLATE (Apr. 1, 2022, 10:39 AM), <https://slate.com/news-and-politics/2022/04/doj-moving-towards-trump-investigation.html>.

194 Evan Perez & Tierney Sneed, *Exclusive: Federal Prosecutors Looking at 2020 Fake Elector Certifications*, CNN (Jan. 26, 2022, 6:56 PM), <https://www.cnn.com/2022/01/25/politics/fake-trump-electoral-certificates-justice-department/index.html>.

195 Washington Desk, *A Special Grand Jury Has Been Granted in Fulton County’s Trump Investigation*, NPR (Jan. 24, 2022, 6:05 PM), <https://www.npr.org/2022/01/24/1075429352/special-grand-jury-fulton-county-da-trump-election-probe>. This section is indebted to work by one of the authors in another forum. See Norman Eisen & Gwen Keyes Fleming, *Fulton’s Special Trump Grand Jury Has Historic Task*, THE ATLANTA JOURNAL-CONSTITUTION (Jan. 25, 2022), <https://www.ajc.com/opinion/opinion-fultons-special-trump-grand-jury-has-historic-task/VGV4DVELVFAVRIDS27WX5PFPUU/>.

196 Tamar Hallerman, *Fulton DA Clarifies Timeline for Witness Testimony in Trump Probe*, THE ATLANTA JOURNAL-CONSTITUTION (Apr. 19, 2022), <https://www.ajc.com/news/georgia-news/fulton-da-clarifies-timeline-for-witness-testimony-in-trump-probe/QPKS7EJWYZHDRDXHYH5NOR3KXGE/>; Norman Eisen & Gwen Keyes Fleming, *Fulton’s Special Trump Grand Jury Has Historic Task*, THE ATLANTA JOURNAL-CONSTITUTION (Jan. 25, 2022), <https://www.ajc.com/opinion/opinion-fultons-special-trump-grand-jury-has-historic-task/VGV4DVELVFAVRIDS27WX5PFPUU/>.

ate.¹⁹⁷ Reporting indicates that District Attorney Willis is in communication with the January 6 Committee.¹⁹⁸ That communication could enhance the investigations both in Washington and in Atlanta. The grand jury began operation on May 2, 2022. Willis has not publicized her exact timeline. While her grand jury can remain seated into 2023, she has indicated that a faster conclusion is possible and that the grand jury will begin to hear testimony on June 1, 2022.¹⁹⁹

197 Norman Eisen & Gwen Keyes Fleming, *Fulton's Special Trump Grand Jury Has Historic Task*, THE ATLANTA JOURNAL-CONSTITUTION (Jan. 25, 2022), <https://www.ajc.com/opinion/opinion-fultons-special-trump-grand-jury-has-historic-task/VGV4DVELVFAVRIDS27WX5PFPUU/>.

198 Tamar Hallerman, *Fulton DA Requests Special Grand Jury for Trump Probe*, THE ATLANTA JOURNAL-CONSTITUTION (Jan. 20, 2022), <https://www.ajc.com/news/atlanta-news/breaking-fulton-da-requests-special-grand-jury-for-trump-probe/E5HCDM2P75ETRAEUHBK2Q7L3FY/>.

199 Tamar Hallerman, *Fulton DA Details Next Stage of Trump Probe*, THE ATLANTA JOURNAL-CONSTITUTION (Feb. 3, 2022), <https://www.ajc.com/news/atlanta-news/fulton-da-details-next-stage-of-trump-probe/G5LX2TXLLFCY-5FZSNNJD37IT4A/>; Tamar Hallerman, *Fulton DA Clarifies Timeline for Witness Testimony in Trump Probe*, THE ATLANTA JOURNAL-CONSTITUTION (Apr. 19, 2022), <https://www.ajc.com/news/georgia-news/fulton-da-clarifies-timeline-for-witness-testimony-in-trump-probe/QPKS7EJWYZHDRDXHYH5NOR3KXGE/>.

III. Potential Crimes

A. 18 USC § 371: Conspiracy to Defraud the United States

The record of publicly disclosed facts shows that former President Donald Trump and members of his circle—including, at a minimum, outside attorney John Eastman—attempted to interfere with Congress’ electoral count on January 6, 2021. Among other things: They pressed Vice President Mike Pence to groundlessly reject electoral certificates from key states, attempting to deny Joe Biden the electoral college majority that he legitimately won in a fair and secure election. In the alternative, they wanted Pence to delay the electoral count.

It furthermore appears that, in coercing leadership to baselessly declare the 2020 election to be tainted by fraud, in direct and unreasonable contravention of authoritative accounts, Trump and those around him—including, at a minimum, DOJ lawyer Jeffrey Clark—planned to interfere with the DOJ’s responsibility to investigate election offenses fairly and evenhandedly.

There is substantial evidence supporting the conclusion that those schemes amount to one or more violations of 18 U.S.C. § 371, although any final determination must of course await the completion of the Committee’s hearing and report, and the decision of the DOJ. § 371 creates an offense “[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy.”²⁰⁰

200 See Project, *Tenth Annual Survey of White Collar Crime*, 32 AM. CRIM. L. REV. 137, 379-406 (1995) (generally discussing § 371).

The statute has two prongs. The first, the “offense prong,” prohibits conspiracies to commit acts that are otherwise defined as criminal under federal law.²⁰¹ Our analysis focuses on the second prong—the “defraud prong”²⁰²—which criminalizes conspiracies “for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government”²⁰³ through “deceit, craft or trickery, [or] by means that are dishonest.”²⁰⁴ As long ago as 1909, a federal court explained the purpose of this second prong: “As used in this statute, the word ‘defraud’ has a significance applicable, not only for the protection of the government in its property rights and interests, but... also for the protection of the government in securing the wholesome administration of its laws and affairs in the interests of the governed.”²⁰⁵ The defraud prong responds to violations of the public trust—as the Supreme Court has taught, it punishes illegal “overreaching of those charged with carrying out the governmental intention.”²⁰⁶

201 See generally Gretchen C. F. Shappert & Christopher J. Costantini, *Klein Conspiracy: Conspiracy to Defraud the United States*, UNITED STATES ATTORNEYS’ BULLETIN 1 (July 2013) (describing the two prongs of § 371).

202 “To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention.” *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). And see, e.g., *United States v. Atilla*, 966 F.3d 118, 130 (2d Cir. 2020); *United States v. Meredith*, 685 F.3d 814, 822 (9th Cir. 2012); *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996); *United States v. Nersesian*, 824 F.2d 1294, 1313 (2d Cir. 1987) (“It is well established that the term ‘defraud’ as used in § 371 not only reaches schemes which deprive the government of money or property, but also is designed to protect the integrity of the United States and its agencies... [T]o be held liable under the broad sweep of the fraud prong of § 371, defendants need not have agreed to commit, or have actually committed, a specific substantive offense. They merely must have agreed to interfere with or to obstruct one of the government’s lawful functions.”).

203 *United States v. Nersesian*, 824 F.2d 1294, at 1313 (2d Cir. 1987).

204 “The gist of the crime is an agreement to defraud the United States by interfering or obstructing lawful government functions through “deceit, craft or trickery, [and] by means that are dishonest.” *United States v. Caldwell*, 989 F.2d at 1058 (quoting *Hammerschmidt v. United States*, 265 U.S. at 188). As the Sixth Circuit has observed: “Section 371 prohibits two types of conspiracy: (1) conspiracy to commit a specific offense (‘offense clause conspiracy’); and (2) conspiracy to defraud the United States (‘defraud clause conspiracy’). The distinction is important because a conspiracy charged under the defraud clause does not require that the Government prove that the conspirators were aware of the criminality of their objective.” *United States v. Tipton*, 269 F. App’x 551, 555 (6th Cir. 2008) (cleaned up).

205 *United States v. Moore*, 173 F. 122, 131 (C.C.D. Or. 1909). And see, e.g., *United States v. Atilla*, 966 F.3d at 130 (“[T]he defraud clause has been applied to conspiracies to obstruct the functions of a variety of government agencies and has not been limited to the IRS.”); *United States v. Conover*, 772 F.2d 765, 771 (11th Cir. 1985) (“The statute is designed to protect the integrity of the United States and its agencies, programs, and policies. Moreover, [t]he United States has a fundamental interest in the manner in which projects receiving its aid are conducted. This interest is not limited strictly to accounting for United States Government funds invested in the project, but extends to seeing that the entire project is administered honestly and efficiently and without corruption and waste.”) (internal quotation marks omitted).

206 *Hammerschmidt v. United States*, 265 U.S. at 188.

In a defraud clause prosecution, the Government must prove four elements²⁰⁷ beyond a reasonable doubt:

A conspirator must...

1. enter into an agreement with one or more others;
2. with specific intent to obstruct a lawful function of the government;
3. by deceitful or dishonest means;
4. and at least one overt act must have been committed in furtherance of the conspiracy.

The following well-established principles are relevant to interpreting these requirements and the statute's reach:

The criminal prohibition goes beyond pecuniary loss to protect the integrity and continuity of U.S. government functions.²⁰⁸ To violate the defraud clause, conspirators need not aim to deprive the

207 See, e.g., *Hammerschmidt*, 265 U.S. at 188; *United States v. Boone*, 951 F.2d 1526, 1543 (9th Cir. 1991); *United States v. Meredith*, 685 F.3d at 822 (citation omitted); *United States v. Ballistrea*, 101 F.3d at 832 (“Moreover, so long as deceitful or dishonest means are employed to obstruct governmental functions, the impairment need not involve the violation of a separate statute.... We thus agree with the Ninth Circuit’s summary of the four elements of a section 371 conspiracy-to-defraud offense: “[T]he government need only show (1) [that defendant] entered into an agreement (2) to obstruct a lawful function of the government (3) by deceitful or dishonest means and (4) at least one overt act in furtherance of the conspiracy.”)(internal quotation marks omitted).

208 *Dennis v. United States*, 384 U.S. 855, 861 (1966) (“It has long been established that this statutory language is not confined to fraud as that term has been defined in the common law. It reaches any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.”) (internal quotation marks omitted). And see, e.g., *United States v. Burgin*, 621 F.2d 1352, 1356 (5th Cir. 1980) (“It is now clear that the term ‘defraud’ as used in § 371 not only reaches financial or property loss through employment of a deceptive scheme, but also is designed and intended to protect the integrity of the United States and its agencies, programs and policies.”).

government of property or money.²⁰⁹ While § 371's predecessor statute had its origin in an 1867 law initially intended at least in part to combat tax fraud, the courts have long held that § 371, by its plain meaning, extends to "any fraud" against the federal government.²¹⁰ And for more than 100 years, courts have been clear that "fraud," in the § 371 context, is not limited to its common-law sense.²¹¹ In 1924, the Supreme Court put it definitively in *Hammerschmidt v. United States*: "To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest."²¹²

The conspiracy need not succeed. Once the conspiracy is properly formed and the overt act occurs, "it is not necessary that the object of the conspiracy be achieved."²¹³ To prevail, the government need not prove that it was actually injured, influenced, or deceived by the conspirators' dishonesty.²¹⁴

The actual misconduct engaged in need not directly impact the federal government. The prosecution need not prove that a § 371 defendant directly lied to the federal government, or directly contacted the federal government at all—as, by the "making of misrepresentations" to federal

209 *Haas v. Henkel*, 216 U.S. 462, 479 (1910). *And see, e.g., United States v. Conover*, 772 F.2d 765 (11th Cir. 1985), *aff'd in part, sub. nom. Tanner v. United States*, 483 U.S. 107, 128 (1987) ("Therefore, if petitioners' actions constituted a conspiracy to impair the functioning of the REA, no other form of injury to the Federal Government need be established for the conspiracy to fall under § 371.").

Nevertheless, even if it were necessary to allege some loss of property under § 371, that requirement would be satisfied by a scheme to secure the emoluments of office for a candidate whom the people did not elect. *See United States v. Aczel*, 219 F. 917, 938 (D. Ind. 1915) ("It is perfectly plain that a conspiracy which is calculated to obstruct and impair, corrupt, and debauch an election where Senators and Representatives in Congress are to be elected, would be to defraud the United States by depriving the government itself of its lawful right to have such Senators and Representatives elected fairly and in accordance with the law. But if the averment of a property loss to the government were essential, this count of the indictment alleges that one of the objects of the conspiracy was to secure for a person not duly elected a member of the House of Representatives, the annual salary of \$7,500 provided as compensation for a duly elected member of such House.").

210 *United States v. Hirsch*, 100 U.S. 33, 25 (1879). *See generally* Lance Cole & Ross Nabatoff, *Prosecutorial Misuse of the Federal Conspiracy Statute in Election Law Cases*, 18 YALE L. & POL'Y REV. 225, 230 (2000) (giving condensed history of § 371's application).

211 *See, e.g., Hyde v. Shine*, 199 U.S. 62, 82 (1905) (explaining that the law punishes not the wrongful taking of land, but instead, "the false practices by which the lands were obtained"). *See generally* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 422 (1959) (providing a definitive overview of § 371's early application by the courts).

212 *Hammerschmidt v. United States*, 265 U.S. at 188.

213 *United States v. Thompson*, 275 F. Supp. 3d 107, 111 (D.D.C. 2017).

214 *See, e.g., United States v. Dean*, 55 F.3d 640, 647 (D.C. Cir. 1995) ("[N]o other form of injury to the Federal Government need be established for the conspiracy to fall under § 371."); *United States v. Smith*, 891 F.2d 703, 713 (9th Cir. 1989), *amended*, 906 F.2d 385 (9th Cir. 1990) (citing *Kay v. United States*, 303 U.S. 1, 6 (1938)) ("It is not necessary to prove that the deceived agency was actually influenced. The one who is seeking to deceive by means of a false statement may not claim that his statements were not influential or the information not important.").

officials or the “submitting of false information” to a federal agency.²¹⁵ A defendant may, for instance, use a third party to reach and defraud the Government,²¹⁶ and may be convicted even though “he did not contact agency personnel or submit documents to the agency.”²¹⁷

“Neither the conspiracy’s goal nor the means used to achieve it need to be independently illegal.”²¹⁸

Notably, if a conviction for defrauding the government required independent illegality, there would be significant redundancy between § 371’s two prongs.²¹⁹

1. Conspiracy

“The essence” of a conspiracy “is an agreement to commit an unlawful act.”²²⁰ To be convicted, a defendant must know “the scheme’s criminal purpose and specifically intend[] to further that

215 *United States v. Ballistrea*, 101 F.3d at 829.

216 *Tanner v. United States*, 483 U.S. 107, 132 (1987).

217 *Ballistrea*, 101 F.3d at 829. Thus, for instance, a defendant was convicted under § 371 for conspiring to structure bank transactions to fall below the \$10,000 reporting threshold, even though they did not make any misrepresentations directly to the IRS. *United States v. Nersesian*, 824 F.2d 1294, 1309-16 (2d Cir. 1987). Another was convicted for selling phony invoices that a third party cited in its tax returns, on the theory that the false information obstructed the IRS—even though the defendant never directly gave false information to the IRS. *United States v. Gurary*, 860 F.2d 521, 525 (2d Cir.1988).

218 *United States v. Caldwell*, 989 F.2d at 1059 (9th Cir. 1993) (citing *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir.1989). *And see, e.g., United States v. North*, 708 F. Supp. 375, 379 (D.D.C. 1988) (“These orders form part of the framework of laws and regulations which North is alleged to have conspired to circumvent and impair. That they themselves do not carry criminal penalties is of no consequence. These are counts alleging conspiracy to defraud the United States and defeat its lawful governmental functions.”). See generally Madeleine Cane, Sephora Grey, & Katherine Hirtle, *Federal Criminal Conspiracy*, 58 AM. CRIM. L. REV. 925, 932 (2021) (“The fraud must be aimed at the United States, but the conspiracy’s acts are not required to otherwise be illegal.”).

219 Section 371 is not inapplicable merely because Congress has adopted other statutes that touch on illegal conduct covered by the conspiracy. *See, e.g., United States v. Minarik*, 875 F.2d 1186, 1195–96 (6th Cir. 1989) (“We do nothing to disturb the well-settled principle that modern criminal statutes defining new offenses do not necessarily erode or displace § 371 conspiracy liability in general.... And of course numerous cases have recognized that more detailed statutes criminalizing substantive acts, enacted after § 371, do not impliedly repeal or preempt the prohibition on conspiracy to commit those acts contained in § 371.”).

220 *Jannelli*, 420 U.S. at 777. *And see United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n. 20 (1978) (“In a conspiracy, two different types of intent are generally required—the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy.”). The agreement, per § 371, must be between two or more persons. On its face, the statute extends to all “persons”—including federal elected officers. Neither the plain text nor the history of § 371 suggest any reason why a federal government official—even the head of the executive branch—could not be a “person” convicted of conspiracy to defraud the federal government. In *United States v. Johnson*, for instance, the Court seemed to take it for granted that the government could legitimately prosecute a Congressman who took a bribe in exchange for influencing the DOJ to drop charges. 383 U.S. 169, 172 (1966).

objective.”²²¹ The defendant need only know “the essential nature of the plan”—the core wrong to be committed—not every detail.²²² And agreement “need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case.”²²³ Tacit agreement, inferred from “concert of action” in furtherance of shared objectives, can be enough.²²⁴

Here, we believe there is strong evidence that Trump and Eastman and Trump and Clark, agreed—tacitly or explicitly—on the end goals of obstructing the electoral count and interfering with the DOJ’s election enforcement work. The evidence also suggests an agreement between Trump and Meadows, and we look forward to learning more starting with the Committee hearings.

a. Trump and Eastman

The evidence shows that Trump and Eastman agreed, tacitly or explicitly, to work in concert towards the common goal of obstructing the congressional count on January 6, 2021.²²⁵

Eastman is the author of two memoranda that lay out a scheme of highly dubious legality for overturning the election.²²⁶ Both call for Vice President Pence to “determine[] on his own” which of the states’ electoral certificates “is valid, asserting that the authority to make that determination under the 12th Amendment, and the Adams and Jefferson precedents, is his alone.”²²⁷

221 Madeleine Cane, Sephora Grey, & Katherine Hirtle, *Federal Criminal Conspiracy*, 58 AM. CRIM. L. REV. 925, 933–34 (2021). *And see, e.g., United States v. John-Baptiste*, 747 F.3d 186, 204–05 (3d Cir. 2014) (“The government must prove beyond a reasonable doubt (1) a shared unity of purpose; (2) an intent to achieve a common illegal goal; and (3) an agreement to work toward that goal.”).

222 *See, e.g., United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998).

223 *Iannelli*, 420 U.S. at 777 n. 10. *And see, e.g., United States v. Fullmer*, 584 F.3d 132, 160 (3d Cir. 2009); *United States v. McKee*, 506 F.3d 225, 238 (3d Cir.2007).

224 *United States v. Mann*, 161 F.3d 840, 847 (5th Cir. 1998).

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

226 *Eastman v. Thompson* Order Re: Privilege of Docs at [3](#).

227 John Eastman, *January 6 Scenario*, <https://s3.documentcloud.org/documents/21066947/jan-3-memo-on-jan-6-scenario.pdf> (last visited Mar. 30, 2022).

In public and in closed-door meetings, Trump repeatedly and forcefully backed Eastman's scheme.²²⁸ Their apparently close partnership in pitching the scheme to policymakers, and ultimately to the public, is indicative of a commonality of purpose. As shown in greater detail above: On January 2, they participated together in a call to convince state legislators to overturn the election.²²⁹ On January 4, they met with Pence together, and they both followed up and kept the pressure on.²³⁰ They both spoke at the January 6 rally, with Eastman directly preceding Trump—both men advocating for Pence to interfere with the congressional count.²³¹ And both Trump and Eastman continued pushing their illegal scheme even during the Capitol invasion.²³²

So here there is what amounts to explicit communication; coordination on substance, messaging, and timing; complete consonance of not just goals but also strategies; and lockstep actions. Trump and Eastman appear to have worked together—sometimes in the same room, sometimes consecutively, always consistently. They promoted a single objective—overturning the election—through common means: pressuring Pence to throw out electoral certificates or to adjourn Congress, both in contravention of established law.

b. Trump and Clark

We believe the evidence also shows that Trump and Clark agreed, tacitly or explicitly, to work in concert towards the common goal of coercing DOJ officials and coopting DOJ's law enforcement powers to overturn the 2020 presidential election.

