

<p>SUPREME COURT STATE OF COLORADO 2 East 14<sup>th</sup> Avenue, Denver, CO 80202</p>	
<p>Original Proceeding District Court, City and County of Denver, Colorado, Case No. 2023CV32577</p>	
<p><b>In Re:</b> <b>Petitioners-Appellees/Cross-Appellants:</b> <b>NORMA ANDERSON, MICHELLE PRIOLA,</b> <b>CLAUDINE CMARADA, KRISTA KAUFER,</b> <b>KATHI WRIGHT, and CHRISTOPHER</b> <b>CASTILIAN,</b></p> <p>v.</p> <p><b>Respondent-Appellee:</b> <b>JENA GRISWOLD,</b> in her official capacity as Colorado Secretary of State,</p> <p>v.</p> <p><b>Intervenor-Appellee:</b> <b>COLORADO REPUBLICAN STATE</b> <b>CENTRAL COMMITTEE,</b> an unincorporated association,</p> <p><b>Intervenor-Appellant/Cross-Appellee:</b> and <b>DONALD J. TRUMP.</b></p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
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**INTERVENOR-APPELLANT'S INDEX OF ATTACHMENTS TO HIS  
OPENING-ANSWER BRIEF**

Intervenor-Appellant Donald J. Trump (“President Trump”) submits the following exhibits to his Opening-Answer Brief and in addition to the exhibits filed by the Petitioners. For sake of brevity, President Trump is not re-filing any exhibits filed by the Petitioners-Appellees that he may have filed as well.

Attachment No.	Description
1	Final Order, Nov. 17, 2023
2	Secretary of State's Omnibus Response to Motion to Dismiss, Sept. 29, 2023
3	Minute Orders, Sept. 22, 2023
4	Order Re: Donald J. Trump's Motion to Dismiss Filed September 29, 2023, Oct. 25, 2023
5	The Reconstruction Acts, 12. Op. Att'y Gen. 182, 205 (1867)
6	Tr. of Argument at 64:5-7 (Katsas J.), <i>Blassingame v. Trump</i> , No. 22-5069 (D.C.Cir. Dec. 7, 2022). – email J Shaw
7	Transcript of President Trump's January 6, 2021, speech at the Ellipse
8	Insurrection, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH. LANGUAGE (1828).
9	Petitioners' Trial Exhibit 148
10	Intervenor Donald J. Trump's Trial Exhibit 1031
11	Petitioners' Trial Exhibit 78

Respectfully submitted 28<sup>th</sup> day of November 2023,

GESSLER BLUE, LLC

By: s/ Scott E. Gessler  
Scott E. Gessler

Attorney for Donald J. Trump

## CERTIFICATE OF SERVICE

I certify that on this 28th day of November 2023, the foregoing was electronically served via e-mail or CCES on all counsel and parties of record.

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**DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO**

1437 Bannock Street  
Denver, CO 80202

DATE FILED: November 05, 2023 at 12:03 PM  
CLERK: JESSICA S. GIBSON  
CASE NUMBER: 2023SA300

**Petitioners:**  
NORMA ANDERSON, MICHELLE PRIOLA,  
CLAUDINE CMARADA, KRISTA KA FER, KATHI  
WRIGHT, and CHRISTOPHER CASTILIAN

v.

**Respondent:**  
JENA GRISWOLD, in her official capacity as  
Colorado Secretary of State

and

**Intervenors:**  
COLORADO REPUBLICAN STATE CENTRAL  
COMMITTEE and DONALD J. TRUMP

**Δ COURT USE ONLY Δ**

Case No.: 2023CV32577

Division: 209

**FINAL ORDER**

This matter came before the Court from October 30, 2023 to November 3, 2023 pursuant to a C.R.S. § 1-1-113 proceeding. Petitioners Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi Wright, and Christopher Castilian (“Petitioners”) were represented by Eric Olson, Sean Grimsley, Jason Murray, Martha Tierney, Mario Nicolais, and Nikhel Sus. Respondent Jena Griswold, in her official capacity as Colorado Secretary of State (“Secretary”), was represented by Jennifer Sullivan, Grant Sullivan, and Michael Kotlarczyk. Intervenor Donald J. Trump was represented by Scott Gessler, Geoffrey Blue, Justin North, Johnathan Shaw, Christopher Halbohn, Mark

Meuser, and Jacob Roth. The Colorado Republican State Central Committee (“CRSCC”) was represented by Jane Raskin, Michael Melito, Robert Kitsmiller, Nathan Moelker, and Benjamin Sisney. The Court, having considered the evidence, the extensive briefing, the proposed findings of fact and conclusions of law, and applicable legal authority, makes the following findings of fact and conclusions of law and issues the following order:

**I. PROCEDURAL BACKGROUND<sup>1</sup>**

1. On September 6, 2023, Petitioners filed their Verified Petition under C.R.S. §§ 1-4-1204, 1-1-113, 13-51-105 and C.R.C.P. 57(a). Petitioners alleged two claims for relief. First, they asserted a claim against the Secretary pursuant to C.R.S. § 1-4-1204 and § 1-1-113. Second, they requested declaratory relief against both the Secretary and Trump. The declaratory relief requested included a declaration that Trump was not constitutionally eligible for the office of the presidency.

2. On September 7, 2023, Trump filed a notice of removal to the United States District Court for the District of Colorado. On September 12, 2023, the United States District Court for the District of Colorado remanded the case, finding that the Secretary was not a nominal party whose consent to remove was permissive.

3. CRSCC filed a motion to intervene on September 14, 2023. This Court granted that motion on September 18, 2023.

4. On September 22, 2023, Trump filed a Special Motion to Dismiss Pursuant to C.R.S. § 13-20-1101(3)(a) (“Trump Anti-SLAPP Motion”). In that motion,

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<sup>1</sup> The Court adopts and incorporates all its prior rulings in this Order.

Trump argued that this case is subject to Colorado’s anti-SLAPP statute because Petitioners’ claims all stem from protected speech or the refusal to speak and because the speech concerned election fraud and a hard-fought election, they are the epitome of public issues. Trump further argued Petitioners were unable to establish a reasonable likelihood of success on their claims. As a result, Trump argued, the Court must dismiss the claims.

5. Also on September 22, 2023, Trump separately moved to dismiss Petitioners’ claims (“Trump Procedural Motion to Dismiss”). Specifically, Trump argued: (1) Petitioners may not litigate constitutional claims in a C.R.S. § 1-1-113 proceeding; (2) the C.R.S. § 1-4-1204 claim was not ripe; (3) C.R.S. § 1-4-1204 does not provide grounds to use the Fourteenth Amendment to bar candidates; and (4) there is no standing on the declaratory judgment claim because there is no particularized or concrete injury. On September 29, 2023, the Petitioners responded to the Trump Procedural Motion to Dismiss. In that Response, the Petitioners agreed to dismiss their declaratory judgment claim. This Court has since dismissed Petitioners’ claim for declaratory judgment.

6. Also, on September 22, 2023, CRSCC filed a Motion to Dismiss Pursuant to Colorado Rule of Civil Procedure 12(b)(5) (“CRSCC Motion to Dismiss”). In that motion, CRSCC argued: (1) the Petition infringes on CRSCC’s first amendment rights; (2) the Secretary’s role in enforcing C.R.S. § 1-4-1204 is ministerial; and (3) the C.R.S. § 1-4-1204 claim is not ripe. The motion also previewed additional arguments that Trump

made in a subsequent motion to dismiss on whether the Fourteenth Amendment can be used to keep Trump off the ballot.

7. Finally, also on September 22, 2023, Petitioners moved to dismiss CRSCC's First Claim for Relief ("Petitioners' Motion to Dismiss"). The Petitioners argued that the CRSCC's First Claim for Relief was inappropriate in a C.R.S. § 1-1-113 proceeding because it is a constitutional challenge to the election code.

8. On September 29, 2023, Trump filed an additional motion to dismiss. This motion to dismiss addressed various constitutional arguments regarding why the Petitioners' Fourteenth Amendment arguments fail ("Fourteenth Amendment Motion to Dismiss"). In that motion, Trump argues: (1) this case presents a nonjusticiable political question; (2) Section Three of the Fourteenth Amendment is not self-executing; (3) Congress has preempted states from judging presidential qualifications; (4) Section Three does not apply to Trump; (5) Petitioners fail to allege that Trump "engaged" in an "insurrection;" and (6) this is an inconvenient forum under C.R.S. § 13-20-1004.

9. Finally, on September 29, 2023, CRSCC filed a Motion for Judgment on the Pleadings under Rule 12/Judgment as a Matter of Law Under Rule 56 ("CRSCC Motion for Judgment"). This motion essentially argued that this Court should grant all the relief CRSCC requested in its Petition based on the Petition alone. This included its requests that this Court declare: (1) the relief Petitioners request is a violation of their First Amendment rights; (2) the Secretary does not have authority to preclude the placement of Trump on Colorado's ballot pursuant to the Fourteenth Amendment; and

(3) only the CRSCC has the authority to determine who is qualified to be on Colorado's ballot as a Republican candidate.

10. On October 5, 2023, the Court granted Donald J. Trump's motion to intervene.

11. On October 11, 2023, the Court denied the Trump Anti-SLAPP Motion on the basis that the anti-SLAPP statute did not apply to this case.

12. On October 20, 2023, the Court issued its Omnibus Ruling on the Pending Dispositive Motions. The Court denied the Trump Procedural Motion to Dismiss, finding Petitioners' claim procedurally proper under C.R.S. § 1-1-113 and ripe for decision under C.R.S. § 1-4-1204. The Court further found that the issue of whether an elector can make a Fourteenth Amendment challenge under C.R.S. § 1-4-1204 was an issue to be preserved for trial. The Court denied the CRSCC Motion to Dismiss, finding that if a political party puts forth a constitutionally ineligible candidate, and if the Secretary of State has the legal authority to vet candidate fitness, the First Amendment is not violated if the State disqualifies that candidate on the grounds of his ineligibility. The Court denied the CRSCC Motion for Judgment, finding it premature. Finally, the Court granted Petitioners' Motion to Dismiss, finding the only relief the Court can afford in a C.R.S. § 1-1-113 proceeding is an order to comply with the Election Code and that the CRSCC's request for declaratory judgment was improper.

13. On October 25, 2023, by separate order, this Court denied Trump's Fourteenth Amendment Motion to Dismiss. First, the Court declined to dismiss the case under the political question doctrine, reserving the issue of whether presidential

eligibility has been delegated to the United States Congress for its final ruling following the presentation of evidence and argument at trial.<sup>2</sup> Next, the Court held that to the extent the Court holds that C.R.S. § 1-4-1204 allows the Court to order the Secretary to exclude a candidate under the Fourteenth Amendment, states can, and have, applied Section Three pursuant to state statutes without federal enforcement legislation. As to Trump's argument that Congress has preempted states from judging presidential qualifications, the Court further declined to dismiss the action based on field preemption. Finally, the Court found Trump had failed to establish dismissal based on *forum non conveniens*. The Court reserved the issues of whether Section Three of the Fourteenth Amendment applies to Trump and whether Trump engaged in an insurrection for its ruling following trial.

14. Trump filed a Motion to Realign the Secretary as a Petitioner, arguing that the Secretary was acting as a Petitioner and should be realigned so that Trump could appeal her decisions, ensure a proper order of proof, and, if necessary, cross-examine the Secretary's witnesses. On October 23, 2023, this Court held that the Secretary, in the context of this litigation, is not antagonistic such that a realignment was

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<sup>2</sup> The Court held it would revisit this ruling to the extent that there was any evidence or argument at trial that provided the Court with additional guidance on whether the issue of presidential eligibility has been delegated to the United States Congress. The Court holds that no evidence or arguments made since its initial ruling on this issue has changed its analysis. Specifically, the Court has reviewed the Honorable Judge Redford's rulings in *LaBrant v. Benson*, Case No. 23-137-MZ (Mich. Ct. Cl. November 14, 2023) and *Castro v. New Hampshire Sec'y of State*, No. 23-CV-416-JL, 2023 WL 7110390 (D.N.H. Oct. 27, 2023) and notes that they rely heavily on certain constitutional provisions and 3 U.S.C. § 15 as providing a textual commitment to a coordinate political branch. This Court has already undertaken that analysis and disagrees. If Intervenors could point to a *clear* textual commitment to Congress, this Court would readily hold that the questions this case presents have been delegated in the Constitution to Congress.

appropriate. The Court further noted it had previously held the Secretary's time would be counted against Petitioners, that Trump was permitted to put on a case, and that all Parties would further be allowed to cross-examine all other Parties' witnesses, except for Intervenors cross-examining each other's witnesses.

15. On October 25, 2023, Trump filed a brief regarding the standard of proof for trial. Petitioners filed a response brief on October 27, 2023. This Court addressed those briefs in its October 28, 2023 Order, holding that pursuant to *Santosky v. Kramer*, 455 U.S. 745, 754 (1982), while Intervenor Trump has a clear interest in being on Colorado's ballot, that interest does not rise to the level of a fundamental liberty interest. The Court thus determined to apply the burden of proof prescribed in C.R.S. § 1-4-1204(4) at trial.

16. In its Order re: Donald J. Trump's Motion *in limine* to Exclude Petitioners' Anticipated Exhibits issued October 27, 2023 ("Exhibits MIL Order"), this Court held that the Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol, HR 117-663, 117th Cong., 2d Sess. (Dec. 22, 2022) ("January 6th Report") was conditionally admissible in this matter subject to the information elicited from the cross-examination of Timothy Heaphy and the testimony of Congressman Troy Nehls.<sup>3</sup>

17. The Court issued its Order Re: Intervenor Trump's Objections to Specific Findings Contained in January 6th Report on October 29, 2023. In that Order, the Court made specific and conditional determinations as to which findings were excluded

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<sup>3</sup> Intervenors ultimately did not call Congressman Nehls, but the Court did consider his previously submitted declaration.



pursuant to the Colorado Rules of Evidence, further stating that “[t]o the extent the parties believe the Court has egregiously or inadvertently erred in its ruling here, they can still argue for admissibility or inadmissibility in their proposed findings of fact, conclusions of law.”

18. The matter proceeded to a five-day trial beginning on October 30, 2023 and concluding on November 3, 2023 (the “Hearing”). On November 15, 2023, the parties presented their closing arguments.

19. Petitioners, the Secretary, and the Intervenors provided this Court with proposed findings of fact and conclusions of law. The Court has incorporated some of the Parties’ proposed findings of fact and conclusions of law, in whole or in part, but only after careful consideration and adoption.

## **II. JANUARY 6TH REPORT**

20. At the Hearing and in their proposed findings of fact and conclusions of law, Intervenors renewed their objections to the admission of the January 6th Report into evidence. The Court hereby makes its final decision regarding the admissibility of the January 6th Report.

21. C.R.E. 803(8) excludes from the hearsay rule “factual findings resulting from an investigation made pursuant to authority granted by law.” C.R.E. 803(8) is nearly identical to its federal counterpart, F.R.E. 803(8), and “[c]ases interpreting a similar federal rule of evidence are instructive” in Colorado. *Leiting v. Mutha*, 58 P.3d 1049, 1052 (Colo. App. 2002). As such, federal law is instructive when interpreting C.R.E. 803(8) here.

22. Citing to *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988) and the Federal Advisory Committee Notes to C.R.E. 803(8)'s federal analogue, the Court in *Barry v. Tr. of Int'l Ass'n Full-Time Salaried Officers & Emps. of Outside Local Unions & Dist. Counsel's (Iron Workers) Pension Plan*, 467 F.Supp.2d 91, 96 (D.D.C. 2006) noted that the Rule assumes admissibility in the first instance. "Hence, the party challenging the admissibility of a public or agency report. . . bears the burden of demonstrating that the report is not trustworthy." *Barry*, 467 F.Supp.2d at 96. The Court then examined four factors first articulated in *Beech Aircraft Corp.*, 488 U.S. at 167, n. 11 which are meant to assist courts in assessing a report's trustworthiness: "(1) the timeliness of the investigation; (2) the special skill or expertise of the investigating official; (3) whether a hearing was held and the level at which it was conducted; and (4) possible motivation problems." *Barry*, 467 F.Supp.2d at 97. The Court in *Barry* further instructed that when examining the factors, a court must focus on whether the report was prepared in a reliable manner instead of whether the Court agrees with the conclusions. 467 F.Supp.2d at 97 (citing *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1306-07 (5th Cir. 1991)).

23. In addition to the four factors, *Barry* instructs that "Congressional reports are not entitled to an additional presumption of trustworthiness or reliability—beyond the one already established in the Advisory Committee Notes—simply by virtue of having been produced by Congress." *Id.* at 98. Further, courts should look to whether members of both parties joined in the report. *Id.*

24. The question before this Court is whether Intervenors have overcome the presumptive admissibility of the January 6th Report. The Court holds that the first three *Barry* factors weigh strongly in favor of reliability. The investigation started approximately six months after the events of January 6, 2021 and ended less than two years after the events took place. As a result, “the passage of time in no way detracts from the report’s reliability.” *Id.* at 100. The investigation was conducted by a well-staffed, highly skilled group of lawyers (including a Republican U.S. Attorney) and led by a former U.S. Attorney. There was a hearing conducted over ten days and 70 witnesses testified—all of whom testified under oath. The Select Committee had large volumes of records that it independently evaluated when crafting its final report. None of these findings were contradicted by evidence presented at the Hearing.

25. Much of the evidence and argument presented at the Hearing centered around the fourth *Barry* factor: possible motivation problems. Intervenors’ arguments against the admissibility of the January 6th Report are that: (1) all nine members of the committee were biased against Trump and held a “deep personal animus” towards him; and (2) there was a lack of involvement by the minority party (the Republican Party in this instance) and therefore a lack of opportunity for effective dissent.

26. Through his cross-examination of Mr. Heaphy, Trump presented evidence that prior to the formation of the January 6th Committee numerous members of the January 6th Committee had expressed disdain for Trump and indicated that they believed that he was responsible for the events of January 6, 2021. Mr. Heaphy confirmed that the January 6th Committee members made these statements but

testified that these statements merely indicated that the committee members had formed a hypothesis as to what had led to the events of January 6, 2021. 11/03/2023 Tr. 186:2-7. Mr. Heaphy further testified that although the committee members had developed this hypothesis, they remained open to whatever conclusions were supported by the evidence uncovered in the investigation. 11/03/2023 Tr. 210:11-19. The Court finds Mr. Heaphy's testimony on this subject to be credible and holds that any perceived animus of the committee members towards Trump did not taint the conclusions of the January 6th Report in such a way that would render them unreliable.<sup>4</sup>

27. Furthermore, the idea that any amount of political bias would render the January 6th Report untrustworthy for the purposes of C.R.E. 803(8) is incompatible with the case law surrounding the admissibility of Congressional reports.

28. As Congressman Ken Buck testified, all (or at least nearly all) Congressional investigations have some measure of political bias or motivation underlying them. 11/02/2023 Tr. 229:4-10. However, courts have admitted Congressional reports subject to their reliability for decades. *See Barry*, 467 F.Supp.2d at 101 (admitting report from a Senate investigation); *Mariani v. United States*, 80 F.Supp.2d 352, 361 (M.D. Pa. 1999) (admitting minority report from a Congressional investigation); *Hobson v. Wilson*, 556 F. Supp. 1157, 1183 (D.D.C. 1982), *aff'd in part, rev'd in part*, 737 F.2d 1 (D.C. Cir. 1984) (admitting Congressional Committee report);

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<sup>4</sup> The Court further notes that nearly all Congressional investigations are initiated because there is something to investigate, *i.e.*, Congress does not investigate events where it does not think something wrong occurred. In this way, Congressional investigations operate somewhat like a police investigation. The fact that the Committee members thought that Trump had instigated the attacks does not necessarily translate to the Committee not turning over every stone and thoroughly investigating the events before reaching its ultimate conclusions.

*McFarlane v. Ben-Menashe*, No. 93-1304(TAF), 1995 WL 129073, at \*5 (D.D.C. Mar. 16, 1995), *withdrawn in part on reconsideration*, No. 93-1304(TAF), 1995 WL 799503 (D.D.C. June 13, 1995), *aff'd sub nom. McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501 (D.C. Cir. 1996) (admitting Congressional Task Force report). Based on the foregoing case law, it would be inappropriate to exclude the January 6th Report simply because it was in part politically motivated. The relevant inquiry is instead whether the report is reliable and trustworthy based upon the factors articulated in *Barry*.

29. Intervenors argue that the composition of the January 6th Committee demonstrates underlying motivation problems. Specifically, Intervenors argue that because the January 6th Committee was made up of 7 Democrats and only 2 Republicans (who, as previously discussed, Trump argues were biased against him), there was no meaningful input from the minority party in the investigation. Petitioners respond that the composition of the January 6th Committee was the result of two events: (1) Senate Republicans' refusal to vote for an independent and bipartisan commission; and (2) Republicans' decision to boycott the January 6th Committee altogether when then-Speaker of the House Nancy Pelosi refused to seat two of the five choices Republicans put forth to sit on the January 6th Committee.

30. While the Court agrees with Intervenors that the January 6th Report would have further reliability had there been greater Republican participation, the events pointed to by Petitioners demonstrate that the Republicans had a meaningful opportunity to participate but simply chose not to do so. While the Court is cognizant that then-Speaker Pelosi rejected two of the five recommended Republicans for the

Committee that the Minority Leader put forth and that she admitted this decision was “unprecedented,” the fact that the congressional Republicans chose not to seat the three Republican members that Speaker Pelosi was agreeable to seating or to nominate a new slate of potential members and instead chose to boycott the Committee is not a valid reason to reject the January 6th Report in total. This is especially true where Congressman Buck testified that he had asked to be placed on the January 6th Committee after then-Speaker Pelosi rejected two of the five Republican nominees, but his request was turned down by Republican Party leadership. 11/02/2023 Tr. 213:3-14.

31. Furthermore, the two Republicans who did sit on the January 6th Committee – Former Reps. Elizabeth Cheney and Adam Kinzinger – were both duly elected Republicans; Congressman Kinzinger was elected six times and Congresswoman Cheney was elected three times. Prior to January 6, 2021, Congresswoman Cheney also served as the chair of the House Republican Conference which is the third highest position in House Republican Leadership.

32. The investigative counsel for the January 6th Committee was also highly qualified. Mr. Heaphy was the chief investigative counsel for the Select Committee. Mr. Heaphy is a former U.S. Attorney with significant experience. The investigative staff included 20 lawyers which Mr. Heaphy noted included many Republicans. Importantly, the staffing decisions did not include any inquiry into political affiliation. 11/03/2023 Tr. 153:24-154:9.

33. The Committee and its investigative staff interviewed or deposed more than 1,000 witnesses, collected, and reviewed over 1 million documents, reviewed

hundreds of hours of video footage, and reviewed 60 federal and state court rulings related to the 2020 election. Trump was subpoenaed, and he refused to comply with the subpoena. The overwhelming majority of witnesses who the January 6th Committee interviewed or deposed were Trump administration officials and Republicans. These witnesses included many of the witnesses that testified at the Hearing.

34. The findings of the January 6th Committee were unanimous, which is why there was not a minority report. This includes the two Republicans who sat on the Committee. These facts all cut against Intervenors' argument that lack of participation of the minority party resulted in the January 6th Report reaching unreliable conclusions.

35. As to Intervenors' arguments that the January 6th Committee's disregard of certain evidence indicates that the investigators were prejudiced against him, the Court finds such arguments unavailing. No evidence was presented at the Hearing that the January 6th Committee or its staff coerced witness testimony, refused to hear testimony they did not want to hear, or disregarded credible exculpatory evidence. Instead, the evidence presented at the Hearing demonstrated that the January 6th Committee heard and reviewed all evidence put before it. The only evidence presented at the Hearing that could arguably show a disregard of certain evidence by the Committee is the fact that the Committee simply chose not to credit certain testimony as credible.<sup>5</sup>

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<sup>5</sup> The only potential evidence presented at the Hearing of the Committee disregarding testimony is Mr. Patel's testimony concerning the authorization of 10,000-20,000 National Guardsmen (which the Court has found incredible for reasons detailed below) and Congressman Buck's testimony that apparently Congressman Jim Jordan told Congressman Buck, when courting his

36. However, as is the case in judicial proceedings and administrative law, such a determination is the purpose of a factfinder. *See, e.g., People ex rel. S.G.*, 91 P.3d 443, 452 (Colo. App. 2004) (“The fact finder is entitled to reject part of a witness’s testimony that it finds to be untruthful and still accept other parts that it finds to be credible.”); *People v. Liggett*, 114 P.3d 85, 90 (Colo. App. 2005) (“A fact finder may believe all, some, or none of a witness’s testimony.”).

37. Furthermore, while Trump spent much time contesting potential biases of the Committee members and their staff, he spent almost no time attacking the credibility of the Committee’s findings themselves. The Hearing provided Trump with an opportunity to subject these findings to the adversarial process, and he chose not to do so, despite frequent complaints that the Committee investigation was not subject to such a process.<sup>6</sup> Because Trump was unable to provide the Court with any credible evidence which would discredit the factual findings of the January 6th Report, the Court has difficulty understanding the argument that it should not consider its findings which are admissible under C.R.E. 803(8).

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vote for Speaker of the House, that he did not refuse to sit for an interview with the January 6th Select Committee. The Court did not consider this testimony because it is hearsay and the Court cannot think of any possible exception to the hearsay rule that would allow its consideration.

<sup>6</sup> The Court notes that while Trump has repeatedly suggested he was not afforded due process, at no point did he ask the Court for any relief on this basis that the Court denied and in fact only used approximately twelve hours and fifteen minutes of the eighteen hours provided to him at the Hearing (or, approximately two-thirds of the allotted time). Further, the Court offered to hear additional witness testimony outside the 5-day hearing if there were any witnesses who were not able to testify between October 30, 2023 and November 3, 2023.



38. Considering the foregoing, the Court holds that the January 6th Report is reliable and trustworthy and thereby admissible pursuant to C.R.E. 803(8). Despite this ruling, the Court wishes to emphasize that it has only considered those portions of the January 6th Report which are referenced in this Order and has considered no other portions in reaching its decision.<sup>7</sup>

### **III. HEARING TESTIMONY**

39. Officer Daniel Hodges testified on behalf of the Petitioners. Daniel Hodges is an officer with the Metropolitan Police Department of Washington, D.C. Daniel Hodges was on duty on January 6, 2021 and testified to his experiences on January 6, 2021 where he was initially monitoring the Stop the Steal Rally at the Ellipse. He ultimately was deployed to the Capitol to reinforce the defenses there—to prevent people from gaining entry to the Capitol. Officer Hodges testified in detail regarding being attacked with a variety of weapons including flagpoles, stolen riot batons, police shields, bike rack barriers, pepper spray, and chemical irritants. Officer Hodges walked the Court through a variety of videos from the body camera he wore that day. The Court found Officer Hodges’s testimony to be credible. The Court gave weight to Officer Hodges’s testimony in finding that there was an insurrection and that the mob was there on Trump’s behalf.

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<sup>7</sup> The Court notes that the Petitioners originally submitted 411 findings from the January 6th Report. The Court previously held that 143 of those findings were inadmissible. In their proposed findings of fact and conclusions of law, Petitioners submitted 98 findings. The Court has considered and cited 31 of those findings in this Order.

40. Congressman Eric Swalwell testified on behalf of the Petitioners.

Congressman Swalwell testified regarding his experience with two prior electoral college certifications as well as the 2020 electoral college certification. He also recounted his experience on the house floor during the attack on the Capitol on January 6, 2021 which took place during the electoral college certification. He recounted his role in the impeachment of Trump for the events of January 6, 2021. The Court holds that Congressman Swalwell's testimony regarding his experience during the attack on the Capitol was credible. The Court gave weight to Congressman Swalwell's testimony in finding that there was an insurrection.

41. Officer Winston Pingeon testified on behalf of the Petitioners. Officer Pingeon was a police officer for the United States Capitol Police on January 6, 2021. That day, he was assigned to the Civil Disturbance Unit with a group of about 25 officers. He was originally staged in what he described as the truck tunnel, but the group was told to put on their riot gear because the outer perimeter lines of the Capitol had been breached. When they arrived, members of the mob assaulted, pushed, and pepper sprayed him and his fellow officers. Officer Pingeon described engaging in hand-to-hand combat for up to three hours while he and the other officers tried to fend off the attackers. The Court holds that Officer Pingeon's testimony was credible. The Court gave weight to Officer Pingeon's testimony in finding that there was an insurrection and that the mob was there on Trump's behalf.

42. Professor Peter Simi testified on behalf of the Petitioners. Professor Simi is a professor of sociology at Chapman University. The Court qualified Professor Simi as

an expert in political extremism, including how extremists communicate, and how the events leading up to and including the January 6, 2021 attack relate to longstanding patterns of behavior and communication by political extremists. Professor Simi has been studying political extremism, political violence, and the communication styles of far-right political extremists for twenty-seven years. He has conducted these studies in three ways: (1) fieldwork (which is spending time embedded with extremists in their natural environments); (2) formal interviews; and (3) archival (collecting information). He testified that he has spent thousands of hours doing fieldwork including with the three primary perpetrators of the January 6, 2021 attack: Oath Keepers, Proud Boys, and Three Percenters. He further testified that he has interviewed 217 right wing extremists and that fourteen of those interviews were with Oath Keepers, Proud Boys, and Three Percenters. Finally, he testified he's spent thousands of hours doing archival research and that research included all three groups. The Court finds that Professor Simi's testimony was credible and helped the Court understand that while Trump's words both before and after January 6, 2021 might seem innocuous to the average listener, they would be interpreted differently by political extremists. The Court gave weight to Professor Simi's testimony in finding that Trump intended and incited the violence on January 6, 2021.

43. Professor William Banks testified on behalf of the Petitioners. Professor Banks is a law professor at Syracuse University teaching classes in constitutional law, national security law, counterterrorism law, and the domestic role of the military. In 2003, he founded the Institute for National Security and Counterterrorism. He has also

advised the Department of Defense and civilian agencies providing for emergency preparedness and response exercises to better prepare for crisis situations. He has written between thirty and forty books and articles on the President's authority to respond to domestic security threats. The Court qualified Professor Banks as an expert on the President's powers to stop domestic attacks on the government and the authorities that then-President Trump had to call on to stop the attack on January 6, 2021. The Court finds that Professor Banks's testimony was credible and helpful to understand the authority then-President Trump had over the D.C. National Guard as well as any authority he had over the National Guard in the adjoining states. The Court gave weight to Professor Banks's testimony in finding that Trump had the authority to call in reinforcements on January 6, 2021, and chose not to exercise it, thereby recklessly endangering the lives of law enforcement, Congress, and the attackers on January 6, 2021.

44. Professor Gerard Magliocca testified on behalf of the Petitioners. Professor Magliocca is a law professor at the Indiana University, Robert H. McKinney School of Law with a focus on constitutional history. Professor Magliocca has been studying the history of the Fourteenth Amendment for several years and in 2020 wrote a paper on Section Three of the Fourteenth Amendment. The Court qualified Professor Magliocca as an expert in the history of Section Three of the Fourteenth Amendment. The Court finds that Professor Magliocca's testimony clarified the history of Section Three of the Fourteenth Amendment. The Court gave weight to Professor Magliocca's testimony in finding that Trump engaged in insurrection. The Court gave weight to

Professor Magliocca's testimony, but ultimately rejected it, regarding whether Section Three of the Fourteenth Amendment applies to former President Trump.

45. Hilary Rudy testified on behalf of the Petitioners. Ms. Rudy is Colorado's Deputy Elections Director. She has held that position since 2013 and has worked full time for the Secretary of State since 2006. The Court finds that Ms. Rudy was knowledgeable about how the Secretary of State's office has traditionally handled qualification issues. Her demeanor was very matter of fact, and it was clear that her goals were apolitical.<sup>8</sup> She was extremely credible. The Court gave weight to Ms. Rudy's testimony regarding the historical practices of the Secretary of State's office including when it would traditionally prevent ballot access and when it would not.

46. Timothy Heaphy testified on behalf of the Petitioners. Mr. Heaphy was the former chief investigative counsel for the January 6th Select Committee. Mr. Heaphy was an assistant U.S. Attorney from 1991-2006, moved to private practice where he did white-collar defense until President Obama appointed him as U.S. Attorney for the Western District of Virginia—a position he held from 2009-2015. In 2017, the City of Charlottesville hired him to investigate the deadly Unite the Right rally. He worked for the January 6th Select Committee from June 2021 through December 2022. The Court found Mr. Heaphy to be a qualified and seasoned investigator. The Court found his testimony regarding the inner workings of the Select Committee to be credible. The Court gave weight to Mr. Heaphy's testimony in deciding to admit specific findings in the January 6th Report.

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<sup>8</sup> The Court notes that Ms. Rudy was not made available to the Petitioners prior to the hearing. She prepared for her testimony with the Deputy Secretary of State.

47. Kash Patel testified on behalf of Intervenor Trump. Mr. Patel was the former Chief of Staff to the acting Secretary of Defense on January 6, 2021. Mr. Patel testified that on January 3, 2021, then-President Trump authorized 10,000-20,000 National Guard forces. He also testified about his experiences with the January 6th Select Committee including that he gave a deposition to the Committee. The Court finds that Mr. Patel was not a credible witness. His testimony regarding Trump authorizing 10,000-20,000 National Guardsmen is not only illogical (because Trump only had authority over about 2,000 National Guardsmen) but completely devoid of any evidence in the record.<sup>9</sup> Further, his testimony regarding the January 6th Committee refusing to release his deposition and refusing his request to speak at a public hearing was refuted by Mr. Heaphy who was a far more credible witness. The Court did not give any weight to Mr. Patel's testimony other than as evidence that the January 6th Select Committee interviewed many of Trump's supporters as part of its extensive investigation.

48. Katrina Pierson testified on behalf of Intervenor Trump. Katrina Pierson was a senior advisor to both of Trump's presidential campaigns. Ms. Pierson tried to intervene regarding internal disputes that had arisen regarding the January 6, 2021 rally. According to Ms. Pierson's testimony, at a January 5, 2021 meeting at the White House, Trump agreed with her position that the speakers at the January 6, 2021 rally should not include inflammatory speakers such as Alex Jones and Ali Alexander. She

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<sup>9</sup> Trump, as commander of the D.C. National Guard, only had direct authority over around 2,000 Guardsmen. To mobilize 10,000-20,000 Guardsmen, he would have had to contact the Governors of other States and they would have had to then give orders, or he would have had to federalize the Guardsmen from those States. In either case, there would have been significant official action taken. No record of such action was produced at the Hearing.

also testified that Trump told someone in the room at the same meeting that he wanted “10,000 National Guards.” The Court has no reason to disbelieve this testimony but mentioning 10,000 National Guardsmen is not the same as authorizing them. Finally, she testified that she spoke with the January 6, 2021 committee for nineteen or twenty hours. The Court finds that Ms. Pierson was credible, and the Court believes her testimony that in a meeting on January 5, 2021, Trump chose the speakers for the January 6, 2021 rally. The Court gave weight to Ms. Pierson’s testimony in finding that Trump chose the speakers on January 6, 2021, that he knew radical political extremists were going to be in Washington, D.C. on January 6, 2021 and likely attending his speech, and that the January 6th Committee extensively interviewed witnesses who were Trump supporters.

49. Amy Kremer testified on behalf of Intervenor Trump. Ms. Kremer is the founder of Women for America First. Her group hosted the January 6, 2021 rally at the Ellipse. Ms. Kremer’s testimony was like Ms. Pierson’s in that she worked with Ms. Pierson to keep the people she described as “whackos” from speaking at the Ellipse. The reason she did not want “whackos” to speak at the Ellipse is because she was worried they might incite violence. She testified that from where she stood on the stage of the Ellipse, she did not witness any violence. Ms. Kremer acknowledged that she remained by the event stage throughout the rally, did not interact with anyone outside the security perimeter at the rally, and was unaware that in response to Trump’s speech, some people in the crowd yelled “storm the Capitol,” “take the Capitol,” and “take the Capitol right now.” She personally did not walk with the crowd to the Capitol and did not go to

the Capitol but instead returned to her hotel immediately after Trump's speech. Ms. Kremer also testified before the January 6th Committee. The Court found Ms. Kremer to be credible but found her testimony to be largely irrelevant other than that she was concerned about speeches at the Ellipse inciting violence and that the January 6th Select Committee interviewed many Trump supporters.

50. Tom Van Flein testified on behalf of Intervenor Trump. He is the chief of staff for Congressman Paul Gosar. He testified that he and the Congressman and his wife attended the January 6, 2021 rally at the Ellipse from about 8:30 a.m. to 10:30 a.m. (more than 2 full hours before Trump spoke) and did not see any violence. The Court found his testimony to be credible but largely irrelevant.

51. Tom Bjorklund testified on behalf of Intervenor Trump. He is the Colorado Republican Party Treasurer. Mr. Bjorklund attended the January 6, 2021 rally at the Ellipse. Mr. Bjorklund showed the Court several pictures and videos he took on that day. Mr. Bjorklund testified that he was not close to the stage at the Ellipse during the rally. He then marched to the Capitol and claimed he did not see any violence despite acknowledging he saw people smashing the windows of the Capitol to gain access. The Court found Mr. Bjorklund's testimony that he did not see any violence to be not credible given he saw people breaching the Capitol through windows they'd smashed. Further, Mr. Bjorklund's testimony that Antifa was involved in the attack lacked credibility and was evidence of his inability to discern conspiracy theory from reality. The Court only gave weight to Mr. Bjorklund's testimony that not all the



protestors were violent and that he understood Trump to be directing the crowd to the Capitol and that he followed that direction.<sup>10</sup>

52. Congressman Ken Buck testified on behalf of Intervenor Trump. Congressman Buck testified about his experience on January 6, 2021, when the Capitol was attacked as well as his views regarding the reliability of the January 6th Report. Congressman Buck also testified that he was not particularly scared during the attack on the Capitol but admitted that was because he did not have a cell phone and did not realize the extent of the attack. The Court found Congressman Buck to be a credible witness. The Court gave weight to Congressman Buck's testimony that Congressional reports are inherently political, and that Minority Leader Kevin McCarthy actively prevented the January 6th Committee from being bipartisan including when he rejected Congressman Buck's request to be on the Committee.

53. Professor Robert Delahunty testified on behalf of Intervenor Trump. Professor Delahunty is a constitutional law professor. The Court qualified Professor Delahunty as an expert in constitutional law and the application of historical documents to 19th-century statutes and constitutional provisions. Professor Delahunty was offered to rebut the opinions of Professor Magliocca, and while he had nowhere near the expertise of Professor Magliocca, he offered opinions that were helpful to the Court in

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<sup>10</sup> The Court notes that it is uncontested that not all attendees of Trump's January 6, 2021 speech heard it as a call to violence. That is consistent with Professor Simi's testimony that the language of political extremists is coded so that there is plausible deniability.

assessing the historical context in which Section Three of the Fourteenth Amendment was ratified.<sup>11</sup>

#### **IV. FINDINGS OF FACT<sup>12</sup>**

##### **A. THE PARTIES**

54. Petitioners Norma Anderson, Michelle Priola, Claudine Cmarada, and Krista Kafer are each registered voters affiliated with the Republican Party who reside in Colorado. Joint Stipulated Facts (“Stipulation”) ¶¶ 1–4. Petitioners Kathi Wright and Christopher Castilian are each registered voters unaffiliated with any political party who reside in Colorado. *Id.* ¶¶ 5–6. Each are eligible electors as defined in C.R.S. § 1-1-104(16).

55. Respondent Jena Griswold is the Secretary of State of Colorado and is sued solely in her official capacity. *Id.* ¶ 7.

56. Intervenor Donald J. Trump served as 45th President of the United States from January 20, 2017, to January 20, 2021. *Id.* ¶ 8. On January 20, 2017, Trump took the Presidential Oath of Office, swearing to “faithfully execute the Office of President of

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<sup>11</sup> The Intervenors seem to have largely abandoned Professor Delahunty’s testimony and cite it only once in their 177 pages of proposed findings of fact and conclusions of law. The citation is for the proposition that the omission of the word “incite” from Section Three means that incitement was not meant to be a form of engagement.

<sup>12</sup> The Court is denying Petitioners the relief they request on legal grounds. Because of the Parties’ extraordinary efforts in this matter, the Court makes findings of facts and conclusions of law on all remaining issues before it. The Court does so because it is cognizant that to the extent the Colorado Supreme Court decides to review this matter, it may disagree with any number of the legal conclusions contained in this Order and the Orders that precede it. The Court has endeavored to give the Colorado Supreme Court all the information it needs to resolve this matter fully and finally without the delay of returning it to this Court.

the United States,” and “to the best of [his] Ability, preserve, protect and defend the Constitution of the United States.” U.S. CONST. art. II, § 1, cl. 8; Stipulation ¶ 9.

57. Trump was a candidate for re-election in 2020. Stipulation ¶ 10.

58. On November 15, 2022, Trump publicly announced his 2024 presidential campaign. *Id.* ¶ 16.

59. On October 11, 2023, the Secretary received a notarized statement of intent from Trump to appear on the presidential primary ballot, along with the required filing fee and the Colorado Republican Party’s approval of his candidacy as required under C.R.S. § 1-4-1204(1). *Id.* ¶ 17.

60. Intervenor CRSCC is an unincorporated nonprofit association and political party committee in the state of Colorado, operating under Colorado law. State Party’s Verified Petition in Intervention ¶ 5.

## **B. TRUMP’S HISTORY WITH POLITICAL EXTREMISTS**

61. As noted above, Petitioners called an expert in political extremism, Professor Peter Simi. Professor Simi has a Ph.D. in Sociology, teaches at Chapman University, and has spent his 27-year career focused on political violence and extremism. 10/31/23 Tr. 11:15–12:12. He has written two books on political violence and extremism—*American Swastika* and *Out of Hiding*—and published over sixty peer-reviewed articles or book chapters on different facets of political violence and extremism. 10/31/23 Tr. 21:15–23:2. He has provided training on political extremism and violence to the Federal Bureau of Investigation, Department of Homeland Security,

the Federal Bureau of Prisons, the Department of Justice, and several state and local law enforcement agencies across the country. 10/31/23 Tr. 23:20–24:6.

62. Professor Simi reviewed Trump’s relationship with his supporters over the years, identified a pattern of calls for violence that his supporters responded to, and explained how that long experience allowed Trump to know how his supporters responded to his calls for violence using a shared language that allowed him to maintain plausible deniability with the wider public. 10/31/23 Tr. 56:23–59:17, 200:22–203:12.

63. Trump himself agrees that his supporters “listen to [him] like no one else.” Ex. 134. Amy Kremer also testified that Trump’s supporters are “very reactive” to his words. 11/02/2023 Tr. 49:4–6.

64. Professor Simi testified about the following examples of patterns of call-and-response that Trump developed and used to incite violence by his supporters.

65. At an October 23, 2015 rally, Trump said to his supporters in response to protestors disrupting the rally, “See, the first group, I was nice . . . The second group, I was pretty nice. The third group, I’ll be a little more violent. And the fourth group I’ll say, ‘Get the hell outta here!’” Ex. 127.

66. The next month, Trump used this very language, telling his supporters to “get [a protester] the hell out of here” and the protester was then assaulted. When asked about the attack the next day, Trump said “maybe [the protester] should have been roughed up.” Ex. 50; 10/31/2023 Tr. 70:1–4, 71:13–72:1, 235:3–10.

67. At a February 2016 rally, Trump told his supporters to “knock the crap out of” any protesters who threw tomatoes and promised to pay the legal fees of anyone carrying out the assault. Ex. 51; 10/31/2023 Tr. 213:14–25.

68. At another February 2016 rally, Trump told his supporters that, in the “old days” a protester would be “carried out on a stretcher,” and that he would like to “punch him in the face.” Ex. 52; 10/31/2023 Tr. 214:6–25.

69. When asked about his supporters’ violent acts in March 2016, Trump said the violence was “very, very appropriate” and that “we need a little bit more of” it. Ex. 53; 10/31/2023 Tr. 67:6–25.

70. At an August 2016 rally, Trump noted “Second Amendment people” might be able to prevent Hillary Clinton (if elected President) and judges appointed by her from interpreting the Constitution in unfavorable ways. Ex. 159.

71. In August 2017, when asked about the white supremacist Unite the Right rally in Charlottesville, Virginia, where a counter-protester was murdered, Trump stated there “was blame on both sides . . . some very fine people on both sides.” Ex. 56; 10/31/2023 Tr. 68:12–20.

72. Far-right extremists, including David Duke, Richard Spencer, and Andrew Anglin, thanked Trump for his comments and took them as an endorsement, notwithstanding Trump’s condemnation of neo-Nazis and white supremacists in the same speech. Professor Simi testified that the latter statement would be understood as plausible deniability. 10/31/2023 Tr. 68:21–69:16, 74:18–75:9, 166:9–20, 226:11–227:7.

73. At an October 2018 rally, Trump referred to a candidate who body slammed a reporter as “my kind of guy.” Ex. 57; 10/31/2023 Tr. 215:22–216:5.

74. At a May 2019 rally, when one of his supporters suggested shooting migrants, Trump stated: “That’s only in the panhandle you can get away with that statement.” The crowd cheered. Ex. 58.

75. In a May 2020 tweet referring to an armed occupation of the Michigan State Capitol by anti-government extremists, Trump tweeted that the attackers were “very good people,” and that the Michigan Governor should respond by appeasing them. Ex. 148, p. 3.

76. On May 29, 2020, President Trump threatened to deploy “the Military” to Minneapolis to shoot “looters” amid protests over the police killing of George Floyd, tweeting “when the looting starts, the shooting starts.” Ex. 148, p. 5.

77. During a presidential debate on September 29, 2020, Trump refused to denounce white supremacists and violent extremists and instead told the Proud Boys to “stand back and stand by,” later adding that “somebody’s got to do something about Antifa and the left.” Ex. 1064.<sup>13</sup>

78. Trump’s words “stand back and stand by” were well received and considered an endorsement. In fact, the Proud Boys turned the phrase into a mantra

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<sup>13</sup> The Court acknowledges that the statement occurred during a debate, when the moderator had asked Trump to ask white nationalists and militias to “stand down,” and further that President Biden called on Trump to disavow the Proud Boys, specifically. Nevertheless, Trump’s conduct is consistent with the pattern identified by Professor Simi in that an apparent disavowal (though the Court notes that “stand back and stand by” does not carry the same meaning as “stand down”) was immediately qualified by an apparent endorsement (*i.e.* that somebody has “got to do something.”).

and put it on merchandise. 10/31/2023 Tr. 77:13–21. The Proud Boys and other extremists understood this as a directive to be prepared for future violence. 10/31/2023 Tr. 78:21–23.

79. Trump also regularly endorsed and cultivated relationships with incendiary figures connected with far-right extremists, including Alex Jones, Steve Bannon, and Roger Stone. 10/31/2023 Tr. 57:8-10, 199:23-200:4, 222:21-225:2. Katrina Pierson, a senior advisor to the Trump campaign who helped to organize the Ellipse rally, testified that Trump “likes the crazies” (referring to individuals like Alexander and Jones, whose speeches are often “incendiary” and “inflammatory”) “who viciously defend him in public.” 11/01/23 Tr. 287:2–12, 299:4–16; *see also* 11/02/23 Tr. 57:15–58:3 (Amy Kremer calling Jones and Alexander “flamethrowers” and “agitators” who “want to get everybody riled up”).

80. Trump retained Bannon and Stone as advisers, two individuals with very close relationships with far-right extremists. 10/31/2023 Tr. 199:23–200:8, 222:21–23, 224:2–13. Though Trump did fire Bannon, he would eventually issue a presidential pardon to him. 10/31/2023 Tr. 223:1–3. Regardless, the Court finds that Trump had courted these fringe figures for many years through activities such as endorsing far-right conspiracy theories like birtherism. 10/31/2023 Tr. 56:23–57:15.

81. On October 30, 2020, a convoy of Trump supporters driving dozens of trucks (calling themselves a “Trump Train”) surrounded a Biden-Harris campaign bus on a Texas highway. On October 31st, Trump tweeted a stylized video of the Trump Train confrontation and stated, “I LOVE TEXAS!” Exs. 71; 148, p. 8.

82. On November 1, 2020, in response to news that the FBI was investigating the incident, Trump tweeted, “In my opinion, these patriots did nothing wrong” and indicated they should not be investigated. Ex. 148, p. 9. Later that day at a rally in Michigan, Trump again celebrated the incident boasting “they had hundreds of cars, Trump, Trump. Trump and the American flag.” Ex. 67.

83. At no point did Trump ever credibly condemn violence by his supporters but rather confirmed his supporters’ violent interpretations of his directives. Professor Simi testified that through these repeated interactions, Trump developed and employed a coded language based in doublespeak that was understood between himself and far-right extremists, while maintaining a claim to ambiguity among a wider audience.

10/31/2023 Tr. 53:2–54:12, 65:20–66:20, 76:9–23, 211:13–218:24.

84. For example, violent far-right extremists understood that Trump’s calls to “fight,” which most politicians would mean only symbolically, were, when spoken by Trump, literal calls to violence by these groups, while Trump’s statements negating that sentiment were insincere and existed to obfuscate and create plausible deniability.

10/31/2023 Tr. 49:14–21, 59:7–17, 101:20–102:6.

85. The Court finds that Trump knew his violent supporters understood his statements this way, and Trump knew he could influence his supporters to act violently on his behalf. 10/31/2023 Tr. 126:11–19, 221:10–21.

86. The Court notes that Trump did not put forth any credible evidence or expert testimony to rebut Professor Simi’s conclusions or to rebut the argument that Trump intended to incite violence.



### **C. TRUMP’S FALSE ALLEGATIONS OF A STOLEN ELECTION**

87. Trump planted the seed well before the 2020 election that any loss would be fraudulent. 10/31/2023 Tr. 61:15–62:1, 63:3–11. He portrayed the election as being “stolen” in a way that “resonate[d]” with far-right extremists and aligned with their “perspective that . . . there’s this corrupt system that’s preventing them from electing somebody that they support, that the system is rigged.” 10/31/2023 Tr. 64:6–16, 168:20–169:6.

88. At an August 17, 2020 campaign rally in Wisconsin, Trump stated, “the only way we’re going to lose this election is if the election is rigged. Remember that. It’s the only way we’re going to lose this election . . . The only way they’re going to win is that way. And we can’t let that happen.” Ex. 61.

89. On August 24, 2020, at the Republican National Convention, Trump called mail-in voting “the greatest scam in the history of politics,” accused Democrats of “stealing millions of votes” and argued that “the only way they can take this election away from us is if this is a rigged election.” Ex. 62.

90. On September 23, 2020, when asked at a White House press briefing whether he would commit to a peaceful transfer of power after the election, President Trump refused. Ex. 64.

91. On November 2, 2020, the day before Election Day, Trump criticized the U.S. Supreme Court for allowing Pennsylvania to extend the time for receiving mail-in ballots, tweeting that the Court’s decision was “VERY dangerous,” “will allow rampant and unchecked cheating and will undermine our entire systems of laws,” and “will also

induce violence in the streets,” imploring that “[s]omething must be done!” Ex. 148, p. 10.

92. On election night, Trump claimed victory, asserting from the White House: “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. We did win this election.” Ex. 47.

93. On November 4, 2020, President Trump tweeted: “We are up BIG, but they are trying to STEAL the Election. We will never let them do it.” Ex. 148, p. 10.

94. On November 5, 2020, Trump tweeted “STOP THE COUNT!”. Ex. 148, p. 12.

95. On November 7, 2020, the election was called for Joe Biden Ex. 78, p. 51 (Finding # 162).

96. On November 8, 2020 Trump tweeted, “We believe these people are thieves. The big city machines are corrupt. This was a stolen election. Best pollster in Britain wrote this morning that this clearly was a stolen election” Ex. 148, p. 12.

97. Trump’s advisors (within his administration, his campaign, and his legal team) repeatedly told him he had virtually no chance of victory, and that there was no evidence of widespread election fraud sufficient to change the election results. Ex. 78, pp. 8, 9, 22 (Finding ## 30, 36, 77).

98. Despite his advisors telling him there was no evidence of election fraud, Trump continued to maintain the election was stolen. *See, e.g.*, Exs. 99; 100; 148, pp. 13-15, 18, 20, 24, 30, 38, 47.

99. Trump filed 62 lawsuits—61 were rejected outright.

100. Trump put forth no evidence at the Hearing that he believed his claims of voter fraud despite the overwhelming evidence there was none. The Court finds that Trump knew his claims of voter fraud were false.

101. On December 13, 2020, Trump tweeted “Swing States that have found massive VOTER FRAUD, which is all of them, CANNOT LEGALLY CERTIFY these votes as complete & correct without committing a severely punishable crime.” Ex. 148, p. 38.

102. On December 14, 2020, the Electoral College met and cast their votes in the 2020 election. Stipulation ¶ 12. The certified electors voted as follows: 306 for Joe Biden and 232 for Donald Trump. *Id.* The certified Electoral College votes were then submitted to Congress. *Id.* ¶ 13.

103. Trump further sought to corruptly overturn the election results through direct pressure on Republican officeholders in various states both before and after the Electoral College met and voted in their respective states. Ex. 78, pp. 2, 59. (Finding ## 5, 185).

104. Many of the state officials targeted by Trump’s campaign of intimidation were subject to a barrage of harassment and violent threats by Trump’s supporters—prompting Georgia election official Gabriel Sterling to issue a public warning to Trump to “stop inspiring people to commit potential acts of violence” or “[s]omeone’s going to get killed.” Ex. 126.

105. Trump saw and retweeted a video of that press conference with a message repeating the very rhetoric Sterling warned would cause violence. Exs. 126; 148, p. 27.

Far-right extremists understood Trump’s refusal to condemn the violence cited in the video and his doubling down on the motivation for that violence as an endorsement of the use of violence to prevent the transfer of presidential power. 10/31/2023 Tr. 92:8–94:6.

106. Trump propelled the “Stop the Steal” movement and cross-country rallies in the lead-up to January 6, 2021 with continued false assertions of election fraud. Ex. 78, p. 82 (Finding # 263).

107. Between Election Day 2020 and January 6, 2021, Stop the Steal organizers held dozens of rallies around the country, inflaming Trump supporters with election disinformation and recruiting them to travel to Washington, D.C. on January 6, 2021. The rallies brought together many groups, including violent extremists such as the Proud Boys, Oath Keepers, and Three Percenters; QAnon conspiracy theorists; and white nationalists. *Id.*; 10/31/2023 Tr. 61:4–14.

108. These same Stop the Steal leaders joined two “Million MAGA Marches” in Washington, D.C. on November 14, 2020, and December 12, 2020. Tens of thousands of Trump supporters attended the events, with protests focused on the Supreme Court building. 11/02/23 Tr. 20:20–22:17, 37:22–38:21.

109. After the November rally turned violent, Trump acknowledged his supporters’ violence, but justified it as self-defense against “ANTIFA SCUM.” Ex. 148, p. 17. Far-right extremists understood Trump’s statement as another endorsement of the use of violence against his political opponents. 10/31/2023 Tr. 91:10–23.

110. As the crowds gathered in Washington, D.C. on December 12, 2020 Trump publicly assailed the Supreme Court for refusing to hear his fictitious claims of election fraud. Ex. 78, p. 83 (Finding # 267); 148, pp. 32-36. Stop the Steal organizers Alex Jones, Owen Shroyer, and Ali Alexander understood his communications as a call to action and thereafter led a march on the Supreme Court, where the crowd chanted slogans such as “Stop the Steal!”, “1776!”, “Our revolution!”, and “The fight has just begun!” Ex. 78, p. 83 (Finding # 268).

111. During the November rally, Trump passed through the crowd in his presidential motorcade. 11/01/23 Tr. 306:8–14. Then, on the morning of December 12, 2020, Trump tweeted: “Wow! Thousands of people forming in Washington (D.C.) for Stop the Steal. Didn’t know about this, but I’ll be seeing them! #MAGA.” Ex. 148, p. 36. Later that day, Trump flew over the protestors in Marine One. Ex. 148, p. 37; 11/01/23 Tr. 306:8–24.

112. Trump sent a tweet at 1:42 a.m. on December 19, 2020, urging his supporters to travel to Washington, D.C. on January 6, 2021: “Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6. Be there, will be wild!” Ex. 148, p. 41.

113. Trump’s “plan” was that when Congress met to certify the election results, Vice President Pence could reject the true electors that voted for Biden and certify Trump’s fake slate of electors or return the slates to the States for further proceedings. Exs. 78, p. 13 (Finding #50); 148, pp. 75, 80.

114. Under the Twelfth Amendment and the Electoral Count Act, 3 U.S.C. § 15 (2018), electoral votes are sent to Congress for a joint session on January 6 where Congress counts the votes from the states. If a Representative objects to the counting of electoral votes from a state, they need a Senator to join in the objection. If that happens, the joint session recesses and goes back to each chamber. The Vice President has no role in the objections other than presiding over the proceedings. 10/30/2023 Tr. 131:17-133:25; 11/02/23 Tr. 187:3–188:15.

115. The Court finds that on December 19, 2020, when Trump tweeted “Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6. Be there, will be wild!” he knew he had lost the election, and he knew there was no basis for Vice President Pence to reject the States’ lawfully certified electors.

116. The Court also finds that Trump’s December 19, 2020 tweet focused the anger he had been sowing about the election being stolen on the January 6, 2021, joint session. The message he sent was that to save democracy, his supporters needed to stop the January 6, 2021 joint session.

117. Trump’s December 19, 2020 tweet had an immediate effect on far-right extremists and militias such as the Proud Boys, the Oath Keepers, and the Three Percenters, who viewed the tweet as a “call to arms” and began to plot activities to disrupt the January 6, 2021 joint session. Ex. 78, pp. 79, 85, 86, 88 (Finding ## 254, 275, 276, 280, 289); 10/31/2023 Tr. 104:18–105:4; 11/03/23 Tr. 200:3–21.

118. Trump repeated his invitation to come to Washington, D.C. on January 6, 2021 at least a dozen times. Ex. 148, pp. 55, 60, 62, 63, 72, 75, 76, 78.

119. On January 1, 2021, Trump retweeted a post from Kylie Jane Kremer, an organizer of March for Trump on January 6, saying “The calvary is coming, Mr. President! JANUARY 6th | Washington, DC.”<sup>14</sup> Trump added, “A great honor!” Ex. 148, p. 64.

120. At the same time, Trump continued to make false statements regarding voter fraud, fueling the fire of his supporters’ belief that the election was somehow stolen. Ex. 148, pp. 47, 48, 50, 61, 69, 73, 75.

121. On December 26, 2023, he tweeted: “If a Democrat Presidential Candidate had an Election Rigged & Stolen, with proof of such acts at a level never seen before, the Democrat Senators would consider it an act of war, and fight to the death. Mitch & the Republicans do NOTHING, just want to let it pass. NO FIGHT!” Ex. 148, p. 49.

122. With this message he justified “an act of war” by claiming that is what the Democrats would do but asserted the Republicans were too weak.

123. Federal agencies that Trump oversaw as the Chief Executive Officer of the Executive Branch—including the Secret Service—identified significant threats of violence ahead of January 6, 2021, including threats to storm the U.S. Capitol and kill elected officials. Such threats were made openly online and widely reported in the press. *See* Ex. 32, pp. 18–26, 102–105. Agency threat assessments stated domestic violent

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<sup>14</sup> A calvary is “an open-air representation of the crucifixion of Jesus.” <https://www.merriam-webster.com/dictionary/calvary>. The Court presumes that Ms. Kremer (and Trump when he retweeted the text) were referring to cavalry or “an army component . . . assigned to combat missions that require great mobility.” <https://www.merriam-webster.com/dictionary/cavalry>.

extremists or militia groups planned for violence on January 6, 2021, with weapons including firearms, and enough ammunition to “win a small war.” *See id.* at 103.

124. The FBI received many tips regarding the potential for violence on January 6, 2021 following Trump’s “will be wild” tweet. One such tip said, “They think they will have a large enough group to march into DC armed and will outnumber the police so they can’t be stopped . . . They believe that since the election was ‘stolen’ it’s their constitutional right to overtake the government and during this coup no U.S. laws apply. Their plan is to literally kill. Please, please take this tip seriously and investigate further.” 11/03/2023 Tr. 218:7–16.

125. Nonetheless, Trump did not advise federal law enforcement agencies that in his speech on January 6, 2021, he was going to instruct the crowd to march to the Capitol. As a result, law enforcement was not prepared for the attendees at the rally to descend on the Capitol.

126. Trump knew that Ali Alexander and Alex Jones wanted to speak at the rally. Katrina Pierson and Amy Kremer described those two as “flamethrowers” and “agitators” who “want to get everyone riled up.” Pierson called them “crazies” and Kremer called them “whackos.” While Trump agreed they should not speak at the rally, there is no evidence Trump discouraged their attendance at the rally or their presence at the Capitol.

127. In the early morning of January 6, 2021 Trump tweeted, “If Vice President @Mike\_Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & even fraudulent numbers in a



process NOT approved by their State Legislatures (which it must be). Mike can send it back!” Ex. 148, p. 80. At 8:17 a.m., Trump tweeted, “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!” *Id.*

128. The Court finds that prior to the January 6, 2021 rally, Trump knew that his supporters were angry and prepared to use violence to “stop the steal” including physically preventing Vice President Pence from certifying the election. In fact, Trump did everything in his power to fuel that anger with claims he knew were false about having won the election and with claims he knew were false that Vice President Pence could hand him the election.

#### **D. THE SPEECH AT THE ELLIPSE**

129. In the early morning of January 6, 2021, tens of thousands of Trump supporters began gathering around the Ellipse for Trump’s speech and “wild” protest he had promoted. Ex. 133, pp. 1–7; 11/02/23 Tr. 56:22–57:10.

130. To enter the Ellipse itself, attendees were required by the Secret Service to pass through magnetometers and to be checked for weapons. 11/02/23 Tr. 44:2–45:18, 57:5–14. Around 28,000 rally attendees passed through the security checkpoints to enter the Ellipse. Ex. 78, pp. 31–32, 102 (Finding ##107, 338).

131. From only the attendees who went through security checkpoints at the Ellipse, the Secret Service confiscated hundreds of weapons and prohibited items, including 269 knives or blades, 242 canisters of pepper spray, 18 brass knuckles, 18

tasers, 6 pieces of body armor, 3 gas masks, 30 batons or blunt instruments, and 17 miscellaneous items like scissors, needles, or screwdrivers. *Id.*

132. About 25,000 additional attendees purposely remained outside the Secret Service perimeter at the Ellipse and avoided the magnetometers. Ex. 78, pp. 31-32 (Finding # 107); 11/02/23 Tr. 57:5–14. They formed into a large crowd that extended to the National Mall and Washington Monument. Ex. 1003; 11/02/2023 Tr. 151:18–152:2. Those attendees were not subject to any security screening. Ex. 78, p. 98 (Finding # 323); 11/02/23 Tr. 44:19–24, 57:5–13.

133. Some members of the crowd wore tactical gear, including ballistic helmets like those worn by riot police, goggles, gas masks, armored gloves, tactical boots, earpieces for radios, and military-grade backpacks with additional gear unknown to police. 10/30/2023 Tr. 70:6–11; 11/02/2023 Tr. 328:19–329:1.

134. Some attendees of the January 6 Ellipse event were armed. Ex. 78, p. 32 (Finding # 108).

135. Despite knowing of the risk of violence and knowing that crowd members were angry and armed, Trump still attended the rally and directed the crowd to march to the Capitol. The following are excerpts from his speech:

“All of us here today do not want to see our election victory stolen by emboldened radical-left Democrats, which is what they’re doing. And stolen by the fake news media. That’s what they’ve done and what they’re doing. ***We will never give up, we will never concede. It doesn’t happen. You don’t concede when there’s theft involved.***”

“***Our country has had enough. We will not take it anymore*** and that’s what this is all about. And to use a favorite term that all of you people really came up with: We will stop the steal. Today I will lay out just some of the evidence

proving that we won this election and we won it by a landslide. This was not a close election.”

“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.”

“And I actually, I just spoke to Mike. I said: ‘Mike, that doesn't take courage. What takes courage is to do nothing. That takes courage.’ And then we're stuck with a president who lost the election by a lot and we have to live with that for four more years. ***We're just not going to let that happen.***”

“We're gathered together in the heart of our nation's capital for one very, very basic reason: ***to save our democracy.***”

“We want to go back and we want to get this right because we're going to have somebody in there that should not be in there and ***our country will be destroyed and we're not going to stand for that.***”

***“For years, Democrats have gotten away with election fraud and weak Republicans.*** And that's what they are. There's so many weak Republicans. And we have great ones. Jim Jordan and some of these guys, they're out there fighting. The House guys are fighting.”

***“If this happened to the Democrats, there'd be hell all over the country going on. There'd be hell all over the country.*** But just remember this: You're stronger, you're smarter, you've got more going than anybody. And they try and demean everybody having to do with us. ***And you're the real people, you're the people that built this nation. You're not the people that tore down our nation.***”

“Republicans are constantly fighting like a boxer with his hands tied behind his back. It's like a boxer. And we want to be so nice. We want to be so respectful of everybody, including bad people. And ***we're going to have to fight much harder.***”

***“And Mike Pence is going to have to come through for us,*** and if he doesn't, that will be a, a sad day for our country because you're sworn to uphold our Constitution.”

“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.”

“Anyone you want, but I think right here, we’re going to walk down to the Capitol, and we’re going to cheer on our brave senators and congressmen and women, **and we’re probably not going to be cheering so much for some of them. Because you’ll never take back our country with weakness. You have to show strength and you have to be strong.** We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated.”

“But think of what happens. Let’s say they’re stiffs and they’re stupid people, and they say, well, we really have no choice . . . You will have a president who lost all of these states. **Or you will have a president, to put it another way, who was voted on by a bunch of stupid people who lost all of these states. You will have an illegitimate president. That’s what you’ll have. And we can’t let that happen.**”

“**The radical left knows exactly what they’re doing. They’re ruthless and it’s time that somebody did something about it.** And Mike Pence, I hope you’re going to stand up for the good of our Constitution and for the good of our country. And if you’re not, I’m going to be very disappointed in you. I will tell you right now. I’m not hearing good stories.”

“**The Republicans have to get tougher.** You’re not going to have a Republican Party if you don’t get tougher. They want to play so straight. They want to play so, sir, yes, the United States. The Constitution doesn’t allow me to send them back to the States. Well, I say, yes it does, because the Constitution says you have to protect our country and you have to protect our Constitution, and you can’t vote on fraud. **And fraud breaks up everything, doesn’t it? When you catch somebody in a fraud, you’re allowed to go by very different rules. So I hope Mike has the courage to do what he has to do. And I hope he doesn’t listen to the RINOs and the stupid people that he’s listening to.**”

“We won in a landslide. This was a landslide. They said it’s not American to challenge the election. **This the most corrupt election in the history, maybe of the world.** You know, you could go third-world countries, but I don’t think they had hundreds of thousands of votes and they don’t have voters for them. I mean no matter where you go, nobody would think this. In fact, it’s so egregious, it’s so bad that a lot of people don’t even believe it. It’s so crazy that people don’t even believe it. It can’t be true. So they don’t believe it. This is not just a matter of domestic politics — **this is a matter of national security.**”

“And we fight. We fight like hell. And if you don’t fight like hell, you’re not going to have a country anymore.”

Exs. 22, pp. B1-B23 (emphasis added); 49.

136. Much of Trump’s speech was not in Trump’s prepared remarks. For instance, Trump’s speech called out Vice President Pence by name eleven times. Exs. 22, pp. B1-B23; 49. The teleprompter draft of the speech released by the National Archives contained only one reference to Vice President Pence. Ex. 157, p. 34.

137. Trump used the word “fight” or variations of it 20 times during his Ellipse speech. Exs. 22, pp. B1-B23; 49. The teleprompter draft contained only one mention of the word fight. Ex. 157, p. 29.

138. Trump also repeatedly insisted that the crowd cannot let the certification happen:

“You will have an illegitimate president. . . . ***we can’t let that happen***”

“We can’t let this stuff happen. We won’t have a country if it happens”  
“And then we’re stuck with a president who lost the election by a lot and we have to live with that for four more years. ***We’re just not going to let that happen***”

“They want to come in again and rip off our country. ***Can’t let it happen***”

“We will never give up, we will never concede. ***It doesn’t happen***. You don’t concede when there’s theft involved.”

Exs. 22, pp. B1-B23 (emphasis added); 49. The teleprompter draft contained no mention of the crowd needing to prevent something from happening. See Ex. 157.

139. The statement that the alleged voter fraud “allowed” his supporters “to go by very different rules,” was not in the prepared speech. Exs. 22, p. B20; 49; 157.

140. Knowing many in the crowd were angry and armed, Trump called on them to march to the Capitol and vowed to join them. Rally attendees took Trump at his word and thought he would join them at the Capitol. 11/02/2023 Tr. 166:21–24.

141. The crowd at the Ellipse reacted to Trump's words with calls for violence. After Trump instructed his supporters to march to the Capitol, members of the crowd responded with shouts of "storm the Capitol!" "invade the Capitol Building!" and repeated chants of "take the Capitol!" Ex. 166.

142. As Professor Simi testified, Trump's speech took place in the context of a pattern of Trump's knowing "encouragement and promotion of violence" to develop and deploy a shared coded language with his violent supporters. 10/31/2023 Tr. 221:10–21. An understanding had developed between Trump and some of his most extreme supporters that his encouragement, for example, to "fight" was not metaphorical, referring to a political "fight," but rather as a literal "call to violence" against those working to ensure the transfer of Presidential power. 10/31/2023 Tr. 66:7–20, 101:8–102:6. While Trump's Ellipse speech did mention "peaceful" conduct in his command to march to the Capitol, the overall tenor was that to save the democracy and the country the attendees needed to fight. 10/31/2023 Tr. 101:8–102:21.

143. Trump understood the power that he had over his supporters. Amy Kremer testified that "when [Trump] does these speeches, he plays off the crowd. And they're very reactive." 11/02/2023 Tr. 49:4–6. She also acknowledged that the rally attendees were there because they believed the lie that the election was stolen. 11/02/2023 Tr. 47:23–48:2. Trump admitted his power over his supporters recently. Ex. 134.

144. The Court finds that Trump's Ellipse speech incited imminent lawless violence. Trump did so explicitly by telling the crowd repeatedly to "fight" and to "fight

like hell,” to “walk down to the Capitol,” and that they needed to “take back our country” through “strength.” He did so implicitly by encouraging the crowd that they could play by “very different rules” because of the supposed fraudulent election.

145. In the context of the speech as a whole, as well as the broader context of Trump’s efforts to inflame his supporters through outright lies of voter fraud in the weeks leading up to January 6, 2021 and his long-standing pattern of encouraging political violence among his supporters, the Court finds that the call to “fight” and “fight like hell” was intended as, and was understood by a portion of the crowd as, a call to arms. The Court further finds, based on the testimony and documentary evidence presented, that Trump’s conduct and words were the factual cause of, and a substantial contributing factor to, the January 6, 2021 attack on the United States Capitol. *See also* 11/03/2023 Tr. 203:20–22; 11/02/2023 278:2–12.

#### **E. THE ATTACK ON THE CAPITOL**

146. While Trump was speaking, large portions of the crowd began moving with purpose from the Ellipse rally toward the Capitol building. Exs. 22, p. 22; 1007; 10/30/2023 Tr. 71:9–21; 11/02/2023 Tr. 331:22–332:15.

147. Around 12:53 p.m., the mob overran United States Capitol Police officers at a police barricade near the Peace Circle, breaching the Capitol’s security perimeter. Ex. 133, p. 9; 10/30/2023 Tr. 194:16–195:7. The Proud Boys, who in the moments before led the mob in chants of “1776,” led this initial breach. Ex. 78, pp. 25-26, 104-105; 10/31/2023 Tr. 54:24–55:3.

148. Shortly before 1:00 p.m., Vice President Pence released a letter asserting that his “role as presiding officer is largely ceremonial” and dismissed the arguments that he could take unilateral action to overturn the election or return the Electoral College votes to the States as contrary to his oath to the Constitution. Ex. 78, p. 78 (Finding # 247); 10/30/2023 Tr. 161:5–162:15.

149. By about 1:00 p.m., the mob had advanced to the Capitol steps and began attacking Capitol police officers there. 10/30/2023 Tr. 201:22–202:5. At 1:00 p.m., the joint session of Congress convened to count the electoral votes. Stipulation ¶ 14. After Congressman Gosar and Senator Cruz objected to the certification of Arizona’s electoral votes, the House and Senate split into their respective chambers to debate them. 10/30/2023 Tr. 139:21–140:6; 11/02/23 Tr. 190:24–192:9.

150. Trump’s speech ended around 1:10 p.m. Ex. 22, p. 24. Thousands more marched toward the Capitol down Pennsylvania Avenue as Trump had instructed. Exs. 22, pp. B1-B23; 49; 10/30/2023 Tr. 199:8–200:8. The size of the mob grew by the minute. 10/30/2023 Tr. 197:8–13. The mob occupied the entire West Plaza by 1:14 p.m. Ex. 133, pp. 11, 12.

151. At 2:13 p.m., the Capitol was breached for the first time when the Proud Boys smashed a window in the Senate wing and the mob began entering the building. Ex. 78, p. 109 (Finding # 361).

152. The Senate recessed at 2:13 p.m., and the House suspended debate on the objections to certification at 2:18 p.m., halting the process of the electoral certification. Stipulation ¶ 14; Ex. 78, p. 113 (Finding # 374).



153. The mob moved immediately toward its target—the certification of the election—and reached the House and Senate chambers within minutes. Ex. 78, p. 113 (Finding # 374); 10/30/2023 Tr. 142:9–143:2, 144:11–23, 146:16–18; 11/02/2023 Tr. 192:10–195:24.

154. Some Members of Congress removed their Congressional pins so they would not be identified by the encroaching mob, others prepared to fight off the mob. 10/30/2023 Tr. 144:11–23.

155. The mob was armed with a variety of weapons including guns, knives, tasers, sharpened flag poles, scissors, hockey sticks, pitchforks, bear spray, pepper spray, and other chemical irritants. Exs. 16; 78, pp. 103, 104, 115-116 (Finding ## 342, 346, 382); 133; 1018; 10/30/2023 Tr. 74:4–10; 75:15–76:4, 105:25–106:24, 201:22–202:5, 220:23–221:2, 224:25–225:2; 11/02/2023 Tr. 334:17–23.

156. The mob also stole objects at the Capitol to use as weapons, including metal bars from police barricades, pieces of scaffolding, trash cans, and batons and riot shields stolen from law enforcement. Ex. 16; 10/30/2023 Tr. 74:4–10, 75:15–76:4, 201:22–202:5.

157. The mob assaulted police officers defending the Capitol to force its way into the building. Throughout the day, police officers were tased, crushed in metal door frames, punched, kicked, tackled, shoved, sprayed with chemical irritants, struck with objects thrown by the crowd, dragged, hit with objects thrown by the crowd, gouged in the eye, attacked with sharpened flag poles, and beaten with weapons and objects that the mob brought to the Capitol or stole on site. Ex. 78, pp. 115-116 (Finding # 382);

10/30/2023 Tr. 73:19–74:10, 87:18–88:6; 103:14–104:10, 201:22–202:5, 208:8–15, 212:14–17, 220:23–221:2, 224:25–225:2. Police deployed tear gas, pepper spray, flash bangs, and a loudspeaker with a pre-recorded message instructing the mob to disperse, but the mob defied those orders and remained at the Capitol. 10/30/2023 Tr. 94:20–97:2; 11/02/2023 Tr. 176:16–177:4, 336:10–337:5.

158. Members of law enforcement feared for their lives as well as the lives of their fellow officers, the Vice President, and the Members and staff inside the Capitol. 10/30/2023 Tr. 74:22–75:4, 210:25–211:2, 222:14–19. The attacks were deadly, resulting in the death of Capitol Police Officer Brian Sicknick. 10/30/2023 Tr. 224:23–225:2. Many other law enforcement officers were injured, some requiring hospitalization for their injuries. 10/30/2023 Tr. 230:11–14.