228 Eastman was also one of the schemers in the Willard Hotel war room, joining since-suspended attorney Rudy Giuliani, indicted contemnor Steve Bannon, and others in planning to overturn the election. Jacqueline Alemany, Emma Brown, Tom Hamburger, & Jon Swaine, *Ahead of Jan. 6, Willard Hotel in Downtown DC was a Trump Team 'Command Center' for Effort to Deny Biden the Presidency*, WASHINGTON POST (Oct. 23, 2021), https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html.

229 Jacqueline Alemany, Emma Brown, Tom Hamburger, & Jon Swaine, *Ahead of Jan. 6, Willard Hotel in Downtown D.C. was a Trump Team 'Command Center' for Effort to Deny Biden the Presidency*, WASHINGTON POST (Oct. 23, 2021, 5:51 PM), https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html.

230 *Eastman v. Thompson* Order Re: Privilege of Docs at 7.

231 John Eastman, Speech to the "Save America March" and Rally, C-SPAN (Jan. 6, 2021), <https://www.c-span.org/video/?c4953961/user-clip-john-eastman-january-6-rally>; Donald J. Trump, President, Speech to the "Save America March" and Rally (Jan. 6, 2021), https://wehco.media.clients.ellingtoncms.com/news/documents/2021/01/13/Trump_Jan_6_speech.pdf.

232 Donald J. Trump (@realDonaldTrump), TRUMP TWITTER ARCHIVE (Jan. 6, 2021, 2:24 PM), <https://www.thetrump-archive.com/>; Aaron Blake, *The Heated Jan. 6 Email Exchange Between Trump's and Pence's Lawyers, Annotated*, WASHINGTON POST (Mar. 3, 2022, 1:27 PM), <https://www.washingtonpost.com/politics/2022/03/03/heated-jan-6-email-exchange-between-trumps-pences-lawyers-annotated/>.

On September 3, 2020, Trump appointed Clark as acting Assistant Attorney General for the Civil Division of the Department of Justice.²³³ Department policy forbids all Assistant Attorneys General from initiating or participating in initial communications with the White House about pending or contemplated investigations,²³⁴ which must be routed through the Attorney General, Deputy Attorney General, Associate Attorney General, or Solicitor General.²³⁵ Nevertheless, according to Jeffrey Rosen’s testimony, Clark violated policy and met directly with Trump—without Rosen’s approval or knowledge—on December 23 or 24, 2020, with the apparent purpose of discussing enforcement actions and investigations surrounding the election.²³⁶ In a call on December 27, Trump told Rosen and then-Acting Deputy Attorney General Richard Donoghue that he’d received advice to “put him [Clark] in” a leadership position at DOJ.²³⁷ Trump apparently referenced replacing DOJ leadership with Clark in the context of demanding that Rosen and Donoghue “just say the election was corrupt and leave the rest to me and the Congressmen [who would be challenging the Electoral College certification on January 6],” and in the context of Rosen’s telling him that DOJ “can’t and won’t just flip a switch and change the election.”²³⁸ In other words: Trump sought to install Clark as acting Attorney General precisely so that Clark would effectuate their common goal of overturning the election.

A few days later, on December 28, 2020, Clark emailed Rosen and Donoghue with “Two Urgent Action Items.” The first was a request for a national security briefing, citing “evidence” from “hackers” that a “Dominion [voting] machine accessed the Internet through a smart thermostat with a net connecting trail leading back to China.”²³⁹ The second “action item” was Clark’s brazen proposal to have “DOJ send letters to the elected leadership of Georgia and other contested states, urging them to convene special legislative sessions in order to appoint a different slate of electors than those popularly chosen in the 2020 election.”²⁴⁰ In a “proof of concept” letter that Clark drafted for his superiors, this unprecedented politicization of DOJ was said to be justified by unspecified “irregularities” that raised “significant concerns” about the 2020 election.²⁴¹

233 Department of Justice, *Jeffrey Bossert Clark*, <https://www.justice.gov/enrd/jeffrey-bossert-clark> (last visited Mar. 28, 2022).

234 Senate Report at 9 (citing Memorandum from Attorney General Eric Holder for Heads of Department Components, All United States Attorneys, at 1 (May 11, 2009)).

235 Senate Report at 9 (citing Memorandum from White House Counsel Donald F. McGahn II to All White House Staff, at 1 (Jan. 27, 2017)).

236 Senate Report at 14, 19–20.

237 Senate Report at 16.

238 *Id.*

239 *Id.* at 20.

240 *Id.* at 21.

241 *Id.* at 21–22.

Donoghue and Rosen quickly shut down Clark's initiative. First, Donoghue sent an email that debunked Clark's claims of irregularities and concerns: "I know of nothing that would support the statement 'we have identified significant concerns that may have impacted the outcome of election in multiple states.'"²⁴² Then Donoghue and Rosen met with Clark, who called on Rosen "to hold a press conference where he announced that 'there was corruption.'"²⁴³ Donoghue and Rosen rejected both the press conference and the letters, and Clark alluded again to his meeting with Trump, and—as Donoghue recalled it—told them that "Trump was considering a leadership change at DOJ."²⁴⁴

The pressure on DOJ continued, now coming from directly inside the White House. On December 29, Trump's Oval Office coordinator sent DOJ leadership a draft complaint, copying Meadows, at Trump's explicit direction.²⁴⁵ As the Office of the Solicitor General observed, the meritless brief—a contemplated lawsuit to be filed directly in the Supreme Court, challenging the elections in six swing states—lacked a cause of action or any evident jurisdictional hook.²⁴⁶ But Trump, directly and through a personal lawyer, Kurt Olson, repeatedly pressured DOJ leadership to file the meritless brief.²⁴⁷

On December 31, as Donoghue recalls it, Trump summoned Rosen and Donoghue to a "contentious" Oval Office meeting where he "seemed unhappy" that they had not "found the fraud" and warned that "Rosen and Donoghue weren't doing their jobs and that people were telling him he should fire both of them and install Clark instead."²⁴⁸ After the meeting, Rosen spoke to Clark, who "revealed that he had in fact spoken to Trump again," and that Trump had asked if Clark was willing to take over as Acting Attorney General.²⁴⁹ In an apparent attempt to debunk Clark's claims of fraud, Rosen agreed to facilitate Clark's request for a briefing from the Director of National Intelligence on election fraud. Rosen also urged Clark to speak with B.J. Pak, the U.S. Attorney for the Northern District of Georgia, who could reassure Clark that there was no truth to allegations of election

²⁴² *Id.* at [21](#).

²⁴³ *Id.* at [23](#).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at [24](#).

²⁴⁶ *Id.* at [26](#).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at [27–28](#).

²⁴⁹ *Id.*

fraud in Atlanta.²⁵⁰ But while Clark attended the intelligence briefing, which confirmed no evidence of ballot fraud, he continued to spout claims of fraud.²⁵¹ And he also never contacted Pak.²⁵²

On January 2, Rosen and Donoghue again met with Clark. Again, Clark told them that he was considering accepting Trump's offer to replace Rosen—but that he might not accept if Rosen were willing to send Clark's letter to state legislatures.²⁵³ Rosen declined once more to send the letter.²⁵⁴ The next day, January 3, Clark called for a meeting with Rosen, informing him that Clark would be replacing Rosen as Acting Attorney General, effective that same day,²⁵⁵ thus suggesting that Clark and Trump—directly, or through an intermediary—were in communication about the election aftermath and the DOJ.

That night, there was a three-hour meeting in the Oval Office, including Trump, Clark, Rosen, Donoghue, and White House lawyers: "According to Rosen, Trump opened the meeting by saying, 'One thing we know is you, Rosen, aren't going to do anything to overturn the election.'"²⁵⁶ The purpose of installing Clark was thus to empower him to send his letter to state legislatures. As Judge Carter summed it up: "President Trump attempted to elevate Jeffrey Clark to Acting Attorney General, based on Mr. Clark's statements that he would write a letter to contested states saying that the election may have been stolen and urging them to decertify electors."²⁵⁷ But eventually Trump backed down in the face of threats of massive DOJ resignations.²⁵⁸

All this is suggestive of an agreement between Trump and Clark—and perhaps others. The goal of such agreement, as Trump himself put it, was to use DOJ to "overturn" Joe Biden's victory. Direct evidence from Rosen and Donoghue shows multiple clandestine and unsanctioned meetings between Trump and Clark. Clark's own admissions, relayed by Rosen and Donoghue, show that Trump and Clark planned—seemingly together—to use DOJ's credibility and power to reverse the election. Their planned means included cloaking unsubstantiated claims of election "irregularities" in the DOJ's authority; sending letters urging state legislatures to undemocratically arrogate to themselves the power to overrule the people's vote; and filing frivolous litigation.

250 *Id.* at [29](#).

251 *Id.* at [33–34](#).

252 *Id.* at [34](#).

253 *Id.* at [33–34](#).

254 *Id.* at [34](#).

255 *Id.* at [35](#).

256 *Id.* at [38](#).

257 *Eastman v. Thompson* Order Re: Privilege of Docs at [5](#).

258 Senate Report at [38](#).

c. Trump and Meadows

Mark Meadows was Trump’s Chief of Staff—responsible, among other things, for “oversee[ing] the White House political and policy processes and manag[ing] the president’s time and attention.”²⁵⁹ The public record amply reflects Meadows’ intimate involvement with Trump’s campaign to overturn the election—and a lockstep concert of action, consistent through multiple strategies towards a common goal,²⁶⁰ that rises to strong circumstantial evidence of conspiracy.²⁶¹

In particular, Meadows was instrumental in efforts to subvert the DOJ’s election protection function, to pressure states to overturn their results, to send phony slates of electors to Congress, and to pressure Vice President Pence to overturn the Electoral College results.

In particular, Meadows was instrumental in efforts to subvert the DOJ’s election protection function, to pressure states to overturn their results, to send phony slates of electors to Congress, and to pressure Vice President Pence to overturn the Electoral College results. The January 6 Committee has released findings showing that “Mr. Meadows received text messages and emails regarding apparent efforts to encourage Republican legislators in certain States to send alternate slates of electors to Congress, a plan which one Member of Congress

acknowledged was ‘highly controversial’ and to which Mr. Meadows responded, ‘I love it.’”²⁶² It was apparently Meadows who introduced Trump to Clark—and Meadows who repeatedly emailed DOJ leadership about the need to investigate bogus fraud claims.²⁶³ Meadows also traveled to Georgia to investigate allegations of fraud—and then reportedly helped to organize the January 2, 2021 phone call where Trump demanded that Georgia election officials “find” him just enough votes

259 David B. Cohen, Karen M. Holt, & Charles E. Walcott, *The Chief of Staff* (June 5, 2021), <https://www.csa.org/journal/chief-of-staff/>.

260 At least one member of the January 6 Committee, Rep. Jamie Raskin (D-MD), has spoken directly to Meadows’ involvement: “Meadows was someone obviously central to the operations of the Trump White House and deeply implicated in Trump’s specific attempts to strip Biden of his electoral college victory after the election. He was above all a loyal servant to Donald Trump regardless of the dictates of the law and the Constitution.” See Michael Kranish, *Inside Mark Meadows’s Final Push to Keep Trump in Power*, WASHINGTON POST (May 9, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/05/09/inside-mark-meadowss-final-push-keep-trump-power/>.

261 See, e.g., *United States v. Boykin*, 794 F.3d 939, 948 (8th Cir. 2015) (“[T]he crime of conspiracy requires a concert of action among two or more persons for a common purpose.” (internal quotation marks omitted)).

262 House Select Committee to Investigate the January 6th Attack on the United States Capitol, House Report, Resolution Recommending That the House of Representatives Find Mark Randall Meadows in Contempt of Congress for Refusal to Comply With a Subpoena Duly Issued by the Select Committee to Investigate the January 6th Attack on the United States Capitol, <https://docs.house.gov/meetings/IJ/IJ00/20211213/114313/HRPT-117-NA.pdf> (hereinafter “House Report”).

263 *Id.*

to win by emailing Secretary of State Brad Raffensperger from a private account and then, when Raffensperger failed to respond, by calling Raffensperger's deputy, Jordan Fuchs.²⁶⁴ Meadows then participated in the call, speaking up to object to Raffensperger's rejection of Trump's claim that 5,000 dead people had voted in the Georgia election.²⁶⁵ When Raffensperger said his office had found only two such instances, Meadows replied: "I can promise you there are more than that."²⁶⁶ And Meadows, according to the January 6 Committee, pressured Pence to overturn the legitimate Electoral College results.²⁶⁷ For instance, he sent an email to Pence's staff containing a memo written by Jenna Ellis,²⁶⁸ an attorney affiliated with Mr. Trump's re-election campaign,²⁶⁹ and requested that the memo "be shared with the vice president."²⁷⁰ The memo "argued that the Vice President could declare electoral votes in six States in dispute when they came up for a vote during the Joint Session of Congress on January 6, 2021."²⁷¹

2. Obstructing a Lawful Function of the Federal Government

To convict under § 371's defraud prong, a prosecutor must show that a defendant had specific intent to obstruct or impede a lawful government function.²⁷² Here, there are two relevant lawful functions of government: the congressional count of electoral votes and the DOJ's election enforcement function.²⁷³ So long as either or both were targets of the conspiracy, stopping the count and

264 *Id.* at 10.; Michael Kranish, *Inside Mark Meadows's Final Push to Keep Trump in Power*, WASHINGTON POST (May 9, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/05/09/inside-mark-meadowss-final-push-keep-trump-power/>.

265 Michael Kranish, *Inside Mark Meadows's Final Push to Keep Trump in Power*, WASHINGTON POST (May 9, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/05/09/inside-mark-meadowss-final-push-keep-trump-power/>.

266 *Id.*

267 House Report at 11.

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

269 *Id.*

270 Marc Short, Pence's chief of staff, said in an interview that "I have no doubt that Mark was aware that our office position was that the vice president did not have extraordinary powers and that instead we interpreted the constitutional role of the vice president as pretty straightforward." Nonetheless, Meadows persisted in sending the Ellis memo to Short. See Michael Kranish, *Inside Mark Meadows's Final Push to Keep Trump in Power*, WASHINGTON POST (May 9, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/05/09/inside-mark-meadowss-final-push-keep-trump-power/>.

271 House Report at 11.

272 See, e.g., *United States v. Gurary*, 860 F.2d at 523.

273 See *United States v. Concord Mgmt. & Consulting LLC*, 347 F. Supp. 3d 38 (D.D.C. 2018).

manipulating the DOJ need not have been the defendants' ultimate objective.²⁷⁴ Also importantly, provided the conspirators specifically intended to obstruct or impede a lawful government function, the Government need not prove that they "were aware of the criminality of their objective."²⁷⁵ For this element, they need only know of the government function and intend to obstruct it.²⁷⁶

A government function does not lose its "lawful" status just because a defendant refuses to accept that it is legitimate or wishes to challenge its legality in court. In *United States v. North*, for instance, the defendant Oliver North, prosecuted for his role in the Iran Contra scandal, was charged with several crimes, including violating 18 U.S.C § 371. North contended that he could not have interfered with or obstructed a "lawful government function" because the federal law that he violated was unconstitutional, since (in his telling) it infringed on the President's power to conduct foreign affairs.²⁷⁷ But the District Court ruled that North's own legal theories and putative concerns about constitutionality notwithstanding, the law was still the law. North was obligated to comply with it until it was overturned by a court or changed by Congress. As the court put it, North's "understanding as to the constitutionality...in no way affords an excuse for his alleged misconduct or entitled him to obstruct the way the government was, in fact, functioning."²⁷⁸

274 *United States v. Harnas*, 974 F.2d 1262, 1268 (11th Cir. 1992) ("Thus, while the government must prove that the United States was the ultimate target of the conspiracy under the defraud clause of § 371, the government is not required to allege that the United States was the intended victim of a conspiracy under the offense clause of § 371."). While impeding the government must be an objective of the conspiracy, it need not be the sole or even a major objective. *United States v. Gricco*, 277 F.3d 339, 348 (3d Cir. 2002).

275 *Ingram v. United States*, 360 U.S. at 678; See also *United States v. Concord Mgmt. & Consulting LLC*, 347 F. Supp. 3d 38 (D.D.C. 2018); *United States v. Tipton*, 269 F. App'x at 551, 555 (6th Cir. 2008).

276 *United States v. Tipton*, 269 F. App'x at 555, citing *United States v. Collins*, 78 F.3d 1021, 1038 (6th Cir.1996).

277 *United States v. North*, 708 F. Supp. at 375, 377 (D.D.C. 1988).

278 *Id.* at 378. In *United States v. Klein*, No. 11-CR-401, 2013 WL 147323, at 3 (N.D. Ill. Jan. 14, 2013), a chaplain was accused of conspiring to helping an incarcerated mobster circumvent protocols limiting his communication with his collaborators on the outside. The chaplain sought dismissal of the indictment, arguing that the protocols—called "SAMs"—were themselves overbroad and illegal. The District Court did not agree: "Klein is precluded from advancing the argument that Count One of the indictment must be dismissed because the SAMs are overbroad. Klein cannot attack the legality of the SAMs that created his alleged unlawful conduct." *Klein* relied on the Supreme Court's holding in *Dennis v. United States*, 384 U.S. at 857–58. At issue there were alleged violations of the Taft-Hartley Act requiring the filing of "non-Communist" affidavits. When the *Dennis* petitioners were convicted of filing false affidavits, they responded by challenging the constitutionality of the applicable Taft-Harley provision. But the Supreme Court held that the time to challenge the lawfulness of the government function was before they broke the law, not after: "It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective." *Id.* at 866; And see, e.g., *United States v. Sattar*, 314 F. Supp. 2d 279, 309 (S.D.N.Y. 2004), *aff'd sub nom. United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009) ("Stewart cannot defeat the charges against her by attacking the legality or constitutionality of the statute or requirement that prompted her alleged deceit.").

The United States Government is responsible, through the vice president and Congress, for counting electoral votes in presidential elections.²⁷⁹ The electoral count is a core function entrusted by law to the federal government, and only capable of being lawfully fulfilled by the federal government. Trump and Eastman—among others, possibly including Meadows—specifically intended to obstruct that count. As discussed above, Eastman and Trump repeatedly urged Pence and his team to either reject electors or to delay the count,²⁸⁰ thus clearly evidencing a specific intent to impede a lawful function of government under § 371.

A “function” of government need not be a specific process or proceeding. A clearly identifiable government interest, or a responsibility assigned to the federal government, is enough. Thus, for instance, in *United States v. Elkins*, the Eleventh Circuit upheld the § 371 conviction of a defendant who conspired to export planes to Libya, which was then subject to strict export controls. The government “function” that Elkins obstructed, the court explained, was not a specific enforcement process but instead the more general “right to implement its foreign policy.”²⁸¹

Similarly, in the fallout from Watergate, a clutch of Richard Nixon’s close advisors were prosecuted for a range of crimes—including violating § 371. The indictment alleged that H.R. Haldeman and others defrauded the United States by impeding the work of the CIA, Federal Bureau of Investigation (FBI), and DOJ. Specifically, the conspirators deprived the government and people of the “right to have the officials of these Departments and Agencies transact their official business honestly and impartially, free from corruption, fraud, improper and undue influence, dishonesty, unlawful impairment and obstruction.”²⁸² One of the three theories of liability under § 371 was that the conspirators “attempt[ed] to get the CIA to interfere with the Watergate investigation being conducted by the FBI.”²⁸³

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279 U.S. Const. amend. XII; 3 U.S.C. § 15.

280 Josh Dawsey, Jacqueline Alemany, Jon Swaine, & Emma Brown, *During Jan. 6 Riot, Trump Attorney Told Pence Team the Vice President’s Inaction Caused Attack on Capitol*, WASHINGTON POST (Oct. 29, 2021, 10:26 PM), https://www.washingtonpost.com/investigations/eastman-pence-email-riot-trump/2021/10/29/59373016-38c1-11ec-91dc-551d44733e2d_story.html.

281 *United States v. Elkins*, 885 F.2d 775, 782 (11th Cir. 1989).

282 *United States v. Haldeman*, 559 F.2d 31, 120 (D.C. Cir. 1976).

283 Haldeman, 559 F.2d at 121–22.

The analogy to the contemporary conspiracy is clear. The federal government is responsible, through the DOJ, for disinterested, ethical, and nonpartisan enforcement of the nation's voting laws.²⁸⁴ Based upon the currently available evidence, and as discussed above, it appears that Trump and Clark specifically intended to interfere with that critically important federal role. The evidence also suggests that Meadows may have done so.

3. Deceitful or Dishonest Means

For conviction under the defraud prong of § 371, “[n]either the conspiracy’s goal nor the means used to achieve it need to be independently illegal.”²⁸⁵ But § 371 does not criminalize every agreement

284 See, e.g., *Federal Prosecution of Election Offenses 1* (Richard C. Pilger eds., 8th ed. 2017), <https://www.justice.gov/criminal/file/1029066/download> (describing “the responsibility of the United States Department of Justice in attacking corruption of the election process”).

285 *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993) (citing *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989)). And see, e.g., *United States v. Cueto*, 151 F.3d 620, 635 (7th Cir. 1998) (citing *United States v. Jackson*, 33 F.3d 866, 870 (7th Cir. 1994)); *United States v. Sans*, 731 F.2d 1521, 1534 (11th Cir. 1984); *United States v. Boone*, 951 F.2d at 1559; *United States v. North*, 708 F. Supp. at 379 (D.D.C. 1988) (“These orders form part of the framework of laws and regulations which North is alleged to have conspired to circumvent and impair. That they themselves do not carry criminal penalties is of no consequence. These are counts alleging conspiracy to defraud the United States and defeat its lawful governmental functions.”); *United States v. Concord Mgmt. & Consulting LLC*, 347 F. Supp. 3d at 51 (the defendant “cannot escape the fact that the course of deceptive conduct alleged is illegal because § 371 makes it illegal. The indictment need not allege a violation of any other statute.”); *United States v. Morosco*, 822 F.3d 1, 6 (1st Cir. 2016) (“[T]he statute’s aim is to protect the government, and deceit can impair the workings of government.”) (quoting *Curley v. United States*, 130 F. 1, 6–10 (1st Cir. 1904)). See generally Madeleine Cane, Sephora Grey, & Katherine Hirtle, *Federal Criminal Conspiracy*, 58 AM. CRIM. L. REV. 925, 932 (2021) (“The fraud must be aimed at the United States, but the conspiracy’s acts are not required to otherwise be illegal.”).

A case in point is *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), which gave the Klein conspiracy its name. There, defendants were convicted of violating § 371 for conspiring to hide their tax liability from the Treasury—even though, it was determined, they actually had no tax liability, and even though there was no statute or regulation requiring disclosure. As one of the defendants’ lawyers later explained it: “The defendants were on trial for conspiring to throw sand in the government’s eyes. Liability could exist even if the Government was not looking at the time the sand was thrown, and even if it turned out that, because there was no tax liability, there was nothing to hide.” Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 436 (1959) (internal quotation marks omitted).

to intentionally disrupt government functions.²⁸⁶ Instead, it only extends to conspiracies that use “deceit, craft or trickery, or at least [] means that are dishonest.”²⁸⁷

This is why courts have largely brushed aside defendants’ claims that § 371 is unconstitutionally vague as applied for failure to give adequate notice that the charged conduct is illegal.²⁸⁸ The statutory standard for criminal intent—specific intent to obstruct or impede—and the requirement of deceit or dishonesty narrow the statute’s reach and protect against prosecution for innocuous conduct.²⁸⁹ A great deal of caselaw has given clarity to the statutory language and explained which government functions will—and which will not—be covered.²⁹⁰

Criminal intent would likely be the critical and most hotly contested element of a § 371 prosecution against Trump, Eastman, Clark, Meadows, and possibly other members of their circle. In his litigation resisting a subpoena from the January 6 Committee to turn over his email correspondence related to the assault on the U.S. Capitol, Eastman claimed that he and Trump did not deploy dishonest means because “[i]t is not ‘deceit, craft or trickery’ for the President, based on counsel from trusted advisors, to have arrived at conclusions on various factual matters which

286 *United States v. Caldwell*, 989 F.2d at 1060 (“The federal government does lots of things, more and more every year, and many things private parties do can get in the government’s way. It can’t be that each such action is automatically a felony.”).

287 *Id.* at 1059 (quoting *Hammerschmidt v. United States*, 265 U.S. at 188). An official acts dishonestly under § 371 if she breaches a duty to the public in search of some private gain, even if she does not tell a specific falsehood. Thus, for instance, in *United States v. Johnson*, 383 U.S. at 172, (the Supreme Court seemed to take it for granted that § 371 properly applied to a congressman who took a payment in exchange for influencing the DOJ to drop prosecutions, even though there was no allegation of any false statement, misrepresentation or deceit. And in *United States v. Peltz*, the Second Circuit upheld the conviction of an SEC employee who disclosed insider information: “Public confidence essential to the effective functioning of government would be seriously impaired by any arrangement that would enable a few individuals to profit from advance knowledge of governmental action. The very making of a plan whereby a government employee will divulge material information which he knows he should not is ‘dishonest.’” 433 F.2d 48, 52 (2d Cir. 1970). As the Second Circuit articulated the rule: “An agreement whereby a federal employee will act to promote private benefit in breach of his duty thus comes within the statute if the proper functioning of the Government is significantly affected thereby.” *Id.* And see, e.g., *United States v. Podell*, 436 F. Supp. 1039, 1041 n. 2 (S.D.N.Y. 1977), *aff’d*, 572 F.2d 31 (2d Cir. 1978) (Congressman who illegally received funds in violation of federal conflict of interest laws pled guilty to obstructing or impairing the “lawful governmental functions” of Congress by serving as a congressman while under a conflict of interest) (citing an indictment charging the Congressman for “obstructing, hindering and impairing said departments, agencies and branches in connection with the performance of their lawful governmental functions, including, the lawful governmental functions of the United States Congress and the legitimate representation by its Members of the interests of the United States and their constituents.”).

288 See, e.g., *United States v. Cueto*, 151 F.3d at 635 (7th Cir. 1998) (dispensing with vagueness challenge).

289 *United States v. Concord Mgmt. & Consulting LLC*, 347 F. Supp. 3d at 59 (collecting cases) (“[C]ourts have repeatedly rejected vagueness challenges to § 371 as applied to conspiracies, like this one, to impair lawful government functions.”).

290 See *id.*

the Select Committee does not share.”²⁹¹ The argument was that the attempts to obstruct and impede Congress and the DOJ could not have been dishonest if Trump and his collaborators honestly believed their cause was just.

But—as Judge Carter found in the *Eastman v. Thompson* litigation, in deciding that Trump and Eastman more than likely violated § 371—that argument cannot withstand scrutiny. There is strong circumstantial evidence showing that Trump, Eastman, Clark, and Meadows subjectively knew that Trump fairly lost a secure election. Regardless of their beliefs about the election outcome, these men also knew that the means by which they pursued their objective were deceptive and inconsistent with established law. And there is no end-justifies-the-means safe harbor under § 371 for conspirators who deceitfully obstruct a lawful government function, even if they subjectively believe that their cause is justified.

a. Trump and His Allies Knew that Trump Fairly Lost a Secure Election

Donald Trump and his supporters defend his post-election schemes by pointing to his obsessively repeated claims of fraud, as though they are validated by repetition. In their telling, Trump was not trying to steal an election that he lost. He was simply trying to defend against a rigged electoral process and preserve a victory that he rightly won. He had, his defenders say, a legitimately held—even if incorrect—interpretation of the facts surrounding the election. As Trump lawyer John Eastman claimed in a legal filing: “The [January 6] Committee has presumably concluded that those who advised the President that no material fraud or illegality existed were correct and that those who offered the opposite advice were incorrect. The fact that former President Trump reached a different conclusion does not show ‘consciousness of wrongdoing.’ It merely shows that the President arrived at a view of various factual questions which the...Committee does not share.”²⁹²

To the contrary, the factual record, laid out in detail above, provides substantial basis to believe that Trump did know the truth.

First, as shown above, Trump started claiming fraud even before Election Day. For many months before the election—without any evidence to back it up—he made such claims as “[t]he only way we’re going to lose this election is if this election is rigged.”²⁹³ These claims were not reasonable responses to real-world events surrounding the 2020 election. They were pretexts, not justifica-

291 Plaintiff’s Reply Brief in Support of Privilege Assertions at 22, *Eastman v. Thompson*, 22-CV-99 (C.D. Ca. Mar. 7, 2022), ECF # 185. (hereinafter “Pls Reply Brief in Support of Privilege Assertions”).

292 *Id.*

293 Donald Trump Speech Transcript Wisconsin August 17, Rev (Aug. 17, 2020), <https://www.rev.com/blog/transcripts/donald-trump-speech-transcript-wisconsin-august-17>.

tions. Trump did not, in other words, “reach” a “conclusion” based on observed facts. It is more defensible to say that he arrived at a pre-determined argument based on ideology and self-interest. Trump’s baseless, pre-election predictions of actual fraud would surely be admitted into evidence at trial because they are inextricably intertwined with his claims of fraud in the election itself.²⁹⁴

Second, Trump’s post-Election Day fraud pretext just continued a pattern from previous elections whose outcomes he did not like. As noted, he claimed fraud in both the 2016 primaries and the general election, baselessly claiming to have won the popular vote “if you deduct the millions of people who voted illegally.”²⁹⁵ This history of adapting an old allegation to new contexts supports the inference that the fraud contention was not a conclusion honestly drawn from real-world facts but an oft-repeated claim in Trump’s rhetorical arsenal. This pattern of disproven fraud claims is relevant here, and would likely be admissible to rebut any defense that Trump sincerely believed that he won the 2020 election. The prosecution would not offer the 2016 statements merely to prove that Trump is chronically dishonest, but instead to demonstrate a pattern of strategic lies about fraud to prove his intent, knowledge, plan, and absence of mistake under Rule 404(b) of the Federal Rules of Evidence.²⁹⁶

294 Most federal appellate courts liberally allow the introduction of evidence that “explains the circumstances” or “completes the story” of a charged crime; while the District of Columbia applies a more exacting standard, it nevertheless admits evidence that is “part of the charged offense.” *United States v. Wilkins*, 538 F. Supp. 3d 49, 70 (D.D.C. 2021).

295 Terrance Smith, *Trump Has Longstanding History of Calling Elections ‘Rigged’ if He Doesn’t Like the Results*, ABC NEWS (Nov. 11, 2020, 5:24 AM), <https://abcnews.go.com/Politics/trump-longstanding-history-calling-elections-rigged-doesnt-results/story?id=74126926>.

296 See, e.g., *United States v. Long*, 328 F.3d 655, 661 (D.C. Cir. 2003) (evidence is “relevant to show a pattern of operation that would suggest intent and that tends to undermine the defendant’s innocent explanation”) (internal quotations and citation omitted); *U.S. v. Semaan*, 594 F.2d 1215 (8th Cir. 1979) (allowing evidence of a defendant’s previous engagement in a fraudulent double-recovery scheme); *U.S. v. Sparkman*, 500 F.3d 678 (8th Cir. 2007) (allowing evidence of defendant’s prior fraudulent conduct to show scheme, pattern, or plan). And see generally *Andresen v. Maryland*, 427 U.S. 463 (1976) (proof of similar acts is admissible to show intent or the absence of mistake).

Third, the argument that Trump subjectively believed the election was stolen from him is also belied by the fact that none of the election fraud theories ever stood up to scrutiny in court,²⁹⁷ and that the advice that “no fraud or illegality” existed was endorsed by a number of Trump’s closest advisors, who delivered that message to Trump himself.²⁹⁸ This is powerful direct and circumstantial evidence that Trump’s collaborators knew that²⁹⁹—or chose to be willfully blind to it.³⁰⁰

Fourth, Trump’s own words, in moments of frustration and desperation, betray that he used claims of fraud cynically and instrumentally, not sincerely. On December 27, when Rosen told Trump that DOJ “can’t and won’t just flip a switch and change the election,” Trump responded by telling him to “just say the election was corrupt and leave the rest to me and the [Republican] Congressmen [who would be challenging the Electoral College certification on January 6].”³⁰¹ The point was not that fraud actually existed: It was that DOJ’s endorsement of election fraud, even without basis, would serve Trump’s goal of retaining power. As Rosen remembered it, Trump told him that DOJ should “just have a press conference.”³⁰² Similarly, Trump’s admonishment to Raffensperger to “to find 11,780 votes” was not a call to uncover fraud, of whatever scale: It was a call to reverse the election, by whatever means.³⁰³

297 Trump’s multiple, internally inconsistent, and flatly incredible fraud claims suggest that Trump was looking for an excuse to overturn the election, not that he sincerely believed fraud had been perpetrated against his candidacy. For example, look at Trump’s attempts to overturn the election outcome in Georgia, where he demanded that Secretary of State Raffensperger “find” just enough votes to fabricate a Trump victory. There, he has falsely claimed at various times that chain of custody issues required throwing out 43,000 ballots; that 5,000 dead people voted; that almost 5,000 out-of-state voters cast illegal ballots; and that election workers procured and illegally counted suitcases full of fraudulent ballots. Compare Phillip Bump, *This Is How Embarrassing Trump’s ‘Fraud’ Claims Have Gotten*, WASHINGTON POST (Sept. 17, 2021, 3:03 PM), <https://www.washingtonpost.com/politics/2021/09/17/this-is-how-embarrassing-trumps-fraud-claims-have-gotten/>, with Martin Pengelly, *Trump Claims 5,000 Dead People Voted in Georgia—but the Real Number Is Four*, THE GUARDIAN (Dec. 28, 2021, 10:03 AM), <https://www.theguardian.com/us-news/2021/dec/28/donald-trump-georgia-2020-election-dead-people>! Hyperlink reference not valid. and Noah Kim, *Fact-Check: Did 4,925 People Improperly Vote in Georgia?*, POLITIFACT (Jan. 6, 2021, 11:58 AM), <https://www.statesman.com/story/news/politics/politifact/2021/01/06/no-evidence-4-925-voters-out-state-voted-georgia-presidential-election/6565409002/> and Bill McCarthy, *Trump Rehashes Debunked Claim about ‘Suitcases’ of Ballots in Georgia Phone Call*, POLITIFACT (Jan. 4, 2021), <https://www.politifact.com/factchecks/2021/jan/04/donald-trump/trump-rehashes-debunked-claim-about-suitcases-ball/>. These internally inconsistent claims matter for more than Trump’s credibility as a potential witness. Because they suggest pretextual motives, shifting rationales are a classic indicator of culpability.

298 Luke Broadwater, *Pressing for Evidence, Jan. 6 Panel Argues That Trump Committed Fraud*, NEW YORK TIMES (Mar. 8, 2022), <https://www.nytimes.com/2022/03/08/us/politics/jan-6-panel-trump-fraud.html>.

299 See *Eastman v. Thompson* Order Re: Privilege of Docs at 38 (“The Court discussed above how the evidence shows that President Trump likely knew that the electoral count plan was illegal. President Trump continuing to push that plan despite being aware of its illegality constituted obstruction by “dishonest” means under § 371. The evidence also demonstrates that Dr. Eastman likely knew that the plan was unlawful.”).

300 See *United States v. Hoffman*, 918 F.2d 44, 46 (6th Cir. 1990) (allowing a jury instruction that “a defendant’s knowledge of a fact may be inferred from willful blindness to the existence of the fact”).

301 Senate Report at 16.

302 *Id.*

303 Amy Gardner & Paulina Firozi, *Here’s the Full Transcript and Audio of the Call Between Trump and Raffensperger*, WASHINGTON POST (Jan. 5, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html.

Fifth, as shown above, reporting suggests that there is a real question as to whether Trump and his closest advisors may have acted to conceal or destroy evidence of Trump's involvement in attempts to overturn the election. A key piece of evidence here may well be the silence in the White House call log on January 6, 2021, taken together with evidence that Trump was less than forthright when he said that he did not know what a "burner phone" is.³⁰⁴ Especially given Trump's affirmative duty to preserve presidential records,³⁰⁵ the absence of a record here suggests that Trump—or others on his behalf—may have taken steps to ensure that there was no evidence of their activities. And, should further factual investigation bear out Trump's involvement, proof of destruction of evidence—like other indicia of a defendant's attempt to conceal his participation in a crime—can be probative of consciousness of guilt.³⁰⁶

b. Trump and Team Used Dishonest Means

Even if they had sincerely believed the election was stolen, frustration with the courts would not have entitled Trump and his allies to deploy dishonest and illegal means to overturn the outcome. Again, § 371 nowhere preconditions prosecution on a defendant's knowledge that he is in the wrong. It only requires that he intentionally obstruct a lawful function of the government by deceitful or dishonest means. Trump appears to have done that, whether or not he honestly believed his own fraud claims.

Eastman and Trump both knew that their legal theory was unavailing, and that it would be illegal for Pence to unilaterally throw out electoral certificates or delay the count *even if* the election somehow had been tainted by fraud. As Judge Carter found, Eastman explicitly admitted that his plan broke from consistent historical practice since the founding of the Republic.³⁰⁷ He admitted that

304 See Amy B. Wang, *Gap in Trump Call Logs on Jan. 6 'Suspiciously Tailored,' Raskin Says*, WASHINGTON POST (Apr. 3, 2022, 3:41 PM), <https://www.washingtonpost.com/politics/2022/04/03/jan-6-committee-raskin-trump-7-hour-gap/> (quoting U.S. Rep. Jamie Raskin, a member of the January 6 Committee) ("It's a very unusual thing for us to find that suddenly everything goes dark for a seven-hour period in terms of tracking the movements and the conversations of the president.").

305 See 44 U.S.C. § 2203.

306 *United States v. Mendez-Ortiz*, 810 F.2d 76, 79 (6th Cir. 1986) ("Spoliation evidence, including evidence that defendant attempted to bribe and threatened a witness, is admissible to show consciousness of guilt.") *United States v. Van Metre*, 150 F.3d 339, 352 (4th Cir. 1998) (same); *United States v. Howard*, 729 F. App'x 181, 188 (3d Cir. 2018) ("Here, there was adequate evidence of Howard's consciousness of guilt, including testimony from the prosecution's forensic scientist that Howard's finger or palm prints—and not Arrington's—were found on cups and containers that contained the stamp bags or heroin residue as well as testimony from a drug-trafficking expert that Howard's behavior was consistent with an attempt to destroy evidence."). *And see* Dennis Aftergut, *The Clearest Evidence Yet of Donald Trump's Criminal Intent on Jan. 6*, SLATE (Mar. 29, 2022, 4:10 PM), <https://slate.com/news-and-politics/2022/03/trump-phone-records-gap-criminal-intent.html> (analyzing the legal significance of the 457 minute gap in phone records) ("Hiding one's calls and conduct on Jan. 6, 2021, as it appears Trump did, rebuts his potential defense that he thought he was acting righteously. People who believe that their behavior is law-abiding do not cover it up in this way.").