159. Even though not everyone in the mob was violent, officers were unable to escape or get reinforcements. 10/30/2023 Tr. 79:9–20. Law enforcement could not differentiate between which members of the mob were violent and which were not. *Id.*

160. The mob's size prevented the police from carrying out arrests for fear of the safety of officers and the detainees. 10/30/2023 Tr. 81:9–22. The mob's size prevented law enforcement from using firearms or employing lethal force. 10/30/2023 Tr. 80:20–81:6. The chaos created by the mob made it futile for police to call for help when they were individually under attack. 10/30/2023 Tr. 209:11–20. The mob's size made it impossible for first responders to reach those in medical distress, and when first responders attempted to provide such aid, they were harassed by the mob and assaulted. 10/30/2023 Tr. 198:20–199:7. The presence of nonviolent members of the mob, who

refused demands to leave, contributed to these problems. Ex. 11; 10/30/2023 Tr. 82:9–11; 90:2–93:13.

161. The Court finds that by sending otherwise non-violent protestors to the Capitol thereby increasing the mob’s numbers through his actions and words, Trump materially aided the attack on the Capitol.

162. Members of the mob told officers, “Trump sent us,” “we don’t want to hurt you, but we will; we’re getting into that building,” “you look scared and you might need your baton,” and “take off your badges, take off your helmets, and show solidarity with we the people or we’re going to run over you. . . . Do you think your little pea shooter guns are going to stop this crowd,” and “it’s going to turn bad man; we have to get you out of here. The others are coming up from the back.” Exs. 11; 14; 10/30/2023 Tr. 200:25–201:11, 202:24–203:5. The mob chanted “fight for Trump” and members yelled into bullhorns “this is not a peaceful protest!” Ex. 21. These types of statements were repeated at multiple locations around the Capitol during the attack where the mob faced resistance from law enforcement. Exs. 11; 14; 10/30/2023 Tr. 200:25–201:11, 212:3–13.

163. The mob referenced war, revolution, Donald Trump, and stopping the election certification. Members of the mob carried flags from the Revolutionary War and the Confederate Battle Flag. Exs. 13; 133; 10/30/2023 Tr. 99:13–100:1. Their flags and signs said, among other things, “Liberty or Death,” “Certify Honesty Not Fraud,” and “Over Turn Biden Win,” “Pence has the power,” “Mike Pence is a bitch,” and “Lynch the Rhinos [sic],” evoking Trump’s references to “RINOs” (Republicans in Name Only) at the Ellipse speech. Ex. 133. They chanted “fight for Trump,” “Stop the Steal,” and “1776.”

Ex. 78, pp. 104-105 (Finding # 347); 10/30/2023 Tr. 77:25-78:11. The crowd displayed a makeshift gallows. 10/31/2023 Tr. 120:19-121:18.

164. The mob taunted law enforcement calling them “traitors” and suggesting that law enforcement was the problem. They yelled “you swore an oath,” “oath breakers,” “you’re on the wrong team,” “you’re not wanted here,” “what about your oath,” and “you’re going against our country.” Ex. 10; 10/30/2023 Tr. 73:14-18, 86:5-10, 200:25-201:11; 212:3-13.

165. Professor Simi testified that the repeated references to 1776, “revolution,” and the Confederate flag, are consistent with far-right extremists’ use of the terms as literal calls for violent revolution. 10/31/2023 Tr. 94:21-95:7, 107:24-108:8, 109:3-8, 120:25-121:18. The presence of weaponry and defensive gear among a significant portion of the crowd confirmed this purpose. 10/31/2023 Tr. 109:16-21. The mob at times worked together. Exs. 20; 21; 10/31/2023 Tr. 115:20-116:3.

166. The January 6th Senate Report that Trump’s counsel described as “the staff report from the Senate that was a bipartisan report” described January 6, 2021 as a “violent and unprecedented attack on the U.S. Capitol, the Vice President, Members of Congress and the democratic process” and that the attackers were “intent on disrupting the Joint Session, during which Members of Congress were scheduled to perform their constitutional obligation to count the electoral votes.” Ex. 22, p. 1; 10/31/2023 Tr. 276:21-25.

167. Amy Kremer described the event as a “horrifying” event and “an awful, awful attack on the seat of our democracy.” 11/02/23 Tr. 65:14-20, 69:3-7.

168. The Court agrees with Congressman Buck and concludes that the attack was “meant to disturb” Congress’s “electoral vote count.” 11/02/2023 Tr. 230:3–7, 341:24–342:8.

#### **F. TRUMP’S REACTION TO THE ATTACK**

169. By 1:21 p.m., Trump was informed the Capitol was under attack. Ex. 78, p. 96 (Finding # 316).

170. At 2:24 p.m., an hour after Trump had been informed the Capitol was under attack, 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!” Ex. 148, p. 83.

171. That tweet was read over a bullhorn to the crowd at the Capitol. Ex. 94.

172. The Court holds that Trump’s 2:24 p.m. tweet further encouraged imminent lawless violence by singling out Vice President Pence and suggesting that the attacking mob was “demand[ing] the truth.” Congressman Swalwell interpreted President Trump’s 2:24 p.m. tweet as painting a “target” on the Capitol and threatening the Vice President and their “personal safety and the proceedings” to certify the election. 10/30/2023 Tr. 149:2–11.

173. The Court further holds that Trump’s 2:24 p.m. tweet caused further violence at the Capitol. Exs. 6; 15; 78, pp. 16-17 (Finding # 56); 10/30/2023 Tr. 103:14–104:5.

174. At 2:25 p.m., the mob breached the Capitol’s East Rotunda doors. Ex. 78, pp. 46-47 (Finding # 150).

175. At 2:25 p.m., the Secret Service evacuated Vice President Pence from his Senate office to a more secure location. Ex. 78, pp. 16-17 (Finding # 56).

176. Around 2:30 p.m., Officer Pingeon was attacked by the mob in the Northwest Courtyard where he was forced to the ground and had his baton stolen. 10/30/2023 Tr. 208:8–210:8.

177. Around the same time, the Senate Chamber and House floor were evacuated. Ex. 78, pp. 35-36 (Finding # 119); 10/30/2023 Tr. 152:19–153:7.

178. At 2:38 p.m. and 3:13 p.m. Trump sent two tweets both encouraging the mob to “remain peaceful” and “[s]tay peaceful” and asking the mob to not hurt law enforcement. Ex. 148, pp. 83, 84. Neither of the tweets condemned the ongoing violence or told the mob to retreat.

179. The mob’s conduct after it breached the Capitol confirmed that its common purpose was to prevent the constitutional transfer of power by targeting Vice President Pence and House Speaker Nancy Pelosi. Immediately after the first breach of the Capitol at 2:13 p.m., the mob moved to the Senate and House chambers where the certification was being debated and Pence and Pelosi were expected to preside. The mob breached the Senate gallery and the mob made a concerted and violent effort to break into the House chamber. Ex. 78, pp. 35-36 (Finding # 119); 10/30/2023 Tr. 155:14–21.

180. Other than sending the two tweets at 2:38 p.m. and 3:15 p.m. which did not call off the attack, Trump did nothing between being informed of the attack at 1:21

p.m. and 4:17 p.m. Instead, Trump ignored pleas to intervene and instead called Senators urging them to help delay the electoral count. When told that the mob was chanting “Hang Mike Pence,” Trump responded that perhaps the Vice President deserved to be hanged. Ex. 78, pp. 46-47 (Finding # 150). Trump also rebuffed pleas from Leader McCarthy to ask that his supporters leave the Capitol stating, “Well, Kevin, I guess these people are more upset about the election than you are.” *Id.*

181. The Court finds that Trump, as the Commander of the D.C. National Guard, had law enforcement entities at this disposal to help stop the attack without any further approval. 10/31/2023 Tr. 246:24-247:7, 249:6-9.

182. Trump could have redeployed the 340 National Guard troops already activated in Washington, D.C. to assist with traffic and other duties on January 6, 2021. This group could have rapidly responded because riot gear was already stored at convenient locations near their places of deployment throughout the city. Exs. 1027; 1031, p. 37; 10/31/2023 Tr. 259:25-260:8. There is no evidence that Trump made any effort on January 6 to redeploy these troops to the Capitol once he knew the attack was underway. 10/31/23 Tr. 259:25–260:11.

183. In addition to the 340 National Guard troops that had already been activated for traffic control duty or as a quick reaction force, Trump could have ordered deployment of additional D.C. National Guard troops once he knew about the attack on the Capitol. Ex. 1027; 10/31/2023 Tr. 252:4–10. He could have asked the Governors of Maryland and Virginia to authorize their state National Guards to help. 10/31/2023 Tr. 260:12–20. He could have ordered the Department of Justice rapid response teams to

the Capitol. 10/31/2023 Tr. 262:11–16. He could have authorized the Department of Homeland Security’s rapid response team which could have deployed “in a matter of minutes from headquarters to the Capitol.” 10/31/2023 Tr. 262:17–21.

184. Trump provided no evidence that he took any action to deploy any of these authorities after learning of the attack on the Capitol. 10/31/2023 Tr. 264:5–8.<sup>15</sup>

185. The Court finds Trump had the authority to call in reinforcements on January 6, 2021, and chose not to exercise it thereby recklessly endangering the lives of law enforcement, Congress, and the attackers on January 6, 2021.

186. Finally, at 4:17 p.m. Trump called off the attack. He released a video in which he said:

I know your pain. I know you’re hurt. We had an election that was stolen from us. It was a landslide election, and everyone knows it, especially the other side. ***But you have to go home now.*** We have to have peace. We have to have law and order. We have to respect our great people in law and order. We don’t want anybody hurt. It’s a very tough period of time. There’s never been a time like this where such a thing happened, where they could take it away from all of us, from me, from you, from our country. This was a fraudulent election. But we can’t play into the hands of these people. We have to have peace. ***So go home.*** We love you. You’re very special. You’ve seen what happens. You see the way others are treated that are so bad and so evil. I know how you feel but ***go home and go home in peace.***

Ex. 68 (emphasis added).

187. The Court holds that Trump’s 4:17 p.m. video endorsed the actions of the mob in trying to stop the peaceful transfer of power. It did not condemn the mob but instead sympathized with them and praised them. It did, however, instruct the mob to

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<sup>15</sup> The Court considers Trump’s inaction solely for the purpose of inferring that he intended for the crowd to engage in violence when he sent them to the Capitol “to fight like hell.” It does not consider his inaction as independent conduct constituting engagement in an insurrection.



go home on three occasions, emphasizing to the mob that this was an order to be followed.

188. The mob obeyed Trump’s order. Ex. 78, p. 36 (Finding # 120); 10/31/2023 Tr. 121:19-21. The statement was understood as a clear directive to cease the attack. 10/31/2023 Tr. 122:9–23, 220:21–221:4.

189. At 6:01 p.m. Trump tweeted again: “These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!” Ex. 148, p. 84.

190. The Court holds that even after the attack, Trump’s tweet justified violence by calling the attackers “patriots,” and continued to perpetuate the falsehood that justified the attack in the first place, his alleged “sacred landslide election victory.” Ex. 148, p. 84.

191. As Professor Simi testified, this after the fact tweet was consistent with Trump’s pattern of communication related to political violence which always ended with Trump praising the violence. 10/31/2023 Tr. 123:12–15.

192. The Court finds that the 6:01 p.m. tweet is further proof of Trump’s intent to disrupt the election certification on January 6, 2021.

193. The Court heard no evidence that Trump did not support the mob’s common purpose of disrupting the constitutional transfer of power. To the contrary, both his 4:17 p.m. video and 6:01 p.m. tweet support the opposite conclusion—that Trump endorsed and intended the actions of the mob on January 6, 2021.

## **G. SECRETARY OF STATE PRACTICES**

194. The Secretary of State is responsible for “certify[ing] the content for state and federal offices to the ballot.” 11/01/2023 Tr. 91:4-5. The Secretary of State’s office “is the filing office for state and federal offices for individuals seeking . . . to run for office in Colorado.” 11/01/2023 Tr. 96:10-12. When the Secretary of State receives a candidate’s paperwork, the office “verif[ies] the information on the application as required under state law, and then ultimately there is a deadline by which [the] office must certify all [contents] to the ballot,” including candidates. 11/01/2023 Tr. 96:13-17.

195. “The Secretary of State is responsible for ensuring that only eligible candidates are placed on the ballot.” Ex. 107. In determining whether a candidate is eligible, the Secretary “must give effect to applicable federal and state law unless a court has held such law to be invalid.” *Id.*; *see also* 11/01/2023 Tr. 107:24-108:3. If the Secretary of State’s office has “affirmative knowledge that a candidate is ineligible for office, then [it] will not certify them to the ballot.” 11/01/2023 Tr. 99:14-16.

196. The office has also kept ineligible presidential candidates off the ballot. 11/01/2023 Tr. 104:24-105:4. One candidate, Abdul Hassan, informed the Secretary of State’s office that he did not meet the constitutional requirements for the presidency because he was not a natural-born United States citizen. 11/01/2023 Tr. 106:7-107:1. The Secretary of State’s office informed Mr. Hassan that he was ineligible, and a court affirmed that determination. 11/01/2023 Tr. 106:17-107:1, 108:11-17; *see also Hassan v. Colorado*, 495 F.App’x 947 (10th Cir. 2012).

197. Other presidential candidates were excluded from the ballot in 2012, 2016, and 2023 (for the 2024 ballot) because they failed to certify their compliance with mandatory federal constitutional requirements for the presidency by completing the required paperwork that would otherwise attest to their qualifications. 11/01/2023 Tr. 151:24-153:12.

198. Candidates, or other electors, who disagree with the Secretary of State's decision regarding whether to certify a candidate to the ballot can challenge the Secretary's decision in court. 11/01/2023 Tr. 91:18-92:2, 102:25-103:3. The office expects such challenges in every election cycle. 11/01/2023 Tr. 101:20-102:3. Accordingly, "[t]he Secretary's Office is never the final arbiter of eligibility because the Secretary's decision to either certify a candidate or not can be challenged in court." 11/01/2023 Tr. 108:7-10.

199. The Secretary of State's office creates the forms used by candidates to access the ballot, including the presidential primary forms. *See* 11/01/2023 Tr. 111:17-22; *see also* Ex. 158.

200. The Major Party Candidate Statement of Intent for the Presidential Primary includes, among other things, checkboxes that require the candidate to certify: "Age of 35 Years;" "Resident of the United States for at least 14 years;" and "Natural-born U.S. Citizen." Ex. 158; 11/01/2023 Tr. 113:1-5. But those qualifications are not the only qualifications for president. 11/01/2023 Tr. 113:9-12. Candidates submitting this form must also sign and notarize the following statement: "I intend to run for the office

stated above and solemnly affirm that I meet **all** qualifications for the office prescribed by law.” Ex. 158 (emphasis added).

201. For instance, the Secretary of State would not put a presidential candidate on the ballot who had already served two terms because that would be in violation of the Twenty-Second Amendment. That is true despite there not being a box to check for the Twenty-Second Amendment.

202. When questioned by the Court, Ms. Rudy testified that should the Secretary of State desire to do so, it could revise the Statement of Intent Form to add a box confirming that the candidate had not served two terms as President. She further testified, that should President Obama seek to be on the presidential primary ballot, that given it was “an objective, knowable fact” that he was not qualified, “it is unlikely we would certify that candidate’s name to the ballot.” 11/01/2023 Tr. 157:15-158:24.

203. On October 11, 2023, the Secretary of State’s office received (1) a Major Party Candidate Statement of Intent for Presidential Primary, signed by Donald J. Trump; (2) a State Party Presidential Primary Approval, signed by Dave Williams, the chair of the Colorado Republican Party, stating that the “Colorado Republican Party has determined [Donald J. Trump] is bona fide and affiliated with the party;” and (3) a \$500 filing fee from Donald J. Trump for President 2024, Inc. Ex. 158.

204. The Major Party Candidate Statement of Intent for Presidential Primary contains the following affirmation: “I intend to run for the office stated above and solemnly affirm that I meet all qualifications for the office prescribed by law.” *Id.* Donald J. Trump signed the affirmation. *Id.*

205. The documents contained in Exhibit 158 are facially complete. No additional paperwork is required for Trump to be certified to the 2024 presidential primary ballot. 11/01/2023 Tr. 123:8-12.

206. The Secretary is holding Trump’s application “pending further direction from the Court.” *See* Notice (Oct. 11, 2023).

207. The Secretary of State is required to certify the candidates who will be listed on the 2024 presidential primary ballot on January 5, 2024. C.R.S. § 1-4-1204(1).

208. The Secretary does not certify candidates individually; rather, she certifies the entire contents of the ballot at once. 11/01/23 Tr. 145:7-16. The Secretary intends to certify the entire 2024 presidential primary ballot on January 5, 2024. *See* 11/01/2023 Tr. 145:7-16.

## **V. CONCLUSIONS OF LAW**

209. The Court previously held that pursuant C.R.S. § 1-4-1204(4) the burden of proof in this matter is preponderance of the evidence. That is the burden the Court has applied. However, the Court holds that the Petitioners have met the higher standard of clear and convincing evidence.

### **A. CAN THE SECRETARY OF STATE EXCLUDE TRUMP FROM THE BALLOT?**

210. The Colorado Secretary of State is charged with the duty to “supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections” and to “enforce the provisions of [the election] code.” C.R.S. § 1-1-107(1). When a

dispute regarding the application and enforcement of the Election Code arises,

C.R.S. § 1-1-113 is implicated. This statute provides in part:

When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction ***alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act***, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, ***the district court shall issue an order requiring substantial compliance with the provisions of this code.*** The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

C.R.S. § 1-1-113(1) (emphasis added).

211. After the filing of a “verified petition” by a registered elector and “notice to the official which includes an opportunity to be heard,” if a court finds good cause to believe that the election official “has committed or is about to commit a breach or neglect of duty or other wrongful act,” it “shall issue an order requiring substantial compliance with the provisions of [the Election Code].” C.R.S. § 1-1-113(1).

212. C.R.S. § 1-4-1204(1) provides that “[n]ot later than sixty days before the presidential primary election, the secretary of state shall certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots.”

Each candidate must be:

seeking the nomination for president of a political party as a bona fide candidate for president of the United States pursuant to political party rules and [must be] affiliated with a major political

party that received at least twenty percent of the votes cast by eligible electors in Colorado at the last presidential election.

C.R.S. § 1-4-1204(1)(b). C.R.S. § 1-4-1204(4) expressly incorporates section 1-1-113 for “[a]ny challenge to the listing of any candidate on the presidential primary election ballot.” Such challenges “must be . . . filed with the district court in accordance with section 1-1-113(1).” C.R.S. § 1-4-1204(4). “Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint.” C.R.S. § 1-4-1204(4).

213. In the Court’s Omnibus Ruling on Pending Dispositive Motions, the Court left for trial the issue of whether the General Assembly has charged the Secretary of State with the authority to investigate or enforce Section Three of the Fourteenth Amendment.

214. Intervenors argue that the Secretary’s role is simply ministerial. They argue “her responsibility is to either confirm that a candidate is affiliated with a party that is a ‘major political party’ according to statute and is a bona fide candidate, pursuant to that party’s rules, or to confirm that the candidate submitted a proper notarized candidate’s statement of intent.”

215. The Court will not revisit its decision from the Omnibus Ruling on Pending Dispositive Motions rejecting CRSCC’s argument that it has an unfettered right to put constitutionally unqualified candidates on the primary ballot. The Court has read the opinion in *Grove v. Simon*, No. A23-1354, 2023 WL 7392541 (Minn. November 8, 2023). C.R.S. § 1-4-1203(2)(a) provides that political parties may participate in a presidential primary only if the party has a “qualified candidate.” C.R.S. § 1-4-1203(3)

provides the Secretary has “the same powers and shall perform the same duties for presidential primary elections as they provide by law for other primary elections and general elections.” In Colorado, the Secretary of State has, at least in some instances, kept constitutionally unqualified candidates off the ballot. *See Hassan*, 495 F.App’x at 948 (holding that Secretary Gessler was correct in excluding a constitutionally ineligible candidate and that “a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office.”).

216. However, in the Court’s view there is a difference between the Secretary having the authority to prohibit a candidate from being put on the ballot based on what Ms. Rudy described as “an objective, knowable fact” and prohibiting a candidate from being put on the ballot due to potential constitutional infirmity that has yet to be determined by either a Court or Congress. The Court holds that the Secretary cannot, on her own accord, keep a candidate from appearing on the ballot based on a constitutional infirmity unless that constitutional infirmity is “an objective, knowable fact.” Here, whether Trump is disqualified under Section Three of the Fourteenth Amendment is not “an objective, knowable fact.”

217. The question then becomes whether Petitioners can file a C.R.S. § 1-1-113 action based on the Secretary’s impending failure to keep Trump off the ballot where the Court does not believe the Secretary, on her own accord, has the power to keep him off the ballot.



218. Petitioners argue that, regardless of whether the Secretary has the power to investigate candidate qualifications, C.R.S. §§ 1-4-1204(4) and 1-1-113 authorize eligible electors to seek a Court order barring the Secretary from placing on the ballot a candidate who is constitutionally ineligible to assume the office they are seeking and that, in such a proceeding, the Court evaluates the candidate's qualifications *de novo*.

219. The Petitioners argue that in *Hanlen v. Gessler*, 333 P.3d 41, 50 (Colo. 2014), the Colorado Supreme Court made clear that “the election code requires a court, not an election official, to determine the issue of eligibility” of a candidate. Two years later, the Colorado Supreme Court reaffirmed that holding and again declared, “when read as a whole, the statutory scheme evidences an intent that challenges to the qualifications of a candidate be resolved only by the courts.” *Carson v. Reiner*, 370 P.3d 1137, 1139 (Colo. 2016). Two years after that, the Colorado Supreme Court noted that even where the paper record submitted to an election official appears sufficient on its face, courts retain the power to review extrinsic evidence in eligibility challenges. *Kuhn v. Williams*, 418 P.3d 478, 485-87 (Colo. 2018). The Court held that “judicial review” under C.R.S. § 1-1-113 is “*de novo*” and “includes the taking of evidence” and that the challengers there could “present evidence demonstrating that a petition actually fails to comply with the Election Code, even if it ‘appear[ed] to be sufficient’ in a paper review.” *Id.* at 485-86 (quoting C.R.S. § 1-4-909(1)).

220. *Kuhn* is particularly instructive in this regard. There, the Court held that the Secretary properly relied on the information before him when certifying the Lamborn Campaign's petition to appear on the ballot. *Id.* at 485. The Court held,

however, that “the question becomes whether the Secretary has another relevant duty he might be ‘about to’ breach or neglect, or some other relevant wrongful act in which he might be ‘about to’ engage.” *Id.* (quoting C.R.S. § 1-1-113(1)).

221. The Court held that “[s]hould the court determine that the petition is not in compliance with the Election Code, the election official should certainly ‘commit a breach or neglect of duty or other wrongful act’” and that it was proper for the district court to review evidence that was not available to the election official. *Id.* (quoting C.R.S. § 1-1-113(1)).

222. The question before the Court then is does the Election Code incorporate Section Three of the Fourteenth Amendment? The Election Code states that the presidential primary process is intended to “conform to the requirements of federal law,” which includes the U.S. Constitution. C.R.S. § 1-4-1201. Further, C.R.S. § 1-4-1203(2)(a) provides that political parties may participate in a presidential primary only if the party has a “qualified candidate.”

223. Ms. Rudy testified that the Secretary has previously kept candidates off the ballot who do not meet the requirements of Article II, Section 1, Clause 5 of the U.S. Constitution. She further testified that the Secretary would likely enforce the Twenty-Second Amendment should Barack Obama or George W. Bush attempt to be put on the primary ballot.

224. While the Court agrees with Intervenors that the Secretary cannot investigate and adjudicate Trump’s eligibility under Section Three of the Fourteenth Amendment, the Election Code gives this Court that authority. C.R.S. § 1-4-1204(4)

("[T]he district court shall hear the challenge and assess the validity of all alleged improprieties" and "issue findings of fact and conclusions of law."); *see also Hassan*, 495 F.App'x at 948 ("a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office"); *Munro v. Socialist Workers Party*, 479 U.S. 189, 193-95 (1986) (affirming exclusion of candidate from ballot under state law based on compelling state interest in protecting integrity and stability of political process); *Bullock v. Carter*, 405 U.S. 134, 145 (1972) ("Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies").

## **B. DID PRESIDENT TRUMP ENGAGE IN AN INSURRECTION?**

### **1. Definition of Insurrection**

225. Section Three of the Fourteenth Amendment, passed in 1866 and ratified by the states in 1868, provides that:

No Person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. CONST. amend. XIV, § 3.

226. Section Three of the Fourteenth Amendment was primarily written to prevent officials who left to join the Confederacy from returning to office. When many former confederates sought to be seated as if nothing happened, Republicans in Congress found it necessary to act and exclude them from positions of authority unless they demonstrated repentance or deserved forgiveness. 11/1/23 Tr. 21:11–23. Congressional debates surrounding Section Three make clear that it was intended not as a punishment for crime, but to add an additional qualification for public office. 11/01/23 Tr. 22:2–6.

227. The oath is central to Section Three. 11/01/23 Tr. 22:9–25. It served a limiting function, because Section Three only applies to those who had betrayed a previously sworn oath to the Constitution—which included those most responsible for the Civil War. 11/01/23 Tr. 22:9–25. Supporters of Section Three believed that such oathbreakers could not again take office and swear the oath without committing “moral perjury.” 11/01/23 Tr. 22:9–25.

228. The history of Section Three and its passage indicate that the provision is not limited to the events of the Civil War. The language of Section Three refers generally to insurrection or rebellion, and senators in the debate made clear their intent for it to apply to future insurrections. 11/01/23 Tr. 23:4–10; 11/03/23 Tr. 42:4–43:4.

229. In the years following ratification of the Fourteenth Amendment, Section Three was enforced by various entities. These enforcements came before the enactment of federal implementing legislation in 1870. 11/01/23 Tr. 23:14–24:21.

230. Congress has the power to remove the disability by a two-thirds vote, and Congress passed a series of measures that would give amnesty to people by name, then afterwards a general amnesty to all the people then covered by Section Three. 11/01/23 Tr. 25:4–19.

231. Section Three qualifies “insurrection” by the phrase “against the same,” referring to the Constitution of the United States to which the oath was sworn. U.S. CONST. amend. XIV, § 3. That limits the scope of the provision by excluding insurrections against state or local law, and including only insurrections against the Constitution, which officials have sworn an oath to support and have now broken. 11/01/23 Tr. 36:10–37:15.

232. As the Supreme Court declared during the Civil War, “[i]nsurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government.” *The Amy Warwick*, 67 U.S. 635, 666 (1862).

233. The Court finds that an “insurrection” at the time of ratification of the Fourteenth Amendment was understood to refer to any public use of force or threat of force by a group of people to hinder or prevent the execution of law.

234. This understanding of “insurrection” comports with the historical examples of insurrection before the Civil War, with dictionary definitions from before the Civil War, with judicial opinions during the same time, and with other authoritative legal sources. *See e.g., Case of Fries*, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) (“any insurrection or rising of any body of people, within the United States, to attain or effect,

by force or violence any object of a great public nature, or of public and general (or national) concern, is a levying war against the United States”); *United States v. Hanway*, 26 F. Cas. 105, 127–28 (C.C.E.D. Pa. 1851); *Chancely v. Bailey*, 37 Ga. 532, 548–49 (1868) (“If the late war had been marked merely by the armed resistance of some of the citizens of the State to its laws, or to the laws of the Federal Government, as in the cases in Massachusetts in 1789, and in Pennsylvania in 1793, it would very properly have been called an insurrection”) (emphasis original).

235. “When interpreting the text of a constitutional provision or statute, [courts] often resort to contemporaneous dictionaries or other sources of context to ensure that we are understanding the word in the way its drafters intended.” *Bevis v. City of Naperville, Illinois*, No. 23-1353, 2023 WL 7273709 at \*11 (7th Cir. Nov. 3, 2023).

236. Noah Webster’s, *An American Dictionary of the English Language* in 1828 defined insurrection as:

a rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state. It is the equivalent to *sedition*, except that *sedition* expresses a less extensive rising of citizens. It differs from *rebellion*, for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one or to place the country under another jurisdiction.

NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1828). Another contemporary dictionary from 1848, John Boag’s *A Popular and Complete English Dictionary*, had an identical definition. JOHN BOAG, *A POPULAR AND COMPLETE ENGLISH DICTIONARY* 727 (John Boag ed., 1848); 11/01/2023 Tr. 31:16-32:2.

237. Trump’s expert witness, Robert Delahunty, offered an opinion that the meaning of “insurrection” at the time was less clear. 11/03/23 Tr. 43:15–51:7. However, Professor Delahunty did not identify any historical sources that appeared to adopt a materially different view. In fact, Professor Delahunty acknowledges that “insurrection need not rise to the level of a rebellion” or to “the level of a civil war,” which supports Magliocca’s definition of “insurrection.” 11/03/23 Tr. 133:8–23.<sup>16</sup> Importantly, Delahunty did not offer an alternate definition of insurrection.

238. Intervenors have offered an alternate definition of insurrection as “the taking up of arms and preparing to wage war upon the United States.”

239. However, in the context of Section Three, and in accordance with the historical understanding, the Court finds that such insurrection must be “against” the “Constitution of the United States” and not against “the United States” as the Intervenors would suggest.

240. Considering the above, and the arguments made at the Hearing and in the Parties’ proposed findings of fact and conclusions of law, the Court holds that an insurrection as used in Section Three of the Fourteenth Amendment is (1) a public use of

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<sup>16</sup> The Court also considered Professor Delahunty’s opinion that this definition is over inclusive and would potentially include the use of force to prevent the delivery of the U.S. Mail. Article I, Section 8, Clause 7 gives Congress the authority to designate mail routes and construct or designate post offices, and presumably the authority to carry, deliver, and regulate the mail of the United States as a whole. *See* U.S. CONST. art. I, § 8, cl. 7. Professor Delahunty argued that the definition of insurrection put forth by the Petitioners would include someone preventing the mail man from delivering mail. Even if the Court interprets delivering mail as “execution of the Constitution,” preventing delivery would only be an insurrection if it was accomplished by a coordinated group of people preventing the delivery of mail and that group was preventing the delivery of mail by force.

force or threat of force (2) by a group of people (3) to hinder or prevent execution of the Constitution of the United States.

241. The Court further concludes that the events on and around January 6, 2021, easily satisfy this definition of “insurrection.”

242. Thousands of individuals descended on the United States Capitol. Many of them were armed with weapons or had prepared for violence in other ways such as bringing gas masks, body armor, tactical vests, and pepper spray. The attackers assaulted law enforcement officers, engaging them in hours of hand-to-hand combat and using weapons such as tasers, batons, riot shields, flagpoles, poles broken apart from metal barricades, and knives against them.

243. The mob was coordinated and demonstrated a unity of purpose. The mob overran police lines outside the Capitol, broke into the Capitol through multiple entrances, and searched out members of Congress and the Vice President who were still inside the Capitol building. They marched through the building chanting in a manner that made clear they were seeking to inflict violence against members of Congress and Vice President Pence.

244. The mob’s purpose was to prevent execution of the Constitution so that Trump remained the President. Specifically, the mob sought to obstruct the counting of the electoral votes as set out in the Twelfth Amendment and thereby prevent the peaceful transfer of power.



## **2. Definition of Engage**

245. Section Three of the Fourteenth Amendment provides that no person shall hold certain offices who, “having previously taken an oath . . . shall have engaged in insurrection or rebellion . . . or given aid or comfort to the enemies thereof.” Petitioners argue that Trump “engaged” in insurrection in two primary ways: (1) through incitement, and (2) through his conduct, by organizing and inspiring the mob and by his inaction during the January 6, 2021 attack on the Capitol.

246. Trump argues that “engage,” as used in Section Three of the Fourteenth Amendment demands a significant level of activity beyond mere words or inaction, as alleged. The Court therefore must resolve the meaning of “engage” as used in Section Three of the Fourteenth Amendment. The Court first considers whether incitement qualifies as “engagement.”

247. Trump’s primary argument that incitement fails to meet the constitutional standard of “engagement” stems from the Second Confiscation Act, passed in 1862. The Second Confiscation Act, among other things, made it a crime for any person to “incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in, or give aid and comfort to, any such existing rebellion or insurrection.” 12 Stat. 589, 590.

248. The argument, generally, is that the Second Confiscation Act distinguished between “incitement” and “engagement” by virtue of listing them separately, thereby suggesting that they were understood to be separate activities. Further, he argues, as

Section Three of the Fourteenth Amendment was patterned, in part, on the Second Confiscation Act, and based disqualification on “engagement,” and not “incitement” or “setting on foot,” Congress did not intend to disqualify those who merely incited insurrection or rebellion. Lastly, Trump argues that certain cases in Congress in 1870 suggest that the Congressional understanding of Section Three did not include incitement as engagement.

249. Petitioners’ argument on this subject is essentially that constitutional amendments generally are less granular than criminal statutes, and so it is not surprising (or determinative) that Section Three provided only for “engagement” and did not specify incitement; further, evidence of the application, interpretation, and enforcement of the term “engage” as used exists and suggests a broader definition that encompasses incitement. Of principal import to Petitioners’ argument are the opinions of Attorney General Henry Stanbery, which, generally, described “engagement” as a voluntary, direct, overt act done with the intent to further the goals of the Confederacy, and distinguished acts of charity, compulsory acts, and the mere harboring of disloyal sentiments uncoupled from activity. Further, Petitioners also point to Congressional actions, concerning members precluded from taking their seats due to conduct which Petitioners argue illustrates the Congressional understanding of Section Three.

250. Having considered the arguments, the Court concludes that engagement under Section Three of the Fourteenth Amendment includes incitement to insurrection. The Court has reviewed The Congressional Globe and Hinds’ Precedents regarding the cases of Representatives Rice and McKenzie, cited by Trump, and finds that they offer

little to no guidance on the question before the Court. Both cases concerned fact questions as to whether the Representatives provided “aid or comfort” to the enemies of the United States, and not whether they had “engaged” in insurrection or rebellion. Though the Court acknowledges the adjacency of the issues, the cases remain unpersuasive as they dealt with a discrete issue in highly distinguishable circumstances from the present case.

251. Similarly, the Court has reviewed the Congressional cases the Petitioners cite and finds that they, too, are inapposite and, therefore, unhelpful. The cases of Philip Thomas and John Young Brown likewise considered whether aid and comfort had been given to the enemies of the United States, and both were assessed pursuant to the standard supplied by a congressional oath which required would-be congressmen to swear that they had not “voluntarily given aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the United States.” Again, the issues presented by these cases go beyond the question before this Court and consequently provide little utility.

252. Further, the Court is not convinced that the Second Confiscation Act compels the conclusion that Congress deliberately omitted other distinct unlawful acts such as incitement by requiring only that a person shall not have engaged in insurrection or rebellion. Section Three of the Fourteenth Amendment is not a mere revision, recodification, or consolidation of the Second Confiscation Act, and so the Court finds that it has limited utility in interpreting Section Three.

253. Further, this Court is mindful that Section Three is a constitutional provision, and as such, its provisions “naturally...must receive a broad and liberal construction.” See *Protestants & Other Ams. United for Separation of Church & State v. O’Brien*, 272 F.Supp. 712, 718 (D.D.C. 1967) (citing *M’Culloch v. Maryland*, 17 U.S. 316, 407 (1819) (nature of constitution necessarily requires “that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.”); see also *U.S. v. Classic*, 313 U.S. 299, 316 (1941) (when interpreting constitution “we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.”).

254. The Court finds more persuasive the opinions of Attorney General Stanbery, which adopted an unequivocally broad interpretation of “engagement” in insurrection. Attorney General Stanbery, on the subject, opined that “an act to fix upon a person the offence of engaging in rebellion under this law, must be an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose.” *The Reconstruction Acts*, 12 Op. Att’y Gen. 182, 204 (1867). Specifically, as it relates to incitement, he opined “disloyal sentiments, opinions, or sympathies would not disqualify, but where a person has by speech or by writing, incited others to engage in rebellion, he must come under the disqualification.” *Id.* at 205; see also *United States v. Powell*, 65 N.C. 709 (C.C.D.N.C. 1871) (the Court, instructing jury, that “the word

'engage' implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebellion, and to bring it to a successful termination.”). Stanbery further rejected the notion that a person need levy war or take up arms to have “engaged” in insurrection or rebellion. The Reconstruction Acts, 12 U.S. Op. Att’y Gen. 141, 161-62 (“...it does not follow that other classes than those who actually levied war and voluntarily joined the ranks of the rebels are to be excluded, taking it to be clear, that in the sense of this law persons may have engaged in rebellion without having actually levied war or taken arms...persons who, in their individual capacity, have done any overt act for the purpose of promoting the rebellion, may well be said, in the meaning of this law, to have engaged in rebellion.”). The Court agrees that “engage” was not intended to be limited to the actual physical, prosecution of combat, or likewise import a necessity that an individual take up arms.

255. Lastly, it would be anomalous to exclude those insurrectionists or rebels who, having taken an oath, participated in the insurrection or rebellion through instigation or incitement. Instigation and incitement are typically actions taken by those in leadership roles, and not, for example, by those on the front lines, with weapon in hand. To exclude from disqualification such people would seem to defeat the purpose of disqualification, at least as it relates to potential leaders of insurrection. Intervenors’ position that “engage” requires more than incitement, therefore, undermines a significant purpose of the disqualification, and as such the Court cannot favor this interpretation. *Jarrolt v. Moberly*, 103 U.S. 580, 586 (1880) (“A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to

give it effective operation and suppress the mischief at which it was aimed.”); *Classic*, 313 U.S. at 316 (when interpreting constitution “we cannot rightly prefer, of the possible meaning of its words, that which will defeat rather than effectuate the Constitutional purpose.”).

256. The Court does not endeavor to fully define the extent to which certain conduct might qualify as “engagement” under Section Three of the Fourteenth Amendment; it is sufficient, for the Court’s purposes, to find that “engagement” includes “incitement.”<sup>17</sup> The Court agrees with Intervenors that engagement “connotes active, affirmative involvement.” The definition of incitement meets this connotation. “Incitement,” as the Court has found, requires a voluntary, intentional act in furtherance of an unlawful objective; such an act is an active, affirmative one.

257. As discussed below, the reason incitement falls outside of First Amendment protections is because of its quality of speech as action. Consequently, the Court sees nothing inconsistent between a requirement that a person be affirmatively, actively involved in insurrection to qualify as having engaged therein and a finding that incitement qualifies as engagement.

### **3. Does Engage Include Inaction?**

258. Intervenors argue this Court should not consider Trump’s failure to act on January 6, 2021 as evidence that he engaged in an insurrection.

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<sup>17</sup> The Court does note that at no point in this proceeding has Trump (or any other party) argued that some type of appropriate criminal conviction is a necessary precondition to disqualification under Section Three. There is nothing in the text of Section Three suggesting that such is required, and the Court has found no case law or historical source suggesting that a conviction is a required element of disqualification.

259. Petitioners argue that Trump’s intentional dereliction of duty was undertaken with the purpose of helping the mob achieve their goal of obstructing the Electoral College certification and it is therefore an independent basis for finding that Trump engaged in insurrection.

260. The Court holds that it need not look further than the words of Section Three to conclude that a failure to act does not constitute engagement under Section Three.

261. Section Three provides two disqualifying offenses: (1) engaging in insurrection or rebellion; or (2) giving aid or comfort to enemies of the United States. U.S. CONST. amend. XIV, §3. Under a plain reading of the text, “engag[ing]” is distinct from “giv[ing] aid or comfort to.” *Id.* In the Court’s view engaging in an insurrection requires action whereas giving aid and comfort could include taking no action.

262. Because the Petitioners do not argue that Trump gave aid or comfort to an enemy of the United States, the Court holds that Trump’s inaction as it relates to his failure to send in law enforcement reinforcements it is not an independent basis for finding he engaged in insurrection.

263. That does not mean that Trump’s failure to condemn the January 6, 2021 attackers (at any point during the attack), his failure to tell the mob to go home (for three hours), or his failure to send reinforcements to support law enforcement has no relevance. To the contrary, the Court holds that all three of these failures are directly relevant to the question of whether the Petitioners have proven the specific intent required under Section Three.

#### **4. The First Amendment's Application**

264. Trump has advanced the argument that the conduct at the core of this case is pure speech, and as such, is afforded robust protections under the First Amendment. Trump raised this issue in his Special Motion to Dismiss Pursuant to C.R.S. § 13-20-1101(3)(a), in his subsequent motion to dismiss, and again during his motion for a directed verdict at trial. The argument relies heavily on *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and its progeny, and (broadly speaking) contends that Trump's purported involvement in the January 6, 2021 attack amounts to nothing more than pure speech which, under the *Brandenburg* test, is only sanctionable as incitement if such speech satisfies the requirements of imminence, intention, and tendency to produce violence. In his motion for a directed verdict, Trump argued that *Brandenburg* requires an objective analysis of the speaker's words when considering the test, citing the relatively recent Sixth Circuit decision *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018).

265. Petitioners generally respond that they seek disqualification under Section Three of the Fourteenth Amendment not just for speech, but for conduct, as well, and as such, the First Amendment provides no protection. They further argue that, even if the First Amendment would normally operate to shield Trump's conduct from sanction, it has no application here where the sanction sought is itself required by the Constitution. Lastly, they argue that, even if *Brandenburg* applies to the proceeding, Trump's conduct satisfies the test and, consequently, his speech is appropriately subject to sanction as falling outside of the First Amendment protections.



266. Before resolving the arguments of the Parties, the Court explores the lay of the land when it comes to First Amendment jurisprudence on the question of inflammatory political speech.

**a. Legal Backdrop**

267. The Court starts with *Brandenburg*, it being the central case at issue and providing the namesake for the test the Court is to consider employing. The appellant in *Brandenburg* was the leader of a local Ku Klux Klan chapter, convicted under the Ohio Criminal Syndicalism statute for “advocating the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “voluntarily assembl(ing) with any society, group, or assemblage or persons formed to teach or advocate the doctrines of criminal syndicalism.” 395 U.S. at 444-45 (quoting Ohio Rev. Code Ann. § 2923.13, *repealed by* 1972 H 511). The Supreme Court of the United States held that the Ohio Criminal Syndicalism statute was unconstitutional on its face. *Id.* at 448-49. The *Brandenburg* Court held that developments in First Amendment jurisprudence favored “the principle that the constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Id.* at 447. The *Brandenburg* Court cited *Noto v. United States*, 367 U.S. 290, 297-98 (1961) for the proposition that “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the

same as preparing a group for violent action and steeling it to such action.” 395 U.S. at 448.

268. Almost a decade later, the Supreme Court considered the intersection of concerted political action and violence in *Nat’l Ass’n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). The case considered the boycott of white merchants in Claiborne County, Mississippi, which began in 1966. *Id.* at 889.

269. At the trial court level, the merchants were awarded damages for lost profits from a seven-year period on three theories. *Id.* at 893. The Mississippi Supreme Court sustained the entirety of the damages imposed on the theory that the boycotters had agreed to use force, violence, and threats to effectuate the boycott. *Id.* at 895. The theory was that the boycott employed force and threats, which caused otherwise willing patrons to forego the boycotted businesses, rendering the entire boycott unlawful and the organizers liable for the entire cost of the boycott. *Id.* The entire history of the boycott will not be recounted by this Court, here; however, there are some salient details during the boycott that are relevant to the Court’s task. On April 1, 1966, the Claiborne County branch of the National Association for the Advancement of Colored People convened and unanimously voted to boycott the white merchants of Port Gibson and Claiborne County. *Id.* at 900. Charles Evers gave a speech on that occasion, and though it was not recorded, the trial court found that Evers told the audience that “they would be watched and that blacks who traded with white merchants would be *answerable to him.*” *Id.* at 900, n. 28 (emphasis original). Further, according to the Sheriff, who

attended, Evers told the crowd that “any ‘uncle toms’ who broke the boycott would ‘have their necks broken’ by their own people.” *Id.* The boycott proceeded for several years. *Id.* at 893.

270. On April 18, 1969, a young black man named Roosevelt Jackson was shot to death by the Port Gibson, Mississippi, police. *Id.* at 902. Crowds gathered and protested the killing. *Id.* On April 19, Charles Evers gave a speech during which he warned that boycott violators would be “disciplined by their own people” and that the Port Gibson Sheriff “could not sleep with boycott violators at night.” *Id.* On April 21, Charles Evers (among others) gave another speech stating “if we catch any of you going in any of them racist stores, we’re gonna break your damn neck.” *Id.* The trial court found that several instances of boycott-related violence had occurred over the preceding three years. *Id.* at 903-06. These included, among other things, the publication of the names of boycott-violators and subsequent ostracization and name-calling, instances of shots being fired through windows of homes owned by boycott violators, bricks and stones being thrown through car windows, and the trampling of a flower garden. *Id.* All these instances of violence occurred in 1966. *Id.* at 906.

271. The Supreme Court found that “[t]hrough speech, assembly, and petition – rather than through riot or revolution – petitioners sought to change a social order that had consistently treated them as second-class citizens.” *Id.* at 912. The Supreme Court recognized that, though these activities are constitutionally protected, the Mississippi Supreme Court’s ruling was not predicated on the theory that state law prohibited a nonviolent, politically-motivated boycott, but rather on the theory that it

had constituted an agreement to use violence, fear, and intimidation. *Id.* at 915. The Supreme Court was emphatic that “the First Amendment does not protect violence,” however it may masquerade. *Id.* at 916. The Court found that it was undisputed that some acts of violence had occurred in the context of the boycott. *Id.* However, the Court went on to find that in such circumstances, where violence occurs “in the context of constitutionally protected activity . . . ‘precision of regulation’ is demanded.” *Id.* (quoting *Nat’l Ass’n for the Advancement of Colored People v. Button*, 371 U.S. 415, 438 (1963)).

272. Relevant to the question before the Court is the Supreme Court’s analysis of the liability imposed on Charles Evers. After noting that Evers could not be held liable by virtue of his association with the boycott alone, the Supreme Court acknowledged that the content of Evers’ speeches was the purported basis for his liability. *Id.* at 926.

273. The Supreme Court found that Evers’ speech did not meet the necessary standard. *Id.* at 929. Emphasizing the distinction between mere advocacy for violence in the abstract, which is afforded protection, and incitement, the Supreme Court found that Evers’ speech “generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them.” *Id.* at 928. Acknowledging that, during Evers’ speech, “strong language was used,” the Supreme Court noted that, with one possible exception, “the acts of violence identified in 1966 occurred weeks or months after [Evers’] April 1, 1966

speech” and that there was no finding “of any violence after the challenged 1969 speech.” *Id.*

274. The Supreme Court held that “Strong and effective extemporaneous rhetoric cannot be nicely channeled into purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.” *Id.* The Supreme Court qualified its findings noting that “[i]f there were other evidence of [Evers’] authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence.” *Id.* at 929. But, because there was “no evidence--apart from the speeches themselves--,” that Evers authorized, ratified, or directly threatened acts of violence, the theory failed. *Id.*

275. In summarizing its opinion, the Supreme Court noted litigation of this type is an extremely delicate matter, as the circumstances exist on a knife’s edge between fundamental rights concerning association and concerted political activity, and the “special dangers” of conspiratorial activity. *Id.* at 932-33.

276. This Court undertakes its task mindful of the necessity of discharging the sort of “precision of regulation” necessary to ensure that the foundational First Amendment rights Petitioners’ challenge implicates are not improperly curtailed. *Button*, 371 U.S. at 438. What is also clear, however, is that violence is not protected expression: the Constitution does not protect lawlessness masquerading as political activism.

### **b. Does *Brandenburg* Apply?**

277. The Court first considers Petitioners' contention that *Brandenburg* and its progeny have no application to this case. Petitioners first argue that their requested relief is not based on speech, but on conduct. Specifically, they argue that Trump's conduct, while containing elements of speech, nevertheless constituted conduct, and point to his inaction during the insurrection, despite having knowledge of the violence and the authority (and affirmative duty) to intercede. Petitioners further distinguish *Brandenburg* and related cases by pointing out that the limitation at issue here is imposed by virtue of the Constitution itself (and not state statute or regulation), applies to a limited category of people (*i.e.* those who have taken an oath to support the Constitution) and that the "penalty" imposed is not civil or criminal liability, but merely disqualification, a standard on who may hold office, imposed only by way of Constitutional Amendment. Lastly, they argue that any apparent conflict between Section Three of the Fourteenth Amendment and the First Amendment is easily reconciled, as disqualification for engaging in rebellion or insurrection could not reach mere disloyal sentiments or the abstract teaching of the propriety of disloyalty but instead requires something more.

278. With respect to Petitioners argument that their request for relief is based on conduct and not speech the Court disagrees. The Court has already ruled on the argument's that Trump's inaction constitutes "engagement." Further, the "conduct" leading up to the events of January 6, 2021, are predicated on public speeches and statements and therefore are appropriately analyzed as "speech." The Court

emphasizes, however, that it considers Trump’s actions and inactions prior to and on January 6, 2021 as context and history to inform its understanding of his speech on January 6, 2021 and the tweets on January 6, 2021.

279. Regarding the argument that Section Three of the Fourteenth Amendment is nonpunitive and merely imposes a qualification for office, and therefore *Brandenburg*’s exacting standard is inapplicable, there is no direct guidance. The nearest guidance this Court can find on the question is *Bond v. Floyd*, 385 U.S. 116 (1966). There, a duly elected state legislator was prevented from taking his seat because of certain endorsements and statements he had made concerning his opposition to the Vietnam War and the draft. *Id.* at 118-25. His expulsion was affirmed by a federal court on the grounds that his conduct constituted a call to action to resist the draft. *Id.* at 127. The Supreme Court considered the intersection of a legislative oath of loyalty, the requirement under Article VI that he swear one, and the First Amendment. *Id.* at 131-32. The Court found that Bond’s disqualification violated the First Amendment, noting the danger that a majority faction might use the oath of loyalty to suppress dissenting political views, and finding that the speech at issue did not constitute a call to unlawfully resist the draft and as such did not demonstrate any “incitement to violation of law.” *Id.* at 132-34.

280. The *Bond* Court emphasized the distinction between discussion, contemplation, and advocacy, on one hand, and calls for lawlessness, on the other. *Id.* at 116. *Bond* was cited by the *Brandenburg* Court for this principle. 395 U.S. at 448.

281. While the Court believes that there is certainly room to distinguish the conduct at issue, here, and the conduct at issue in *Bond*, and does not suggest that the factual circumstances between the two cases are at all similar, the lessons from *Brandenburg*-related cases are clear: in order for speech to lose its protection, it must cross the threshold from abstraction to action; it must be used as a means of force, not a means of contemplation of advocacy. *See, e.g., U.S. v. Dellinger*, 472 F.2d 340, 360 (7th Cir. 1972) (the question at the heart of incitement is “whether particular speech is intended to and has such capacity to propel action that it is reasonable to treat such speech as action.”). Speech that constitutes an integral tool in furtherance of the lawless act loses its distinction and becomes an instrument of force. *See Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941) (“Utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.”). *Bond* suggests that these same principles apply with equal force in the context of elected officials and loyalty oaths.

282. Acknowledging the foregoing principles, in this Court’s view, reconciles the First and Fourteenth Amendments to the extent there is any conflict. Applying the *Brandenburg* standard to questions of incitement as “engagement,” even in the context of elected officials and loyalty oaths, ensures that mere “disloyal sentiments, opinions, or sympathies” do not result in disqualification from office. It ensures that elected officials are afforded the appropriate breathing space to discuss public policy. Therefore, to the extent the Petitioners seek Trump’s disqualification on the basis that



he engaged in insurrection through incitement, it must be proven that his speech was intended to produce imminent lawless action and was likely to do so.

### **c. The *Brandenburg* Standard**

283. First, before undertaking the *Brandenburg* analysis, the Court addresses the argument Trump made during its motion for a directed verdict that the Court ought to consider only the “objective meaning” of the language at issue. The Sixth Circuit considered and rejected the importation of an “objective analysis” in *Nwanguma*, and this Court likewise finds that “objectivity” is not a required part of the *Brandenburg* test. 903 F.3d at 613.

284. As the U.S. Supreme Court observed, the court is obligated to make an independent examination of the whole record when considering the “content, form, and context” of the speech. *Snyder v. Phelps*, 562 U.S. 443, 453-54 (2011) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)). Unlike in *Nwanguma*, the “whole record” here consists of more than just the Ellipse speech and more than just the plain language used. Ultimately, all language is, at its core, a system of signals (whether through sounds, symbols, or otherwise) designed to convey meaning from a speaker to an audience. An inquiry into a speaker’s intent can appropriately probe what the speaker understands or knows about how his audience will perceive his speech. This is not an inquiry into the “reaction of the audience,” but rather asks whether, and in what way, the speaker knows how his choice of language will be understood, and, therefore, what he “intends” his speech to mean as evidenced by his use of language. *Watts v. United States*, 394 U.S. 705 (1969) (“taken in context, and regarding the expressly

conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.”); *Hess v. Indiana*, 414 U.S. 105, 108 (1973)(“there was no evidence or rational inference from the import of the language that his words were intended to produce, and likely to produce, imminent disorder.”).

285. To assess whether Trump intended to produce disorder and whether his words were likely to produce disorder, the Court must consider his knowledge or understanding of how his words would be perceived by his audience. Such an inquiry requires the Court to consider the history of Trump’s relationship to and interaction with extremist supporters and political violence. See, e.g., *Claiborne Hardware Co.*, 458 U.S. at 929 (noting that “if there were other evidence of his [Evers’] authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence.”).

286. Second, the Court addresses the issue of the intent required to establish incitement. Trump has raised the issue of the requisite level of intent to be applied in this matter and, by the Court’s reading, the parties are largely in agreement. The Court finds that the specific intent necessary to sustain a finding of incitement is likewise sufficient to sustain the intent required by Section Three. Under *Brandenburg*, the inquiry is whether the speech at issue is “[1] intended to produce, and [2] likely to produce, imminent disorder.” *Counterman v. Colorado*, 600 U.S. 66, 97 (Sotomayor, J., concurring in part) (citation omitted). The U.S. Supreme Court in *Counterman* wrote “when incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge.” 600 U.S. at 81. “A person acts

purposefully when he ‘consciously desires’ a result.” *Id.* at 79 (citation omitted). “A person acts knowingly when ‘he is aware that [a] result is practically certain to follow.” *Id.* (citation omitted). The *Counterman* Court noted that knowledge is “not often distinguished from purpose.” *Id.*; *see also Tison v. Arizona*, 481 U.S. 137, 150 (1987) (“one intends certain consequences when he desires that his acts cause those consequence or knows that those consequences are substantially certain to result from his acts.”).

287. For this Court to find that Trump incited an insurrection, the Court must first find that he had the specific intent (either purpose or knowledge) to produce the insurrection. A finding that Trump had the purpose or knowledge of producing the insurrection is sufficient to satisfy the requirement that he “engaged” in insurrection through an intentional act.

### **5. Application of *Brandenburg***

288. The Court concludes, based on its findings of fact and the applicable law detailed above, that Trump incited an insurrection on January 6, 2021 and therefore “engaged” in insurrection within the meaning of Section Three of the Fourteenth Amendment. First, the Court concludes that Trump acted with the specific intent to disrupt the Electoral College certification of President Biden’s electoral victory through unlawful means; specifically, by using unlawful force and violence. Next, the Court concludes that the language Trump employed was likely to produce such lawlessness.

289. Regarding Trump’s specific intent (either purpose or knowledge), the Court considers highly relevant Trump’s history of courting extremists and endorsing

political violence as legitimate and proper, as well as his efforts to undermine the legitimacy of the 2020 election results and hinder the certification of the Electoral College results in Congress. Trump's history of reacting favorably to political violence committed at his rallies or in his name, as well as his cultivation of relationships with extremist political actors who frequently traffic in violent rhetoric, is well-established. Trump has consistently endorsed violence and intimidation as not only legitimate means of political expression, but as necessary, even virtuous. Further, the Court has found that Trump was aware that his supporters were willing to engage in political violence and that they would respond to his calls for them to do so.

290. In addition to his consistent endorsement of political violence, Trump undertook efforts to undermine the legitimacy of the 2020 presidential election well in advance of the election, making accusations of widespread corruption, voter fraud, and election rigging. These efforts intensified when the election results were returned showing that he had lost the election, despite a complete lack of evidence showing any such fraud and his knowledge that there was no evidence. As the electoral college votes were cast, and the certification date drew closer, Trump further intensified his public efforts at disrupting the certification, even as violence, intimidation, and calls for political violence escalated. In the wake of this, Trump supported calls for protests in Washington, D.C., and focused his call on the date of the certification, January 6, 2021. Trump continued to inflame his supporters with false accusations of historic levels of election corruption. Leading up to January 6, 2021, federal law enforcement and security agencies identified significant threats of violence associated with the planned

January 6, 2021 rallies. Despite these warnings, Trump undertook no effort to prepare law enforcement or discourage violence among the prospective attendees. Importantly, he did not tell law enforcement he intended to direct the crowd to protest at the Capitol.

291. On the morning of January 6, 2021, Trump focused the attention of his supporters on Vice President Mike Pence and his role in certifying the electoral college results, falsely claiming Vice President Pence had the authority to “send back” the electoral votes for recertification. Trump proceeded to give a speech at the Ellipse, wherein he again inflamed his supporters by contending that the election was “stolen,” that the country was in existential danger from endemic corruption, that strength and action were needed to save the country, and that it was time to do something about it. He continued to focus the crowd on Vice President Pence and directed the crowd to march to the Capitol building, claiming that he would be joining them. The crowd reacted predictably, marched on the Capitol, violently clashed with police officers attempting to secure the building, and breached the building with the intent to disrupt the certification.

292. After being informed of the attack, Trump did little. Trump first sent out a tweet condemning Vice President Pence for refusing to illegally interrupt the electoral vote certification and continued to promote his false claims that the 2020 presidential election was fraudulent. He later sent out tweets encouraging his supporters to “remain peaceful” and “stay peaceful” despite knowing that they were not peaceful. Predictably, these tweets had no effect. Trump resisted calls from advisors and members of his party to intercede and took no immediate action to quell the violence. It was not until 4:17

p.m. that Trump released a video that unmistakably called for the mob to disperse while simultaneously praising their conduct. Trump continued to praise the violent conduct of the mob after it had dispersed.

293. The Court concludes that Trump acted with the specific intent to incite political violence and direct it at the Capitol with the purpose of disrupting the electoral certification. Trump cultivated a culture that embraced political violence through his consistent endorsement of the same. He responded to growing threats of violence and intimidation in the lead-up to the certification by amplifying his false claims of election fraud. He convened a large crowd on the date of the certification in Washington, D.C., focused them on the certification process, told them their country was being stolen from them, called for strength and action, and directed them to the Capitol where the certification was about to take place.

294. When the violence began, he took no effective action, disregarded repeated calls to intervene, and pressured colleagues to delay the certification until roughly three hours had passed, at which point he called for dispersal, but not without praising the mob and again endorsing the use of political violence. The evidence shows that Trump not only knew about the potential for violence, but that he actively promoted it and, on January 6, 2021, incited it. His inaction during the violence and his later endorsement of the violence corroborates the evidence that his intent was to incite violence on January 6, 2021 based on his conduct leading up to and on January 6, 2021. The Court therefore holds that the first *Brandenburg* factor has been established.

295. Regarding the second *Brandenburg* factor, the Court finds that the language Trump used throughout January 6, 2021 was likely to incite imminent violence. The language Trump employed must be understood within the context of his promotion and endorsement of political violence as well as within the context of the circumstances as they existed in the winter of 2020, when calls for violence and threats relating to the 2020 election were escalating. For years, Trump had embraced the virtue and necessity of political violence; for months, Trump and others had been falsely claiming that the 2020 election had been flagrantly rigged, that the country was being “stolen,” and that something needed to be done.

296. Knowing of the potential for violence, and having actively primed the anger of his extremist supporters, Trump called for strength and action on January 6, 2021, posturing the rightful certification of President Biden’s electoral victory as “the most corrupt election in the history, maybe of the world” and as a “matter of national security,” telling his supporters that they were allowed to go by “very different rules” and that if they didn’t “fight like hell, [they’re] not going to have a country anymore.” Such incendiary rhetoric, issued by a speaker who routinely embraced political violence and had inflamed the anger of his supporters leading up to the certification, was likely to incite imminent lawlessness and disorder. The Court, therefore, finds that the second *Brandenburg* factor has been met.

297. Trump has, throughout this litigation, pointed to instances of Democratic lawmakers and leaders using similarly strong, martial language, such as calling on supporters to “fight” and “fight like hell.” The Court acknowledges the prevalence of

martial language in the political arena; indeed, the word “campaign” itself has a military history. *See, e.g., Claiborne Hardware Co.*, 458 U.S. at 928 (“Strong an effective extemporaneous rhetoric cannot be nicely channeled into purely dulcet phrases.”). This argument, however, ignores both the significant history of Trump’s relationship with political violence and the noted escalation in Trump’s rhetoric in the lead up to, and on, January 6, 2021. It further disregards the distinct atmosphere of threats and calls for violence existing around the 2020 election and its legitimacy. When interpreting Trump’s language, the Court must consider not only the content of his speech, but the form and context as well. *See Id.* at 929 (noting that, if there had been “other evidence” of Evers’ “authorization of wrongful conduct,” the references to “discipline” in his speeches could be used to corroborate that evidence).

298. Consequently, the Court finds that Petitioners have established that Trump engaged in an insurrection on January 6, 2021 through incitement, and that the First Amendment does not protect Trump’s speech.

### **C. DOES SECTION THREE OF THE FOURTEENTH AMENDMENT APPLY TO PRESIDENT TRUMP?**

299. For Section Three of the Fourteenth Amendment to apply to Trump this Court must find both that the Presidency is an “office . . . under the United States” and that Trump took an oath as “an officer of the United States” “to support the Constitution of the United States.” U.S. CONST. amend. XIV, § 3.

300. Professor Magliocca provided historical evidence that the Presidency was understood as an “office, civil or military, under the United States” such that



disqualified individuals could not assume the Presidency. 11/01/23 Tr. 59:17-62:6. The most compelling testimony to that effect was an exchange between Senators Morrill and Johnson during the Congressional Debates over Section Three, where one Senator explained to the other that the Presidency was covered by “office, civil or military, under the United States.” Professor Magliocca also testified it would be preposterous that Section Three would not cover Jefferson Davis—the President of the Confederacy—should he have wished to run for President of the United States after the civil war. *Id.*

301. The Court holds there is scant direct evidence regarding whether the Presidency is one of the positions subject to disqualification. The disqualified offices enumerated are presented in descending order starting with the highest levels of the federal government and descending downwards. It starts with “Senator or Representatives in Congress,” then lists “electors of President and Vice President,” and then ends with the catchall phrase of “any office, civil or military, under the United States, or under any State.” U.S. CONST. amend. XIV, § 3.

302. To lump the Presidency in with any other civil or military office is odd indeed and very troubling to the Court because as Intervenors point out, Section Three explicitly lists all federal elected positions except the President and Vice President. Under traditional rules of statutory construction, when a list includes specific positions but then fails to include others, courts assume the exclusion was intentional. *Dep’t of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015) (finding that Congress intended to exclude rules or regulations when it included only the word “law” versus elsewhere where it used the phrase “laws, rule or regulation”).

303. Finally, the Intervenors point out that an earlier version of the Amendment read “No person shall be qualified or shall hold the office of President or vice president of the United States, Senator or Representative in the national congress....” Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 10 (Oct. 28, 2023) (unpublished draft) (on file with the Social Science Research Network). This fact certainly suggests that the drafters intended to omit the office of the Presidency from the offices to be disqualified.<sup>18</sup>

304. The Court holds that it is unpersuaded that the drafters intended to include the highest office in the Country in the catchall phrase “office . . . under the United States.”

305. Next the Court addresses whether Trump “previously [took] an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State.” U.S. CONST. amend. XIV, § 3. Because President Trump was never a congressman, state legislator, or state officer, Section Three applies only if he was an “officer of the United States.” *Id.*

306. Professor Magliocca testified that during Reconstruction, the President of the United States was understood to be an “officer of the United States.” 11/01/2023 Tr.

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<sup>18</sup> In response to the argument that it would be preposterous that Section Three of the Fourteenth Amendment would not prevent Jefferson Davis from being President of the United States, the Court notes that one possible reason why the Presidency was not included in positions disqualified is that Section Three clearly disqualifies electors for the office of the President and Vice President. Perhaps, the thought process was that by excluding electors who were former oath swearing confederates, there was effectively no chance of a former confederate leader becoming President or Vice President.

51:20-52:3. He points to Attorney General Stanbery's first opinion that stated that the phrase "officer of the United States" was used "in its most general sense and without any qualification" in Section Three. 11/01/23 Tr. 53:12-54:4; The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 158 (1867). The next sentence, however, would cut against including a President when Stanbery states "I think, as here used, it was intended to comprehend military as well as civil officers of the United States who had taken the prescribed oath." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 158. To refer to the President of the United States as a mere "civil officer" is counterintuitive.

307. The Court holds that the more obvious reading of Attorney General Stanbery's opinion is that his reference to the "most general sense and without any qualification" was to make it clear that, unlike with State officers, the phrase applied to all lower-level federal officers so long as they took an oath, and did not apply only to the upper echelon of the military and civil ranks.

308. Stanbery's second opinion likewise states that "officers of the United States" applied "without limitation" to any "person who has, at any time prior to the rebellion held any office, civil or military, under the United States and has taken an official oath to support the Constitution of the United States." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 182, 203(1867); 11/03/23 Tr. 256:22-257:13.

309. In other words, Magliocca testified because the Presidency is an "office," the person who holds that office and swears an oath was understood to be an "officer." Stanbery's second opinion later goes on to say that the President is an "executive officer." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 182, 196 (1867); 11/01/23 Tr.

59:11–16. But to some extent this reference cuts against the President being included because Section Three explicitly includes “executive . . . officer[s] of any State” but only includes “officer of the United States”. U.S. CONST. amend. XIV, § 3.

310. Magliocca further argued that contemporary usage supports the view that the President is an “officer of the United States.” Andrew Johnson repeatedly referred to himself as such in presidential proclamations, members of Congress both during the 39th Congress that ratified the Fourteenth Amendment and during Johnson’s impeachment several years later repeatedly referred to the President the same way, and earlier presidents in the Nineteenth Century were referred to the same way. 11/01/23 Tr. 56:3–59:16, 69:21–71:21.

311. On the other hand, Intervenors argue that five constitutional provisions show that the President is not an “officer of the United States.”

- The Appointments Clause in Article II, Section 2, Clause 2 distinguishes between the President and officers of the United States. Specifically, the Appointments Clause states that the President “shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” U.S. CONST. art. II, § 2, cl. 2.
- The Impeachment Clause in Article II, Section 4 separates the President and Vice President from the category of “civil Officers of the United States:” “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4.
- The Commissions Clause in Article II, Section 3 specifies that the President “shall Commission all the Officers of the United States.” U.S. CONST. art. II, § 3.

- In the Oath and Affirmation Clause of Article VI, Clause 3, the President is explicitly absent from the enumerated list of persons the clause requires to take an oath to support the Constitution. The list includes “[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States.” US. CONST. art. VI, cl. 3.
- Article VI provides further support for distinguishing the President from “Officers of the United States” because the oath taken by the President under Article II, Section 1, Clause 8 is not the same as the oath prescribed for officers of the United States under Article VI, Clause 3.

312. The Court agrees with Intervenors that all five of those Constitutional provisions lead towards the same conclusion—that the drafters of the Section Three of the Fourteenth Amendment did not intend to include the President as “an officer of the United States.”

313. Here, after considering the arguments on both sides, the Court is persuaded that “officers of the United States” did not include the President of the United States. While the Court agrees that there are persuasive arguments on both sides, the Court holds that the absence of the President from the list of positions to which the Amendment applies combined with the fact that Section Three specifies that the disqualifying oath is one to “support” the Constitution whereas the Presidential oath is to “preserve, protect and defend” the Constitution,<sup>19</sup> it appears to the Court that for

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<sup>19</sup> The Court agrees with Petitioners that an oath to preserve, protect and defend the Constitution encompasses the same duties as an oath to support the Constitution. The Court, however, agrees with Intervenors that given there were two oaths in the Constitution at the time, the fact that Section Three references the oath that applies to Article VI, Clause 3 officers suggests that that is the class of officers to whom Section Three applies.

whatever reason the drafters of Section Three did not intend to include a person who had only taken the Presidential Oath.<sup>20</sup>

314. To be clear, part of the Court’s decision is its reluctance to embrace an interpretation which would disqualify a presidential candidate without a clear, unmistakable indication that such is the intent of Section Three. As Attorney General Stanbery again noted when construing the Reconstruction Acts, “those who are *expressly* brought within its operation cannot be saved from its operation. Where, from the generality of terms of description, or for any other reason, a reasonable doubt arises, that doubt is to be resolved against the operation of the law and in favor of the voter.” The Reconstruction Acts, 12 U.S. Op. Att’y Gen. 141, 160 (1867) (emphasis added).<sup>21</sup> Here, the record demonstrates an appreciable amount of tension between the competing interpretations, and a lack of definitive guidance in the text or historical sources.

315. As a result, the Court holds that Section Three of the Fourteenth Amendment does not apply to Trump.

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<sup>20</sup> Whether this omission was intentional, or an oversight is not for this Court to decide. It may very well have been an oversight because to the Court’s knowledge Trump is the first President of the United States who had not previously taken an oath of office.

<sup>21</sup> The Court is mindful that Stanbery was considering disenfranchisement, not qualification for office, and that he was interpreting a statute he considered “penal and punitive” in nature; the Court nevertheless finds that the principle articulated, that the law ought err on the side of democratic norms except where a contrary indication is clear, is appropriate and applicable to the circumstances.

**VI. CONCLUSION**

Pursuant to the above, the Court ORDERS the Secretary of State to place Donald J. Trump on the presidential primary ballot when it certifies the ballot on January 5, 2024.

DATED: November 17, 2023.

BY THE COURT:



Sarah B. Wallace  
District Court Judge

## Minute Orders

Case Number: 2023CV032577

Case Type: Injunctive Relief

Case Caption: Anderson, Norma et al v. Jena Griswold In Her  
Official Capacity et al

Division: 209

Judicial Officer: Sarah Block Wallace

Court Location: Denver County - District

DATE FILED: November 28, 2023 12:03 PM

Order Date: 09/22/2023

JUDGE SARAH B. WALLACE. CTRM 209. FTR 9:00. STAT. ATP ERIC OLSON, MARTHA TIERNEY, MARIO NICOLAIS, AND SEAN GRIMSLEY ATD FOR GRISWOLD, MICHAEL KOTLARCZYK; FOR TRUMP, SCOTT GESSLER, GEOFFREY BLUE, AND JUSTIN NORTH; FOR CRSCC, ROBERT KITSMILLER AND MICHAEL MELITO COURT DISCUSSES EXPANDED MEDIA COVERAGE REQUESTS WITH THE PARTIES. COURT SETS ORAL ARGUMENT ON THE SLAPP MOTION FOR 1:30 ON 10/13/2023. COURT ORDERS THAT PTFS DISCLOSE THEIR WITNESS LIST ON 09/29/2023; DEFS SHOULD DISCLOSE THEIR WITNESS LIST ON 10/09/2023; PARTIES HAVE UNTIL 10/23/2023 TO SUPPLEMENT THEIR WITNESS LIST AND PROVIDE A JOINT ORDER OF PROOF. THE ORIGINAL WITNESS LISTS SHOULD PROVIDE ENOUGH DETAIL AS TO WHAT THE WITNESSES WILL TESTIFY TO SO THAT PARTIES CAN MAKE A REQUEST FOR DEPOSITIONS. COURT DENIES REQUEST FOR EXPERT DEPOSITIONS; REPORTS SHOULD BE FULSOME AS EXPERTS WILL NOT BE ALLOWED TO TESTIFY TO ANYTHING OUTSIDE OF THE EXPERT REPORTS. PTFS WILL IDENTIFY EXPERTS AND SUBJECT MATTER BY 09/25/2023; DEFS SHALL IDENTIFY EXPERTS AND SUBJECT MATTER BY 10/13/2023. PTFS WILL PROVIDE EXPERT REPORTS BY 10/06/2023; DEFS SHALL PROVIDE EXPERT REPORTS BY 10/27/2023. PTFS WILL PROVIDE PRELIMINARY EXHIBITS ON 10/06/2023; DEFS WILL PROVIDE PRELIMINARY EXHIBIT LISTS ON 10/16/2023; PARTIES WILL EXCHANGE FINAL EXHIBIT LISTS ON 10/23/2023. PARTIES SHOULD PROVIDE A LIST OF STIPULATED AND A LIST OF NON-STIPULATED EXHIBITS PER PARTY BY 10/23/2023. MOVING PARTY SHOULD PROVIDE THE COURT WITH A COURTESY COPY OF THE MTDS WITH EXHIBITS WHEN THEY ARE FULLY BRIEFED. COURT ORDERS THAT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW BE FILED BY 11/08/2023. COURT ORDERS THAT A BRIEFING ON THE REMAINING EVIDENTIARY ISSUES BE PROVIDED BY EACH PARTY BY 10/20/2023; RESPONSES DUE BY 10/27/2023. COURT ORDERS THAT 702 MOTIONS BE FILED BY 10/16/2023; RESPONSES DUE BY 10/27/2023. PTFS WILL BE ALLOWED TO MAKE 702 OBJECTIONS AT THE HEARING. COURT DENIES REQUEST FOR AMICUS BRIEFS. COURT ENTERS THE PROTECTIVE ORDER SUBMITTED BY PTFS WITH MODIFICATIONS. /CAS



<b>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO</b> 1437 Bannock Street Denver, CO 80202	<b>Δ COURT USE ONLY Δ</b>
<b>Petitioners:</b> NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAUFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN  <b>v.</b>  <b>Respondents:</b> JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and DONALD J. TRUMP  <b>and</b>  <b>Intervenors:</b> COLORADO REPUBLICAN STATE CENTRAL COMMITTEE and DONALD J. TRUMP	
<b>ORDER RE: DONALD J. TRUMP'S MOTION TO DISMISS FILED SEPTEMBER 29, 2023</b>	

This matter comes before the Court on Donald J. Trump's Motion to Dismiss, filed September 29, 2023. Having considered the parties' briefing, the relevant legal authorities cited, and being otherwise familiar with the record in this case, the Court FINDS and ORDERS as follows:

## **I. LEGAL STANDARD**

A complaint must state a plausible claim for relief to survive a C.R.C.P. 12(b)(5) motion to dismiss. *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016). However, motions to dismiss are disfavored, and may be granted only when, assuming all the allegations of the complaint are true, and drawing all reasonable inferences in favor of the plaintiff, the plaintiff would still not be entitled to any relief under any cognizable legal theory. *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011). Although a complaint need not contain detailed factual allegations, a plaintiff must identify the grounds on which he is entitled to relief, and cannot simply provide “labels and conclusions, and a formulaic recitation of the elements of a cause of action.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint is insufficient if it provides only bald assertions without further factual enhancement. *Id.* at 557.

Whether a claim is stated must be determined solely from the complaint. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). A court may consider only the facts alleged in the pleadings, as well as “documents attached as exhibits or incorporated by reference, and matters proper for judicial notice.” *Denver Post*, 255 P.3d at 1088.

## **II. ANALYSIS**

In his Motion to Dismiss, Intervenor Trump makes the following arguments: (1) the question before the Court is a non-justiciable political question; (2) Section 3 of the Fourteenth Amendment is not self-executing; (3) Congress has preempted states from

judging presidential qualifications; (4) Section 3 of the Fourteenth Amendment does not apply to Intervenor Trump; (5) the Petition fails to state a claim that violence constituted an insurrection or President Trump engaged in an insurrection; and (6) the case should be moved to Washington, D.C. under Colorado’s *forum non conveniens* statute.