307 *Eastman v. Thompson* Order Re: Privilege of Docs at [7](#).

the Supreme Court would unanimously reject it.³⁰⁸ He admitted that it “violated the Electoral Count Act on four separate grounds.”³⁰⁹ He admitted that it was inimical to his own purported convictions as a conservative.³¹⁰ He even admitted his plan was entirely aimed at partisan advantage, since he didn’t think a Democratic vice president should have the same powers that he claimed for Pence.³¹¹ In an email on January 6, he acknowledged that he was calling on Pence to commit a “relatively minor violation” of the Electoral Count Act.³¹² And, in another email, he acknowledged that he told Trump directly that “the Vice President does not have the power to decide things unilaterally.”³¹³ So Trump could not hide behind the claim that he did not know he was pressing Pence to do something against the law. The architect of the plan—Trump’s own lawyer—told him so.³¹⁴

There is also reason to believe that Clark and Meadows knew that the means they employed to interfere with the DOJ were dishonest. Both Clark and Meadows violated longstanding government protocols and policies in their attempted politicization of the DOJ, and appear to have done so knowingly. There is direct evidence, in the form of testimony from senior DOJ officials, that Clark knew that his communications with Trump violated agency protocols and policies.³¹⁵ The same is true for Meadows’ own repeated violations of policy designed to prevent political interference with DOJ investigations.³¹⁶

308 *Id.*

309 *Id.*

310 *Id.* at 39.

311 *Id.*

312 Exhibit N at 2, *Eastman v. Thompson*, 22-cv-99 (C.D. Ca. Mar. 2, 2022), ECF # 160-16.

313 Exhibit M at 2, *Eastman v. Thompson*, 22-cv-99 (C.D. Ca. Mar. 2, 2022), ECF # 160-15.

314 Trump’s attempts to use illegal means to reverse the election and remove the duly-elected president did not stop with January 6. See Luke Broadwater & Shane Goldmacher, *House Republican Says Trump Asked Him to Illegally ‘Rescind’ 2020 Election*, NEW YORK TIMES (Mar. 23, 2022), <https://www.nytimes.com/2022/03/23/us/politics/trump-mo-brooks-senate.html> (“Representative Mo Brooks... claimed on Wednesday that the former president had asked him repeatedly in the months since to illegally ‘rescind’ the election, remove President Biden and force a new special election.”).

315 Senate Report at 44 (“Clark had a responsibility to know that the policy prohibited him from meeting with Trump without authorization. Regardless, prior to his unauthorized meetings with Trump, Clark had constructive knowledge that such contact violated the contacts policy after Donoghue sent that very policy to Clark and other senior DOJ leaders after the 2020 general election on November 11, 2020. Yet even being admonished by Donoghue that his unauthorized meeting in the Oval Office violated the contacts policy, and even though Clark assured Rosen that he would not meet with the President again, Clark brazenly violated the policy at least once more.”).

316 *Id.* (“Mark Meadows also repeatedly violated the DOJ-White House contacts policy. The White House version of that policy in force at the time made clear that communications with DOJ about pending or contemplated investigations or cases were to involve only the President, Vice President, White House Counsel, and the White House Counsel’s designees. The policy, which was enshrined in a memo from former White House Counsel McGahn, stressed, ‘In order to ensure that DOJ exercises its investigatory and prosecutorial functions free from the fact or appearance of improper political influence, these rules must be strictly followed.’ Meadows violated the policy each time he contacted Rosen to request that DOJ look into election fraud allegations, whether in Fulton County, New Mexico, or elsewhere.”).

This dishonesty of the collective efforts to interfere with the election are borne out more generally by Trump’s own endorsement of violence and abusive conduct as tools to overturn the election. That endorsement was a continuation of Trump’s conduct during the period leading up to November 3, which had included his pointed refusal to condemn the Proud Boys during the 2020 election—directing them to “stand back and stand by”—and thus inviting their conduct in showing up at the Capitol on January 6.³¹⁷

Trump’s speech on January 6 was well calculated to encourage people to “fight like hell,” and when they did just that, Trump’s statements lauding the invasion and praising the invaders³¹⁸ as “very special” “patriots” whom he professed to “love”³¹⁹ showed his endorsement of what had gone on. So did his knowing failure to intervene for several hours once the Capitol was breached—despite the entreaties of several members of his inner circle.³²⁰ Beyond this invocation and acquiescence

in acts of violence by his supporters, Trump and his allies also explored, threatened, or actually engaged in other grossly abusive acts in an effort to prevail. These included the possibility of misusing national security powers to seize voting machines³²¹; launching a pressure campaign against state officials that may well have violated state laws³²²; collaborating with battleground

This dishonesty of the collective efforts to interfere with the election are borne out more generally by Trump’s own endorsement of violence and abusive conduct as tools to overturn the election.

317 Adam Gabbatt, *Trump’s Refusal to Condemn White Supremacy Fits Pattern of Extremist Rhetoric*, THE GUARDIAN (Sept. 30, 2020, 10:39 PM), <https://www.theguardian.com/us-news/2020/sep/30/trump-white-supremacy-extremist-rhetoric>.

318 Eliza Relman, Oma Seddiq, & Jake Lahut, *Trump Tells His Violent Supporters Who Stormed the Capitol “You’re Very Special,” but Asks Them “to Go Home,”* BUSINESS INSIDER (Jan 6, 2021, 4:46 PM), <https://www.businessinsider.com/trump-video-statement-capitol-rioters-we-love-you-very-special-2021-1>.

319 Eliza Relman, Oma Seddiq, & Jake Lahut, *Trump Tells His Violent Supporters Who Stormed the Capitol “You’re Very Special,” but Asks Them “to Go Home,”* BUSINESS INSIDER (Jan 6, 2021, 4:46 PM), <https://www.businessinsider.com/trump-video-statement-capitol-rioters-we-love-you-very-special-2021-1>; Shant Shahrigan, *Trump Praises Jan. 6 Rioters as “Patriots” and “Peaceful People,”* NEW YORK DAILY NEWS (July 11, 2021), <https://news.yahoo.com/trump-praises-jan-6-rioters-211400473.html>. And see Memorandum Opinion and Order, *Thompson v. Trump*, 21-CV-400, 2022 WL 503384, at 35 (D.D.C. Feb. 18, 2022), ECF # 66 (noting that “a reasonable observer could read that tweet as ratifying the violence and other illegal acts that took place that day”).

320 Jim Acosta, *Trump Did Not Want to Tweet ‘Stay Peaceful’ During January 6 Riot, Key Former Aide Says*, CNN (Jan. 6, 2022, 3:01 PM), <https://www.cnn.com/2022/01/06/politics/trump-tweet-january-6/index.html>.

321 *Trump Directly Involved in Plans to Seize Voting Machines—Reports*, REUTERS (Feb. 1, 2022, 11:26 AM), <https://www.reuters.com/world/us/trump-directly-involved-plans-seize-voting-machines-reports-2022-02-01/>.

322 Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to ‘Find’ Votes to Overturn Election*, NEW YORK TIMES (May 26, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html>.

state electors to sign and submit phony electoral certificates³²³; and filing endless, meritless litigation.³²⁴

We believe that all of this evidence supports the legal conclusion that Trump and his allies utilized deceitful or dishonest means in order to overturn the election.

4. Overt Acts

§ 371's fourth element is the performance of at least one overt act by one of the participants in furtherance of the conspiracy.³²⁵ The overt act shows that the conspiracy progressed from thought into action, but the act need not itself be criminal or even illegal.³²⁶

The public record reflects numerous instances of overt acts in furtherance of the alleged conspiracies detailed here. Among many other acts, Eastman and Trump met with Pence and sought to coerce him into doing their bidding. Meadows repeatedly emailed DOJ officials, demanding that they investigate nonexistent fraud. And Clark drafted a "proof of concept" letter, emailing it to DOJ leadership with a request for permission to send it to Georgia.³²⁷

323 Terry Gross, *How Trump Sought to Use Fake Electors, Conspiracy Theories to Remain in Power*, NPR (Feb. 10, 2022, 1:35 PM), <https://www.npr.org/2022/02/10/1079835695/how-trump-sought-to-use-fake-electors-conspiracy-theories-to-remain-in-power>.

324 William Cummings, Joey Garrison, & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021 10:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>.

325 See generally Madeleine Cane, Sephora Grey, & Katherine Hirtle, *Federal Criminal Conspiracy*, 58 AM. CRIM. L. REV. at 934–35; *Braverman v. United States*, 317 U.S. 49, 53 (1942) ("The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime.").

326 *Yates v. United States*, 354 U.S. 298, 334 (1957) ("It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy. Nor, indeed, need such an act, taken by itself, even be criminal in character. The function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work.'").

327 See, e.g., *United States v. Lange*, 834 F.3d 58, 74 (2d Cir. 2016) (sending emails in furtherance of a conspiracy is an overt act); *United States v. Rommy*, 506 F.3d 108, 120 (2d Cir. 2007) ("It is beyond question that telephone calls can constitute overt acts in furtherance of a conspiracy."); *United States v. Nelson*, 852 F.2d 706, 713 (3d Cir. 1988) (explaining that an overt act "may be as innocent on its face as the act of meeting, writing a letter, depositing a check, or talking on the telephone").

B. 18 USC § 1512(c)(2) & (k): Obstructing an Official Proceeding

18 U.S.C. § 1512(c)(2) forbids corruptly obstructing or impeding—or attempting to obstruct or impede—an official proceeding. § 1512(k) forbids conspiring to obstruct or impede an official proceeding. While any final determination must await the completion of the Committee’s hearing and report, and the decision of the DOJ, we believe the facts support a substantial case that Trump and members of his circle—including, most prominently, John Eastman—violated § 1512(c)(2) and (k) through their scheme to block and delay the congressional count of electoral vote certificates on January 6, 2021.

In full, § 1512(c)³²⁸ provides:

(c) Whoever corruptly—

1. alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or
2. otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

328 Paragraph (2) is a “catch-all” or omnibus provision, designed to cover the many instances of obstruction that could not be itemized in paragraph (1). See *United States v. Burge*, 711 F.3d 803, 809 (7th Cir. 2013) (“The expansive language in this provision operates as a catch-all to cover ‘otherwise’ obstructive behavior that might not fall within the definition of document destruction.”). As one circuit court noted, it is a “well-established rule” that “omnibus clauses of federal obstruction statutes be broadly construed.” *United States v. Mitchell*, 877 F.2d 294, 299 (4th Cir. 1989) (collecting cases). That imperative of broad application responds to criminal creativity: Omnibus obstruction statutes ensure that federal law covers “the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined.” *United States v. Griffin*, 589 F.2d 200, 206-07 (5th Cir. 1979).

To convict under § 1512(c)(2), then, the prosecution must prove at a minimum that an alleged perpetrator attempted to (1) corruptly; (2) obstruct, influence, or impede; (3) an official proceeding. Conviction for conspiracy under § 1512(k) does not require actual commission or attempt to commit the acts constituting the crime, but does require that (1) two or more persons entered into the unlawful agreement to corruptly obstruct an official proceeding; and (2) the defendant knowingly and intentionally joined the conspiracy with an awareness of its unlawful purpose.³²⁹

1. Criminal Intent: To Act “Corruptly”

Factually, there seems little doubt that Trump and some members of his circle agreed upon and tried to implement a plan to prevent Congress from counting electoral certificates on January 6, 2021. That agreement plainly appears to satisfy the elements of a conspiracy under the law, and the overwhelming weight of precedent holds that an attempt to prevent Congress from counting the certificates is attempted obstruction of an official proceeding within the meaning of § 1512(c). As some commentators have noted, then, the truly dispositive question in a § 1512 prosecution is whether the Government could prove beyond a reasonable doubt that Trump and his advisors had the requisite criminal intent for culpability.³³⁰

329 18 U.S.C. Section 1512(k) “Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.” Subsection (k), unlike some other conspiracy statutes, contains no overt act requirement. *United States v. Edlind*, 887 F.3d 166, 176 n.4 (4th Cir. 2018) (noting that § 1512(k) “does not contain an overt act requirement.”).

330 See, e.g., Barbara McQuade, *United States v. Donald Trump: A “Model Prosecution Memo” on the Conspiracy to Pressure Vice President Pence*, JUST SECURITY (Feb. 22, 2022), <https://www.justsecurity.org/80308/unit-ed-states-v-donald-trump-model-prosecution-memo/>.

The currently available evidence here strongly suggests that the answer is yes.³³¹ Culpability under § 1512(c) requires that a defendant act “corruptly.”³³² A wealth of caselaw—from D.C. district courts and from circuit courts around the country—has given “corruptly” a consensus “settled legal meaning.”³³³ First: A defendant must have “specific intent to obstruct, impede, or influence the proceeding.”³³⁴ Here, that is easily shown: Trump himself is on the record specifically calling for Vice President Pence to throw out electoral certificates and to delay the count.³³⁵ Second: There must be a nexus—“a relationship in time, causation, or logic”—between the obstructive conduct

331 *Eastman v. Thompson* Order Re: Privilege of Docs at 36 (“Based on the evidence, the Court finds it more likely than not that President Trump corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021.”).

332 In the face of the overwhelming weight of precedent, insurrectionists prosecuted for invading the Capitol on January 6 have repeatedly failed to convince any federal judge that the D.C. Circuit’s ruling in *United States v. Poindexter*, 951 F.2d 369, 377 (D.C. Cir. 1991), should control.

There, the appellate court construed “corruptly” as used in the then-extant version of 18 U.S.C. § 1505, which forbade “corruptly” obstructing “the due and proper administration of the law.” As applied to Admiral John Poindexter, the former national security advisor convicted of lying to Congress, the term was impermissibly “vague; that is, in the absence of some narrowing gloss, people must guess at its meaning and as to its application.” *Poindexter*, 951 F.2d at 378.

But, as any number of federal judges have recently observed, *Poindexter* simply does not apply to § 1512(c). First: *Poindexter* was an application of a since-rewritten statute—and not the statute at issue in a prosecution under § 1512—to a specific set of facts that are not the facts at issue in a potential prosecution of Donald Trump. See *Montgomery*, 2021 WL 6134591 at 18 (“*Poindexter* turned on the specific language of 18 U.S.C. § 1505 as then written and the specific charge in that case—that is, lying to Congress.”). Since 1991, courts have repeatedly refused to extend *Poindexter* to all uses of “corruptly” in all obstruction cases. See *United States v. Sandlin*, 2021 WL 5865006 at 11 (noting that courts have “cabined *Poindexter*’s holding to its facts and have not read it as a broad indictment of the use of the word corruptly in the various obstruction-of-justice statutes”). Most relevantly, both the U.S. Supreme Court and the D.C. Circuit have since upheld the “corruptly” criminal intent requirement in § 1512(b). *United States v. Morrison*, 98 F.3d 619, 629 (D.C. Cir. 1996); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). “In sum, the narrow holding in *Poindexter* does not mean that the word ‘corruptly’ necessarily renders a criminal statute unconstitutionally vague, nor does it compel a conclusion that Section 1512(c)(2) is vague as applied” to a particular defendant’s conduct. *United States v. Puma*, 21-CR-454, 2022 WL 823079 at 10–11 (D.D.C. Mar. 19, 2022).

333 *United States v. Williams*, 553 U.S. 285, 306 (2008) (“What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal culpability to whether the defendant’s conduct was ‘annoying’ or ‘indecent’—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.”). This is why no court has found § 1512(c)(2) to be unconstitutionally vague: “The question is whether the term provides a discernable standard when legally construed.” *United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017). As DC federal courts have now unanimously found, and as the discussion below shows, “corruptly” has a settled legal meaning, and one which put Trump and his co-conspirators on notice that their conduct here crossed the line.

334 *United States v. Sandlin*, 2021 WL 5865006 at 12.

335 For instance, on January 4, Trump and Eastman met with Vice President Pence and his team at the Oval Office, specifically pressing Pence “to reject electors or delay the count.” *Eastman v. Thompson* Order Re: Privilege of Docs at 7.

and the official proceeding.³³⁶ Trump’s efforts were explicitly, logically, and causally aimed at the electoral count. He spoke publicly at the January 6 pre-invasion rally, and tweeted on January 6, calling for Pence to throw out votes.³³⁷ Third: As one D.C. federal court recently explained, prosecutors can prove “corrupt” action under § 1512(c) in one of two ways: “Section 1512(c) clearly punishes those who endeavor to obstruct an official proceeding by acting with a corrupt purpose, or ... by independently corrupt means, or both.”³³⁸

Here, it appears to be *both*. As discussed below, caselaw explains that a “corrupt purpose” is an “improper purpose”—and, most relevantly, that a defendant acts with “improper purpose” when he is motivated by self-interest and not by legal duty. Trump’s attempts to obstruct and interfere with the electoral count were undertaken “with a corrupt purpose,” because the facts suggest he was motivated by his desire to retain power rather than a legitimate desire to faithfully execute the law. The caselaw similarly defines “independently corrupt means” as means that are independently illegal or normatively wrong. Trump evidently employed “independently corrupt” means because his efforts to obstruct the count relied on patently dishonest tactics and on actions that Trump and his collaborators had abundant reason to know, even at the time, were both normatively wrong and unlawful.

a. Corrupt Purpose

The most appropriate definition of the word “corruptly” here is provided in 18 U.S.C. § 1505: “As used in section 1505, the term ‘corruptly’ includes acting with an improper purpose...”³³⁹ Federal courts of appeal have applied that definition to other federal obstruction statutes, including § 1503 and § 1512(c). Under that precedent, a would-be obstructor is criminally liable when he is “motivated by an improper purpose.”³⁴⁰

336 *Id.* And see, e.g., *United States v. Grider*, 21-CR-22, 2022 WL 392307 at 7 (D.D.C. Feb. 9, 2022) (“Although the Court of Appeals has not yet weighed in, various judges of this Court have consistently held that “corruptly” requires (1) some degree of specific intent to obstruct and (2) a nexus between the obstruction and the proceeding to be obstructed.”).

337 See Donald J. Trump, President, Speech to the “Save America March” and Rally (Jan. 6, 2021), https://wehco.media.clients.ellingtoncms.com/news/documents/2021/01/13/Trump_Jan_6_speech.pdf (“Because if Mike Pence does the right thing, we win the election.”).

338 *United States v. Puma*, 2022 WL 823079 at 10 (citing *United States v. Nordean*, 21-CR-175, 2021 WL 6134595 at 11 (D.D.C. Dec. 28, 2021)).

339 False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 3, 110 Stat. 3459, 3460.

340 See *United States v. Fasolino*, 586 F.2d 939, 941 (2d Cir. 1978) (interpreting “corruptly” under Section 1503 to mean “motivated by an improper purpose”); *United States v. Gordon*, 710 F.3d at 1151 (“[C]orruptly,” for purposes of 1512(c), means “acting with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede, or obstruct the proceeding.”); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (“Section 1512(b) does not prohibit all persuasion but only that which is ‘corrupt[.]’ or ‘motivated by an improper purpose.’”); *United States v. Haldeman*, 559 F.2d 31, 114–115 & 115 n.229 (D.C. Cir. 1976) (finding the following jury instruction proper: “The word, ‘corruptly,’ as used in this statute simply means having an evil or improper purpose or intent. In terms of proof, in order to convict any Defendant of obstruction of justice, you must be convinced beyond a reasonable doubt that the Defendant made some effort to impede or obstruct the Watergate investigation or the trial of the original Watergate defendants.”).