**a. Non-Justiciable Political Question**

“In general, the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid.’” *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). A case “involves a political question . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’” *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) In such a case, the United States Supreme Court has held that a court lacks the authority to decide the dispute before it. *Zivotofsky*, 566 U.S. at 195. This exception is narrow. *Id.* A court cannot avoid its responsibility to enforce a specific statutory right because the issues have political implications. *Id.* at 196.

In this case, Intervenor Trump argues that the U.S. Constitution reserves exclusively to the U.S. Congress the decision as to whether a candidate is unqualified under Section 3 of the Fourteenth Amendment.<sup>1</sup> He does not argue the second basis

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<sup>1</sup> Intervenor Trump claims that Courts have dismissed “every Section Three challenge brought against President Trump—and every other federal candidate or officeholder—arising from the events of January 6, 2021.” Intervenor Trump, however, cites nary a case. Presumably, this is because those cases have been dismissed for lack of federal standing. In this case, C.R.S. § 1-1-113 clearly gives Petitioners standing.

under the political question doctrine—that a Court is incapable of resolving the question—nor could he. Instead, Intervenor Trump argues the U.S. Constitution reserves exclusively for the United States Congress the power under Section 3 of the Fourteenth Amendment to determine whether a party may take office. In doing so, Intervenor Trump relies on cases that address the question of whether various Presidential candidates (Barack Obama, John McCain, and Ted Cruz) were natural born citizens. He does not cite a case holding that the question before this Court (whether a candidate is barred under Section 3 of the Fourteenth Amendment) is barred under the political question doctrine.

#### **i. Intervenor Trump’s Cases**

Intervenor Trump cites the Third Circuit in *Berg v. Obama*, 586 F.3d 234, 238 (3d Cir. 2009) for the proposition that the question of whether Barack Obama was a natural born citizen was a non-justiciable political question outside the province of the judiciary. The Court in *Berg* makes no such holding. Instead, when describing the history of the case, the Third Circuit states, “[w]e also denied that motion, reiterating Berg’s apparent lack of standing and also stating that Berg’s lawsuit seemed to present a non-justiciable political question.” *Id.* This Court does not have this order in front of it, in which the Third Circuit apparently stated, “the lawsuit seemed to present a non-justiciable political question.” *Id.* However, even if it did, it appears that whatever the Third Circuit did say regarding the political question doctrine was *dicta*.

In addition to *Berg*, Intervenor Trump cites a series of trial court opinions, and one California appellate opinion, some published, some unpublished, that largely hold

or state in *dicta* that the plaintiffs' claims are likely also barred under the political question doctrine as a question committed to a coordinate political department. The Court addresses the cases Intervenor Trump cites below.

In *Robinson v. Bowen*, 567 F.Supp.2d 1144, 1145 (N.D. Cal. 2008), an elector pledged to a third-party candidate filed a motion for preliminary injunction seeking to remove John McCain from the ballot because he was allegedly not a natural born citizen. The Court denied the motion for preliminary injunction because the plaintiff was not likely to succeed on the merits. *Id.* at 1146. The Court then noted that Article II of the Constitution prescribes the number of presidential electors to which each state is entitled, and the Twelfth Amendment prescribes the manner in which the electors shall elect the President. *Id.* The Court examined 3 U.S.C. § 15 which directs that Congress “shall open, count, and record the electoral votes” and provides a mechanism for objections. *Id.* at 1147. Finally, it turned to the Twentieth Amendment which provides instructions on how to proceed if a president elect fails to qualify. *Id.* Having looked at these various constitutional provisions and statutes, the *Robinson* Court then concluded, without invoking the political question doctrine, that “[j]udicial review—if any—should occur only after the electoral and Congressional processes have run their course.” *Id.* The course it referred to was a 3 U.S.C. § 15 objection to a candidate and the Twentieth Amendment procedures addressing a failure to qualify. The idea, however, of Court intervention after “Congressional processes have run their course” is directly contrary to a holding that this is a political question—where there is no judicial review permitted.

In *Kerchner v. Obama*, 669 F.Supp.2d 477, 479-80 (D. N.J. 2009), two citizens brought actions against various government officials, including the U.S. Congress, alleging President Obama was not a natural born citizen and seeking to compel Congress to hold hearings, conduct investigations, and take certain actions following said investigations. The Court held the plaintiffs did not have Article III standing. *Id.* at 483. In a footnote, the Court noted that even if there was standing, the case likely fell into “the category of generalized grievances that are most appropriately handled by the legislative branch.” *Id.* at n. 5. It continued that “it appears that Plaintiffs have raised claims that are likewise barred under the ‘political question doctrine’ as a question demonstrably committed to a coordinate political department,” citing to Article II, Section 1 of the U.S. Constitution and the Twelfth Amendment, Section 3. *Id.*

*Keyes v. Bowen*, 117 Cal.Rptr.3d 207 (Cal. Ct. App. 2010) is the only appellate court opinion cited that has addressed the issue. There, the appellate court held the Secretary of State had no duty to investigate presidential eligibility and extensively cited *Robinson, supra*, for the proposition that “presidential qualification issues are best resolved in Congress.” *Keyes*, 117 Cal.Rptr.3d at 216.

Of the cases Intervenor Trump relies on, the Court in *Grinols v. Electoral Coll.*, No. 2:12-CV-02997-MCE-DAD, 2013 WL 2294885 (E.D. Cal. May 23, 2013) (unpublished), *aff’d*, 622 F.App’x 624 (9th Cir. 2015) had the most extensive analysis. First, it noted that the “natural born citizen” requirement does not designate which branch should address whether the candidate is qualified. *Id.* at \*6. It further noted Article II, Section 1 of the Constitution establishes that the Electoral College elects the

President. *Id.* It then pointed out that “[t]he Twelfth Amendment empowers the President of the Senate to preside over the meeting between the House of Representatives and the Senate in which the President of the Senate counts the electoral votes.” *Id.* According to the Court, “[t]he Twentieth Amendment empowers Congress to create a procedure in the event that neither the President-elect nor Vice President-elect qualifies to serve as President of the United States [sic].” *Id.* Finally, the Court pointed out that “the Twenty-Fifth Amendment provides for removal of the President should he be unfit to serve.” *Id.* Based on those provisions, the Court held “the Constitution make[s] clear that the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States.” *Id.*

In *Strunk v. New York State Bd. of Elections*, No. 6500/11, 2012 WL 1205117, at \*12 (N.Y. Sup. Ct. Apr. 11, 2012) (unreported disposition), *aff’d*, 5 N.Y.S.3d 483 (N.Y. App. Div. 2015) the Court held the framework for the Electoral College and its voting procedures for President and Vice President is found in Article II, Section 1 of the Constitution. More specifically, the Court noted that 3 U.S.C. § 15 dictates “the counting of electoral votes and the process for objecting” to votes. *Id.* According to the Court, “[n]o objections were made by members of the Senate and House of Representatives, which would have resolved these objections if made.” *Id.*

Finally, in *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at \*16 (S.D. Miss. Mar. 31, 2015) (unpublished), the Court, relying on *Keyes* and *Grinols*, *supra*, held “this court can find no authority in the Constitution

which would permit it to determine that a sitting president is unqualified for office or a president-elect is unqualified to take office. These prerogatives are firmly committed to the legislative branch of our government.”

## **ii. Petitioners’ Cases**

Petitioners primarily cite *Elliot v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016),<sup>2</sup> *aff’d*, 134 A.3d 51 (Pa. 2016), *cert. denied*, 580 U.S. 867 (2016). There, the Court reviewed Article II, Section 1 and the Twelfth Amendment of the United States Constitution which set forth the procedure by which a person is elected to the office of the President. *Id.* at 650. The Court in *Elliot* described Article II, Section 1 and the Twelfth Amendment as accomplishing the following:

1. vested in the legislatures of the several states, not Congress, the power to “appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled.”
2. commanded the electors, once selected, to meet in their respective states, and vote by ballot for two persons, and then to transmit their votes to the nation’s seat of government.
3. commanded, upon receipt, the President of the Senate open the ballots and count the votes in the presence of the members of the Senate and the House of Representatives.
4. provide that only in the case of a tie, or the absence of a majority, does the Constitution allow Congress to choose the President and Vice President.

*Id.* (quoting U.S. CONST. art. II, § 1, cl. 2).

After reviewing the various constitutional provisions that supposedly support the Court dismissing the case due to the political question doctrine, the Court in *Elliot* concluded that the Constitution does not vest the Electoral College with the power to

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<sup>2</sup> The Pennsylvania Commonwealth Court is an appellate court that also has original jurisdiction to hear election cases.



determine eligibility of a presidential candidate. *Id.* at 650-51. The Court similarly concluded that Congress has no control over the process other than deciding the day on which electors “give their votes.” *Id.* at 651 (quoting U.S. CONST. amend. XII). The Court then compared the provisions regarding Presidential eligibility with those regarding the eligibility of Congress where the U.S. Constitution clearly vests in Congress the power to determine the eligibility of its own members. *Id.* The Court concluded that because the Constitution does not vest any entity of the federal government with the power to ensure that only persons who are constitutionally eligible become the President, that determination is reserved for the Courts. *Id.*

The only other case the Petitioners cite that squarely addresses this issue is *Williams v. Cruz*, OAL Dkt. No. STE 5016-16, pp. 4-5 (N.J. Off. of Admin. Law Apr. 12, 2016), a New Jersey administrative law decision where the judge examined the various Constitutional provisions and held:

While Congress is the Judge of the Elections, Returns, and Qualifications of its Own Members, including their citizenship . . . Congress is not afforded any similar role in connection with the issue of Presidential eligibility. There is no basis to conclude that the issue of eligibility of a person to serve as President has been textually committed to the Congress.

### **iii. Analysis**

Intervenor Trump argues the weight of the law favors a holding that the political question doctrine precludes judicial review, and that Petitioner can only cite “two idiosyncratic state cases that never received appellate review.”<sup>3</sup> The Petitioners, on the

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<sup>3</sup> The Pennsylvania Supreme Court affirmed the decision in *Elliot v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016).

other hand, argue nothing in the Constitution commits to Congress and the Electoral College the exclusive power to determine presidential qualifications and that Intervenor Trump's cases are distinguishable because in none of those cases did the plaintiffs bring pre-election suits in state court under a state law authorizing ballot access challenges.

The Court agrees with Intervenor Trump that the weight of cases have held that challenges to an individual's qualifications to be President are barred by the political question doctrine. The Court, however, agrees with Petitioners that most of the cases Intervenor Trump cites involved post-election attempts to remove former President Obama from office and that there is at least some distinction between ballot access cases and removing a sitting President. Further, most of the cases concluding that the political question doctrine applies did so with very little analysis of what the constitutional provisions they rely on provide. For that reason, the Court looks to the specific provisions to determine if they meet the "textually demonstrable constitutional commitment of the issue to a coordinate political department" standard. *Baker*, 369 U.S. at 217.

## **ARTICLE II OF THE U.S. CONSTITUTION**

U.S. CONST. art. II, § 1, cl. 2 provides:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

This clause vests the States authority to appoint electors. The Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to

determine whether a candidate for President or a President-elect is constitutionally ineligible.

U.S. CONST. art. II, § 1, cl. 3 provides:

The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.

This clause directs that the Electors shall meet and certify a list of whom the Electors voted for and transmit it to the President of the Senate. The President of the Senate shall the open the Certificates and count them. It also outlines what happens if there is a tie. The Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for President or a President-elect is constitutionally ineligible.

U.S. CONST. art. II, § 1, cl. 4 provides: “The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”

This clause says that Congress sets the date that the Electors meet to certify their votes. The Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for President or a President-elect is constitutionally ineligible.

U.S. CONST. art. II, § 1, cl. 5 provides:

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

While this clause sets out certain constitutional qualifications, it says nothing regarding what branch of the government shall determine if the candidate meets those eligibility qualifications.

U.S. CONST. art. II, § 1, cl. 6 provides:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

This clause addresses what happens when a President is removed and does not address who determines whether a candidate for President or President-elect meets eligibility qualifications.

## **THE TWELFTH AMENDMENT**

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. CONST. amend. XII.

The Twelfth Amendment modifies Article II, Section 1, Clause 3 and makes it clear that the President and Vice President are chosen separately but together. If there

is no majority or a tie for President, the House of Representatives chooses the President. In the interim, the newly elected Vice President will serve as President. While the Twelfth Amendment references the “constitutional disability of the President” and that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President,” the Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for president or a President-elect is constitutionally ineligible.

### **SECTION 3 OF THE TWENTIETH AMENDMENT**

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

U.S. CONST. amend. XX, § 3.

This provision addresses what happens if the President-elect dies or fails to qualify. It also allows Congress to make law to provide for the case when neither the President-elect nor the Vice President-elect qualify. *Robinson*, 567 F.Supp.2d at 1147; *Keyes*, 117 Cal.Rptr.3d at 216; and *Grinols*, 2013 WL 2294885 at \*6 cite the Twentieth Amendment for the proposition that it empowers Congress to create a procedure if neither the President-elect nor Vice President-elect qualifies to serve as President of the United States. *See Peace & Freedom Party v. Bowen*, 912 F.Supp.2d 905, 911 (E.D. Cal.

2012), *aff'd sub nom. Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) (“Section 3 [of the Twentieth Amendment] was intended to provide for a then-unprovided for contingency: the selection and succession of the presidency in the event that the president elect, vice president elect, or both could not assume office” (citing 75 Cong. Rec. 3831 (1932) (statement of Rep. Cable))). And Congress did just that when it passed the Presidential Succession Act of 1947, 3 U.S.C. § 19. What Congress has not done is provide for any process to determine whether a President qualifies and what entity is supposed to make that determination. Further, nothing in the text of the Amendment commits to Congress the exclusive authority to render judgment on a presidential candidate’s fitness to be placed on the ballot. *See Lindsay*, 750 F.3d at 1065 (“nothing in the Twentieth Amendment states or implies that Congress has the *exclusive* authority to pass on the eligibility of candidates for president” (emphasis in original)). However, unlike the other Constitutional provisions relied on by the decisions Intervenor Trump relies on, section 3 of the Twentieth Amendment does include the word “qualify” and suggests that someone or something has decided whether a President qualifies to be President. It is for this reason that the Court has asked the Parties to provide the Court with testimony regarding the historical meaning and interpretation of this Amendment, if such evidence exists.

### **3 U.S.C. § 15**

Finally, the decisions Intervenor Trump cites rely heavily on 3 U.S.C. § 15 for the proposition that there is an objection process when the electoral college votes are counted and that it is during this process that the objections to the qualifications of a

**President should be made.** *Robinson*, 567 F.Supp.2d at 1147 (“It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify”); *Keyes*, 117 Cal.Rptr.3d at 216 (quoting *Robinson, supra*); *Strunk*, 2012 WL 1205117 at \*12 (“the counting of electoral votes and the process for objecting for the 2009 Presidential election is found in 3 USC § 15. . . . This required the meeting of the joint session of Congress to count the 2008 electoral votes. . . . No objections were made by members of the Senate and House of Representatives, which would have resolved these objections if made. This is the exclusive means to resolve objections to the electors' selection of a President or a Vice President”); *Taitz*, 2015 WL 11017373 at \*13 (noting that the *Keyes* Court cited the Twelfth Amendment and 3 U.S.C. § 15 when it “stated that the Constitution and laws of the United States delegate to Congress the authority to raise and decide objections to a presidential nominee's candidacy”); *see also Oines v. Ritchie*, Dkt. No. A12-1765 (Minn. Oct. 18, 2012) (citing *Keyes* in support of the conclusion that 3 U.S.C. § 15 provides the avenue for challenging constitutional qualifications of presidential candidates).

Congress, however, amended 3 U.S.C. § 15 in 2022. As amended, 3 U.S.C. § 15(d)(2)(B)(ii) provides: “The only grounds for objections shall be as follows: (I) The electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1). (II) The vote of one or more electors has not been regularly given.”



As such, it appears that Congress has disavowed any ability it once had to consider objections other than the two listed above—including any regarding the constitutional qualifications of the President-elect.

### **SECTION 3 OF THE FOURTEENTH AMENDMENT**

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. CONST. amend. XIV, § 3.

This provision clearly gives Congress the ability to remove a constitutional disability should a person be disqualified under Section Three of the Fourteenth Amendment. However, it says nothing regarding what government body would adjudicate or determine such disability in the first instance.<sup>4</sup> The Court notes, however, it would be strange for Congress to be the only entity that is empowered to determine the disability and then also the entity that is empowered to remove it.

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<sup>4</sup> Intervenor Trump argues that “Section Three itself contains an exclusive grant of jurisdiction to Congress.” The argument is that if this Court were to disqualify Intervenor Trump from being a candidate, it would strip Congress of the ability to remove the disability. The Court disagrees. If this Court were to disqualify Intervenor Trump, there would be nothing standing in the way of Congress immediately removing that disability. In fact, there is nothing standing in Congress’s way of removing the disability prior to Secretary Griswold or this Court determining whether Intervenor Trump is disqualified in the first instance.

The Court, having considered the above, declines to dismiss this case under the political question doctrine. A controversy involves a political question when, as is argued here, there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.” *Baker*, 369 U.S. at 217. As the foregoing demonstrates, there is no textually demonstrable constitutional commitment of the issue to a coordinate political department. The text is simply silent as to the specific issue, and arguments by inference, implication, or convention fail to demonstrate the kind of strong “textually demonstrable commitment” necessary for the Court to find the matter nonjusticiable. *See, e.g.*, U.S. CONST. art. I, § 5, cl. 1 (“Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members”); *Powell v. McCormack*, 395 U.S. 486, 548 (1969) (Art. I, § 5, cl. 1 is a “textually demonstrable commitment” to Congress to judge *only* the qualifications expressly set forth in art. I, § 2, cl. 2, and nothing more).

The Court will, however, revisit this ruling when it makes a final ruling following the hearing set to begin October 30, 2023 to the extent that there is any evidence or argument at trial that provides the Court with additional guidance on whether the issue of presidential eligibility has been delegated to the United States Congress. *Baker*, 369 U.S. at 198 (“In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.”)

### **b. Whether the Fourteenth Amendment Is Self-Executing**

Citing a law review article authored by Joshua Blackman and Seth Barrett Tillman, Intervenor Trump argues “Section Three of the Fourteenth Amendment is not self-executing and cannot be applied to support a cause of action seeking judicial relief absent Congressional enactment of a statute authorizing Plaintiffs to bring such a claim in court.” Intervenor Trump argues that the Blackman and Tillman law review article substantially refutes the law review article authored by William Baude and Michael Stokes Paulsen which the Petitioners cite in their Response causing the authors “to substantially modify their own analysis” and for a well-respected constitutional scholar, Steven Calabresi, to reverse his position on the matter. The Court has reviewed the modifications of the Baude and Paulsen law review article and the modifications do not in any way reverse their positions. Further, the retraction from Calabresi had nothing to do with whether Section Three was self-executing but was rather based on whether Section Three applies to Presidents. This leaves the Court with two law reviews that are over 100 pages each with contradictory conclusions.

Intervenor Trump argues there is “[a]mple precedent” supporting Blackman and Tillman’s conclusion that Section Three was not self-executing. But the only precedent cited is *In re Griffin*, 11 F.Cas. 7 (C.C. Va. 1869) written by Chief Justice Salmon Chase while riding circuit.

The Petitioners, on the other hand, argue that whether Section 3 is self-executing is irrelevant because Petitioners are proceeding under Colorado’s Election Code which provides it a cause of action. The Court agrees. To the extent that the Court ultimately

holds that C.R.S. § 1-4-1204 allows the Court to order Secretary Griswold to exclude a candidate under the Fourteenth Amendment, the Court holds that states can, and have, applied Section 3 pursuant to state statutes without federal enforcement legislation. *See, e.g., State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at \*16 (N.M. Dist. Ct. Sept. 6, 2022) (adjudicating Section 3 challenge under state *quo warranto* law); *Worthy v. Barrett*, 63 N.C. 199, 200-01 (1869) (adjudicating Section 3 challenge as *mandamus* action), *appeal dismissed sub nom. Worthy v. Comm’rs*, 76 U.S. 611 (1869); *In re Tate*, 63 N.C. 308, 309 (1869) (adjudicating Section 3 challenge as *mandamus* action); *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 632 (La. 1869) (adjudicating Section 3 challenge under state *quo warranto* law); *Rowan v. Greene*, Dkt. No. 2222582-OSAH-SECSTATE-CE-57- Beaudrot (Ga. Off. Admin. Hr’gs May 6, 2022) (state administrative Section 3 challenge).<sup>5</sup>

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<sup>5</sup> Intervenor Trump argues that none of the cited cases are relevant as such cases “relied upon state laws patterned after Section Three that applied to state officials.” Not so. In these cases, state law provided the procedural avenue for challenging a candidate’s fitness for office, but the substantive question remained qualification under the Fourteenth Amendment, not merely a state law patterned after Section Three. *See Griffin*, 2022 WL 4295619 at \*16 (“The Court therefore concludes that . . . Mr. Griffin became disqualified under Section Three of the Fourteenth Amendment”); *Worthy*, 63 N.C. at 200 (procedural statute in question “provides that no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Article XIV, shall qualify under this act or hold office in this State” (internal quotation omitted)); *Tate*, 63 N.C. at 309 (applying the rule in *Worthy* to bar County Attorneys from office, to wit: “We are of the opinion that he is disqualified from holding office under the 14th Amendment of the Constitution of the United States”); *Sandlin*, 21 La. Ann. at 631-33 (in *quo warranto* proceeding brought under “the intrusion act (No. 156, acts of 1868),” qualification of candidate was assessed under both the “eligibility act, No. 39, of the acts of the State Legislature of 1868, and the third Section of the Fourteenth Amendment to the Constitution of the United States.” Supreme Court of Louisiana held that the eligibility act was not applicable to the proceeding, and that “[t]he inquiry in this case is, has the defendant, under the provisions of the fourteenth amendment to the Constitution of the United States and those of the act of Congress of twenty-fifth June, 1868 [re-admitting secessionist states to the Union, requiring compliance with Section 3 of the Fourteenth Amendment], the legal right to discharge the duties of the office of District Judge of the Eleventh Judicial District.”).

### **c. Whether Federal Preemption Applies**

Intervenor Trump argues that federal law has preempted the States from governing ballot access for presidential candidates.

Under the field preemption doctrine, “the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.” *Arizona v. United States*, 567 U.S. 387, 399 (2012).

[Congressional] intent to displace state law altogether can be inferred from a framework of regulation “so pervasive . . . that Congress left no room for the States to supplement it” or where there is a “federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”

*Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In support of this argument, Trump cites the Twelfth Amendment, the Twentieth Amendment, and 3 U.S.C. § 15 for the proposition that federal law occupies the field.

Based on the discussion above regarding the political question doctrine, it is unclear to the Court that there is any mechanism under federal law to determine whether a candidate for President or President-elect meets the eligibility requirements let alone a framework of regulation so pervasive that Congress left no room for the States to supplement it. The Court declines to dismiss this action based on the field preemption doctrine.

### **d. Whether Section Three of the Fourteenth Amendment Applies to a President**

This is an issue that will be addressed at the hearing set to begin October 30, 2023.

**e. Whether President Trump Engaged in an Insurrection**

This is an issue that will be addressed at the hearing set to begin October 30, 2023.

**f. Forum Selection Clause**

Lastly, Intervenor Trump seeks dismissal of the action based on the forum. Colorado law sets out five requirements which all must be met to dismiss on *forum non conveniens* grounds. Pursuant to C.R.S. § 13- 20-1004(1), they are:

1. “The claimant or claimants are not residents of the state of Colorado.” C.R.S. § 13-20-1004(1)(a). Here, all Petitioners are Colorado Residents.
2. “An alternative forum exists.” C.R.S. § 13-20-1004(1)(b). Intervenor Trump has not identified a viable alternative forum. The three forums he suggests are: (1) Congress—but as discussed above, there is no mechanism by which a Colorado elector can object to Intervenor Trump’s qualification to Congress; (2) Criminal Prosecution—Intervenor Trump provides no explanation about how the Petitioners can seek criminal prosecution against Intervenor Trump in Washington, D.C.; and (3) Federal Court in Washington, D.C. But, as Intervenor Trump acknowledges, the Petitioners do not have standing in Federal Court. No adequate alternative forum, therefore, has been identified.
3. “The injury or damage alleged to have been suffered occurred outside of the state of Colorado.” C.R.S. § 13-20-1004(1)(c). The alleged injury, in this case, is having an ineligible candidate on the ballot. That injury will occur in Colorado.

4. “A substantial portion of the witnesses and evidence is outside the state of Colorado.” C.R.S. § 13-20-1004(1)(d). Here, Intervenor Trump concludes this is the case but has not put forth any specific witness that he’d like to attend that is unavailable at trial.

5. “There is a significant possibility that Colorado law will not apply to some or all of the claims.” C.R.S. § 13-20-1004(1)(e). There is no doubt that Colorado election law will play a significant part in any decision this Court renders.

As Intervenor Trump acknowledges, except in the “most unusual circumstances,” a resident plaintiff’s choice of forum is honored. *McDonnell-Douglas Corp. v. Lohn*, 557 P.2d 373, 374 (Colo. 1976). In fact, Colorado courts have “extremely limited discretion under this doctrine to dismiss an action filed by a resident plaintiff.” *Cox v. Sage Hosp. Res., LLC*, 413 P.3d 302, 304 (Colo. App. 2017). Here, the Petitioners all reside in Colorado and have exercised their right to object to Intervenor Trump’s name being placed onto the ballot under C.R.S. § 1-1-113 and C.R.S. § 1-4-1204. While Trump argues that they are nominal plaintiffs, he fails to explain who the actual plaintiffs are in this matter.

In short, Intervenor Trump’s motion under the *forum non conveniens* statute fails because he has not articulated why this is a “most unusual circumstance,” nor has he offered an alternative forum or identified witnesses he cannot call because they won’t come to Colorado. Rather, it appears that he is simply objecting to the C.R.S. § 1-1-113 process.

### **III. CONCLUSION**

For all the above reasons, the Court DENIES Intervenor Trump's Motion to Dismiss, filed September 29, 2023.

DATED: October 25, 2023.

BY THE COURT:



Sarah B. Wallace  
District Court Judge



12 U.S. Op. Atty. Gen. 182 (U.S.A.G.), 1867 WL 2127

United States Attorney General

DATE FILED: November 28, 2023 12:03 PM

THE RECONSTRUCTION ACTS.

June 12, 1867.

1. The powers and duties of the military commanders in the districts constituted by the act of March 2, 1867, 'to provide for the more efficient government of the rebel States,' considered and determined.2. The jurisdiction of military commissions under that act defined.3. Summary of the points considered and determined in the former opinion of the Attorney General on this subject.

**\*\*1** The PRESIDENT.

SIR

On the 24th ultimo, I had the honor to transmit for your consideration my opinion upon some of the questions arising under the reconstruction acts therein referred to. I now proceed to give my opinion on the remaining **\*183** questions upon which the military commanders require instructions.

1. As to the powers and duties of these commanders.

The original act recites in its preamble, that 'no legal State governments or adequate protection for life or property exist' in those ten States, and that 'it is necessary that peace and good order should be enforced' in those States 'until loyal and republican State governments can be legally established.'

The 1st and 2d sections divide these States into five military districts, subject to the military authority of the United States, as thereafter prescribed, and make it the duty of the President to assign from the officers of the army a general officer to the command of each district, and to furnish him with a military force to perform his duties and enforce his authority within his district.

The 3d section declares, 'that it shall be the duty of each officer, assigned as aforesaid, to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, and to this end he may allow local civil tribunals to take jurisdiction of and try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose; and all interference, under color of State authority, with the exercise of military authority under this act, shall be null and void.'

The 4th section provides, 'That all persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and no cruel or unusual punishment shall be inflicted; and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed, until it is approved by the officer in command of the district, and the laws and regulations for the government of the army shall not be affected by this act, except in so far as they conflict with its provisions: *Provided*, That no sentence of death **\*184** under the provisions of this act shall be carried into effect without the approval of the President.'

The 5th section declares the qualification of voters in all elections, as well to frame the new constitution for each State, as in the elections to be held under the provisional government, until the new State constitution is ratified by Congress, and also fixes the qualifications of the delegates to frame the new constitution.

**\*\*2** The 6th section provides, 'That until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only, and in all

respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same; and in all elections to any office under such provisional governments all persons shall be entitled to vote, and none others, who are entitled to vote under the provisions of the 5th section of this act; and no person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the third article of said constitutional amendment.’

The duties devolved upon the commanding general by the supplementary act relate altogether to the registration of voters, and the elections to be held under the provisions of that act. And as to these duties, they are plainly enough expressed in the act, and it is not understood that any question, not heretofore considered in the opinion referred to, has arisen, or is likely to arise, in respect to them.

My attention, therefore, is directed to the powers and duties of the military commanders under the original act.

We see clearly enough that this act contemplates two distinct governments in each of these ten States: the one military, the other civil. The civil government is recognized as existing at the date of the act. The military government is created by the act.

Both are provisional, and both are to continue until the new State constitution is framed and the State is admitted \*185 to representation in Congress. When that event takes place, both these provisional governments are to cease. In contemplation of this act, this military authority and this civil authority are to be carried on together. The people in these States are made subject to both, and must obey both, in their respective jurisdictions.

There is, then, an imperative necessity to define as clearly as possible the line which separates the two jurisdictions, and the exact scope of the authority of each.

Now, as to the civil authority recognized by the act as the provisional civil government, it covered every department of civil jurisdiction in each of these States.

It had all the characteristics and powers of a State government—legislative, judicial, and executive—and was in the full and lawful exercise of all these powers, except only that it was not entitled to representation as a State of the Union.

This existing government is not set aside; it is recognized more than once by the act. It is not in any one of its departments, or as to any one of its functions, repealed or modified by this act, save only in the qualifications of voters, the qualifications of persons eligible to office, the manner of holding elections, and the mode of framing the constitution of the State. The act does not in any other respect change the provisional government, nor does the act authorize the military authority to change it.

\*\*3 The power of further changing it is reserved, not granted, and it is reserved to Congress, not delegated to the military commander.

Congress was not satisfied with the organic law or constitution under which this civil government was established. *That* constitution was to be changed in only one particular to make it acceptable to Congress, and that was in the matter of the elective franchise. The purpose, the sole object of this act, is to effect that change, and to effect it by the agency of the people of the State, or such of them as are made voters by means of elections provided for in the act, and in the meantime to preserve order and to \*186 punish offenders, if found necessary, by military commissions.

We are, therefore, not at a loss to know what powers were possessed by the existing civil authority.

The only question is upon the powers conferred on the military authority.

Whatever power is not given to the military remains with the civil government.

We see, first of all, that each of these States is 'made subject to the military authority of the United States'—not to the military authority altogether, but with this express limitation—'as hereinafter prescribed.'

We must, then, examine what is thereafter provided, to find the extent and nature of the power granted.

This, then, is what is granted to the military commander: The power or duty 'to protect all persons in their rights of person and property; to suppress insurrection, disorder, and violence, and punish, or cause to be punished, all disturbers of the public peace and criminals;' and he may do this by the agency of the criminal courts of the State, or, if necessary, he may have resort to military tribunals.

This comprises all the powers given to the military commander.

Here is a general clause, making it the duty of the military commander to give protection to all persons in their rights of person and property. Considered by itself, and without reference to the context and to other provisions of the act, it is liable, from its generality, to be misunderstood.

What sort of protection is here meant? What violations of the rights of person or of property are here intended? In what manner is this protection to be given? These questions arise at once.

It appears that some of the military commanders have understood this grant of power as all comprehensive, conferring on them the power to remove the executive and judicial officers of the State, and to appoint other officers in their places; to suspend the legislative power of the \*187 State; to take under their control, by officers appointed by themselves, the collection and disbursement of the revenues of the State; to prohibit the execution of the laws of the State by the agency of its appointed officers and agents; to change the existing laws in matters affecting purely civil and private rights; to suspend or enjoin the execution of the judgments and decrees of the established State courts; to interfere in the ordinary administration of justice in the State courts, by prescribing new qualifications for jurors, and to change, upon the ground of expediency, the existing relations of the parties to contracts, giving protection to one party by violating the rights of the other party.

\*\*4 I feel confident that these military officers, in all they have done, have supposed that they had full warrant for their action. Their education and training have not been of the kind to fit them for the delicate and difficult task of giving construction to such a statute as that now under consideration. They require instruction, and nearly all of them have asked for instruction, to solve their own doubts, and to furnish to them a safe ground for the performance of their duties.

There can be no doubt as to the rule of construction according to which we must interpret this grant of power. It is a grant of power to military authority, over civil rights and citizens, in time of peace. It is a new jurisdiction, never granted before, by which, in certain particulars and for certain purposes, the established principle that the military shall be subordinate to the civil authority is reversed.

The rule of construction to be applied to such a grant of power is thus stated in Dwarrris on Statutes, p. 652: 'A statute creating a new jurisdiction ought to be construed strictly.'

Guided by this rule, and in the light of other rules of construction familiar to every lawyer, especially of those which teach us that, in giving construction to single clauses, we must look to the context and to the whole \*188 law, that general clauses are to be controlled by particular clauses, and such construction is to be put on a special clause as to make it harmonize with the other parts of the statute so as to avoid repugnancy, I proceed to the construction of this part of the act.

To consider, then, in the first place, the terms of the grant. It is of a power to protect all persons in their rights of person and property. It is not a power to create new rights, but only to protect those which exist and are established by the laws under

which these people live. It is a power to preserve, not to abrogate; to sustain the existing frame of social order and civil rule, and not a power to introduce military rule in its place; in effect, it is police power; and the protection here intended is protection of persons and property against violence, unlawful force, and criminal infraction. It is given to meet the contingency recited in the preamble, of a want of 'adequate protection for life and property' and the necessity also recited, 'that peace and good order should be enforced.'

This construction is made more apparent when we look at the immediate context, and see in what mode and by what agency this protection is to be secured. This duty or power of protection is to be performed by the suppression of insurrection, disorder, and violence, and by the punishment, either by the agency of the State courts, or by military commissions, when necessary, of all disturbers of the public peace and criminals; and it is declared, that all interference, under color of State authority, with the exercise of this military authority, shall be null and void.

The next succeeding clause provides for a speedy trial of the offender, forbids the infliction of cruel and unusual punishment, and requires that sentences of these military courts, which involve the liberty or life of the accused, shall have the approval of the commanding general, and, as to a sentence of death, the approval of the President, before execution.

**\*\*5** All these special provisions have reference to the preservation **\*189** of order and protection against violence and crime. They touch no other department or function of the civil administration, save only its criminal jurisdiction, and even as to that the clear meaning of this act is, that it is not to be interfered with by the military authority, unless when a necessity for such interference may happen to arise.

I see no authority, nor any shadow of authority, for interference with any other courts, or any other jurisdiction, than criminal courts, in the exercise of criminal jurisdiction.

The existing civil authority, in all its other departments—legislative, executive, and judicial—is left untouched.

There is no provision, even under the plea of necessity, to establish, by military authority, courts or tribunals for the trial of civil cases, or for the protection of such civil rights of person or property as come within the cognizance of civil courts, as contradistinguished from criminal courts.

In point of fact, there was no foundation for such a grant of power; for the civil rights act, and the freedmen's bureau act, neither of which is superseded by this act, made ample provision for the protection of all merely civil rights, where the laws or courts of these States might fail to give full, impartial protection.

I find no authority anywhere in this act for the removal by the military commander of the proper officers of a State, either executive or judicial, or the appointment of persons in their places.

Nothing short of an express grant of power would justify the removal or the appointment of such an officer. There is no such grant expressed or even implied. On the contrary, the act clearly enough forbids it. The regular State officials, duly elected and qualified, are entitled to hold their offices. They, too, have rights which the military commander is bound to protect, not authorized to destroy.

We find in the concluding clause of the 6th section of the act that these officials are recognized, and express provision is made to perpetuate them. It is enacted that, 'in all elections to any office under such provisional governments, **\*190** all persons shall be entitled to vote, and none others, who are entitled to vote under the provisions of the 5th section of this act; and no person shall be eligible to any office under such provisional governments who would be disqualified from holding office under the provisions of this act.'

This provision not only recognizes all the officers of the provisional governments, but, in case of vacancies, very clearly points out how they are to be filled; and that happens to be in the usual way, by the people, and not by any other agency or any other power, either State or federal, civil or military.

I find it impossible, under the provisions of this act, to comprehend such an official as a governor of one of these States appointed to office by one of these military commanders.

**\*\*6** Certainly he is not the governor recognized by the laws of the State, elected by the people in the State, and clothed as such with the chief executive power. Nor is he appointed as a military governor for a State, which has no lawful governor, under the pressure of an existing necessity, to exercise powers at large.

The intention, no doubt, was to appoint him to fill a vacancy occasioned by a military order, and to put him in the place of the removed governor, to execute the functions of the office, as provided by law.

The law takes no cognizance of such an official, and he is clothed with no authority or color of authority.

What is true as to the governor is equally true as to all the other legislative, executive, and judicial officers of the State. If the military commander can oust one from his office, he can oust them all. If he can fill one vacancy, he can fill all vacancies, and thus usurp all civil jurisdiction into his own hands, or the hands of those who hold their appointments from him and subject to his power of removal, and thus frustrate the very right secured to the people by this act. Certainly this act is rigorous enough in the power which it gives. With all its severity, the **\*191** right of electing their own officers is still left with the people, and it must be preserved.

I must not be understood as fixing limits to the power of the military commander in case of an actual insurrection or riot. It may happen that an insurrection in one of these States may be so general and formidable as to require the temporary suspension of all civil government, and the establishment of martial law in its place. And the same thing may be true as to local disorder or riot, in reference to the civil government of the city or place where it breaks out. Whatever power is necessary to meet such emergencies the military commander may properly exercise.

I confine myself to the proper authority of the military commander where peace and order prevail. When peace and order do prevail, it is not allowable to displace the civil officers, and appoint others in their places, under any idea that the military commander can better perform his duties, and carry out the general purposes of the act by the agency of civil officers of his own choice rather than by the lawful incumbents. The act gives him no right to resort to such agency, but does give him the right to have 'a sufficient military force' to enable him 'to perform his duties and enforce his authority within the district to which he is assigned.'

In the suppression of insurrection and riot the military commander is wholly independent of civil authority.

So, too, in the trial and punishment of criminals and offenders, he may supersede the civil jurisdiction.

His power is to be exercised in the special emergencies, and the means are put into his hands by which it is to be exercised, that is to say, 'a sufficient military force to enable such officer to perform his duties and enforce his authority,' and military tribunals of his own appointment to try and punish offenders. These are strictly military powers, to be executed by military authority, not by the civil authority, or by civil officers appointed by him to perform ordinary civil duties.

**\*\*7 \*192** If these emergencies do not happen, if civil order is preserved, and criminals are duly prosecuted by the regular criminal courts, the military power, though present, must remain passive.

Its proper function is to preserve the peace, to act promptly when the peace is broken, and restore order.

When that is done, and the civil authority may again safely resume its functions, the military power again becomes passive, but on guard and watchful.

This, in my judgment, is the whole scope of the military power conferred by this act; and, in arriving at this construction of the act, I have not found it necessary to resort to the strict construction which is allowable.

What has been said indicates my opinion as to any supposed power of the military commander to change or modify the laws in force.

The military commander is made a conservator of the peace, not legislator. His duties are military duties, executive duties: not legislative duties. He has no authority to enact or declare a new code of laws for the people within his district, under any idea that he can make a better code than the people have made for themselves.

The public policy is not committed to his discretion. The Congress which passed this act undertook, in certain grave particulars, to change these laws; and, these changes being made, the Congress saw no further necessity of change, but were content to leave all the other laws in full force, but subject to this emphatic declaration: that, as to these laws, and such future changes as might be expedient, the question of expediency, and the power to alter, amend, or abolish, was reserved for 'the paramount authority of the United States, at any time, to abolish, modify, control, or supersede the same.' Where, then, does a military commander find *his* authority 'to abolish, modify, control, or supersede' any one of these laws?

The enumeration of the extraordinary powers exercised by the military commanders in some of the districts would extend this opinion to an unreasonable length.

**\*193** A few instances must suffice.

In one of these districts, the governor of a State has been deposed under a threat of military force, and another person, called a governor, has been appointed by the military commander to fill his place. Thus presenting the strange spectacle of an official intrusted with the chief power to execute the laws of the State, whose authority is not recognized by the laws he is called upon to execute.

In the same district, the judge of one of the criminal courts of the State has been summarily dealt with.

The act of Congress does give authority to the military commander, in cases of necessity, to transfer the jurisdiction of a criminal court to a military tribunal. That being the specific authority over the criminal courts given by the act, no other authority over them can be lawfully exercised by the military commander.

But, in this instance, the judge has, by military order, been ejected from his office, and a private citizen has been appointed judge in his place by military authority, and is now in the exercise of criminal jurisdiction 'over all crimes, misdemeanors, and offences' committed within the territorial jurisdiction of the court.

**\*\*8** This military appointee is certainly not authorized to try any one for any offence as a member of a military tribunal, and he has just as little authority to try and punish any offender as a judge of a criminal court of the State.

It happens that this private citizen, thus placed on the bench, is to sit as the sole judge in a criminal court whose jurisdiction extends to cases involving the life of the accused.

If he has any judicial power in any case, he has the same power to take cognizance of capital cases, and to sentence the accused to death, and order his execution. A strange spectacle, where the judge and the criminal may very well 'change places;' for if

the criminal has unlawfully taken life, so too does the judge. This is the inevitable result, for the only tribunal, the only judges, if they can be called judges, which a military commander \*194 can constitute and appoint under this act, to inflict the death penalty, is a military court composed of a board, and called in the act a 'military commission.'

I see no relief for the condemned against the sentence of this agent of the military commander. It is not the sort of court whose sentence of death must be first approved by the commander and finally by the President, for that is allowed only where the sentence is pronounced by a 'military commission.' Nor is it a sentence pronounced by the rightful court of a State, but by a court and by a judge not clothed with authority under the laws of the State, but constituted by the military authority. As the representative of this military authority, this act forbids interference, 'under color of State authority,' with the exercise of his functions.

In another one of these districts a military order commands the governor of the State to forbid the reassembling of the legislature, and thus suspends the proper legislative power of the State. In the same district an order has been issued 'to relieve the treasurer of the State from the duties, bonds, books, papers, &c., appertaining to his office,' and to put an 'assistant quartermaster of United States volunteers' in place of the removed treasurer; the duties of which quartermaster-treasurer are thus summed up: He is to make to the headquarters of the district 'the same reports and returns required from the treasurer, and a monthly statement of receipts and expenditures; he will pay all warrants for salaries which may be or become due, and legitimate expenditures for the support of the penitentiary, State asylum, and the support of the provisional State government; but no scrip or warrants for outstanding debts of other kind than those specified will be paid without special authority from these headquarters. He will deposit funds in the same manner as though they were those of the United States.'

In another of these districts a body of military edicts, issued in general and specials orders regularly numbered, and in occasional circulars, have been promulgated, which \*195 already begin to assume the dimensions of a code. These military orders modify the existing law in the remedies for the collection of debts, the enforcement of judgments and decrees for the payment of money, staying proceedings instituted, prohibiting in certain cases the right to bring suit, enjoining proceedings on execution for the term of twelve months, giving new liens in certain cases, establishing homestead exemptions, declaring what shall be a legal tender, abolishing in certain cases the remedy by foreign attachment, abolishing bail, 'as heretofore authorized,' in cases *ex contractu*, but not in 'other cases known as actions *ex delicto*,' and changing in several particulars the existing laws as to the punishment of crimes, and directing that the crimes referred to 'shall be punished by imprisonment at hard labor for a term not exceeding ten years nor less than two years, in the discretion of the court having jurisdiction thereof.' One of these general orders, being No. 10 of the series, contains no less than seventeen sections, embodying the various changes and modifications which have been recited.

\*\*9 The question at once arises in the mind of every lawyer, what power or discretion belongs to the court, having jurisdiction of any of these offences, to sentence a criminal to any other or different punishment than that provided by the law which vests him with jurisdiction.

The concluding paragraph of this order, No. 10, is in these words: 'Any law or ordinance heretofore in force in North Carolina or South Carolina, inconsistent with the provisions of this general order, are hereby suspended and declared inoperative.' Thus announcing, not only a power to suspend the laws, but to declare them generally inoperative, and assuming full powers of legislation by the military authority.

The ground upon which these extraordinary powers are based is thus set forth in military order, No. 1, issued in this district: 'The civil government now existing in North Carolina and South Carolina is provisional only, and in all respects subject to the paramount authority of the United \*196 States, at any time to abolish, modify, control, or supersede the same.' Thus far the provisions of the act of Congress are well recited. What follows is in these words: 'Local laws and municipal regulations, not inconsistent with the Constitution and laws of the United States, or the proclamations of the President, or with such regulations as are or may be prescribed in the orders of the commanding general, are hereby declared to be in force; and, in conformity



therewith, civil officers are hereby authorized to continue the exercise of their proper functions, and will be respected and obeyed by the inhabitants.’

This construction of his powers, under the act of Congress, places the military commander on the same footing as the Congress of the United States. It assumes that ‘the paramount authority of the United States at any time to abolish, modify, control, or supersede,’ is vested in him as fully as it is reserved to Congress. He deems himself a representative of that paramount authority. He puts himself upon an equality with the law-making power of the Union; the only paramount authority in our government, so far, at least, as the enactment of laws is concerned.

He places himself on higher ground than the President, who is simply an executive officer. He assumes, directly or indirectly, all the authority of the State, legislative, executive, and judicial, and in effect declares, ‘I am the State.’

I regret that I find it necessary to speak so plainly of this assumption of authority.

I repeat what I have heretofore said, that I do not doubt that all these orders have been issued under an honest belief that they were necessary or expedient, and fully warranted by the act of Congress.

There may be evils and mischiefs in the laws which these people have made for themselves, through their own legislative bodies, which require change; but none of these can be so intolerable as the evils and mischiefs which must ensue from the sort of remedy applied.

**\*\*10 \*197** One can plainly see what will be the inevitable confusion and disorder which such disturbances of the whole civil policy of the State must produce. If these military edicts are allowed to remain, even during the brief time in which this provisional military government may be in power, the seeds will be sown for such a future harvest of litigation as has never been inflicted upon any other people.

There is, in my opinion, an executive duty to be performed here which cannot safely be avoided or delayed.

For, notwithstanding the paramount authority assumed by these commanders, they are not, even as to their proper executive duties, in any sense, clothed with a paramount authority. They are, at least, subordinate executive officers. They are responsible to the President for the proper execution of their duties, and upon him rests the final responsibility. They are his selected agents. His duty is not all performed by selecting such agents as he deems competent, but the duty remains with him to see to it that they execute their duties faithfully and according to law.

It is true, that this act of Congress only refers to the President in the matter of selecting and appointing these commanders; and in the matter of their powers and duties under the law, the act speaks in terms directly to them; but this does not relieve them from their responsibility to the President, nor does it relieve him from the constitutional obligation imposed upon him to see that all ‘the laws are faithfully executed.’

It can scarcely be necessary to cite authority for so plain a proposition as this. Nevertheless, as we have a recent decision completely in point, I may as well refer to it.

Upon motion made by the State of Mississippi before the Supreme Court of the United States at its late term, for leave to file a bill against the President of the United States to enjoin him against executing the very acts of Congress now under consideration; the opinion of the court upon dismissing that motion, and it seems to have been unanimous, was delivered by the chief justice. I **\*198** make the following quotation from the opinion: ‘Very different is the duty of the President, in the exercise of the power to see that the laws are faithfully executed, and among those laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding



generals, and their duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.'

Certain questions have been propounded from one of these military districts touching the construction of the power of the military commander to constitute military tribunals for the trial of offenders, which I will next consider.

**\*\*11** Whilst the act does not in terms displace the regular criminal courts of the State, it does give the power to the military commander, when in his judgment a necessity arises, to take the administration of the criminal law into his own hands, and to try and punish offenders by means of military commissions.

In giving construction to this power, we must not forget the recent and authoritative exposition given by the Supreme Court of the United States as to the power of Congress to provide for military tribunals for the trial of citizens in time of peace, and to the emphatic declaration, as to which there was no dissent or difference of opinion among the judges, that such a power is not warranted by the constitution.

A single extract from the opinion of the minority, as delivered by the chief justice, will suffice: 'We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists; where peace exists, the laws of peace must prevail. What we do maintain is, that where the nation is involved in \*199 war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army, or against the public safety.'

Limiting myself here simply to the construction of this act of Congress, and to the question in what way it should be executed, I have no hesitation in saying, that nothing short of an absolute or controlling necessity would give any color of authority for arraigning a citizen before a military commission.

A person charged with crime in any of these military districts has rights to be protected, rights the most sacred and inviolable, and among these the right of trial by jury, according to the laws of the land. When a citizen is arraigned before a military commission on a criminal charge he is no longer under the protection of law, nor surrounded with those safeguards which are provided in the Constitution. This act, passed in a time of peace, when all the courts, State and federal, are in the undisturbed exercise of their jurisdiction, authorizes at the discretion of a military officer, the seizure, trial, and condemnation of the citizen. The accused may be sentenced to death, and the sentence may be executed without a judge. A sentence which forfeits all the property of the accused requires no approval. If it affects the liberty of the accused, it requires the approval of the commanding general; and if it affects his life, it requires the approval of the general and of the President. Military and executive authority rule throughout in the trial, the sentence, and the execution. No *habeas corpus* from any State court can be invoked; for this law declares, that 'all interference, under color of State authority, with the exercise of military authority under this act, shall be null and void.'

**\*\*12** I repeat it, that nothing short of an absolute necessity can give any color of authority to a military commander \*200 to call into exercise such a power. It is a power the exercise of which may involve him, and every one concerned, in the greatest responsibilities. The occasion for its exercise should be reported at once to the Executive, for such instructions as may be deemed necessary and proper.

Questions have arisen whether, under this power, these military commissions can take cognizance of offences committed before the passage of the act, and whether they can try and punish for acts not made crimes or offences by federal or State law.

I am clearly of opinion that they have no jurisdiction as to either. They can take cognizance of no offence that has not happened after the law took effect. Inasmuch as the tribunal to punish, and the measure or degree of punishment, are established by this act, we must construe it to be prospective, and not retroactive. Otherwise, it would take the character of an *ex post facto* law. Therefore, in the absence of any language which gives the act a retrospect, I do not hesitate to say it cannot apply to past offences.

There is no legislative power given under this military bill to establish a new criminal code. The authority given is to try and punish criminals and offenders, and this proceeds upon the idea that crimes and offences have been committed; but no person can be called a criminal or an offender for doing an act which, when done, was not prohibited by law.

But, as to the measure of punishment, I regret to be obliged to say that it is left altogether to the military authorities, with only this limitation: that the punishment to be inflicted shall not be cruel or unusual.

The military commission may try the accused, fix the measure of punishment, even to the penalty of death, and direct the execution of the sentence.

It is only when the sentence affects the 'life or liberty' of the person that it need be approved by the commanding general, and only in cases where it affects the life of the accused that it needs also the approval of the President.

**\*201** As to crimes or offences against the laws of the United States, the military authority can take no cognizance of them, nor in any way interfere with the regular administration of justice by the appropriate federal courts.

In the opinion heretofore given upon other questions arising under these laws, I gave at large, for your consideration, the grounds upon which my conclusions were arrived at, intending thereafter to state these conclusions in a concise and clear summary. I now proceed to execute that purpose, which is made especially necessary from the confusion and doubts which have arisen upon that opinion in the public mind, caused, in part, by the errors of the telegraph and the press in its publication, and in part by the inaptitude of the general reader to follow carefully the successive and dependent steps of a protracted legal opinion.

#### SUMMARY.

**\*\*13** Who are entitled to registration?

1. The oath prescribed in the supplemental act defines all the qualifications required, and every person who can take that oath is entitled to have his name entered upon the list of voters.

2. The board of registration have no authority to administer any other oath to the person applying for registration than this prescribed oath, nor to administer any oath to any other person, touching the qualifications of the applicant, or the falsity of the oath so taken by him. The act to guard against falsity in the oath provides that, if false, the person taking it shall be tried and punished for perjury.

No provision is made for challenging the qualifications of the applicant, or entering upon any trial or investigation of his qualifications, either by witnesses or any other form of proof.

3. *As to citizenship and residence.* The applicant for registration must be a citizen of the State and of the United **\*202** States, and must be a resident of a county included in the election district. He may be registered, if he has been such citizen for a period less than twelve months at the time he applies for registration, but he cannot vote at any election unless his citizenship has *then* extended to the full term of one year. As to such a person, the exact length of his citizenship should be noted opposite his name on the list, so that it may appear on the day of election, upon reference to the list, whether the full term has then been accomplished.

4. An unnaturalized person cannot take this oath, but an alien who has been naturalized can take it, and no other proof of naturalization can be required from him.

5. No one who is not twenty-one years of age at the time of registration can take the oath, for he must swear that he has then attained that age.

6. No one who has been disfranchised for participation in any rebellion against the United States, or for felony committed against the laws of any State, or of the United States, can safely take this oath.

The actual participation in a rebellion, or the actual commission of felony, does not amount to disfranchisement. The sort of disfranchisement here meant, is that which is declared by law, passed by competent authority, or which has been fixed upon the criminal by the sentence of the court which tried him for the crime.

No law of the United States has declared the penalty of disfranchisement for participation in rebellion alone. Nor is it known that any such law exists in either of these ten States, except perhaps Virginia, as to which State special instructions will be given.

7. *As to disfranchisement arising from having held office, followed by participation in rebellion.* This is the most important part of the oath, and requires strict attention to arrive at its meaning. I deem it proper to give the exact words. The applicant must swear or affirm as follows:

‘That I have never been a member of any State legislature, nor held any executive or judicial office in any \*203 State, and afterwards engaged in any insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof; that I have never taken an oath as a member of Congress of the United States, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof.’

\*\*14 Two elements must concur in order to disqualify a person under these clauses: *first*, the office and official oath to support the Constitution of the United States; *second*, engaging afterwards in rebellion. Both must exist to work disqualification, and must happen in the order of time mentioned.

A person who has held an office, and taken the oath to support the federal Constitution, and has not afterwards engaged in rebellion, is not disqualified.

So, too, a person who has engaged in rebellion, but has not theretofore held an office and taken that oath, is not disqualified.

8. *Officers of the United States.* As to these, the language is without limitation. The person who has at any time prior to the rebellion held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States, is subject to disqualification.

9. *Military officers* of any State, prior to the rebellion, are not subject to disqualification.

10. Municipal officers, that is to say, officers of incorporated cities, towns, and villages, such as mayors, aldermen, town-council, police, and other city or town officers, are not subject to disqualification.

11. Persons who have, prior to the rebellion, been members of Congress of the United States, or members of a State legislature, are subject to disqualification. But those who have been members of conventions framing or amending \*204 the constitution of a State, prior to the rebellion, are not subject to disqualification.

12. All the executive or judicial officers of any State, who took an oath to support the Constitution of the United States, are subject to disqualification, and in these I include county officers, as to whom I made a reservation in the opinion heretofore given. After full consideration, I have arrived at the conclusion that they are subject to disqualification, if they were required to take, as a part of their official oath, the oath to support the Constitution of the United States.

13. Persons who exercised mere agencies or employments under State authority are not disqualified, such as commissioners to lay out roads, commissioners of public works, visitors of State institutions, directors of State banks or other State institutions, examiners of banks, notaries public, commissioners to take acknowledgments of deeds, and lawyers.

*Engaging in rebellion.*

Having specified what offices held by any one prior to the rebellion come within the meaning of the law, it is necessary next to set forth what subsequent conduct fixes upon such person the offence of engaging in rebellion. I repeat, that two things must exist, as to any person, to disqualify him from voting: first, the office held prior to the rebellion; and, afterwards, participation in the rebellion.

14. An act to fix upon a person the offence of engaging in rebellion under this law must be an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose.

**\*\*15** A person forced into the rebel service by conscription, or under a paramount authority which he could not safely disobey, and who would not have entered such service if left to the free exercise of his own will, cannot be held to be disqualified from voting.

15. Mere acts of charity, where the intent is to relieve **\*205** the wants of the object of such charity, and not done in aid of the cause in which he may have been engaged, do not disqualify. But organized contributions of food and clothing, for the general relief of persons engaged in the rebellion, and not of a merely sanitary character, but contributed to enable them to perform their unlawful object, may be classed with acts which do disqualify.

Forced contributions to the rebel cause, in the form of taxes or military assessments, which a person may be compelled to pay or contribute, do not disqualify. But voluntary contributions to the rebel cause, even such indirect contributions as arise from the voluntary loan of money to rebel authorities, or purchase of bonds or securities created to afford the means of carrying on the rebellion, will work disqualification.

16. All those who, in legislative or other official capacity, were engaged in the furtherance of the common unlawful purpose, where the duties of the office necessarily had relation to the support of the rebellion, such as members of the rebel conventions, congress, and legislatures, diplomatic agents of the rebel confederacy, and other officials whose offices were created for the purpose of more effectually carrying on hostilities, or whose duties appertained to the support of the rebel cause, must be held to be disqualified.

But officers who, during the rebellion, discharged official duties not incident to war, but only such duties as belong to a state of peace, and were necessary to the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion or disqualified. Disloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, he must come under the disqualification.

17. *The duties of the board appointed to superintend the elections.* This board, having the custody of the list of registered voters in the district for which it is constituted, must see that the name of the person offering to vote is found **\*206** upon the registration list, and if such proves to be the fact, it is the duty of the board to receive his vote. They cannot receive the vote of any person whose name is not upon the list, though he may be ready to take the registration oath, and although he may satisfy them that he was unable to have his name registered at the proper time, in consequence of absence, sickness, or other cause. The board cannot enter into any inquiry as to the qualifications of any person whose name is not on the list, or as to the qualifications of any person whose name is on the list.

**\*\*16** 18. *The mode of voting is provided in the act to be by ballot.* The board will keep a record and poll-book of the election, showing the votes, list of voters, and the persons elected by a plurality of the votes cast at the election, and make returns of these to the commanding general of the district.

19. The board appointed for registration and for superintending the elections must take the oath prescribed by the act of Congress entitled 'An act to prescribe an oath of office,' approved July 2, 1862.

I am sir, very respectfully, Your obedient servant,

HENRY STANBERY.

12 U.S. Op. Atty. Gen. 182 (U.S.A.G.), 1867 WL 2127

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

DATE FILED: November 28, 2023 12:03 PM

3 ----- X  
4 JAMES BLASSINGAME :  
AND SIDNEY HEMBY, :  
5 Appellees, :  
6 v. : No. 22-5069  
7 DONALD J. TRUMP, :  
8 Appellant. :  
9 ----- X

10 Wednesday, December 7, 2022

11 Washington, D.C.

12 The above-entitled matter came on for oral  
13 argument pursuant to notice.

14 BEFORE:

15 CHIEF JUDGE SRINIVASAN, CIRCUIT JUDGE KATSAS, AND  
16 SENIOR CIRCUIT JUDGE ROGERS

17 APPEARANCES:

18 ON BEHALF OF THE APPELLANT:

19 JESSE R. BINNALL, ESQ.

20 ON BEHALF OF THE APPELLEES:

21 JOSEPH M. SELLERS, ESQ.

C O N T E N T S

ORAL ARGUMENT OF:

PAGE

Jesse R. Binnall, Esq.  
On Behalf of the Appellant

3; 80

Joseph M. Sellers, Esq.  
On Behalf of the Appellees

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P R O C E E D I N G S

THE CLERK: Case number 22-5069, et al. James Blassingame and Sidney Hemby v. Donald J. Trump, Appellant. Mr. Binnall for the Appellant; Mr. Sellers for the Appellees.

JUDGE SRINIVASAN: Good morning, counsel. Mr. Binnall, please proceed when you're ready.

ORAL ARGUMENT OF JESSE R. BINNALL, ESQ.

ON BEHALF OF THE APPELLANT

MR. BINNALL: Good morning, and may it please the Court, Jesse Binnall on behalf of Donald J. Trump.

I will endeavor to save two minutes for rebuttal.

The District Court acknowledged that when President Trump made his address on the Ellipse on January 6th, 2021, he was speaking on matters of public concern. It also held that speech is unquestionably a critical function of the presidency. It even found that a first-term president is in a sense always a candidate for office.

Nevertheless, the District Court incorrectly held that the speech and other similar presidential communications were not protected by absolute immunity, because the content of the speech had an electoral purpose rather than a governance purpose.

This purpose-driven analysis that was favored by the District Court is effectively a rebranding of the



1 motive-driven analysis that was considered and soundly  
2 rejected by the Supreme Court in Nixon v. Fitzgerald.

3 JUDGE KATSAS: I'm not sure that's fair. The  
4 District Court just looked at the words on their face,  
5 looked at the speech and said is this political or is this  
6 governmental, without getting into what was in the  
7 president's mind. Why is that, I mean it might be right or  
8 wrong. It just doesn't seem to me motive-based.

9 MR. BINNALL: Your Honor, the reason that it is is  
10 because when you look at purpose and when you look at  
11 motive, those are words that are used interchangeably in the  
12 Fitzgerald opinion, effectively interchangeably in the  
13 Fitzgerald opinion, and goes to what the intent of the  
14 president is for a particular communication.

15 And when you start to do that sort of functional  
16 surgery, when you get so far down in deciding, well, what  
17 really is it that the president is trying to do here, at  
18 that point you start to blend the lines between what is  
19 something that is clearly within the realm of the presidency  
20 under Article II, and what it's appropriate for Article III  
21 to look at.

22 And that's why the Supreme Court was so clear in  
23 the case of United States v., I'm sorry, Nixon v.  
24 Fitzgerald, that you have to have very bright lines, because  
25 as soon as you start saying, well, the goal here really

1 wasn't governance per se, but it was something that was  
2 political per se. It was to help him get reelection per se.  
3 As the District Court even acknowledged in this case, with  
4 every first-term president being a candidate for reelection,  
5 it will become the exception that swallows the rule.

6 JUDGE SRINIVASAN: So I'm not sure line-drawing  
7 cuts decidedly in favor of one side or the other. I think  
8 everybody has some line-drawing issues here, to some extent.  
9 And let me just explore that a little bit, if I could.

10 MR. BINNALL: Yes.

11 JUDGE SRINIVASAN: Suppose you have a circumstance  
12 in which a president has a private meeting with supporters  
13 and urges them, and this is in advance of an election, and  
14 urges them to go to the polls in unfavorable areas to  
15 intimidate voters and prevent them from exercising the  
16 franchise. And then there's a civil action that's filed by  
17 someone who's been intimidated and deterred from voting  
18 under 1985, which I think encompasses this kind of conduct,  
19 and the president asserts official immunity.

20 MR. BINNALL: And by far that would be a horrible  
21 situation that we would hope would never happen. But in a  
22 case like that, and what the Fitzgerald court was very clear  
23 on, it's not that there's not a remedy. The question here  
24 is only on civil liability versus accountability. There  
25 still is the opportunity for accountability.

1 JUDGE SRINIVASAN: So your answer is that in that  
2 situation there'd be official immunity.

3 MR. BINNALL: There would be official immunity,  
4 but --

5 JUDGE SRINIVASAN: So even if it's private, it's a  
6 totally private conversation, and it's a private  
7 conversation between a president and supporters, and he  
8 urges them in private, what I'm worried about is winning  
9 reelection, all I care about is winning reelection. Doesn't  
10 have anything to do with any policy agenda. It just has to  
11 do with I want to be president, and I want you to help me  
12 make that happen by going to the polls in areas in which  
13 voters are likely to vote against me, and prevent them from  
14 voting.

15 MR. BINNALL: A truly horrible situation, if that  
16 were to happen. I want to make that clear. But in that  
17 case the question is not necessarily whether it is political  
18 or electoral, but whether it is still something of public  
19 concern, or as the Clinton court said, only of private  
20 concern. And in that case --

21 JUDGE SRINIVASAN: Well, I think what the Nixon  
22 court said was it's within the outer perimeter of official  
23 responsibility, and that's the language that we're all --

24 MR. BINNALL: Yes.

25 JUDGE SRINIVASAN: -- revolving our questions

1 around. And so you think it's within official  
2 responsibility to urge supporters to prevent people from  
3 voting.

4 MR. BINNALL: I think that's a disgusting goal,  
5 but I think that, I think that's well within the realm of  
6 what the Fitzgerald dissenters used in their parades of  
7 horrors about how bad this could happen, what could happen  
8 if this goes wrong, and what the Fitzgerald court said. We  
9 understand that sometimes, even in the most extreme of  
10 circumstances, there are rights without remedies. And we do  
11 that with immunity every day, in this courtroom.

12 JUDGE SRINIVASAN: What is the official  
13 responsibility that's being (indiscernible) there?

14 MR. BINNALL: In this case?

15 JUDGE SRINIVASAN: In the hypothetical.

16 MR. BINNALL: Well, oh, I'm sorry, in the  
17 hypothetical --

18 JUDGE SRINIVASAN: Yes.

19 MR. BINNALL: -- it's of course in something as  
20 bad as that, you don't want to say that there was something  
21 clearly on point that the president could point to. But a  
22 president taking actions regarding elections, and I don't  
23 think you want to filter down any more than that, because  
24 once you filter down any more than that, then you get into  
25 this type of judicial oversight of the executive that was

1 not envisioned by the founders. So the executive being part  
2 of elections, of you know, the bully pulpit of the  
3 presidency, even if something is only privately said to his  
4 supporters to advance that. And I agree, Your Honor, that  
5 is a close call.

6 JUDGE SRINIVASAN: Well, but what is, but the only  
7 thing that's being advanced in that hypothetical is  
8 reelection. That's it. And what's the official  
9 responsibility?

10 MR. BINNALL: You cannot separate governance from  
11 election. If the president wants reelection, it's so that  
12 the president can continue to govern. And so because of  
13 that, that's I think as far down as you can go to see that,  
14 if this is within the realm of the presidency, as bad as  
15 that particular act might be.

16 And I want to make it clear, that's something  
17 where you would have an extremely strong case for  
18 impeachment in the House, conviction in the Senate, and then  
19 you have the impeachment judgment clause. The beauty of  
20 this is that the founders gave us this system. They said  
21 that in certain circumstances they know that something could  
22 go horribly wrong and that a president needs to be taken out  
23 of office, and if he is, at that point he can be prosecuted  
24 for it. And something like that would --

25 JUDGE SRINIVASAN: But impeachment isn't always

1 the answer, right, because I mean even you acknowledge in  
2 your briefs there are certain things that a president does  
3 while in office that wouldn't be subject to immunity. You  
4 have some, I think sexual assault was one of them that comes  
5 up in the --

6 MR. BINNALL: I think the Clinton case was clear  
7 on that.

8 JUDGE SRINIVASAN: And so you could have an  
9 impeachment proceeding based on that, if it's conduct while  
10 in office --

11 MR. BINNALL: That's right.

12 JUDGE SRINIVASAN: -- and if impeachment, and  
13 conviction didn't happen after impeachment, you'd still  
14 allow for a civil action. In other words it wouldn't matter  
15 that there's the impeachment remedy and it turns out that  
16 impeachment was unsuccessful.

17 MR. BINNALL: No, it's, I would say it's more like  
18 concentric circles on something like that, where of course  
19 you can have impeachment based on private conduct, not just  
20 official conduct, and you can certainly have a lawsuit based  
21 on, as the Clinton court said, purely personal conduct,  
22 where you have something that's sexual assault, something  
23 purely of a prurient interest. And especially of course  
24 with the Clinton case it's also very clear this is conduct  
25 that happened before the presidency, not during the

1 presidency. And I think it's particularly important --

2 JUDGE SRINIVASAN: No, I was hypothesizing. I  
3 didn't understand your brief when you talked about sexual  
4 assault to be limiting it to sexual assault before the  
5 presidency. I assume you cover sexual assault --

6 MR. BINNALL: Yes.

7 JUDGE SRINIVASAN: -- even if it's  
8 (indiscernible).

9 MR. BINNALL: And yes, it's something like that is  
10 purely of a prurient interest. So for the sexual assault,  
11 if it was, you know, someone, if it was a president talking  
12 to his stockbroker about his individual stocks, for  
13 instance, something that was only of his financial interest  
14 himself, not worried about the broader economy but only the  
15 financial interest of himself, that would be another example  
16 of something that is, as the Clinton court put, purely  
17 personal. And so if you have something that's purely  
18 personal, that's different.

19 JUDGE SRINIVASAN: Even if it's a speech. So on  
20 the purely personal one that you just highlighted, which is  
21 personal financial interest, if the president gives public  
22 remarks that say buy my family's product, buy my son's  
23 product instead of the competitor product, because the CEO  
24 of the competitor's company is a, name your immoral conduct  
25 that's going to dissuade somebody from purchasing it, and

1 the only thing that's going on is personal financial  
2 interest, even if it's in a speech, you think that would not  
3 be immune.

4 MR. BINNALL: That hypothetical is I think a much  
5 closer case, because it could very well be that, you know,  
6 buy my product because the other side is bad could very well  
7 be a public concern. But if it was buy my product because I  
8 want more money in my account, and it was really limited to  
9 that, if it was that narrow, then yes.

10 JUDGE SRINIVASAN: And how do you know that? So  
11 don't you have to mind motives to some extent, as you  
12 started out saying, to decide when the president says buy my  
13 son's product, and I really want you to buy my son's  
14 product, and you know, part of the reason you should buy my  
15 son's product is because the person who sells the other  
16 product is a philanderer. It doesn't have anything to do  
17 with --

18 MR. BINNALL: A much, much closer case in  
19 something like that, and you know, the other person being a  
20 philanderer I think probably takes it to the point where it  
21 could very well be something that's a public concern,  
22 because it would have to do with society's mores rather than  
23 just private concern.

24 But that is a much, much closer case, and it is  
25 clear that in order to decide if it's something purely



1 personal, in the words of the Clinton court, you'd have to  
2 look at the act to decide that. But what you can't do is  
3 dive so far down that you run directly afoul of what the  
4 Fitzgerald court said.

5           And it's I think noteworthy that in this case the  
6 District Court claims to be looking primarily at the Clinton  
7 case, but really if you look at it, it's following, it's  
8 paralleling the objections of the dissenters in Fitzgerald.  
9 And so that really is the difference there, is are we taking  
10 and are we looking at a communication or a presidential act  
11 so granularly that if you get far enough down into the weeds  
12 you can certainly find an objection about, well, this is  
13 really personal, it's not presidential.

14           But once you do that, you start this Article III  
15 oversight of the executive that is directly opposite of what  
16 the Fitzgerald court was looking at.

17           JUDGE KATSAS: When the president gets involved in  
18 electoral counting, what enumerated power of Article II is  
19 he acting under?

20           MR. BINNALL: Your Honor, while it's very possible  
21 that when the president is campaigning he might be  
22 executing --

23           JUDGE KATSAS: Just focus on electoral counting.

24           MR. BINNALL: I'm sorry --

25           JUDGE KATSAS: On counting --

1 MR. BINNALL: Oh electoral votes.

2 JUDGE KATSAS: -- electoral votes. Because  
3 normally --

4 MR. BINNALL: Yes.

5 JUDGE KATSAS: -- normally, you know, the  
6 president has a take care power which encompasses all  
7 federal statutes. He is a lawmaker to the extent he can  
8 sign or veto bills, so if he's talking about things that  
9 could be the subject of a federal statute, but that's sort  
10 of easy to see the speech about the matter is sort of  
11 necessary and proper, or closely connected to those powers.

12 But electoral counting seems different, because  
13 the Constitution and statutes are very clear in excluding  
14 the president. So what power is he acting under?

15 MR. BINNALL: And the words here are important,  
16 because the Fitzgerald court doesn't use the word power or  
17 duty necessarily --

18 JUDGE KATSAS: It uses the word function.

19 MR. BINNALL: It uses the word function, so it's  
20 something that's not necessarily something that comes  
21 directly from a statute or the Constitution, but it does  
22 fall within the president's (indiscernible).

23 JUDGE KATSAS: So I mean is that a vehicle for  
24 creating an unenumerated power in the president?

25 MR. BINNALL: No, it's not something that creates

1 unenumerated powers. What it does do is --

2 JUDGE KATSAS: So then which power is he acting  
3 under?

4 MR. BINNALL: It's something that, part of the  
5 historical aspect of the presidency that's been long  
6 recognized is the bully pulpit, is the president to speak on  
7 things that are not necessarily within his special  
8 constitutional Article II powers.

9 So for instance, it is very, very normal for  
10 presidents to comment on decisions of courts now. It has  
11 happened many times this year alone. It's very normal for a  
12 president to comment on any number of things that the  
13 president was specifically excluded under, from, under the  
14 Constitution, you know, a veto override a president would  
15 still speak on, even though he has no part in a veto  
16 override.

17 There's any number of things that it is normal and  
18 customary for a president to speak about, using the bully  
19 pulpit, using those matters of public concern. And in these  
20 times it's especially important that we protect the ability  
21 of the president to act, in the words of the Nixon court,  
22 with the maximum ability to deal fearlessly and impartially  
23 with the duties of his office.

24 And so that goes, you know, just beyond, and the  
25 Fitzgerald court talks about you can't draw lines that are

1 so fine that it ignores the history of the presidency and  
2 what the president does.

3 JUDGE ROGERS: Well, even though you haven't cited  
4 a Supreme Court decision that quite goes as far as your last  
5 proposition, you are asking this Court to adopt that  
6 standard? In other words, you resist any effort to drill  
7 down, in your words. Yet what I hear you saying, and I  
8 thought you were arguing this in your brief as well, that at  
9 least as to the bully pulpit, because that's just  
10 traditional, a part of a president's function, whether he is  
11 commenting on the actions of another branch or not, that the  
12 Court has no role to play here.

13 MR. BINNALL: Your Honor, if it's something, I  
14 would say that if it is something on public concern, that's  
15 right. At that point the remedy is different than a damages  
16 action on the civil side of the court. That side, then we  
17 have to follow the other remedies that are available,  
18 something that the Fitzgerald court was very, very clear  
19 about. And the Fitzgerald court I think goes into some  
20 detail about the 75,000 other, I mean at that time, it's  
21 probably more now, 75,000 other people in the country that  
22 have protections of absolute immunity, and that doesn't mean  
23 that there aren't very worthy plaintiffs that are denied a  
24 remedy because of that.

25 Now if you look at the remedy --

1           JUDGE ROGERS: That's really your point  
2 (indiscernible) historically separation of powers, the  
3 founders made certain choices. And to the extent those  
4 choices were, what I'll say rational decisions based on  
5 their experience in dealing with the king, that there may be  
6 gaps in our system such that for example the president may  
7 have no role in ensuring the electoral integrity of the  
8 process for electing a president.

9           But nevertheless, that is within the outer limits.  
10 And as I hear you, and I thought this was true in your  
11 brief, you really resisted any definition of limits. And I  
12 know the Supreme Court has spoken in terms of, well, when  
13 you can't cite an enumerated power or authority, then you  
14 can of course rely on history. But the Court there seems to  
15 be focusing on, you know, 200 years of precedent, for  
16 example, in subpoenas of presidents. So I just wonder how  
17 you would have the Court write the standard.

18           MR. BINNALL: Thank you, Judge Rogers. And it's  
19 of course important to have standards like that, and the  
20 standard that the Court should adopt is very similar to what  
21 was already done with Fitzgerald, in that you're limited to  
22 only seeing whether something is either within a statutory  
23 framework for the presidency, constitutional framework of  
24 the presidency, or historical framework of the presidency.

25           And if it falls within that, that is the end of

1 inquiry for absolute immunity purposes, especially for the  
2 presidency where there's that, it's perhaps the most  
3 important absolute immunity of numerous in our system,  
4 because it's so inherent in the separation of powers.

5           And so at that point, once you decide it's on  
6 issues of public concern, there still is an opportunity for  
7 accountability. It's just not accountability through a  
8 civil damages lawsuit.

9           JUDGE KATSAS: Suppose I agree with you on speech  
10 of matters of public concern, and I also agree with you that  
11 it is too fraught to, as a general matter, to try to  
12 distinguish political speech from official speech as to the  
13 president.