A purpose is “improper” or “corrupt” in this context when an actor pursues personal gain or advantage at the expense of professional or ethical duty. As the Ninth Circuit recently explained: “As used in criminal-law statutes, the term ‘corruptly’ usually ‘indicates a wrongful desire for pecuniary gain or other advantage.’”³⁴¹ Other circuits concur. “[T]he term ‘corruptly’ in criminal laws has a longstanding and well-accepted meaning,” the Sixth Circuit has held. “It denotes ‘[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others.’”³⁴²

In *United States v. Cueto*, a lawyer argued that his obstructive motive under 18 U.S.C. § 1503 could not be “corrupt” or improper because he was simply advocating for his client, who ran an illegal gambling operation. But the Seventh Circuit followed its sister circuits in holding that a defendant acts corruptly when he is motivated by personal advancement in derogation of professional responsibility: “It is undisputed that an attorney may use any lawful means to defend his client.... However, it is the corrupt endeavor to protect the illegal gambling operation and to safeguard his own financial interest, which motivated Cueto’s otherwise legal conduct, that separates his conduct from that which is legal.”³⁴³ Similarly, the Second Circuit has held that a defendant acts with an improper purpose—and thus criminally for federal obstruction purposes—when he is motivated by a desire for self-protection in counseling a witness to invoke the Fifth Amendment.³⁴⁴ Professors Daniel Hemel and Eric Posner, in their recent study, apply that caselaw to presidential obstruction of justice.³⁴⁵ They conclude that a president acts with improper and corrupt motive when he acts “to advance narrowly personal, pecuniary, or partisan interests.”³⁴⁶

Here, Trump appears based on the available evidence to have acted with an improper purpose. He aimed to achieve a partisan victory and to retain personal power in the face of what he knew to be Biden’s legitimate victory, and after he knew that there was no legitimate avenue for disrupting the congressional count. As former federal prosecutor Barbara McQuade has noted: “It would be wrongful or improper for Trump to seek to retain the presidency if he knew that he had been defeated in the November election.”³⁴⁷ He did know. As we showed above, Trump was told—repeatedly, clearly, and by his own partisan allies—that he lost a safe and secure election. But even had

341 *United States v. Lonich*, 23 F.4th at 902–03 (citing Black’s Law Dictionary).

342 *United States v. Buendia*, 907 F.3d 399, 402 (6th Cir. 2018). *And see, e.g., United States v. Rooney*, 37 F.3d 847, 852–53 (2d Cir. 1994) (same); *United States v. Ogle*, 613 F.2d 233, 238 (10th Cir. 1979) (same).

343 151 F.3d 620, 631 (7th Cir. 1998).

344 *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006).

345 For an additional, in-depth discussion of presidential obstruction of justice, see Barry H. Berke, Noah Bookbinder, & Norman Eisen, BROOKINGS INSTITUTION, *Presidential Obstruction of Justice: The Case of Donald J. Trump* (Aug. 22, 2018), <https://www.brookings.edu/research/presidential-obstruction-of-justice-the-case-of-donald-j-trump-2nd-edition/>.

346 Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CAL. L. REV. 1277, 1312 (2018).

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

he somehow genuinely believed he won, it would still be improper for Trump to attempt to stop the congressional count if he knew all legitimate and lawful means to contest the election had been tried and had failed.

b. Independently Corrupt Means

Recall that acting “corruptly” –and thus culpably—for the purposes of § 1512(c) requires acting with “a corrupt purpose” or “by independently corrupt means, or both.”³⁴⁸

We have shown that Trump acted with a corrupt purpose, as that term is defined at law. In the alternative, or additionally, he also appears to have acted through independently corrupt means. “Corrupt means” need not be independently criminal—just improper and wrongful, in the dictionary definition sense of “contrary to law, statute, or established rule.”³⁴⁹ And, as noted *supra*, the Eastman/Trump scheme plainly deployed “corrupt” means in that sense of the term, because it called for Mike Pence to “violate[] the Electoral Count Act on four separate grounds,”³⁵⁰ even if none of those violations were separate crimes.

Only one federal judge has suggested that conviction under § 1512(c) may require *both* corrupt purpose *and* corrupt means—and also that “corrupt means” includes only independently *criminal* behavior. In *United States v. Sandlin*, the prosecution of a defendant who invaded the Capitol building on January 6, U.S. District Court Judge Dabney Friedrich held that the term “corruptly” in § 1512(c) was not unconstitutionally vague as applied to a defendant who was alleged to have impeded the count through violence. She explained that the “core set of conduct against which § 1512(c)(2) may be constitutionally applied” includes “independently criminal conduct that is inherently malign...and committed with the intent to obstruct an official proceeding.”³⁵¹ But Judge Friedrich cautioned that “other cases, such as those involving lawful means...will present closer questions.”³⁵²

Any interpretation conditioning successful prosecution on proof of independently criminal means should be rejected. Other judges on Judge Friedrich’s court have taken a contrary position and no

348 *United States v. Puma*, 21-CR-454, 2022 WL 823079, at 10 (D.D.C. Mar. 19, 2022) (cleaned up) (citing *United States v. Nordean*, 21-CR-175, 2021 WL 6134595, at 1 (D.D.C. Dec. 28, 2021)).

349 *Wrongful*, def. 3(a), Oxford English Dictionary (2d ed. 1989). Cited in *United States v. Sandlin*, 2021 WL 5865006, at 13 (Friedrich, J.).

350 *Eastman v. Thompson* Order Re: Privilege of Docs at [7](#).

351 *United States v. Sandlin*, 2021 WL 5865006, at 13 (citing *United States v. North*, 910 F.2d at 943, *opinion withdrawn and superseded in part on reh’g*, 920 F.2d 940 (D.C. Cir. 1990) ((Silberman, J., concurring in part and dissenting in part) and *Arthur Andersen LLP v. United States*, 544 U.S. at 704).

352 *Id.* See also Order, *United States v. Reffitt*, 21-CR-32 (D.D.C. Dec. 29, 2021), ECF # 81 (noting the same concern about edge cases that may present vagueness problems).

appellate court has insisted on independently criminal conduct before affirming a conviction under § 1512(c). Instead, the heavy weight of precedent shows that independently corrupt—not necessarily criminal—means may be sufficient to prove corrupt intent, but it is surely not necessary.³⁵³ Indeed, federal appellate courts have repeatedly affirmed obstruction convictions of defendants who commit otherwise lawful acts with criminal intent. Thus, for instance, in *United States v. Smith*, the Ninth Circuit affirmed the obstruction convictions of several Los Angeles Sheriff’s Department employees for engaging in conduct that would have been legal but for the defendants’ intent to interfere with an FBI investigation into civil rights violations at Los Angeles County jails.³⁵⁴ In *United States v. Mitchell*, defendants—who took money to convince a congressman to stop a congressional investigation—argued that they were wrongfully convicted for the lawful behavior of lobbying Congress.³⁵⁵ The Fourth Circuit disagreed, holding that the means of obstruction need not be independently criminal: “[M]eans, other than ‘illegal means,’ when employed to obstruct justice fall within the ambit of the ‘corrupt endeavor’ language of federal obstruction statutes.”³⁵⁶ In *United States v. Cueto*, the Seventh Circuit upheld the obstruction conviction of an attorney who maintained that all of his allegedly criminal actions—including filing court pleadings—had been no more than lawful advocacy.³⁵⁷ “Otherwise lawful conduct, even acts undertaken by an attorney in the course of representing a client,” the court explained, “can transgress § 1503 if employed with the corrupt intent to accomplish that which the statute forbids.”³⁵⁸ And, in *United States v. Cintolo*, the First Circuit held that “any act by any party—whether lawful or unlawful on its face” may violate federal obstruction statutes “if performed with a corrupt motive.”³⁵⁹

353 See *United States v. Puma*, 2022 WL 823079, at 10 (describing “a consensus that Section 1512(c) clearly punishes those who ‘endeavor[] to obstruct’ an official proceeding by acting ‘with a corrupt purpose, or... by independently corrupt means, or [] both.’”). And see, e.g., *United States v. Silverman*, 745 F.2d 1386, 1393 (11th Cir. 1984) (interpreting § 1503) (“The statute reaches all corrupt conduct capable of producing an effect that prevents justice from being duly administered, regardless of the means employed.”).

354 831 F.3d 1207, 1211 (9th Cir. 2016). In *Smith*, the sheriff’s office defendants violated § 1503 when they enforced otherwise-legal jail rules with corrupt intent—for instance, by seizing a cell phone from an inmate that an FBI agent smuggled to him as part of the investigation. See also Jury Instructions, *United States v. Baca*, No. 16-cr-00066 (C.D. Cal. Mar. 13, 2017) ECF #301 (“A local officer has the authority to investigate potential violations of state law. This includes the authority to investigate potential violations of state law by federal agents. A local officer, however, may not use this authority to engage in what ordinarily might be normal law enforcement practices, such as interviewing witnesses, attempting to interview witnesses or moving inmates, for the purpose of obstructing justice.”).

355 877 F.2d 294 (4th Cir. 1989).

356 *Id.* at 299.

357 151 F.3d 620 (7th Cir. 1998).

358 *Id.* at 628–31. And see, e.g., *United States v. Ogilvie*, 12-CR-121, 2014 WL 117414, at 2 (D. Nev. Jan. 9, 2014), *aff’d sub nom. United States v. Tracy*, 598 F. App’x 548 (9th Cir. 2015) (finding that indictment adequately alleged an offence under § 371 when it alleged, *inter alia*, that defendants conspired to file frivolous litigation against the IRS and its employees.).

359 818 F.2d 980, 991 (1st Cir. 1987).

c. Section 1512(c)(2) does not require proof of consciousness of wrongdoing—but Trump and his collaborators knew their behavior was wrong.

In his lawsuit to block Congress from obtaining emails about his role in the January 6 insurrection, John Eastman maintained that Trump cannot face criminal liability under § 1512(c). In Eastman’s telling, Trump was following the advice of counselors who told him that the election genuinely was stolen. Therefore, for Eastman, Trump did not know he was doing something that broke the law—that is, Trump did not have the “consciousness of wrongdoing,” that, in Eastman’s telling, is required for criminal liability.³⁶⁰

As we showed above, the currently available facts here do appear to support a finding of consciousness of wrongdoing. There is powerful evidence, surveyed in Section I, that Trump knew he lost the election and that the means he employed to overturn the election outcome were dishonest and wrong. Practically speaking, prosecutorial judgment may depend above all on proof of consciousness of wrongdoing. But, at least as a technical matter, that is more than a prosecutor would need to charge and convict Trump and his allies. Consciousness of wrongdoing is a heightened criminal intent standard imported from § 1512(b). It is not native to subsection (c); does not fit with the plain language of the statute; has not been applied by the significant majority of appellate courts to examine the question; and should not be applied here.³⁶¹

The “consciousness of wrongdoing” standard was developed by the Supreme Court in *Arthur Andersen LLP v. United States*, which asked whether a jury was properly instructed on criminal intent in a trial for obstruction under § 1512(b).³⁶² That subsection punishes anyone who “knowingly uses intimidation or physical force, threatens, or corruptly persuades another person with intent to” withhold or alter certain documents. So, the Court was compelled to determine the significance of the statute’s agglomerating “knowingly” and “corruptly.” It responded with the “consciousness of wrongdoing” standard. For a conviction to stand under § 1512(b), the Court explained, a defendant must know he is doing what the law forbids. That “knowing” language is entirely absent from § 1512(c), which merely requires that a defendant act “corruptly”—a standard that is, on its face, less demanding than *knowingly* acting corruptly.

360 Pl.’s Reply Brief in Support of Privilege Assertions at 27.

361 See, e.g., *Eastman v. Thompson* Order Re: Privilege of Docs at 21 (“The Ninth Circuit has not defined ‘corruptly’ for purposes of this statute. However, the court has made clear that the threshold for acting ‘corruptly’ is lower than ‘consciousness of wrongdoing.’”). Although it is true that other courts have not applied a consciousness of wrongdoing standard, the Committee may elect to organize its hearings around that standard, given that DOJ has relied upon it in the January 6 cases.

362 544 U.S. 696 (2005).

Eastman cited *United States v. Lonich*, a Ninth Circuit case, to support his claim that the government must prove “consciousness of wrongdoing” to secure a conviction under § 1512(c).³⁶³ But that is not what *Lonich* says. Instead, in *Lonich*, the Ninth Circuit specifically notes that it never had, and did not need to, define “corruptly” for the purposes of § 1512(c). That is because the trial court in *Lonich* instructed the jury that consciousness of wrongdoing would satisfy the statute’s criminal intent requirement—and the jury found guilty. In affirming, the Ninth Circuit held only that conscious wrongdoing would certainly be sufficient for culpability under § 371—not that conscious wrongdoing is necessary. Instead, the court explicitly noted that proof of conscious wrongdoing might well be more than the statute requires: “We have, however, affirmed an instruction stating that ‘corruptly’ meant acting with ‘consciousness of wrongdoing’ because it, ‘if anything...placed a higher burden of proof on the government than section 1512(c) demands.’”³⁶⁴

Lonich has it right on the plain meaning of the statute. But it is nevertheless true that two federal judges interpreting § 1512(c) in cases involving January 6 defendants have suggested that the Government must prove consciousness of wrongdoing. U.S. District Court Judge John Bates, while recognizing that § 1512(b) and (c) have different language about criminal intent, overlooked that textual barrier to read § 1512(b)’s “consciousness of wrongdoing” requirement into § 1512(c): “[I]n order to be convicted of obstruction under § 1512(c)(2), a defendant must have been ‘aware that what he does is precisely that which the statute forbids,’ such that ‘[h]e is under no necessity of guessing whether the statute applies to him.’”³⁶⁵ And, as Judge Bates observed, the federal government prosecuting those January 6 defendants has apparently conceded, in briefing, that it must prove consciousness of wrongdoing to obtain a conviction under § 1512(c).³⁶⁶ In addition, in *United States v. Reffitt*, the first January 6 prosecution to proceed to a jury trial, U.S. District Court Judge Dabney Friedrich’s jury instruction defined “corruptly” for purposes of § 1512(c) to include consciousness of wrongdoing.³⁶⁷

363 Pl.’s Reply Brief in Support of Privilege Assertions at 20 (citing *United States v. Lonich*, 23 F.4th 881, 906 (9th Cir. 2022)).

364 *United States v. Lonich*, 23 F.4th at 906 (citing *United States v. Watters*, 717 F.3d 733, 735 (9th Cir. 2013)).

365 *United States v. McHugh*, 21-CR-453, 2022 WL 296304, at 11 (D.D.C. Feb. 1, 2022) (citing *Screws v. United States*, 325 U.S. 91, 104 (1945)). And see *United States v. Bozell*, 21-CR-216, 2022 WL 474144 (D.D.C. Feb. 16, 2022) (Bates, J., applying consciousness of wrongdoing standard).

366 See, e.g., *United States v. Montgomery*, 2021 WL 6134591, at 21 (“And the government concedes that it will be required to prove at least that Defendants acted with ‘consciousness of wrongdoing.’”).

367 Final Jury Instruction at 26, *United States v. Reffitt*, 21-CR-32 (D.D.C. Mar. 7, 2022), ECF # 119 (“To act ‘corruptly,’ the defendant must use unlawful means or act with an unlawful purpose, or both. The defendant must also act with ‘consciousness of wrongdoing.’ ‘Consciousness of wrongdoing’ means with an understanding or awareness that what the person is doing is wrong.”).

That jury instruction and the government’s concession appear to have been unnecessary, required by neither text—as we have seen—nor precedent. Judge Bates argued that “the courts of appeals, bolstered by *Arthur Andersen*, have uniformly defined ‘corruptly’ in § 1512(c) to require ‘consciousness of wrongdoing.’”³⁶⁸ That assertion is difficult to understand. As we have seen, the Ninth Circuit expressly declined to import the *Andersen* criminal intent standard into subsection (c)(2).³⁶⁹ The Seventh Circuit has similarly declined.³⁷⁰ And in fact, not one of the appellate cases cited by Judge Bates as evidence of the circuit courts’ supposed unanimity explicitly applies a “consciousness of wrongdoing” standard—or even mentions a single time the phrase “consciousness of wrongdoing.”³⁷¹ Instead, those cases hold that § 1512(c) requires that a defendant act with an “improper purpose” or “dishonestly,” and with specific intent to obstruct or impede an official proceeding.³⁷²

In any event, even if the elevated criminal intent standard of consciousness of wrongdoing applied to § 1512(c), prosecutors would have a strong case. As we discussed above, there is abundant evidence showing that Trump and his collaborators knew their attempt to block the congressional count was against the law.

2. Obstruct, Influence, and Impede

At least 11 district court decisions have held that defendants who attempted to stop the congressional count on January 6 committed an act punishable under § 1512(c)(2), which prohibits

368 *United States v. McHugh*, 2022 WL 296304, at 11.

369 *United States v. Watters*, 717 F.3d at 735.

370 *United States v. Matthews*, 505 F.3d 698, 705 (7th Cir. 2007) (declining to adopt the *Anderson* definition, and explaining that corruptly means “with the purpose of wrongfully impeding the due administration of justice”).

371 *United States v. Delgado*, 984 F.3d 435, 452 (5th Cir. 2021) (never discussing the “consciousness of wrongdoing” standard or using that phrase); *United States v. Friske*, 640 F.3d 1288, 1291 (11th Cir. 2011) (same); *United States v. Mintmire*, 507 F.3d 1273, 1289 (11th Cir. 2007) (same); *United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013) (same). Oddly, McHugh does not cite the circuit court whose precedent does support its contention. *United States v. Mann*, 701 F.3d 274, 305–06 (8th Cir. 2012) (importing standard from (b) into (c) without discussion or recognition of the difference in statutory language) (“We have found that a defendant can be convicted of knowingly engaging in corrupt persuasion where the defendant acted with ‘consciousness of wrongdoing.’”).

372 *United States v. Gordon*, 710 F.3d at 1151 (“Acting ‘corruptly’ within the meaning of § 1512(c)(2) means acting “with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct the [forfeiture proceeding].” (internal quotation marks and citation omitted)); *United States v. Mintmire*, 507 F.3d 1273 (11th Cir. 2007) (requiring a showing of “improper purpose”).

attempts to obstruct or impede an official proceeding.³⁷³ As one federal judge put it: Obstruct and impede “are expansive and seemingly encompass all sorts of actions that affect or interfere with official proceedings, including blocking or altering the evidence that may be considered during

373 See *United States v. Puma*, 2022 WL 823079, at 3 (“At least eleven other decisions from this Court have denied motions to dismiss filed by Capitol insurrection defendants raising some combination of these and other arguments.”). Beyond those many decisions, federal courts have long held that statutes forbidding, obstructing, or impeding an event also cover efforts to stop that event from happening. See, e.g., *United States v. Lustyik*, 833 F.3d 1263, 1266 (10th Cir. 2016) (affirming obstruction conviction where defendants conspired to convince a congressman to stop a congressional investigation).

Our theory of prosecution points to specific affirmative steps that Trump and Eastman took in apparent violation of § 1512(c), including their repeated attempts to coerce Mike Pence into discarding electoral certificates. We note, though, that at least one prominent member of Congress has implied that Trump’s *inaction* on January 6 may separately constitute obstruction under § 1512(c)(2)—or, at least, that inaction can be aggregated with Trump’s affirmative actions to suggest an obstructive scheme. See *Bourjaily v. United States*, 483 U.S. 171, 179–80 (1987) (characterizing as a “simple fact[] of evidentiary life” the proposition that “individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.”); *United States v. Pedraza*, 636 Fed. Appx. 229, 236–37 (5th Cir. 2016) (quoting *United States v. Kingston*, 875 F.2d 1091 (5th Cir. 1989) (“[W]here, as here, the government presents circumstantial evidence of an ongoing pattern of similar transactions, the jury may reasonably infer from the pattern itself that evidence otherwise susceptible of innocent interpretation is plausibly explained only as part of the pattern.”)).

In December of 2021, calling on her colleagues to cite former White House Chief of Staff Meadows for contempt of Congress, Republican congresswoman Liz Cheney invoked the language of § 1512(c): “Did Donald Trump, through action or inaction, corruptly seek to obstruct or impede Congress’ official proceeding to count electoral votes?” Aaron Blake, *What Crime Might Trump Have Committed on Jan. 6? Liz Cheney Points to One*, WASHINGTON POST (Dec. 14, 2021, 10:46 AM), <https://www.washingtonpost.com/politics/2021/12/14/liz-cheney-trump-crime/>.

Inaction—like Trump’s hours-long failure to try to stop the Capitol invasion on January 6—is not normally criminally punishable. But there are two relevant exceptions. First, inaction can be criminal when there is a duty to act. Second, inaction can be criminal when it is motivated by a desire to aid the perpetrators. *Burkhardt v. United States*, 13 F.2d 841 (6th Cir. 1926).

Article II, Section 3 of the Constitution commands the president to “take Care that the Laws be faithfully executed.” It is true that the Take Care clause does not make the president criminally liable whenever he or she fails to prevent a federal crime from occurring. See generally Renato Mariotti, *The Bar for Charging Trump with Obstructing Congress Is Higher Than Many Realize*, POLITICO, (Dec. 23, 2021, 4:30 AM), <https://www.politico.com/news/magazine/2021/12/23/trump-charge-obstructing-congress-525927>. (“The key word used by Cheney is ‘inaction.’ Thus far the evidence made public by the committee indicates that in the face of a violent attack on the U.S. Capitol, Trump did nothing. Cheney and others argue that Trump violated his oath of office, in which he swore to ‘preserve, protect and defend the Constitution,’ which requires him to ‘take care that the laws be faithfully executed.’ There can be little dispute that Trump failed to do so. But a president violating his oath of office, in itself, does not constitute a federal crime.”)

But at least one prominent scholar has made the case that a president violates his duty when he refuses to enforce the law because he *wants* a crime to occur—when, for example, he hopes to advance his own interests through the criminal conduct of others. Albert W. Alschuler, *The Easiest Case for the Prosecution: Trump’s Aiding and Abetting Unlawful Occupation of the Capitol*, JUST SECURITY (Oct. 25, 2021), <https://www.justsecurity.org/78718/the-easiest-case-for-the-prosecution-trumps-aiding-and-abetting-unlawful-occupation-of-the-capitol/>.

an official proceeding or, as the defendants attempted, halting the occurrence of the proceeding altogether.”³⁷⁴

In the face of this near-unanimity, only one judge has agreed with January 6 defendants that § 1512(c)(2) only prohibits behavior that amounts to tampering with evidence. In *United States v. Miller*,³⁷⁵ U.S. District Court Judge Carl Nichols dismissed a § 1512(c)(2) charge against a defendant who invaded the Capitol on January 6. The court held that Miller’s attempt to impede the congressional count was not prohibited by § 1512(c), which—in Judge Nichols’ reading—“requires that the defendant have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding.”³⁷⁶

374 *United States v. Sandlin*, 2021 WL 5865006 at 5. See also *United States v. Grider*, 2022 WL 392307 at 6 (Obstruct can and does mean to stop the progression of the proceeding. “Section 1512(c) criminalizes two classes of actions: (1) tampering with evidence that may go before an official body and (2) obstructing the official body itself.”).

375 *United States v. Miller*, 21-CR-119, 2022 WL 823070 (D.D.C. Mar. 7, 2022). See also *United States v. Fischer*, 21-CR-234, 2022 WL 782413 at 4 (D.D.C. Mar. 15, 2022) (same). The meaning and placement of the word “otherwise” at the start of subsection (c)(2) are at the core of the disagreement between Judge Nichols and every other judge to examine the issue. Recall that there are two clauses to (c), which applies to “whoever corruptly— (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so...” The question is whether “otherwise” limits the scope of (2), such that the second clause only prohibits behavior that affects “a record, document, or other object,” like the behavior prohibited in (1). Judge Nichols held that it does. He found the statute susceptible of several plausible meanings and applied the rule of lenity.

376 *United States v. Miller*, 21-CR-119, 2022 WL 823070 at 15 (D.D.C. Mar. 7, 2022).

But that idiosyncratic reading seems to misapply a key precedent³⁷⁷ and key canons of statutory interpretation.³⁷⁸ And even if it is correct, it seems distinguishable. Trump and Eastman stand in a very different position from the insurrectionists who invaded the Capitol, and § 1512 allegations against them would certainly extend to taking “some action with respect to a document.” Their object was to convince Vice President Pence to reject state electoral vote certificates—documents, to be sure—that he was supposed to physically open and present to the appointed tellers.³⁷⁹ They wanted Pence to deprive the tellers of the opportunity to read the certificate documents, list the votes, and ascertain the results.³⁸⁰

377 An important part of *Miller*'s reasoning hinged on his interpretation of *Begay v. United States*, 553 U.S. 137 (2008). As Judge Nichols saw it, the *Begay* court “concluded that the ACCA’s use of the word ‘otherwise’ in some way tethered the text preceding the word to the text following it.” *United States v. Miller*, 21-CR-119, 2022 WL 823070 at 7 (D.D.C. Mar. 7, 2022). To Judge Nichols, that precedent, in turn, supported a reading of “otherwise” that similarly tethered § 1512(c)(2) to subsection (1), confining subsection (2)’s scope to behavior that—like the behavior in subsection (1)—affects documents and other objects. But, as U.S. District Court Judge Paul Friedman explained only weeks after *Miller* was decided, the *Begay* court actually declined to rest its opinion on the meaning of the word “otherwise.” Opinion and Order at 25-26, *United States v. Puma*, 21-CR-454 (D.D.C. 3/19/22), ECF # 37 (citing *United States v. Montgomery*, 21-CR-46, 2021 WL 6134591 at 11 (D.D.C. Dec. 28, 2021)).

378 For instance: *Miller* reasons that, if § 1512(c)(2) is a true residual clause, then it might be read to prohibit everything that § 1512(c)(1) prohibits and more. If so, § 1512(c)(1) would be superfluous. But *Miller* never confronted the compelling retort advanced by Judge Moss in *Montgomery*, demonstrating that there is a critical difference between § 1512 (c)(2) and § 1512 (c)(1):

The plain text of Section 1512(c)(1) targets the alteration of *evidence* “with the intent to impair *the object’s integrity or availability* for use in an official proceeding.” 18 U.S.C. § 1512(c)(1) (emphasis added). In contrast, Section 1512(c)(2) takes aim at the obstruction of the official proceeding *itself*. In other words, while the official proceeding is the indirect object of the intent requirement in Section 1512(c)(1), it is the *direct* object of the conduct at issue in Section 1512(c)(2). Thus, “otherwise” signals a shift in emphasis from actions directed at evidence to actions directed at the official proceeding itself.

So § 1512(c)(1) is not redundant: It encodes a different standard than § 1512(c)(2). And there is no constitutional or interpretive significance in the mere fact that § 1512(c)(2) covers some conduct that might also fall under § 1512(c)(1). *United States v. Montgomery*, No. CR 21-46 (RDM), 2021 WL 6134591 at 12 (D.D.C. Dec. 28, 2021) (cleaned up).

379 3 U.S.C. § 15.

380 See Government’s Response to Defendants’ Joint Supplemental Brief at 40, *United States v. Miller*, 21–119 (D.D.C. 11/17/21), ECF # 63-1. (“At a bare minimum, Section 1512(c)(2) covers conduct that prevents the examination of documents, records, and other nontestimonial evidence in connection with an official proceeding. If, for example, the defendants had corruptly blocked the vehicle carrying the election returns to the Capitol for congressional examination at the certification proceeding, that conduct would clearly fit within Section 1512(c)(2). Section 1512(c)(2) would likewise cover blocking a bus carrying the Members of Congress to the Capitol to examine the election returns at the certification proceeding. And it just as readily covers displacing the Members of Congress from the House and Senate Chambers, where they would examine and discuss those returns and other records.”).

Ultimately, it may turn out that there is, in fact, no disagreement among the courts with respect to the interpretation of § 1512 as applied to the January 6 defendants. On May 3, 2022, Judge Nichols stated in court that he was “very seriously contemplating” reconsidering his position.³⁸¹

3. Official Proceeding

Courts have unanimously found the congressional count of electoral votes to be an “official proceeding” under § 1512(c).³⁸²

The meaning of “official proceeding” for our purposes can start and end with the language of the statute. 18 U.S.C. § 1515(a)(1)(B) defines “official proceeding” for the purposes of § 1512(c)(2) as including “a proceeding before the Congress.” As Judge Nichols demonstrated in *United States v. Miller*, a purely textualist reading of the statute shows that the count was a “proceeding.”³⁸³ “Proceeding,” Judge Nichols explained, is defined by *Webster’s* as “a particular thing done.”³⁸⁴ Judge Nichols notes that the count also fits under the *Black’s Law Dictionary* definition, “[t]he business conducted by a court or other official body.”³⁸⁵

As Judge Nichols’ decision suggests, that could be the end of the discussion in an era in which “we’re all textualists.”³⁸⁶ But January 6 defendants have argued, and some judges have agreed,

381 Jordan Fisher, *The only judge to dismiss obstruction charges in a Capitol riot case is ‘seriously contemplating’ reconsidering*, WUSA9 (May 3, 2022), <https://www.wusa9.com/article/news/national/capitol-riots/judge-very-seriously-contemplating-reconsidering-order-throwing-out-obstruction-charges-carl-nichols-jeffrey-mckellop-joseph-fischer-garrett-miller/65-224d476c-9625-4bf3-b423-813420c7733f>.

382 See Cong. Defs. Opp. to Pl. Eastman’s Privilege Assertions at 38 (“To date, six judges from the United States District Court for the District of Columbia have addressed the applicability of section 1512(c) to defendants criminally charged in connection with the January 6th attack on the Capitol. Each has concluded that Congress’s proceeding to count the electoral votes on January 6th was an ‘official proceeding’ for purposes of this section, and each has refused to dismiss charges against defendants under that section.”); Barbara McQuade, *United States v. Donald Trump: A “Model Prosecution Memo” on the Conspiracy to Pressure Vice President Pence*, JUST SECURITY (Feb. 22, 2022), <https://www.justsecurity.org/80308/united-states-v-donald-trump-model-prosecution-memo/> (citing cases); Katelyn Polantz, *Judge Rejects Oath Keepers’ Efforts To Dismiss Charge in Jan. 6 Prosecutions*, CNN (Dec. 20, 2021); Zoe Tillman, *Jan. 6 Defendants Keep Losing Challenges to a Felony Charged in Hundreds of Cases*, BUZZFEED NEWS (Feb. 3, 2022), <https://www.buzzfeednews.com/article/zoetillman/january-6-riot-felony-obstruction-charges>.

383 Memorandum Opinion at 9, *United States v. Miller*, 21-CR-119 (D.D.C. 3/7/22), ECF # 72 (“But this argument essentially ignores that, as used in § 1512, ‘official proceeding’ is a defined term, and its definition covers the Congressional certification of Electoral College results.”).

384 *Id.*

385 *Id.* at 10.

386 Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> (comments by Kagan, J.).

contrary to the apparent plain meaning of § 1515, that “not every ‘proceeding’ before Congress is an official proceeding.”³⁸⁷ That still does not help January 6 defendants, since courts have unanimously held that the electoral count was “official” in every relevant way. “Official,” as courts have noted, “means formal or ceremonious.”³⁸⁸ And “[f]ew Congressional events could be more ceremonious and formal than the quadrennial Joint Session of Congress mandated by the Constitution and federal statute.”³⁸⁹

Nor has parsing prepositions availed insurrectionist defendants. Some have insisted that the electoral count may have been an official proceeding *of* Congress without being the requisite “official proceeding *before* Congress.” And some judges have indulged that argument, but it gets defendants nowhere. As Judge Bates explained: “[F]ormality alone does not make a congressional activity a ‘proceeding before the Congress.’ In addition, a second party must be integrally involved in the ‘proceeding’ in order for it to be ‘before’ the Congress.”³⁹⁰ Unfortunately for January 6 insurrectionists, the congressional count did “involve a second entity as an integral component: the Electoral College.”³⁹¹

Finally, defendants have insisted that only an “adjudicative” proceeding falls within the meaning of the statute—whereas, they (now) maintain, the electoral count was purely “ministerial.”³⁹² Trump and Eastman could hardly echo that defense: After all, they have loudly and repeatedly argued that the count was adjudicative, with Vice President Pence given the authority to adjudicate and invalidate ballots. But even if Trump and Eastman were brazen enough to raise the defense, they would be wrong. Other than impeachments and electoral counts, Congress does almost no adjudication, so “to require that a ‘proceeding before the Congress’ be ‘adjudicative’ would essentially read it out of § 1515, and it beggars belief that Congress would proscribe conduct

387 *United States v. Grider*, 2022 WL 392307 at 4.

388 *Id.* (citing *United States v. Sandlin*, 2021 WL 5865006 at 3).

389 *Id.* See also *Sandlin*, 2021 WL 5865006, at 4 (“The Joint Session thus has the trappings of a formal hearing before an official body. There is a presiding officer, a process by which objections can be heard, debated, and ruled upon, and a decision—the certification of the results—that must be reached before the session can be adjourned. Indeed, the certificates of electoral results are akin to records or documents that are produced during judicial proceedings, and any objections to these certificates can be analogized to evidentiary objections.”).

390 *United States v. McHugh*, 2022 WL 296304, at 5.

391 *Id.* at 7 (“Thus, the certification proceeding sees Congress formally convene to hear, debate, and decide any disputes arising from the proceedings of a second entity. Although the electors are neither physically present in front of Congress nor ‘parties’ to the proceeding *per se*, they and their ballots are in a very real sense integral components of the event.”).

392 *Id.* at 9.

related to ‘proceeding[s] before the Congress’ while at the same time intending that prohibition to apply solely to functions Congress does not perform.”³⁹³

4. Conspiracy

The core of conspiracy is agreement among two or more people to achieve a common illegal goal—here, the corrupt obstruction of the congressional electoral count.³⁹⁴ “The central feature of a conspiracy is the agreement, but it doesn’t need to be formal or even spoken.”³⁹⁵ As the Supreme Court has explained, the agreement “need not be shown to have been explicit,” and “can instead be inferred from the facts and circumstances of the case.”³⁹⁶ One typical form of circumstantial evidence in proving a conspiracy is “concert of action,” from which “an agreement can be inferred.”³⁹⁷ Here, as demonstrated above, we believe the circumstantial and direct evidence that Trump and Eastman agreed on a scheme to obstruct and impede the congressional count on January 6 to be compelling.³⁹⁸

C. Other Possible Charges

If federal charges are brought against Trump and his associates, § 371 and § 1512(c) are the most likely vehicles. But those are hardly the only statutes that might apply—and federal prosecution is not the only avenue for holding Trump accountable.

393 *Id.* at 8.

394 See, e.g., *Thompson v. Trump* Opinion and Order at 29 (“The key is that the conspirators share the same general conspiratorial objective, or a single plan the essential nature and general scope of which is known to all conspirators.”).

395 *United States v. Sanders*, 952 F.3d 263, 274 (5th Cir. 2020).

396 *Iannelli v. United States*, at 777 n.10 (1975). And see, e.g., *United States v. Tyson*, 653 F.3d 192, 208 (3d Cir. 2011) (“We have recognized that the existence of a conspiratorial agreement may be proven by circumstantial evidence alone.”); *United States v. Morris*, 836 F.2d 1371, 1373 (D.C. Cir. 1988) (“[S]ince a conspiracy is by nature secret, the jury may fairly infer the existence of the agreement through either direct or circumstantial evidence.”).

397 *United States v. Mann*, 161 F.3d at 847.

398 This monograph does not address the contention that Trump criminally conspired with the insurrectionists who sought to obstruct the count by force. We do not reject that possibility, either. Notably, on February 18, 2022, Judge Amit Mehta, of the federal court in D.C., found that plaintiffs—including congressmen and Capitol police officers—plausibly pled a civil conspiracy between Trump and the insurrectionists who invaded the Capitol on January 6. [Thompson v. Trump Opinion and Order](#).

1. Additional Federal Charges

The actions of Trump and members of his inner circle may satisfy the elements for any or all of the following federal violations.

Coercion of Political Activity.³⁹⁹ 18 U.S.C. § 610 makes it a felony to “intimidate, threaten, command, or coerce” a federal employee to engage in political activity. Attempts are crimes, too, and political activity includes “working or refusing to work on behalf of any candidate.”⁴⁰⁰ To the extent that Trump, Meadows, and Clark commanded DOJ officials—on pain of termination—to initiate patently meritless investigations and litigation aimed at the political purpose of overturning the results of an election that they knew Trump lost, investigation is warranted as to whether such actions constitute a felony under § 610.

Political Use of Official Authority.⁴⁰¹ 18 U.S.C. § 595 prohibits “a person employed in any administrative position by the United States” from “us[ing] his official authority for the purpose of interfering with, or affecting, the nomination or the election of any candidate for the office of President...” Trump, Meadows, and Clark, as persons employed in administrative positions by the United States and the DOJ, should be investigated for possible violations of § 595 in using their official authority for the purpose of changing the outcome of the election.

Conspiracy Against Rights and Deprivation of Rights.⁴⁰² 18 U.S.C. § 241 creates a crime “if two or more persons conspire to injure...any person” in freely exercising a right secured by federal law or the U.S. Constitution. 18 U.S.C. § 242 prohibits willfully depriving any person of federal rights under color of law. Trump and his inner circle should be investigated for possible violations of both statutes—not least, through their efforts to cancel the presidential votes of battleground state residents by convincing Mike Pence to reject electoral slates.

399 For a more in-depth discussion, see *generally* Letter from Noah Bookbinder, President, Citizens for Responsibility and Ethics in Washington, to Attorney General Merrick Garland and FBI Director Christopher Wray (July 29, 2021), <https://www.citizensforethics.org/wp-content/uploads/2021/07/2021-7-29-Trump-Meadows-Attempting-to-Overturn-Election.pdf>; Dennis Aftergut & Kathleen Clark, *DOJ Should Investigate Jeff Clark and Mark Meadows for Political Coercion Act and Hatch Act Violations*, JUST SECURITY (Aug. 26, 2021), <https://www.justsecurity.org/77994/doj-should-investigate-jeff-clark-and-mark-meadows-for-political-coercion-act-and-hatch-act-violations/>; Letter from Claire O. Finkelstein & Richard W. Painter to Corey R. Amundson, Chief, Public Integrity Section, Department of Justice (Oct. 26, 2020), <https://www.law.upenn.edu/live/files/10951-trump-criminal-hatch-act-complaint>; Letter from Claire O. Finkelstein & Richard W. Painter to Corey R. Amundson, Chief, Public Integrity Section, Department of Justice (Oct. 26, 2020), <https://www.law.upenn.edu/live/files/10951-trump-criminal-hatch-act-complaint>.

400 18 U.S.C. § 610.

401 18 U.S.C. § 595

402 See *generally* Edward A. Purcell, Jr., *The One Obvious Statute the DOJ Could Use to Prosecute Trump for Jan. 6*, SLATE (Nov. 24, 2021), <https://slate.com/news-and-politics/2021/11/criminal-statute-trump-prosecution-january-six.html>.