14           What makes this a hard case for me, putting all of  
15 that aside, is the at least colorable case of incitement.  
16 And what is the functional justification or historical  
17 pedigree for extending an absolute immunity, in the actual  
18 case or a hypothetical case, to a president who just incites  
19 lawless action, riots in the streets and so.

20           MR. BINNALL: And Judge Katsas, that's exactly the  
21 issue that I think the Fitzgerald court was dealing with  
22 when they looked at the arguments about what is the point of  
23 allowing a president to do something that is directly  
24 unlawful in a personnel --

25           JUDGE KATSAS: No, it's very different.

1 Fitzgerald was about a clearly official act within the  
2 president's power, that might or might not be unlawful,  
3 depending on the president's motive, right, it's a  
4 retaliation case and the Court says that's just too  
5 intrusive to try to police that line. This seems to me  
6 different.

7 I take the hypothetical case. The president gets  
8 out the microphone and says this election was stolen, they  
9 are not going to do anything. You go burn Congress down.  
10 Hypothetical, but that's --

11 MR. BINNALL: Of course. Not what's said in the  
12 speech, but --

13 JUDGE KATSAS: to extend --

14 MR. BINNALL: -- in a case like that --

15 JUDGE KATSAS: -- extend immunity, absolute  
16 immunity for that?

17 MR. BINNALL: Only in regards to civil liability.

18 And let's look at something that's very, very  
19 horrible, and that is a prosecutor purposely taking and  
20 manufacturing evidence to put an innocent defendant behind  
21 bars, something that is absolutely horrible, and we still  
22 say you can't sue that prosecutor. It doesn't mean that  
23 that prosecutor is free from accountability. It just means  
24 that we say that that defendant cannot, the criminal  
25 defendant cannot be a civil plaintiff against that

1 prosecutor, so --

2 JUDGE KATSAS: Because we sort of expect that if  
3 we allow claims like that, they'll happen all the time.  
4 They might turn on motives. Just the burden of, the burden  
5 on the system will be too great, so we just allow that wrong  
6 to go uncorrected through civil remedies. This just seems,  
7 I mean how many cases will there be with a colorable claim  
8 of incitement against the president?

9 MR. BINNALL: There might be --

10 JUDGE KATSAS: And what's the harm of trying to  
11 police, you know, is this just above the Brandenburg line or  
12 just below the Brandenburg line? It seems like that is not  
13 going to hamstring the president in his day-to-day job.

14 MR. BINNALL: I believe it is going to hamstring  
15 the president in his day-to-day job and here's why, is  
16 because once you start to draw that line and you start to do  
17 a type of, Brandenburg-type first amendment analysis of  
18 incitement in the presidency, at that point you now have  
19 judges that are acting as umpires on what crosses that line  
20 and what doesn't, in such a way that presidents will have to  
21 worry about giving speeches and everything, giving  
22 impassioned speeches, as every president has.

23 And highly controversial presidents, highly  
24 controversial speeches by presidents, which have happened  
25 before President Trump and have happened after President



1 Trump, and have to worry about what judge is this going to  
2 land in front of, what court is this going to land in front  
3 of, in such a way that I might have to go through the full  
4 aspect of litigation, which is exactly what immunity is  
5 supposed to protect against.

6           And that line-drawing here, if you do, runs  
7 directly afoul, directly, of what the Fitzgerald court was  
8 concerned about, where they knew that things would happen  
9 that would be controversial, and they knew that the founders  
10 gave us an option for that. They knew that there was a way  
11 for dealing with that. It just wasn't through civil  
12 damages.

13           JUDGE SRINIVASAN: Make sure --

14           JUDGE KATSAS: I'm fine.

15           JUDGE SRINIVASAN: -- the other line of  
16 questioning -- okay.

17           Can I follow up a little bit on what I thought was  
18 the main argument you were putting forward in your briefs,  
19 which is about the bully pulpit and speechmaking?

20           But what I hear from you this morning is not  
21 necessarily about the bully pulpit and speechmaking, because  
22 it seems like your argument applies to purely private  
23 interactions. And so I don't know what work the  
24 speechmaking is doing. It seems like the line you're  
25 drawing now is purely personal, versus matter of public

1 concern, regardless of whether it's in a speech or in  
2 private.

3           Am I missing something? Because suppose you have  
4 the personal product, promoting a personal product. Even in  
5 a speech, your point is that if it's just for driving one's  
6 personal wealth, that's purely personal. And the fact that  
7 it's, it's the bully pulpit, the president uses the bully  
8 pulpit to say buy this line of merchandise, it's going to be  
9 great for me and my family. But I'm standing on the bully  
10 pulpit, telling you this is the best stuff you've ever seen.  
11 Buy this.

12           But you think that because it's purely personal,  
13 the bully pulpit doesn't matter, that really the dividing  
14 line is between purely personal and something that's beyond  
15 that so as to bring it within official responsibility.

16           MR. BINNALL: I think we come back to the finer,  
17 lines finer than history would allow there, Judge  
18 Srinivasan, where the bully pulpit is incredibly important  
19 to this analysis, but the bully pulpit is something going  
20 all the way back, as far as what I've been able to look at  
21 and find, and I've looked at a great number of speeches at  
22 this point, is on these matters of public concern when  
23 you're speaking as the president, and that's the line that I  
24 think is particularly important to draw.

25           I don't think the Court, I think it is difficult

1 on any speech a president gives to decide that it's outside  
2 the bully pulpit of the presidency. And you know, certainly  
3 the bully pulpit is within the outer perimeters of the  
4 presidency. But I'm just mindful, of course --

5 JUDGE SRINIVASAN: But not in the matter of what  
6 it's about, because it's not, you don't have a bully pulpit  
7 uber alles rule because even if it's the bully pulpit, if  
8 it's the bully pulpit about something that's personal, you  
9 think no immunity.

10 MR. BINNALL: I'd say a bully pulpit on things  
11 that are personal only --

12 JUDGE SRINIVASAN: Right.

13 MR. BINNALL: -- is not historically, is clearly  
14 historically is part of the presidency. I think that is,  
15 would be a very fact-intensive inquiry. I think that's very  
16 different than this case. I think that is something that is  
17 a much closer call, but I would say that because --

18 JUDGE SRINIVASAN: Close enough, a closer call,  
19 yes, but close enough that the lines have to be drawn so  
20 that even if it's a bully pulpit and it's purely personal,  
21 however you define the category, so it's really, really  
22 personal not just kind of personal. I think I understand  
23 where you're going with this.

24 But so long as it's really, really personal, even  
25 if it's the bully pulpit, no immunity. That's the way you

1 look at it.

2 MR. BINNALL: Sure, and I think the words used in  
3 Clinton are right, purely.

4 JUDGE SRINIVASAN: Purely.

5 MR. BINNALL: Purely personal. If something's  
6 purely personal, the Supreme Court in Clinton says that  
7 that's not due immunity. But that's very different than  
8 something --

9 JUDGE SRINIVASAN: If you have a presidential  
10 candidate who then says, an incumbent who's running for  
11 reelection, who says I want to be reelected, and the reason  
12 I want to be reelected is because it's really good for me  
13 personally. It's going to, I mean my products are going to  
14 go through the roof if I get reelected, that's what I'm  
15 worried about.

16 MR. BINNALL: Admittedly a much different case,  
17 and admittedly a much closer call --

18 JUDGE SRINIVASAN: Yes --

19 MR. BINNALL: -- and private discussions are  
20 certainly a closer call, but private discussions are also  
21 just such an inherent part of the presidency. Why we have  
22 executive privilege, of course, is because private  
23 communications are also a very important part of the  
24 presidency. And so the question then becomes is this  
25 something that is within the outer perimeter, and part of

1 the outer perimeter is speaking on matters of public  
2 concern.

3           So if it's something where it's close, it's even  
4 close, and this is isn't close. This is speaking about, you  
5 know, this is a speech about an election that is clearly a  
6 political concern. This is dead center.

7           But the exception --

8           JUDGE ROGERS: As a follow up. Go ahead. Finish  
9 your (indiscernible).

10           MR. BINNALL: Thank you. Thank you, Judge Rogers.

11           But the analysis that you have is admittedly  
12 closer, because it appears to be, you know, purely personal  
13 at that point, because it's only a pecuniary interest.

14           And then so you look at something that is, by  
15 words alone, only a pecuniary interest, just like in the  
16 Clinton case it's purely a sexual interest, then that makes  
17 it that very, very close call. But that's not where we are  
18 here.

19           JUDGE ROGERS: So let me ask, follow up on a  
20 couple of questions my colleague asked, namely had the  
21 president said, as I think Judge Katsas had a hypothetical,  
22 the election was stolen and I want you, my supporters, to go  
23 to the Capitol and burn it down, or words to that effect, I  
24 want you to personally attack members of Congress, I want  
25 you to interrupt the proceedings.

1           And what I'm trying to understand in your argument  
2 is where hypothetically the president is undermining by his  
3 words the system that the founders established, and arguably  
4 crossing the line to not only, maybe not specifically  
5 articulating burn the Capitol and attack members of  
6 Congress, nevertheless that was the reasonable import of his  
7 remarks, as the District Court found.

8           And to the extent neither Nixon nor Clinton  
9 involved this type of situation where, to put it bluntly,  
10 even though the president may speak about destroying the  
11 constitutional system, and doing so by crippling another  
12 branch of government, that's all within the outer limits of  
13 the bully pulpit, which at least heretofore I hadn't  
14 understood to stretch so far that it could be that type of  
15 remark.

16           MR. BINNALL: And Judge Roberts --

17           JUDGE ROGERS: Rogers.

18           MR. BINNALL: -- the hypothetical you use of  
19 course is different from encouraging your supporters to  
20 peacefully and patriotically make their voices heard.

21           But I understand your concern in your  
22 hypothetical, and what I would again point you to is the  
23 Fitzgerald opinion, where they say presidential matters will  
24 arouse the most intense feelings. So this is not something  
25 that was unheard of to them.

1           In a hypothetical like you just gave, you're  
2 looking at a much, at a very, very clear example when  
3 impeachment could be used, you know, go burn down the  
4 Capitol. Impeachment could be used. Conviction could be  
5 used. And very possibly at that point there could be,  
6 through the impeachment judgment clause, further  
7 proceedings --

8           JUDGE ROGERS: What I think you're trying to  
9 explore is you're seeking absolute immunity, despite the  
10 nature of the remarks, and that impeachment is the only  
11 remedy, isn't that correct?

12           MR. BINNALL: It's correct, but that's what the  
13 Fitzgerald court said that the remedy is. And so it's not  
14 what I think is appropriate or what's not, it's that this  
15 debate has already happened and it was decided by the  
16 Fitzgerald court.

17           JUDGE ROGERS: What I'm trying to get is that we  
18 may not have 200 years of precedent, all right, that the  
19 Court looked at in advance, for example. But there's always  
20 a first case, and certainly the District Court and this  
21 Court is not required to ignore the obvious, unless there  
22 would be absolute immunity. And I think your argument is  
23 basically it doesn't matter what the president says. He may  
24 arouse feelings, he may arouse feelings even where he knows  
25 people have come armed with military weapons, and any

1 candidate knows there are fringe people supporting them, and  
2 they have to be careful.

3           But nevertheless the complaint cites a course of  
4 conduct by the president, over months. And is there no role  
5 at that point where, as the District Court found, and these  
6 are not the District Court's words, but the president is  
7 seeking to destroy our constitutional system?

8           MR. BINNALL: In the facts of this case the answer  
9 is there is not a place in civil litigation to review those  
10 acts of the president. Any acts, no matter how --

11           JUDGE ROGERS: But there are limits, that's my  
12 point under your argument, though you couch some of your  
13 answers as well, we don't need to drill down any further.  
14 As a practical matter, regardless of what the president  
15 says, you're saying he's entitled to absolute immunity, and  
16 the only remedy under the Constitution is impeachment. And  
17 I'm just --

18           MR. BINNALL: And that's what --

19           JUDGE ROGERS: -- trying to get you to deal with  
20 at least, I don't read the opinions of the Supreme Court  
21 (indiscernible) although I understand the references to  
22 history. I understand the references to precedence. But  
23 there always has to be a first case, all right? And maybe  
24 it's not this case, and maybe it'll have to wait for the  
25 Supreme Court to identify that first case.



1           But isn't that sort of the factual situation  
2 that's before this Court?

3           MR. BINNALL: Your Honor, the issue with the first  
4 case is that it will almost certainly open the flood doors  
5 to the 20th case and the 50th case. And so that is why we  
6 have to be, that's why the Fitzgerald court was so careful  
7 to close those doors on issues just like this.

8           And what the Court is wrestling here is certainly  
9 understandable, but it's the same exact thing that the  
10 Fitzgerald court wrestled with 40 years ago when it made a  
11 decision on that. And if the argument is that the  
12 Fitzgerald court was just wrong, then that's a question for  
13 the Supreme Court, not for this Court, because these are  
14 questions, as clear as Your Honor has been on the  
15 difficulties of presidential actions that arouse those  
16 intense feelings, the Supreme Court has been very clear that  
17 that's not a position for courts, especially in civil  
18 litigation.

19           JUDGE SRINIVASAN: I understand -- no, go ahead,  
20 please.

21           JUDGE KATSAS: You've said civil liability clearly  
22 off the table, impeachment clearly on the table. Do you  
23 have a position on criminal liability?

24           MR. BINNALL: That's a very different case, but I  
25 think that I don't have, necessarily have a position on

1 that, because the founders did. And I think other courts  
2 have spoken more at length about it.

3 JUDGE KATSAS: I mean the attractiveness of  
4 absolute immunity in the civil context might depend on the  
5 number of other remedies available, so.

6 MR. BINNALL: That's right, Your Honor, I would  
7 agree with that. And so what you have is, for instance  
8 we've talked about impeachment a lot today. But the  
9 Fitzgerald court talks about the other remedies.

10 JUDGE KATSAS: Is criminal a possibility?

11 MR. BINNALL: Criminal, if you look at other cases  
12 that are out there, theoretically could be, especially when  
13 you look at the impeachment judgment clause, where in the  
14 hypothetical that the Court used earlier there was something  
15 so extreme as instructing people to burn down the Capitol --

16 JUDGE KATSAS: Right.

17 MR. BINNALL: -- and something that inflaming,  
18 we're looking at a very, very different case than peacefully  
19 and patriotically make your voice heard, where at that point  
20 the case for impeachment, for removal, is so strong that you  
21 have the impeachment judgment clause for just that reason,  
22 where the founders made very clear that after an  
23 impeachment, after a conviction after a removal from office,  
24 that there could be criminal aspects.

25 You then also look at some of the other cases that

1 have been cited more recently. You know, of course you have  
2 United States v. Nixon, et cetera, et cetera, where there  
3 could also theoretically be other remedies that are  
4 available. And the Fitzgerald court was extremely clear  
5 that they were only talking about civil liability. While  
6 they didn't go into as much detail about things like  
7 criminal liability, and that's not why we're here today, the  
8 Fitzgerald court was talking about civil liability. That's  
9 why we're here today.

10 JUDGE SRINIVASAN: Just two more questions, I  
11 know, and we'll give you some rebuttal time.

12 What do I do with the following set of  
13 considerations that, or when a president is seeking  
14 reelection, there's a lot of things that a president might  
15 do to seek reelection that are nothing bound up in his  
16 official responsibilities as president, because the opponent  
17 might seek to do the very same things, and the opponent by  
18 definition can't be the president. We don't have two  
19 presidents at the same time.

20 So the opponent says I want to do the following  
21 things to make sure that my side wins, and all they're  
22 trying to do is to get in office. The president's trying to  
23 do the exact same thing. Why isn't it the case that when  
24 you have actions that could equally be done for the exact  
25 same purpose, which is to gain office, that a non-president

1 can do, it takes it outside the ken of what's within the  
2 perimeter of the president's official responsibility, which  
3 is the words that (indiscernible).

4 MR. BINNALL: Yes that is, Judge Srinivasan. And  
5 there are certain advantages, of course, that are built into  
6 our system, that an incumbent president does have. And I  
7 don't know that this is necessarily an advantage so much as  
8 it's something that follows the office of the president.

9 And so for instance an early candidate for president is  
10 not going to have Secret Service protection, but a president  
11 is. A candidate for president is not necessarily going to  
12 have the amazing advantage of having Air Force One. A  
13 president is.

14 And in this case there are still very robust  
15 protections for all presidential candidates. The first  
16 amendment dead center has to do with political speech and  
17 what a presidential candidate is going to say on the  
18 campaign trail.

19 JUDGE SRINIVASAN: I guess it's not, what I'm  
20 asking about and it's, I know I'm asking it very abstractly  
21 so I can make it more concrete, but I'm not trying to say  
22 that there's a disequilibrium and then one side is  
23 advantaged for purposes of the election. I'm not worried  
24 about that.

25 What I'm worried about is whether it actually

1 falls within official presidential responsibility, when  
2 what's going on is campaigning for office. Both sides are  
3 campaigning for office. Both sides do things that try to  
4 maximize the chances that they'll win.

5           It just turns out that when the president does  
6 some things that maximize the chances that he'll win, it's  
7 immune. When the other side does the exact same thing, you  
8 know, the other side, to use the hypo I started out with,  
9 tries to get people to the polls who support them, to  
10 prevent anybody from voting in districts that are going to  
11 be disadvantageous for them to have a high vote count.

12           That's, and all they're trying to do is get in  
13 office, doesn't have anything, by definition has nothing to  
14 do with official presidential responsibility, because all  
15 they're trying to do is get in office. It's the exact same  
16 thing the president's trying to do. All he's trying to do  
17 is trying to get in office.

18           Yet totally immunity on one hand. You can have  
19 agreements with people to go to the polls to stop people  
20 from voting, and you can't be sued civilly for it.

21           MR. BINNALL: That is right, Your Honor, and I  
22 understand what the Court is concerned about there. But  
23 what I would say is there may be a number of things that are  
24 within the functions of the presidency that are not unique  
25 to the presidency.

1           So while it is unique to the presidency that he  
2 has these highly unusual for the presidency, probably  
3 unique, the bully pulpit of the presidency, it certainly is  
4 not the case that other people can't give impassioned  
5 speeches that get a wide audience, and that you're going to  
6 have different legal protections.

7           And it is still the case, for instance, that  
8 government employees that retaliate against other government  
9 employees are not going to have the same level of immunity.  
10 They'll have a different immunity.

11           And there's certainly of course retribution in  
12 employment that happens where, all across this country every  
13 day, where there's no immunity at all.

14           So of course in courtrooms just like this one,  
15 certainly in this building, you have people that are  
16 operating where a prosecutor can do one thing and be immune  
17 from civil liability, and a defense attorney can do almost  
18 the exact same thing and is very much subject to liability.  
19 So this is something that's inherent within our system, that  
20 because it's so important to protect certain functions of  
21 certain offices, that it's going to be that disequilibrium,  
22 at least to some extent.

23           JUDGE SRINIVASAN: Last question from me for now.  
24 The insulation that immunity affords would apply even if the  
25 president who's a presidential candidate offers payment,

1 right, so of the way you're looking at it. So if the  
2 presidential candidate says I'll pay you to go to the polls  
3 to prevent people from voting, I'm not talking about speech,  
4 I'm just saying that's an action that just, it's just, it's  
5 an action that says I was intimidated from voting. I went  
6 to the polls to vote. I couldn't vote because this person  
7 came to me armed and said you're not going to vote today. I  
8 went home.

9           Turns out the president paid that person to make  
10 sure that I couldn't vote. Doesn't have anything to do with  
11 speech. It's just the conduct of preventing me from voting,  
12 and the conduct the president took. Your answer is still  
13 immunity.

14           MR. BINNALL: My answer is that immunity civilly,  
15 but that is something dead center that there should be very  
16 serious consequences for in the other aspects of  
17 accountability. But as far as civil immunity goes --

18           JUDGE KATSAS: Even in a case where first  
19 amendment law would treat something as a verbal act rather  
20 than a speech?

21           MR. BINNALL: Yes, Judge Katsas, this is different  
22 than a first amendment analysis.

23           JUDGE KATSAS: Why are you fighting Mathis?  
24 That's not this case. Why do you need to win that one?

25           MR. BINNALL: I don't need to win that. I think

1 that of course is a much, much closer case.

2 JUDGE SRINIVASAN: Well, I'm trying to  
3 understand --

4 JUDGE KATSAS: That seems like an extraordinary --

5 MR. BINNALL: That's an extraordinary, and I will  
6 say this. That becomes something that certainly is very  
7 fact-dependent, because it's not part of the bully pulpit of  
8 the presidency. It's something that matters to the public  
9 concern.

10 JUDGE SRINIVASAN: But we already got past bully  
11 pulpit because --

12 MR. BINNALL: Right.

13 JUDGE SRINIVASAN: -- I mean I think earlier --

14 JUDGE ROGERS: Yes, yes.

15 JUDGE SRINIVASAN: -- you realized we're past the  
16 bully pulpit, because even private conversations are fine as  
17 long as they concern an election.

18 MR. BINNALL: Certainly, yes, immunity is not  
19 limited to the bully pulpit, absolutely. And so what I'm  
20 getting at there is that it is much, it is certainly much  
21 harder to tie the hypothetical that you just gave into a  
22 historical aspect of a presidency, such as the bully pulpit.  
23 It's a much, much closer case at that point.

24 So for instance --

25 JUDGE SRINIVASAN: But still immunity under your



1 view. I mean your argument is that you have immunity  
2 because it has to do with an election, and that's the bully  
3 pulpit.

4 MR. BINNALL: Well, it's a closer call. I still  
5 think immunity probably would apply in that situation, but  
6 and one thing to look at is Congressional immunity, where  
7 you might have one member of a house of Congress beat  
8 another with a cane, right, and that wasn't part of speech  
9 and debate. Because it was beating with a cane, there was  
10 criminal liability on that, and there was no protection on  
11 the House floor when that happened with Preston Brooks  
12 beating Sumner in the lead-up to the Civil War. So  
13 something like that, where we look at the other immunity per  
14 Article I, you can look at and see that there is a much  
15 closer case there.

16 JUDGE SRINIVASAN: Right, and to be, to fall  
17 within immunity, which you said it does, that means that  
18 that conduct is within the outer perimeter of official  
19 responsibility. That's within official responsibility.

20 MR. BINNALL: I'm saying that it's, that because  
21 it's, let me (indiscernible) just a little --

22 JUDGE SRINIVASAN: That has to be your answer.

23 MR. BINNALL: It is --

24 JUDGE SRINIVASAN: Yes.

25 MR. BINNALL: -- it certainly is my answer that it

1 is. But it becomes then the closer call that we talked  
2 about, not nearly as clear as we are here, as to whether  
3 that's connected to something that's historically part of  
4 the presidency, unlike giving a presidential speech or  
5 communicating as president.

6 JUDGE SRINIVASAN: Okay.

7 JUDGE KATSAS: One more question from me, which is  
8 about an argument I don't think you made, but correct me if  
9 I'm wrong.

10 The principal statute here applies generally to  
11 persons. And we and the Supreme Court have a line of cases  
12 which say if you have a generally worded statute that covers  
13 persons or agencies, right, in the FOIA context, the APA  
14 context, we presume that those general words don't pick up  
15 the president.

16 Did you make that argument, and if not, why not?

17 MR. BINNALL: I'm not sure that that's quite as,  
18 with, let me say this. That is clearly something that the  
19 Court should consider in a Nixon-type analysis. I think the  
20 Court certainly can make that consideration in a Nixon v.  
21 Fitzgerald analysis.

22 JUDGE KATSAS: Did you make the argument?

23 MR. BINNALL: I don't know if we made it in quite  
24 that way.

25 JUDGE KATSAS: I didn't see it in the District

1 Court opinion.

2 MR. BINNALL: I believe it was, you know, Judge  
3 Katsas, trying to go back to the briefs, I don't want to  
4 make a representation that I (indiscernible) --

5 JUDGE KATSAS: Fair enough. It wasn't before us.  
6 It just struck me that might be a little bit of a narrower  
7 and more textually based way of sort of operationalizing  
8 some of the themes you're articulating, than getting into  
9 immunity, which has a little bit of a made-up feel to me.

10 MR. BINNALL: That's right, and --

11 JUDGE SRINIVASAN: Well, to be clear, as I  
12 understand the question it doesn't have to do with Nixon v.  
13 Fitzgerald immunity. It's that textually --

14 JUDGE KATSAS: No, it's a textual --

15 JUDGE SRINIVASAN: Right.

16 MR. BINNALL: That's right.

17 JUDGE KATSAS: -- it's a question whether --

18 MR. BINNALL: That's right.

19 JUDGE KATSAS: -- whether that's open to us as an  
20 alternative.

21 MR. BINNALL: I'd say it certainly is open to the  
22 Court to decide something on that limited ground, and I'd  
23 have to think about the avoidance canon and whatnot, and  
24 whether that's an appropriate (indiscernible) at this stage.

25 JUDGE KATSAS: Well immunity's a little bit open-

1 ended. It might be common law-ish, but it might be Article  
2 II-ish, so if we render an immunity holding, I suppose it  
3 depends on how we write it, but we could be saying something  
4 about the Constitution, which the statutory theory would  
5 not.

6 MR. BINNALL: That's right, and this gets into a  
7 little bit of a discussion in Fitzgerald actually between  
8 the majority and Chief Justice Burger, talking about what  
9 Congress can specifically do regarding making it so a  
10 president is specifically subject to a suit.

11 But I agree, that would be one aspect of an avenue  
12 that the Court could take to resolve this question.

13 JUDGE SRINIVASAN: Well, not our Court. I mean  
14 that issue's not before our Court. You're just saying a  
15 court could (indiscernible).

16 MR. BINNALL: A court, that could certainly be  
17 something that resolved it, I agree --

18 JUDGE SRINIVASAN: It's not part of the immunity  
19 question.

20 MR. BINNALL: It really is not part of the  
21 immunity question. It's something that I would say is  
22 separate, and so that's something that could be looked at.

23 JUDGE SRINIVASAN: Let me make sure my colleagues  
24 don't have additional questions for you at this time.

25 Thank you. We'll give you some rebuttal time.

1 MR. BINNALL: Thank you very much.

2 JUDGE SRINIVASAN: We'll hear from Mr. Sellers  
3 now.

4 ORAL ARGUMENT OF JOSEPH M. SELLERS, ESQ.

5 ON BEHALF OF THE APPELLEES

6 MR. SELLERS: Good morning. May it please the  
7 Court, Joseph Sellers.

8 I do want to address the immunity issue. Before I  
9 do, I want to answer a question Judge Katsas just asked,  
10 although I think the issue of, I think it's the clear  
11 statement rule, is not at issue here, because of the nature  
12 of the question presented.

13 But I would just call to your attention the  
14 Franklin v. Massachusetts Supreme Court decision at 505 --

15 JUDGE KATSAS: That's the one I had in mind.

16 MR. SELLERS: Okay. Well, the key there, the  
17 language there, expressly says that it's, the president's  
18 coverage in a statute, which is not named, should not be  
19 presumed where it might interfere with the president's  
20 constitutional prerogatives.

21 And I submit that here the president has not been  
22 engaged in anything remotely like a constitutional  
23 prerogative. So while that statute might apply in other  
24 circumstances where the president has acted in our view  
25 outside the outer perimeter of the presidency, I don't think

1 you can apply that rule here. And I think Franklin and  
2 courts interpreting it have so recognized.

3           So let me turn to the question that we do have  
4 before us, which is that President Trump is not entitled,  
5 excuse me, to the immunity which he seeks, because his  
6 conduct interfered with the peaceful transfer of power,  
7 which is exclusively entrusted to Congress by the  
8 Constitution, and which the framers intentionally excluded  
9 the president from.

10           And as a result it's inconceivable that that kind  
11 of conduct, which infringed the prerogatives of another  
12 branch of government, can be within the legitimate duties of  
13 the presidency, even the outer perimeter of those legitimate  
14 duties. It would be extraordinary, and I'll come back to  
15 President Trump's proposed matters of public concern,  
16 although there may be less of that to discuss than before.

17           But it's inconceivable that the president can  
18 avail himself of immunity, which derives directly from the  
19 same separation of powers underlying our government, that  
20 his conduct thwarted by blocking the discharge of duties  
21 solely entrusted to Congress, and from which the incumbent  
22 president was intentionally excluded.

23           He can't have it both ways. He can't avail  
24 himself of an immunity provided by the separation of powers  
25 by virtue of conduct that infringes on the separation of

1 powers, and that is what he's done here. I can --

2 JUDGE SRINIVASAN: So let me just test that a  
3 little bit. So suppose the president exhorts people who  
4 he's speaking to to go to Congress to stop a vote on  
5 legislation that he opposes. That's interfering with  
6 Congress's conduct of a vote, but it's something that  
7 presidents often encourage people to let Congress know --

8 MR. SELLERS: Right.

9 JUDGE SRINIVASAN: -- that they oppose legislation  
10 that's being considered.

11 MR. SELLERS: I think the circumstances here are  
12 more extreme, because this is a situation, there's no  
13 question that the boundaries between the branches of  
14 government are not always, they're not siloed, so there are  
15 occasions where one may be engaged with the other. But this  
16 is an area that's hermetically sealed from the presidency,  
17 in which it's clear that not only was it exclusively  
18 entrusted to the president, as opposed to maybe people  
19 appearing to lobby or to express opinions on a piece of  
20 legislation.

21 And importantly is Federalist Paper 68 states it  
22 was intended to keep the president, incumbent president,  
23 away from the very process he interfered with. So I don't  
24 think it's the same circumstance.

25 I think this is one that is not your run-of-the-

1 mill president saying you might go to Congress and tell  
2 people that you don't like this legislation, which is maybe  
3 within the province of the --

4 JUDGE SRINIVASAN: What if the legislation is an  
5 amendment to the Electoral Count Act?

6 MR. SELLERS: I'm sorry, it's an amendment to --

7 JUDGE SRINIVASAN: If it's an amendment to the law  
8 that defines how Congress --

9 MR. SELLERS: Right. I still don't think that  
10 it's, I mean if it's enacted it may be a different matter,  
11 but I think it's --

12 JUDGE SRINIVASAN: But he opposes the legislation  
13 or supports it, either way --

14 MR. SELLERS: Yes.

15 JUDGE SRINIVASAN: -- he exhorts his --

16 MR. SELLERS: I don't think it, I don't, I think  
17 we're talking about what's incorporated into the  
18 Constitution, and the Electoral Count Act is an aid of  
19 enforcing the terms of the provisions of Article II, but  
20 it's not something that is, you know, part and parcel of  
21 that. So I would not, I don't think we would think that is  
22 the same kind of violation of the separation of powers.

23 JUDGE SRINIVASAN: You think it --

24 MR. SELLERS: It is not.

25 JUDGE SRINIVASAN: It is not. So the president,



1 that would be immune. That would be.

2 MR. SELLERS: That would be immune, yes.

3 JUDGE KATSAS: There are lots of circumstances in  
4 which a president speaks on matters that aren't in any  
5 obvious way connected to his take care, or bill signing, or  
6 other enumerated powers. Your broadest theory would call  
7 all of that into question, or would at least expose the  
8 president to civil suits. That seems troubling.

9 MR. SELLERS: Yes, I --

10 JUDGE KATSAS: So let's just talk about a couple.

11 MR. SELLERS: Okay.

12 JUDGE KATSAS: The president is hermetically  
13 sealed away from deciding cases or controversies within the  
14 meaning of Article III. There is hypothetically a leaked  
15 draft Supreme Court opinion and the president issues --

16 MR. SELLERS: Hypothetically.

17 JUDGE KATSAS: -- the president issues a public  
18 statement strongly supporting or condemning --

19 MR. SELLERS: Right.

20 JUDGE KATSAS: -- the presumed decision in a  
21 pending case.

22 MR. SELLERS: Right. Again, I don't think it is,  
23 the bottom line is I think the president's entitled to  
24 immunity.

25 JUDGE KATSAS: Is entitled?

1 MR. SELLERS: Is entitled to immunity.

2 JUDGE KATSAS: On what theory?

3 MR. SELLERS: On the theory that --

4 JUDGE KATSAS: Just talking about the result in  
5 the case.

6 MR. SELLERS: Correct. And that's the reason I  
7 think he's entitled to immunity.

8 The remarks I think that, President Trump's  
9 standard that he's proposing here, which focuses on the  
10 speech, although I will come to the District Court's I think  
11 well thought out characterization of the speeches as  
12 promoting his incumbency, but putting that to one side, as a  
13 general matter I think the remarks the president makes are  
14 generally immune from --

15 JUDGE KATSAS: Speech, it's speech. It's on a  
16 matter of public concern --

17 MR. SELLERS: Right.

18 JUDGE KATSAS: -- and it's in an area where the  
19 president has no --

20 MR. SELLERS: Has no --

21 JUDGE KATSAS: -- direct power to act.

22 MR. SELLERS: I understand. I think that what  
23 makes this particular situation an offense to the separation  
24 of powers is that his remarks were part of a course, ongoing  
25 course of conduct which led to the actual disruption of the

1 performance of (indiscernible) duties --

2 JUDGE KATSAS: I'm going to, we'll talk about  
3 that, and just to show a few cards, what makes this a hard  
4 case for me, I asked your opponent about this, is the I'll  
5 just say arguable or colorable incitement.

6 But your broader theory about if the president is  
7 talking about a court issue or a state issue or cultural  
8 issue in the world, that's --

9 MR. SELLERS: Oh, I think, I'm sorry to interrupt  
10 you.

11 JUDGE KATSAS: No.

12 MR. SELLERS: I think those are ordinary functions  
13 of the presidency, and would be well within the boundaries  
14 of the outer perimeter of the presidency as entitled to  
15 immunity.

16 JUDGE KATSAS: So the Supreme Court says that  
17 Congress lacks constitutional authority to prohibit  
18 possession of weapons within X hundred feet of a school.  
19 The president gets on TV and in fiery rhetoric urges the  
20 states to prohibit possession of guns within a school zone.  
21 That's fine.

22 MR. SELLERS: Again, I don't think it's an offense  
23 to the separation of powers. It is a form of which, there's  
24 a lot of fiery rhetoric now these days in public discourse,  
25 so that alone I don't think is (indiscernible).

1           JUDGE KATSAS: But I mean I'm constructing the  
2 hypo so that you can't connect the speech to --

3           MR. SELLERS: I understand. But as I understand  
4 the key part of the hypothetical is that if he direct, he  
5 urges the states to take action, and it's that action which  
6 you --

7           JUDGE KATSAS: And then he goes on to say you'd  
8 better do this because these gun manufacturers have blood on  
9 their hands and they don't care that schoolchildren are  
10 getting slaughtered right --

11          MR. SELLERS: Right.

12          JUDGE KATSAS: It's very fiery.

13          MR. SELLERS: Yes.

14          JUDGE KATSAS: And it's not just they should act,  
15 it's they should act because you know, there's some bad  
16 person doing something.

17          MR. SELLERS: I understand. Again, I think  
18 there's immunity there. His action, his remarks are urging  
19 the states or anyone else to take certain action, but the  
20 key part is that the, there was no interference there, as  
21 there was here, with the actions of a co-equal branch of  
22 government.

23          JUDGE KATSAS: Okay, so hypothetical case,  
24 electoral counting and the president gives the speech, urges  
25 people to march, and is crystal clear he wants a nonviolent

1 protest, and he quotes Gandhi and Martin Luther King, and  
2 asks the protestors to sit in front of Congress and be  
3 arrested.

4 MR. SELLERS: Right. I don't think the, again,  
5 the focus from our perspective is on whether the consequence  
6 is the interference with, in this case the electoral college  
7 count, ballot count.

8 And if there's interference with a core function  
9 of another branch of government, whether it is because they,  
10 he's told them to act peacefully and they nonetheless  
11 interfere, or he incites them to violence and they  
12 interfere, the key is that he, that they interfered in, as  
13 part of his direction, in a core function of another branch  
14 of government, exclusively entrusted to that branch of  
15 government. And here, one that was, the framers couldn't  
16 have been clearer that they wanted the president to stay out  
17 of.

18 JUDGE SRINIVASAN: So the answer, so the answer to  
19 the hypo is that --

20 JUDGE KATSAS: Yes, what's --

21 MR. SELLERS: I'm sorry if I didn't answer it.

22 JUDGE SRINIVASAN: -- there is immunity or there's  
23 not?

24 MR. SELLERS: There's, there is immunity.

25 JUDGE KATSAS: He's crystal clear he wants a

1 peaceful protest.

2 MR. SELLERS: There's immunity, at least if I  
3 understand your hypothetical correctly, there was no  
4 interference with the ultimate electoral college ballot  
5 count in your hypothetical. Am I correct or did I  
6 misunderstand it?

7 JUDGE KATSAS: Well, I'll give you two. First one  
8 is no interfering. Crystal clear, no violence, peaceful  
9 protect.

10 MR. SELLERS: Right. I don't think, I think  
11 there's immunity.

12 JUDGE KATSAS: Okay, same hypo, except, and just  
13 take this as a stipulation, unforeseeably to the  
14 president --

15 MR. SELLERS: Right.

16 JUDGE KATSAS: -- some bad apples in the group --

17 MR. SELLERS: Right.

18 JUDGE KATSAS: -- don't follow his direction to  
19 peacefully protest --

20 MR. SELLERS: Right.

21 JUDGE KATSAS: -- and break in and --

22 MR. SELLERS: So you raised the question which I  
23 think is, I'm sorry, I just need to answer your question, is  
24 by saying that I think under those circumstances, to be  
25 direct, there's probably immunity.

1           But I want to distinguish it from the  
2 circumstances here, if you'll permit me, because here there  
3 are, and I can review them from the record, events that  
4 occurred here that are not just, that show this was a  
5 continuous course of conduct by the president, for which he  
6 is ultimately responsible, as opposed to the totally  
7 unforeseen circumstances which I understand your  
8 hypothetical to (indiscernible).

9           JUDGE KATSAS: So I agree with how you're thinking  
10 about the case, which is to say the pressure point is the  
11 arguable incitement. That's a bit different from the  
12 District Court theory, which is trying to draw a line  
13 between speech qua, official speech qua president and speech  
14 qua candidate.

15           MR. SELLERS: Sure. So let me turn to that, which  
16 I, the District Court I think offers another and in some  
17 ways narrower ground on which to affirm, but it is less  
18 susceptible to any clear line-drawing --

19           JUDGE KATSAS: I actually think it's much broader.  
20 It's much broader --

21           MR. SELLERS: Right.

22           JUDGE KATSAS: -- because the line between  
23 candidate speech and presidential speech is going to --

24           MR. SELLERS: Well, I -- sorry. I totally agree  
25 with you. When I said narrower, what I meant was on the

1 well pleaded allegations in the complaint here, I think the  
2 District Court's ruling can be affirmed.

3           What I think even the District Court acknowledges  
4 is that, excuse me, it's very hard to draw some lines based  
5 on that, that would guide future presidents.

6           JUDGE KATSAS: Right.

7           MR. SELLERS: Which is why I think we look to as  
8 the benchmark the separation of powers is a much more  
9 enduring way of looking at this, and one that the Supreme  
10 Court in the Nixon case and the Clinton case both examined.

11           JUDGE SRINIVASAN: That's the narrow ground? When  
12 you say there's a narrow ground, that's the one you're  
13 talking about?

14           MR. SELLERS: I'm sorry, what I mean by narrow is  
15 I perhaps should have said well-defined ground, rather than  
16 narrow.

17           JUDGE SRINIVASAN: But that is the one.

18           MR. SELLERS: That's the one --

19           JUDGE KATSAS: I'm sorry, which is what?

20           MR. SELLERS: I'm sorry --

21           JUDGE KATSAS: If it's not a case by case judgment  
22 of whether the challenged speech is official or --

23           MR. SELLERS: Right.

24           JUDGE KATSAS: -- electoral, what is it?

25           MR. SELLERS: It's instead the more general



1 standard is whether it infringed, disrupted the separation  
2 of powers, infringes a co-equal branch of government in the  
3 discharge of duties exclusively entrusted to it.

4 And the point, without characterizing it as narrow  
5 or broad, is it offers I think a clearer guide to future  
6 presidents and courts, and one that is entrenched based on  
7 the, some of jurisprudence, admittedly limited, from the  
8 Nixon and the Clinton case.

9 JUDGE SRINIVASAN: So if a president, if President  
10 Clinton, while the Supreme Court is considering Clinton v.  
11 Jones, exhorts people to go to the Supreme Court and let  
12 their voices be heard, to urge the Court to rule in his  
13 favor.

14 MR. SELLERS: To rule against, I'm sorry?

15 JUDGE SRINIVASAN: To rule in his favor.

16 MR. SELLERS: Oh, his favor.

17 JUDGE SRINIVASAN: In Clinton v. Jones which is  
18 pending --

19 MR. SELLERS: Yes, yes.

20 JUDGE SRINIVASAN: -- on the day of argument,  
21 let's say.

22 MR. SELLERS: While it's pending, yes.

23 JUDGE SRINIVASAN: No immunity, because there's  
24 separation of powers. It's interfering with the conduct of  
25 another branch's responsibilities.

1           MR. SELLERS:  If its effect is, it's not just  
2 about the purpose, if the effect is to, you know, if they  
3 disrupt the functioning of the Supreme Court, if they stop  
4 the deliberations, if they do something of that sort, I  
5 think there's no immunity.

6           JUDGE SRINIVASAN:  And that, and whether it has  
7 that consequence is based on the allegations in the  
8 complaint.  So the complaint alleges that President Clinton  
9 urged everybody to go to the Supreme Court to protest  
10 loudly.  That ended up causing the Court to take a recess  
11 while in the middle of argument, and therefore suppose that  
12 there's some injury that results from that, then civil  
13 liability; no immunity.

14           MR. SELLERS:  I see my time is expired.

15           JUDGE KATSAS:  We might keep you longer.

16           MR. SELLERS:  That's fine.  I'm happy to be here.  
17 I just wanted to acknowledge --

18           JUDGE SRINIVASAN:  Sure.  Yes, please.  No, thanks  
19 for noting it, but absolutely.

20           MR. SELLERS:  Yes.

21           JUDGE SRINIVASAN:  Yes.

22           MR. SELLERS:  So I think under the circumstances  
23 you presented, again I want to focus on whether the entire  
24 course of conduct that started with President Clinton urging  
25 the crowd to go to the Supreme Court would have been that

1 the interference with the functioning of the Court would  
2 have been part of the, inextricably bound up in his original  
3 direction or exhortation.

4           So if he had said go to the Court and you know,  
5 stand outside and chant we want a certain outcome, and that  
6 was it, and some group nonetheless went and invaded the  
7 Court, I think it is a harder call to divest him of  
8 immunity, because it is under those circumstances part of a  
9 continuous course of conduct, of which the end game, the  
10 interference, was not part of it.

11           I could give you some examples in the complaint  
12 here, or in the record here, which I think show why this  
13 particular situation is part of a continuous course of  
14 conduct which would, was --

15           JUDGE SRINIVASAN: But I thought a lot of the  
16 allegations are to the effect that the president knew what  
17 was going to happen. He kind of catalyzed what was going to  
18 happen. He didn't actually say, I don't think there's an  
19 allegation in the complaint that says --

20           MR. SELLERS: Correct.

21           JUDGE SRINIVASAN: -- go do what ended up  
22 happening.

23           MR. SELLERS: Right.

24           JUDGE SRINIVASAN: So there's always going to be  
25 this question of predictable consequences or foreseeable

1 consequences --

2 MR. SELLERS: Right.

3 JUDGE SRINIVASAN: -- even if the words  
4 themselves, as alleged in the complaint, don't call for  
5 those consequences.

6 MR. SELLERS: Right. But the circumstances here,  
7 if I can give you a few examples from the record that I  
8 think demonstrate that President Trump here set this up  
9 with, in order to interfere with the electoral college  
10 ballot counting.

11 So besides the fact that he called the assembled  
12 crowd to direct them to the Capitol, which by the way was a  
13 violation of the permit, which only allowed them to stay at  
14 the Ellipse, in dispatching the crowd to Congress, President  
15 Trump urged them to take back our country by demanding that  
16 Congress do the right thing and only count the electors who  
17 have been lawfully elected, sorry, lawfully slated.

18 He began these before January 6th, of course. He  
19 was repeatedly telling his followers that the election was  
20 stolen and stop the steal and it's fraudulent, so he set the  
21 stage on January 6th for a series of expectations about the  
22 legitimacy of the election. He then dispatched the crowd to  
23 go to the Congress, and as we, also is alleged in the  
24 complaint, he chose the timing in such a way, he could have  
25 waited until the electoral college balloting had concluded,

1 but he chose to do this at a time when Congress was actively  
2 engaged in the very process that he was exhorting the crowd  
3 to stop.

4           And I think those circumstances make this evident  
5 from the record, without any need for discovery or anything  
6 like that, that that was ultimately part of the overall  
7 course of action which --

8           JUDGE SRINIVASAN: But it seems like a lot of that  
9 goes to degrees of likelihood that the injury would come  
10 about. And there's various data points that you've put  
11 together, both here and in your complaint, that say should  
12 have known what was going to happen. And that's, the same  
13 thing could be true when a president says go to the Supreme  
14 Court.

15           MR. SELLERS: Right.

16           JUDGE SRINIVASAN: And on that hypo can I just ask  
17 the following question, which is at the outset, I think in  
18 response to Judge Katsas, if there's a leak of an opinion  
19 and the opinion hasn't been issued yet, by definition, so we  
20 don't know yet what the outcome of the case is going to be,  
21 if a president then urges supporters to voice their  
22 opposition to what appears to be where the Supreme Court's  
23 headed, what's the difference, and I think you said there  
24 would be immunity then. What's the difference between that  
25 and telling them to go there on the day of argument? It's

1 still that the decision hasn't been rendered yet. It's  
2 still urging --

3 MR. SELLERS: Yes.

4 JUDGE SRINIVASAN: -- people to go and affect what  
5 the result's going to be, and it's still urging them to go  
6 and affect the result of a proceeding that's pending in  
7 another branch of government.

8 MR. SELLERS: Right. Again, I think there's a  
9 difference in what I believe here was conveying the  
10 expectation that they would actually intrude on, stop the  
11 process for counting the electoral college ballots.

12 If in your hypothetical it had been go into the  
13 Supreme Court and stop them from deliberating, or something  
14 of that sort, I think we'd have a different situation,  
15 because under those circumstances they would be directly  
16 disrupting the functioning of a coequal branch.

17 JUDGE SRINIVASAN: So then what's the standard?  
18 What's the standard you would say that we would write into  
19 an opinion, that divides the kind of exhortation that  
20 infringes the separation of powers in the way that you think  
21 is here --

22 MR. SELLERS: And --

23 JUDGE SRINIVASAN: -- here, and situations that  
24 fall short, because although the outcome happens and it sets  
25 in motion a chain of events that results in the outcome, you

1 still have immunity?

2 MR. SELLERS: I think based on the well-pleaded  
3 allegations in the complaint, that there was, if the  
4 president launched, took action that disrupted or blocked  
5 the performance of a function, I'm going to say blocked or  
6 disrupted because that term is critical to this, as opposed  
7 to complaining or protesting or something. But actually  
8 disrupted the discharge of duties by a coequal branch of  
9 government, in an area that was exclusively entrusted to  
10 that branch of government, and I think --

11 JUDGE SRINIVASAN: But not that it had that  
12 result, because that's going to be the allegation in any  
13 case in which that result ensues. So what's the standard  
14 that, it has to turn on what the president in fact said or  
15 did, right?

16 MR. SELLERS: Yes.

17 JUDGE SRINIVASAN: Without regard to --

18 MR. SELLERS: Yes, yes.

19 JUDGE SRINIVASAN: -- what result in fact came  
20 about, and then --

21 MR. SELLERS: Yes, but it's that he, well, there  
22 is, I think you have to evaluate it without having  
23 recognized what the result was.

24 JUDGE SRINIVASAN: Right.

25 MR. SELLERS: That is whether the president

1 intended the result or not.

2 JUDGE SRINIVASAN: Right.

3 MR. SELLERS: But so the first point is did it  
4 have the effect of disrupting the discharge of duties  
5 exclusively entrusted to another branch of government.

6 But in order to attribute that to the president,  
7 which would divest him of immunity, you have to look at I  
8 think, excuse me, the entire course of events leading up to  
9 it, including events with respect to for instance what  
10 happened before January 6th, and look to see whether the  
11 president could reasonably be credited with responsibility  
12 for that series of events all attributed to his remarks or  
13 his instigation.

14 And admittedly it's based on the allegations in  
15 the complaint, as we know, although if immunity is denied,  
16 the president has an opportunity at the trial court with  
17 additional discovery to show that in fact I didn't, that  
18 didn't happen the way that you've alleged, and I'm --

19 JUDGE SRINIVASAN: So maybe my own density, so --

20 MR. SELLERS: Sorry.

21 JUDGE SRINIVASAN: -- forgive me, but it may be my  
22 own density, so forgive me, but the standard would be then  
23 predicated on, it has to be predicated not on the actual  
24 outcome, on the effect. It has to be predicated, the  
25 standard by which we determine whether immunity exists has



1 to be predicated on what the president said or did, and that  
2 standard, I heard block or interference. So is the standard  
3 the president asked for blocking or interfering?

4 MR. SELLERS: If he either overtly, explicitly or  
5 implicitly. That is I think you, as you point out, the  
6 president, and I think this one was in our allegations, was  
7 very artful in the way he did this, did not ever announce go  
8 to Congress and stop this from happening.

9 JUDGE SRINIVASAN: But why doesn't that apply to  
10 president, the President Clinton hypo? The same thing, you  
11 could just say it's he stopped just short of it, knew what  
12 was going to happen. I'm just trying to get the exact --

13 MR. SELLERS: No, I understand.

14 JUDGE SRINIVASAN: -- words you would use.

15 MR. SELLERS: Yes, I'm sorry, if you can remind me  
16 of the particulars of your, I have several hypotheticals  
17 here.

18 JUDGE SRINIVASAN: Right, so Clinton v. Jones is  
19 pending before the Supreme Court.

20 MR. SELLERS: Right.

21 JUDGE SRINIVASAN: The president says --

22 MR. SELLERS: I see.

23 JUDGE SRINIVASAN: -- go to the Supreme Court,  
24 protest at the Court, and I need to win this case. And  
25 doesn't say interfere, doesn't say stop the Court from doing

1 what it's doing. Could be seen as just go and peacefully  
2 protest. Could also be seen as do something more. And  
3 that's the kind of ground that we have to be cognizant of --

4 MR. SELLERS: Right.

5 JUDGE SRINIVASAN: -- if we were to fashion a  
6 standard --

7 MR. SELLERS: Right.

8 JUDGE SRINIVASAN: -- along the lines of what  
9 you're saying, so that's what I'm --

10 MR. SELLERS: Well, and I guess I'm not sure I'm  
11 going to be as much help with this as you would like me to  
12 be, because I think it turns on the contours of the  
13 allegations in the case.

14 So I think in your hypothetical it's pretty thin,  
15 compared to the circumstances we have here. And so I would  
16 say that instead of saying it's necessarily immune or  
17 necessarily not immune, I would say again I think the  
18 question is on the, taking the record as a whole, is it  
19 plausible to infer that the president was initiating actions  
20 which were going to disrupt the performance of or block the  
21 performance of a coequal branch of government's discharge of  
22 its duties.

23 JUDGE SRINIVASAN: Plausible to infer that --

24 MR. SELLERS: Yes.

25 JUDGE SRINIVASAN: -- the president was asking for

1 disruption --

2 MR. SELLERS: I think that's all we can do --

3 JUDGE SRINIVASAN: Okay.

4 MR. SELLERS: -- on the face of a complaint.

5 JUDGE SRINIVASAN: And it wouldn't be plausible to  
6 infer that in the hypo in which the president says go to the  
7 Supreme Court.

8 MR. SELLERS: I think it's, I think it would be a  
9 closer call. I think it would probably be so thin, given  
10 the consequence, which is to waive immunity, that that might  
11 fall in favor of granting immunity. But it is, I just think  
12 this has to be judged based on the plausible allegations in  
13 the complaint, and the sufficiency of them as to whether  
14 they show an intention to, not intention but a president  
15 pursuing a course of conduct which is directed at disrupting  
16 the performance of a coequal branch of government.

17 JUDGE KATSAS: What is the relationship between  
18 this standard you've articulated, I'll just call it the  
19 blocking standard --

20 MR. SELLERS: Okay.

21 JUDGE KATSAS: -- and the substantive first  
22 amendment Brandenburg standard? Because it would seem to me  
23 very odd to say that the president would lose his immunity  
24 for this kind of inciting activity in circumstances where a  
25 private party would have a substantive defense under

1 Brandenburg.

2 MR. SELLERS: Well, except that we hold presidents  
3 to a standard that they adhere to the Constitution. And the  
4 private party has rights in some ways that the president  
5 doesn't have.

6 JUDGE KATSAS: So in your view the president  
7 would, the president could be divested of immunity in  
8 circumstances where a private party could not be held liable  
9 consistent with the first amendment?

10 MR. SELLERS: I think under this scenario you gave  
11 here that's definitely a possibility. I don't, I mean I  
12 think here we have a situation which makes that --

13 JUDGE KATSAS: Do you think the president on the  
14 merits has a first amendment Brandenburg defense? I know  
15 the District Court rejected it.

16 MR. SELLERS: Yes, I --

17 JUDGE KATSAS: Do you think he has it?

18 MR. SELLERS: I don't think as a member of the  
19 government that I think he has a first amendment --

20 JUDGE KATSAS: Even as an officeholder speaking on  
21 matters of public concern?

22 MR. SELLERS: I again don't think that the first  
23 amendment governs that inquiry. But I would add one thing  
24 in this setting, in this case, that if the Brandenburg  
25 standard were to apply, I think he crossed it.

1 JUDGE KATSAS: So let's talk about that. So  
2 that's, to me that's where the rubber meets the road here.

3 MR. SELLERS: Okay.

4 JUDGE KATSAS: And I know it's a tough case. If  
5 you look at, you just print out the speech, which I have  
6 done, and read the words on the page, it doesn't look like  
7 it would satisfy the standard, right?

8 MR. SELLERS: Right.

9 JUDGE KATSAS: The worst parts of it are ambiguous  
10 terms, you know, fight like hell, and there are other parts  
11 of it that explicitly say don't be violent. Now if you  
12 compare that to we're going to break your damn necks, which  
13 is Claiborne Hardware, or we're going to take to the effing  
14 streets --

15 MR. SELLERS: Right.

16 JUDGE KATSAS: -- which is Hess --

17 MR. SELLERS: Right.

18 JUDGE KATSAS: -- this looks less inciting.

19 MR. SELLERS: So first of all I think this has to,  
20 the remarks on the Ellipse on the 6th have to be put in a  
21 broader context. This wasn't a speech that was delivered in  
22 a vacuum, or a blank slate. He had been building and  
23 building a series of expectations and skepticism and anger  
24 about the results of the election.

25 JUDGE KATSAS: And if you minimize the words on

1 the page, and maximize the --

2 MR. SELLERS: Right.

3 JUDGE KATSAS: -- context, I'll just, you know,  
4 the --

5 MR. SELLERS: I understand.

6 JUDGE KATSAS: -- the powder keg, let's use that  
7 for shorthand, then it looks maybe dangerous.

8 MR. SELLERS: Well, and I, again I would say that  
9 the fact that after rousing this group, which all responded  
10 to an invitation from the president that was laden with  
11 expressions about the election was stolen and it was  
12 fraudulent, and we have to make sure an illegitimate  
13 president isn't inaugurated, and things of that sort.

14 They come to the Ellipse, and as I think the term  
15 used, a powder keg, he created a powder keg by virtue of the  
16 lead-up to that. And then he ignited it by, and yes, there  
17 may be no single set of words at the Ellipse that are  
18 tantamount to the kind of examples that you have in the  
19 Brandenburg cases, but taken as a whole I think it's quite  
20 clear that the president was then igniting this situation,  
21 and you know, talking about again demanding that Congress do  
22 the right thing and only count the electors who have been  
23 lawfully slated, and let's walk to the Capitol and --

24 JUDGE KATSAS: I get it. The 6th Circuit has a  
25 couple of Brandenburg cases, including one involving a

1 protester at a Trump rally who was roughed up, which seem to  
2 stand for the proposition that if the words themselves are  
3 not very inciting, and the primary danger comes from the  
4 powder keg, that's not enough to eliminate first amendment  
5 protection under Brandenburg.

6 Do you have a view on that? I mean I know you  
7 have a view on that, but how should we --

8 MR. SELLERS: Yes.

9 JUDGE KATSAS: -- how should we, I can't remember  
10 if these were in the briefs, but Bible Believers and  
11 Nwanguma.

12 MR. SELLERS: Yes, I don't remember them being in  
13 the brief, but I can, I accept your summary of them.

14 So again I want to back up for just a second, and  
15 I realize this may be very important to you, but I don't  
16 think the Brandenburg standard governs here.

17 But that said, if it were to play a role in this,  
18 I think it's, and the 6th Circuit concluded that the words  
19 are not enough, even if they're simply igniting a powder  
20 keg, I'd have to see the circumstances in which they said  
21 that. I think we have an enormous type of powder keg here.  
22 I'm not sure you could say, one, that this is a case for all  
23 purposes, and I'd have to look at the 6th Circuit decisions  
24 to determine.

25 JUDGE KATSAS: Well, one of them is there's a

1 Muslim festival, and protesters go and right in the middle  
2 of it shout very offensive things about Islam and provokes a  
3 violent response, but the things shouted are clearly  
4 protected. And the argument for no first amendment  
5 protection is like my God, this was a powder keg, of course  
6 this was going to happen. Any idiot would know that there'd  
7 be a violent response.

8           And then the second case, Nwanguma is, it's a  
9 Trump rally. There are protesters. The crowd's getting  
10 worked up --

11           MR. SELLERS: Right.

12           JUDGE KATSAS: -- and he says get them out of  
13 here, but don't hurt them. So ambiguous words on the page,  
14 but fraught situation.

15           MR. SELLERS: Right. So I'm not sure this is a  
16 perfect distinction, but one of the things I would say here  
17 is that the, beside the powder keg situation, I think here  
18 President Trump was launching a course of conduct that was,  
19 as opposed to perhaps calling some people by inflammatory  
20 names, for instance, or something of that sort. And I think  
21 that the distinction is important because it makes, it puts  
22 the president in a position to be part of the course of  
23 action that followed, rather than simply an instigator. And  
24 not that I think he was an instigator here, but I think that  
25 is a distinction.



1 JUDGE KATSAS: Okay.

2 JUDGE SRINIVASAN: On Brandenburg, is it the case,  
3 I don't know the answer to this, do you get an immediate  
4 collateral order appeal in a Brandenburg situation normally?

5 MR. SELLERS: Not that I know of.

6 JUDGE SRINIVASAN: So there's, you could view  
7 Brandenburg as overlapping with presidential official  
8 immunity, but presidential official immunity --

9 MR. SELLERS: Right.

10 JUDGE SRINIVASAN: -- also can be viewed as a  
11 distinct issue.

12 MR. SELLERS: Yes, and I think that it's quite  
13 clear in this, in the way the issue was presented by the  
14 appellant, and with which we didn't disagree because of the  
15 way it's framed, is I think the only issue that is granted  
16 immediate appeal is the issue of immunity.

17 I submit that the Brandenburg issue is a separate  
18 and important issue, but I don't think it spells --

19 JUDGE SRINIVASAN: It could inform --

20 JUDGE KATSAS: It could be litigated below is a  
21 merits issue. I'm testing if I think it's a limiting --

22 MR. SELLERS: Yes.

23 JUDGE KATSAS: -- principle on the immunity.

24 MR. SELLERS: And I'm happy to answer your  
25 questions. I just --

1 JUDGE SRINIVASAN: Yes, I just was trying to  
2 understand the (indiscernible) of the case. That's a --

3 MR. SELLERS: I don't think it is. It is squarely  
4 before the Court right now, as I --

5 JUDGE KATSAS: I mean it seems to me it's a novel  
6 issue because we don't have, one way or another, a case on  
7 absolute immunity in a borderline or just more than  
8 borderline incitement case.

9 MR. SELLERS: Yes, and so again I agree. It's one  
10 of --

11 JUDGE SRINIVASAN: So it could inform the content  
12 of immunity. I don't --

13 JUDGE KATSAS: Right.

14 MR. SELLERS: Yes.

15 JUDGE SRINIVASAN: -- I think it could, but I just  
16 was making sure that I understood where we stood in the  
17 case.

18 MR. SELLERS: And it's one reason why we, again  
19 returning to the separation of powers, because we think  
20 that's the benchmark with which to be viewing this. And the  
21 nature of the remarks may be part of the course of action  
22 that is there, but it's not, we don't see the first  
23 amendment as interplaying with the, how the separation of  
24 powers allocates responsibilities between branches of  
25 government.

1           JUDGE SRINIVASAN: So can I ask one question that  
2 is in this general zone, that's been giving me some pause,  
3 which is does it matter if the statements that are at issue  
4 arise in response to a question from the press in a press  
5 conference, as opposed to a circumstance in which a  
6 president just chooses to make an affirmative statement or  
7 speech?

8           And the reason I ask is you could obviously  
9 envision situations in which there's an elicitation of a  
10 response from a press question, and it seems eminently  
11 within the crosshairs of the president's official duties to  
12 have press conferences and respond --

13           MR. SELLERS: Yes.

14           JUDGE SRINIVASAN: -- to the press --

15           MR. SELLERS: I think --

16           JUDGE SRINIVASAN: -- so he says the exact same  
17 thing --

18           MR. SELLERS: Right.

19           JUDGE SRINIVASAN: -- but it's in response to a  
20 direct question --

21           MR. SELLERS: Yes.

22           JUDGE SRINIVASAN: -- in a press conference.

23           MR. SELLERS: I think there is a difference, and  
24 the reason, somewhat responding to Judge Katsas before, is  
25 one, where he has initiated this, I think it shows a degree

1 of his responsibility for the continuing course of conduct,  
2 even if in fact in response to a reporter's question he says  
3 (indiscernible) --

4 JUDGE SRINIVASAN: So where you're going I think  
5 is then the exact, literally the exact same words --

6 MR. SELLERS: I understand.

7 JUDGE SRINIVASAN: -- maybe apart from the lead-  
8 in, immunity in response to a press question or press  
9 conference; no immunity when it's --

10 MR. SELLERS: I understand.

11 JUDGE SRINIVASAN: -- an affirmative. So I just  
12 want to make sure that's right.

13 MR. SELLERS: Yes.

14 JUDGE SRINIVASAN: That may be what you're saying,  
15 but I want to make sure that's right.

16 MR. SELLERS: I think what my, my intention was to  
17 say the response with the same content, to a reporter's  
18 question, there's immunity.

19 JUDGE SRINIVASAN: So then in the affirmative  
20 statements situations that put it in the land of non-  
21 immunity under your rubric, suppose the president starts by  
22 saying I know there's been a lot of questions out there  
23 about the following, and he reads the Twitterverse or  
24 whatever, there's a lot of questions out there about the  
25 following. Here's my statement. Still no immunity there

1 because it wasn't literally in response to a press question  
2 in the middle of a press conference, even though the  
3 zeitgeist is --

4 MR. SELLERS: Right. I think -- did I interrupt  
5 you?

6 JUDGE SRINIVASAN: No, no, you didn't.

7 MR. SELLERS: I think the key question is whether  
8 you can infer from this that the president was intending to  
9 launch or initiate a course of action, the beginning of  
10 which is he starts with his statement, which you've referred  
11 to, and if that's the case and there are in this case other  
12 circumstances that are consistent with that, I think he's  
13 responsible and I think he loses his immunity.

14 But even though he may have said something very  
15 similar or identical in response to a press question, at  
16 least --

17 JUDGE SRINIVASAN: But can't he intend to launch  
18 that same thing in response to a press question?

19 MR. SELLERS: He could, if that's the way, if a  
20 reporter asks him something and he says I want to use this  
21 opportunity to --

22 JUDGE SRINIVASAN: Well, he doesn't say that, but  
23 he says the same thing, I mean, but the inference is I'm  
24 going to use that question as a vehicle for --

25 MR. SELLERS: So again I, you know, we are, these

1 are going to be somewhat fact, I know this is not  
2 satisfying, but --

3 JUDGE SRINIVASAN: No, no, but that's what we have  
4 to do.

5 MR. SELLERS: Fact-driven kind of inquiries, and  
6 we come back to the point that the inquiry ought to be about  
7 whether the president, based on the well pleaded allegations  
8 in the complaint, it's evident that he was launching or  
9 directing a, or himself, I mean, a course of action which is  
10 going to interfere with the coequal branch of government.

11 JUDGE SRINIVASAN: And is it your view that then  
12 as a categorical matter, when it's in response to a press  
13 question that standard won't be satisfied.

14 MR. SELLERS: If it's in response to a press  
15 question, that alone insulates it from, is that what you're  
16 saying?

17 JUDGE SRINIVASAN: Yes, is that, as I heard  
18 your --

19 MR. SELLERS: No, I'm sorry if I wasn't clear. I  
20 mean ordinarily I would think it would be immune, but I  
21 would say that it is functionally equivalent to what I just  
22 said, the president launched a course of conduct, then I  
23 think he would have the same effect, he would lose his  
24 immunity --

25 JUDGE SRINIVASAN: Even in --

1 MR. SELLERS: -- the functional equivalent --

2 JUDGE SRINIVASAN: -- even in a press conference.

3 MR. SELLERS: Correct, if it's a functional  
4 equivalence to standing there and if he said in response to  
5 the reporter thank you for asking that question, it gives me  
6 the opportunity to announce that I want the crowd to go to  
7 Congress and do these other things. The fact that it  
8 responds to a press question I don't think is --

9 JUDGE SRINIVASAN: Right, I mean I don't think  
10 it's ever going to be that stark, but it would be, you get  
11 the question and you say, in the course of giving the  
12 response --

13 MR. SELLERS: I understand, and I, again I --

14 JUDGE SRINIVASAN: -- it could be immune, could be  
15 not immune, even in the context of a press --

16 MR. SELLERS: I think it depends on the  
17 circumstances, and I unfortunately think that that's up to  
18 the courts, so --

19 JUDGE ROGERS: So let me ask a question here. I  
20 understand the standard on summary judgment, but here I just  
21 want to be clear. You acknowledge I think that the  
22 statement, the actual words used by the president, are not  
23 what the crowd actually did. In other words the president  
24 didn't say break in, didn't say assault members of Congress,  
25 assault Capitol Police, or anything like that.

1           And what I'm concerned about is to what extent at this  
2 stage we're in a, that a court is in a position to give the  
3 plaintiffs the benefit of all reasonable inferences. And as  
4 I understand your argument, because of the president being  
5 the head of the executive branch, we expect certain types of  
6 conduct from him. And that conduct would not include  
7 denigrating the separation of powers.

8           And so even though he was very careful in the  
9 words he used, and had language in there that said remember  
10 to be peaceful, nevertheless part of our political system,  
11 as you know better than I, is there are always unfortunately  
12 going to be extremists on both sides who go too far. And  
13 the president says I never told anybody to break in. I  
14 never told anybody to assault the Capitol Police. I never  
15 told anybody to rampage through the Capitol building.

16           And a more negative inference I suppose arises  
17 because even after he was informed about the dangers that  
18 this crowd had placed members of Congress, and had in fact  
19 disrupted the proceeding, and that people were being  
20 seriously injured, and there were direct threats toward the  
21 vice-president, he did nothing to issue a calming statement  
22 and tell his followers for example go home, you know, stop  
23 this kind of lawful protest that's become unlawful with  
24 people being injured, et cetera.

25           So by standing silent, even when he did not know



1 arguably in advance that some of his followers would take  
2 his remarks to be asking them to do what they were doing,  
3 nevertheless, given the words he used, he is entitled to  
4 immunity because commenting that he thought over a course of  
5 time that the election was stolen from him can be viewed as  
6 a critique, a bully pulpit critique of the way the states  
7 were checking the votes that were cast, and then certifying  
8 them to the Congress, and sort of trying to put the most  
9 negative inference on what the president was saying.

10           One of the areas I'm concerned about is we have a  
11 history in this country of protest where they may start out  
12 as peaceful protests but they've turned violent, either  
13 because of opposing points of view or police actions, et  
14 cetera. So here we're talking about the President of the  
15 United States, and he makes this statement after, as you  
16 say, a course of conduct. And then according to the  
17 complaint, even after he's told of the physical and human  
18 damage that has been done and is being done, he stands  
19 silent. So I guess my focus is is that fact critical here,  
20 that that is an allegation in the complaint.

21           MR. SELLERS: Right. So Judge Rogers, let me try  
22 to respond. You've raised a number of very important  
23 points.

24           First of all, to the last point you made, the  
25 allegations are in the complaint that in the afternoon after

1 the crowd began to break into the Capitol, the media was  
2 covering this, and the allegation is that President Trump  
3 saw the reports of that and not only didn't do anything to  
4 calm the crowd, he actually retweeted the remarks that he  
5 issued at the Ellipse to support them.

6           There's also, even before that, when at the very  
7 end of the remarks at the Ellipse, when President Trump  
8 called upon the crowd to go to the Capitol that he started,  
9 the allegations, this is at Joint Appendix page 38, people  
10 were saying, shouting storm the Capitol, and take the  
11 Capitol right now, and the president did nothing to calm  
12 that or to say no, that's not what I meant.

13           As to your point about there being buried within  
14 this lengthy set of remarks a series of statements about go  
15 peacefully and patriotically I think is one phrase that he  
16 used, again I want to make the point that this is part of a  
17 broader course of conduct, and it has to be looked at that  
18 way, not parsed separately with particular sentences, which  
19 I think would be a mistake and embroil the courts in endless  
20 amounts of line-drawing.

21           Here it was quite clear. He had a choice that he  
22 could, if he really wanted to raise the concerns about the,  
23 what he viewed was a fraudulent election, or election  
24 security or something of that sort, he could have done that  
25 without dispatching the crowd to the Capitol at exactly the

1 point when they were engaged in counting the electoral  
2 college ballots.

3           So this was, sending a crowd to an area, as I said  
4 before, in which the Constitution has hermetically sealed  
5 this from the president, and entrusted it only to the  
6 Congress, and it is I think fair to infer from that that his  
7 intentions were to have this crowd attempt to interfere with  
8 that. In fact he said, you know, let's stop them from  
9 counting the electors and have only those who are lawfully  
10 slated, an area that again Alexander Hamilton was clear in  
11 Federalist Paper 68 was to be excluded from the incumbent  
12 president.

13           So I submit that your points are well taken. I  
14 agree with them. There is a broader point here, which is  
15 about looking at this through, as a continuous course of  
16 conduct.

17           JUDGE SRINIVASAN: Can I ask one more question? I  
18 want to make sure that Judge Rogers got a response.

19           One more question. You kind of framed this as two  
20 different ways to affirm in your mind. One is the blocking  
21 of the function of another branch, separation of powers  
22 rationale. And the other is seeking to vindicate a personal  
23 interest in attaining office, as opposed to falling within  
24 official responsibility. For your argument we haven't  
25 talked much about that one.

1 MR. SELLERS: Okay.

2 JUDGE SRINIVASAN: And what's, and they kind of  
3 merge, to some extent --

4 MR. SELLERS: Yes.

5 JUDGE SRINIVASAN: -- because one way to show that  
6 it's not part of the official responsibility of the  
7 president --

8 MR. SELLERS: Right.

9 JUDGE SRINIVASAN: -- is if it's exclusively the  
10 responsibility of another branch.

11 MR. SELLERS: Right.

12 JUDGE SRINIVASAN: But and I don't want to have an  
13 entirely new argument on this, but I'm just, what's your  
14 reaction to the proposition that attaining office is  
15 vindicating one's personal interest in a way that renders  
16 immunity principles inapplicable because it doesn't have to  
17 do with something that's within your official  
18 responsibility?

19 MR. SELLERS: Yes, it is clearly, that's our  
20 position, that seeking to perpetuate your incumbency, or  
21 attaining office, as you put it, is necessarily outside the  
22 scope of the official duties of the presidency, because the  
23 presidency has no view as to who holds the presidency. So  
24 it cannot be construed as any kind of exercise, enumerated  
25 or otherwise, of any duties entrusted by the Constitution to

1 the president.

2           So it is a, my only reason to focus on the  
3 separation of powers is because, as I think the District  
4 Court observed, it may be harder to provide some kind of,  
5 admittedly not perfect, but set of benchmarks to give the  
6 courts who administer this using the separation of powers as  
7 the ground position, as opposed to the question that was  
8 presented here.

9           But I thought the District Court did an excellent  
10 job of reviewing all the allegations and assembling them and  
11 digesting them, and concluding that ultimately the president  
12 was engaged in efforts to campaign to perpetuate his  
13 incumbency, on these factual allegations.

14           JUDGE SRINIVASAN: Okay. Let me make sure my  
15 colleagues don't have additional questions for you.

16           Thank you, Mr. Sellers.

17           Mr. Binnall, we'll give you three minutes for  
18 rebuttal. We'll see where that goes.

19           ORAL REBUTTAL OF JESSE R. BINNALL, ESQ.

20                           ON BEHALF OF THE APPELLANT

21           MR. BINNALL: Thank you, Your Honor.

22           Judge Srinivasan, as we started the argument  
23 today, one thing that the Court brought up, and I understand  
24 the Court's concern here, is that you said that there was  
25 line-drawing issues on both sides, and I think we've seen

1 that through the questioning today.

2           One thing that I'd like to point out is that when  
3 there are these issues about line-drawing, and you look at  
4 the stark separation of powers concerns, the tie has to go  
5 to the runner, to use a baseball analogy. You need to, and  
6 the Fitzgerald court makes --

7           JUDGE SRINIVASAN: And I assume you think the  
8 runner is the president.

9           MR. BINNALL: The runner is the president --

10          JUDGE SRINIVASAN: All right.

11          MR. BINNALL: -- in this case.

12          JUDGE SRINIVASAN: Okay.

13          MR. BINNALL: And that much and more. The  
14 Fitzgerald court made so clear that even if it's close, that  
15 has to go to the president, to protect that separation of  
16 powers interest.

17                 And the argument that my friend focused on, about  
18 separation of the the alleged offense to separation of  
19 powers, what that framework essentially looks at is that by  
20 saying that there's been an offense to the separation of  
21 powers that opens the floodgate, you don't necessarily have  
22 to worry about standing, you then can say immunity no longer  
23 applies.

24                 That's a particularly problematic analysis,  
25 especially since for separation of powers concerns there is

1 impeachment. A dispute between Article I and Article II is  
2 specifically provided for in the Constitution.

3           Judge Katsas, one thing that I think important to  
4 look at regarding the Court's Brandenburg thoughts is, well,  
5 it's certainly not the case that Brandenburg would comprise  
6 the outer perimeter, the full outer perimeter. It is  
7 important to see that speech by a president, that is clearly  
8 within Brandenburg, as this speech was, as the Court pointed  
9 out, you have to look at the words themselves, not the  
10 powder keg. And that gives --

11           JUDGE KATSAS: That's my instinct, but give me  
12 your best shot on why, at least at a motion to dismiss stage  
13 on these facts, we shouldn't say that there's at least a  
14 litigable issue.

15           MR. BINNALL: Because of the fact that immunity is  
16 meant to protect from litigation, not just from liability.  
17 But that is, as the Fitzgerald court points out, quite  
18 clearly as other courts and immunity --

19           JUDGE KATSAS: I mean this question is on the  
20 assumption that Brandenburg or not matters. And I  
21 understand your broader position is it doesn't matter. Just  
22 assume it does.

23           MR. BINNALL: You only need the protections of the  
24 first amendment when there is that powder keg, and a lot of  
25 times for incitement. So the powder keg is always there.

1 It's certainly in there in the Claiborne case. It's  
2 certainly in there in Brandenburg, and certainly in the  
3 progeny. And so that's why it is so extremely important at  
4 that point that we then look at the words themselves.

5           And in this point, because those words clearly  
6 fall within that, it must be that they're within the outer  
7 perimeters of the presidency, just as a matter of law,  
8 without needing further factual analysis, because having to  
9 go through and do a further factual analysis at that point  
10 would eviscerate the entire purpose of immunity.