Seditious Conspiracy.⁴⁰³ 18 U.S.C § 2384 forbids conspiracy between two or more people “by force to prevent, hinder, or delay the execution of any law of the United States.” Some of the January 6 defendants, including Oath Keepers leader Stewart Rhodes, have been charged with seditious conspiracy. To convict Trump and his inner circle, prosecutors might for example seek to prove that the White House conspired—coming to a tacit or express agreement—with the insurrectionists who sought to stop the electoral count by force. Other experts point out that a lesser showing under the statute would also be sufficient.⁴⁰⁴

2. State Charges

The January 6 Committee, in arguing that John Eastman’s emails should be turned over under the crime-fraud exception to attorney-client privilege, put forward evidence to show that Eastman had likely committed at least three crimes or frauds: Violating § 371,⁴⁰⁵ violating § 1512(c),⁴⁰⁶ and committing common law fraud under District of Columbia law. Judge Carter did not reach the issue of whether state law was transgressed, since he found that the Committee met its burden by showing likely violations of the two federal statutes.⁴⁰⁷

But there certainly may be state legal exposure as well. Most notably, as some of the authors of this report have previously explained, the former president and possibly others in his circle are at substantial risk of state prosecution as a result of the investigation undertaken by the Fulton County, Georgia District Attorney’s Office.⁴⁰⁸

403 Compare Barbara McQuade, *United States v. Donald Trump: A “Model Prosecution Memo” on the Conspiracy to Pressure Vice President Pence*, JUST SECURITY (Feb. 22, 2022), <https://www.justsecurity.org/80308/unit-ed-states-v-donald-trump-model-prosecution-memo/> (discussing possible seditious conspiracy charges) with Joshua Braver, *The Justice Department Shouldn’t Open the Pandora’s Box of Seditious Conspiracy*, LAWFARE (May 6, 2021, 3:23 PM), <https://www.lawfareblog.com/justice-department-shouldnt-open-pandoras-box-seditious-conspiracy> (“Seditious conspiracy is the wrong political crime to condemn the leaders of the Jan. 6 insurrectionists. A sedition charge could open up a Pandora’s box that would criminalize vast swaths of more mundane activity such as certain forms of radical protest, resisting arrest, prison riots or robbing a federal bank.”).

404 In denying Trump’s motion to dismiss in a civil suit brought by members of Congress and Capitol police, federal Judge Amit Mehta found that the plaintiffs plausibly pled a conspiracy between Trump and the insurrectionists who breached the Capitol. See *Thompson v. Trump* Opinion and Order. The plausible pleading required to survive a civil motion to dismiss, of course, falls far short of the proof required to indict and ultimately convict in a criminal case. For another view, see Christina Pazzanese, *Lawrence Tribe Sees Legal Problems for Trump in Senate Report*, THE HARVARD GAZETTE (Oct. 7, 2021), <https://news.harvard.edu/gazette/story/2021/10/laurence-tribe-sees-legal-problems-for-trump-in-senate-report/>.

405 Cong. Defs. Opp. to Pl. Eastman’s Privilege Assertions at 42–46.

406 *Id.* at 38–42.

407 *Id.* at 46–50.

408 Letter from Noah Bookbinder, Citizens for Responsibility and Ethics in Washington, to Acting Attorney General Jeffrey Rosen and Fulton County District Attorney Fani Willis (Jan. 4, 2021), <https://www.citizensforethics.org/wp-content/uploads/2021/01/2021-1-4-Trump-overturning-election-DOJ-Fulton-County-DA.pdf>; See [Brookings Report Re: Fulton County](#).

At the core of the Georgia case against Trump is his January 2 call to Secretary of State Brad Raffensperger, during which Trump demanded that Raffensperger “find 11,780 votes”—exactly one more vote than Joe Biden’s margin of victory in the state. But, as detailed above, Trump’s attempt to overturn the Georgia result was not limited to one call. He also personally contacted other officials in Georgia—including the governor and the secretary of state’s chief investigator, Frances Watson—seeking their help in reversing his loss.

Trump’s unprecedented interference in Georgia’s election potentially ran afoul of several state criminal laws.

Trump’s unprecedented interference in Georgia’s election potentially ran afoul of several state criminal laws. Most saliently, those may include:

Criminal Solicitation to Commit Election Fraud.⁴⁰⁹ A defendant violates Ga. Code Ann. § 21-2-604 by intentionally attempting to cause another person to engage in election-related behavior that would constitute a crime. Trump seems to have done exactly that when he importuned Raffensperger to “find” the votes that Trump needed to win Georgia. Among other crimes that Trump may have solicited: Raffensperger would have committed a state misdemeanor if he had failed to perform his statutory duty to accurately “tabulate, compute, and canvass the votes cast for each slate of presidential electors.”⁴¹⁰

Intentional Interference with Performance of Election Duties.⁴¹¹ Georgia law creates a crime if anyone “intentionally interferes with, hinders, or delays or attempts to interfere with, hinder, or delay any other person in the performance of any act or duty authorized or imposed” by Georgia’s election laws.⁴¹² The law and facts point to a strong case that Trump attempted to interfere with Raffensperger’s lawful administration of Georgia’s election laws—not least, when he threatened criminal consequences if Raffensperger did not “find” enough votes. And he may well have interfered with Watson, too, in pressuring her “to vary from prescribed audit procedures, to alter the timeline of her investigation, and to target pro-Biden electoral strongholds.”⁴¹³

409 Ga. Code Ann. § 21-2-604.

410 *Id.* § 21-2-499 (laying out the Secretary of State’s official duties); Ga. Code Ann. § 21-2-596 (creating a misdemeanor for the failure of a public officer to fulfill their election duties).

411 *Id.* § 21-2-597.

412 *Id.*

413 Brookings Report Re: Fulton County at 70.

Conspiracy to Commit Election Fraud. Georgia prohibits conspiracy “with another to commit a violation” of Georgia’s election laws.⁴¹⁴ Violating the statute requires an agreement—tacit or explicit—with at least one other person to commit an election crime, and the commission of at least one act in furtherance of the conspiracy.⁴¹⁵ Based on the public record, it seems possible that Trump may have broken this law by conspiring with others “to interfere with, hinder, or delay” Raffensperger and Watson “in the performance of” their statutory duties relating to the administration of the election.⁴¹⁶

Racketeer Influenced and Corrupt Organizations Act (RICO). Georgia’s RICO statute⁴¹⁷ recognizes that repeated violations of law by an enterprise are deserving of legal sanctions additional to those that would be levied against an individual for similar conduct.⁴¹⁸ The key to the RICO statute—and to its prosecutability—is a demonstrated “pattern” of misconduct,⁴¹⁹ namely two or more violations included in a list of eligible crimes. Several of the state charges discussed above are among those eligible offenses.⁴²⁰ If Trump or his collaborators were found guilty of those requisite state crimes, they may also be subject to a RICO prosecution. The Fulton County District Attorney mentioned racketeering in her letter to state officials kicking off her investigation in February 2021,⁴²¹ and she and at least one member of her staff have a history of success with RICO prosecutions.⁴²²

414 Ga. Code Ann. § 21-2-603.

415 *Id.*

416 Ga. Code Ann. § 21-2-597.

417 Ga. Code Ann. § 16-4-1 et. seq.

418 Ga. Code Ann. § 16-14-4(a)–(c).

419 *Id.*

420 Ga. Code Ann. § 16-14-3

421 Richard Fausset & Danny Hakim, *Georgia Prosecutors Open Criminal Inquiry Into Trump’s Efforts to Subvert Election*, NEW YORK TIMES (Feb. 10, 2021), <https://www.nytimes.com/2021/02/10/us/politics/trump-georgiainvestigation.html>.

422 Tamar Hallerman & Christian Boone, *Fulton DA’s Comfort with Racketeering Law Could Influence Trump Probe*, THE ATLANTA JOURNAL-CONSTITUTION (Mar. 15, 2021), <https://www.ajc.com/news/crime/fulton-das-comfort-with-racketeering-law-could-influence-trump-probe/CN0Q3VLPBFBQPKCBKRYTT6ARDQ/>; Kate Brumback, *RICO Expert Hired by Prosecutor Investigating Trump Call*, ASSOCIATED PRESS (Mar. 10, 2021), <https://apnews.com/article/donald-trump-georgia-general-elections-elections-racketeering6c488fce674bc0f375b60c6be55054a4>.

GA Code § 21-2-604 (2016)(a)-(b)

A person commits the offense of criminal solicitation to commit election fraud when,

with intent that another person engage in conduct constituting a felony or misdemeanor under Georgia law,

he or she solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such felony or misdemeanor conduct

All these offenses grow out of the same fact pattern that we have already discussed at length: Trump's long campaign to bully, coerce, and cajole state officials into helping him to reverse the election results. As we have shown, there is substantial evidence that Trump knew he lost. But that guilty knowledge is not necessary for conviction under the state statutes discussed here.⁴²³ The law holds that he committed a Georgia crime if he intended to solicit an election offense, whether or not he really believed that he won the election.⁴²⁴ Nor does it matter that he failed. Attempt is enough.

423 Brookings Report Re: Fulton County at [71](#).

424 *Id.*

IV. Additional Defenses

We have already discussed a number of the principal defenses that Trump and his allies might raise to prosecutions under § 371 and § 1512. Most prominently, we explained why there is strong evidence of culpable criminal intent for both statutes. We showed that prosecutors could prove—even though they need not prove—that Trump and his allies acted through independently corrupt means. And we explained that obstruction of the congressional count is punishable under § 1512(c)(2) even if no documents were altered, concealed, or destroyed. In this section, we address additional possible defenses, and conclude that they are likely meritless.

A. The First Amendment Does Not Protect Speech Integral to Criminal Conduct

The theories of prosecution articulated here do not depend on Trump’s speech, delivered on January 6, in which—among other incendiary calls to violence—he called on his supporters to “fight like hell and if you don’t fight like hell, you’re not going to have a country anymore.”⁴²⁵ Accordingly, they do not implicate the question whether Trump’s speech that day incited violence and was thus beyond the bounds of the First Amendment’s protections.⁴²⁶ Instead, the theories discussed here involve many questions about whether things said by Trump and others were, outside of our brief reference to the charge of seditious conspiracy, “speech integral to criminal conduct,”⁴²⁷ which is never protected by the First Amendment. It is a long-accepted

425 Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021, 12:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial>.

426 Judge Mehta, of the D.C. federal court, found that Trump’s speech was at least plausibly an “implicit call for imminent violence or lawlessness” that crossed the line into unprotected territory. *Thompson v. Trump* Opinion at 92.

427 *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

rule that “First Amendment rights, are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.”⁴²⁸ Unprotected speech includes advice on how to commit a crime,⁴²⁹ and speech that amounts to an agreement to commit a crime.⁴³⁰ So Trump cannot claim, for instance, that his urging Pence to unilaterally discard votes, or his asking Raffensperger to “find” new votes, are statements by him that are protected by the First Amendment.

B. Trump’s Acquittal in His Second Impeachment Trial Is No Defense

In *Thompson v. Trump*, a civil suit brought by U.S. representatives and Capitol police officers, Trump claimed that he could not be held civilly liable for his role in the January 6 insurrection since the Senate had already declined to convict him for that same behavior. But U.S. District Judge Amit Mehta correctly rejected that claim, and it is even less likely to apply in a criminal prosecution.

Trump’s argument invoked two separate but related legal doctrines—*res judicata* and *collateral estoppel*, also known as claim preclusion and issue preclusion. Both are designed to promote finality and prevent repeated litigation of the same issues by the same parties. As Judge Mehta explained, under the *res judicata* doctrine, “a subsequent lawsuit will be barred if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction.”⁴³¹ *Collateral estoppel*, meanwhile, “bars successive litigation of an issue of fact or law when “(1) the issue is actually litigated; (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; and (4) under circumstances where the determination was essential to the judgment, and not merely dictum.”⁴³²

Neither doctrine applied in *Thompson v. Trump*, and neither would apply here. First: As noted, the doctrines only apply in subsequent litigation “between the same parties or their privies.” Judge Mehta found in *Thompson* that even individual House members, suing in their private capacity,

428 *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972).

429 *United States v. Meredith*, 685 F.3d at 819–20.

430 *Scales v. United States*, 367 U.S. 203, 229 (1961).

431 *Thompson v. Trump*, No. 21-CV-00400 (APM), 2022 WL 503384, at 22 (D.D.C. Feb. 18, 2022) (quoting *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006)).

432 *Id.* at 22–23 (quoting *Capitol Servs. Mgmt., Inc. v. Vesta Corp.*, 933 F.3d 784, 794 (D.C. Cir. 2019)).

were not the “same party” as the full House as a prosecuting body. Nor were those individual representatives “in privity” with—that is, sharing the same interests with—the full House.⁴³³ It is harder still to imagine that the DOJ—which represents the executive branch in prosecuting crimes—is in privity with the legislative branch. Second: The Constitution explicitly provides that an impeached president can also be criminally tried.⁴³⁴ So, as Judge Mehta noted, “it would be an odd result to then say that the acquitted individual could use the non-conviction by the Senate to have preclusive effect, which would thwart any second proceeding.”⁴³⁵ Third: as Judge Mehta observes, “applying preclusion principles here would require the court to assess the adequacy of the Senate proceedings, an inquiry that is nonjusticiable.”⁴³⁶ And fourth: “[I]t is impossible to discern whether there was a ‘final, valid judgment on the merits’ for purposes of *res judicata*, and what issues of fact or law the Senate deemed necessary to its judgment for purposes of collateral estoppel.”⁴³⁷

C. Advice of Counsel Is No Defense

Trump could not plausibly argue that he lacked the requisite dishonest or corrupt state of mind merely because he acted on advice of counsel—Eastman in one aspect of the events, and Clark in another. First: To the extent that a defendant claiming advice of counsel must show that the advisor was actually his lawyer, Trump may fail. It is true that Judge Carter, in *Eastman v. Thompson*, found Eastman was functioning as Trump’s lawyer. But that proceeding also showed that Eastman could not produce a signed retainer agreement, and further investigation may undercut any claim that Eastman was Trump’s lawyer. Furthermore, Clark could never make a showing that he was

433 See *Primax Recoveries, Inc. v. Lee*, 260 F. Supp. 2d 43, 52 (D.D.C. 2003) (“A party is considered to be “in privity” with another where he is “so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved.”).

434 U.S. Const. art. I, § 3, cl. 7 (“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”); *Nixon v. United States*, 506 U.S. 224, 234 (1993) (“[T]he Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses—the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings.”).

435 *Thompson v. Trump*, No. 21-CV-00400 (APM), 2022 WL 503384, at 23 (D.D.C. Feb. 18, 2022).

436 *Id.* at 24.

437 *Id.* In fact, the record suggests that at least one influential senator may have acquitted Trump at his impeachment trial for the events of January 6, despite Trump’s apparent guilt, precisely because of the availability of later prosecution. See Alex Rogers & Manu Raju, *McConnell Blames Trump but Voted Not Guilty Anyway*, CNN (Feb. 13, 2021, 7:42 PM), <https://www.cnn.com/2021/02/13/politics/mitch-mcconnell-acquit-trump/index.html> (statement of Senate Minority Leader Mitch McConnell) (arguing that “impeachment was never meant to be the final forum for American justice” and declaring: “We have a criminal justice system in this country. We have civil litigation. And former Presidents are not immune from being held accountable by either one.”).

Trump's personal lawyer, because he was plainly the federal government's lawyer. Second: Trump embraced a false narrative about fraud and proved willing to use the power of the federal government to partisan ends, before either Eastman or Clark came on the scene. So the notion that he was merely following counsel's advice is factually unpersuasive. He had malign intent long before they appeared. Third, and relatedly: The advice of counsel defense is not available when the purported lawyer is actually a co-conspirator. Thus, in *U.S. v. Carr*, the Fifth Circuit held that a defendant could not avail himself of an advice of counsel defense where the attorney in question had been "integrally involved in the sham operation."⁴³⁸ Fourth, and finally: The defense only works if it is reasonable for the defendant to rely on counsel.⁴³⁹ But here, for all the reasons shown above, reliance was unreasonable. Even Eastman himself, for instance, told Trump directly that his legal advice would not stand up in court.⁴⁴⁰

D. Dishonest Lawyering Activities Are Not Shielded from Prosecution

Neither Eastman nor Clark could hide behind claims that their activity is protected as zealous advocacy for clients. Even assuming that Eastman was Trump's lawyer, and that his theorizing about overturning the will of the people counts as legal advocacy, it simply is not true that all legal advocacy is beyond the reach of § 371 or § 1512(c).⁴⁴¹

438 740 F.2d 339 (5th Cir. 1984), *certiorari denied* 471 U.S. 1004.

439 See Laurence Tribe & Dennis Aftergut, *The Evidence Is Clear: It's Time to Prosecute Donald Trump*, THE GUARDIAN (Mar. 16, 2022, 6:22 AM), <https://www.theguardian.com/commentisfree/2022/mar/16/donald-trump-criminal-charges-january-6-capitol-attack> ("Even if Trump and Eastman had the requisite attorney-client relationship, which is dubious as a matter of fact, the defense has a gaping hole: under the law, Trump's reliance must have been reasonable. Far from being reasonable, Eastman's claim that that Pence was 'the ultimate arbiter' of the electoral count was utter 'nonsense.' Trump would be unable to produce any lawyer who supported that constitutionally absurd theory and could withstand even amateur cross-examination.").

440 Exhibit M at 2, *Eastman v. Thompson*, 22-cv-99 (C.D. Ca. Mar. 2, 2022), ECF # 160–15.

441 Of course, Clark and Eastman were not the only lawyers who apparently counseled and collaborated in Trump's efforts to overturn the election. Rudy Giuliani, Cleta Mitchell, Sidney Powell, Lin Wood, and others may be implicated in Trump's schemes—and, at a bare minimum, may have violated rules of legal ethics and professional responsibility. Some are facing disciplinary action as a result. See, e.g., Cameron Jenkins, *Texas State Bar Refers Sidney Powell to Judge for Discipline over Efforts to Overturn Election*, THE HILL (Mar. 9, 2022, 3:34 PM), [hehill.com/homenews/state-watch/597565-texas-state-bar-refers-sidney-powell-to-judge-for-discipline-over/](https://www.thehill.com/homenews/state-watch/597565-texas-state-bar-refers-sidney-powell-to-judge-for-discipline-over/); Alison Durkee, *Here Are All The Places Sidney Powell, Lin Wood And Pro-Trump Attorneys Could Also Be Punished For 'Kraken' Lawsuits After Michigan Sanctions Ruling*, FORBES (Aug. 26, 2021, 3:09 PM), <https://www.forbes.com/sites/alisondurkee/2021/08/26/here-are-all-the-places-sidney-powell-lin-wood-and-pro-trump-attorneys-could-also-be-punished-for-kraken-lawsuits-after-michigan-sanctions-ruling/?sh=405b991be1aa>. Any far-reaching DOJ investigation into efforts to overturn the election should follow the law and the facts wherever they lead—including to members of the bar.

In *United States v. Lonich*, discussed at length above, the Ninth Circuit held that a lawyer purporting to advise his client is not categorically protected from prosecution under § 1512(c). There, the defendant, a lawyer, counseled his purported client “to give grand jury testimony that was either outright false, seriously misleading, or both.” Under the circumstances, the court held, the defendant had gone beyond any “latitude” that an attorney might have helping clients frame public statements “consistent with the truth.”⁴⁴²

And in *United States v. Cueto*, the Seventh Circuit upheld the § 371 conviction of a lawyer whose advocacy crossed the line. Amiel Cueto engaged in unethical and frivolous litigation tactics to protect his client and business partner, who was at the center of an illegal gambling operation.⁴⁴³ When he was convicted of violating § 371, Cueto claimed that he could not be punished under § 371 for his advocacy activities. The Seventh Circuit did not agree, because Cueto went far beyond lawyering: “[T]he record clearly demonstrates that his conduct, which necessarily includes his corrupt endeavors, was not typical conduct of a lawyer and that it certainly was not lawful lawyering conduct.... Although his actions initially may have stemmed from routine, even vigorous, advocacy, at some point his conduct exceeded the scope of lawful lawyering conduct. ‘[A]cts which are themselves legal lose their legal character when they become constituent elements of an unlawful scheme.’”⁴⁴⁴

The *Cueto* decision did not deny that prosecution of attorneys for conduct that involves advocacy has the potential to chill the right to counsel—but the Seventh Circuit identified a counterbalancing

442 23 F.4th 881, 907 (9th Cir. 2022).