11           I see my time has expired, unless --

12           JUDGE SRINIVASAN: I have one question.

13           MR. BINNALL: Yes.

14           JUDGE SRINIVASAN: Sorry to belabor this. But  
15 there's allegations in the complaint that are beyond the  
16 January 6th speech.

17           MR. BINNALL: Yes.

18           JUDGE SRINIVASAN: And so, and some of them don't  
19 naturally raise Brandenburg questions, or other kinds of  
20 questions. Some of them can be viewed as, you know, more  
21 private in nature, outside the ken of what we've been  
22 talking about.

23           So even if one thought that the January 6th speech  
24 is something that implicates presidential immunity, what  
25 about the fact that there's still other things in the



1 complaint like filing lawsuits in the personal capacity,  
2 like having private conversations with election officials in  
3 various states, like planning the rally? Things of that  
4 nature, that don't really squarely implicate a lot of the  
5 things we're talking about here, but that are in the case.

6 MR. BINNALL: I think there's a reason why the  
7 District Court effectively looks at this analysis as the  
8 communications, because those communications are the only  
9 thing that could survive the other aspects of the case.

10 So for instance the District Court, when it talked  
11 about the first amendment analysis, acknowledged that the  
12 first amendment would prohibit those other acts aspects of  
13 it. So that's why I think it's appropriate when we look at  
14 immunity here, primarily we look at the speech issues. But  
15 when you look at things like election lawsuits and other  
16 activities of a president, that still is within the outer  
17 perimeter regardless, but it's I think still very clearly  
18 part of the outer perimeter test. And then you also come to  
19 the very particular problem, if you want to, as the  
20 complaint suggests, go towards some sort of negative  
21 responsibility of the president. So for instance the  
22 suggestion in the complaint that the president had a duty to  
23 talk (indiscernible) --

24 JUDGE SRINIVASAN: Right, and that's not before  
25 us, because that, I don't think that there, the plaintiffs

1 lost on that and didn't appeal on the 1986 part. I mean  
2 it's not, at least it's not part of the collateral --

3 MR. BINNALL: I agree.

4 JUDGE SRINIVASAN: -- of that.

5 MR. BINNALL: Just as we're talking about the  
6 other things as part of the complaint, I would say that when  
7 you look at all that together, is this still something that  
8 the president is doing on matters of public concern. Is it  
9 still, you know, beyond just the bully pulpit, that the  
10 president doing as president, and he is, and anything else,  
11 as the District Court properly recognized, would be  
12 prohibited by the first amendment otherwise.

13 JUDGE SRINIVASAN: Okay. Thank you, counsel.

14 MR. BINNALL: Thank you.

15 JUDGE SRINIVASAN: Thank you to both counsel.

16 We'll take the case under submission.

17 (Whereupon, the proceedings were concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

*Margaret L. vanEkeren*

\_\_\_\_\_  
Margaret L. vanEkeren

December 18, 2022  
Date

DEPOSITION SERVICES, INC.



**The Ellipse**

The media will not show the magnitude of this crowd. Even I, when I turned on today, I looked, and I saw thousands of people here, but you don't see hundreds of thousands of people behind you because they don't want to show that. We have hundreds of thousands of people here, and I just want them to be recognized by the fake news media. Turn your cameras, please, and show what's really happening out here, because these people are not going to take it any longer. They're not going to take it any longer. Go ahead. Turn your cameras, please. Would you show?

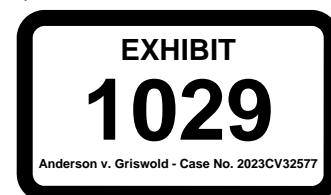
They came from all over the world, actually, but they came from all over our country. I just really want to see what they do. I just want to see how they covered. I've never seen anything like it. But it would be really great if we could be covered fairly by the media. The media is the biggest problem we have, as far as I'm concerned, single biggest problem -- the fake news and the big tech. Big tech is now coming into their own. We beat them four years ago. We surprised them. We took them by surprise and this year, they rigged an election. They rigged it like they've never rigged an election before. And by the way, last night they didn't do a bad job either, if you notice. I'm honest.

Just, again, I want to thank you. It's just a great honor to have this kind of crowd and to be before you and hundreds of thousands of American patriots who are committed to the honesty of our elections and the integrity of our glorious republic. All of us here today do not want to see our election victory stolen by emboldened radical left Democrats, which is what they're doing, and stolen by the fake news media. That's what they've done and what they're doing. We will never give up. We will never concede. It doesn't happen. You don't concede when there's theft involved.

Our country has had enough. We will not take it anymore and that's what this is all about. And to use a favorite term that all of you people really came up with, we will "stop the steal." Today, I will lay out just some of the evidence proving that we won this election, and we won it by a landslide. This was not a close election.

You know, I say sometimes jokingly, but there's no joke about it, I've been in two elections. I won them both and the second one, I won much bigger than the first. OK? Almost 75 million people voted for our campaign, the most of any incumbent president by far in the history of our country, 12 million more people than four years ago. And I was told by the real pollsters, we do have real pollsters. They know that we were going to do well, and we were going to win. What I was told, if I went from 63 million, which we had four years ago, to 66 million, there was no chance of losing. Well, we didn't go to 66. We went to 75 million, and they say we lost. We didn't lose.

And by the way, does anybody believe that Joe had 80 million votes? Does anybody believe that? He had 80 million computer votes. It's a disgrace. There's never been anything like that. You could take Third World countries. Just take a look, take Third World countries. Their elections are more honest than what we've been going through in this country. It's a disgrace. It's a disgrace. Even when you look at last night, they're all running around like chickens with their heads cut off, with boxes. Nobody knows what the hell is going on. There's never been anything like this. We will not let them silence your voices. We're not going to let it happen. Not going to let it happen.



[Crowd noise]

Thank you. And I'd love to have, if those tens of thousands of people would be allowed, the military, the Secret Service, and we want to thank you, and the police, law enforcement. Great. You're doing a great job. But I'd love it if they could be allowed to come up here with us. Is that possible? Can you just let them come up, please? And Rudy [Giuliani], you did a great job. He's got guts. You know what? He's got guts, unlike a lot of people in the Republican Party. He's got guts. He fights. He fights, and I'll tell you. Thank you very much, John [Eastman]. Fantastic job. I watched.

That's a tough act to follow, those two. 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 could be happening to our Constitution." And he looked at Mike Pence, and I hope Mike is going to do the right thing.

I hope so. I hope so, because if Mike Pence does the right thing, we win the election. All he has to do. All -- 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. We're supposed to protect our country, support our country, support our Constitution and protect our Constitution. States want to revote. The states got defrauded. They were given false information. They voted on it. Now they want to recertify. They want it back. All Vice President Pence has to do is send it back to the states to recertify, and we become president, and you are the happiest people.

And I actually, I just spoke to Mike. I said, "Mike, that doesn't take courage. What takes courage is to do nothing. That takes courage," and then we're stuck with a president who lost the election by a lot, and we have to live with that for four more years. We're just not going to let that happen. Many of you have traveled from all across the nation to be here, and I want to thank you for the extraordinary love. That's what it is. There's never been a movement like this ever, ever, for the extraordinary love for this amazing country and this amazing movement. Thank you.

[Crowd noise]

By the way, this goes all the way back past the Washington Monument. Do you believe this? Look at this. Unfortunately, they gave the press the prime seats. I can't stand that. No, but you look at that, behind. I wish they'd flip those cameras and look behind you. That is the most amazing sight. When they make a mistake, you get to see it on television. Amazing, amazing, all the way back. And don't worry, we will not take the name off the Washington Monument. We will not. Cancel culture. You know, they wanted to get rid of the Jefferson Memorial, either take it down or just put somebody else in there. I don't think that's going to happen. It damn well better not. Although with this administration, if this happens, it could happen. You'll see some really bad things happen.

They'll knock out Lincoln too, by the way. They've been taking his statue down. But then we signed a little law. You hurt our monuments, you hurt our heroes, you go to jail for 10 years, and everything stopped. You notice that? It stopped. It all stopped. And they could use Rudy back in New York City. Rudy, they could use you. Your city is going to hell. They want Rudy Giuliani back in New York. We'll get a little younger version of Rudy. Is that OK, Rudy?

We're gathered together in the heart of our nation's capital for one very, very basic and simple reason: to save our democracy. Most candidates on election evening -- of course this thing goes on so long, they

still don't have any idea what the votes are. We still have congressional seats under review. They have no idea. They've totally lost control. They've used the pandemic as a way of defrauding the people in a proper election. But you know, you know, when you see this and when you see what's happening, number one, they all say, "Sir, we'll never let it happen again." I said, "That's good, but what about eight weeks ago?" You know, they try and get you to go. They say, "Sir, in four years, you're guaranteed." I said, "I'm not interested right now. Do me a favor, go back eight weeks. I want to go back eight weeks. Let's go back eight weeks." We want to go back, and we want to get this right because we're going to have somebody in there that should not be in there and our country will be destroyed, and we're not going to stand for that.

For years, Democrats have gotten away with election fraud and weak Republicans, and that's what they are. There's so many weak Republicans. We have great ones, Jim Jordan, and some of these guys. They're out there fighting. The House guys are fighting, but it's incredible. Many of the Republicans, I helped them get in. I helped them get elected. I helped Mitch [McConnell] get elected. I helped -- I could name 24 of them, let's say. I won't bore you with it, and then all of a sudden you have something like this. It's like, "Oh, gee, maybe I'll talk to the President sometime later." No, it's amazing. The weak Republicans, they're pathetic Republicans and that's what happens. If this happened to the Democrats, there'd be hell all over the country going on. There'd be hell all over the country. But just remember this. You're stronger. You're smarter. You've got more going than anybody, and they try and demean everybody having to do with us, and you're the real people. You're the people that built this nation. You're not the people that tore down our nation.

The weak Republicans, and that's it. I really believe it. I think I'm going to use the term, the weak Republicans. You got a lot of them, and you got a lot of great ones, but you got a lot of weak ones. They've turned a blind eye even as Democrats enacted policies that chipped away our jobs, weakened our military, threw open our borders and put America last. Did you see the other day where Joe Biden said, "I want to get rid of the America First policy"? What's that all about, get rid of -- how do you say, "I want to get rid of America First"? Even if you're going to do it, don't talk about it, right? Unbelievable, what we have to go through, what we have to go through, and you have to get your people to fight. And if they don't fight, we have to primary the hell out of the ones that don't fight. You primary them. We're going to let you know who they are. I can already tell you, frankly.

But this year, using the pretext of the China virus and the scam of mail-in ballots, Democrats attempted the most brazen and outrageous election theft. There's never been anything like this. It's a pure theft in American history. Everybody knows it. That election, our election was over at 10 o'clock in the evening. We're leading Pennsylvania, Michigan, Georgia by hundreds of thousands of votes, and then late in the evening or early in the morning, boom, these explosions of bullshit, and all of a sudden. All of a sudden it started to happen.

Don't forget when [Mitt] Romney got beat. Romney. Did you see his -- I wonder if he enjoyed his flight in last night? But when Romney got beaten, you know, he stands up like you're more typical -- "Well, I'd like to congratulate the victor." The victor? Who was the victor, Mitt? "I'd like to congratulate." They don't go and look at the facts. Now, I don't know. He got slaughtered probably, maybe it was OK. Maybe it was -- that's what happened. But we look at the facts, and our election was so corrupt that in the history of this country we've never seen anything like it. You can go all the way back. You know, America is blessed with elections. All over the world, they talk about our elections. You know what the world says about us now? They say we don't have free and fair elections. And you know what else? We don't have a free and fair press.

Our media is not free. It's not fair. It suppresses thought. It suppresses speech, and it's become the enemy of the people. It's become the enemy of the people. It's the biggest problem we have in this country. No Third World countries would even attempt to do what we caught them doing, and you'll hear about that in just a few minutes. Republicans are constantly fighting like a boxer with his hands tied behind his back. It's like a boxer, and we want to be so nice. We want to be so respectful of everybody, including bad people. And we're going to have to fight much harder, and Mike Pence is going to have to come through for us. And if he doesn't, that will be a sad day for our country because you're sworn to uphold our Constitution. 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 any one you want, but I think right here. We're going walk down to the Capitol, and we're going to cheer on our brave senators, and congressmen and women. And we're probably not going to be cheering so much for some of them because you'll never take back our country with weakness. You have to show strength, and you have to be strong.

We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated. I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard. Today we will see whether Republicans stand strong for integrity of our elections, but whether or not they stand strong for our country, our country. Our country has been under siege for a long time, far longer than this four-year period. We've set it on a much straighter course, a much ... I thought four more years. I thought it would be easy.

We created the greatest economy in history. We rebuilt our military. We get you the biggest tax cuts in history. Right? We got you the biggest regulation cuts. There's no president, whether it's four years, eight years, or in one case more, got anywhere near the regulation cuts. It used to take 20 years to get a highway approved. Now we're down to two. I want to get it down to one, but we're down to two. And it may get rejected for environmental or safety reasons, but we got it down the safety. We created Space Force. Look at what we did. Our military has been totally rebuilt. So we create Space Force, which by and of itself is a major achievement for an administration. And with us, it's one of so many different things.

Right to try. Everybody knows about right to try. We did things that nobody ever thought possible. We took care of our vets. Our vets, the VA now has the highest rating, 91%, the highest rating that it's had from the beginning, 91% approval rating. Always you watch the VA, when it was on television. Every night people living in a horrible, horrible manner. We got that done. We got accountability done. We got it so that now in the VA, you don't have to wait for four weeks, six weeks, eight weeks, four months to see a doctor. If you can't get a doctor, you go outside, you get the doctor, you have them taken care of. And we pay the doctor. And we've not only made life wonderful for so many people, we've saved tremendous amounts of money, far secondarily, but we've saved a lot of money.

And now we have the right to fire bad people in the VA. We had 9,000 people that treated our veterans horribly. In prime time, they would not have treated our veterans badly. But they treated our veterans horribly. And we have what's called the VA Accountability Act. And the Accountability says if we see somebody in there that doesn't treat our vets well, or they steal, they rob, they do things badly, we say, "Joe, you're fired. Get out of here." Before, you couldn't do that. You couldn't do that before.

So we've taken care of things. We've done things like nobody's ever thought possible. And that's part of the reason that many people don't like us, because we've done too much, but we've done it quickly.

And we were going to sit home and watch a big victory. And everybody had us down for a victory. It was going to be great. And now we're out here fighting. I said to somebody, I was going to take a few days and relax after our big electoral victory. Ten o'clock, it was over. But I was going to take a few days.

And I can say this, since our election, I believe, which was a catastrophe when I watch and even these guys knew what happened, they know what happened. They're saying, "Wow, Pennsylvania's insurmountable. Wow, Wisconsin, look at the big leads we had." Even though the press said we were going to lose Wisconsin by 17 points. Even though the press said Ohio is going to be close, we set a record. Florida's going to be close -- we set a record. Texas is going to be close. Texas is going to be close -- we set a record. And we set a record with Hispanic, with the Black community. We set a record with everybody.

Today, we see a very important event though, because right over there, right there, we see the event going to take place. And I'm going to be watching, because history is going to be made. We're going to see whether or not we have great and courageous leaders or whether or not we have leaders that should be ashamed of themselves throughout history, throughout eternity, they'll be ashamed. And you know what? If they do the wrong thing, we should never ever forget that they did. Never forget. We should never ever forget. With only three of the seven states in question, we win the presidency of the United States.

And by the way, it's much more important today than it was 24 hours ago. Because I spoke to David Perdue, what a great person, and Kelly Loeffler, two great people, but it was a setup. And, you know, I said, "We have no back line anymore." The only back line, the only line of demarcation, the only line that we have is the veto of the President of the United States. So this is now what we're doing, a far more important election than it was two days ago.

I want to thank the more than 140 members of the House. Those are warriors. They're over there working like you've never seen before, studying, talking, actually going all the way back, studying the roots of the Constitution, because they know we have the right to send a bad vote that was illegally got. They gave these people bad things to vote for and they voted, because what did they know? And then when they found out a few weeks later -- again, it took them four years to devise history. And the only unhappy person in the United States, single most unhappy, is Hillary Clinton because she said, "Why didn't you do this for me four years ago? Why didn't you do this for me four years ago? Change the votes! 10,000 in Michigan. You could have changed the whole thing!" But she's not too happy. You notice you don't see her anymore. What happened? Where is Hillary? Where is she?

But I want to thank all of those congressmen and women. I also want to thank our 13 most courageous members of the US Senate, Sen. Ted Cruz, Sen. Ron Johnson, Sen. Josh Hawley, Kelly Loeffler. And Kelly Loeffler, I'll tell you, she's been so great. She works so hard. So let's give her and David a little special -- because it was rigged against them. Let's give her and David. Kelly Loeffler, David Perdue. They fought a good race. They never had a shot. That equipment should never have been allowed to be used, and I was telling these people don't let them use this stuff. Marsha Blackburn, terrific person. Mike Braun, Indiana. Steve Daines, great guy. Bill Hagerty, John Kennedy, James Lankford, Cynthia Lummis. Tommy Tuberville, the coach. And Roger Marshall. We want to thank them, senators that stepped up, we want to thank them.

I actually think, though, it takes, again, more courage not to step up. And I think a lot of those people are going to find that out, and you better start looking at your leadership because the leadership has led you



down the tubes. You know? "We don't want to give \$2,000 to people. We want to give them \$600." Oh, great. How does that play politically? Pretty good? And this has nothing to do with politics. But how does it play politically? China destroyed these people. We didn't destroy -- China destroyed them, totally destroyed them. We want to give them \$600, and they just wouldn't change. I said, "Give them \$2,000. We'll pay it back. We'll pay it back fast. You already owe 26 trillion. Give them a couple of bucks. Let them live. Give them a couple of bucks!"

And some of the people here disagree with me on that. But I just say, look, you got to let people live. And how does that play though? OK, number one, it's the right thing to do. But how does that play politically? I think it's the primary reason, one of the primary reasons, the other was just pure cheating. That was the super primary reason. But you can't do that. You got to use your head.

As you know the media has constantly asserted the outrageous lie that there was no evidence of widespread fraud. You ever see these people? "While there is no evidence of fraud" -- oh, really? Well, I'm going to read you pages. I hope you don't get bored listening to it. Promise? Don't get bored listening to it, all those hundreds of thousands of people back there. Move them up, please. Yeah. All these people, don't get bored. Don't get angry at me because you're going to get bored because it's so much. The American people do not believe the corrupt fake news anymore. They have ruined their reputation.

But it used to be that they'd argue with me, I'd fight. So I'd fight, they'd fight. I'd fight, they'd fight. Boop-boop. You'd believe me, you'd believe them. Somebody comes out. You know. They had their point of view, I had my point of view. But you'd have an argument. Now what they do is they go silent. It's called suppression. And that's what happens in a communist country. That's what they do. They suppress. You don't fight with them anymore, unless it's a bad story. If they have a little bad story about me, they'll make it 10 times worse and it's a major headline. But Hunter Biden, they don't talk about him. What happened to Hunter? Where's Hunter? Where is Hunter? They don't talk about him.

Now watch, all the sets will go off. Well, they can't do that because they get good ratings. The ratings are too good. Now where is Hunter? And how come Joe was allowed to give a billion dollars of money to get rid of the prosecutor in Ukraine? How does that happen? I'd ask you that question. How does that happen? Can you imagine if I said that? If I said that it would be a whole different ball game. And how come Hunter gets three and a half million dollars from the mayor of Moscow's wife, and gets hundreds of thousands of dollars to sit on an energy board even though he admits he has no knowledge of energy, and millions of dollars up front, and how come they go into China and they leave with billions of dollars to manage? "Have you managed money before?" "No, I haven't." "Oh, that's good. Here's about \$3 billion."

No, they don't talk about that. No, we have a corrupt media. They've gone silent. They've gone dead. I now realize how good it was if you go back 10 years. I realize how good, even though I didn't necessarily love him, I realized how good, it was like a cleansing motion. Right? But we don't have that anymore. We don't have a fair media anymore. It's suppression, and you have to be very careful with that. And they've lost all credibility in this country. We will not be intimidated into accepting the hoaxes and the lies that we've been forced to believe over the past several weeks. We've amassed overwhelming evidence about a fake election. This is the presidential election. Last night was a little bit better because of the fact that we had a lot of eyes watching one specific state, but they cheated like hell anyway.

You have one of the dumbest governors in the United States. And, you know, when I endorsed him, I

didn't know this guy. At the request of David Perdue. He said, "A friend of mine is running for governor." "What's his name?" And you know the rest. He was in fourth place, fifth place. I don't know. He was way -- He was doing poorly. I endorsed him. He went like a rocket ship and he won. And then I had to beat Stacey Abrams with this guy, Brian Kemp. I had to beat Stacey Abrams and I had to beat Oprah, used to be a friend of mine. I was on her last show. Her last week she picked the five outstanding people. I don't think she thinks that anymore. Once I ran for president, I didn't notice there were too many calls coming in from Oprah. Believe it or not, she used to like me, but I was one of the five outstanding people.

And I had a campaign against Michelle Obama and Barack Hussein Obama against Stacey. And I had Brian Kemp, he weighs 130 pounds. He said he played offensive line in football. I'm trying to figure that. I'm still trying to figure that out. He said that the other night, "I was an offensive lineman." I'm saying, "Really? That must've been a very small team." But I look at that and I look at what's happened, and he turned out to be a disaster. This stuff happens.

You know, look, I'm not happy with the Supreme Court. They love to rule against me. I picked three people. I fought like hell for them, one in particular I fought. They all said, "Sir, cut him loose. He's killing us." The senators, you know, very loyal senators. They're very loyal people. "Sir, cut him loose. He's killing us, sir. Cut him loose, sir." I must've gotten half of the senators. I said, "No, I can't do that. It's unfair to him. And it's unfair to the family. He didn't do anything wrong. They're made-up stories. They were all made-up stories. He didn't do anything wrong." "Cut him loose, sir." I said, "No, I won't do that." We got him through. And you know what? They couldn't give a damn. They couldn't give a damn. Let them rule the right way, but it almost seems that they're all going out of their way to hurt all of us, and to hurt our country. To hurt our country.

You know, I read a story in one of the newspapers recently, how I control the three Supreme Court justices. I control them. They're puppets. I read it about Bill Barr, that he's my personal attorney. That he'll do anything for me. And I said, "You know, it really is genius," because what they do is that, and it makes it really impossible for them to ever give you a victory, because all of a sudden Bill Barr changed, if you hadn't noticed. I like Bill Barr, but he changed, because he didn't want to be considered my personal attorney. And the Supreme Court, they rule against me so much. You know why? Because the story is I haven't spoken to any of them, any of them, since virtually they got in. But the story is that they're my puppet. That they're puppets. And now that the only way they can get out of that, because they hate that, it's not good in the social circuit. And the only way they get out is to rule against Trump. So let's rule against Trump, and they do that. So I want to congratulate them.

But it shows you the media's genius. In fact, probably, if I was the media, I'd do it the same way. I hate to say it. But we got to get them straightened out. Today, for the sake of our democracy, for the sake of our Constitution, and for the sake of our children, we lay out the case for the entire world to hear. You want to hear it?

In every single swing state, local officials, state officials, almost all Democrats made illegal and unconstitutional changes to election procedures without the mandated approvals by the state legislatures, that these changes paved the way for fraud on a scale never seen before. And I think we'd go a long way outside of our country when I say that.

So just in a nutshell, you can't make a change on voting for a federal election unless the state legislature approves it. No judge can do it. Nobody can do it, only a legislature. So as an example in Pennsylvania or whatever, you have a Republican legislature, you have a Democrat mayor, and you have a lot of

Democrats all over the place. They go to the legislature, the legislature laughs at them. Says, "We're not going to do that." They say, "Thank you very much." And they go and make the changes themselves. They do it anyway. And that's totally illegal. That's totally illegal. You can't do that.

In Pennsylvania, the Democrat secretary of state and the Democrat state Supreme Court justices illegally abolished the signature verification requirements just 11 days prior to the election. So think of what they did. No longer is there signature verification. Oh, that's OK. We want voter ID, by the way. But no longer is there signature verification, 11 days before the election! They say, "We don't want it." You know why they don't want it? Because they want to cheat. That's the only reason. Who would even think of that? We don't want to verify a signature? There were over 205,000 more ballots counted in Pennsylvania. Now think of this. You had 205,000 more ballots than you had voters. That means you had 200 -- where did they come from? You know where they came from? Somebody's imagination. Whatever they needed. So in Pennsylvania you had 205,000 more votes than you had voters! And it's -- the number is actually much greater than that now. That was as of a week ago. And this is a mathematical impossibility, unless you want to say it's a total fraud. So Pennsylvania was defrauded.

Over 8,000 ballots in Pennsylvania were cast by people whose names and dates of birth match individuals who died in 2020 and prior to the election. Think of that. Dead people! Lots of dead people, thousands. And some dead people actually requested an application. That bothers me even more. Not only are they voting, they want an application to vote. One of them was 29 years ago died. It's incredible.

Over 14,000 ballots were cast by out-of-state voters. So these are voters that don't live in the state. And by the way, these numbers are what they call outcome determinative. Meaning these numbers far surpass -- I lost by a very little bit. These numbers are massive. Massive. More than 10,000 votes in Pennsylvania were illegally counted, even though they were received after Election Day. In other words, "They were received after Election Day, let's count them anyway!" And what they did in many cases is they did fraud. They took the date and they moved it back, so that it no longer is after Election Day. And more than 60,000 ballots in Pennsylvania were reported received back. They got back before they were ever supposedly mailed out. In other words, you got the ballot back before you mailed it! Which is also logically and logistically impossible, right? Think of that one. You got the ballot back. Let's send the ballots. Oh, they've already been sent. But we got the ballot back before they were sent. I don't think that's too good.

Twenty-five thousand ballots in Pennsylvania were requested by nursing home residents, all in a single giant batch -- not legal -- indicating an enormous illegal ballot-harvesting operation. You're not allowed to do it. It's against the law. The day before the election, the state of Pennsylvania reported the number of absentee ballots that had been sent out. Yet this number was suddenly and drastically increased by 400,000 people. It was increased. Nobody knows where it came from -- by 400,000 ballots. One day after the election, it remains totally unexplained. They said, "Well, we can't figure that." Now that's many, many times what it would take to overthrow the state. Just that one element. 400,000 ballots appeared from nowhere, right after the election.

By the way, Pennsylvania has now seen all of this. They didn't know because it was so quick. They had a vote, they voted, but now they see all this stuff. It's all come to light. Doesn't happen that fast. And they want to recertify their votes. They want to recertify. But the only way that can happen is if Mike Pence agrees to send it back.

Mike Pence has to agree to send it back. And many people in Congress want it sent back, and think of what you're doing. Let's say you don't do it. Somebody says, "Well, we have to obey the Constitution." And you are, because you're protecting our country and you're protecting the Constitution, so you are. But think of what happens. Let's say they're stiff and they're stupid people. And they say, "Well, we really have no choice." Even though Pennsylvania and other states want to redo their votes, they want to see the numbers. They already have the numbers. Go very quickly and they want to redo their legislature because many of these votes were taken, as I said, because it wasn't approved by their legislature. That in itself is illegal and then you have the scam and that's all of the things that we're talking about. But think of this: If you don't do that, that means you will have a president of the United States for four years, with his wonderful son.

You will have a president who lost all of these states, or you will have a president, to put it another way, who was voted on by a bunch of stupid people who lost all of these things. You will have an illegitimate president, that's what you'll have. And we can't let that happen. These are the facts that you won't hear from the fake news media. It's all part of the suppression effort. They don't want to talk about it. They don't want to talk about it. In fact, when I started talking about that, I guarantee you a lot of the television sets and a lot of those cameras went off and that's how a lot of cameras back there. But a lot of them went off, but these are the things you don't hear about. You don't hear what you just heard. And I'm going to go over a few more states. But you don't hear it by the people who want to deceive you and demoralize you and control you -- big tech, media.

Just like the suppression polls that said we're going to lose Wisconsin by 17 points. Well, we won Wisconsin. They don't have it that way because they lose just by a little sliver. But they had me down the day before. Washington Post/ABC poll: down 17 points. I called up a real pollster. I said, "What is that?" "Sir, that's called a suppression poll. I think you're going to win Wisconsin, sir." I said, "But why do they make it 4 or 5 points?" "Because then people vote. But when you're down 17, they say, 'Hey, I'm not going to waste my time. I love the President, but there's no way.'" Despite that, despite that, we won Wisconsin. We're going to see. We're going to see. But that's called suppression because a lot of people, when they see that, it's very interesting. This pollster said, "Sir, if you're down 3, 4 or 5, people vote. When you go down 17, they say, 'Let's save, let's go and have dinner, and let's watch the presidential defeat tonight on television darling.'" "

And just like the radical left tries to blacklist you on social media, every time I put out a tweet, even if it's totally correct, totally correct, I get a flag. I get a flag. And they also don't let you get out. On Twitter, it's very hard to come onto my account. It's very hard to get out a message. They don't let the message get out nearly like they should, but I've had many people say, "I can't get on your Twitter." I don't care about Twitter. Twitter is bad news. They're all bad news. But you know what? If you want to get out of message, and if you want to go through big tech, social media, they are really, if you're a conservative, if you're a Republican, if you have a big voice, I guess they call it shadow ban, right? Shadow ban. They shadow ban you, and it should be illegal. I've been telling these Republicans get rid of Section 230.

And for some reason, Mitch and the group, they don't want to put it in there. And they don't realize that that's going to be the end of the Republican Party as we know it, but it's never going to be the end of us, never. Let them get out. Let the weak ones get out. This is a time for strength. They also want to indoctrinate your children in school by teaching them things that aren't so. They want to indoctrinate your children. It's all part of the comprehensive assault on our democracy and the American people to finally standing up and saying no. This crowd is, again, a testament to it. I did no advertising. I did

nothing. You do have some groups that are big supporters. I want to thank that -- Amy [Kremer] and everybody. We have some incredible supporters, incredible, but we didn't do anything. This just happened.

Two months ago, we had a massive crowd come down to Washington. I said, "What are they there for?" "Sir, they're there for you." We have nothing to do with it. These groups, they're forming all over the United States. And we got to remember, in a year from now, you're going to start working on Congress. And we got to get rid of the weak congresspeople, the ones that aren't any good, the Liz Cheneys of the world, we got to get rid of them. We got to get rid -- you know, she never wants a soldier brought home. I've brought a lot of our soldiers home. I don't know, some like it. They're in countries that nobody even knows the name. Nobody knows where they are. They're dying. They're great, but they're dying. They're losing their arms, their legs, their face. I brought them back home, largely back home, Afghanistan, Iraq. Remember I used to say in the old days, "Don't go into Iraq. But if you go in, keep the oil." We didn't keep the oil. So stupid. So stupid, these people. And Iraq has billions and billions of dollars now in the bank. And what did we do? We get nothing. We never get. But we do actually, we kept the oil here. We did good. We got rid of the ISIS caliphate. We got rid of plenty of different things that everybody knows and the rebuilding of our military in three years, people said it couldn't be done. And it was all made in the USA, all made in the USA. Best equipment in the world. In Wisconsin, corrupt Democrat run cities deployed more than 500 illegal unmanned, unsecured drop boxes, which collected a minimum of 91,000 unlawful votes. It was razor thin, the loss. This one thing alone is much more than we would need, but there are many things.

They have these lockboxes and they pick them up and they disappear for two days. People would say, "Where's that box?" They disappeared. Nobody even knew where the hell it was. In addition, over 170,000 absentee votes were counted in Wisconsin without a valid absentee ballot application. So they had a vote, but they had no application. And that's illegal in Wisconsin. Meaning those votes were blatantly done in opposition to state law. And they came 100% from Democrat areas, such as Milwaukee and Madison, 100%. In Madison, 17,000 votes were deposited in so-called human drop boxes. You know what that is, right? Where operatives stuff thousands of unsecured ballots into duffel bags on park benches across the city in complete defiance of cease and desist letters from state legislatures. Your state legislature said, "Don't do it." They're the only ones that could approve it. They gave tens of thousands of votes.

They came in, in duffel bags. Where the hell did they come from? According to eyewitness testimony, postal service workers in Wisconsin were also instructed to illegally backdate approximately 100,000 ballots. The margin of difference in Wisconsin was less than 20,000 votes. Each one of these things alone wins us the state. Great state, we love the state, we won the state. In Georgia, your secretary of state, who -- I can't believe this guy's a Republican. He loves recording telephone conversations. I thought it was a great conversation personally, so did a lot of other -- people love that conversation, because it says what's going on. These people are crooked. They're 100%, in my opinion, one of the most corrupt between your governor and your secretary of state. And now you have it again last night, just take a look at what happened, what a mess. And the Democrat party operatives entered into an illegal and unconstitutional settlement agreement that drastically weakened signature verification and other election security procedures.

Stacey Abrams, she took them to lunch. And I beat her two years ago with a bad candidate, Brian Kemp. But they took -- the Democrats took the Republicans to lunch because the secretary of state had no clue what the hell was happening, unless he did have a clue. That's interesting. Maybe he was with the other

side, but we've been trying to get verifications of signatures in Fulton County. They won't let us do it. The only reason they won't is because we'll find things in the hundreds of thousands. Why wouldn't they let us verify signatures in Fulton County, which is known for being very corrupt? They won't do it. They go to some other county where you would live. I said, "That's not the problem. The problem is Fulton County." Home of Stacey Abrams. She did a good job. I congratulate her, but it was done in such a way that we can't let this stuff happen.

We won't have a country if it happens. As a result, Georgia's absentee ballot rejection rate was more than 10 times lower than previous levels, because the criteria was so off. Forty-eight counties in Georgia with thousands and thousands of votes rejected zero ballots. There wasn't one ballot. In other words, in a year in which more mail-in ballots were sent than ever before, and more people were voting by mail for the first time, the rejection rate was drastically lower than it had ever been before. The only way this can be explained is if tens of thousands of illegitimate votes were added to the tally. That's the only way you could explain it. By the way, you're talking about tens of thousands. If Georgia had merely rejected the same number of unlawful ballots, as in other years, there should have been approximately 45,000 ballots rejected -- far more than what we needed to win, just over 11,000.

They should find those votes. They should absolutely find that. Just over 11,000 votes, that's all we need. They defrauded us out of a win in Georgia, and we're not going to forget it. There's only one reason the Democrats could possibly want to eliminate signature matching, oppose voter ID and stop citizenship confirmation. Are you a citizenship? (sic) You're not allowed to ask that question. Because they want to steal the election. The radical left knows exactly what they're doing. They're ruthless and it's time that somebody did something about it. And Mike Pence, I hope you're going to stand up for the good of our Constitution and for the good of our country. And if you're not, I'm going to be very disappointed in you. I will tell you right now. I'm not hearing good stories. In Fulton County, Republican poll watchers were ejected, in some cases physically, from the room under the false pretense of a pipe burst.

Water main burst, everybody leave. Which we now know was a total lie. Then election officials pulled boxes -- Democrats -- and suitcases of ballots out from under a table. You all saw it on television. Totally fraudulent. And illegally scanned them for nearly two hours totally unsupervised. Tens of thousands of votes, as that coincided with a mysterious vote dump of up to 100,000 votes for Joe Biden, almost none for Trump. Oh, that sounds fair. That was at 1:34 a.m. The Georgia secretary of state and pathetic governor of Georgia -- although he says, I'm a great president. You know, I sort of maybe have to -- He said the other day, "Yes, I disagree with (the) president but he's been a great president." OK. Thank you very much. Because of him and others -- Brian Kemp, vote him the hell out of office, please.

Well, his rates are so low, his approval rating now, I think it just reached a record low. They've rejected five separate appeals for an independent and comprehensive audit of signatures in Fulton County. Even without an audit, the number of fraudulent ballots that we've identified across the state is staggering. Over 10,300 ballots in Georgia were cast by individuals whose names and dates of birth match Georgia residents who died in 2020 and prior to the election. More than 2,500 ballots were cast by individuals whose names and dates of birth match incarcerated felons in Georgia prison. People who are not allowed to vote. More than 4,500 illegal ballots were cast by individuals who do not appear on the state's own voter rolls. Over 18,000 illegal ballots were cast by individuals who registered to vote using an address listed as vacant, according to the Postal Service. At least 88,000 ballots in Georgia were cast by people whose registrations were illegally backdated.

Sixty-six thousand votes -- each one of these is far more than we need. Sixty-six thousand votes in Georgia were cast by individuals under the legal voting age. And at least 15,000 ballots were cast by individuals who moved out of the state prior to (the) November 3 election. They say they moved right back. They move right back. Oh, they moved out. They moved right back. OK. They miss Georgia that much. I do. I love Georgia, but it's a corrupt system. Despite all of this, the margin in Georgia is only 11,779 votes. Each and every one of these issues is enough to give us a victory in Georgia, a big, beautiful victory. Make no mistake, this election stolen from you, from me and from the country. And not a single swing state has conducted a comprehensive audit to remove the illegal ballots. This should absolutely occur in every single contested state before the election is certified.

In the state of Arizona, over 36,000 ballots were illegally cast by non-citizens. Two-thousand ballots were returned with no address. More than 22,000 ballots were returned before they were ever supposedly mailed out. They returned, but we haven't mailed them yet. Eleven thousand six hundred more ballots and votes were counted more than there were actual voters. You see that? So you have more votes, again, than you have voters.

One hundred fifty thousand people registered in (Maricopa) County after the registration deadline. One hundred three thousand ballots in the county were sent for electronic adjudication with no Republican observers. In Clark County, Nevada, the accuracy settings on signature verification machines were purposely lowered before they were used to count over 130,000 ballots. If you signed your name as Santa Claus, it would go through. There were also more than 42,000 double votes in Nevada. Over 150,000 people were hurt so badly by what took place. And 1,500 ballots were cast by individuals whose names and dates of birth match Nevada residents who died in 2020, prior to (the) November 3 election. More than 8,000 votes were cast by individuals who had no address and probably didn't live there. The margin in Nevada is down at a very low number. Any of these things would have taken care of the situation.

We would have won Nevada, also. Every one of these we're going over, we win. In Michigan quickly, the secretary of state, a real great one, flooded the state with unsolicited mail-in ballot applications, sent to every person on the rolls, in direct violation of state law. More than 17,000 Michigan ballots were cast by individuals whose names and dates of birth matched people who were deceased. In Wayne County -- that's a great one, that's Detroit -- 174,000 ballots were counted without being tied to an actual registered voter. Nobody knows where they came from. Also in Wayne County, poll watchers observed canvassers re-scanning batches of ballots over and over again, up to three or four or five times. In Detroit, turnout was 139% of registered voters. Think of that. So you had 139% of the people in Detroit voting. This is in Michigan -- Detroit, Michigan.

A career employee of the Detroit, City of Detroit, testified under penalty of perjury that she witnessed city workers coaching voters to vote straight Democrat, while accompanying them to watch who they voted for. When a Republican came in, they wouldn't talk to him. The same worker was instructed not to ask for any voter ID and not to attempt to validate any signatures if they were Democrats. She (was) also told to illegally and was told, backdate ballots received after the deadline and reports that thousands and thousands of ballots were improperly backdated. That's Michigan. Four witnesses have testified under penalty of perjury that after officials in Detroit announced the last votes had been counted, tens of thousands of additional ballots arrived without required envelopes. Every single one was for a Democrat. I got no votes.

At 6:31 a.m., in the early morning hours after voting had ended, Michigan suddenly reported 147,000 votes. An astounding 94% went to Joe Biden, who campaigned brilliantly from his basement. Only a couple of percentage points went to Trump. Such gigantic and one-sided vote dumps were only observed in a few swing states and they were observed in the states where it was necessary. You know what's interesting, President Obama beat Biden in every state other than the swing states where Biden killed him. But the swing States were the ones that mattered. There were always just enough to push Joe Biden barely into the lead. We were ahead by a lot and within the number of hours we were losing by a little.

In addition, there is the highly troubling matter of Dominion Voting Systems. In one Michigan county alone, 6,000 votes were switched from Trump to Biden and the same systems are used in the majority of states in our country. Sen. William Ligon, a great gentleman, chairman of Georgia Senate Judiciary Subcommittee, Senator Ligon, highly respected on elections has written a letter describing his concerns with Dominion in Georgia.

He wrote, and I quote, "The Dominion voting machines employed in Fulton County had an astronomical and astounding 93.67% error rate." It's only wrong 93% of the time. "In the scanning of ballots requiring a review panel to adjudicate or determine the voter's interest, in over 106,000 ballots out of a total of 113,000." Think of it, you go in and you vote and then they tell people who you're supposed to be voting for. They make up whatever they want. Nobody's ever even heard. They adjudicate your vote. They say, "Well, we don't think Trump wants to vote for Trump. We think he wants to vote for Biden. Put it down for Biden." The national average for such an error rate is far less than 1% and yet you're at 93%. "The source of this astronomical error rate must be identified to determine if these machines were set up or destroyed to allow for a third party to disregard the actual ballot cast by the registered voter."

The letter continues, "There is clear evidence that tens of thousands of votes were switched from President Trump to former Vice President Biden in several counties in Georgia. For example, in Bibb County, President Trump was reported to have 29,391 votes at 9:11 PM eastern time. While simultaneously Vice President Joe Biden was reported to have 17,213. Minutes later, just minutes, at the next update, these vote numbers switched with President Trump going way down to 17,000 and Biden going way up to 29,391." And that was very quick, a 12,000 vote switch, all in Mr. Biden's favor.

So, I mean, I could go on and on about this fraud that took place in every state and all of these legislatures want this back. I don't want to do it to you because I love you and it's freezing out here, but I could just go on forever. I can tell you this.

So when you hear, when you hear, "While there is no evidence to prove any wrongdoing," this is the most fraudulent thing anybody's -- This is a criminal enterprise. This is a criminal enterprise and the press will say, and I'm sure they won't put any of that on there because that's no good, do you ever see, "While there is no evidence to back President Trump's assertion," I could go on for another hour reading this stuff to you and telling you about it. There's never been anything like it. Think about it, Detroit had more votes than it had voters. Pennsylvania had 205,000 more votes than it had more -- but you don't have to go any -- Between that, I think that's almost better than dead people, if you think, right? More votes than they had voters, and many other States are also.

It's a disgrace that the United States of America, tens of millions of people are allowed to go vote without so much as even showing identification. In no state is there any question or effort made to



verify the identity, citizenship, residency, or eligibility of the votes cast. The Republicans have to get tougher. You're not going to have a Republican Party if you don't get tougher. They want to play so straight, they want to play so, "Sir, yes, the United States, the Constitution doesn't allow me to send them back to the States." Well, I say, "Yes, it does because the Constitution says you have to protect our country and you have to protect our Constitution and you can't vote on fraud, and fraud breaks up everything, doesn't it?" When you catch somebody in a fraud, you're allowed to go by very different rules. So I hope Mike has the courage to do what he has to do. And I hope he doesn't listen to the RINOs and the stupid people that he's listening to. It is also widely understood that the voter rolls are crammed full of non-citizens, felons and people who have moved out of state and individuals who are otherwise ineligible to vote. Yet Democrats oppose every effort to clean up their voter rolls. They don't want to clean them up. They are loaded. And how many people here know other people that when the hundreds of thousands and then millions of ballots got sent out, got three, four, five, six, and I heard one who got seven ballots. And then they say, "You didn't quite make it, sir." We won. We won in a landslide. This was a landslide.

They said, "It's not American to challenge the election." This is the most corrupt election in the history, maybe of the world. You know, you could go (to) Third World countries, but I don't think they had hundreds of thousands of votes and they don't have voters for them. I mean, no matter where you go, nobody would think this. In fact, it's so egregious, it's so bad, that a lot of people don't even believe it. It's so crazy that people don't even believe it. It can't be true. So they don't believe it. This is not just a matter of domestic politics, this is a matter of national security. So today, in addition to challenging the certification of the election, I'm calling on Congress and the state legislatures to quickly pass sweeping election reforms, and you better do it before we have no country left. Today is not the end. It's just the beginning.

With your help over the last four years, we built the greatest political movement in the history of our country and nobody even challenges that. I say that over and over, and I never get challenged by the fake news, and they challenge almost everything we say. But our fight against the big donors, big media, big tech and others is just getting started. This is the greatest in history. There's never been a movement like that. You look back there all the way to the Washington Monument. It's hard to believe. We must stop the steal and then we must ensure that such outrageous election fraud never happens again, can never be allowed to happen again, but we're going forward. We'll take care of going forward. We got to take care of going back. Don't let them talk, "OK, well we promise," I've had a lot of people, "Sir, you're at 96% for four years." I said, "I'm not interested right now. I'm interested in right there."

With your help we will finally pass powerful requirements for voter ID. You need an ID to cash your check. You need an ID to go to a bank, to buy alcohol, to drive a car. Every person should need to show an ID in order to cast your most important thing, a vote. We will also require proof of American citizenship in order to vote in American elections. We just had a good victory in court on that one, actually. We will ban ballot harvesting and prohibit the use of unsecured drop boxes to commit rampant fraud. These drop boxes are fraudulent. There for, they get -- they disappear and then all of a sudden they show up. It's fraudulent. We will stop the practice of universal, unsolicited mail-in balloting. We will clean up the voter rolls that ensure that every single person who cast a vote is a citizen of our country, a resident of the state in which they vote and their vote is cast in a lawful and honest manner. We will restore the vital civic tradition of in-person voting on Election Day so that voters can be fully informed when they make their choice. We will finally hold big tech accountable and if these people had courage and guts, they would get rid of Section 230, something that no other company, no other person in America, in the world, has.

All of these tech monopolies are going to abuse their power and interfere in our elections and it has to be stopped and the Republicans have to get a lot tougher and so should the Democrats. They should be regulated, investigated and brought to justice under the fullest extent of the law. They're totally breaking the law. Together we will drain the Washington swamp and we will clean up the corruption in our nation's capital. We have done a big job on it, but you think it's easy, it's a dirty business. It's a dirty business. You have a lot of bad people out there. Despite everything we've been through, looking out all over this country and seeing fantastic crowds, although this I think is our all-time record. I think you have 250,000 people. Two hundred fifty thousand!

Looking out at all the amazing patriots here today, I have never been more confident in our nation's future. Well, I have to say we have to be a little bit careful. That's a nice statement, but we have to be a little careful with that statement. If we allow this group of people to illegally take over our country, because it's illegal when the votes are illegal, when the way they got there is illegal, when the States that vote are given false and fraudulent information. We are the greatest country on Earth and we are headed, and were headed, in the right direction. You know, the wall is built. We're doing record numbers at the wall. Now they want to take down the wall. Let's let everyone flow in. Let's let everybody flow in.

We did a great job in the wall. Remember the wall? They said it could never be done. One of the largest infrastructure projects we've ever had in this country and it's had a tremendous impact and we got rid of catch and release, we got rid of all of the stuff that we had to live with. But now the caravans, they think Biden's getting in, the caravans are forming again. They want to come in again and rip off our country. Can't let it happen. As this enormous crowd shows, we have truth and justice on our side. We have a deep and enduring love for America in our hearts. We love our country. We have overwhelming pride in this great country, and we have it deep in our souls. Together we are determined to defend and preserve government of the people, by the people and for the people.

Our brightest days are before us. Our greatest achievements still wait. I think one of our great achievements will be election security because nobody until I came along, had any idea how corrupt our elections were. And again, most people would stand there at 9:00 in the evening and say, "I want to thank you very much," and they go off to some other life, but I said, "Something's wrong here. Something's really wrong. Can't have happened." And we fight. We fight like hell and if you don't fight like hell, you're not going to have a country anymore.

Our exciting adventures and boldest endeavors have not yet begun. My fellow Americans, for our movement, for our children and for our beloved country, and I say this, despite all that's happened, the best is yet to come.

So we're going to, we're going to walk down Pennsylvania Avenue, I love Pennsylvania Avenue, and we're going to the Capitol and we're going to try and give -- the Democrats are hopeless. They're never voting for anything, not even one vote. But we're going to try and give our Republicans, the weak ones, because the strong ones don't need any of our help, we're going to try and give them the kind of pride and boldness that they need to take back our country.

So let's walk down Pennsylvania Avenue. I want to thank you all. God bless you and God bless America. Thank you all for being here. This is incredible. Thank you very much. Thank you.

Compilation of Tweets from @realDonaldTrump

**November 27, 2016**

DATE FILED: November 28, 2023 12:03 PM

3:30 PM



**Donald J. Trump** ✓  
@realDonaldTrump



In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally

3:30 PM · Nov 27, 2016

<https://twitter.com/realDonaldTrump/status/802972944532209664>

**November 9, 2018**

3:33 PM



**Donald J. Trump** ✓  
@realDonaldTrump



Just out — in Arizona, SIGNATURES DON'T MATCH. Electoral corruption  
- Call for a new Election? We must protect our Democracy!

3:33 PM · Nov 9, 2018

<https://twitter.com/realDonaldTrump/status/1060993836984324096>

April 17, 2020

11:21 AM



**Donald J. Trump** ✓  
@realDonaldTrump



LIBERATE MINNESOTA!

11:21 AM · Apr 17, 2020

<https://twitter.com/realDonaldTrump/status/1251168994066944003>

11:22 AM



**Donald J. Trump** ✓  
@realDonaldTrump

LIBERATE MICHIGAN!

11:22 AM · Apr 17, 2020

<https://twitter.com/realDonaldTrump/status/1251169217531056130>

11:25 AM



**Donald J. Trump** ✓  
@realDonaldTrump



LIBERATE VIRGINIA, and save your great 2nd Amendment. It is under siege!

11:25 AM · Apr 17, 2020

<https://twitter.com/realDonaldTrump/status/1251169987110330372>

**May 1, 2020**

8:42 AM



**Donald J. Trump** ✓

@realDonaldTrump



The Governor of Michigan should give a little, and put out the fire. These are very good people, but they are angry. They want their lives back again, safely! See them, talk to them, make a deal.

8:42 AM · May 1, 2020

<https://twitter.com/realDonaldTrump/status/1256202305680158720>

**May 24, 2020**

10:08 AM



**Donald J. Trump** ✓

@realDonaldTrump



The United States cannot have all Mail In Ballots. It will be the greatest Rigged Election in history. People grab them from mailboxes, print thousands of forgeries and “force” people to sign. Also, forge names. Some absentee OK, when necessary. Trying to use Covid for this Scam!


10:08 AM · May 24, 2020

<https://twitter.com/realDonaldTrump/status/1264558926021959680?lang=en>

May 28, 2020

12:00 AM



**Donald J. Trump** 

@realDonaldTrump



Thank you Cowboys. See you in New Mexico!

[twitter.com/RideWithC4T/st...](https://twitter.com/RideWithC4T/status/1265855459719892993)

This Tweet is from a suspended account. [Learn more](#)

12:00 AM · May 28, 2020

<https://twitter.com/realDonaldTrump/status/1265855459719892993>

May 29, 2020

12:53 AM



**Donald J. Trump**  @realDonaldTrump · May 29, 2020

I can't stand back & watch this happen to a great American City, Minneapolis. A total lack of leadership. Either the very weak Radical Left Mayor, Jacob Frey, get his act together and bring the City under control, or I will send in the National Guard & get the job done right.....

 71.8K

 62K

 212.6K



**Donald J. Trump**  @realDonaldTrump

This Post violated the X Rules about glorifying violence. However, X has determined that it may be in the public's interest for the Post to remain accessible. [Learn more](#)

....These THUGS are dishonoring the memory of George Floyd, and I won't let that happen. Just spoke to Governor Tim Walz and told him that the Military is with him all the way. Any difficulty and we will assume control but, when the looting starts, the shooting starts. Thank you!

12:53 AM · May 29, 2020

Part 1: <https://twitter.com/realDonaldTrump/status/1266231100172615680>

Part 2: <https://twitter.com/realDonaldTrump/status/1266231100780744704>



**May 30, 2020**

10:08 PM



**Donald J. Trump** ✓

@realDonaldTrump



The National Guard has been released in Minneapolis to do the job that the Democrat Mayor couldn't do. Should have been used 2 days ago & there would not have been damage & Police Headquarters would not have been taken over & ruined. Great job by the National Guard. No games!

10:08 PM · May 30, 2020

33.7K Reposts 8,799 Quotes 197.6K Likes 457 Bookmarks

<https://twitter.com/realDonaldTrump/status/1266914470066036736>

**July 30, 2020**

8:46 AM



**Donald J. Trump** ✓

@realDonaldTrump



With Universal Mail-In Voting (not Absentee Voting, which is good), 2020 will be the most INACCURATE & FRAUDULENT Election in history. It will be a great embarrassment to the USA. Delay the Election until people can properly, securely and safely vote???

8:46 AM · Jul 30, 2020

<https://twitter.com/realDonaldTrump/status/1288818160389558273>



September 17, 2020

7:56 AM



**Donald J. Trump** ✓

@realDonaldTrump



[@TrueTheVote](#) There is a group of people (largely Radical Left Democrats) that want ELECTION MAYHEM. States must end this CRAZY mass sending of Ballots. Also, a GIFT to foreign interference into our election!!! Stop it now, before it is too late.

7:56 AM · Sep 17, 2020

<https://twitter.com/realDonaldTrump/status/1306562791894122504>

October 31, 2020

8:41 PM



**Donald J. Trump** ✓  
@realDonaldTrump



I LOVE TEXAS!



8:41 PM · Oct 31, 2020

<https://twitter.com/realDonaldTrump/status/1322700188624932869>

November 1, 2020

8:18 PM



**Donald J. Trump** ✓  
@realDonaldTrump



In my opinion, these patriots did nothing wrong. Instead, the FBI & Justice should be investigating the terrorists, anarchists, and agitators of ANTIFA, who run around burning down our Democrat run cities and hurting our people!



**Tony Plohetski** @tplohetski · Nov 1, 2020

NEW: Very short statement from the FBI confirming that they are investigating incident Friday involving Biden bus.

### **Record Statement:**

*FBI San Antonio is aware of the incident and investigating. No further information is available at this time.*

8:18 PM · Nov 1, 2020

[https://twitter.com/realDonaldTrump/status/1323072051402350592.](https://twitter.com/realDonaldTrump/status/1323072051402350592)

**November 2, 2020**

8:02 PM



**Donald J. Trump** ✓

@realDonaldTrump



Some or all of the content shared in this Tweet is disputed and might be misleading about an election or other civic process. [Learn more](#)

The Supreme Court decision on voting in Pennsylvania is a VERY dangerous one. It will allow rampant and unchecked cheating and will undermine our entire systems of laws. It will also induce violence in the streets. Something must be done!

8:02 PM · Nov 2, 2020

<https://twitter.com/realDonaldTrump/status/1323430341512622080>

**November 4, 2020**

12:49 AM



**Donald J. Trump** ✓

@realDonaldTrump



Some or all of the content shared in this Tweet is disputed and might be misleading about an election or other civic process. [Learn more](#)

We are up BIG, but they are trying to STEAL the Election. We will never let them do it. Votes cannot be cast after the Polls are closed!

12:49 AM · Nov 4, 2020

<https://twitter.com/realDonaldTrump/status/1323864823680126977>

**November 4, 2020 (continued)**

10:04 AM



**Donald J. Trump** ✓  
@realDonaldTrump



Some or all of the content shared in this Tweet is disputed and might be misleading about an election or other civic process. [Learn more](#)

Last night I was leading, often solidly, in many key States, in almost all instances Democrat run & controlled. Then, one by one, they started to magically disappear as surprise ballot dumps were counted. VERY STRANGE, and the “pollsters” got it completely & historically wrong!

10:04 AM · Nov 4, 2020

<https://twitter.com/realDonaldTrump/status/1324004491612618752>

10:17 AM



**Donald J. Trump** ✓  
@realDonaldTrump



How come every time they count Mail-In ballot dumps they are so devastating in their percentage and power of destruction?

10:17 AM · Nov 4, 2020

<https://twitter.com/realDonaldTrump/status/1324007806694023169?lang=en>



November 5, 2020

9:12 AM



**Donald J. Trump** ✓  
@realDonaldTrump



STOP THE COUNT!

9:12 AM · Nov 5, 2020

<https://twitter.com/realDonaldTrump/status/1324353932022480896>

November 8, 2020

9:17 AM



**Donald J. Trump** ✓  
@realDonaldTrump



“We believe these people are thieves. The big city machines are corrupt. This was a stolen election. Best pollster in Britain wrote this morning that this clearly was a stolen election, that it’s impossible to imagine that Biden outran Obama in some of these states.

9:17 AM · Nov 8, 2020

58.6K Reposts 24.8K Quotes 366.1K Likes 816 Bookmarks



Post your reply!

Reply



**Donald J. Trump** ✓ @realDonaldTrump · Nov 8, 2020



...Where it mattered, they stole what they had to steal. @newtgingrich

Part 1: <https://twitter.com/realDonaldTrump/status/1325442336957018112>.

Part 2: <https://twitter.com/realdonaldtrump/status/1325442345396039680>

November 9, 2020

2:54 PM



**Donald J. Trump** ✓

@realDonaldTrump

Nevada is turning out to be a cesspool of Fake Votes. @mschlapp & @AdamLaxalt are finding things that, when released, will be absolutely shocking!

2:54 PM · Nov 9, 2020

<https://twitter.com/realDonaldTrump/status/1325889532840062976>.

November 10, 2020

9:37 PM



**Donald J. Trump** ✓

@realDonaldTrump



People will not accept this Rigged Election!



**Scott Adams** ✓ @ScottAdamsSays · Nov 10, 2020

You are being brainwashed to accept the results of the election as fair. You will be told that only bad people are skeptical in this situation, and that you will be held to account for doubting.

9:37 PM · Nov 10, 2020

<https://twitter.com/realDonaldTrump/status/1326353226749386757>.

**November 11, 2020**

9:03 AM



**Donald J. Trump** ✓  
@realDonaldTrump



A guy named Al Schmidt, a Philadelphia Commissioner and so-called Republican (RINO), is being used big time by the Fake News Media to explain how honest things were with respect to the Election in Philadelphia. He refuses to look at a mountain of corruption & dishonesty. We win!

9:03 AM · Nov 11, 2020

<https://twitter.com/realDonaldTrump/status/1326525851752656898>

**November 12, 2020**

11:34 AM



**Donald J. Trump** ✓  
@realDonaldTrump



“REPORT: DOMINION DELETED 2.7 MILLION TRUMP VOTES NATIONWIDE. DATA ANALYSIS FINDS 221,000 PENNSYLVANIA VOTES SWITCHED FROM PRESIDENT TRUMP TO BIDEN. 941,000 TRUMP VOTES DELETED. STATES USING DOMINION VOTING SYSTEMS SWITCHED 435,000 VOTES FROM TRUMP TO BIDEN.” @ChanelRion @OANN

11:34 AM · Nov 12, 2020


<https://twitter.com/realDonaldTrump/status/1326926226888544256>



November 13, 2020

7:50 PM



**Donald J. Trump** 

@realDonaldTrump



Georgia Secretary of State, a so-called Republican (RINO), won't let the people checking the ballots see the signatures for fraud. Why? Without this the whole process is very unfair and close to meaningless. Everyone knows that we won the state. Where is [@BrianKempGA](#)?

7:50 PM · Nov 13, 2020

<https://twitter.com/realDonaldTrump/status/1327413534901350400?lang=en>

November 14, 2020

9:29 AM



**Donald J. Trump**   
@realDonaldTrump



The Consent Decree signed by the Georgia Secretary of State, with the approval of Governor [@BrianKempGA](#), at the urging of [@staceyabrams](#), makes it impossible to check & match signatures on ballots and envelopes, etc. They knew they were going to cheat. Must expose real signatures!

9:29 AM · Nov 14, 2020

34.1K Reposts   6,693 Quotes   167.9K Likes   347 Bookmarks



Post your reply!

Reply



**Donald J. Trump**  @realDonaldTrump · Nov 14, 2020



....What are they trying to hide. They know, and so does everyone else.  
EXPOSE THE CRIME!

Part 1: <https://twitter.com/realDonaldTrump/status/1327619653020110850>

Part 2: <https://twitter.com/realDonaldTrump/status/1327619654592892931>

November 14, 2020 (continued)

11:17 PM



**Donald J. Trump** ✓  
@realDonaldTrump



ANTIFA SCUM ran for the hills today when they tried attacking the people at the Trump Rally, because those people aggressively fought back. Antifa waited until tonight, when 99% were gone, to attack innocent #MAGA People. DC Police, get going — do your job and don't hold back!!!

11:17 PM · Nov 14, 2020

41.4K Reposts 9,197 Quotes 231.1K Likes 681 Bookmarks

<https://twitter.com/realDonaldTrump/status/1327828007311073280>

November 16, 2020

8:26 AM



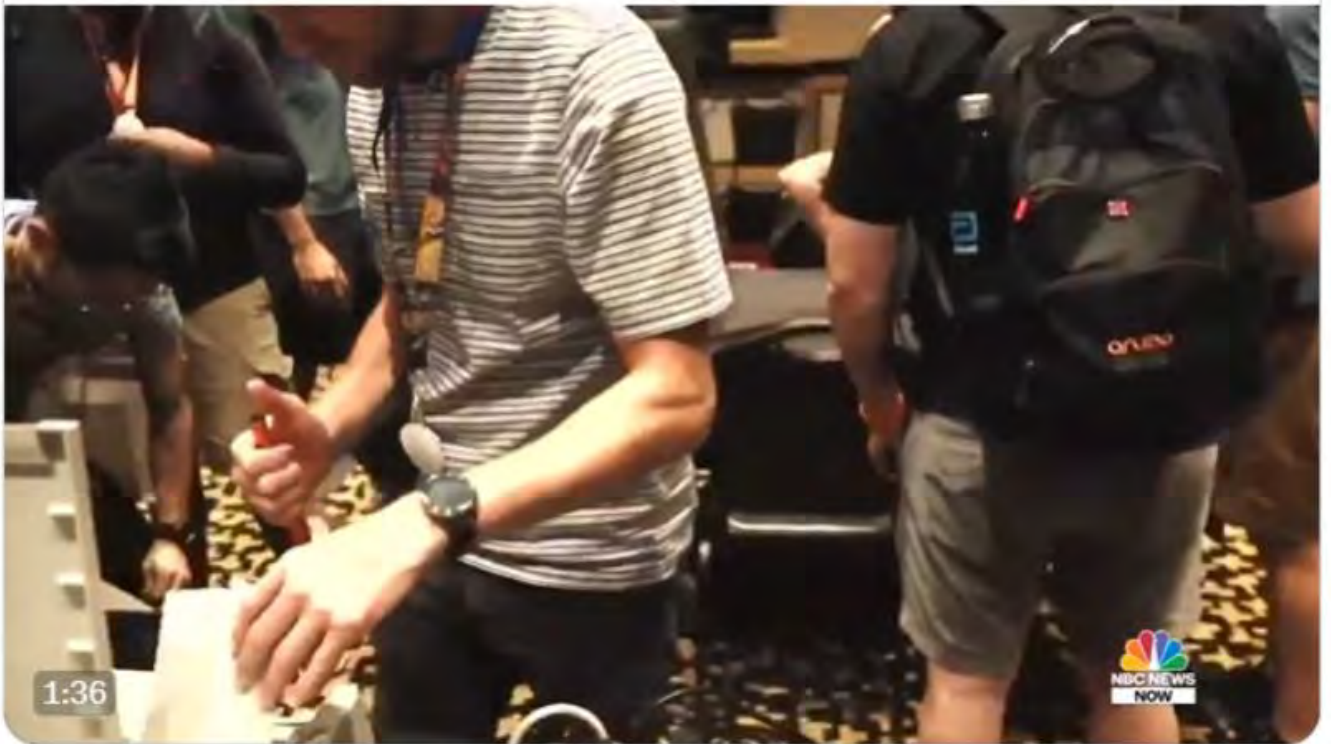
**Donald J. Trump** ✓  
@realDonaldTrump



Dominion is running our Election. Rigged!



**Donald J. Trump** ✓ @realDonaldTrump · Nov 14, 2020



8:26 AM · Nov 16, 2020

<https://twitter.com/realDonaldTrump/status/1328328547598000130>

November 17, 2020

DATE FILED: November 8, 2023 8:37 PM  
FILING ID: 2332BA8F9987D  
CASE NUMBER: 2023CV32577

7:07 PM

 **Donald J. Trump**  @realDonaldTrump · Nov 17, 2020 ...

The recent statement by Chris Krebs on the security of the 2020 Election was highly inaccurate, in that there were massive improprieties and fraud - including dead people voting, Poll Watchers not allowed into polling locations, “glitches” in the voting machines which changed...

 29K  34K  151K  

 **Donald J. Trump**  @realDonaldTrump ...

...votes from Trump to Biden, late voting, and many more. Therefore, effective immediately, Chris Krebs has been terminated as Director of the Cybersecurity and Infrastructure Security Agency.


7:07 PM · Nov 17, 2020

Part 1: <https://twitter.com/realDonaldTrump/status/1328852352787484677>

Part 2: <https://twitter.com/realDonaldTrump/status/1328852354049957888>

November 18, 2020

10:38 AM

 **Donald J. Trump**  @realDonaldTrump ...

“The numbers have not improved, it is still 71% out of balance”, stated Wayne County, Michigan, Canvassers. “There is widespread irregularities in poll numbers.” There are “more votes than people”. The two harassed patriot Canvassers refuse to sign the papers!

10:38 AM · Nov 18, 2020

<https://twitter.com/realDonaldTrump/status/1329086548093014022>



November 19, 2020

8:46 AM



**Donald J. Trump** ✓

@realDonaldTrump



Thousands of uncounted votes discovered in Georgia counties. When the much more important signature match takes place, the State will flip Republican, and very quickly. Get it done! [@BrianKempGA](#)

8:46 AM · Nov 19, 2020

<https://twitter.com/realDonaldTrump/status/1329420741553643522>

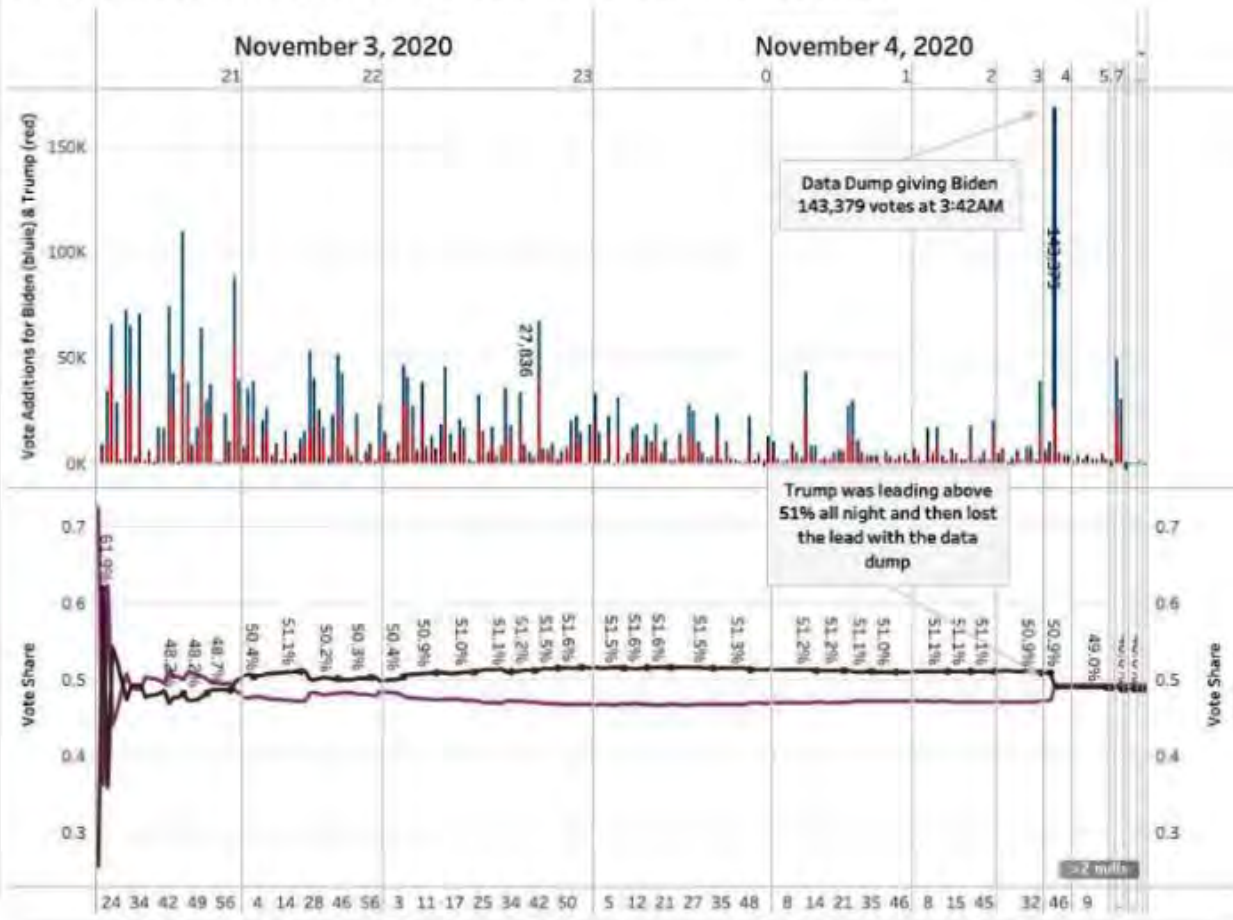
November 19, 2020 (continued)

8:49 PM

 **Donald J. Trump**  @realDonaldTrump · Nov 18, 2020

Look at this in Wisconsin! A day AFTER the election, Biden receives a dump of 143,379 votes at 3:42AM, when they learned he was losing badly. This is unbelievable!

Wisconsin - Individual Time Stamped Entries from the New York Times



8:49 PM · Nov 19, 2020

<https://twitter.com/realDonaldTrump/status/1329233502139715586>

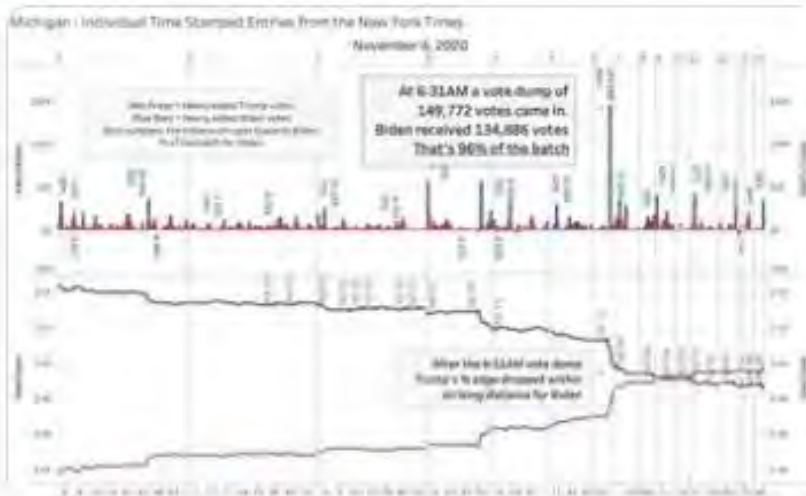
# November 19, 2020 (continued)

8:49 PM



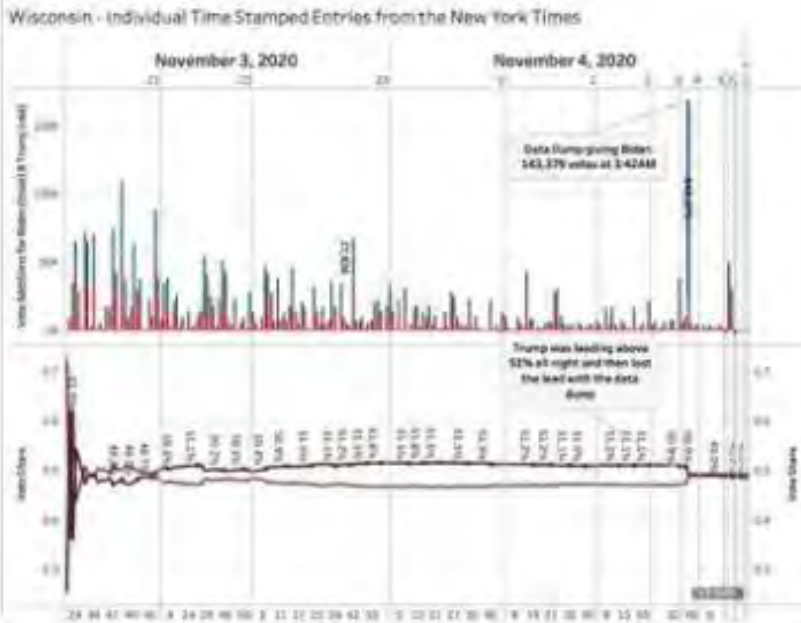
Donald J. Trump @realDonaldTrump

Look at this in Michigan! A day AFTER the election, Biden receives a dump of 134,886 votes at 6:31AM!



Donald J. Trump @realDonaldTrump - Nov 18, 2020

Look at this in Wisconsin! A day AFTER the election, Biden receives a dump of 143,379 votes at 3:42AM, when they learned he was losing badly. This is unbelievable!



8:49 PM - Nov 19, 2020

<https://twitter.com/realDonaldTrump/status/1329602736053252107>



**November 27, 2020**

2:35 PM



**Donald J. Trump** ✓

@realDonaldTrump



Biden did poorly in big cities (Politico), except those of Detroit (more votes than people!), Philadelphia, Atlanta and Milwaukee, which he had to win. Not surprisingly, they are all located in the most important swing states, and are long known for being politically corrupt!

2:35 PM · Nov 27, 2020

<https://twitter.com/realDonaldTrump/status/1332407714304110597>

**November 30, 2020**

8:59 AM



**Donald J. Trump** ✓

@realDonaldTrump



Why won't Governor [@BrianKempGA](#), the hapless Governor of Georgia, use his emergency powers, which can be easily done, to overrule his obstinate Secretary of State, and do a match of signatures on envelopes. It will be a "goldmine" of fraud, and we will easily WIN the state....

8:59 AM · Nov 30, 2020

<https://twitter.com/realDonaldTrump/status/1333410418119864320>

November 30, 2020 (continued)

6:39 PM



**Donald J. Trump** ✓  
@realDonaldTrump



Why is he rushing to put a Democrat in office, especially when so many horrible things concerning voter fraud are being revealed at the hearing going on right now. @OANN What is going on with @dougducey? Republicans will long remember!

**The Recount** ✓ @therecount · Nov 30, 2020

Gov. Ducey (R-AZ) certifies Biden's win in Arizona, and announces he will sign documents today so that Senator-elect Mark Kelly (D) can be sworn in "as swiftly as possible."

(Kelly will be sworn in on Wednesday, per reports. The Senate will then be 52R-48D.)



6:39 PM · Nov 30, 2020

<https://twitter.com/realDonaldTrump/status/1333556242984431616>

**November 30, 2020 (continued)**

6:40 PM



**Donald J. Trump** ✓

@realDonaldTrump



TRUE!



**Christina Bobb** ✓ @christina\_bobb · Nov 30, 2020

Gov Ducey has betrayed the people of Arizona.

6:40 PM · Nov 30, 2020

<https://twitter.com/realDonaldTrump/status/1333556458575818754>

**December 1, 2020**

2:31 PM



**Donald J. Trump** ✓

@realDonaldTrump



Hope everybody is watching @OANN right now. Other media afraid to show. People are coming forward like never before. Large truck carrying hundreds of thousands of fraudulent (FAKE) ballots to a voting center? TERRIBLE - SAVE AMERICA!

2:31 PM · Dec 1, 2020

<https://twitter.com/realDonaldTrump/status/1333856259662077954>

December 1, 2020 (continued)

3:49 PM



Donald J. Trump ✓

@realDonaldTrump



Jesse Morgan—a truck driver (subcontractor) with USPS in PENNSYLVANIA...