443 The indictment alleged, *inter alia*, that Cueto “conspired to influence and hinder the function of the grand jury by filing false motions, which attacked the operations of the FBI and the Office of the United States Attorney, in an attempt to delay and disrupt the investigation and to discharge the grand jury. Finally, the third aspect of the conspiracy focused on Cueto’s attempts to obstruct the proceedings in federal district court by persuading Venezia’s (and his co-defendants’) defense counsel to file various motions, including a motion to disqualify the district court judge assigned to hear the racketeering case.” *United States v. Cueto*, 151 F.3d 620, 628 (7th Cir. 1998).

444 *Cueto*, 151 F.3d at 636 (quoting *United States v. Bucey*, 876 F.2d 1297, 1312 (7th Cir.1989)). And see *United States v. Cintolo*, 818 F.2d at 993 (“Nothing in the caselaw, fairly read, suggests that lawyers should be plucked gently from the madding crowd and sheltered from the rigors of 18 U.S.C. § 1503 in the manner urged by appellant and by the amici.”).

The defendant in *Cintolo*, an attorney, was convicted on one count of conspiracy to obstruct justice under the offense prong of § 371. He had, among other things, “represented a witness in a grand jury investigation of racketeering while he acted at the direction of the criminal organization leader, who used Cintolo to ensure that the witnesses did not testify. Cintolo counseled his “client” to assert the Fifth Amendment and, when granted immunity, to refuse to testify and to suffer a contempt charge.” Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 686–87 (2005). On appeal, Cintolo argued that the conviction could not stand because his legal advice was not independently illegal, which the First Circuit held was beside the point: His “innocent acts” were alchemically converted “to guilty ones by the addition of improper intent.” *Cintolo*, 818 F.2s at 993. “Notwithstanding that the means used by the appellant might be regarded as lawful, if viewed in a vacuum, clear proof of improper motive could surely serve to criminalize that conduct.” *Id.*

concern for the impartial and fair administration of justice: “If lawyers are not punished for their criminal conduct and corrupt endeavors to manipulate the administration of justice, the result would be the same: the weakening of an ethical adversarial system and the undermining of just administration of the law.”⁴⁴⁵ So the court refused to decree immunity for lawyers who conspire to obstruct government functions by deceit or dishonesty: “Although we appreciate that it is of significant importance to avoid chilling vigorous advocacy and to maintain the balance of effective representation, we also recognize that a lawyer’s misconduct and criminal acts are not absolutely immune from prosecution.”⁴⁴⁶ It is of course the “dishonest means” requirement that protects lawyers against prosecution for innocuous conduct. Lawyers often act with specific intent to impede, and ideally to entirely defeat, government functions—for instance, the prosecution of their clients. But the use of dishonest means distinguishes that (ethical) advocacy from illegal conspiracy.⁴⁴⁷

A critical point, from the Seventh Circuit’s perspective, was that *Cueto* plainly violated a host of professional responsibility rules and ethical canons, including against filing frivolous motions and against an attorney pursuing his own financial interests over his client’s goals. Those violations—even if not independently illegal—went to the “dishonesty” of his means.⁴⁴⁸ Other courts have agreed. Thus, in *Cintolo*, the Court thought it relevant that the convicted lawyer plainly violated his professional responsibility of loyalty to his client, a grand jury witness.⁴⁴⁹

445 *United States v. Cueto*, 151 F.3d 620, 632 (7th Cir. 1998).

446 *Id.*

447 Criminal intent is also what separates zealous advocacy from criminal obstruction in the related context of 18 U.S.C. §1512(c), which similarly prohibits obstructing official proceedings. See Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CAL. L. REV. 1277, 1285 & 1285-n. 35 (2018) (“The criminal defense lawyer who moves to quash a subpoena thereby impedes an investigation, but that does not mean that he should go to jail. What separates the wheat from the chaff in obstruction cases is the mens rea requirement: to be guilty of obstruction, a defendant must act with a corrupt purpose.”).

448 *United States v. Cueto*, 151 F.3d at 636 (“Indeed, it is evident that many of his actions were prohibited by the rules of professional responsibility and the canons of legal ethics... Although those violations do not necessarily constitute criminal violations of the law, they are further evidence of an intent to participate in the conspiracy.”).

449 As one commentator put it: “On the facts presented by the government, *Cintolo*’s conduct was clearly professionally blameworthy, because he was acting for the benefit of another client who feared the witness’s testimony and contrary to the interests of the witness himself.” Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 371–72 (1998).

In a related context, the Sixth Circuit has held that professional norms and duties are relevant to an attorney’s culpability for obstructive conduct. In *United States v. Wuliger*, the defendant, a divorce lawyer, was convicted of violating wiretapping law for using illegally-obtained tapes as the basis for his depositions. He claimed, though, that he’d gotten the tapes from his client, and that as his client’s agent and advocate he was entitled to believe his client’s assertion that the tapes were legally obtained. The Sixth Circuit held that, while he was not immunized by his advocacy, the attorney was entitled to have the jury take into account the nature and scope of his professional duties in determining whether he had the requisite guilty knowledge. 981 F.2d 1497 (6th Cir. 1992).

Here, as noted, Eastman advocated for legal theories that he seemingly knew could not stand up in court. And courts would also find it relevant—like the lawyers in *Cueto* and *Cintolo*—that Eastman is currently under investigation by the California State Bar for professional ethical violations.⁴⁵⁰

E. Prosecuting Trump Would Not Violate the Constitutional Prerogatives of the Presidency

In 1995, the Office of Legal Counsel (OLC) —a DOJ arm that advises the president and executive branch agencies—issued an opinion articulating the “clear statement” rule, aimed at protecting the president’s authority and prerogatives. The OLC’s rule provides that “statutes that do not expressly apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President’s constitutional prerogatives.”⁴⁵¹ Courts need not follow the clear statement rule—but the DOJ must, until it is withdrawn or overturned.

But there is no reason to believe the clear statement rule, even if it was correct when issued, would prevent DOJ from investigating and seeking an indictment against Trump—much less against his collaborators who do not benefit from any special Article II considerations.

In 2019, Special Counsel Robert Mueller found that the clear statement rule would not stop prosecutors from applying federal obstruction statutes—including, specifically, §1512(c)(2) —to the president. Mueller started by observing that the 1995 OLC opinion explicitly approved the application to the president of a criminal statute that “raises no separation of powers questions were it to be applied to the President,” like the prohibition against bribery.⁴⁵² From there, Mueller reasoned that Congress could and did prohibit the president from engaging in similar acts of corruption and obstruction: “Congress can permissibly criminalize certain obstructive conduct by

450 State Bar of California, Press Release, *State Bar Announces John Eastman Ethics Investigation* (Mar. 1, 2022), <https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-announces-john-eastman-ethics-investigation>. Norman Eisen, one of the authors of this report, is one of the authors of the disciplinary complaint against Eastman. See Tom Hamburger & Jacqueline Alemany, *Group Files Complaint with California Bar Association Against John Eastman, Lawyer Who Advised Trump on Election Challenges*, WASHINGTON POST (Oct. 4, 2021, 6:07 PM), https://www.washingtonpost.com/politics/eastman-trump-bar-complaint/2021/10/04/26dc7d50-2535-11ec-8831-a31e7b3de188_story.html.

451 Office of Legal Counsel, Department of Justice, *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges* (Dec. 18, 1995), <https://www.justice.gov/file/20126/download>, at 351.

452 Robert S. Mueller, III, *Report on the Investigation Into Russian Interference in the 2016 Presidential Election*, U.S. DEPARTMENT OF JUSTICE (Mar. 2019), <https://www.justice.gov/archives/sco/file/1373816/download> (hereinafter “Mueller Report”), at 170.

the President, such as suborning perjury, intimidating witnesses, or fabricating evidence, because those prohibitions raise no separation-of-powers questions.... The Constitution does not authorize the President to engage in such conduct, and those actions would transgress the President's duty to 'take Care that the Laws be faithfully executed.'"⁴⁵³

The clear statement rule, Mueller understood, was aimed at protecting the presidency's constitutional prerogatives. Trump's campaign to coerce Mike Pence to throw out electoral slates⁴⁵⁴ went far beyond those prerogatives. In fact, the campaign interfered with prerogatives reserved to the vice president and to Congress under the Twelfth Amendment. A knowing and intentional campaign to reverse a democratic election is simply not arguably within the president's powers—especially where the campaign was specifically aimed at infringing on powers specifically withheld from the president and entrusted by the Constitution to other officers and branches of government.

453 *Id.*

454 Michael S. Schmidt, *Trump Says Pence Can Overturn His Loss in Congress. That's Not How It Works*, NEW YORK TIMES (April 30, 2021), <https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election.html>.

Conclusion

Our assessment here, as the Committee proceeds with its hearings, is based only on the publicly available evidence at the time of publication. It is bolstered by Judge Carter’s conclusion, drawing upon the Committee’s filings in that case, that Trump is likely guilty of federal crimes.⁴⁵⁵ We do not yet possess all the facts, and that is why the January 6 Committee hearings and interim and final reports are so important. That is true whether the Committee simply lays out all of the evidence (both pro and con liability) in detail, or whether the Committee’s reports include formal criminal referrals applying the law to that evidence. New facts emerging will demand new analysis, and might lead to new conclusions about criminality. Fulton County’s special grand jury has also begun its work. The Committee should bear that in mind as well in its presentation of evidence and decisions around referrals.

Of course, we know that the ultimate decision whether to seek charges can be made only by federal and state prosecutors. We understand the significant distance between “likely guilty” and provably “guilty beyond a reasonable doubt.” And we do not think that prosecution should lightly be instituted against anyone—including against a former President of the United States who remains supported by a significant percentage of the electorate. But we believe that the integrity of our legal system depends upon living up to the principle that no person is above the law. Thus the job ahead must be to apply the law to all the known facts, and adhere to traditional principles in deciding whether to move forward with prosecution. It is critically important to the rule of law that its penalties apply to all persons equally, regardless of their influence or political stature.

The United States Attorneys’ Manual lays out a default rule for instituting prosecution: “The attorney for the government should commence or recommend federal prosecution if he/she believes that the person’s conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.” That rule holds true, the manual suggests, unless one of three exceptions is present: “(1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.”⁴⁵⁶ According to the manual, considerations

⁴⁵⁵ See *Eastman v. Thompson* Order Re: Privilege of Docs at [40](#).

⁴⁵⁶ U.S. ATTORNEYS’ MANUAL § 9-27.220.

relevant to the federal interest in prosecution include “[t]he nature and seriousness of the offense; the deterrent effect of prosecution; [and] the person’s culpability.”⁴⁵⁷

It is difficult to imagine a more serious offense, in long-term consequences, than plotting to overturn a presidential election. It is also hard to imagine any way to deter Trump other than criminal prosecution. After all, he has survived an unprecedented two impeachments.⁴⁵⁸ The political system no longer offers any consequences that he needs to fear. The Big Lie and its consequences are still with us, posing the very real risk that Trump and his supporters will be back with more schemes aimed at disrupting and overturning our elections. And, if the evidence—once it is all in—is sufficient to make the case beyond a reasonable doubt, it is difficult to imagine anyone more culpable than a public official who so blatantly betrays the public trust.

The Fulton County District Attorney may well prosecute Trump—and perhaps others—for violations of Georgia law. But Georgia cannot prosecute Trump for federal offenses committed against the federal government—and implicating, as victims, residents of other states who would have been disenfranchised by Trump’s schemes.

The Big Lie and its consequences are still with us, posing the very real risk that Trump and his supporters will be back with more schemes aimed at disrupting and overturning our elections.

So by its own standards the DOJ should take the evidence very seriously; should investigate searchingly; and should strongly consider charging anyone against whom the evidence is found to be sufficient to make the case.

The January 6 Committee has already accumulated an enormous amount of information, drawn from hundreds of interviews and thousands of documents. Now its hearings and reports should present a clear, comprehensive, intelligible record of the events and actors who threatened, and continue to threaten, our democracy.⁴⁵⁹ That information, even if not accompanied by a formal criminal referral in the interim or final reports, can serve as a roadmap⁴⁶⁰ for federal, state, and

457 *Id.*

458 Calvin Woodward, *2 Impeachment Trials, 2 Escape Hatches for Donald Trump*, ASSOCIATED PRESS (Feb. 14, 2021), <https://apnews.com/article/donald-trump-trials-coronavirus-pandemic-mitch-mcconnell-elections-4d1d7ec-837c3e942dcbfda962a6dd691>.

459 See generally Ankush Khardori, *The Jan. 6 Committee Can Make a Difference: Simply by Revealing What It’s Found*, POLITICO (Apr. 12, 2022, 12:00 PM), <https://www.politico.com/news/magazine/2022/04/12/jan-6-house-select-committee-criminal-referral-00024654> (“The committee cannot compel the Justice Department to investigate or prosecute Trump. But it can lay out all of the evidence it’s gathered over the past eight months, and it should aim to do so in a manner that is accessible to the general public so the country has a clear and comprehensive account.”).

460 The most well-known such “roadmap” remains the one the Watergate grand jury transmitted to the House Judiciary Committee in connection with impeachment proceedings against President Richard M. Nixon in 1974. See Grand Jury Report and Recommendation Concerning Transmission of Evidence to the House of Representatives, National Archives (released Oct. 31, 2018), <https://www.archives.gov/research/investigations/watergate/roadmap>.

local prosecutors, including Fulton County's District Attorney. But there are advantages to the Committee laying down a clear and unmistakable marker of its conclusions. Just a few years ago, the Mueller Report was misconstrued as an exoneration of Donald Trump precisely because it did not draw any formal conclusions about liability.⁴⁶¹ The January 6 Committee—again, if it believes the facts warrant it—cannot risk similarly being misunderstood and misrepresented.⁴⁶²

Some have argued that a referral from a political-branch entity risks exposing any ensuing prosecution to accusations of politicization.⁴⁶³ But there is no avoiding accusations of politicization here: Any investigation and prosecution will be of a highly polarizing political figure. A greater risk to the future of our democracy would be realized if the Committee were less than clear and explicit about what it finds, and if that ambiguity contributed to a weakness of will by federal prosecutors to move forward even if the standards for prosecution are met. There has never been a case where securing accountability for wrongdoing was more critical to the future of the nation.

Attorney General Garland has promised to investigate the attempts to overturn the 2020 election and overthrow our democracy. He has committed to following the facts and the law wherever they lead.⁴⁶⁴ So has the Fulton County District Attorney.⁴⁶⁵ The Committee has the authority to assist them both to make those determinations. In the impartial and effective exercise of its power, the Committee will be providing an invaluable service to the American people and to democracy itself.

461 See Barbara McQuade & Joyce White Vance, *These 11 Mueller Report Myths Just Won't Die. Here's Why They're Wrong*, TIME (June 24, 2019, 9:57 AM), <https://time.com/5610317/mueller-report-myths-breakdown/>.

462 See Harry Litman, *Column: The Jan. 6 Committee Should Call Trump's Crime a Crime*, LOS ANGELES TIMES (Apr. 19, 2022, 3:00 AM), <https://www.latimes.com/opinion/story/2022-04-19/jan-6-committee-donald-trump-merrick-garland-justice-department-criminal-referral> ("The Jan. 6 Committee runs the same risk if it pulls its punches. Trump could proclaim, misleadingly, that the committee had not found sufficient evidence to ask the Justice Department to indict him. And the committee's lack of a 'verdict' could be spun to blunt the force of any determination that the former president was indeed a criminal.").

463 See, e.g., Michael S. Schmidt & Luke Broadwater, *Jan. 6 Panel Has Evidence for Criminal Referral of Trump, but Splits on Sending*, NEW YORK TIMES (Apr. 10, 2022), <https://www.nytimes.com/2022/04/10/us/politics/jan-6-trump-criminal-referral.html>.

464 Department of Justice, Press Release, *Attorney General Merrick B. Garland Delivers Remarks on the First Anniversary of the Attack on the Capitol* (Jan. 5, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-first-anniversary-attack-capitol> ("The Justice Department remains committed to holding all January 6th perpetrators, at any level, accountable under law—whether they were present that day or were otherwise criminally responsible for the assault on our democracy. We will follow the facts wherever they lead."). And see C. Ryan Barber, *Biden's Justice Department Wants to Hire 131 More Lawyers to Prosecute January 6 Cases*, BUSINESS INSIDER (Mar. 28, 2022, 4:03 PM), <https://www.businessinsider.com/biden-justice-department-prosecutors-january-6-capitol-attack-cases-2022-3> (quoting Deputy Attorney General Lisa Monaco) ("We are going to continue to do those cases. We are going to hold those perpetrators accountable, no matter where the facts lead us, [and] as the attorney general has said, no matter at what level. We will do those cases.").

465 Tamar Hallerman & Ben Brash, *Fulton DA Faces Biggest Decision of Career as Trump Grand Jury Looms*, THE ATLANTA JOURNAL-CONSTITUTION (Apr. 29, 2022), <https://www.ajc.com/politics/fulton-da-faces-biggest-decision-of-career-as-trump-grand-jury-looms/6OKYH6PMRZB3TPBSQZJSHL5CCU/>.

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Ambassador Norman Eisen (ret.) is a senior fellow in Governance Studies at Brookings. He served in the White House from 2009 to 2011 as special counsel and special assistant to President Barack Obama for ethics and government reform, was the U.S. Ambassador to the Czech Republic from 2011 to 2014, and served as special counsel to the House Judiciary Committee for the Trump impeachment and trial from 2019 to 2020. Before that, he was a partner in the D.C. law firm Zuckerman Spaeder, where he practiced law from 1991 to 2009. He is the author of, *A Case for the American People: The United States v. Donald J. Trump* (Crown 2020) and *The Last Palace: Europe's Turbulent Century in Five Lives and One Legendary House* (Crown 2018) and the editor of *Overcoming Trumpery: How to Restore Ethics, the Rule of Law, and Democracy* (Brookings 2022) and *Democracy's Defenders: U.S. Embassy Prague, the Fall of Communism in Czechoslovakia, and Its Aftermath* (Brookings 2020). Eisen received his J.D. from Harvard Law School in 1991 and his B.A. from Brown University in 1985, both with honors. He is the co-founder and former chair of Citizens for Responsibility and Ethics in Washington (CREW) and the co-founder and executive chair of the States United Democracy Center and States United Action. In that capacity, Ambassador Eisen is co-counsel in the case brought against militia groups and their members who were involved in the January 6, 2021 assault on the U.S. Capitol. See Complaint, *District of Columbia v. Proud Boys International L.L.C., et al*, 21-cv-3267 (D.D.C. Dec. 12, 2021) ECF #1. He has also participated in bar complaints against attorneys who allegedly participated in the attempted overturn of the election. See, e.g., Letter to District of Columbia Court of Appeals' Office of Disciplinary Counsel Re: Jeffery Clark's Professional Conduct, Oct. 5, 2021, <https://ldad.org/wp-content/uploads/2021/10/DC-Ethics-Complaint-Against-Jeffrey-Clark.pdf>, and States United Democracy Center's Letter to California's Office of Chief Trial Counsel George Cardona Re: Request for Investigation of John C. Eastman, Oct. 4, 2021, <https://statesuniteddemocracy.org/>

wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf. States United's activities are more fully described on its [website](#). He is a CNN Legal Analyst and has been profiled in *The Washington Post*, *The Wall Street Journal*, *New York Magazine*, *Politico*, and *Tablet*. He was named to the *Politico* 50 list of thinkers shaping American politics and as one of Washington's most influential people by *Washingtonian*. Eisen was an inspiration for the character of the crusading lawyer Deputy Kovacs in the 2014 film "The Grand Budapest Hotel."

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