From Team Trump (Text TRUMP to 88022) ✓

3:49 PM · Dec 1, 2020

<https://twitter.com/realDonaldTrump/status/1333875814585282567>



December 1, 2020 (continued)

10:27 PM



**Donald J. Trump** ✓  
@realDonaldTrump



Rigged Election. Show signatures and envelopes. Expose the massive voter fraud in Georgia. What is Secretary of State and @BrianKempGA afraid of. They know what we'll find!!!



**Brendan Keefe - Atlanta News First** @BrendanKeefe · Dec 1, 2020

"It. Has. All. Gone. Too. Far," says @GabrielSterling with Georgia Sec of State after a Dominion tech's life was threatened with a noose. "Mr. President, you have not condemned these actions or this language....all of you who have not said a damn word are complicit in this."

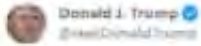


10:27 PM · Dec 1, 2020

<https://twitter.com/realDonaldTrump/status/1333975991518187521>

December 4, 2020

5:49 PM



Thank you to Senate President Karen Fann and House Speaker Russell Bowers - and all, for what you are doing in Arizona. A fast check of signatures will easily give us the state. Votes against have been reduced to a very small number!

**Press Release**  
 Arizona State Legislature  
 Senate President Karen Fann (R-1)  
 House Speaker Russell Bowers (R-23)  
 1700 West Washington • Phoenix, Arizona • 85007-2844

Friday, December 4, 2020  
 FOR IMMEDIATE RELEASE

**Legislative Leaders call for audit of Maricopa County election software and equipment**

(Phoenix, Ariz. Capital) — Senate President Karen Fann and Speaker of the House Booby Benson today called for an independent audit of the Dominion software and equipment used by Maricopa County in the 2020 General Election. The two leaders, along with incoming Senate Government Chair Michelle Ugenti-Ria and House Majority Leader Warren Peterson, had numerous phone calls with members of the Maricopa County Board of Supervisors.

"As a longtime advocate for improving and modernizing our election system, I am pleased to learn that the Maricopa County Board of Supervisors is supportive of conducting an independent audit of their voting software and equipment," said Sen. Ugenti-Ria. "It is important we maintain all of the voting public's confidence in our elections and this is a positive first step to the right direction."

"A significant number of voters believe that their request and wish the number of irregularities it is easy to understand why," said House Majority Leader Peterson. "Especially concerning are the allegations made surrounding the vendor Dominion. It is imperative that the County immediately do a forensic audit on the Dominion software and equipment to make sure the results were accurate."

Legislative also emphasized in the agreement from support it is to move expeditiously on this matter.

**Press Release**  
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 1700 West Washington • Phoenix, Arizona • 85007-2844

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<https://twitter.com/realDonaldTrump/status/1334993249082236931>

December 5, 2020

4:35 PM



**Donald J. Trump** ✓

@realDonaldTrump



But you never got the signature verification! Your people are refusing to do what you ask. What are they hiding? At least immediately ask for a Special Session of the Legislature. That you can easily, and immediately, do. [#Transparency](#)



**Brian Kemp** ✓ @BrianKempGA · Dec 5, 2020



As I told the President this morning, I've publicly called for a signature audit three times (11/20, 11/24, 12/3) to restore confidence in our election process and to ensure that only legal votes are counted in Georgia. #gapol  
[twitter.com/realDonaldTrump...](https://twitter.com/realDonaldTrump/status/1335336916582084614)

4:35 PM · Dec 5, 2020






<https://twitter.com/realDonaldTrump/status/1335336916582084614>



**December 5, 2020 (continued)**

5:33 PM

 **Donald J. Trump**  @realDonaldTrump · Dec 5, 2020 ...

Between Governor [@DougDucey](#) of Arizona and Governor [@BrianKempGA](#) of Georgia, the Democrat Party could not be happier. They fight harder against us than do the Radical Left Dems. If they were with us, we would have already won both Arizona and Georgia...

 18.5K       21.5K       107.7K            

 **Donald J. Trump**  @realDonaldTrump ...

...We received more LEGAL votes by far. All I can do is run, campaign, and be a good (great!) President – it is 100% up to the states to manage the election. Republicans will NEVER forget this.



5:33 PM · Dec 5, 2020

Part 1: <https://twitter.com/realDonaldTrump/status/1335351629810286592>

Part 2: <https://twitter.com/realDonaldTrump/status/1335351633459310593>

**December 7, 2020**

10:37 AM

 **Donald J. Trump**  @realDonaldTrump ...

The Republican Governor of Georgia refuses to do signature verification, which would give us an easy win. What's wrong with this guy? What is he hiding?

10:37 AM · Dec 7, 2020

<https://twitter.com/realDonaldTrump/status/1335971721262796801>



**December 7, 2020 (continued)**

7:50 PM



**Donald J. Trump** ✓  
@realDonaldTrump



RINOS @BrianKempGA, @GeoffDuncanGA, & Secretary of State Brad Raffensperger, will be solely responsible for the potential loss of our two GREAT Senators from Georgia, @sendavidperdue & @KLoeffler. Won't call a Special Session or check for Signature Verification! People are ANGRY!

7:50 PM · Dec 7, 2020

<https://twitter.com/realdonaldtrump/status/1336110929856040960>

**December 8, 2020**

9:51 AM



**Donald J. Trump** ✓  
@realDonaldTrump



Thank you to Speaker Cutler and all others in Pennsylvania and elsewhere who fully understand what went on in the 2020 Election. It's called total corruption!



**Rep. Malcolm Kenyatta** @malcolmkenyatta · Dec 7, 2020

Speaker Cutler should have told the President to accept the results of the election and knock off the nonsense.

Instead, he joined a letter last week to ask Congress to overturn the electoral college.

The cowardice is stunning. [washingtonpost.com/politics/trump...](https://www.washingtonpost.com/politics/trump...)

9:51 AM · Dec 8, 2020

<https://twitter.com/realdonaldtrump/status/1336322408970559495>

December 9, 2020

8:39 AM



**Donald J. Trump**   
@realDonaldTrump



This was not my case as has been so incorrectly reported. The case that everyone has been waiting for is the State's case with Texas and numerous others joining. It is very strong, ALL CRITERIA MET. How can you have a presidency when a vast majority think the election was RIGGED?

— **SCOTUSblog** @SCOTUSblog · Dec 8, 2020

The Supreme Court has rejected a Pennsylvania Republican congressman's request to prevent Pennsylvania from certifying its presidential election results in favor of Joe Biden.

This case is different from the lawsuit filed by the state of Texas this morning. [twitter.com/AHoweBlogger/s...](https://twitter.com/AHoweBlogger/status/1336666810742149120)

(ORDER LIST: 592 U.S.)

TUESDAY, DECEMBER 8, 2020

ORDER IN PENDING CASE

20A98      KELLY, MIKE, ET AL. V. PENNSYLVANIA, ET AL.

The application for injunctive relief presented to Justice Alito and by him referred to the Court is denied.

8:39 AM - Dec 9, 2020

<https://twitter.com/realDonaldTrump/status/1336666810742149120>

**December 10, 2020**

9:24 AM



**Donald J. Trump** ✓

@realDonaldTrump



The Supreme Court has a chance to save our Country from the greatest Election abuse in the history of the United States. 78% of the people feel (know!) the Election was RIGGED.

9:24 AM · Dec 10, 2020

<https://twitter.com/realDonaldTrump/status/1337040387349893121>

**December 11, 2020**

3:28 PM



**Donald J. Trump** ✓

@realDonaldTrump



If the Supreme Court shows great Wisdom and Courage, the American People will win perhaps the most important case in history, and our Electoral Process will be respected again!

3:28 PM · Dec 11, 2020

<https://twitter.com/realDonaldTrump/status/1337494507756072961>

**December 11, 2020 (continued)**

11:50 PM



**Donald J. Trump** ✓

@realDonaldTrump



The Supreme Court really let us down. No Wisdom, No Courage!

11:50 PM · Dec 11, 2020

<https://twitter.com/realDonaldTrump/status/1337620892139081728>

December 12, 2020

12:24

 **Donald J. Trump**    
@realDonaldTrump

So, you're the President of the United States, and you just went through an election where you got more votes than any sitting President in history, by far - and purportedly lost. You can't get "standing" before the Supreme Court, so you "intervene" with wonderful states.....

12:24 AM · Dec 12, 2020

20.1K Reposts 6,348 Quotes 129K Likes 395 Bookmarks

 Post your reply!  Reply

 **Donald J. Trump**  @realDonaldTrump · Dec 12, 2020   
....that, after careful study and consideration, think you got "screwed", something which will hurt them also. Many others likewise join the suit but, within a flash, it is thrown out and gone, without even looking at the many reasons it was brought. A Rigged Election, fight on!

Part 1: <https://twitter.com/realDonaldTrump/status/1337629305405321216?s=20>

Part 2: <https://twitter.com/realDonaldTrump/status/1337629306919538694>



**December 12, 2020 (continued)**

9:59 AM



**Donald J. Trump** ✓

@realDonaldTrump



Wow! Thousands of people forming in Washington (D.C.) for Stop the Steal. Didn't know about this, but I'll be seeing them! #MAGA

9:59 AM · Dec 12, 2020

<https://twitter.com/realDonaldTrump/status/1337774011376340992>

11:04 AM



**Donald J. Trump** ✓

@realDonaldTrump



The Supreme Court had ZERO interest in the merits of the greatest voter fraud ever perpetrated on the United States of America. All they were interested in is "standing", which makes it very difficult for the President to present a case on the merits. 75,000,000 votes!

11:04 AM · Dec 12, 2020

<https://twitter.com/realDonaldTrump/status/1337790419875352576>

December 12, 2020 (continued)

1:56 PM



**Donald J. Trump** ✓  
@realDonaldTrump



From **Drew Hernandez** ✓ GP


1:56 PM · Dec 12, 2020

<https://twitter.com/realDonaldTrump/status/1337833603309465600?s=20>

December 13, 2020

5:49 PM



**Donald J. Trump**   
@realDonaldTrump



Swing States that have found massive VOTER FRAUD, which is all of them, CANNOT LEGALLY CERTIFY these votes as complete & correct without committing a severely punishable crime. Everybody knows that dead people, below age people, illegal immigrants, fake signatures, prisoners,....

5:49 PM · Dec 13, 2020

32.5K Reposts 7,876 Quotes 165.8K Likes 506 Bookmarks



Post your reply!

Reply



**Donald J. Trump**  @realDonaldTrump · Dec 13, 2020




.....and many others voted illegally. Also, machine “glitches” (another word for FRAUD), ballot harvesting, non-resident voters, fake ballots, “stuffing the ballot box”, votes for pay, roughed up Republican Poll Watchers, and sometimes even more votes than people voting, took....

9,109

17.4K

102K



**Donald J. Trump**  @realDonaldTrump · Dec 13, 2020



....place in Detroit, Philadelphia, Milwaukee, Atlanta, Pittsburgh, and elsewhere. In all Swing State cases, there are far more votes than are necessary to win the State, and the Election itself. Therefore, VOTES CANNOT BE CERTIFIED. THIS ELECTION IS UNDER PROTEST!

Part 1: <https://twitter.com/realDonaldTrump/status/1338254785666043908>

Part 2: <https://twitter.com/realDonaldTrump/status/1338254787020787712>

Part 3: <https://twitter.com/realDonaldTrump/status/1338254787675041802>



December 14, 2020

8:57 AM



**Donald J. Trump** ✓  
@realDonaldTrump



“Why did the Swing States stop counting in the middle of the night?”  
[@MariaBartiro](#) Because they waited to find out how many ballots they had to produce in order to steal the Rigged Election. They were so far behind that they needed time, & a fake “water main break”, to recover!

8:57 AM · Dec 14, 2020

<https://twitter.com/realDonaldTrump/status/1338483200046354434>

2:59 PM



**Donald J. Trump** ✓  
@realDonaldTrump



WOW. This report shows massive fraud. Election changing result!

 **Detroit Free Press** @freep · Dec 14, 2020

BREAKING: Judge orders release of report examining Antrim County vote tabulators [freep.com/story/news/pol...](https://www.freep.com/story/news/politics/2020/12/14/judge-orders-release-of-report-examining-antrim-county-vote-tabulators/338574268154646528)

2:59 PM · Dec 14, 2020

<https://twitter.com/realDonaldTrump/status/1338574268154646528>

**December 15, 2020**

12:21 AM



**Donald J. Trump** ✓  
@realDonaldTrump



This is BIG NEWS. Dominion Voting Machines are a disaster all over the Country. Changed the results of a landslide election. Can't let this happen. Thank you for the genius, bravery, and patriotism of the Judge. Should get a medal! [twitter.com/KMCRadio/statu...](https://twitter.com/KMCRadio/status/1338715842931023873)

This Tweet is from a suspended account. [Learn more](#)

12:21 AM · Dec 15, 2020

<https://twitter.com/realDonaldTrump/status/1338715842931023873>

**December 16, 2020**

1:09 AM



**Donald J. Trump** ✓  
@realDonaldTrump



“Study: Dominion Machines shifted 2-3% of Trump Votes to Biden. Far more votes than needed to sway election.” Florida, Ohio, Texas and many other states were won by even greater margins than projected. Did just as well with Swing States, but bad things happened. [@OANN](#)

1:09 AM · Dec 16, 2020

<https://twitter.com/realdonaldtrump/status/1339090279429775363>

December 19, 2020

1:42 AM



Donald J. Trump   
@realDonaldTrump




Peter Navarro releases 36-page report alleging election fraud 'more than sufficient' to swing victory to Trump [washex.am/3nwaBCe](https://washex.am/3nwaBCe). A great report by Peter. Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!

1:42 AM · Dec 19, 2020

<https://twitter.com/realDonaldTrump/status/1340185773220515840>

9:41 AM



Donald J. Trump   
@realDonaldTrump



He didn't win the Election. He lost all 6 Swing States, by a lot. They then dumped hundreds of thousands of votes in each one, and got caught. Now Republican politicians have to fight so that their great victory is not stolen. Don't be weak fools!

 NY Post Opinion  @NYPostOpinion · Dec 18, 2020  
Stephen Colbert's Joe Biden interview a real joke [trib.al/oc4Z7Fi](https://trib.al/oc4Z7Fi)



9:41 AM · Dec 19, 2020

<https://twitter.com/realDonaldTrump/status/1340306154031857665>

**December 19, 2020 (continued)**

11:30 AM



**Donald J. Trump**   
@realDonaldTrump



The Cyber Hack is far greater in the Fake News Media than in actuality. I have been fully briefed and everything is well under control. Russia, Russia, Russia is the priority chant when anything happens because Lamestream is, for mostly financial reasons, petrified of...

11:30 AM · Dec 19, 2020

 41.8K

 32.4K

 126K

 545



Post your reply

Reply



**Donald J. Trump**  @realDonaldTrump · Dec 19, 2020



....discussing the possibility that it may be China (it may!). There could also have been a hit on our ridiculous voting machines during the election, which is now obvious that I won big, making it an even more corrupted embarrassment for the USA. @DNI\_Ratcliffe @SecPompeo

 28.3K

 25.3K

 112.3K



Part 1: <https://twitter.com/realDonaldTrump/status/1340333618691002368>

Part 2: <https://twitter.com/realDonaldTrump/status/1340333619299147781>



December 19, 2020 (continued)

1:24 PM



**Donald J. Trump** ✓  
@realDonaldTrump



1:24 PM · Dec 19, 2020

<https://twitter.com/realDonaldTrump/status/1340362336390004737>

2:59 PM



**Donald J. Trump** ✓  
@realDonaldTrump



The lie of the year is that Joe Biden won! Christina Bobb @OANN

2:59 PM · Dec 19, 2020

<https://twitter.com/realDonaldTrump/status/1340386251866828802>

**December 20, 2020**

12:26 AM



**Donald J. Trump** ✓

@realDonaldTrump



GREATEST ELECTION FRAUD IN THE HISTORY OF OUR COUNTRY!!!

12:26 AM · Dec 20, 2020

<https://twitter.com/realDonaldTrump/status/1340529063799246848?lang=en>

**December 21, 2020**

7:24 AM



**Donald J. Trump** ✓

@realDonaldTrump



Big news coming out of Pennsylvania. Very big illegal ballot drop that cannot be accounted for. Rigged Election!

7:24 AM · Dec 21, 2020

<https://twitter.com/realDonaldTrump/status/1340996686257254403>

December 21, 2020 (continued)

10:30 AM



**Donald J. Trump** ✓  
@realDonaldTrump



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

10:30 AM · Dec 21, 2020



17.2K



23.7K



110.8K



122



Post your reply

Reply



**Donald J. Trump** ✓ @realDonaldTrump · Dec 21, 2020



....@sendavidperdue will not be able to win on January 5th. unless these people allow Signature Verification in presidential race. K & D need it for their race also, & Georgia spirit will rise to such a high that they will easily bring home a great victory. Move fast @BrianKempGA



8,974



13.2K



72.5K



Part 1: <https://twitter.com/realDonaldTrump/status/1341043284542713857>

Part 2: <https://twitter.com/realDonaldTrump/status/1341043285368909824>

**December 21, 2020 (continued)**

4:48 PM



**Donald J. Trump** ✓

@realDonaldTrump



Two years ago, the great people of Wisconsin asked me to endorse a man named Brian Hagedorn for State Supreme Court Justice, when he was getting destroyed in the Polls against a tough Democrat Candidate who had no chance of losing. After my endorsement, Hagedorn easily won!...

4:48 PM · Dec 21, 2020



15.5K



19.7K



115.8K



195



Post your reply

Reply



**Donald J. Trump** ✓ @realDonaldTrump · Dec 21, 2020



...WOW, he just voted against me in a Big Court Decision on voter fraud (of which there was much!), despite many pages of dissent from three highly respected Justices. One thing has nothing to do with another, but we ended up losing 4-3 in a really incorrect ruling! Great...



15.3K



15.1K



88.6K



**Donald J. Trump** ✓ @realDonaldTrump · Dec 21, 2020



...Republicans in Wisconsin should take these 3 strong decisions to their State Legislators and overturn this ridiculous State Election. We won in a LANDSLIDE!

Part 1: <https://twitter.com/realDonaldTrump/status/1341138407460925440>

Part 2: <https://twitter.com/realDonaldTrump/status/1341138408274595843>

Part 3: <https://twitter.com/realDonaldTrump/status/1341138409092509696>



**December 22, 2020**

10:29 AM



**Donald J. Trump** ✓

@realDonaldTrump



THE DEMOCRATS DUMPED HUNDREDS OF THOUSANDS OF BALLOTS IN THE SWING STATES LATE IN THE EVENING. IT WAS A RIGGED ELECTION!!!

10:29 AM · Dec 22, 2020

<https://twitter.com/realDonaldTrump/status/1341405487057821698>

**December 23, 2020**

12:08 PM



**Donald J. Trump** ✓

@realDonaldTrump



They are slow walking the signature verification in Georgia. They don't want results to get out prior to January 6th. They know what they are trying so hard to hide. Terrible people! @BrianKempGA

12:08 PM · Dec 23, 2020

<https://twitter.com/realDonaldTrump/status/1341792832093364226>

## December 23, 2020 (continued)

6:16 PM



**Donald J. Trump** ✓

@realDonaldTrump



After seeing the massive Voter Fraud in the 2020 Presidential Election, I disagree with anyone that thinks a strong, fast, and fair Special Counsel is not needed, IMMEDIATELY. This was the most corrupt election in the history of our Country, and it must be closely examined!

6:16 PM · Dec 23, 2020

<https://twitter.com/realDonaldTrump/status/1341885394124607488>

## December 24, 2020

3:43 PM



**Donald J. Trump** ✓

@realDonaldTrump



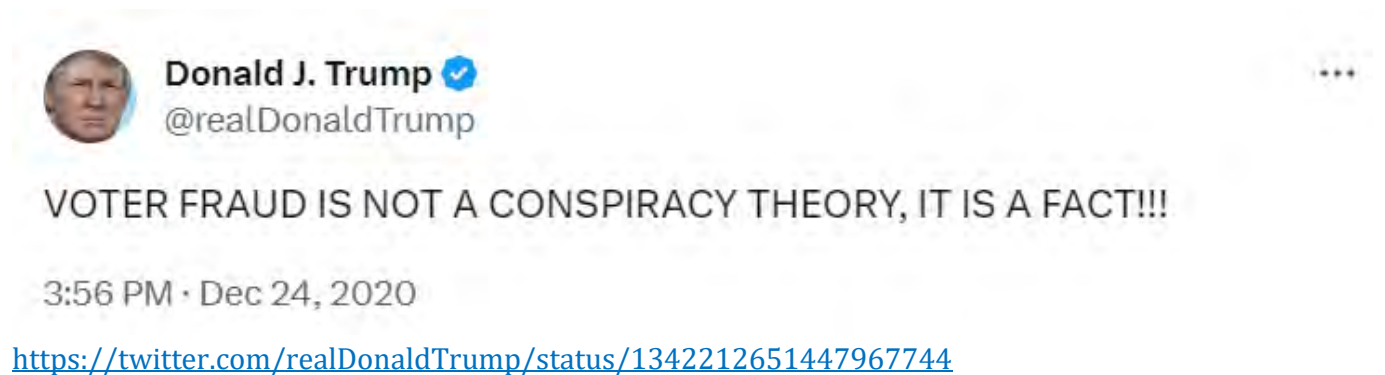
At a meeting in Florida today, everyone was asking why aren't the Republicans up in arms & fighting over the fact that the Democrats stole the rigged presidential election? Especially in the Senate, they said, where you helped 8 Senators win their races. How quickly they forget!

3:43 PM · Dec 24, 2020

<https://twitter.com/realDonaldTrump/status/1342209260026023940>

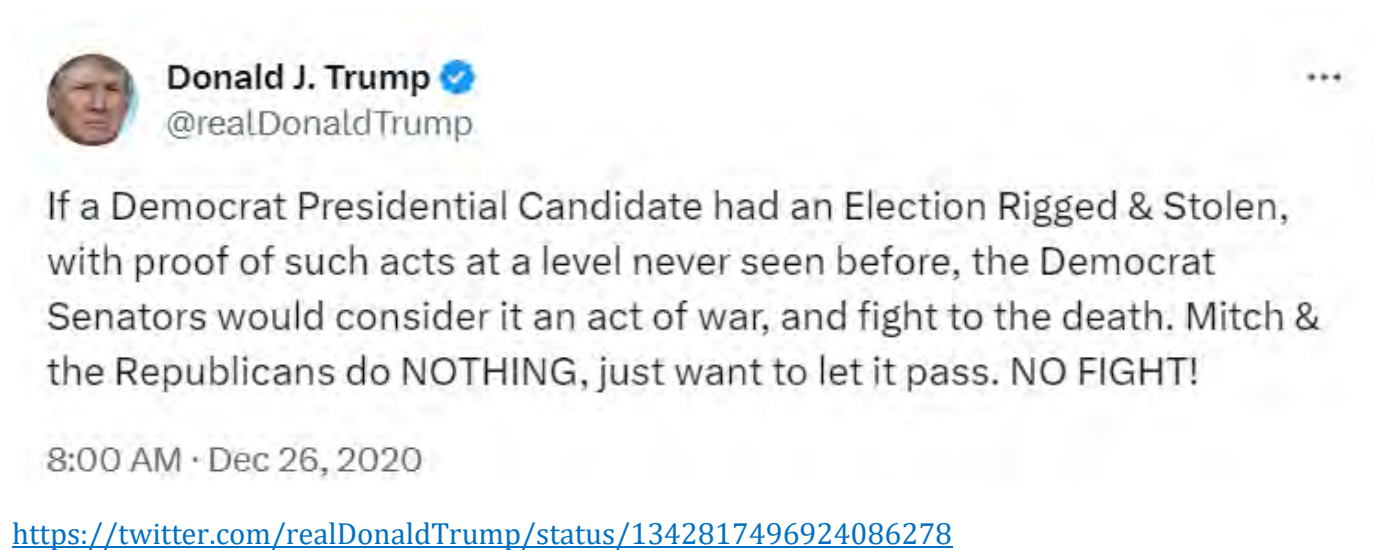
**December 24, 2020 (continued)**

3:56 PM



**December 26, 2020**

8:00 AM



**December 26, 2020 (continued)**

8:14 AM



**Donald J. Trump** ✓  
@realDonaldTrump



The “Justice” Department and the FBI have done nothing about the 2020 Presidential Election Voter Fraud, the biggest SCAM in our nation’s history, despite overwhelming evidence. They should be ashamed. History will remember. Never give up. See everyone in D.C. on January 6th.

8:14 AM · Dec 26, 2020

<https://twitter.com/realDonaldTrump/status/1342821189077622792?lang=en>

8:51 AM



**Donald J. Trump** ✓  
@realDonaldTrump



The U.S. Supreme Court has been totally incompetent and weak on the massive Election Fraud that took place in the 2020 Presidential Election. We have absolute PROOF, but they don’t want to see it - No “standing”, they say. If we have corrupt elections, we have no country!

8:51 AM · Dec 26, 2020

<https://twitter.com/realDonaldTrump/status/1342830505163706369>

**December 26, 2020 (continued)**

9:00 AM



**Donald J. Trump**   
@realDonaldTrump



A young military man working in Afghanistan told me that elections in Afghanistan are far more secure and much better run than the USA's 2020 Election. Ours, with its millions and millions of corrupt Mail-In Ballots, was the election of a third world country. Fake President!

9:00 AM · Dec 26, 2020

<https://twitter.com/realDonaldTrump/status/1342832582606598144>



**December 26, 2020 (continued)**

6:23 PM

The screenshot shows a Twitter thread by Donald J. Trump (@realDonaldTrump) from December 26, 2020. The main tweet at the top has 41.4K reposts, 5,553 quotes, 194.3K likes, and 408 bookmarks. It contains the text: "Time for Republican Senators to step up and fight for the Presidency, like the Democrats would do if they had actually won. The proof is irrefutable! Massive late night mail-in ballot drops in swing states, stuffing the ballot boxes (on video), double voters, dead voters,". Below this are three replies, all from Donald J. Trump. The first reply says "...fake signatures, illegal immigrant voters, banned Republican vote watchers, MORE VOTES THAN ACTUAL VOTERS (check out Detroit & Philadelphia), and much more. The numbers are far greater than what is necessary to win the individual swing states, and cannot even be contested....". The second reply says "...Courts are bad, the FBI and 'Justice' didn't do their job, and the United States Election System looks like that of a third world country. Freedom of the press has been gone for a long time, it is Fake News, and now we have Big Tech (with Section 230) to deal with....". The third reply says "...But when it is all over, and this period of time becomes just another ugly chapter in our Country's history, WE WILL WIN!!!". Each tweet in the thread shows engagement metrics like replies, retweets, and likes.

**Donald J. Trump** @realDonaldTrump  
Time for Republican Senators to step up and fight for the Presidency, like the Democrats would do if they had actually won. The proof is irrefutable! Massive late night mail-in ballot drops in swing states, stuffing the ballot boxes (on video), double voters, dead voters,  
6:23 PM · Dec 26, 2020  
41.4K Reposts 5,553 Quotes 194.3K Likes 408 Bookmarks

Post your reply! Reply

**Donald J. Trump** @realDonaldTrump · Dec 26, 2020  
...fake signatures, illegal immigrant voters, banned Republican vote watchers, MORE VOTES THAN ACTUAL VOTERS (check out Detroit & Philadelphia), and much more. The numbers are far greater than what is necessary to win the individual swing states, and cannot even be contested....  
3,196 10.6K 41.9K

**Donald J. Trump** @realDonaldTrump · Dec 26, 2020  
...Courts are bad, the FBI and "Justice" didn't do their job, and the United States Election System looks like that of a third world country. Freedom of the press has been gone for a long time, it is Fake News, and now we have Big Tech (with Section 230) to deal with....  
10.8K 23.2K 124.3K

**Donald J. Trump** @realDonaldTrump · Dec 26, 2020  
...But when it is all over, and this period of time becomes just another ugly chapter in our Country's history, WE WILL WIN!!!  
22.9K 29.8K 151.8K

- Part 1: <https://twitter.com/realdonaldtrump/status/1342974370822692867>
- Part 2: <https://twitter.com/realDonaldTrump/status/1342974373632876545>
- Part 3: <https://twitter.com/realDonaldTrump/status/1342974375008600070>
- Part 4: <https://twitter.com/realDonaldTrump/status/1342974377218994181>

December 27, 2020

12:28 AM



**Donald J. Trump** ✓  
@realDonaldTrump



Michigan AG Dana Nessel Pursues Sanctions Against Lawyers Questioning Election [breitbart.com/politics/2020/...](https://www.breitbart.com/politics/2020/12/26/michigan-attorney-general-dana-nessel-pursues-sanctions-against-lawyers-questioning-election/) via @BreitbartNews  
These lawyers are true patriots who are fighting for the truth and, obviously, getting very close. AG should be sanctioned. Fight on!



breitbart.com

Michigan AG Dana Nessel Pursues Sanctions Against Lawyers Questioning El...  
Michigan Attorney General Dana Nessel is pursuing sanctions against lawyers who questioned the outcome of the November election. | Politics

12:28 AM · Dec 27, 2020

<https://twitter.com/realDonaldTrump/status/1343066231222448130>

December 27, 2020 (continued)

12:36 AM



**Donald J. Trump** ✓  
@realDonaldTrump



Speaking for America!



**Donald J. Trump** ✓ @realDonaldTrump · Dec 22, 2020

Statement by Donald J. Trump, The President of the United States

Full Video: [fb.watch/2ynPrdD81y/](https://fb.watch/2ynPrdD81y/)



12:36 AM · Dec 27, 2020

<https://twitter.com/realDonaldTrump/status/1343068273827577861>



**December 27, 2020 (continued)**

5:51 PM

← **Post**



**Donald J. Trump** ✓  
@realDonaldTrump



See you in Washington, DC, on January 6th. Don't miss it. Information to follow!

5:51 PM · Dec 27, 2020

<https://twitter.com/realDonaldTrump/status/1343328708963299338>

**December 28, 2020**

4:00 PM



**Donald J. Trump** ✓  
@realDonaldTrump



“Breaking News: In Pennsylvania there were 205,000 more votes than there were voters. This alone flips the state to President Trump.”


4:00 PM · Dec 28, 2020

<https://twitter.com/realDonaldTrump/status/1343663159085834248>

December 29, 2020

8:59 AM



**Donald J. Trump**   
@realDonaldTrump



"A group of Republican lawmakers in Pennsylvania say 200,000 more votes were counted in the 2020 Election than voters (100% went to Biden). State Representative Frank Ryan said they found troubling discrepancies after an analysis of Election Day data." @FoxNews This is far....

8:59 AM · Dec 29, 2020

32K Reposts 2,606 Quotes 139.9K Likes 233 Bookmarks



Post your reply!

Reply



**Donald J. Trump**   
@realDonaldTrump · Dec 29, 2020



...more votes than is needed by me to win Pennsylvania, not to mention hundreds of thousands of votes in other categories which increase my already big lead into a landslide. All other Swing States show likewise. WE NEED NEW & ENERGETIC REPUBLICAN LEADERSHIP. This can not stand..

2,032

7,850

35.2K



**Donald J. Trump**   
@realDonaldTrump · Dec 29, 2020



....Can you imagine if the Republicans stole a Presidential Election from the Democrats - All hell would break out. Republican leadership only wants the path of least resistance. Our leaders (not me, of course!) are pathetic. They only know how to lose! P.S. I got MANY Senators..

11.3K

16.9K

92.7K



**Donald J. Trump**   
@realDonaldTrump · Dec 29, 2020



....and Congressmen/Congresswomen Elected. I do believe they forgot!

7,513

12.9K

81.7K



Part 1: <https://twitter.com/realDonaldTrump/status/1343919651336712199>

Part 2: <https://twitter.com/realDonaldTrump/status/1343919652125241345>


Part 3: <https://twitter.com/realDonaldTrump/status/1343919653068943361>

Part 4: <https://twitter.com/realDonaldTrump/status/1343919654008356867>

**December 29, 2020 (continued)**

5:55 PM



**Donald J. Trump** 

@realDonaldTrump



When are we going to be allowed to do signature verification in Fulton County, Georgia? The process is going VERY slowly. [@BrianKempGA](#) Pennsylvania just found 205,000 votes more than they had voters. Therefore, we WIN Pennsylvania!!!

5:55 PM · Dec 29, 2020

<https://twitter.com/realDonaldTrump/status/1344054358418345985>

December 30, 2020

12:57 AM



**Donald J. Trump** ✓

@realDonaldTrump



The Wall Street Journal's very boring & incoherent Editorial fails to mention my big & easy wins in Texas, Florida, Ohio, Iowa & many other states that the @WSJ & other joke polls said I would lose. Also, they fail to mention the fact that I got many Republican Senators elected..

12:57 AM · Dec 30, 2020



9,063



18K



102.5K



109



Post your reply

Reply



**Donald J. Trump** ✓ @realDonaldTrump · Dec 30, 2020



....that, quite frankly, didn't have much of a chance, like 7, 8 or 9. The Presidential Election was Rigged with hundreds of thousands of ballots mysteriously flowing into Swing States very late at night as everyone thought the election was easily won by me. There were many....



4,763



13.3K



81.6K



**Donald J. Trump** ✓ @realDonaldTrump · Dec 30, 2020



....other acts of fraud and irregularities as well. STAY TUNED!



8,017



13.7K



84K



Part 1: <https://twitter.com/realDonaldTrump/status/1344160786252525568>

Part 2: <https://twitter.com/realDonaldTrump/status/1344160787384971264>

Part 3: <https://twitter.com/realDonaldTrump/status/1344160788567773189>

December 30, 2020 (continued)

1:49 AM



**Donald J. Trump** ✓

@realDonaldTrump



New Lott study estimates 11,350 absentee votes lost to Trump in Georgia. Another 289,000 "excess (fraudulent) votes" across GA, AZ, MI, NV, PA, and WI. Check it out! [➔ papers.ssrn.com/sol3/papers.cf...](https://papers.ssrn.com/sol3/papers.cf...)



1:49 AM · Dec 30, 2020

<https://twitter.com/realDonaldTrump/status/1344173684983017473>



**December 30, 2020 (continued)**

9:26 AM



**Donald J. Trump**   
@realDonaldTrump



Hearings from Atlanta on the Georgia Election overturn now being broadcast. Check it out. @OANN @newsmax and many more. @BrianKempGA should resign from office. He is an obstructionist who refuses to admit that we won Georgia, BIG! Also won the other Swing States.

9:26 AM · Dec 30, 2020

<https://twitter.com/realDonaldTrump/status/1344288700851744769>

2:06 PM

← **Post**



**Donald J. Trump**   
@realDonaldTrump



JANUARY SIXTH, SEE YOU IN DC!

2:06 PM · Dec 30, 2020

<https://twitter.com/realDonaldTrump/status/1344359312878149634>

**December 30, 2020 (continued)**

2:38 PM



**Donald J. Trump** ✓

@realDonaldTrump



The United States had more votes than it had people voting, by a lot. This travesty cannot be allowed to stand. It was a Rigged Election, one not even fit for third world countries!

2:38 PM · Dec 30, 2020

<https://twitter.com/realDonaldTrump/status/1344367336715857921?lang=en>

4:38 PM



**Donald J. Trump** ✓

@realDonaldTrump



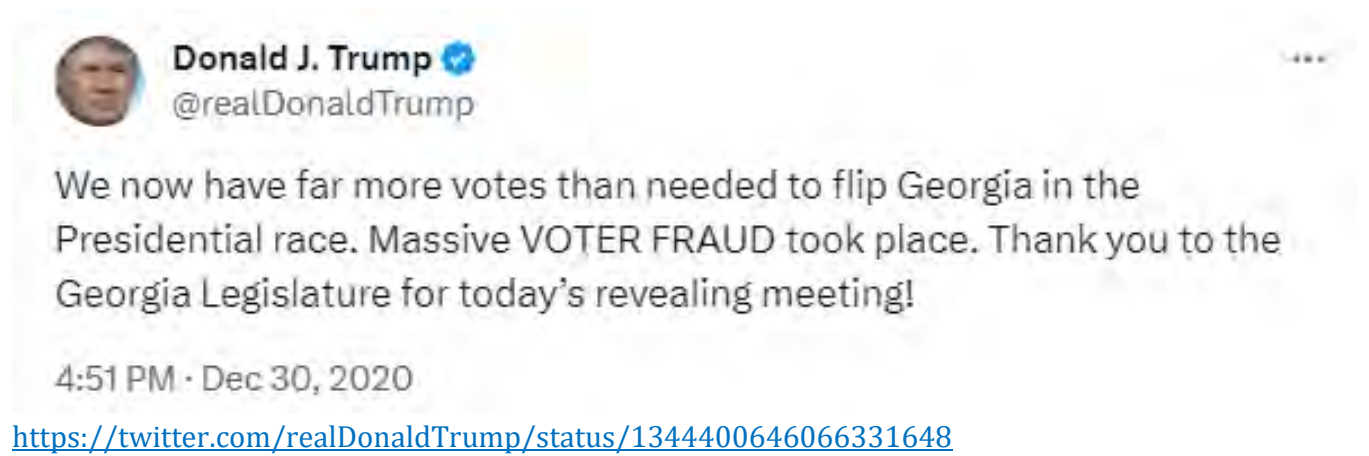
.@BrianKempGA, his puppet Lt. Governor @GeoffDuncanGA, and Secretary of State, are disasters for Georgia. Won't let professionals get anywhere near Fulton County for signature verifications, or anything else. They are virtually controlled by @staceyabrams & the Democrats. Fools!

4:38 PM · Dec 30, 2020

<https://twitter.com/realDonaldTrump/status/1344397397280088070>

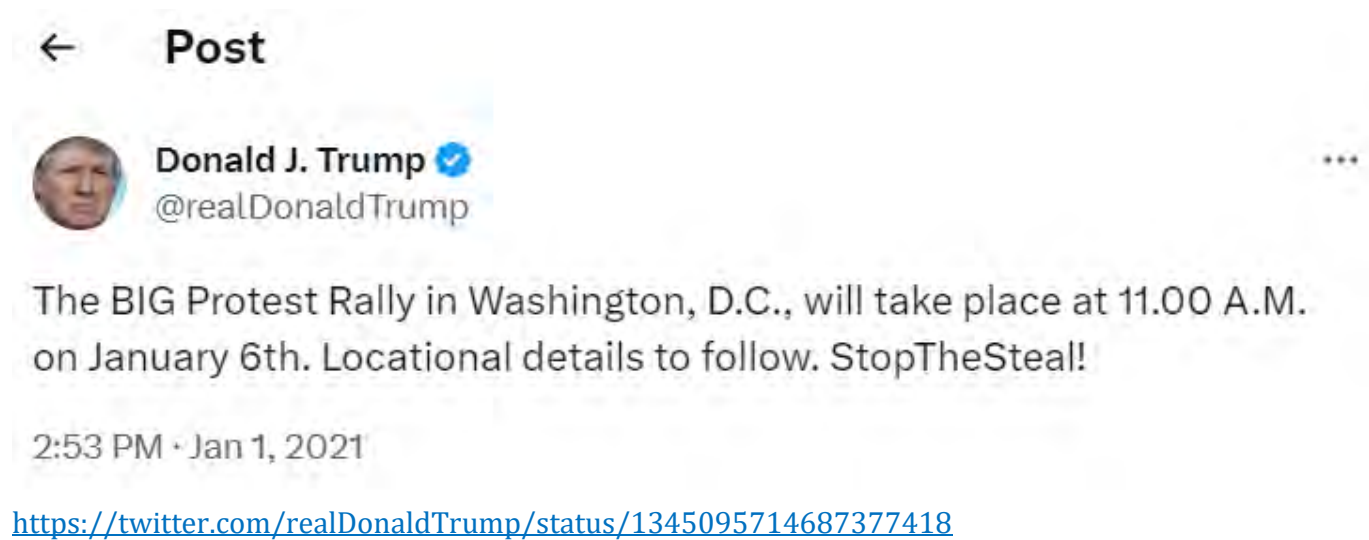
**December 30, 2020 (continued)**

4:51 PM



**January 1, 2021**

2:53 PM





January 1, 2021 (continued)

3:10 PM




Donald J. Trump   
@realDonaldTrump



Massive amounts of evidence will be presented on the 6th. We won, BIG!



Josh Hawley  @HawleyMO · Dec 30, 2020

Millions of voters concerned about election integrity deserve to be heard. I will object on January 6 on their behalf

**Hawley Statement On Objecting During Electoral College Certification Process on Jan. 6**

“Following both the 2004 and 2016 elections, Democrats in Congress objected during the certification of electoral votes in order to raise concerns about election integrity. They were praised by Democratic leadership and the media when they did. And they were entitled to do so. But now those of us concerned about the integrity of this election are entitled to do the same.

“I cannot vote to certify the electoral college results on January 6 without raising the fact that some states, particularly Pennsylvania, failed to follow their own state election laws. And I cannot vote to certify without pointing out the unprecedented effort of mega corporations, including Facebook and Twitter, to interfere in this election, in support of Joe Biden. At the very least, Congress should investigate allegations of voter fraud and adopt measures to secure the integrity of our elections. But Congress has so far failed to act.

“For these reasons, I will follow the same practice Democrat members of Congress have in years past and object during the certification process on January 6 to raise these critical issues.”

3:10 PM · Jan 1, 2021

<https://twitter.com/realDonaldTrump/status/1345100089505755139?lang=en>

January 1, 2021 (continued)

3:34 PM



Donald J. Trump   
@realDonaldTrump



A great honor!



Kylie Jane Kremer @KylieJaneKremer · Dec 19, 2020

The calvary is coming, Mr. President!

JANUARY 6th | Washington, DC

TrumpMarch.com



#MarchForTrump #StopTheSteal

**MARCH for TRUMP**  
TO DEMAND TRANSPARENCY & PROTECT ELECTION INTEGRITY  
**JANUARY 6TH**  
**WASHINGTON, DC**  
THE PRESIDENT IS CALLING ON US TO COME BACK TO WASHINGTON ON JANUARY 6TH FOR A BIG PROTEST - "BE THERE, WILL BE WILD"  
SPECIFIC LOCATION & TIME TBA SOON  
**#MARCHFORTRUMP**  
**TRUMP MARCH.COM**

3:34 PM · Jan 1, 2021

<https://twitter.com/realDonaldTrump/status/1345106078141394944>

**January 1, 2021 (continued)**

6:27 PM





**Donald J. Trump**   
@realDonaldTrump




Before even discussing the massive corruption which took place in the 2020 Election, which gives us far more votes than is necessary to win all of the Swing States (only need three), it must be noted that the State Legislatures were not in any way responsible for the massive....

6:27 PM · Jan 1, 2021

 9,471

 24.5K

 110.4K

 247



Post your reply


Reply



**Donald J. Trump**  @realDonaldTrump · Jan 1, 2021



....changes made to the voting process, rules and regulations, many made hastily before the election, and therefore the whole State Election is not legal or Constitutional. Additionally, the Georgia Consent Decree is Unconstitutional & the State 2020 Presidential Election....

 2,740

 13.4K

 73.6K



**Donald J. Trump**  @realDonaldTrump · Jan 1, 2021



....is therefore both illegal and invalid, and that would include the two current Senatorial Elections. In Wisconsin, Voters not asking for applications invalidates the Election. All of this without even discussing the millions of fraudulent votes that were cast or altered!

 7,414

 14.3K

 76K



Part 1: <https://twitter.com/realDonaldTrump/status/1345149555390771201>

Part 2: <https://twitter.com/realDonaldTrump/status/1345149556967800832>

Part 3: <https://twitter.com/realDonaldTrump/status/1345149558154797056>

January 1, 2021 (continued)

6:38 PM



**Donald J. Trump** ✓

@realDonaldTrump



January 6th. See you in D.C.



**Donald J. Trump** ✓ @realDonaldTrump · Dec 23, 2020

Replying to @realDonaldTrump



6:38 PM · Jan 1, 2021

<https://twitter.com/realDonaldTrump/status/1345152408591204352>



January 1, 2021 (continued)

6:53 PM



**Donald J. Trump** ✓  
@realDonaldTrump



Herschel is speaking the truth!



**Herschel Walker** ✓ @HerschelWalker · Dec 30, 2020

After watching the Ga Senate Hearings, there is no doubt there is serious Election Fraud! The whole world is watching.... so Georgia, we can be leaders by doing what's right.




6:53 PM · Jan 1, 2021

<https://twitter.com/realDonaldTrump/status/1345156316076060674>

January 2, 2021

11:20 AM



**Donald J. Trump**   
@realDonaldTrump

...

Why haven't they done signature verification in Fulton County, Georgia. Why haven't they deducted all of the dead people who "voted", illegals who voted, non Georgia residents who voted, and tens of thousands of others who voted illegally, from the final vote tally?

11:20 AM · Jan 2, 2021



21.5K



33.3K



146.2K



163



Post your reply

Reply



**Donald J. Trump**   
@realDonaldTrump · Jan 2, 2021

...

....Just a small portion of these votes give US a big and conclusive win in Georgia. Have they illegally destroyed ballots in Fulton County? After many weeks, we don't yet even have a judge to hear this large scale voter fraud case. The only judge seems to be Stacey's sister!

10K

17.6K

87.7K



Part 1: <https://twitter.com/realDonaldTrump/status/1345404682655707136>

Part 2: <https://twitter.com/realDonaldTrump/status/1345404684723507200>

**January 2, 2021 (continued)**

6:15 PM



**Donald J. Trump** ✓  
@realDonaldTrump



An attempt to steal a landslide win. Can't let it happen!



**Senator Ted Cruz** ✓ @SenTedCruz · Jan 2, 2021

.@AP: Cruz Leads 11 GOP Senators Challenging Biden Win Over Trump  
[nbcconnecticut.com/news/politics/...](https://www.nbcconnecticut.com/news/politics/)

6:15 PM · Jan 2, 2021

<https://twitter.com/realDonaldTrump/status/1345508977031974918?lang=en>

9:04 PM



**Donald J. Trump** ✓  
@realDonaldTrump



From **Kylie Jane Kremer** ✓

9:04 PM · Jan 2, 2021

<https://twitter.com/realDonaldTrump/status/1345551634907209730>

January 3, 2021

8:29 AM

← Post



Donald J. Trump   
@realDonaldTrump



Republicans in Georgia must be careful of the political corruption in Fulton County, which is rampant. The Governor, [@BrianKempGA](#), and his puppet Lt. Governor, [@GeoffDuncanGA](#), have done less than nothing. They are a disgrace to the great people of Georgia!


8:29 AM · Jan 3, 2021

[https://twitter.com/realDonaldTrump/status/1345723944654024706?ref\\_src=twsrc%5Etfw](https://twitter.com/realDonaldTrump/status/1345723944654024706?ref_src=twsrc%5Etfw)

8:57 AM

← Post



Donald J. Trump   
@realDonaldTrump



I spoke to Secretary of State Brad Raffensperger yesterday about Fulton County and voter fraud in Georgia. He was unwilling, or unable, to answer questions such as the “ballots under table” scam, ballot destruction, out of state “voters”, dead voters, and more. He has no clue!

8:57 AM · Jan 3, 2021

<https://twitter.com/realDonaldTrump/status/1345731043861659650>



**January 3, 2021 (continued)**

9:20 AM



**Donald J. Trump**   
@realDonaldTrump



“Georgia election data, just revealed, shows that over 17,000 votes illegally flipped from Trump to Biden.” @OANN This alone (there are many other irregularities) is enough to easily “swing Georgia to Trump”. #StopTheSteal @HawleyMO @SenTedCruz @Jim\_Jordan

9:20 AM · Jan 3, 2021

<https://twitter.com/realDonaldTrump/status/1345736811906273282>

**January 3, 2021 (continued)**

10:27 AM



**Donald J. Trump** ✓  
@realDonaldTrump



I will be there. Historic day!



**Kylie Jane Kremer** ✓ @KylieJaneKremer · Jan 2, 2021

BE A PART OF HISTORY!

January 6th - arrive by 9AM

White House Ellipse

RSVP @ TrumpMarch.com

#MarchForTrump #StopTheSteal #DoNotCertify



10:27 AM · Jan 3, 2021

<https://twitter.com/realDonaldTrump/status/1345753534168506370>

**January 3, 2021 (continued)**

1:24 PM



**Donald J. Trump** ✓  
@realDonaldTrump



The Swing States did not even come close to following the dictates of their State Legislatures. These States “election laws” were made up by local judges & politicians, not by their Legislatures, & are therefore, before even getting to irregularities & fraud, UNCONSTITUTIONAL!

1:24 PM · Jan 3, 2021

<https://twitter.com/realdonaldtrump/status/1345798202650460162>

1:45 PM



**Donald J. Trump** ✓  
@realDonaldTrump



Sorry, but the number of votes in the Swing States that we are talking about is VERY LARGE and totally OUTCOME DETERMINATIVE! Only the Democrats and some RINO'S would dare dispute this - even though they know it is true!


1:45 PM · Jan 3, 2021

<https://twitter.com/realdonaldtrump/status/1345803569438597121>

**January 4, 2021**

10:07 AM



**Donald J. Trump**   
@realDonaldTrump




How can you certify an election when the numbers being certified are verifiably WRONG. You will see the real numbers tonight during my speech, but especially on JANUARY 6th. @SenTomCotton Republicans have pluses & minuses, but one thing is sure, THEY NEVER FORGET!

10:07 AM · Jan 4, 2021

<https://twitter.com/realDonaldTrump/status/1346110956078817280>

10:45 AM



**Donald J. Trump**   
@realDonaldTrump



The “Surrender Caucus” within the Republican Party will go down in infamy as weak and ineffective “guardians” of our Nation, who were willing to accept the certification of fraudulent presidential numbers!

10:45 AM · Jan 4, 2021

<https://twitter.com/realDonaldTrump/status/1346120645613150208>

January 5, 2021

10:27 AM



**Donald J. Trump** ✓  
@realDonaldTrump



See you in D.C.



**Donald J. Trump** ✓ @realDonaldTrump · Jan 1, 2021

[secure.winred.com/save-america/e...](https://secure.winred.com/save-america/e...)

10:27 AM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346478482105069568>

11:06 AM



**Donald J. Trump** ✓  
@realDonaldTrump



The Vice President has the power to reject fraudulently chosen electors.

11:06 AM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346488314157797389>

**January 5, 2021 (continued)**

5:05 PM



**Donald J. Trump** ✓

@realDonaldTrump



Washington is being inundated with people who don't want to see an election victory stolen by emboldened Radical Left Democrats. Our Country has had enough, they won't take it anymore! We hear you (and love you) from the Oval Office. MAKE AMERICA GREAT AGAIN!

5:05 PM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346578706437963777?s=20>

5:12 PM



**Donald J. Trump** ✓

@realDonaldTrump



I hope the Democrats, and even more importantly, the weak and ineffective RINO section of the Republican Party, are looking at the thousands of people pouring into D.C. They won't stand for a landslide election victory to be stolen. @senatemajldr @JohnCornyn @SenJohnThune

5:12 PM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346580318745206785>



January 5, 2021 (continued)

5:25 PM



**Donald J. Trump** ✓

@realDonaldTrump



Antifa is a Terrorist Organization, stay out of Washington. Law enforcement is watching you very closely! @DeptofDefense @TheJusticeDept @DHSgov @DHS\_Wolf @SecBernhardt @SecretService @FBI

5:25 PM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346583537256976385>

**January 5, 2021 (continued)**

5:43 PM



**Donald J. Trump**   
@realDonaldTrump



I will be speaking at the SAVE AMERICA RALLY tomorrow on the Ellipse at 11AM Eastern. Arrive early — doors open at 7AM Eastern. BIG CROWDS!



5:43 PM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346588064026685443>



January 5, 2021 (continued)

9:59 PM



Donald J. Trump @realDonaldTrump



### BIG NEWS IN PENNSYLVANIA!

<p>The Majority Leader United States Senate 317 Russell Senate Office Building Washington, DC 20510</p>	<p>Republican Leader – US House of Representatives 2469 Rayburn House Office Building Washington, DC 20515</p>	<p>These procedures were implemented for the purpose of ensuring that all voters and poll watchers to be allowed to observe, they were "corralled" so far from the canvassing of ballots, that they could not view the activities.</p>
<p>Dear Leader McConnell and Leader McCarthy,</p>		<p>Requests from legislators for independent investigations have been ignored by the administration.</p>
<p>As members of the Pennsylvania Senate, we believe in the integrity of the election process. After speaking with our colleagues, a majority of the State Senate is troubled by the many inconsistencies that happened in our Commonwealth during the 2020 election.</p>		<p>Due to these incessant and questionable activities, we believe that PA election results should not have been certified by our Secretary of State.</p>
<p>Due to numerous unlawful violations taken by Pennsylvania Governor, Tom Wolf; Secretary of State, Kathy Boockvar; and the rogue State Supreme Court, the balance of power was taken from the State Legislature, who by the U.S. and PA Constitutions, set the time, place and manner of holding elections.</p>		<p><b>Members, we ask for more time given the fact that the U.S. Supreme Court is to hear Trump vs. Boockvar in the coming days. We ask that you delay certification of the Electoral College to allow due process as we pursue election integrity in our Commonwealth.</b></p>
<p>Act 77 of 2019 that was signed into law, provides the following clear provisions:</p>		<p>Very respectfully,</p>
<p>Tom Corbett Governor Pro Tempore</p>	<p>Kim Ward Majority Leader</p>	
<p>Kristin Phillips-Hill Senator, 30<sup>th</sup> District</p>	<p>Kristin Phillips-Hill Senator, 28<sup>th</sup> District</p>	

9:59 PM · Jan 5, 2021

<https://twitter.com/realDonaldTrump/status/1346652589673345024>

January 6, 2021

1:00 AM

← Post



**Donald J. Trump** ✓  
@realDonaldTrump

...

If Vice President @Mike\_Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & even fraudulent numbers in a process NOT approved by their State Legislatures (which it must be). Mike can send it back!

1:00 AM · Jan 6, 2021

<https://twitter.com/realDonaldTrump/status/1346698217304584192>

8:17 AM

← Post



**Donald J. Trump** ✓  
@realDonaldTrump

...

States want to correct their votes, which they now know were based on irregularities and fraud, plus corrupt process never received legislative approval. All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!

8:17 AM · Jan 6, 2021

<https://twitter.com/realDonaldTrump/status/1346808075626426371>

**January 6, 2021 (continued)**

8:22 AM

← **Post**



**Donald J. Trump** ✓  
@realDonaldTrump



THE REPUBLICAN PARTY AND, MORE IMPORTANTLY, OUR COUNTRY, NEEDS THE PRESIDENCY MORE THAN EVER BEFORE - THE POWER OF THE VETO. STAY STRONG!

8:22 AM · Jan 6, 2021

<https://twitter.com/realDonaldTrump/status/1346809349214248962>

9:15 AM



**Donald J. Trump** ✓  
@realDonaldTrump



The States want to redo their votes. They found out they voted on a FRAUD. Legislatures never approved. Let them do it. BE STRONG!

9:15 AM · Jan 6, 2021

<https://twitter.com/realDonaldTrump/status/1346822610957561858>

January 6, 2021 (continued)

1:49 PM



**Donald J. Trump**   
@realDonaldTrump



**RSBN** @RSBNetwork

pscp.tv

Watch LIVE: Save America March at The Ellipse featuring President  
@realDonaldTrump

1:49 PM · Jan 6, 2021

<https://twitter.com/realDonaldTrump/status/1346891760174329859?cxt=HHwWhsC7we66j7EIAAAA>

January 6, 2021 (continued)

2:24 PM



**Donald J. Trump** ✓  
@realDonaldTrump

...

Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!

2:24 PM · Jan 6, 2021 · Twitter for iPhone

Source 1: <https://web.archive.org/web/20210106192450>

Source 2: <https://fox59.com/news/national-world/1-6-panel-told-repeatedly-he-lost-trump-refused-to-go/> [https://scontent-iad3-1.xx.fbcdn.net/v/t1.6435-9/134672109\\_10159607785642176\\_8644372029803014794\\_n.png?nc\\_cat=110&ccb=1-7&nc\\_sid=9267fe&nc\\_ohc=lu5Unmd2QeIAX9ku1c-&nc\\_ht=scontent-iad3-1.xx&oh=00\\_AfBQuKx5JW2YmGvBwNqpjGm2Nj3\\_-PAsRkOjiWe5A9NgUA&oe=65180457](https://scontent-iad3-1.xx.fbcdn.net/v/t1.6435-9/134672109_10159607785642176_8644372029803014794_n.png?nc_cat=110&ccb=1-7&nc_sid=9267fe&nc_ohc=lu5Unmd2QeIAX9ku1c-&nc_ht=scontent-iad3-1.xx&oh=00_AfBQuKx5JW2YmGvBwNqpjGm2Nj3_-PAsRkOjiWe5A9NgUA&oe=65180457)

2:38 PM

← **Post**



**Donald J. Trump** ✓  
@realDonaldTrump

...

Please support our Capitol Police and Law Enforcement. They are truly on the side of our Country. Stay peaceful!

2:38 PM · Jan 6, 2021

<https://twitter.com/realDonaldTrump/status/1346904110969315332>



**January 6, 2021 (continued)**

3:13 PM

← **Post**



**Donald J. Trump** ✓  
@realDonaldTrump



I am asking for everyone at the U.S. Capitol to remain peaceful. No violence! Remember, WE are the Party of Law & Order – respect the Law and our great men and women in Blue. Thank you!

3:13 PM · Jan 6, 2021

<https://twitter.com/realDonaldTrump/status/1346912780700577792>

6:01 PM



**Donald J. Trump** ✓  
@realDonaldTrump



These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!

6:01 PM · Jan 6, 2021 · Twitter for iPhone

Source 1: [https://scontent-iad3-1.xx.fbcdn.net/v/t1.6435-9/135249759\\_10159608459792176\\_48918632044549425\\_n.png?nc\\_cat=104&ccb=1-7&nc\\_sid=9267fe&nc\\_ohc=7CjRiy6fqAsAX-4-m3l&nc\\_ht=scontent-iad3-1.xx&oh=00\\_AfDcz9QQfO6u6pLptFvubtHomyKa9S2O--RRrBWjprfPyw&oe=65181A3E](https://scontent-iad3-1.xx.fbcdn.net/v/t1.6435-9/135249759_10159608459792176_48918632044549425_n.png?nc_cat=104&ccb=1-7&nc_sid=9267fe&nc_ohc=7CjRiy6fqAsAX-4-m3l&nc_ht=scontent-iad3-1.xx&oh=00_AfDcz9QQfO6u6pLptFvubtHomyKa9S2O--RRrBWjprfPyw&oe=65181A3E)

Source 2: <https://www.npr.org/2022/11/19/1131351535/elon-musk-allows-donald-trump-back-on-twitter>

Source 3: <https://www.usatoday.com/story/tech/news/2021/01/06/washington-dc-protest-twitter-facebook-silence-donald-trump/6569864002/>



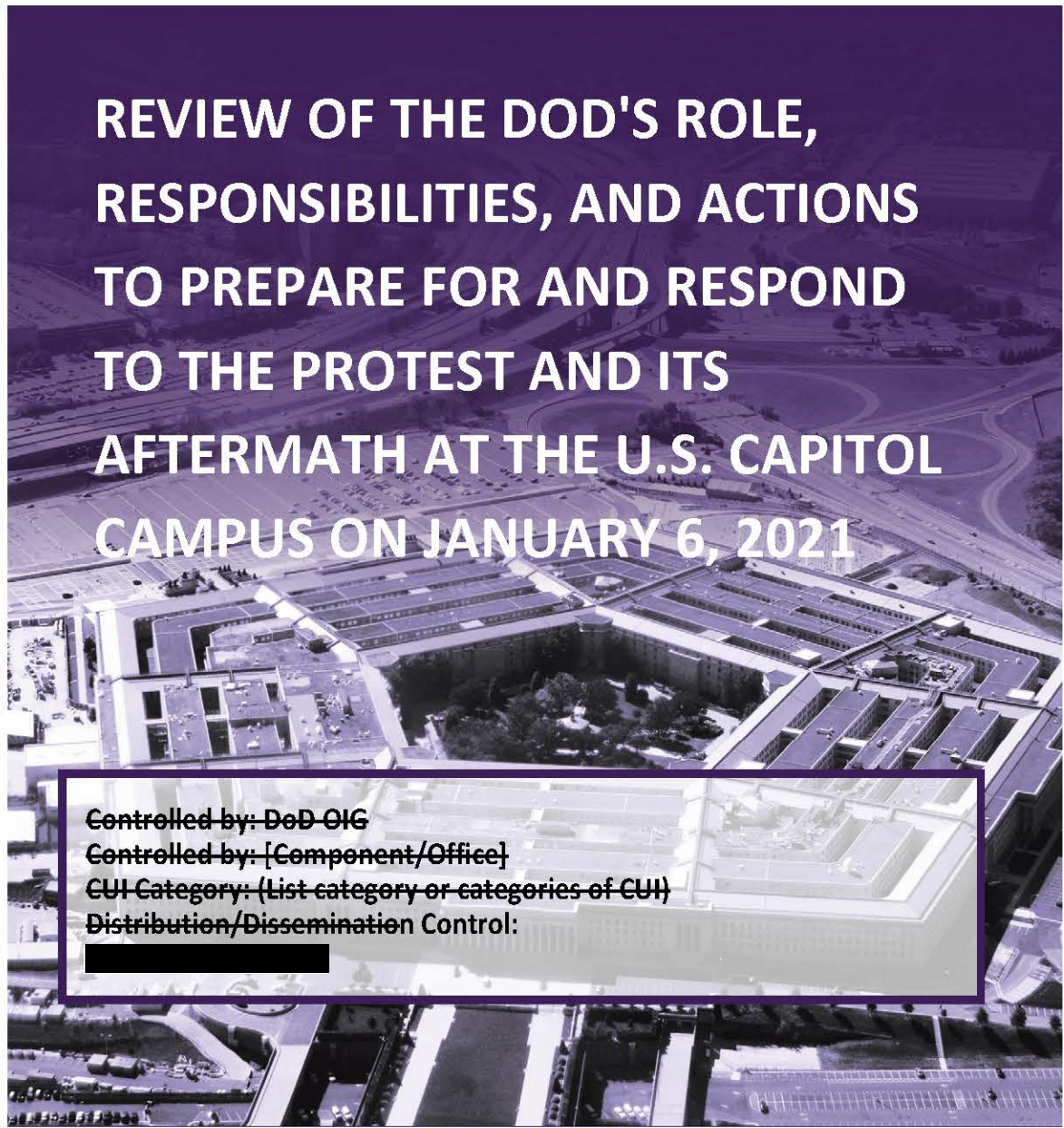
CUI

# INSPECTOR GENERAL

DATE FILED: November 29, 2023 12:03 PM

*U.S. Department of Defense*

November 16, 2021



## REVIEW OF THE DOD'S ROLE, RESPONSIBILITIES, AND ACTIONS TO PREPARE FOR AND RESPOND TO THE PROTEST AND ITS AFTERMATH AT THE U.S. CAPITOL CAMPUS ON JANUARY 6, 2021

Controlled by: DoD-OIG  
Controlled by: [Component/Office]  
CUI Category: (List category or categories of CUI)  
Distribution/Dissemination Control:  
[REDACTED]

INTEGRITY ★ INDEPENDENCE ★ EXCELLENCE

CUI

EXHIBIT  
**1031**  
Anderson v. Griswold - Case No. 2023CV32577







# **REVIEW OF THE DEPARTMENT OF DEFENSE'S ROLE, RESPONSIBILITIES, AND ACTIONS TO PREPARE FOR AND RESPOND TO THE PROTEST AND ITS AFTERMATH AT THE U.S. CAPITOL CAMPUS ON JANUARY 6, 2021**

## **I. INTRODUCTION**

This report presents the results of the DoD Office of Inspector General (OIG) review of the DoD's role, responsibilities, and actions to prepare for and respond to the protest and its aftermath at the U.S. Capitol Campus on January 6, 2021.<sup>1</sup>

The DoD Acting Inspector General initiated this review on January 15, 2021. Our review evaluated requests for DoD support before January 6, 2021, how the DoD responded to such requests, the requests for support the DoD received as the events unfolded on January 6, 2021, and how the DoD responded to the protests and rioting at the U.S. Capitol Campus. We evaluated whether the DoD's actions were appropriate and supported by requirements. We also examined whether the DoD complied with applicable laws, regulations, and other guidance in its response to requests for assistance.

To conduct the review, we assembled a multidisciplinary team of DoD OIG administrative and criminal investigators, evaluators, auditors, and attorneys. We examined approximately 24.6 gigabytes of e-mails and documents, including letters, memorandums, agreements, plans, orders, reports, briefings, calendars, statements witnesses made in congressional hearings, and comments witnesses made to journalists as reported in media articles and network news broadcasts. We examined records from the offices of the Secretary of Defense (SecDef); the DoD General Counsel; the Chairman of the Joint Chiefs of Staff (JCS); the Secretary of the Army (SecArmy); the Chief, National Guard Bureau (NGB); and the District of Columbia National Guard (DCNG). We also reviewed records provided to us by the Office of the Mayor, Washington, D.C.; the Office of the District of Columbia Homeland Security and Emergency Management Agency (DCHSEMA); the Department of the Interior (DoI); the U.S. Capitol Police (USCP) OIG; and the Federal Bureau of Investigation (FBI). Finally, we reviewed official e-mails, telephone records, call logs, and records from other means of communication, such as text messages, that DoD officials used before and on January 6, 2021.

We interviewed 44 witnesses, including:

- Mr. Christopher C. Miller, former Acting SecDef;
- Mr. Ryan C. McCarthy, former SecArmy;
- Mr. Kenneth Rapuano, former Assistant Secretary of Defense for Homeland Defense and Global Security (ASD[HD&GS]);
- Mr. Robert Salesses, former Deputy Assistant Secretary of Defense for Homeland Defense Integration and Defense Support of Civil Authorities (DASD[HD & DSCA])

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<sup>1</sup> The U.S. Capitol Campus is a large area within Washington, D.C., that consists of the U.S. Capitol building and visitor center, principal congressional office buildings, Library of Congress buildings, Supreme Court buildings, U.S. Botanic Garden and over 270 acres of grounds.

- General (GEN) Mark Milley, Chairman, JCS;
- GEN James McConville, Chief of Staff, U.S. Army;
- GEN Daniel Hokanson, Chief, NGB;
- Lieutenant General (LTG) Walter Piatt, Director of the Army Staff;
- Then-LTG Charles Flynn, Deputy Chief of Staff for Operations, Plans, and Training/G-3/5/7, Headquarters, Department of the Army (HQDA);<sup>2</sup>
- Major General (MG) William Walker, Commanding General, DCNG;<sup>3</sup>
- Ms. Muriel Bowser, Mayor, Washington, D.C.;
- Dr. Christopher Rodriguez, Director, DCHSEMA;
- Acting Chief of Police Robert Contee, D.C. Metropolitan Police Department (MPD);<sup>4</sup>
- Mr. Steven Sund, former Chief of Police, USCP; and
- DoD personnel involved in planning and executing the DCNG's response to requests for assistance at the U.S. Capitol Building.<sup>5</sup>

We also reviewed classified material as part of our review; however, this report does not contain any classified information.

Although we conducted an independent review of the actions of the DoD's Components and personnel, we also held interagency meetings with the OIGs from the Department of Justice (DoJ), Department of Homeland Security (DHS), and DoI to identify and address potentially overlapping facts and timelines applicable to each OIG's independent reviews of the January 6, 2021 events.

We divided our report into six sections.

Section I is an introduction to this report.

Section II provides an overview of our findings, conclusions, and recommendations.

Section III, "Defense Support of Civil Authorities," provides an overview of the DoD's mission, the DCNG's mission, and the support that DCNG provides to civil authorities.

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<sup>2</sup> LTG Flynn received a promotion to General and subsequently assumed command of U.S. Army Pacific on June 4, 2021. We address him as LTG Flynn throughout this report.

<sup>3</sup> MG Walker served as the Commanding General, District of Columbia Army and Air National Guard, from January 2017 through March 2021. On March 5, 2021, MG Walker was selected as the new Sergeant at Arms of the U.S. House of Representatives. He subsequently retired from military service and was sworn in as the 38th Sergeant at Arms of the U.S. House of Representatives on April 26, 2021. We address him as MG Walker throughout this report.

<sup>4</sup> Mr. Contee became the MPD Chief on May 4, 2021.

<sup>5</sup> Hereafter we refer to the U.S. Capitol Building in this report as the Capitol.

Section IV, “Significant Events Leading Up to January 6, 2021,” provides an overview of the relevant events leading up to January 6, 2021, and includes information about protests, riots, and other events in D.C. from June through December 2020, and the DoD’s review and approval of the D.C. Government’s request for assistance (RFA) from the DCNG. We also provide our conclusions regarding DoD actions during this period.<sup>6</sup>

Section V, “DoD’s Actions on and After January 6, 2021,” provides details of the events on January 6, 2021. It includes information about the DCNG’s mission and activities, DoD coordination with D.C. and Federal officials, receipt and approval of the USCP’s RFA, DoD planning for the DCNG’s new mission, the DoD’s response to the events at the Capitol, and plans for the DCNG and National Guard (NG) forces from several states to help secure the Capitol in the immediate aftermath of January 6, 2021. We also provide our conclusions regarding DoD actions during this period.

Section VI, “DoD OIG Review Observations and Recommendations,” details our observations regarding the DoD’s response time to the Capitol on January 6, 2021. Additionally, we make recommendations that the SecDef and SecArmy should consider improving the DoD’s Defense Support of Civil Authorities (DSCA) operations, policies, and procedures.

We provided a copy of our preliminary report to the Deputy SecDef, the DoD General Counsel, and The Inspector General of the Army for review on October 29, 2021. We asked them to review our preliminary report and identify any information they believed should be exempt from public release under the Freedom of Information Act, section 552, title 5, United States Code. We also asked them to identify any information they believed was factually incorrect and provide documentation to support their assessment for our review. We also provided excerpts from our preliminary report to the OIGs from the DOJ, DHS, and DOI, and asked each to review for exemptions from public release and to identify any potential factual errors. We received responses from all entities that reviewed our preliminary report and, where we deemed appropriate, modified our final report.

## **II. OVERVIEW OF THE DOD OIG REVIEW**

### *A. EVENTS LEADING UP TO JANUARY 6, 2021*

The United States held a presidential election on November 3, 2020. As individual states tallied and reported their election results to Congress, the President of the United States asserted that the election results were fraudulent.

The President announced via Twitter on December 19, 2020, that there would be a large protest on January 6, 2021, in Washington, D.C. He also alleged election fraud. He followed with a tweet on December 27, 2020, about the planned large gathering on January 6, 2021, to protest Congress certifying the Electoral College vote results at the Capitol.<sup>7</sup>

Twelve days later, on Thursday, December 31, 2020, Mayor Bowser sent a letter to MG Walker, requesting DCNG support in the District of Columbia for January 5 through 6, 2021. Mayor Bowser wrote in her letter that DCNG personnel would support both the MPD and the Fire and Emergency Medical Services (DCFEMS). In addition, she wrote, “[N]o DCNG personnel shall be

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<sup>6</sup> We based our conclusions on a preponderance of the evidence, consistent with our normal process in administrative investigations.

<sup>7</sup> A description of the electoral process is at <https://www.usa.gov/election>. A description of the Electoral College is at <https://www.archives.gov/electoral-college>.

armed during this mission, and at no time, will DCNG personnel or assets be engaged in domestic surveillance, searches, or seizures of [U.S.] persons.” She also stated that the Director, DCHSEMA, would send an RFA to MG Walker providing detailed requirements for the request.

The DCHSEMA Director sent an RFA to MG Walker on December 31, 2020, requesting DCNG personnel to support D.C. authorities from 7:30 a.m., Tuesday, January 5, 2021, through midnight, Wednesday, January 6, 2021.<sup>8</sup> The DCHSEMA Director wrote that the DCNG’s primary mission would be “crowd management and assistance with blocking vehicles at traffic posts [traffic control points or TCPs].” The DCHSEMA Director specifically requested six DCNG crowd management teams at identified Metro transit stations to prevent overcrowded platforms and teams to help staff 30 designated TCPs.

MG Walker forwarded the D.C. RFA to Mr. McCarthy on Friday, January 1, 2021, and recommended that Mr. McCarthy approve supporting the request. Mr. Miller told us that he learned of the D.C. RFA on January 1, 2021. During the following weekend, Army Staff members coordinated the response to D.C. officials with staff members assigned to the Office of the Assistant Secretary of Defense for Homeland Defense and Global Security (OASD[HD&GS]) and the DoD Office of General Counsel (OGC). OASD(HD&GS) staff members also telephoned and texted their points of contact at the U.S. Secret Service (USSS), U.S. Marshals Service (USMS), U.S. Park Police (USPP), DHS, and USCP to determine if any of these Federal civilian law enforcement agencies intended to request DoD support for January 6, 2021. All of these agencies responded that they did not anticipate needing DoD assistance.

Mr. Miller and Mr. McCarthy attended a number of meetings from Saturday, January 2, 2021, through Monday, January 4, 2021, within the DoD and with the DoJ, the DHS, and the DoI. The DoD held these meetings to discuss approval of the D.C. RFA, the potential for civil disturbances on January 6, 2021, and conditions for deployment of DCNG personnel. During these interagency and interdepartmental meetings, Mr. Miller sought to ensure that civilian agencies had no additional support requirements for the DoD, and that the DoJ would be designated as the lead Federal agency if circumstances developed to necessitate a Federal response to potential civil disturbances. During a January 4, 2021 meeting, Acting Attorney General (AG) Jeffrey Rosen orally concurred with the DoD’s plan for fulfilling the D.C. RFA. Mr. McCarthy wrote in a January 4, 2021 letter to Mr. Miller that he intended to approve the D.C. RFA if a lead Federal agency was designated and if the anticipated size of the demonstrations exceeded the capability of civilian law enforcement agencies.<sup>9</sup>

Following a January 4, 2021 meeting with Mr. McCarthy, Mr. Miller signed a memorandum that authorized Mr. McCarthy to approve the D.C. RFA, subject to consultation with Mr. Rosen and additional guidance. Mr. Miller specifically withheld the authority from Mr. McCarthy to approve riot control equipment or tactics; use military Intelligence, Surveillance, and Reconnaissance (ISR) assets; share equipment with law enforcement agencies; and seek support from non-DCNG units. Finally, Mr. Miller authorized Mr. McCarthy to employ a standby Quick Reaction Force (QRF) only as a last resort in response to a request from an appropriate civil authority.<sup>10</sup> He directed Mr. McCarthy to notify him immediately if Mr. McCarthy employed the QRF.<sup>11</sup>

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<sup>8</sup> Copies of the DCHSEMA Director’s RFA and Mayor Bowser’s letters are in Appendix C. In this report, we refer to the DCHSEMA Director’s RFA and the Mayor’s letter as the “D.C. RFA.”

<sup>9</sup> See Appendix C for a copy of Mr. McCarthy’s letter.

<sup>10</sup> A Quick Reaction Force (QRF) is any force that is poised to respond on very short notice.

<sup>11</sup> See Appendix C for a copy of Mr. Miller’s memorandum.

On the evening of January 4, 2021, Mr. McCarthy discussed the DoD's mission and Mr. Miller's employment guidance with MG Walker. Later that evening, an Army Staff member, on behalf of Mr. McCarthy, sent a letter to the DoJ to request Mr. Rosen's written concurrence with the DoD's plan to fulfill the D.C. RFA.

Mr. McCarthy sent a letter to MG Walker on January 5, 2021, that authorized MG Walker to support the D.C. RFA with 340 DCNG personnel for traffic and crowd control activities at 30 TCPs and 6 Metro stations; chemical, biological, radiological, and nuclear (CBRN) monitoring and hazardous material on-site support; and a 40-person QRF stationed at Joint Base Andrews (JBA), Maryland. The letter prohibited performing other tasks and duties or employing the QRF without Mr. McCarthy's approval.<sup>12</sup>

The DCNG executed its approved mission as directed on the morning of January 5, 2021. Additionally, on January 5, 2021, Mayor Bowser sent a letter to both the DoD and DoJ advising that no other Federal law enforcement support personnel were required and discouraged the deployment of any additional Federal law enforcement personnel without first consulting with MPD leadership.<sup>13</sup>

No major incidents of rioting or other violence occurred on January 5 or during the morning of January 6, 2021.

#### *B. EVENTS ON JANUARY 6, 2021*

At about 11:00 a.m. on Wednesday, January 6, the President and other speakers addressed a large group of protesters assembled on The Ellipse, near the White House. At this time, [REDACTED] DCNG soldiers were on duty at TCPs and Metro stations in downtown Washington, D.C., with another [REDACTED] off duty and expected to report to the DCNG Armory during the afternoon to relieve troops on duty and cover TCPs and Metro stations during the evening. The 40-person DCNG QRF was stationed at JBA. The QRF was outfitted with riot control equipment, and the soldiers at TCPs and Metro stations had riot control equipment stored in their vehicles. [REDACTED] DCNG soldiers were carrying out CBRN monitoring and hazardous material on-site support, and [REDACTED] DCNG personnel were at the Armory providing command and control and other support.

Shortly before 1:00 p.m. on January 6, 2021, as the President concluded his speech, a large crowd left The Ellipse and began marching towards the Capitol. As this group reached the area of the U.S. Capitol Campus, an undetermined number of individuals forced their way past barricades, some attacking law enforcement personnel, and into the Capitol as Members of Congress were meeting to certify the Electoral College vote count.<sup>14</sup> Beginning at 1:49 p.m. and throughout the afternoon of January 6, 2021, the DoD and the DCNG received numerous calls from various Federal and D.C. government officials requesting support and immediate assistance.

At 2:20 p.m., a conference call between Army Staff members, civilian officials from the D.C. government, and the USCP was initiated during which Mr. Sund requested NG support at the Capitol. Mr. McCarthy relayed the request to Mr. Miller, who approved mobilization of the DCNG at 3:04 p.m. The DCNG moved the QRF from JBA to the DCNG Armory, arriving at approximately 3:15 p.m. The [REDACTED] DCNG soldiers on duty at TCPs and Metro stations remained at their posts

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<sup>12</sup> See Appendix C for a copy of Mr. McCarthy's letter.

<sup>13</sup> See Appendix C for a copy of Mayor Bowser's letter.

<sup>14</sup> These actions are under criminal investigation by the DoJ-FBI and were not within the scope of our review.

without other direction. At 3:48 p.m., after contacting congressional leaders and media personnel to rebut false media reports that the DoD denied Mr. Sund's request for support, Mr. McCarthy left the Pentagon for MPD headquarters to coordinate the DCNG response to the Capitol events.

After Mr. McCarthy arrived at MPD headquarters, he worked with D.C. government officials to develop a plan to re-mission and deploy the DCNG to support the USCP at the Capitol. Mr. McCarthy then called Mr. Miller at about 4:32 p.m., and Mr. Miller immediately approved the re-mission plan and authorized Mr. McCarthy and MG Walker to deploy the DCNG to the Capitol.

The soldiers on duty at TCPs and Metro stations returned to the Armory at approximately 5:00 p.m. as directed by the DCNG Joint Task Force commander and did not participate in the response to the Capitol events. The QRF, now supplemented with Soldiers reporting to duty for the evening shift at TCPs and Metro stations and other personnel on duty at the Armory, left the Armory at 5:15 p.m. for USCP headquarters to be sworn in as "special policemen" by USCP personnel. The response force then moved to the Capitol, arriving at 5:55 p.m., and joined civilian law enforcement personnel in reinforcing the perimeter and clearing the Capitol grounds.

The events at the Capitol led to questions from Members of Congress about the adequacy and timeliness of the DoD's response to requests for assistance and DCNG's deployment to the Capitol.

### *C. FINDINGS AND CONCLUSIONS*

#### Conclusions on DoD Actions Before January 6, 2021

We concluded that the actions the DoD took before January 6, 2021, to prepare for the planned protests in Washington, D.C., on January 5 and 6, 2021, were appropriate, supported by requirements, consistent with the DoD's roles and responsibilities for DSCA, and compliant with laws, regulations, and other applicable guidance.

We also examined the actions the DoD took before January 6, 2021, that were independent of the D.C. RFA. We looked for a role or responsibility for the DoD to act preemptively to prevent or deter what later happened at the Capitol. We found none. On the contrary, we found restrictions that limited the DoD's roles and responsibilities in planning and providing support for domestic civil disturbance operations (CDO). These restrictions, set forth in statutes and implementing DoD directives, do not limit what civil authorities can request, but rather mandate what support DoD can provide to civilian authorities by setting strict limits.

#### Conclusions on DoD Actions On January 6, 2021

We concluded that the DoD's actions to respond to the USCP's RFA on January 6, 2021, were appropriate, supported by requirements, consistent with the DoD's roles and responsibilities for DSCA, and compliant with laws, regulations, and other applicable guidance. In particular, we determined that the decisions made by Mr. Miller, Mr. McCarthy, and other senior DoD officials, and actions taken by the DoD in response to the civil disturbance at the U.S. Capitol Campus on January 6, 2021, were reasonable in light of the circumstances that existed on that day and requests from D.C. officials and the USCP.

We also determined that DoD officials did not delay or obstruct the DoD's response to the USCP RFA on January 6, 2021.

*D. DOD OIG REVIEW OBSERVATIONS AND RECOMMENDATIONS*

Although we reached the previous conclusions, we made several observations and recommendations about how the DoD could improve its command structure, command and control architecture, communications systems, planning, and training during future DSCA missions within D.C. We detail our observations and recommendations in Section VI of this report.

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### III. DEFENSE SUPPORT OF CIVIL AUTHORITIES

To place the DoD's responsibilities and role in the events leading up to and on January 6, 2021, into context, we briefly describe the authorities that allow the DoD to support civil authorities. We then describe the processes the DoD uses to review and approve or disapprove requests for the DCNG to support local and Federal civil authorities in D.C.<sup>15</sup>

#### *Defense Support of Civil Authorities Overview*

The DoD exists to defend the United States and fight its wars. Although primarily oriented toward foreign threats to the homeland, the DoD possesses capabilities and resources that can support civil authorities and other domestic non-DoD entities. Defense Support of Civil Authorities (DSCA) is a DoD term that describes a broad range of activities that support civil authorities. These can include provision of medical treatment services, search and rescue operations, and CBRN response. The DoD provides DSCA in response to an RFA from civil authorities for help with domestic emergencies, law enforcement agency support, and other domestic activities. The DoD can provide DSCA on its own initiative as outlined below, but only when directed by the President under the Insurrection Act, or in very limited circumstances when exercising Immediate Response Authority or Emergency Authority.<sup>16</sup>

#### *DSCA Authorities*

Before providing DSCA in response to each RFA, the DoD must determine the specific legal authority that directs or allows the requested support. U.S. law, presidential executive orders and directives, Federal regulations, and DoD policies provide the framework and authorities for DSCA at the Federal, state, local, tribal, and territorial levels. We briefly discuss authorities related to civil disturbances, other emergencies, and support to civilian law enforcement below. Appendix A contains excerpts from the standards applicable to our review.

#### Civil Disturbances and Emergency Authority

Civil disturbances represent a category of domestic emergency that includes group acts of violence and disorder that are prejudicial to public law and order. State and local law enforcement agencies are the primary response agencies during a domestic civil disturbance. State and territorial governors may activate NG forces under their control in state active duty status during such disturbances. The D.C. mayor is not a state or territorial governor and does not have authority over the DCNG.

The U.S. Attorney General (AG) receives and coordinates requests for CDO, and is responsible for managing the U.S. Government's response to domestic civil disturbances. Federal military forces supporting the AG while conducting CDO remain under SecDef command and control, and play a limited role during a Federal response.

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<sup>15</sup> The Assistant Secretary of Defense for Homeland Defense and Global Security is the DoD proponent for DSCA policy and is responsible for the DoD issuances that were the primary sources for this section of our review. These include DoDD 3025.18, "Defense Support of Civil Authorities (DSCA)," December 29, 2010, (Incorporating Change 2, March 19, 2018); DoD Instruction 3025.21, "Defense Support of Civilian Law Enforcement Agencies," February 27, 2013, (Incorporating Change 1, Effective February 8, 2019); DoD Instruction 3025.22, "The Use of the National Guard for Defense Support of Civil Authorities," July 26, 2013, (Incorporating Change 1, May 15, 2017); and all volumes of DoD Manual 3025.01, "Defense Support of Civil Authorities," August 11, 2016.

<sup>16</sup> The events on January 6, 2021, did not meet those limited circumstances allowing DoD unilateral action.

In rare cases, Federal forces also may respond directly to civil disturbances. The U.S. Constitution and U.S. law authorize the President to employ military forces to suppress insurrections, rebellions, and domestic violence in a specific civil jurisdiction under specific circumstances. The Insurrection Act allows the President to use Title 10 forces to enforce Federal laws when rebellion against U.S. authority makes it impracticable to enforce U.S. law by ordinary means.<sup>17</sup> Additional information on the Insurrection Act is located in Appendix A.

DoD policy allows Federal military commanders to exercise “emergency authority” under extraordinary circumstances to prevent significant loss of life, prevent wanton destruction of property, restore governmental function, restore public order, protect Federal property, and protect Federal functions. Federal military commanders do not need a request for assistance from civil authorities to respond, and may perform tasks such as dispersing unauthorized assemblages, patrolling disturbed areas, maintaining essential transportation and communications systems, setting up roadblocks, and cordoning off areas. Emergency authority is only available when (1) local authorities are unable to control large-scale, unexpected civil disturbances, and (2) it is impossible to communicate through the military chain of command to obtain presidential authorization for the DoD to conduct CDO.

### Disasters, Other Emergencies, and Immediate Response Authority

Primary responsibility for responding to natural and man-made disasters and emergencies rests with state and local officials. A governor may activate state or territorial NG forces to fulfill these responsibilities and may directly request aid from other states pursuant to the Emergency Management Assistance Compact (EMAC).<sup>18</sup> A governor may also request Federal assistance when requirements exceed the state’s capabilities. DHS, specifically the Federal Emergency Management Agency, acts as the Lead Federal Agency for coordinating the Federal response to large-scale natural disasters. In general, the DoD provides disaster and emergency support in response to requests from this Agency.

DoD policy states that Federal military commanders, DoD Component heads, and responsible DoD civilian officials can exercise “immediate response authority” to save lives, prevent human suffering, and mitigate great property damage when the time to act does not permit obtaining higher headquarters (HQ) approval.<sup>19</sup> Civil non-law enforcement authorities must first make an oral or written RFA to the DoD. DoD support under immediate response authority may include search and rescue, evacuation, emergency medical treatment, firefighting, debris clearance, and food and water distribution.

Support of civilian law enforcement activities, as opposed to non-law enforcement activities, is not provided under immediate response authority because this authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory.

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<sup>17</sup> Title 10 of the United States Code outlines the legal basis for the roles, missions, and organization of the U.S. Armed Forces. Title 10 forces include active duty military, reservist, and National Guard personnel ordered to Federal-level active duty for Federal-level missions. National Guardsmen working in full-time positions, and on certain state missions, also serve in a Title 10, Federal status.

<sup>18</sup> The EMAC is a mutual aid agreement Congress signed into law in 1966 that allows states, territories, and the District of Columbia to share resources during emergencies.

<sup>19</sup> The Stafford Act (section 5121, title 42, United States Code) provides statutory authority for the use of the armed forces for domestic disaster relief.

### Support of Civilian Law Enforcement Activities

The DoD may support civilian law enforcement agencies for preplanned and other events such as civil disturbances, disasters, and other emergencies. When providing support, the DoD must recognize and conform to legal limitations on direct DoD involvement in civilian law enforcement activities. For example, the 1878 Posse Comitatus Act, section 1385, title 8, United States Code (18 U.S.C. § 1385), as amended, generally prohibits the use of active duty Federal military personnel to enforce U.S. laws within the borders of the United States. This prohibition applies to NG personnel when they serve in Title 10 status, but not when they serve in a Title 32 or state active duty status.<sup>20</sup> Any employment of Federal military forces in support of civilian law enforcement operations must maintain the primacy of civilian authority. The SecDef must ensure that DoD support does not include or permit direct DoD participation in search, seizure, arrest, or other similar law enforcement activity unless a law otherwise authorizes participation in such activity. Examples of possible DoD support include specialized personnel and units, equipment, facilities, training, and expert advice.

The SecDef is the approval authority for requests for direct assistance in support of civilian law enforcement agencies, including responding with assets that have the potential for lethality.<sup>21</sup> This includes situations in which a confrontation between civilian law enforcement and civilian individuals or groups is anticipated. The Assistant Secretary of Defense for Homeland Defense and Global Security (ASD[HD&GS]) is the DoD official responsible for DSCA policy and reviews all such requests. Within the Office of the ASD (HD&GS), the DSCA Director, who reports to the DASD for Homeland Defense Integration and DSCA, and his staff receive and coordinate requests for DSCA. The ASD(HD&GS) may approve some types of DoD support for civilian law enforcement agencies, including (1) non-lethal support that is not related to law enforcement functions like arrest, seizure, or crowd or traffic control; and (2) CBRN and explosive detection and response capabilities for preplanned events.

U.S. law allows the DoD to assist the USCP on a temporary and reimbursable basis when the Capitol Police Board asks for help and on a permanent and reimbursable basis when the Capitol Police board asks in advance and in writing. The DoD may provide assistance without reimbursement under circumstances specified in other sections of U.S. law. Except in an emergency, the Capitol Police Board must consult with appropriate members of the U.S. Senate and House of Representatives before requesting DoD assistance.<sup>22</sup> The law also authorizes the USCP Chief, in the event the Capitol Police Board determines there is an emergency, to appoint any member of the uniformed services, including members of the NG, as a “special officer of the Capitol Police.”

#### *DSCA and the DCNG*

The President appoints the DCNG Commanding General (CG), who reports to the President. In a 1969 executive order, the President delegated to the SecDef the authority to “supervise,

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<sup>20</sup> Title 10 personnel are active duty military members in the Army, Navy, Air Force, and Marine Corps. National Guard personnel serve in a Title 10 status when the President calls them to active duty, or “federalizes” them. Title 32 personnel are National Guard personnel funded with Federal funds, while remaining under the command and control of the governor of their state, territory, or commonwealth.

<sup>21</sup> Except when a Federal military commander exercises emergency authority as explained in the passage about civil disturbances.

<sup>22</sup> The Capitol Police Board consists of the Sergeant at Arms of the U.S. House of Representatives, the Sergeant at Arms and Doorkeeper of the U.S. Senate, and the Architect of the Capitol. The USCP Chief serves in an approved non-voting capacity.

administer and control” the DCNG.<sup>23</sup> In a subsequent memorandum, the SecDef further delegated authority over the D.C. Army National Guard (DCARNG) to the SecArmy and authority over the D.C. Air National Guard (DCANG) to the Secretary of the Air Force.<sup>24</sup> The D.C. mayor is not in the DCNG chain of command.

The 1969 executive order authorized the SecDef, subject to the President’s direction, to order the DCNG to aid D.C. civil authorities. The SecDef subsequently delegated authority to the SecArmy to command DSCA operations of the DCARNG and DCANG, through the DCNG CG. A fact sheet about the DCNG and an excerpt from the DCNG’s “2019 Annual Report” that depicts the chain of command and organizational structure are located in Appendix B.

### *Approving Requests for DCNG Assistance in the District of Columbia*

DoD policy requires DoD officials to consider a set of factors designed to ensure compliance with laws and other important criteria when reviewing RFAs. Staffing procedures, which we briefly describe below, depend on whether the requesting agency is the D.C. government or a Federal agency within D.C. A list of review criteria and schematic descriptions of the procedures used for the RFAs we examined for this review is located in Appendix B.

The D.C. government submits RFAs to the DCNG CG, who reviews them and makes a recommendation to the SecArmy. The Army Staff advises the SecArmy on the RFA as needed, and the SecArmy coordinates with the SecDef. The SecArmy also coordinates with and receives advice from the AG. The SecArmy or SecDef then approves or disapproves the RFA, and the SecArmy notifies the D.C. government, often through the DCNG CG. The Mayor may appoint DCNG personnel providing the approved support to D.C. as “Special [Police] privates.” During the appointment period, “Special [Police] privates” possess all the powers and privileges and perform all the duties of standing police force privates.

Federal agencies normally send RFAs through the DoD Executive Secretariat to the SecDef for approval.<sup>25</sup> The SecDef is not required to coordinate these Federal agency RFAs with the AG. When the USCP is the requesting Federal agency, the Capitol Police Board must make an advance written request. In an emergency, the U.S. House of Representatives’ or the U.S. Senate’s Sergeant at Arms may make an oral request and follow up with a written request from the Capitol Police Board. The Chief of the USCP does not have the authority to make an emergency RFA independent of the Capitol Police Board. The Chief of the USCP may appoint any responding NG personnel as “special officer[s] of the Capitol Police.”

## **IV. SIGNIFICANT EVENTS LEADING UP TO JANUARY 6, 2021**

In this section, we detail the information the DoD received before January 6, 2021, about possible civil disturbances, and the actions the DoD took in response to that advance information. We give particular attention to the December 31, 2020 D.C. RFA for traffic and crowd control during the protests planned for January 5 and 6, 2021, and how the DoD responded to that request. At the end of this section, we present our conclusions about the DoD’s response to the D.C. RFA, based on a preponderance of the evidence we reviewed.

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<sup>23</sup> Executive Order 11485, “Supervision and control of the National Guard of the District of Columbia,” October 1, 1969.

<sup>24</sup> Secretary of Defense Memorandum, “Supervision and Control of the National Guard of the District of Columbia,” October 10, 1969.

<sup>25</sup> Federal agencies sometimes submit RFAs directly to the DCNG CG or the SecArmy, who coordinates them with the SecDef.

### *Chronology of Significant Events Leading Up to January 6, 2021*

Table 1 lists significant events concerning civil disturbances and the presidential election that happened before January 6, 2021.<sup>26</sup>

*Table 1. Chronology of Significant Events Leading Up to January 6, 2021*

Date	Event
<b>May 25, 2020</b>	Mr. George Floyd dies while in police custody in Minneapolis, Minnesota.
<b>May 29 – Jun. 1, 2020</b>	Violent protests occur in D.C. over George Floyd’s death; DCNG personnel and aviation assets help with Federal response.
<b>Jul. 4, 2020</b>	The DCNG helps civil authorities with crowd management during Independence Day festivities in D.C.
<b>Aug. 28, 2020</b>	The DCNG helps civil authorities with crowd management and traffic control during the 57th anniversary of the March on Washington for Jobs and Freedom.
<b>Nov. 3, 2020</b>	The U.S. presidential election takes place.
<b>Nov. 14, 2020</b>	Post-presidential election protests occur in D.C.; civil authorities do not request DCNG assistance.
<b>Dec. 12, 2020</b>	The second post-presidential election protest in D.C. occurs; civil authorities do not request DCNG assistance.
<b>Dec. 19, 2020</b>	The President tweets, “Big protest in D.C. on January 6, 2021. Be there, will be wild!”
<b>Dec. 27, 2020</b>	The President tweets, “See you in Washington, D.C., on January 6th. Don’t miss it. Information to follow!”
<b>Dec. 30, 2020</b>	The MPD estimates that on January 6, 2021, there will be approximately 23 protest groups and 25,550 protestors; the MPD shares this information with the DCNG.
<b>Dec. 30, 2020</b>	The DHS estimates that on January 6, 2021, there will be 21 protest groups and 2,000 protestors committed to attend all protests in Washington, D.C.; DHS shares this information with the AOC. <sup>27</sup>
<b>Dec. 31, 2020</b>	The MPD shares with the DCNG an assessment that group actions during planned protests will be spontaneous and include the possibility of more aggression.
<b>Dec. 31, 2020</b>	The DCHSEMA Director submits the D.C. RFA to the DCNG for January 5-6, 2021, for traffic control at intersections; crowd control at Metro station platforms; and CBRN response capability. MG Walker informs Mr. McCarthy of the D.C. RFA.
<b>Jan. 1, 2021</b>	MG Walker sends his mission analysis for fulfilling the D.C. RFA for January 5-6, 2021, to Mr. McCarthy with a recommendation for approval.
<b>Jan. 2, 2021</b>	Mr. McCarthy and MG Walker discuss the D.C. RFA on a conference call; MG Walker updates his support plans while waiting for approval of the D.C. RFA.
<b>Jan. 2, 2021</b>	Mr. Miller, GEN Milley, Mr. McCarthy, and GEN McConville discuss the D.C. RFA; Mr. McCarthy says the final decision will come on January 4, 2021.
<b>Jan. 2, 2021</b>	Mr. Miller’s staff coordinates with the FBI, DHS, and USMS on whether these agencies had any concerns regarding the January 5-6, 2021 election protest events; the FBI had no specific concerns; DHS was not increasing its posture and was not tracking any threats to Federal facilities; and USMS was not responding to protests on January 5-6, 2021.
<b>Jan. 2, 2021</b>	The DCHSEMA Director submits an updated D.C. RFA to DCNG that includes a requirement to swear in DCNG personnel as “Special Police.”
<b>Jan. 3, 2021</b>	Mr. Miller’s staff coordinates with the USCP and USPP on whether either agency is requesting support for the planned election protest events on January 5-6, 2021; neither agency requests DoD support for the events.

<sup>26</sup>We identified the date and time that events occurred by a preponderance of the evidence we reviewed.

<sup>27</sup>The Army Operations Center (AOC) is the Army’s main location for command, control, and coordination of all Army operational activities. The use of the initials “AOC” throughout this report refer to the Army Operations Center, and not the initials commonly used to refer to or identify Congresswoman Alexandria Ocasio-Cortez.

Date	Event
Jan. 3, 2021	Mr. Miller participates in a Government interagency senior-level meeting; none of the attendees requests DoD assistance for January 5-6, 2021.
Jan. 3, 2021	Mr. McCarthy and the MPD Acting Chief of Police discuss the D.C. RFA; Mr. McCarthy wants the MPD to exhaust all Federal law enforcement resources first and defers the D.C. RFA approval decision to January 4, 2021.
Jan. 3, 2021	Mr. McCarthy discusses the D.C. RFA with Army senior leaders; he prepares for a decision meeting with Mr. Miller the next day to discuss the possible role of other Federal agencies in the expected election protests.
Jan. 3, 2021	Mr. Miller and GEN Milley attend a White House meeting. At the end of the meeting, the President asks about election protest preparations and Mr. Miller tells him, "We've got a plan, and we've got it covered."
Jan. 4., 2021	Mr. McCarthy recommends to Mr. Miller that the DCNG support the D.C. RFA, subject to three conditions all related to the role of other Federal agencies; Mr. Miller orally authorizes Mr. McCarthy to approve the D.C. RFA and discusses his additional guidance for fulfilling the request.
Jan. 4, 2021	Mr. McCarthy informs Mayor Bowser and the MPD Acting Chief of Police that the D.C. RFA is approved.
Jan. 4, 2021	MG Walker briefs Mr. McCarthy on final plans to fulfill the D.C. RFA; they discuss mission parameters and employment guidance.
Jan. 4, 2021	Mr. Miller issues written guidance applicable to the DCNG's fulfillment of the D.C. RFA.
Jan. 4, 2021	Mr. Miller discusses the D.C. RFA with Mr. Rosen.
Jan. 4, 2021	Mr. McCarthy asks Mr. Rosen by letter to confirm the plan to use DCNG personnel to fulfill the D.C. RFA.
Jan. 5, 2021	The DCNG begins an approved mission to support the MPD with traffic and crowd control at intersections and Metro stations.
Jan. 5, 2021	The AOC receives early information that DHS is monitoring 81 planned gatherings and has nothing significant to report regarding credible threats.
Jan. 5, 2021	Mr. McCarthy sends a letter to MG Walker that issues written authority to fulfill the RFA and conveys detailed employment guidance.
Jan. 5, 2021	Mayor Bowser states in writing that her government is prepared for the planned election protests and does not require help from Federal law enforcement agencies; she also wants to be consulted before deployment of any Federal resources beyond the approved DCNG deployment.
Jan. 5, 2021	During the evening, the President calls Mr. Miller to discuss the upcoming rallies. Mr. Miller told us that the President told him to "do what's required to protect the American people."
Jan. 5, 2021	The AOC receives an assessment from the USPP ICTB that the USPP can handle the President's Ellipse rally and large crowds; the ICTB has concerns over lack of intelligence on a notional "one off domestic radical."
Jan. 5, 2021	The FBI's Norfolk Division released an SIR [REDACTED]

#### Legend

ICTB Intelligence/Counter-Terrorism Branch

SIR Situational Information Report

### *Events in Washington, D.C., Before the 2020 Presidential Election*

The events leading up to the 2020 presidential election are important to the January 6, 2021 fact pattern we reviewed because witnesses told us that previous events influenced the DoD response to RFAs pertaining to civil disturbances before and on January 6, 2021. After the May 25, 2020 death of Mr. Floyd while in police custody in Minneapolis, Minnesota, cities throughout the United States experienced several weeks of demonstrations, some of which were marked by



episodes of looting, vandalism, arson, and other violence. Beginning on May 29, 2020, Washington, D.C., entered a similar period of demonstrations and rioting that lasted into June 2020.

Protests occurred throughout downtown Washington, D.C., on May 30, 2020, including vandalism of monuments on the National Mall. These protests continued on May 31, 2020, and a number of businesses were looted. Based on the civil unrest, the former U.S. AG characterized the day as “the most violent day of civil unrest in the District in 30 years.”

Mayor Bowser ordered a 7:00 p.m. curfew for Washington, D.C., on June 1, 2020. During the early evening, Federal law enforcement officers cleared Lafayette Square of protesters before the President spoke at the nearby St. John’s Episcopal Church. Although mobilized DCNG troops were present, they did not participate in the removal of protesters from Lafayette Square. Protests continued throughout that night and the DCNG deployed its available assets in force. It was during these events that a DCNG UH-72 medical evacuation helicopter was filmed hovering over a group of protesters.<sup>28</sup> The recording was widely publicized in the news and on social media.<sup>29</sup> One media outlet, *Politico*, reported, “The optics of the past 72 hours are putting people inside the halls of the Pentagon on edge as images of U.S. troops on the streets of the nation’s capital dominate airwaves across the globe.”

Mr. McCarthy described the June 2020 events as violent. He said, “It [the riot] turned very violent. They looted buildings. They spray painted monuments. They burned a church. Six of our [DCNG] Soldiers were injured and over the course of those 3 or 4 days about 100 policemen were injured.” Mr. McCarthy noted the public criticism of the DoD’s response. He mentioned the use of helicopters and added, “We had [DCNG] Soldiers in Lafayette Square where people thought they were engaging civilians because we had [loaned] military police shields to law enforcement officials. So there were [civilian] policemen ... using military police shields and we spent days and weeks explaining to the media and the Congress those weren’t our guys.”<sup>30</sup>

An Army public affairs officer told us that the Army received calls complaining that active duty personnel were in the streets from May through June 2020 because they saw active duty unit patches on DCNG uniforms. The officer explained that this was a misunderstanding because “there are several National Guard and Reserve units that have deployed with active duty troops so they have those combat patches” on their right shoulder.<sup>31</sup> In addition, some citizens thought Federal law enforcement officers who wore military-style uniforms were actually Soldiers. Other witnesses we interviewed said that the use of riot control agents and ISR aircraft were a concern to many in the DoD. According to Mr. McCarthy, the events of the summer led to congressional hearings and legislation on identifying personnel and other aspects of how DoD should operate in American cities.<sup>32</sup>

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<sup>28</sup> This incident resulted in a DCNG Army Regulation 15-6 investigation, a Department of the Army Inspector General investigation, and a DoD OIG oversight review of those investigations. The oversight review is available at the DoD OIG’s public website at <https://media.defense.gov/2021/May/28/2002731290/-1/-1/1/DODIG%20REPORT%20NO.%202021-089..PDF>.

<sup>29</sup> For example, <https://www.nytimes.com/2020/06/06/us/politics/protests-trump-helicopters-national-guard.html>.

<sup>30</sup> Additional details regarding the Army’s investigation into the events of June 2020 were publicly released on May 26, 2021, and can be found at <https://media.defense.gov/2021/May/28/2002731290/-1/-1/1/DODIG%20REPORT%20NO.%202021-089..PDF>.

<sup>31</sup> For example, if a DCNG Soldier was assigned or attached to an active duty unit while serving in a combat zone, that Soldier might wear the patch of the active duty unit on the right shoulder of his or her uniform.

<sup>32</sup> The U.S. House Armed Services Committee held a hearing on the DoD’s role in civilian law enforcement on July 9, 2020. Then-Secretary of Defense Dr. Mark Esper stated that governors across the nation called up more than 43,000 NG personnel to “uphold the rule of law, safeguard life and property, and protect the rights of Americans, all Americans, to protest safely and peacefully.”

An Army witness told us that a key lesson DoD learned from the events of June 2020 was that senior leaders need a thorough understanding of exactly what support civil authorities have requested. The witness explained that after the June 2020 events, Dr. Mark Esper and Mr. McCarthy began taking a personal interest in reviewing new RFAs, and they decided that requests for DCNG support to local and Federal law enforcement during planned protests were not routine requests.

Another Army witness told us that because of the June 2020 events, any time there was a scheduled protest, every agency asked for large number of forces without providing adequate justification. The witness told us that this caused the Army to put some conditions on requests for DCNG support during protests.

On July 4, 2020, and again on August 28, 2020, the DCNG provided support to Federal and D.C. law enforcement officials for two major events: (1) D.C.'s July 4, 2020 Independence Day festivities and (2) the 57th anniversary of the March on Washington for Jobs and Freedom. For the Independence Day festivities, the USPP requested that DCNG personnel serve in a security role to provide a uniformed presence and for crowd management. For the March on Washington anniversary, the DCHSEMA requested DCNG assistance with crowd management, TCPs, and CBRN response.<sup>33</sup> The DCNG provided 450 personnel for each mission with no notable incidents reported.<sup>34</sup>

#### *Events in Washington, D.C., After the 2020 Election*

A witness told us that Dr. Esper declined an RFA from the USPP for 150 DCNG to serve as a QRF from November 1 through 8, 2020. The witness said that Dr. Esper declined the RFA because he thought civil authorities had become over-reliant on the DoD as a first responder rather than as a last resort for civil disturbances.

The U.S. presidential election took place on November 3, 2020. During the evening of and for days after the election, the President and his supporters used the slogan "Stop the Steal" to express and rally support for the President's assertion that the election results were fraudulent. Protesters and counter-protesters gathered at various locations within Washington, D.C., on November 14, 2020, and engaged each other in violent confrontations. The violence resulted in at least one person stabbed, numerous others injured, and multiple arrests. The DoD and DCNG were not asked to support the law enforcement response to these incidents.

Protesters and counter-protesters gathered again at various locations within D.C. on December 12, 2020, and engaged in confrontations that were more violent. According to the DCNG [REDACTED], the DCNG received no RFAs for support from either D.C. officials or Federal law enforcement for the violent confrontations on that date. The DCNG [REDACTED] told us that for the November and December 2020 protests, the DCNG maintained a high level of situational awareness and was prepared to recall DCNG personnel for support if necessary.

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<sup>33</sup> The DCNG has a Weapons of Mass Destruction Civil Support Team with CBRN detection and response capabilities.

<sup>34</sup> There is no mention of a QRF for the July 4, 2020 festivities. Although DCHSEMA did not request a QRF for the March on Washington anniversary, the DCNG mission analysis process identified a QRF, which the SecArmy approved.

On December 19, 2020, the President tweeted that there would be a rally in D.C. on January 6, 2021. He tweeted:

Peter Navarro releases a 36-page report alleging election fraud “more than sufficient” to swing victory to Trump washex.am/3NWABCe. A great report by Peter. Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!

From December 26, 2020, through January 5, 2021, the President sent additional tweets about the planned January 6, 2021 election protest.<sup>35</sup>

### DoD Planning for January 5 Through 7, 2021

Mr. McCarthy testified before the U.S. House Appropriations Committee on January 26, 2021, that the Army does not collect domestic intelligence and relies on other Federal and local agencies for intelligence and threat assessments. He and other witnesses stated that it would have been inappropriate for the Army to plan to secure the Capitol without a support request from a Federal agency.

We asked Mr. McCarthy what information he or his staff received about planned protests and the potential for violence in the days before January 6, 2021. He and other witnesses told us that the MPD forecasted activity similar to election protests and counter-protests that occurred on November 14 and December 12, 2020. Mr. McCarthy told us that intelligence personnel did not anticipate that the protests would be as violent as they were on January 6, 2021. He also said that the DHS manages information collection and dissemination for interagency partners and provides law enforcement information as needed to Army senior leaders. Mr. McCarthy said that he did not remember receiving any briefings or information that indicated a specific threat, and he only recalled preparing plans for January 5 through 7, 2021, regarding the D.C. RFA submitted to the DoD on December 31, 2020.

Army Staff witnesses told us that the DoD did not plan for the anticipated January 5 and 6, 2021, election protests until the DCNG received the D.C. government’s RFA. They said that there were no contingency plans for conducting CDOs in D.C. because the DoD acts only in response to specific requests from civil authorities unless the President invokes the Insurrection Act. MG Walker told us that he had a contingency plan for everything and that not having a contingency plan was “leadership malpractice.”

### *Events of December 30, 2020*

The DCNG [REDACTED] e-mailed MG Walker; Brigadier General (BG) Aaron R. Dean II, U.S. Army, The Adjutant General, DCNG; Brigadier General (Brig Gen) Mark A Maldonado, U.S. Air Force, DCANG Commander and Director, Joint Staff, Joint Task Force District of Columbia (JTF-DC), DCNG; and BG Robert K. Ryan, U.S. Army, Land Component Commander, JTF-DC, DCNG, at 10:58 a.m. to forward information received from civilian law enforcement agencies. The e-mail discussed the planned election protests for January 6, 2021, and included information that the DCNG received from the MPD and Federal law enforcement. According to the e-mail, law enforcement agencies did not anticipate requesting civil disturbance support from the DCNG, but that the USSS might request Weapons of Mass Destruction Civil Support Team (CST) assistance. At

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<sup>35</sup> See Appendix E for the full text of these tweets.

the time of the e-mail, 23 protest groups had registered to participate or had made known their intent to attend protest events on January 5 and 6, 2021, with an expected attendance of 25,550. The MPD estimated that the protests would be similar to November and December 2020 but larger because of the President's tweet earlier that month.

BG Christopher LaNeve, Director of Operations, Readiness and Mobilization, Army G-3/5/7, Headquarters, Department of the Army (HQDA), e-mailed Mr. McCarthy and GEN McConville an update at 1:45 p.m. on the expected January 5 through 7, 2021 protests.<sup>36</sup> He reported that local law enforcement had not recalled or placed their officers on standby, and would maintain their operations centers in a "warm" status.<sup>37</sup> BG LaNeve included the DHS National Operations Center's (NOC) listing of the date, time, purpose, and number of interested and committed participants for 21 named protest events. According to the DHS NOC, the approximate number of people committed to attend all protests in Washington, D.C., from January 5 through 7, 2021, was 2,000, with more expressing an interest in attending.

### *Events of December 31, 2020*

The DCNG [REDACTED] e-mailed MG Walker, BG Dean, Brig Gen Maldonado, and BG Ryan at 5:04 p.m. to update them on significant changes the DCNG received from the MPD and Federal law enforcement regarding the anticipated protests. The significant changes were:

- organizers extended the events to include January 5, 2021;
- MPD was expected to request blocking vehicles for January 5 and 6, 2021; and
- DCFEMS was expected to request CST support.

The DCNG [REDACTED] e-mailed the following details from the MPD and the USPP.

- The MPD estimated the crowd's size would be 19,925.
- The USPP estimated 10,000 to 20,000 attendees were expected to attend the demonstrations but there was no central plan among the groups. The largest group of attendees was expected to assemble and remain at The Ellipse. Other groups would assemble at Freedom Plaza and the Capitol. The USPP reported that there was not a single organizer to control all the groups, so most action would be spontaneous. This was seen by some as a "last chance" so there was the possibility of more aggression than in previous protests.<sup>38</sup>

MG Walker called Mr. McCarthy during the late afternoon of December 31, 2020, and told him that the D.C. government would request DCNG support for January 5 and 6, 2021. An Army witness explained that the purpose of the D.C. RFA was to have the DCNG help the MPD with traffic and crowd control so that more MPD officers could be ready to respond to any civil unrest.

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<sup>36</sup> BG LaNeve received a promotion to Major General on February 25, 2021, and assumed duties and responsibilities as the Army's Deputy Chief of Staff, G-3/5/7, on June 21, 2021. We address him as BG LaNeve throughout this report.

<sup>37</sup> Although we were not able to define a "warm" status as it relates to the MPD, we believe it likely means maintaining the minimum staff needed to keep their operations center functioning.

<sup>38</sup> The e-mail did not specify exactly what was meant by "last chance"; however, the protest was planned to draw attention to the scheduled Electoral College vote at the Capitol.

Mr. McCarthy told MG Walker to conduct a mission analysis, and that he (Mr. McCarthy) would notify Mr. Miller of the pending D.C. RFA.

MG Walker also e-mailed Mr. McCarthy at 5:13 p.m. to advise that the DCHSEMA Director called to request that the DCNG help the MPD at 30 TCPs and 6 Metro stations, and provide CST support to D.C. Fire and Emergency Medical Services (DCFEMS). MG Walker added that DCHSEMA had not sent a formal request for assistance and that with a possible exception of the USSS, no Federal requests for assistance were anticipated. MG Walker included a slide presentation, "District of Columbia National Guard 5-6 January 2021 Support Plan," December 31, 2020, depicting the DCNG's initial assessment in anticipation of the receipt of the formal D.C. RFA. The presentation noted that the MPD and USPP estimated a crowd of 15,000 to 20,000, with an expectation that supporters of the Proud Boys and anti-fascist (antifa) organizations would seek confrontations with each other that could result in assaults and opportunities to commit larceny, looting, and arson. The final slide stated the following.

- Upon receipt of the formal D.C. RFA, mission analysis would be conducted.
- The mission required 350 DCNG personnel.
- The DCNG would have liaison teams at the MPD Emergency Operations Center.
- If required, [REDACTED] more DCNG personnel could respond within 3 hours, [REDACTED] more within 6 hours, and [REDACTED] more within 12 hours under the Commanding General's selective encampment order.<sup>39</sup>

LTG Piatt e-mailed Mr. McCarthy, GEN Hokanson, the Military District of Washington Commanding General, and MG Walker at 5:29 p.m. and told them that the Army Staff was ready to process the formal D.C. RFA when received.

Mayor Bowser sent a letter dated December 31, 2020, to MG Walker formally requesting DCNG support for the MPD and DCFEMS during demonstrations for which the National Park Service issued permits on January 5 and 6, 2021. Mayor Bowser specified, "[N]o DCNG personnel shall be armed during this mission, and at no time, will DCNG personnel or assets be engaged in domestic surveillance, searches, or seizures of [U.S.] persons." Mayor Bowser concluded by stating that the DCHSEMA Director would send MG Walker an RFA providing detailed requirements for the request.<sup>40</sup>

The DCHSEMA Director sent an RFA dated December 31, 2020, to MG Walker formally requesting that the DCNG help the MPD with crowd management and traffic management at 30 designated TCPs and 6 D.C. Metro stations from 7:30 a.m. to midnight on January 5 and 6, 2021. He asked that DCNG personnel wear reflective vests and carry lighted wands used to direct traffic. He also asked MG Walker to have the DCNG's CST provide CBRN and hazardous material support to the DCFEMS from 7:00 a.m. on January 5, 2021, to 7:00 a.m. on January 7, 2021. The DCHSEMA Director repeated Mayor Bowser's statements regarding no weapons or domestic surveillance,

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<sup>39</sup> See Appendix D for a copy of the slide presentation MG Walker e-mailed to Mr. McCarthy. Selective encampment is a recall of National Guardsmen based on other operational mission support requirements and meeting military medical readiness, and is not subject to open internal investigations of misconduct.

<sup>40</sup> See Appendix C for a copy of Mayor Bowser's letter.

searches, or seizures of U.S. persons. He confirmed that the MPD and DCFEMS exhausted their organic capabilities and could not carry out their security plans without the requested DCNG support.<sup>41</sup>

MG Walker told us that it was not alarming to receive two letters requesting the same or similar DCNG support. He told us that he normally received only one letter from the DCHSEMA Director; however, because the MPD, Mayor Bowser, the Deputy Mayor, and DCHSEMA were very concerned about the January 6 events, the Mayor sent her separate letter.<sup>42</sup> Mayor Bowser told us that she sent a letter to MG Walker to alert him that the DCHSEMA Director was going to send him an RFA. She told us that the District decided that because the number of participants expected at The Ellipse and at Freedom Plaza was growing, she would need the National Guard's support.

Mr. Miller told us that he learned of the D.C. RFA on December 31, 2020, although he could not recall how. He told us that he decided at that time that he would approve the D.C. RFA once the staffing process was completed.

### *Events of January 1, 2021*

The DCNG [REDACTED] completed the mission analysis for the D.C. RFA within 24 hours of receiving it. Regarding the D.C. RFA, in a memorandum for MG Walker the DCNG [REDACTED] recommended:

- an initial maximum of [REDACTED] Army and Air Guardsmen;
- if required, an additional [REDACTED] Guardsmen able to respond within 3 hours and [REDACTED] Guardsmen able to respond within 6 hours;
- any DCNG engagement in law enforcement activity [such as traffic control or crowd management] required that the MPD first swear in Guardsmen as "special police";
- all Guardsmen would serve on 32 U.S.C. § 502(f) status;<sup>43</sup>
- all Guardsmen would be unarmed; and
- at no time would the Guardsmen or assets engage in domestic surveillance, searches or seizures of U.S. persons.

The DCNG [REDACTED] told us that during the time between the D.C. RFA and the execution of the mission, the DCNG was preparing for the mission by conducting rehearsals, building operations orders, and assembling gear.

MG Walker signed a letter to Mr. McCarthy requesting that he approve the D.C. RFA. He enclosed the D.C. RFA, the mission analysis, and a copy of the MPD Rules for the Use of Force (RUF) for unarmed "Special Police."<sup>44</sup> The DCNG [REDACTED] e-mailed MG Walker's letter and the attachments to an Associate General Counsel in the Army OGC at 12:18 p.m. Mr. McCarthy

<sup>41</sup> See Appendix C for a copy of DCHSEMA Director Rodriguez's letter.

<sup>42</sup> Mayor Bowser's and the DCHSEMA Director's letters combined to create the D.C. RFA.

<sup>43</sup> In 32 U.S.C. § 502, "Required drills and field exercises," paragraph (f), members of the National Guard may be activated for training or to support operations or missions undertaken at the request of the President or SecDef.

<sup>44</sup> See Appendix C for a copy of MG Walker's letter and enclosures.

then requested a January 2, 2021 meeting with Mr. Miller and GEN Milley to discuss the DoD's options for a response to the D.C. RFA.

The DCNG prepared Operations Order (OPORD) 001-2021, "Operation Guardian," January 1, 2021. The OPOrd provided instructions for planning and executing a mission to support the D.C. government with crowd management, traffic control points, and a Civil Support Team from January 5 through 7, 2021. The SITUATION paragraph stated, in part, that there were no credible threats of violence or civil unrest. The EXECUTION paragraph included a four-phase concept of the Operation. The first phase was planning and preparation, which included mission analysis, training, exercises, and coordination as necessary with D.C. government and Federal agencies. The second phase was initial assembly. The third phase was execution, and the fourth was redeployment and closure. The OPOrd tasked the Joint Forces HQ DCNG J3 with tasking subordinate units to execute or support the mission in accordance with key leader instructions, which the order did not specify. It also tasked the Joint Forces HQ DCNG J4 with ensuring that civil disturbance equipment was available.<sup>45</sup>

Mr. McCarthy told us that he wanted to ensure that local law enforcement was in the lead and that they exhausted all of their assets before turning to the DoD. If the DoD were to help, Mr. McCarthy wanted to see that there would be a command and control architecture that had the appropriate authorities and jurisdictions, and could make the appropriate decisions.

BG LaNeve told us that Mr. McCarthy needed to evaluate and understand who would be in charge and exactly what the DCNG would be expected to do to support law enforcement operations for the January 6, 2021 events. Another witness told us that the events of June 2020 made Mr. McCarthy sensitive to having Soldiers performing a law enforcement function near the Capitol while Congress certified the election results. GEN McConville and a third witness gave the example that in June 2020, the DCNG used tactical vehicles but Mr. McCarthy wanted them to use non-tactical vehicles in January 2021. The third witness also told us that Mr. McCarthy was concerned about the appearance of having the military close to the Capitol or having it look like an overly militarized response. According to this witness, Mr. McCarthy also wanted to make sure that law enforcement, not the military, was in the lead, and that a Federal agency other than the DoD was in charge of coordinating Federal actions as needed to prepare for or respond to any civil unrest.

Another witness told us that June 2020 showed that the DCNG needed a clear mission to support the D.C. RFA. The mission needed to state exactly what the DCNG would be required to do—when, for whom, and who would be in charge. The witness said that there was some discussion on the Army Staff that for this D.C. RFA it would be better if the DCNG did not have to be involved at all, and that other agencies should exhaust all resources before asking for DoD help. This witness also said that Mr. McCarthy understood that having the image of military personnel in full military combat gear guarding the Capitol was not a favorable optic and not something that people were excited about.

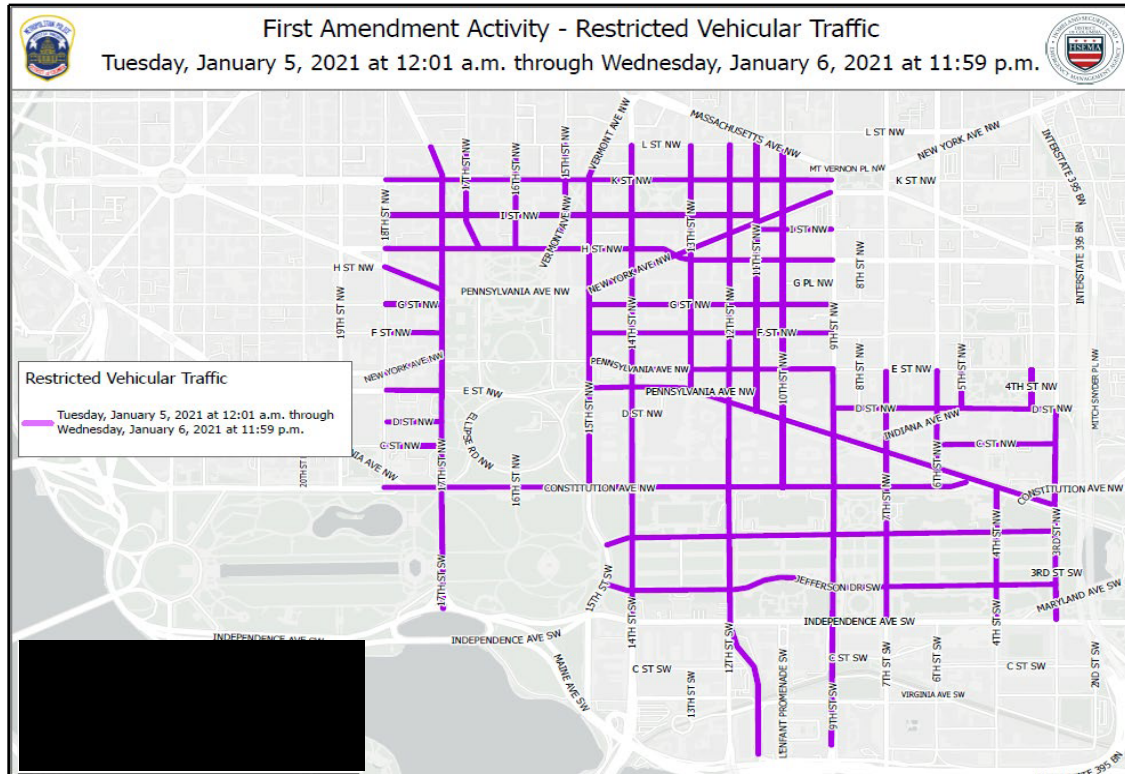
MG Walker e-mailed Mr. McCarthy a map at 8:50 p.m. that showed the streets and intersections where the MPD planned to restrict vehicular traffic for January 5 and 6, 2021. The map gave Mr. McCarthy a tentative list of the 30 intersections and 6 Metro stations where DCNG personnel would augment the MPD at TCPs.

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<sup>45</sup> See Appendix D for a copy of OPOrd 001-2021.

Figure 1 shows the map that MG Walker sent to Mr. McCarthy. A witness told us that Mr. McCarthy was comfortable supporting the request once he saw exactly how and where the MPD wanted to place DCNG personnel.

Figure 1. MPD – First Amendment Activity – Restricted Vehicular Traffic



### Events of January 2, 2021

At 11:23 a.m., MG Walker confirmed to Maj Gen Nordhaus that there were no changes to the D.C. RFA for January 6, 2021. BG LaNeve e-mailed LTG Flynn that there would be an 11:30 a.m. conference call with Mr. McCarthy about the D.C. RFA. BG LaNeve wrote that the D.C. RFA was supportable, that he had seen no information that suggested crowds larger than previous estimates, and that the MPD and the USPP still had not assigned extra people to be on duty. At the 11:30 a.m. conference call, MG Walker discussed the D.C. RFA with Mr. McCarthy and other Army senior leaders.

At 1:14 p.m., a DCNG [REDACTED] e-mailed attorneys from the NGB, HQDA, and JCS about DCNG personnel being deputized for the limited roles D.C. requested in its RFA, stating:

[REDACTED] I do believe it was an oversight in that [DC]HSEMA's request did not include the statutory provision, and [I] am verifying this now.

Mr. Miller held a 1:30 p.m. virtual meeting with Mr. McCarthy, GEN Milley, GEN McConville, GEN Hokanson, and other senior DoD leaders. According to Mr. Miller, DoD leadership at that time was focused on another matter that was his primary concern, but they also discussed the D.C. RFA



for January 6, 2021. Mr. Miller told us that Army leadership expressed concerns about the negative press the DoD received after the DCNG's previous deployment for civil disturbances in June 2020, but Army leadership agreed to support the D.C. RFA for January 6, 2021. GEN Hokanson told us that he believed the SecArmy approved the RFA on January 2, 2021, and sent it back to MG Walker to execute the mission. Mr. Rapuano, the ASD(HD&GS), told us that it was reasonable to believe that the negative criticism of the DoD's role in the June 2020 civil disturbances contributed to some hesitation regarding the DoD's role in future civil disturbance missions. Mr. Salesses, the DASD(HD&DSCA), told us that there was concern within the DoD about using personnel like the DCNG was used in June 2020, and DoD leaders wanted law enforcement agencies to take the leading role in the civil disturbance mission for January 6, 2021.

GEN Milley described the 1:30 p.m. virtual meeting with Mr. Miller and other DoD leaders. GEN Milley told us that they discussed the concept of operations (CONOPS), crowd estimates, rules of engagement, and external perimeters and internal perimeters.<sup>46</sup> He also said that they talked about the Lead Federal Agency and setting up a command post.

An e-mail from a staff member of the Office of the Under Secretary of Defense for Policy to Mr. Salesses summarized Mr. Miller's 1:30 p.m. meeting.

- No decisions were made.
- Mr. McCarthy was not inclined to provide support unless D.C. had exhausted all resources.
- GEN Milley stressed the need for a lead Federal agency and that DoD should be the last resort.
- Principals agreed to reconvene on Monday, January 4, 2021.

This e-mail string also mentioned updating Mr. Rapuano, who was on leave, to tell him that Federal partners (USSS, DoI/Park Police, DoJ/FBI) were considering DoD support for the upcoming week.

After receiving this e-mail, Mr. Salesses contacted Mr. Rapuano, who directed OASD(HD&GS) staff members to contact Federal law enforcement agencies to determine if they planned to request DoD support for January 6, 2021. The DSCA [REDACTED] e-mailed points of contact at the FBI, USMS, and DHS asking for their specific concerns that the DoD should be tracking. The [REDACTED] responded that they had no specific concerns. The DHS representative stated that they were not increasing their posture and were not tracking any threats to Federal facilities. The USMS representative stated that they were not responding to protests on January 5 and 6, 2021, and did not require DoD support.

Mr. McCarthy e-mailed Army senior leaders at 5:48 p.m. to inform them that there would not be a final decision on the D.C. RFA until he met with Mr. Miller on January 4, 2021.

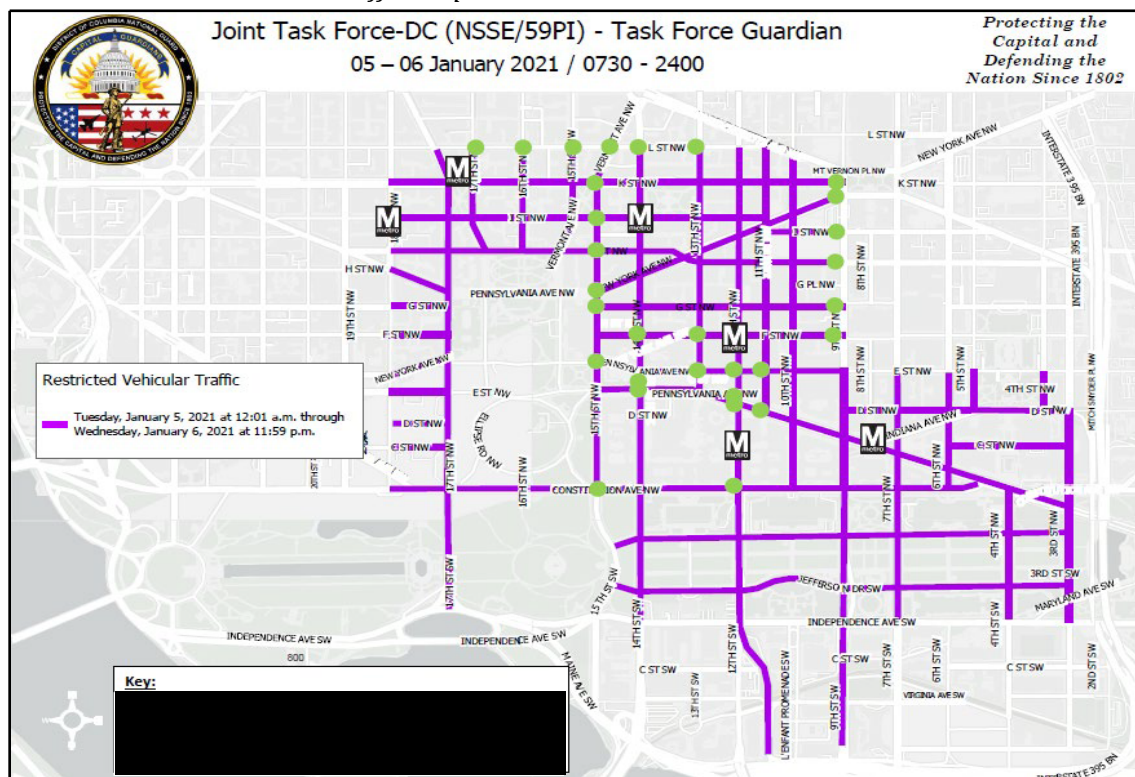
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<sup>46</sup> The Army defines "Concept of Operations" in Army Doctrine Publication (ADP) 5-0, "The Operations Process," July 31, 2019, as "a statement that directs the manner in which subordinate units cooperate to accomplish the mission and establishes the sequence of actions the force will use to achieve the end state."

MG Walker e-mailed Mr. McCarthy an updated slide presentation at 9:38 p.m. and referenced their discussion earlier in the day. The presentation, “District of Columbia National Guard 5-6 January 2021 Support Plan,” was an update based on additional mission analysis. MG Walker updated the number of Guardsmen at each MPD TCP and provided additional information about CST capabilities and support to D.C. and Federal agencies. He stated that the number of DCNG personnel supporting the MPD changed to 340, which was closer to his original estimate of 350. MG Walker also stated in his e-mail that the 340 DCNG personnel included a 40-person DCANG QRF. The slide presentation showed a reduction in the projected recall response time of [REDACTED] additional DCNG personnel from 3 hours to 1 hour, and for [REDACTED] more from 6 hours to 3 hours.

This presentation also included a slide showing the TCPs and Metro stations where DCNG personnel would support the MPD. MG Walker told us that while the DCNG was preparing the slide presentation, Mr. McCarthy and senior Army leaders talked about optics, and how the DCNG personnel were not to be close to the Capitol. Figure 2 is the slide from MG Walker’s presentation that shows in purple the streets where the MPD would restrict vehicle traffic and in green the intersections where DCNG personnel would support MPD officers. The slide also indicates DCNG-supported Metro stations.<sup>47</sup> No DCNG personnel were positioned near the Capitol.

Figure 2. Restricted Vehicular Traffic Map with the TCPs and Metro Stations



The DCNG [REDACTED] e-mailed an updated version of the December 31, 2020 D.C. RFA to an Army OGC attorney advisor at 7:38 p.m. The revised D.C. RFA added a statement that Mayor Bowser would designate DCNG personnel supporting MPD as “Special Police” under D.C. Code, Title

<sup>47</sup> See Appendix D for a copy of the entire presentation.

5, Section 5-129.03, "Appointment of special police without pay." This designation gave DCNG personnel law enforcement authority equal to that of D.C. civilian police officers.<sup>48</sup>

MG Walker told us that the DCNG personnel were deputized in case they needed to help the MPD. The DCNG ██████████ told us that even providing TCPs is a law enforcement function, so DCNG personnel needed to be sworn in as special deputies so they could conduct crowd management, crowd safety, and traffic control activities.

GEN McConville wrote in an e-mail to LTG Piatt that it was important to have a well-defined plan for Mr. McCarthy if the decision was made to commit the DCNG. He stated that local, state, and Federal law enforcement should be committed first and that the DCNG should be the last resort, in a support role.

### *Events of January 3, 2021*

At 9:24 a.m., Mr. Sund spoke to the U.S. House of Representatives and U.S. Senate Sergeants at Arms, seeking approval to submit a request for DCNG support at the Capitol on January 6, 2021. The Sergeants at Arms did not approve submitting a request asking DCNG for support. Mr. Sund added that the House Sergeant at Arms expressed concerns about the optics of National Guard members around the Capitol.

GEN McConville told us:

the general feeling of all those involved [with approving the D.C. RFA] was that the military would have no role, and many people talked about the optics of having military at the Capitol. What that would look like, how that would influence even some of the demonstrators or protesters. And so there was a general feeling among everybody that the military would be in a very small and supporting role even to this point with the traffic control points."

At 9:51 a.m., the Army Operations Center (AOC) e-mailed information that the AOC received from the DHS NOC to BG LaNeve. The DHS NOC reported that the USPP approved numerous protest permits and that several hotels were sold out during the nights of January 5 and 6, 2021. The DHS NOC called those indicators of large crowds although the estimated numbers of protestors remained unknown. The DHS NOC indicated that Lafayette Square, the National Mall, and the Capitol Building were the areas of concern. Several witnesses told us that the crowd estimates were based on information gathered from the media and from rental car and hotel reservations. MG Walker told us:

So, the Metropolitan Police Department they canceled all leave, all hands on deck. They said ... that they were ready for any eventuality. The FBI was talking about what they were seeing, the hotels. The Secret Service was talking about they're in a heightened state. Everybody was in a heightened state of awareness and readiness.

The military advisor to the DHS e-mailed Maj Gen Nordhaus at 7:48 a.m., advising that the DHS was planning to mobilize DHS law enforcement officers to protect Federal properties in the National Capitol Region in response to potential protest activity for January 5 and 6, 2021.

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<sup>48</sup> See Appendix C for a copy of the DCHSEMA Director's updated letter.

Maj Gen Nordhaus responded that MG Walker received the D.C. RFA anticipating potential protest activities for those dates.

The DSCA Special Events [REDACTED] queried and received responses from several Federal and D.C. government agencies, including the USCP, regarding whether they planned to request DCNG support before January 6, 2021. None of the agencies anticipated requesting or requiring DoD assistance beyond the D.C. RFA. Mr. Sund told us a subordinate advised him of DoD's query and that he directed the subordinate to give a negative response because he did not have approval to request DCNG support.

Mr. Sund spoke to the Senate Sergeant at Arms at 11:53 a.m. to request approval for DCNG support on January 6, 2021. According to Mr. Sund, the Senate Sergeant at Arms recommended he contact the DCNG to find out if the USCP needed immediate help from the DCNG, how many personnel MG Walker could provide, and how quickly they could deploy to the Capitol.

Mr. Salesses e-mailed Mr. Rapuano at 12:25 p.m. with the results of OASD(HD&GS) staff's contacts with other Federal agencies. He noted that Federal civilian law enforcement agencies were tracking the planned protest activities, but the FBI, USMS, USPP, USCP, and DHS did not anticipate requesting DoD or DCNG support. Mr. Salesses also summarized the D.C. RFA and the planned DCNG response force for TCPs and Metro stations. Additionally, Mr. Salesses drafted a read-ahead memorandum for Mr. Rapuano's meeting with Mr. Miller the following day. The memorandum summarized the D.C. RFA, recommended that Mr. Miller approve the D.C. RFA, and advised Mr. Miller that no Federal agencies were requesting DoD or DCNG support for the January 6, 2021 protests.

Mr. Miller attended a 1:00 p.m. virtual interagency meeting with Cabinet members and representatives from the DoJ, DoI, and DHS; the then-Assistant to the President for National Security Affairs (National Security Advisor); and senior DoD officials including Mr. McCarthy and GEN Milley. Mr. Miller told us that during the meeting he attempted to ensure the interagency group had a common operating picture and to determine if other Federal agencies intended to request support from the DoD. The attendees from the other Federal agencies told Mr. Miller that they were not going to request DoD support and that civilian law enforcement officials believed they could handle whatever protests were expected for January 6, 2021.

GEN Milley told us that during this meeting, the group discussed: (1) the D.C. RFA; (2) crowd size—estimates remained the same, 15,000 to 20,000; and (3) crowd locations—the Washington Monument, the National Mall, Freedom Plaza, Lafayette Square Plaza/Black Lives Matter Plaza, the Capitol, the White House, and The Ellipse. GEN Milley emphasized that the lead Federal agency and law enforcement needed to be the first responders, and that ultimately this was police work. He told us that everyone agreed to that. He told us that the attendees stated the following during the meeting.

- Secretary of the Interior: The DoI did not anticipate making any requests for DCNG assistance. The DoI brought people in from the other parts of the country to assist them.
- Acting AG: The DoJ was prepared and needed no support from the DoD. A fusion center was set up at the FBI. There was a lot of chatter but no specific threat.

- DHS Director of Ops: The DHS would have its virtual situation room operational and saw no specific threat to any Federal buildings. The DHS also brought in additional assets to augment current forces.
- Secretary of Homeland Security: Concerned about what would happen at sunset and the potential it would be similar to what happened on November 14 and December 12, 2020, with small opposing groups roaming the city and fighting one another.
- Secretary of the Army: Briefed the draft CONOPS for the National Guard mission to support the D.C. RFA.
- National Security Advisor: Wanted to make sure everyone communicated with the USSS.

Mr. McCarthy told us that during the meeting they discussed: (1) the requirements to support the D.C. RFA; (2) the oral designation from the White House to make the Justice Department the lead Federal agency, and (3) the DoD's question, "Does anyone else need support? Because we could mobilize the entire Guard?" Mr. McCarthy told us that the only request the DoD had received at that time was the D.C. RFA. He said that the USCP, USPP, and other Federal agencies did not ask for support. Mr. McCarthy did not know which White House official designated the lead Federal agency; however, GEN Milley told us:

Ambassador [Robert C.] O'Brien [National Security Advisor] or White House Chief of Staff [Mark] Meadows, one of them says, "Hey, Department of Justice is the lead Federal agency." Which is the right answer by the way. The Department of Justice should be the lead Federal agency. It's a law enforcement issue, it's domestic in nature and at the Federal level the Department of Justice should be and they are normally on things like this.

GEN Milley told us that the DoD initiated these interagency meetings even though the DoJ was the lead Federal agency. He said the reason the interagency meetings were happening was that he, Mr. McCarthy, and Mr. Miller, and others insisted on the coordination meetings.

Mr. McCarthy called Chief Contee at 3:30 p.m. to discuss the D.C. RFA. Chief Contee told us that during the call, Mr. McCarthy indicated that the DoD was going to deny the D.C. RFA and expressed concern with the optics of boots on the ground anywhere near the Capitol. We asked Mr. McCarthy the reason he gave to Chief Contee for why the DoD might deny the RFA. Mr. McCarthy responded, "I wanted to make sure that he [Chief Contee] exhausted all of his resources [before asking for DCNG help], that he was looking to Federal law enforcement for support, and that he had exhausted all of those assets." Mr. McCarthy also said, "We were very conscious of our [public] perception and operations. We wanted to make sure that we communicated very clearly what we were doing, if we were going to support those [civil disturbance] operations." Mr. McCarthy added that Chief Contee did not want to use Federal law enforcement to support MPD operations.

Chief Contee explained to us that he did not want other Federal law enforcement involved on January 6, 2021, because of the risk associated with having unidentified Federal officers carrying

weapons within D.C. Chief Contee said that Mr. McCarthy asked him to give Mr. McCarthy until January 4, 2021, for a decision on the D.C. RFA.<sup>49</sup>

Mr. Miller told us, “There was absolutely no way ... I was putting U.S. military forces at the Capitol, period.” He cited media stories alleging that the President’s advisors were pushing him to declare martial law to invalidate the election and that Mr. Miller was an ally installed as the Acting SecDef to facilitate a coup. He also cited a January 3, 2021 open letter from 10 former Secretaries of Defense warning the DoD not to use the military in a manner antithetical to the U.S. Constitution. Mr. Miller stated that he “made a very deliberate decision that I would not put U.S. military people ... East of the 9th Street, northwest. ... And the reason for that was I knew if the morning of the 6th or prior if we put U.S. military personnel on the Capitol, I would have created the greatest Constitutional crisis probably since the Civil War.”

Other witnesses concurred with Mr. Miller. Mr. McCarthy stated:

We were very conscious of the perception of military personnel near the Capitol and we’re trying to communicate to the Congress ... and we wanted them to know that [DCNG] were in support of Metro PD, that we were not putting the[m] near the Capitol. We’re getting a lot of chatter on the news as well as the Congress of what is the military going to do that day [January 6, 2021]?

Mr. McCarthy told us that he did not want to create the perception that the military was involved in the electoral process. He said that Mr. Miller made it clear that the military would not be involved in certifying the election results and that “10 different news agencies” asked him about military use and martial law. Mr. McCarthy said that he wanted to make sure that civilian law enforcement, not the military, was in the lead, and that a Federal agency other than the DoD had the lead for coordinating Federal actions, as needed, to prepare for or respond to the demonstrations. He said that the DoD learned in the summer of 2020 that the multi-jurisdictional nature of D.C. made putting the security architecture in place a complex problem.<sup>50</sup>

Mr. McCarthy hosted a video teleconference (VTC) with Army senior leaders and staff to prepare for a January 4, 2021 meeting with Mr. Miller. Before this meeting, BG LaNeve e-mailed Mr. McCarthy a slide presentation, which showed two unresolved conditions for supporting the D.C. RFA. First, no lead Federal agency was designated. Second, the DoD did not know the level to which other Federal agencies committed their support to the MPD. Mr. McCarthy told the group about his conversation with Chief Contee and emphasized his (Mr. McCarthy’s) concerns about command and control.

LTG Piatt told us that he believed Mr. McCarthy wanted to recommend approval of the D.C. RFA after the following conditions were met. According to LTG Piatt, there had to be a lead Federal agency and other agencies had to exhaust their forces. LTG Piatt said that there had to be a coherent plan and all agencies needed a shared understanding of the size of the demonstrations. Additionally, LTG Piatt said that the DoD needed to know the details of the shared threat

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<sup>49</sup> Chief Contee said that this telephone call took place on December 31, 2020. We presented it here because the preponderance of evidence indicated it was January 3, 2021. Mr. McCarthy told us that MG Walker notified him about the request on the evening of December 31, 2020. Mr. McCarthy discussed the RFA with MG Walker, Mr. Miller, and others on January 1 and 2, 2021. Mayor Bowser swore in Chief Contee on January 2, 2021. Mr. McCarthy said that he called Chief Contee the day after he was sworn into office.

<sup>50</sup> We reviewed the transcript of a July 9, 2020 hearing of the U.S. House Armed Services Committee on the DoD’s role in civilian law enforcement. Committee Chair Adam Smith told GEN Milley and then-Secretary of Defense Esper, “I am very concerned about the Department of Defense becoming unduly politicized.”

assessment from the FBI and DHS. According to LTG Piatt, Mr. McCarthy also stressed the importance of understanding the threat assessment, the RUF, and the mission parameters; proper equipment; and training.

Mr. Miller and GEN Milley met with the President at the White House at 5:30 p.m. The primary topic they discussed was unrelated to the scheduled rally. GEN Milley told us that at the end of the meeting, the President told Mr. Miller that there would be a large number of protestors on January 6, 2021, and Mr. Miller should ensure sufficient National Guard or Soldiers would be there to make sure it was a safe event. Gen Milley told us that Mr. Miller responded, "We've got a plan and we've got it covered."

Mr. Sund told us that at 6:14 p.m., he and MG Walker discussed DCNG support available to the USCP for January 6, 2021. According to Mr. Sund, MG Walker told him that in addition to support provided to the city for traffic closures, an additional [REDACTED] DCNG personnel were supporting the COVID-19 response. Mr. Sund told us that MG Walker advised him that if the USCP needed immediate assistance, MG Walker could change the mission of DCNG personnel supporting COVID-19 operations fairly quickly and deploy those Soldiers to the Capitol.

The Task Force Guardian (TF Guardian) Commander told us that the DCNG had [REDACTED] Guardsmen helping with traffic control and security at COVID-19 testing locations in support of the D.C. government.<sup>51</sup> He said that because the Guardsmen were already on orders, the DCNG would be ready to go if anything happened during the timeframe specified in the D.C. RFA. The DCNG would recall the Guardsmen to the Armory and send the Guardsmen as a QRF wherever needed.

#### *Events of January 4, 2021*

Mr. McCarthy submitted his recommendation to approve the D.C. RFA in a letter to Mr. Miller dated January 4, 2021. Mr. McCarthy recommended that the DCNG support the RFA if:

- a lead Federal agency other than the DoD was established to coordinate the actions of all entities involved;
- the estimated numbers for the demonstrations exceeded local and Federal agencies' abilities to address the risks; and
- all other Federal agencies exhausted their assets to support the demonstrations.

Mr. McCarthy informed Mr. Miller that the DCNG would support the MPD with 340 personnel consisting of:

- two shifts of [REDACTED] personnel each operating non-tactical vehicles at TCPs;
- two shifts of [REDACTED] personnel each providing support at Metro stations;
- the [REDACTED]-person CST;

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<sup>51</sup> The TF Guardian Commander was not identified and activated until January 4, 2021; however, the testimony provided by the TF Guardian Commander was relevant at this point in our report.

- a 40-person QRF staged at JBA; and
- [REDACTED] personnel providing command and control and other mission support.<sup>52</sup>

He stated that the DCNG was not authorized to perform tasks other than those authorized in his letter, and that he would not commit the DCNG until Mr. Miller approved the RFA.<sup>53</sup> The Acting Army General Counsel concurred with Mr. McCarthy's recommendation and conditions.

LTG Piatt told us that Mr. McCarthy based the language in the letter partly on the appearance to Army officials that the MPD, USCP, DoJ, USPP, and USSS each had its own plan.

Mr. Miller met with Mr. McCarthy, GEN Milley, and other senior DoD leaders at 9:00 a.m. for what Mr. Miller described as a decision meeting. Mr. Miller orally approved the D.C. RFA during this meeting. Mr. Rapuano directed the OASD(HD&GS) [REDACTED] after the meeting to draft an approval memorandum.

Mr. McCarthy told us that at 10:45 a.m., he called Chief Contee, who was with Mayor Bowser, and told them the DCNG would fulfill the D.C. RFA. Chief Contee told us that during this call, Mr. McCarthy stipulated that: (1) the DCNG would have a specific number of personnel; (2) the DCNG could not be posted east of 9th Street; and (3) the MPD could not change the mission without his approval.<sup>54</sup> Chief Contee said that the stipulations Mr. McCarthy placed on the use of DCNG personnel were not consistent with his experience with previous RFAs that D.C. submitted to the DoD. Chief Contee told us that he thought it might have resulted from the DoD's concerns over the optics of having boots on the ground.

An official in the Army's Office of the Chief Legislative Liaison told us that Mr. McCarthy notified the Senate Armed Services Committee, House Armed Services Committee, Senate Appropriations Committee for Defense, and House Appropriations Committee for Defense about the decision. He notified each committee by telephone about the DoD's decision to fulfill the D.C. RFA and the fact that the DoD had not received any other RFAs. The official told us that this was standard procedure for Mr. McCarthy, and that Mr. McCarthy answered Members' questions about whether Soldiers' uniforms would be clearly marked and whether Soldiers would carry weapons. Army congressional liaison officers e-mailed details of Mr. McCarthy's decision pending Mr. Miller's formal approval and the upcoming DCNG deployment to congressional staffers at approximately 11:00 a.m.

Mr. Salesses sent Mr. Miller's draft approval memorandum to the Office of the Secretary of Defense and the Army Staff for coordination at 12:42 p.m., and an updated version was distributed for review at 2:11 p.m. At 2:28 p.m., BG LaNeve forwarded Mr. Miller's draft memorandum to LTG Piatt for Mr. McCarthy's review. LTG Flynn then e-mailed a copy to MG Walker at 2:41 p.m., and recommended that MG Walker review the memorandum with the SecArmy during their evening meeting. MG Walker was scheduled to brief Mr. McCarthy at 5:30 p.m. on his final plans to fulfill the D.C. RFA.

The DCNG organized the TF Guardian on January 4, 2021, to support the D.C. RFA. This task force consisted of 340 Army and Air National Guardsmen assigned to the DCNG. Their mission was

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<sup>52</sup> The QRF that staged at JBA consisted of D.C. Air National Guard personnel.

<sup>53</sup> See Appendix C for a copy of Mr. McCarthy's letter.

<sup>54</sup> 9th Street Northwest is approximately 2,500 feet west of 1st Street Northwest, the street that is immediately adjacent to the west side of the Capitol. The west steps of the Capitol are another 500 feet, approximately, east of 1st Street Northwest.



to support the MPD at the TCPs and Metro station platforms, and included a QRF staged at JBA. The task force was a subordinate command under the Joint Task Force District of Columbia, commanded by BG Ryan.

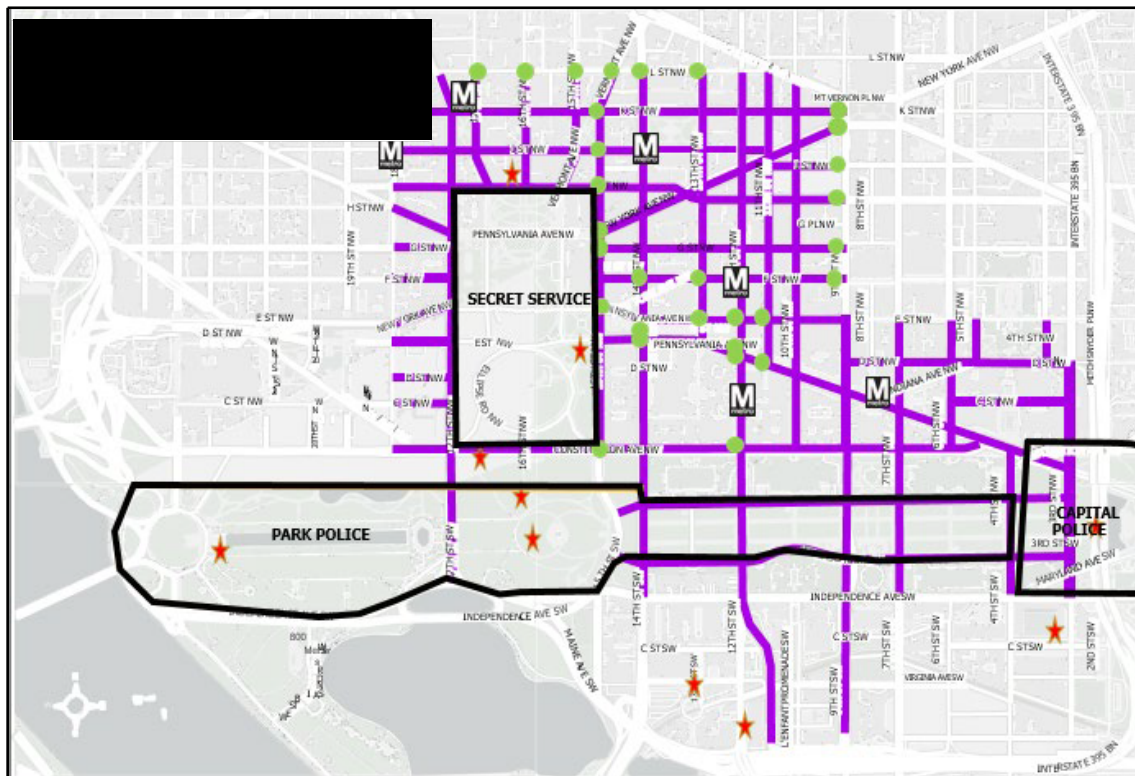
The TF Guardian Commander told us that no DCNG tabletop exercises were conducted in preparation for the D.C. RFA to support the election protest events scheduled for January 5 through 7, 2021, although several tabletop exercises were conducted both internally at the DoD and the DCNG and externally with the USSS related to the upcoming 2021 presidential inauguration.<sup>55</sup>

MG Walker e-mailed an updated slide presentation to BG LaNeve and other Army leaders at 4:41 p.m. The presentation referenced the approved D.C. RFA and showed supported TCPs and Metro stations. It also indicated areas of USCP, USPP, and USSS jurisdiction; and identified locations of proposed demonstrations. No DCNG personnel were positioned near the Capitol. The presentation also covered the RUF; transportation; and command, control, and communications.

[REDACTED]

<sup>56</sup> Figure 3 shows the updated TCPs, Metro stations, jurisdictions, and demonstrations.

Figure 3. Restricted Vehicular Traffic Map with TCPs, Metro Stations, Jurisdictions, and Demonstrations



Mr. Miller, GEN Milley, Mr. McCarthy, Mr. Rosen, MG Walker, and others attended a virtual Federal interagency meeting at 5:00 p.m. Mr. Miller again asked attendees from other Federal agencies whether they would need DoD support on January 6, 2021. None of the agencies’

<sup>55</sup> A tabletop exercise is an activity in which key personnel assigned high-level roles and responsibilities gather to deliberate various simulated emergency or rapid response situations.

<sup>56</sup> See Appendix D for a copy of the presentation.

representatives indicated they needed DoD support. GEN Milley described this meeting as an update and said that attendees reviewed the DCNG concept of the operation. GEN Milley told us that during the meeting, MG Walker said he was not inclined to need any additional support because he had what he needed. After the meeting, an Army Staff member called a staff member of Mr. Rosen's and advised her that during the virtual interagency meeting, Mr. Rosen gave "his oral concurrence today to the request from Secretary McCarthy for approval of the plan to provide the District of Columbia Government with specified support from the D.C. National Guard this week."

MG Walker briefed Mr. McCarthy at 5:30 p.m. MG Walker told us that he did not get a copy of Mr. Miller's memorandum approving the D.C. RFA and containing Mr. Miller's specific employment guidance. MG Walker stated that Mr. McCarthy would not normally share correspondence from Mr. Miller with MG Walker. Mr. McCarthy said that he did not recall MG Walker questioning, either during the briefing or at any other time, the guidance MG Walker received about carrying out the mission, including guidance for employing the QRF. He said that MG Walker wanted to make sure Soldiers had access to helmets and body armor if they needed it to protect themselves, and that he (Mr. McCarthy) authorized DCNG personnel to have that equipment in their vehicles.

Other witnesses told us that Mr. McCarthy and MG Walker both reviewed Mr. Miller's DCNG employment guidance and the fact that Mr. McCarthy would hold at his level the authority to employ the QRF. Mr. McCarthy first would require a plan from the DCNG before he would authorize QRF deployment.<sup>57</sup> During a joint hearing of the Senate Homeland Security and Governmental Affairs Committee and the Senate Rules and Administration Committee, on March 3, 2021, MG Walker stated that Mr. McCarthy's decision to hold the authority to use the QRF at his level and to only authorize if Mr. McCarthy had a CONOPS was unusual to him. MG Walker testified that he did not have the restrictions in the employment guidance in the past. The other witnesses said that MG Walker acknowledged the guidance when Mr. McCarthy provided it and did not express concerns.

During his interview, we presented MG Walker with a copy of Mr. Miller's memorandum and asked him to review it. MG Walker told us that this was the first time he saw the memorandum or was informed of its contents. After reviewing the memorandum, MG Walker emphasized to us that although Mr. Miller, in his approval memorandum, authorized Mr. McCarthy to employ the QRF as a last resort, Mr. McCarthy withheld this authority at his level, which gave MG Walker a "bit of indigestion." MG Walker told us that "for whatever reason," Mr. McCarthy would only authorize the QRF to deploy "as a last resort" and would "require a concept of operation prior to authorizing."

A witness from the Army Staff told us:

The discussion of QRF implementation beforehand was very clear and General Walker understood it and he knew exactly what needed to happen if the QRF needed to be employed and he had no questions or concerns at that time. He was using June [2020] as a baseline too, and honestly in my opinion is the fact that the Secretary had to approve the QRF [would] absolve General Walker of any liabilities issues if he did employ the QRF.

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<sup>57</sup> The scope of the RFA meant that that QRF could assist DCNG personnel with traffic and crowd control at TCPs and Metro stations. Only Mr. McCarthy or Mr. Miller could approve using the QRF for another purpose.

The DCHSEMA Director told us that MG Walker notified him by telephone that the DCNG would support the D.C. RFA. The TF Guardian Commander told us that there was planning to prepare for the D.C. RFA but that he did not know until January 4, 2021, that it was approved.

Mr. Miller said that he spoke with Mr. Rosen between 5:45 p.m. and 6:00 p.m. Mr. Miller described this call as his attempt to determine whether Mr. Rosen needed anything from the DoD and to remind Mr. Rosen of his role to be the lead Federal agency. Mr. Miller said the meeting was a continuation of the process to ensure all of the involved agencies understood who was in charge.

The TCP Officer in Charge (OIC) told us that she learned at 5:53 p.m. that she would be the OIC of the DCNG personnel assigned to the TCP mission beginning the following day, January 5, 2021. The TCP OIC said that she received only general details about the mission and that the TCP personnel reported to the D.C. Armory on the morning of January 4, 2021.

MG Walker stated that the QRF consisted of personnel from the DCANG's 113th Security Forces Squadron, many of whom were law enforcement officers in their civilian employment.<sup>58</sup> The QRF OIC confirmed that the QRF came from the 113th Wing and said that the QRF had 16 Security Forces Squadron personnel, and had 8 administrative, 2 medical, 5 aircrew consisting of 2 pilots and 3 flight attendants, and 10 maintenance personnel. The 16 Security Forces personnel had previous experience with civil unrest; however, the other 24 QRF members, including the QRF OIC, came from a mix of military specialties in the 113th Wing and had no experience in civil unrest operations. The QRF OIC said that he learned of the mission on the evening of January 4, 2021, and that he would be the OIC for the QRF the next day, January 5, 2021. He reported to the TF Guardian Commander, with directions to be prepared to respond anywhere in D.C. when ordered.

At 6:54 p.m., Mr. Miller's staff e-mailed his signed memorandum to a member of Mr. McCarthy's staff. Mr. Miller's memorandum, "Employment Guidance for the District of Columbia National Guard," authorized Mr. McCarthy to approve the D.C. RFA after Mr. McCarthy consulted with the AG, as Executive Order 11485 requires.<sup>59</sup> The memorandum also stated that the DCNG would remain under MG Walker's command and control. The memorandum authorized Mr. McCarthy to deploy the DCNG's QRF only as a last resort and in response to a request from an appropriate civil authority, and directed Mr. McCarthy to notify Mr. Miller immediately if he authorized the QRF's deployment.<sup>60</sup> Mr. Miller's employment guidance included eight restrictions, which only he (Mr. Miller) could rescind. The DCNG could not:

- be issued weapons, ammunition, bayonets, batons, or ballistic protection equipment such as helmets and body armor;
- interact physically with protestors, except when necessary in self-defense or defense of others, consistent with the DCNG RUF;
- employ any riot control agents;
- share equipment with law enforcement agencies;

<sup>58</sup> The 113th Security Forces Squadron is a subordinate unit of the 113th Wing, DCANG, at JBA.

<sup>59</sup> Executive Order 11485, "Supervision and control of the National Guard of the District of Columbia," October 1, 1969.

<sup>60</sup> The memorandum authorized Mr. McCarthy to approve the D.C. government's December 31, 2020 D.C. RFA. This meant that Mr. McCarthy could only employ the QRF within the scope of that particular RFA, to help DCNG elements engaged in traffic and crowd control at TCPs and Metro stations.

- use ISR assets or conduct ISR incident, awareness, and assessment activities;
- employ helicopters or any other air assets;
- conduct searches, seizures, arrests, or other similar direct law enforcement activity; or
- seek support from any non-DCNG National Guard units.<sup>61</sup>

Mr. McCarthy told us that Mr. Miller based his employment guidance on lessons the DoD learned from the June 2020 civil disturbance events in Washington, D.C., as described earlier in this report, when response actions escalated quickly based on what Mr. McCarthy termed “fragmentary orders.”

An e-mail from a DoJ attorney to an Army official showed the Army official called between 6:34 p.m. and 6:49 p.m. and informed the DoJ attorney that earlier on January 4, 2021, Mr. Rosen gave his oral concurrence with the DCNG’s plan to fulfill the D.C. RFA. The DoJ attorney wrote that the DoJ requested a written request from Mr. McCarthy for memorialization of the Acting AG’s oral approval.

A second Army official e-mailed the DoJ attorney a letter from Mr. McCarthy addressed to Mr. Rosen at 7:45 p.m. The letter conveyed the D.C. RFA and mission details and stated that Mr. McCarthy approved the DCNG to support the MPD with 340 personnel. It went on to say that after Mr. Rosen’s concurrence, Mr. McCarthy would provide his decision and Mr. Rosen’s concurrence to Mr. Miller. The DoJ attorney acknowledged receipt of the letter at 7:46 p.m.<sup>62</sup>

### *Events of January 5, 2021*

A Joint Force Headquarters – National Capitol Region, U.S. Army Military District of Washington Force Protection Advisory assessed the threats of crime and domestic terrorism as “Moderate.” [REDACTED]

BG Ryan and the DCNG [REDACTED] told us that they did not receive the approval for the mission to fulfill the D.C. RFA until January 5, 2021. The DCNG [REDACTED] added that sometimes they do not receive mission approvals until the day of a mission. He said that the DCNG would routinely anticipate that requests for support would be approved and plan accordingly before the formal approval would be sent to them.

Mr. McCarthy and other witnesses told us that Mr. McCarthy signed a letter to codify what he and MG Walker discussed during MG Walker’s 5:30 p.m. briefing on January 4, 2020. Mr. McCarthy’s staff and attorneys from the Army Offices of The Judge Advocate General and General Counsel worked on Mr. McCarthy’s letter on the night of January 4, 2021, and Mr. McCarthy

<sup>61</sup> See Appendix C for a copy of Mr. Miller’s memorandum.

<sup>62</sup> See Appendix C for a copy of Mr. McCarthy’s letter.

signed it on January 5, 2021. The letter, addressed to MG Walker, restated Mr. Miller's employment guidance but removed previous language that prohibited DCNG personnel from donning helmets and body armor without first getting permission. Instead, Mr. McCarthy ordered DCNG personnel to store helmets and body armor in vehicles or buildings in close proximity to the TCP and Metro positions that were staffed. He directed DCNG leadership to notify him if a threat required immediate donning of the equipment for self-defense. Mr. McCarthy also wrote:

I withhold authority to approve employment of the DCNG Quick Reaction Force (QRF) and will do so only as a last resort, in response to a request from an appropriate civil authority. I will require a concept of operation prior to authorizing employment of the QRF. If the QRF is employed, DCNG personnel will be clearly marked and/or distinguished from civilian law enforcement personnel. You will notify me immediately of any requests for QRF employment.

[Paragraph omitted]

Pursuant to my request, the Deputy Attorney General reviewed and concurred with your plan for support to the civil authorities of the District of Columbia.

All DCNG personnel associated with this support mission will serve under the provisions of Title 32, U.S.C., Section 502(f). They will serve solely in a support role to the named civil authorities and remain under the command and control of DCNG leadership at all times. DCNG will not be armed for this event however, MPD requests that DCNG members be equipped with safety vests and lighted traffic wands to assist with this mission. Further, MPD requests DCNG personnel supporting the mission be appointed as "Special Police" pursuant to D.C. Code § 5-129.03. They will not engage in domestic surveillance of U.S. persons.<sup>63</sup>

We asked Mr. McCarthy to explain the CONOPS he required before he would authorize employing the QRF. He said that it included a description of DCNG and MPD personnel in the employment area, the mission or task the QRF would perform, how the QRF would perform the mission, who the QRF would support, and how the QRF would communicate during the mission.

Mr. McCarthy summarized his thoughts about reviewing and approving the D.C. RFA in light of civil disturbance events in spring and summer 2020. He said:

We knew we were going to support it [D.C. RFA]. It was one of those things where not purely saying "no" but our initial—we're initially inclined to say, "Did you [D.C. government] exhaust all of your other resources? Have you looked at this? Have you looked at that? Is there a better way—because just the history of putting Soldiers into these operations as you go back to the '60s, Martin Luther King riots, and say, I mean that's why our posture in the DoD when [in June 2020] we had the 82nd Airborne Division 30 minutes of Washington D.C., that was history about to repeat itself from [the] King riots. It was the same unit. So, the mindset of the Department of Defense was whether it was any of these operations we wanted to be sure—could law enforcement do it without us? So, if you fast-forward to the 6th, this thing

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<sup>63</sup> See Appendix C for a copy of Mr. McCarthy's letter.

transpired in minutes, and hours, or it took days to build up the structure that we had and that still wasn't perfect last summer.

Mr. McCarthy said that he wanted to make sure the MPD and D.C. government officials rigorously analyzed the mission and asked the hard questions.

Mr. McCarthy and other witnesses emphasized that there was a direct relationship between the lessons learned from the involvement of DoD personnel during the June 2020 civil disturbances and the specific language in the written employment guidance designed to achieve the clarity of purpose he gave to MG Walker. Mr. McCarthy also emphasized to us that he was conscious of having Soldiers on D.C. streets, and particularly near the Capitol as Congress certified the presidential election results, because this could create a false impression that the military was playing a role in the election process. One witness told us that June 2020 taught Mr. McCarthy the importance of a deliberate decision-making process—that he could not simply approve RFAs and let the DCNG figure out the details.

The DCNG [REDACTED] told us that in his 15 years of experience with the DCNG, he had never seen a document that showed the guidance that was as descriptive, with so many constraints and restrictions, as the employment guidance for the January 5 and 6, 2021 mission.

The TCP OIC told us that she reported to the Armory at 4:00 a.m. The TCP Deputy OIC said that at 11:00 p.m. on January 4, 2021, he was ordered to report to the Armory at 5:00 a.m. on January 5, 2021. The TCP Deputy OIC told us that there was a single shift on January 5, 2021, that worked from 8:00 a.m. to 8:00 p.m. The TCP Deputy OIC explained that he and the TCP OIC were:

splitting the detail down by [traffic control] point, not necessarily by shift, and we were actively rotating people through at all times, and then it's structured—it shifted over—oh, gosh. It shifted to shiftwork starting on the 6th when we realized it was going to be more of a permanent emplacement in those locations.

The TCP Deputy OIC continued that [REDACTED] DCNG personnel were at 30 TCPs for a total of [REDACTED] for the mission. The TCP OIC said that [REDACTED] DCNG personnel were at 30 TCPs, for a total of [REDACTED] personnel on each shift and [REDACTED] for the two-shift mission.

The TCP OIC and Deputy TCP OIC said that they received no information that there were credible threats to the DCNG mission or its personnel. The TCP OIC explained that they expected protests, but nothing involving violence. The TCP OIC said that the DCNG was there only as a presence; they were not to use tactical vehicles and needed to keep their riot control gear out of public view.

The TCP OIC told us that personnel assigned to the TCPs did not belong to a particular unit, but were transitioned from personnel on COVID orders and had no specific military specialty. She said that they received basic riot control training, medical screening, and public affairs and judge advocate general briefings; and the MPD deputized them. She added that there was no preexisting plan to designate one of the shifts for civil disturbance purposes.

According to the TCP OIC, the DCNG personnel were equipped with General Services Administration vehicles or rental vehicles and wore their regular uniforms with black vests that identified them as DCNG. She told us that for January 5, 2021, they stored their response force

equipment set in a “box truck,” which they parked at a designated rally point at the corner of 14th Street Northwest and Pennsylvania Avenue. This equipment set consisted of a helmet with face shield, a body shield, a baton, and shin guards. The TCP OIC added that they were told on the evening of January 5, 2021, to move that riot gear from the box truck to their vehicles, and to keep the riot gear concealed so that the public would not see it.

The TCP OIC said that she was directed to help the MPD with traffic control. She added that the TF Guardian Commander briefed them that they could not change their mission, that they were not to leave the assigned TCP position, even if the MPD left, and to relay any movement information up the chain of command. She said that if there was no MPD at the intersection, they were to stay in the vehicle. The TCP OIC also said:

And we were given very clear guidance that we are there only to assist MPD, and we are not to—we are not stopping anything unless an MPD asks, unless we felt that we needed to help the MPD because it was a life-threatening instance [at the TCPs], but otherwise it was the MPD Officer that's [sic] going to be doing any kind of thing that was involving any kind of threat. We were there for a presence.

The TCP OIC indicated that there was a similar mission at the Metro stations to ensure pedestrian traffic on the Metro platforms flowed freely or to help shut down the Metro stations in an emergency. The TCP Deputy OIC added that the TCP OIC and personnel at the Metro stations were DCANG personnel.

The DCNG 33rd CST Commander told us that he was staged at D.C. Fire Engine #2 Station with the D.C. Fire Chief and D.C. Fire Operations. He said that he had a small Joint Hazard Assessment Team on standby at the Armory with D.C. Fire Department personnel. He had another Joint Hazard Assessment Team located at the White House with three personnel stationed in two civilian vehicles and one person inside the White House's Emergency Operations Center as a liaison.

Before the TCP and Metro platform mission began, an AOC staff member e-mailed BG LaNeve at 7:28 a.m. to relay that the AOC was monitoring DHS and DCNG information and that the DHS had nothing significant to report in the NCR. The AOC also reported that local law enforcement was monitoring Facebook and open media sources for information on what to expect at the 81 planned gathering locations.

The QRF OIC told us that the QRF at JBA did not ready itself until the TCP and Metro platform mission was well under way. He stated that, at 10:00 a.m., the QRF received its equipment set consisting of helmets, face shields, shields, shin guards, kneepads, batons, and protective vests without armor plates. They then conducted civil disturbance training, the first such training that a majority of the personnel ever received, and were ready to deploy by 12:30 p.m.

BG Ryan and other witnesses told us that an MPD officer asked the TCP OIC and the TCP Deputy OIC to reposition a TCP from one location to another. BG Ryan told us that it was a long process because the request went through the chain of command all the way to Mr. McCarthy for approval. BG Ryan told us that there was great concern about restrictions placed on DCNG personnel assigned to TCPs. The TF Guardian Commander also told us that the DCNG could not move a TCP at the MPD's request over a distance of one block without Mr. McCarthy's approval.

Mr. Sund told us that he hosted a noon video call with civilian law enforcement leaders, the Military District of Washington CG, and MG Walker. MG Walker said that during the video call he told Mr. Sund that if the USCP needed the DCNG, Mr. Sund would need to submit a formal letter requesting assistance. MG Walker told us that he would have every available Guardsman in the Armory head to the Capitol, and would order the ones supporting the MPD at TCPs to head to the Capitol, if requested.

At 12:30 p.m., a policy adviser from U.S. Senator Chris Murphy's office e-mailed an Army Staff member a letter addressed to Mr. Rosen, Mr. Miller, and Mr. McCarthy regarding the deployment of the DCNG and compliance with section 1064 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021. The letter addressed the requirement for members of the Armed Forces and Federal law enforcement personnel to visibly display both their names and organizations on their uniforms.

A member of Mayor Bowser's staff e-mailed a letter to a member of the Army Staff at 2:27 p.m. The letter informed Mr. Rosen, Mr. Miller, and Mr. McCarthy that the D.C. government did not request personnel support from other Federal law enforcement agencies in preparation for the election demonstrations expected to take place on January 5 and January 6, 2021. Mayor Bowser noted that the DCNG would provide logistical support to the MPD, and discouraged any additional deployment without first consulting with the MPD. Mayor Bowser wrote that the MPD was prepared to lead the law enforcement, coordination, and response to allow for the peaceful demonstration of First Amendment rights in Washington, D.C.<sup>64</sup>

Mayor Bowser and the DCHSEMA Director both told us that the intent of Mayor Bowser's letter was to ensure coordination and notification between Federal agencies and the D.C. government if additional Federal forces were deployed to Washington, D.C., during the January 6, 2021 demonstrations. Mr. McCarthy told us that he read the letter and thought back to June 2020 when there was confusion as DCNG, MPD, and Federal law enforcement personnel were all on the streets with different missions, authorities, and jurisdictions.

At 7:30 p.m., a DHS official forwarded USPP intelligence notes to an official in the AOC. The 1:30 p.m. entry in the DHS NOC current operations chat log stated:

We [USPP] are probably looking at bigger crowds for tomorrow than for anything [we] saw in Nov or Dec. Interestingly, we are not seeing [Black Lives Matter] BLM/Antifa mobilize as they have done in the past. ... [There will] be some fights and some minor property damage. My main concern is the one off domestic radical who sees this date (6 Jan) [as] the "last stand" or last opportunity to stop Congress and right a wrong done by the election. That's who we have no intel on and that's what worries me the most. We can handle the POTUS [President's] event and large crowds. It's the rhetoric that I'm afraid might have already influenced some already unstable individuals into action.

Two other log entries from the DHS NOC current operations chat log stated:

Open sources are reporting thousands are expected to attend the rally on the Ellipse ... as pro-Trump supporters descend on the nation's capital for a series of marches to protest the results of the 2020 election.

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<sup>64</sup> See Appendix C for a copy of Mayor Bowser's letter.



Approximately 300 ARNG [Army National Guard] will muster today (05 JAN) to assist local law enforcement with traffic control points, crowd management at metro stations and CST operations. Crowds estimated at 15-20K with approximately 81 separate events planned.

Mr. Miller told us that the President called him during the evening of January 5, 2021, and asked if Mr. Miller was watching the protests in Freedom Plaza.<sup>65</sup> Mr. Miller told us that at that point, he was not concerned that there was going to be a mobilization of violence. Mr. Miller told us that he and the President discussed the upcoming rallies, and the President's guidance was to do what was required to protect the American people.

The FBI's Norfolk Division released a "Situational Information Report [SIR]," dated January 5, 2021, [REDACTED].

We asked 16 witnesses about this report, including Mr. Miller, Mr. McCarthy, GEN Milley, and Mr. Sund. All 16 witnesses told us that they knew nothing of this FBI report on January 5-6, 2021, and did not learn of it until after January 6, 2021, when the media reported on it.

Coordination with the FBI identified two DoD representatives assigned to the Norfolk Joint Terrorism Task Force who were on the distribution list for the FBI SIR. The first DoD representative retired in December 2020 and did not have access to the FBI's e-mail system on January 5, 2021. The second DoD representative told us that he was out of his office and traveling on Government business when he received the e-mailed FBI SIR. He could not confirm whether he forwarded the FBI SIR because, at the time of his interview, he did not have access to his archived e-mails. He told us:

I don't know if I forwarded that particular SIR. Like I said I was TDY down in Florida working on another case and I'm sure that I looked at my e-mail, looked at the SIR, saw that it said Washington D.C. and I don't know if I forwarded it out. [REDACTED]

He also told us that Washington, D.C., was not within his area of responsibility and that he had no specific recollection on whether or not he forwarded the SIR or notified anyone of the FBI SIR because it did not pertain to his area of responsibility.

The TCP OIC told us that during the evening hours, the TCP personnel moved their equipment set to their General Services Administration and rental vehicles to keep the riot gear concealed so that the public would not see. The TF Guardian Commander told us that this was done so personnel did not have to fall back to a different location to get the protective gear, if needed. The QRF OIC told us that the QRF was released at 11:30 p.m., and he planned for the QRF to report to JBA at 10:30 or 11:00 a.m. the next day, January 6, 2021.

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<sup>65</sup> Freedom Plaza is an open plaza situated near 14th Street and Pennsylvania Avenue near the White House in Washington, D.C. Freedom Plaza is a place known for political protest and civic events.

*DoD OIG Conclusions on DoD Actions Before January 6, 2021*

We concluded that the actions the DoD took before January 6, 2021, to prepare for the planned protests in Washington, D.C., on January 5 through 6, 2021, were appropriate, supported by requirements, consistent with the DoD's roles and responsibilities for DSCA, and complied with laws, regulations, and other applicable guidance.

We reached our conclusion based on the following.

- D.C. officials submitted a written RFA on December 31, 2020, to the DoD.
- DoD officials evaluated the D.C. RFA for legality, lethality, risk, cost, appropriateness, and readiness, as DoD policy required.
- Executive Order 11485 authorized the SecDef to order the DCNG to aid the civil authorities of D.C.
- The D.C. RFA included direct support to law enforcement, which DoD policy allows with SecDef approval.
- In the chain of command, MG Walker reported to Mr. McCarthy and Mr. McCarthy reported to Mr. Miller.
- Mr. McCarthy acted within his authority when he made conditional recommendations to Mr. Miller to authorize support to the D.C. RFA.
- Mr. Miller acted within his authority when he authorized Mr. McCarthy to approve the D.C. RFA with written guidance on what the DCNG was not authorized to do without Mr. Miller's specific personal authorization.
- Mr. McCarthy acted within his authority when he required MG Walker to develop a CONOPS before authorizing MG Walker to employ the QRF at the Capitol.
- Mr. Rosen concurred with the DoD's plan to fulfill the D.C. RFA.
- Mr. Miller and Mr. McCarthy's instructions for fulfilling the D.C. RFA were reasonable, based on:
  - DoD's experience responding to civil unrest in D.C. in June 2020;
  - a desire to avoid fulfilling the D.C. RFA in a way that would create the impression that the military would influence or play a role in Congress's January 6, 2021 Electoral College vote certification; and
  - a desire to fulfill the D.C. RFA for limited TCP and Metro station support exactly as requested and avoid performing restricted law enforcement activities such as searches, seizures, arrests, and surveillance of individuals.

- DoD officials determined that the agencies responsible for maintaining law and order in D.C. did not need DoD support.
- DoD officials received information from civilian law enforcement channels that did not warrant advising the President to consider invoking the authorities in the Insurrection Act or National Emergencies Act.

We also examined the actions the DoD took before January 6, 2021, that were independent of the D.C. RFA. We looked for a standard that required or would have allowed the DoD to act preemptively without presidential direction to prevent or deter what later happened at the Capitol. We found none. On the contrary, we found restrictions on the DoD's roles and responsibilities in planning and providing support for domestic civil disturbance operations, including the following.

- U.S. law and DoD policy severely restrict the DoD's conduct of domestic law enforcement activities.
- DoD policy states that civilian law enforcement, not the DoD, has the primary responsibility to maintain law and order in D.C.; agencies of the Federal government other than the DoD have supplementary responsibility; and more specifically, the USCP has the responsibility to maintain law and order on the U.S. Capitol Campus.
- In general, the DoD does not initiate DSCA except in response to an RFA from a civil authority, and U.S. laws, regulations, and policies do not authorize the DoD to act in the absence of a valid request for DSCA.

We found no standard that would have allowed the DoD to act preemptively or unilaterally before January 6, 2021, in response to projected civil disturbances in D.C. We determined that the DoD's roles, planning, and actions taken were authorized and appropriate in response to the single and limited RFA the DoD received on December 31, 2020, to support civil authorities on January 5 and 6, 2021.

## **V. DOD'S ACTIONS ON AND AFTER JANUARY 6, 2021**

In this section, we present information about the events that occurred on January 6, 2021, at the Capitol, and how DoD personnel responded to these events. We focus on the USCP RFA and how the DoD received, approved, and fulfilled it. We interviewed witnesses about their recollections of the exact times that specific events occurred on January 6, 2021, and many of the witnesses' recollections varied. We also examined the DCNG's continued role in securing the Capitol after January 6, 2021, and testimony DoD and other officials gave in congressional hearings after January 6, 2021, about how the DoD responded to the events at the Capitol on January 6, 2021, and the timeliness of that response. At the end of this section, we present our conclusions about the DoD's actions on January 6, 2021, based on a preponderance of the evidence we reviewed.

Table 2 lists significant events concerning the Capitol on January 6, 2021.

Table 2. Chronology of Significant Events on January 6, 2021

Time	Event
<b>Morning Events</b>	
5:00 a.m.	The AOC reports on the previous night's events, including six arrests and pro-President protestor clashes with the MPD.
7:00 a.m.	DCNG personnel begin their mission at TCPs and Metro stations.
10:00 a.m.	The AOC reports that 323 DCNG personnel were "prepared to support Civil Disturbance Operations."
11:29 a.m.	Mr. McCarthy and Army senior leaders receive a DCNG personnel status brief as of 10:00 a.m.
<b>Noon - 12:59 p.m.</b>	
Noon	The AOC reports "█ DCNG personnel at 30 TCPs, █ at six Metro stations, and 42 on QRF standby."
Noon	The President begins speaking at The Ellipse.
12:46 p.m.	Mr. McCarthy receives the noon DCNG personnel status update.
12:53 p.m.	The Capitol grounds' outer perimeters are breached, according to Mr. Sund.
12:58 p.m.	Mr. Sund requests assistance from Chief Contee and receives officers from the MPD, surrounding counties, and the Virginia State Police.
<b>1:00 - 1:59 p.m.</b>	
1:11 p.m.	The President concludes his speech at The Ellipse.
1:34 p.m.	Mayor Bowser calls Mr. McCarthy about USCP assistance.
1:40 p.m.	The AOC reports to Army senior leaders that an estimated crowd of 15,000 – 20,000 people are "moving in the direction of the National Capitol."
1:49 p.m.	Mr. Sund calls MG Walker and requests DCNG assistance.
<b>2:00 - 2:59 p.m.</b>	
2:10 p.m.	Mr. Sund calls MG Walker and informs him of the Capitol Police Board's authorization to request DCNG assistance.
2:13 p.m.	The AOC reports to Army senior leaders that crowds continue to gather at the Capitol, which is "reportedly locked down due to multiple attempts to cross police barriers and police injuries."
2:15 p.m.	Mr. Sund reports the first unlawful breach of the Capitol.
2:17 p.m.	The TF Guardian Commander tells the QRF OIC to get the QRF "geared up and on the bus for when Mr. McCarthy approves a change in mission."
2:19 p.m.	The DCHSEMA Director initiates a conference call with MG Walker to help Mr. Sund to request DCNG assistance at the Capitol.
2:22 p.m.	Mr. McCarthy begins a conference call in his office with key D.C. government leaders and members of his staff "to determine the situation and their requirements." Mr. Sund orally requests DCNG support for the USCP and Mr. McCarthy subsequently departs his office during the call to brief Mr. Miller.
2:45 p.m.	The conference call in Mr. McCarthy's office with his staff and D.C. leaders ends on receipt of a report of gunfire inside the Capitol.
2:55 p.m.	The QRF departs JBA with a police escort to the D.C. Armory, according to the QRF OIC.
2:55 p.m.	The TF Guardian Commander arrives at the USCP Command Post in the Capitol.
<b>3:00 - 3:59 p.m.</b>	
3:04 p.m.	Mr. Miller authorizes Mr. McCarthy to mobilize all 1,100 personnel in the DCNG.
3:15 p.m.	The QRF arrives at the DCNG Armory, according to the QRF OIC.
3:26 p.m.	Mr. Sund calls MG Walker to coordinate a formal written USCP request for DCNG assistance.
3:48 p.m.	Mr. McCarthy departs the Pentagon for MPD HQ.

Time	Event
3:55 p.m.	GEN Hokanson initiates communications with the state governors.
<b>4:00 - 4:59 p.m.</b>	
4:05 p.m.	Mr. McCarthy arrives at MPD HQ and meets with Mayor Bowser and Chief Contee. Mr. McCarthy receives a situational brief and develops a plan for the DCNG to help the USCP at the Capitol.
4:07 p.m.	Mr. Sund e-mails a written request to MG Walker for immediate DCNG support.
4:08 p.m.	The AOC reports a 41-person QRF is on the way from JBA to the Armory, "with 184 more on standby as of" 3:23 p.m.
4:13 p.m.	According to the DoD Executive Secretary, Mr. Miller approves a USCP request for Pentagon Force Protection Agency support.
4:25 p.m.	According to witnesses, BG LaNeve notifies MG Walker to have the DCNG ready to respond.
4:30 p.m.	Mr. Miller concurs with Mr. McCarthy's plan for DCNG personnel to meet with the MPD and conduct Capitol perimeter security and clearance operations as part of a joint USCP, FBI, MPD, and DCNG operation.
4:35 p.m.	Mr. McCarthy calls MG Walker and informs him that Mr. Miller approved the DCNG re-mission request to support the USCP.
4:40 p.m.	Mr. McCarthy accepts the Maryland Governor's offer of Maryland NG assets.
<b>5:00 - 5:59 p.m.</b>	
5:00 p.m.	Mr. McCarthy reissues the deployment order that he gave MG Walker at 4:35 p.m.
5:08 p.m.	MG Walker orders the DCNG QRF, now enhanced with additional personnel, to move to the Capitol.
5:15 p.m.	DCNG personnel depart the Armory en route to USCP HQ.
5:15 p.m.	Mr. McCarthy briefs Mr. Miller, and they discuss planning considerations including troop levels, and mission duration.
5:20 p.m.	DCNG personnel arrive at the Capitol, according to MG Walker.
5:29 p.m.	DCNG personnel arrive at USCP HQ, according to the TF Guardian Commander and QRF OIC.
5:30 p.m.	MG Walker arrives at the Capitol.
5:40 p.m.	The USCP swears in DCNG personnel as "Special Police" at USCP HQ.
5:55 p.m.	DCNG personnel arrive on the grounds of the Capitol, according to the QRF OIC.
<b>6:00 - 6:59 p.m.</b>	
6:00 p.m.	DCNG personnel join the line of law enforcement personnel facing the crowd on the west side of the Capitol.
6:00 p.m.	Mr. McCarthy briefs Mr. Miller, GEN Milley, the White House Counsel, the National Security Advisor, and officials from the DHS, DoI, DoJ, and FBI by telephone that 150 DCNG personnel are at the Capitol and another 150 are on the way.
6:09 p.m.	BG Matt Smith, Deputy Operations Director, G-3/5/7, HQDA, receives a report from the AOC that 1,000 police officers are on Capitol grounds and that the building is clear of rioters as of 6:04 p.m.
6:14 p.m.	The USCP and MPD, with the help of the DCNG, establish a perimeter on the west side of the Capitol.
6:29 p.m.	Mr. McCarthy speaks by telephone with the FBI Deputy Director to maintain situational awareness and discuss resources needed to secure the Capitol.
6:50 p.m.	Mr. McCarthy telephonically thanks Virginia's governor for his offer to send Virginia Army NG forces.
<b>7:00 - 7:59 p.m.</b>	
7:03 p.m.	A DCNG official e-mails Mr. McCarthy, MG Walker, LTG Piatt, and BG LaNeve to report that the Capitol's interior and east front were "clear of demonstrators" as of 6:45 p.m.

Time	Event
<b>7:15 p.m.</b>	Mr. Miller, Mr. McCarthy, GEN Milley, Mr. Rosen, Mayor Bowser, and Chief Contee conduct a conference call with the Vice President, the Speaker of the House of Representatives, the Senate Majority Leader, and the Senate Minority Leader to discuss the current situation at the Capitol.
<b>7:52 p.m.</b>	MG Walker meets with Mr. McCarthy at MPD HQ to begin planning to integrate out-of-state NG personnel arriving in D.C.
<b>8:00 - 8:59 p.m.</b>	
<b>8:51 p.m.</b>	Mr. Miller directs GEN Hokanson to identify state NG units "in the vicinity of the District of Columbia" that can "conduct civil disturbance/support law enforcement operations." For such units, Mr. Miller authorizes "additional training" under 32 U.S.C. § 502(f), which authorizes commanders to order NG members to perform training or other duties to carry out operations or missions the President or SecDef requests.
<b>9:00 - 11:59 p.m.</b>	
<b>9:00 p.m.</b>	Mr. Miller, Mr. McCarthy, GEN Milley, and GEN Hokanson conduct a conference call to plan for the arrival of up to 6,200 out-of-state NG personnel.
<b>9:45 p.m.</b>	Mr. McCarthy departs MPD HQ for the Armory.
<b>9:56 p.m.</b>	BG Smith e-mails senior DoD and Army leaders that as of 6:00 p.m., approximately one company of DCNG personnel arrived at the Capitol and integrated with Federal law enforcement.
<b>9:58 p.m.</b>	Mr. McCarthy meets with MG Walker and senior DCNG leaders at the Armory to discuss putting DCNG personnel on 30-day mobilization orders and to develop plans to integrate large numbers of NG personnel reporting to D.C. from different states.
<b>10:15 p.m.</b>	Mr. McCarthy departs the Armory and arrives at the Capitol grounds.
<b>10:20 p.m.</b>	MG Walker receives three calls between 10:20 p.m. and 10:32 p.m. from Mr. Sund, who is following up on his written RFA.
<b>11:00 p.m.</b>	Mr. McCarthy departs the Capitol and returns to MPD HQ.
<b>11:27 p.m.</b>	Maj Gen Nordhaus notifies the NG Joint Force Headquarters in Virginia, Maryland, Pennsylvania, New York, New Jersey, and Delaware that they are "now approved to begin movement into the DC area."

### *Events Before Noon*

Mr. Miller spent the morning of January 6, 2021, focused on another significant national security matter. He had a television on in the background in his office to be aware of the events in downtown D.C. According to the OASD(HD&GS) DSCA [REDACTED], the primary focus of the OASD(HD&GS) staff was a major transition exercise scheduled for January 7, 2021, involving the incoming Deputy Secretary of Defense.

BG LaNeve received an e-mail from the AOC at 5:00 a.m. reporting, in part, that:

- 243 DCNG personnel were "released from blocking and Metro positions" at 11:30 p.m. the previous night;
- the DCNG was "deploying to [traffic] blocking and Metro position" not later than 8:00 a.m.;

- there were “six arrests overnight,” including two gun charges and various civil disturbance charges; and
- pro-President protesters clashed with the MPD at approximately 1:37 a.m.

The DCNG TCP detail held its first formation of the day at 5:00 a.m. with the first shift of ■ personnel present for duty. This shift, led by the TCP OIC, was scheduled to be relieved between 2:30 p.m. and 4:00 p.m. by a second ■-person shift led by the TCP Deputy OIC. The TCP OIC and the TCP senior enlisted advisor spent the morning moving between TCPs. Similar to the TCP OIC, the TF Guardian Commander remained in his command vehicle with his senior enlisted advisor and two Soldiers east of the White House. They moved between the various DCNG positions throughout the day.

The TCP Deputy OIC told us that he reported to the Armory at approximately 5:00 a.m. He said that on this day, the detail planned to change from a single shift to two shifts with the night shift reporting to the Armory at 3:30 p.m. for a shift change scheduled for 5:00 p.m.

DCNG witnesses told us that DCNG operations were normal the morning of January 6, 2021. At 7:00 a.m., DCNG personnel began their mission at the TCPs and Metro stations. MG Walker stated that the Guardsmen had riot gear in their vehicles at the TCPs. The TF Guardian Commander said that the DCNG “had time in the morning to put the [riot] gear in every vehicle. So every vehicle had helmets, shin guards, protective shields, [and] vests, everything in the vehicle.” A DCNG official e-mailed MG Walker a status update as of 10:00 a.m., stating that ■ DCNG personnel were on station at 30 TCPs, ■ were at 6 Metro stations, and the 40-Guardsmen QRF was on standby at JBA.

Mr. McCarthy told us that, as the DCNG’s DSCA mission began that morning, MG Walker was in command and BG LaNeve monitored the situation from the Pentagon. BG LaNeve told us that the DCNG deployed to support the MPD at TCPs and Metro stations as planned. LTG Piatt said that the Army G-3/5/7 operations staff performed a “conditions check” to make sure everything with the DCNG was in place as planned.

The AOC e-mailed BG LaNeve the “DHS NOC Update as of 1000.” The update reported, in part, that:

- 323 DCNG personnel were “prepared to support Civil Disturbance Operations” with mission dates of January 5 through 24, 2021;
- no incidents of criminal or illegal activity directed at Federal facilities or personnel occurred in the preceding 24 hours;
- a USPP official stated, “We can handle the President’s event and large crowds”;
- the USSS estimated the crowd in and around The Ellipse at 10:00 a.m. at more than 20,000, with no reported incidents; and
- the Arlington County Police Department agreed to help the MPD January 5-6, 2021.

The QRF OIC reported to JBA at approximately 10:30 a.m. He told us that eight Airmen who were assigned to the QRF the day before had been reassigned. Eight new Airmen reported for QRF duty just before noon.

At 11:29 a.m., Mr. McCarthy's Executive Officer forwarded the "DHS NOC Update [#1] as of 1100" to Mr. McCarthy and Army senior leaders. Update #1 repeated the information reported in the 10:00 a.m. report and added that the MPD estimated the crowd size "in and around the city" at 15,000.

#### *Events From Noon Through 12:59 p.m.*

A DCNG official e-mailed MG Walker a status update of "NSTR" (nothing significant to report) as of noon. ██████ DCNG personnel were on station at 30 TCPs, ██████ were at 6 Metro stations, and the QRF, now listed at 42 personnel, was on standby. The TF Guardian Commander clarified that the QRF was still at JBA.

The President started his speech at The Ellipse at noon.

The QRF OIC stated that the QRF, which now included several untrained personnel, conducted training between 12:30 p.m. and 1:00 p.m. He told us, "[W]e issued them equipment immediately and started their civil disturbance training immediately. I got everybody out there and we just kind of rehashed to get everyone a little bit more time with the training and more comfortable with their gear." The QRF OIC explained:

The training—our Security Forces personnel basically took us outside in the parking lot. We geared up with our civil disturbance gear. We lined up a—I would say the training was excellent for what they provided to us and we felt comfortable going out into the field with what we learned you know, lined up simulated response to aggravated crowd throwing objects, pushing against, holding the line, and just preventing people getting through.

He also said that during this time, he heard from the 113th Wing leaders and others that the situation at The Ellipse and the Capitol was escalating. The 113th Wing leadership directed that he notify them when QRF training was finished.

MG Walker e-mailed Mr. McCarthy an update at 12:46 p.m. with information that was current as of noon. His report stated:

- the President is making remarks at The Ellipse and the overall situation is intensifying;
- there is no change in the DCNG force posture;
- current demonstrations are peaceful;
- there are 20,000 peaceful demonstrators at The Ellipse, 80,000 peaceful demonstrators at Lincoln Memorial/Mall, and 200 periodic demonstrators and counter-demonstration confrontations at Capitol Hill;
- there are no additional requests for DCNG personnel;



- DCNG personnel are not targets; and
- there are no recommendations for Army Senior Leader actions.

Mr. Sund told us that demonstrators approached a fence line established around the Capitol grounds at 12:53 p.m. According to Mr. Sund, the demonstrators immediately started fighting with USCP officers, “tearing apart the barricades and hundreds started breaching our perimeter.” Mr. Sund told us that he then contacted the Capitol Police Board at 12:58 p.m. to declare an emergency so he could make a request for DCNG assistance.

*Events From 1:00 p.m. Through 1:59 p.m.*

The second shift, also known as the relief shift, of DCNG troops assigned to TCPs and Metro stations began reporting to the Armory at 1:00 p.m. Between 1:00 p.m. and 1:30 p.m., LTG Piatt received reports of many people moving towards the Capitol with some walking past or moving USCP barriers. The TF Guardian Commander saw the crowds leaving The Ellipse and walking toward the Capitol.

The President concluded his speech at The Ellipse at 1:11 p.m.

Mr. McCarthy told us that Mayor Bowser called him at 1:34 p.m. and asked whether the USCP had asked for the DoD’s assistance. Mr. McCarthy told us that it was clear to him the DoD needed to help either the MPD or the USCP. Mr. McCarthy said that he needed to know the CONOPS and the task and purpose for any request other than for MPD TCPs and Metro stations. In response to Mayor Bowser informing Mr. McCarthy that the USCP needed DCNG assistance, he told a staff member to immediately contact Mr. Miller, who was in his office. One of Mr. Miller’s staff members told Mr. McCarthy that Mr. Miller was in meetings until 4:00 p.m., which indicated to Mr. McCarthy that Mr. Miller was not yet aware of the situation at the Capitol. Mr. McCarthy then told his staff that they needed to assemble senior leaders to determine how to provide support to the Capitol.

The DHS NOC Update #2 reported that as of 1:30 p.m.:

- “no major incidents of illegal activity” occurred in the previous two hours;
- an estimated crowd of 15,000 – 20,000 people were “moving in the direction of the National Capitol” from The Ellipse and other points in the city; and
- the Capitol police confirm a few people attempted to cross police barriers and were arrested; the situation continues to develop.

Mr. Sund called MG Walker at 1:49 p.m. to ask about DCNG assistance at the Capitol. During the call, Mr. Sund told MG Walker the Capitol Police Board was preparing the emergency authorization to request DCNG assistance. MG Walker said that Mr. Sund asked him to send National Guardsmen to the Capitol during the call. MG Walker stated that he then called LTG Piatt and told him, “Hey, look. The Capitol is being breached. You can see it on TV. We need to get out there and help them.” MG Walker said that he wanted Mr. McCarthy’s immediate approval by voice confirmation but, according to MG Walker, LTG Piatt told him, “We’ve got to go find the Secretary of the Army.”

During a joint hearing of the Senate Homeland Security and Governmental Affairs Committee and the Senate Rules and Administration Committee, a U.S. Senator asked MG Walker, “If the restrictions on your authorities hadn’t been put in place by DoD, what would you have done when Chief Sund called you at 1:49 [p.m.] on January 6th with an urgent request for National Guard assistance?” MG Walker answered:

I would have immediately pulled all the Guardsmen that were supporting the Metropolitan Police Department. They had the gear in their vehicles. I would have had them assemble in the Armory and then get on the buses and go straight to the [Capitol] and report to the ... most ranking Capitol Police officer they saw and take direction.

[Paragraph omitted]

So that was the plan. I would have sent them there immediately. As soon as I hung up, my next call would have been to my subordinate commanders [to] get every single Guardsman in this building, and everybody that’s helping the Metropolitan Police—re-mission them to the Capitol without delay.

Another U.S. Senator asked, “General Walker, to review the timeline[,] at 1:49 [p.m.] Chief Sund contacted you, at 2:15 [p.m.] the Capitol was breached. I think in your testimony you said you had the available 340 D.C. National Guard troops, is that correct?” MG Walker responded, “Well, sir, it was actually half of that so—so half were on the streets helping the Metropolitan Police Department, the other half would have come [*sic*] in to relieve them, but we would have called them in to come in.” The U.S. Senator then asked, “Okay, so you had 40 in the quick—quick reaction force, correct?” MG Walker responded, “Yes, sir.” The U.S. Senator then asked MG Walker, “[H]ad this [USCP RFA] all been preapproved by the Secretary of Defense ... how quickly could you have gotten how many people to the Capitol?” MG Walker responded that he could have had 150 Guardsmen at the Capitol in 20 minutes.

Mr. Salesses and other witnesses stated that regardless of Mr. Miller’s and Mr. McCarthy’s employment guidance, MG Walker did not have the authority to direct the DCNG to respond to a civil disturbance at the Capitol in support of the USCP. Mr. Salesses explained that only the SecDef had that authority.

Mr. Miller told us that he noticed on the television in his office that some protestors had become violent at the Capitol. He did not recall the exact time he noticed this, but stated that it was at that moment that he knew an RFA to help at the Capitol would soon come. He said that before January 6, 2021, he did not intend to place military personnel at the Capitol because he knew that the military was only to be used as a last resort. However, after seeing attempts to use a bike rack as a weapon against law enforcement, he was prepared to approve a request for assistance if he received one.

As events escalated at the Capitol, the DoD Executive Secretary moved into Mr. Miller’s office. Throughout the day, Mr. Miller exchanged telephone calls with the Vice President, Members of Congress, Cabinet members, and members of the White House staff. Mr. Miller and GEN Milley both told us that there were no calls between the President and Mr. Miller.

The TF Guardian Commander told the QRF OIC between 1:50 p.m. and 2:00 p.m. to stand by and be prepared to load the buses. The DCNG Director of Operations told the QRF OIC that upon the breach of the Capitol, the QRF was on an enhanced alert status.

The TCP OIC received instructions from the TF Guardian Commander after the Capitol was breached on how to staff the TCP locations. The TCP OIC added that according to the TF Guardian Commander, if no MPD officers were present at the TCP locations, DCNG personnel who felt unsafe could get into their cars. If DCNG personnel “really felt unsafe, and if there is not an MPD [officer] present, [DCNG personnel] can drive to the next TCP.” The TF Guardian Commander told us that once MPD officers started to move to the Capitol, DCNG personnel could consolidate the TCPs “so that the Soldiers and Airmen weren’t just sitting out there by themselves. At least there was a larger group of them together as MPD pulled off [to go to the Capitol].” The TCP OIC clarified that none of the TCPs consolidated because of MPD personnel leaving the TCPs, because “we had no threats at our TCPs.”

*Events From 2:00 p.m. Through 2:59 p.m.*

The TF Guardian Commander told us that shortly after 2:00 p.m., he learned via news reports that protesters had breached the Capitol, so he started to move closer to the Capitol. Mr. Sund told us that the Capitol Police Board authorized his request for DCNG assistance at 2:08 p.m. He called MG Walker at 2:10 p.m., told him about the emergency authorization, and stated that the USCP were being “overrun by thousands of protesters fighting violently with the officers.” According to MG Walker, 20 minutes later, Mr. Sund called MG Walker again and said, “Hey, it’s getting worse,” and “I need 200 Guardsmen immediately.”

The AOC forwarded “DHS NOC Update #3 as of 1400” to Army senior leaders at 2:13 p.m. Update #3 reported, in part, that (1) crowds continued to gather at the Capitol, which was “reportedly locked down due to multiple attempts to cross police barriers and police injuries”; (2) the USCP arrested people who attempted to cross barriers; and (3) the situation continued to develop.

MG Walker explained the action the TF Guardian Commander took in responding to the events at the Capitol. MG Walker said:

And [the TF Guardian Commander] who was—he was in charge of all the traffic control points, and he was in charge of the Metro stations. On his own, we call it initiative, he goes to the Capitol because the police were leaving the traffic control points, MPD was. They abandoned the traffic control points. Well, guess what? We can’t be there without the police. So, [the TF Guardian Commander] heads to the Capitol and the police tell him, “Hey, look. Where’s the Guard? Where’s everybody?” And [the TF Guardian Commander is calling BG Ryan], “Hey, we’ve got to get here right away.” And that was at— [TF Guardian Commander] at 1412 [2:12 p.m.] he goes to the Capitol and says, “Hey, it’s going to be breached.” This is [the TF Guardian Commander] calling back [to BG Ryan].

According to MG Walker, at the same time the TF Guardian Commander moved to the Capitol and contacted DCNG HQ, BG Dean told BG Ryan to hold the night shift traffic control points on standby and get everybody ready to deploy to the Capitol as quickly as possible. MG Walker stated he was on the phone trying to get permission to deploy to the Capitol. MG Walker added, “I’m just going to say it, everybody in the National Guard knew what was expected of them. Everybody knew where we were supposed to be and what we were supposed to do.”

The TF Guardian Commander told us that after pre-positioning himself with the USCP, he called BG Ryan to ask about the status of DCNG personnel responding to the events at the Capitol.

He informed BG Ryan that the USCP was requesting immediate help, and BG Ryan told him he was working the request. BG Ryan confirmed to us that about the same time as the TF Guardian Commander arrived at the Capitol, BG Ryan arrived at the DCNG HQ Joint Operations Center for a Commanders Update Briefing. After speaking with the TF Guardian Commander and observing the developing events on a nearby television, he notified BG Dean of the situation. BG Ryan said his staff was told that MG Walker and BG Dean were awaiting approval to deploy DCNG personnel.

According to Mr. Sund, the first unlawful entry into the Capitol happened at 2:15 p.m. At about this same time, the TF Guardian Commander received a report from his Soldiers that MPD officers were leaving the TCPs and moving to the Capitol. He said that upon losing MPD support at the TCPs, and in anticipation of a new RFA from the USCP, he consolidated the TCPs, established a rally point close to the Capitol, and then proceeded to the Capitol himself. He called the QRF OIC at 2:17 p.m. and told him to get the QRF “geared up and get them on the bus and just have them waiting” for re-mission approval from Mr. McCarthy.

The DCHSEMA Director called MG Walker at 2:19 p.m., and requested that all DCNG personnel report immediately to the Capitol in support of the MPD. MG Walker relayed the DCHSEMA Director’s request to Army senior leaders via secure VTC at 2:22 p.m.

The AOC e-mailed GEN McConville, LTG Piatt, LTG Flynn, and other Army senior leaders at 2:20 p.m. to relay open-source reports regarding the Vice President. According to the reports, the Vice President “has been ushered from the U.S. Capitol as protesters breach the Capitol Building. Additional open source reports indicate the U.S. Senate is in recess due to a warning of an external threat.”

Mr. McCarthy said that the DCNG [REDACTED] called him at 2:20 p.m., reporting explosions and firearms going off in D.C. Mr. McCarthy then requested a conference call, which began at 2:22 p.m., so he could understand the situation<sup>66</sup> LTG Piatt arrived in Mr. McCarthy’s office as the conference call was starting. GEN McConville, LTG Flynn, BG LaNeve, the Acting Army General Counsel and other staff personnel joined Mr. McCarthy in his office during the conference call. Mayor Bowser, the DCHSEMA Director, Chief Contee, Mr. Sund, and other members of their staffs also joined the conference call.

During the conference call, Mr. Sund made an urgent request for immediate DCNG assistance at the Capitol. Mr. McCarthy was on the conference call when it started, but did not remain present for the duration of the call. Witnesses told us that Mr. McCarthy stayed on the call for approximately 5 minutes, long enough to hear and acknowledge the urgent request from Mr. Sund and Mayor Bowser. Mr. McCarthy asked MG Walker how quickly the QRF could respond, and MG Walker said that the QRF could move in 20 minutes. Mr. McCarthy told us, “I do remember telling General Walker to posture all of his troops and to get to the right configuration to get ready to go and I was going to go get the authority.” LTG Piatt told us that Mr. McCarthy directed MG Walker to move the QRF to the Armory. MG Walker told us that he moved the QRF to the Armory on his own initiative, “without permission.”

According to two witnesses, MG Walker did not have the authority to deploy the QRF and Mr. McCarthy did not have the authority to re-mission any DCNG element, including the QRF, from the approved mission of supporting the MPD with TCPs and Metro stations to a new mission of supporting the USCP at the Capitol. The authority to approve support to a Federal agency rested

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<sup>66</sup> According to testimony from Mayor Bowser and the DCHSEMA Director, it was the DCHSEMA Director who convened the conference call.

with Mr. Miller. Witnesses told us that Mr. McCarthy told LTG Piatt to develop a plan with MG Walker and the civilian participants on the telephone call for the DCNG to deploy and then Mr. McCarthy “ran down the hallway” to see Mr. Miller.

We asked LTG Piatt to describe the conference call. LTG Piatt told us that it was not the “clearest” conference call because some participants were nearly panicked. He said that people talked over each other, there was “yelling and screaming and shouting,” other people were moving in and out of Mr. McCarthy’s office, simultaneous conversations were occurring, the news was on the television, and background noise was heard on some of the participants’ telephones. He said that Mr. McCarthy understood that law enforcement needed help immediately, but call participants did not have a clear understanding of the situation. LTG Piatt said that before leaving the conference call, Mr. McCarthy told LTG Piatt that he was going to get Mr. Miller’s approval and that he (LTG Piatt) should develop a plan to re-mission the DCNG from their current limited mission to helping Federal law enforcement deal with the situation at the Capitol.

MG Walker told us that during the call, LTG Piatt and LTG Flynn asked him for his operational plan, and he answered, “The operational plan, I’m going to give it to you right now. Get on the buses, get to the Capitol, and take direction from Metropolitan, I mean from either the Metropolitan Police or the United States Capitol Police. That’s the plan.”

During his interview with us, LTG Piatt commented on MG Walker’s plan. LTG Piatt told us that he commanded a division in Iraq and could not imagine sending a subordinate element into a violent situation without that element clearly understanding the mission. LTG Piatt added, “It would be like me saying, ‘Go to Baghdad and just find somebody and see what they need.’”

Mr. Sund told us that during the conference call, LTG Piatt commented on the “optics of [the] National Guard standing in line with the Capitol in the background,” and that he [LTG Piatt] “would rather relieve your [USCP] officers off traffic posts” so the officers could respond to the Capitol.

The DCHSEMA Director told us that either LTG Piatt or LTG Flynn said it would not look good to have Soldiers confront “peaceful protesters.” Chief Contee told us that an Army official commented on the “optics” of having “boots on the ground” at the Capitol.

MG Walker stated that LTG Piatt and LTG Flynn said they would not advise Mr. McCarthy to send Guardsmen to the Capitol; it would not be a good optic and could incite the crowd. MG Walker said that he was “stunned” and “frustrated” at these comments.

LTG Piatt told us that optics were a concern as the Army prepared to deploy Soldiers into downtown D.C. in response to the D.C RFA, but he did not recall making that statement during the telephone call specifically about the USCP’s RFA. Two Army witnesses who were on the conference call told us that during the call, LTG Piatt questioned the impression that the image or “optic” of uniformed Soldiers rushing into the Capitol would make with the public. One Army witness said that LTG Piatt thought that the “optic” was not appropriate in the absence of a good plan for deploying Soldiers to the Capitol. The other Army witness told us that LTG Piatt was trying to emphasize that law enforcement, not the DCNG, was best suited for the mission of clearing the Capitol.

The two Army witnesses also told us that LTG Piatt asked questions during the conference call and tried to understand exactly what was happening at the Capitol, what tasks DCNG personnel would perform, whether they should be armed, who the QRF would align with, and where the QRF

would assemble once they arrived at the Capitol. One of these witnesses said that no one on the conference call could answer LTG Piatt's questions and the only thing LTG Piatt and the witness heard were "hysterical cries for help." The other witness said that the civilian officials did not want to hear any questions, and wanted every available Soldier to immediately rush to the Capitol. This witness told us that LTG Piatt explained that DCNG personnel were not armed or equipped for riot control and if the DCNG reported immediately, as requested, the USCP would only get "a bunch of bodies that [would] be able to reinforce the perimeter" but would not be equipped or prepared to conduct building clearance operations.

Mr. Sund told us that LTG Piatt said his recommendation to Mr. McCarthy was to not support the request. He said that Chief Contee then said, "Hold on. Let me get this right. You're denying [Mr. Sund's] request for National Guard?" According to Mr. Sund, LTG Piatt said that he was not denying the request and that he would discuss the request with Mr. McCarthy.

Chief Contee described his exchange with LTG Piatt to us. He said that he asked Mr. Sund if Mr. Sund was asking for the support of the DCNG on the grounds of the Capitol and Mr. Sund responded, "Yes." Chief Contee told us that he then told LTG Piatt that [Mr. Sund] was requesting the support of the DCNG and asked LTG Piatt if he was denying the request. According to Chief Contee, LTG Piatt replied that they were not denying the request. One witness described LTG Piatt as the "calm voice" on the conference call and recounted how LTG Piatt told the group that he was not disapproving the plan but was saying that we needed a plan so that he could recommend approving it. Another witness said that Mayor Bowser and Chief Contee were frustrated that LTG Piatt told them that Mr. McCarthy was getting the approval from Mr. Miller, rather than saying, "Yes, we're coming."

According to LTG Piatt, he told the conference call participants that the DCNG was better suited to establish a cordon around the building and not do room clearing operations, a task suited to law enforcement. He told us that he stated three times that he was not denying the request and was, instead, telling the group it needed to develop a plan while Mr. McCarthy secured Mr. Miller's approval. He said that he was unable to calm the group down, and finally someone on the call stated they would tell the media that the Army denied the USCP request. According to an Army witness on the call, Mayor Bowser made the statement about telling the media the Army denied the USCP request.

We asked LTG Flynn about his involvement in the conference call. LTG Flynn told us that when he entered Mr. McCarthy's office, LTG Piatt was on the telephone asking questions. He listened to the conference call for a couple of minutes, did not contribute to the conversation, and left to establish a video conference call. Other Army witnesses confirmed that LTG Flynn's participation was minimal.

As the conference call in Mr. McCarthy's office continued, Mr. McCarthy, GEN McConville, BG LaNeve, and three staff members ran to Mr. Miller's office where they met with Mr. Miller, Deputy Secretary of Defense David Norquist, GEN Milley, GEN Hokanson, and the DoD General Counsel. Mr. McCarthy described the situation as "very confusing." They discussed which DoD forces were already in the city, which resources could respond, the full mobilization of the DCNG, and how quickly the forces could mobilize.<sup>67</sup> Mr. McCarthy told Mr. Miller that the DCNG needed to mobilize everything and move to the Capitol as quickly as possible, and Mr. Miller immediately

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<sup>67</sup> Mobilization of the DCNG means to gather the forces in one place, organize the forces, and get the forces ready to operate under approved conditions.

agreed. Mr. McCarthy also said that there was tremendous confusion at that time because they lacked specifics about the situation, did not yet know the task DCNG would perform, and, thus, could not develop a plan to execute that task quickly.

LTG Piatt told us that at about 2:45 p.m., the conference call in Mr. McCarthy's office ended when someone on the conference call reported that gunshots were fired inside the Capitol. LTG Piatt said that he then joined the secure video conference call planning bridge that LTG Flynn opened, which included MG Walker and DCNG staff members. He told us that there was shock and confusion, and "what we could see coming together was the Capitol was overrun, penetrated, the perimeter was shattered." LTG Piatt then told the group on the video conference call:

We're going to get approval. We need to come up with a plan. I think my assumption will be that we will be asked to cordon the outer perimeter of the Capitol to facilitate the clearance of the Capitol and then allow for [law enforcement to make] targeted arrests of those that were the most violent.

The TF Guardian Commander told us that he called the QRF OIC sometime at 2:17 p.m. and told him to equip the QRF and prepare it for a move to the Capitol. The QRF OIC stated that he received multiple notifications between 1:50 p.m. and 2:30 p.m. to prepare to load the QRF on their buses and move to the Capitol. He stated that he received an order to move to the Armory at 2:45 p.m. and that the QRF departed JBA with a police escort at 2:55 p.m., arrived at the Armory at 3:15 p.m., and stood by for further orders.

The TF Guardian Commander arrived at the USCP Command Post at 2:55 p.m.<sup>68</sup> First an MPD Assistant Chief asked, and then Mr. Sund asked, "How many Guardsmen do you have on the way now?" The TF Guardian Commander did not know how many Guardsmen were on the way but told them that he was working on it. The TF Guardian Commander told them that he needed Mr. McCarthy's approval to deploy the DCNG to the Capitol.

Mr. Miller told us that sometime before 3:00 p.m., he heard of gunshots being fired inside the Capitol. He stated that was the point when he knew the DoD would have to become involved in the response at the Capitol. He said, "Whatever time that was that was like, Okay. The National Guard is getting mobilized. We're going big. It's now—it now has triggered that worst-case scenario." Mr. Miller also told us that he needed to focus on what was happening nationally and internationally and avoid being "target-locked" in the event a major incident happened elsewhere at the same time.

#### *Events From 3:00 p.m. Through 3:59 p.m.*

Mr. Miller ordered Mr. McCarthy to mobilize all of the DCNG's 1,100 personnel at approximately 3:04 p.m. Mr. Miller told us that his order gave Mr. McCarthy the approval and guidance he needed to mobilize the DCNG to help the USCP and MPD, and that MG Walker would immediately employ the QRF. The DCNG ██████████ told us that at 3:04 p.m., MG Walker ordered a selective encampment and recall of DCNG units.

We asked Mr. McCarthy if Mr. Miller's decision to mobilize the entire DCNG included approval also to deploy DCNG personnel immediately to the Capitol to support the MPD or the USCP. He replied, "It did," but he added that Mr. Miller wanted:

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<sup>68</sup> USCP Headquarters is located at 119 D Street NE, Washington, D.C. 20510. It is not located within the Capitol itself.

a clear understanding of what you're going to do. Get a plan. Put it all together, and then go. ... I was going to come back to him on how we're going to do it. ... I was going to go down to Metro PD Headquarters and get a better read on the situation. ... [I]t was clear that we wanted to come back to him and show him how it was ... .

Mr. McCarthy also said that GEN Milley suggested mobilizing forces from neighboring states because it was unclear how long troops would be needed. GEN Hokanson took the lead for coordinating this effort, while he [Mr. McCarthy] took the lead for coordinating the immediate response with the D.C. government and Federal agencies.

GEN McConville told us that he understood Mr. Miller's order to mean Mr. McCarthy could mobilize everyone in the DCNG and get them to the Armory while simultaneously planning how to help law enforcement at the Capitol. He said that the DCNG personnel needed to know the mission, task, and purpose; what equipment to have or not to have, including weapons; what route to take; and other details.

GEN Hokanson told us that while discussing National Guard personnel during the meeting, Mr. Miller said, "Get them everything they want." The original number of personnel they discussed was 6,000. GEN Hokanson told us that he left the meeting to start calling leaders at the State level for support.

The TF Guardian Commander told us that he called BG Ryan multiple times from USCP HQ between 2:49 p.m. and 4:15 p.m., "trying to get an answer on the force" and telling BG Ryan, "We need to have our forces come here now. I need the QRF now." The TF Guardian Commander also told us that BG Ryan responded, "Hey, I've already let [MG Walker] know. I've talked to BG Dean, we're working it. We're getting a release now." The TF Guardian Commander stated that he thought the QRF's release was imminent, and then he could recall the [REDACTED] DCNG personnel at the TCPs to a specific location at the Capitol. He said, "[S]ince I had already linked up with both MPD and Capitol Police I could easily just bring them into the line and then hook them up and tell them where to get set up."

We asked the TF Guardian Commander if the DCNG had a plan if they were needed at the Capitol. He responded that he was not sure if Mr. McCarthy was aware that he (the TF Guardian Commander) was with the USCP helping to bring in forces. He told us that they had a plan for the troops to assemble at a rally point, organize, and don riot gear, and that he had already made contact with the USCP and MPD.

The TCP OIC told us that between 3:00 p.m. and 3:17 p.m., the Metro station mission consolidated with the TCP personnel to the vicinity of 14th Street and Pennsylvania Avenue for security reasons "because they were standing at the Metro ... they weren't in a vehicle."

Mr. McCarthy left Mr. Miller's office and called MG Walker at approximately 3:05 p.m. Mr. McCarthy did not want to send the DCNG to the Capitol without a plan he could present to Mr. Miller. A witness told us that Mr. McCarthy and MG Walker discussed how many personnel were already at the Armory and where the DCNG could replace or reinforce MPD officers, freeing the MPD to respond to events at the Capitol in greater numbers. Mr. McCarthy directed MG Walker to recall DCNG personnel to the Armory, including the QRF at JBA and those already supporting the



MPD at Metro stations. He ordered that all personnel be equipped with riot shields and batons, and for MG Walker to prepare a “hasty” plan to support law enforcement at the Capitol.

MG Walker stated that he ordered the QRF to move from JBA to the Armory at 3:00 p.m. He said that they arrived 20 minutes later, got off the buses, put on their riot gear, reboarded the buses, before 5:00 p.m., and waited at the Armory.

According to an Army witness, while Mr. McCarthy was in Mr. Miller’s office, the Mayor’s office notified the news media that LTG Piatt denied the USCP’s RFA. Mr. McCarthy then spent the next 25 minutes calling and speaking with leading Members of Congress, the news media, and Mayor Bowser, correcting inaccurate reports and telling them of Mr. Miller’s approval of the USCP RFA and his own effort to get the entire DCNG mobilized. Mr. McCarthy said that he asked Mayor Bowser where she was and if he could co-locate with her. Mayor Bowser told Mr. McCarthy that she was at MPD HQ, and Mr. McCarthy told her that he would get to MPD HQ as soon as he could.

While Mr. McCarthy dealt with news media inquiries, the VTC with Army Staff and DCNG officials continued. LTG Piatt told us that the DCNG’s position was, “We don’t plan. We just provide numbers. [You, the Army] tell us what you need.” LTG Piatt said that he disagreed and told the DCNG group there must be a clear task and purpose for a new mission. They initially thought the mission would be to reinforce a perimeter, but there was no longer a perimeter to reinforce. LTG Piatt told us that it looked like it would be a mission to “take back the Capitol” from the protesters, so they had to equip, configure, and move to meet a new, emerging mission. LTG Piatt explained that the military decision-making process identifies specified and implied tasks, which:

results in an operations order or a concept of the operation, and that can be formal, written pages [or] it could be informal. It could be a drawing on a piece of paper, or could be a verbal [oral] explanation of what operations I need to do so that we know we have scoped the environment, we’ve analyzed the threat, we’ve equipped the forces correctly and they’re prepared to accomplish the mission and higher headquarters understands what the mission is.

LTG Piatt said that while this was occurring, the DCNG was recalling its personnel, building up forces as they reported to the Armory, issuing civil disturbance gear, and getting buses and vehicles lined up for transport. Also during this hour, the QRF arrived at the Armory from JBA.

Mr. Sund called MG Walker to coordinate a formal written USCP request for DCNG assistance at 3:26 p.m.

The TCP Deputy OIC told us that the TCP night shift was scheduled to report to the Armory at 3:30 p.m. As the Deputy OIC began to ready personnel to perform their duty, a DCNG operations officer told him that the mission would change from TCP to QRF duty and to prepare to receive civil disturbance equipment. He then notified the TCP OIC that he would not be relieving the day shift as planned. The TCP Deputy OIC continued that there were no details or “real authorization,” and he was concerned because he learned in the civil disturbances in June 2020 “how this could go” if they (the DCNG) “rolled in unprepared like we did the first night [in June 2020].” According to the TCP Deputy OIC, they performed equipment checks and inspections, and light training, such as “standard shield formation.”

Mr. McCarthy left the Pentagon for MPD HQ at approximately 3:48 p.m. to meet with Mayor Bowser and Chief Contee. His aide, executive officer, public affairs officer, and congressional liaison officer accompanied him while BG LaNeve followed in a second vehicle. Mr. McCarthy told us that LTG Piatt did not make any recommendations to him before he left for MPD headquarters. We asked Mr. McCarthy what happened on the conference call while he was in Mr. Miller's office that gave D.C. officials the impression that the USCP RFA would be declined. Mr. McCarthy told us his staff was trying to get situational awareness but it was clear there was a lot of confusion. He said individuals on the conference call were talking past each other so he made the decision to go to MPD headquarters, coordinate directly with D.C. officials, and get some assets to the Capitol as quickly as possible. An Army witness told us that MG Walker could not clearly articulate to his staff what the USCP specifically needed. The witness said this is what prompted Mr. McCarthy and his staff to go to MPD HQ to figure out what was actually happening at the Capitol and what the USCP needed. Another witness told us that MG Walker and his staff "were unable to tell Secretary McCarthy any details about where they [DCNG] were going, what they were doing," which was why Mr. McCarthy went to MPD HQ to do the planning. The witness said that the DCNG, including MG Walker and two DCNG liaison officers at MPD HQ, provided no meaningful input to Mr. McCarthy or did not produce a plan that set the conditions to deploy to the Capitol other than to say they were ready to go.

GEN Hokanson told us that the first state he called for help was Virginia. He spoke with the Adjutant General for Virginia, MG Tim Williams, at 3:46 p.m. At the time of his call, the Virginia Governor already had authorized mobilization of their 500-member response force. MG Williams told GEN Hokanson that the Virginia response force would arrive the following morning (January 7). GEN Hokanson then called the Adjutant General for Maryland, MG Tim Gowan, at 3:55 p.m. The Maryland Governor also ordered mobilization of Maryland's response force. MG Gowan informed GEN Hokanson that 100 members of the Maryland response force could be to D.C. in about 8 to 10 hours with a follow-on force of 150 to 200 more. GEN Hokanson also told us that he "reached out" to Delaware, Pennsylvania, New Jersey, and New York. He asked them if and how quickly they could provide support. GEN Hokanson told us that they "started the process [mobilizing their Guardsmen] really immediately on that."

#### *Events From 4:00 p.m. Through 4:59 p.m.*

The AOC received DHS NOC Update #4, current as of 4:00 p.m., at 4:08 p.m. Update #4 reported, in part, that:

- the Capitol was being evacuated to a safe alternate location as of 3:52 p.m.;
- 1,100 DCNG personnel were activated as of 3:38 p.m.; and
- a 41-person QRF was on the way from JBA to the Armory with 184 more on standby as of 3:23 p.m.

Update #4 also included:

- a 3:00 p.m. report that a civilian at the Capitol sustained a gunshot wound;
- a 2:35 p.m. report that Mayor Bowser ordered a citywide curfew to begin at 6:00 p.m.;

- a 2:45 p.m. report that the DHS Acting Deputy Secretary authorized Federal law enforcement agencies to immediately help the USCP; and
- a 2:23 p.m. open-source report that the Vice President evacuated the Capitol and the U.S. Senate was in recess.

BG Smith forwarded DHS NOC Update #4 to DoD and Army senior leaders at 4:50 p.m.

Mr. McCarthy arrived at MPD HQ at approximately 4:05 p.m. and met with Mayor Bowser and Chief Contee. BG LaNeve arrived several minutes later. Mr. McCarthy's aide carried a map of the city, a lesson learned from his experience with responding to civil disturbances in June 2020. Witnesses told us that not having heard from MG Walker regarding any specific plan, Mr. McCarthy laid the map on a table. Mr. McCarthy, Mayor Bowser, Chief Contee, and others present drafted a plan that identified where the DCNG personnel would go, the route they would take, with whom they would connect when they arrived, what they would do when they got there, whom they would support, who was in charge, and who the key leaders were. Mr. McCarthy then telephonically briefed Mr. Miller and GEN Milley on the draft plan. Mr. Miller concurred with the plan and authorized the deployment of the DCNG to the Capitol. According to BG LaNeve, it took about 20 minutes to work out these details before giving an order to initiate the movement plan.

Mr. Sund said that he e-mailed the written request for DCNG support to MG Walker at 4:07 p.m.

The TCP OIC told us that she received a text message from the Sergeant Major for the TF Guardian Commander at 4:11 p.m. directing all TCP and Metro station personnel to remain in place. Around this same time, the TCP OIC learned that that roughly 90 DCNG personnel from the afternoon relief shift were re-missioned to the QRF and put under the command of the TCP Deputy OIC. The TCP OIC's day shift personnel were not re-missioned.

At approximately 4:13 p.m., the USCP requested the support of Pentagon Force Protection Agency officers through a standing mutual aid agreement. Mr. Miller approved the request for law enforcement support.

Witnesses told us that BG LaNeve called MG Walker at approximately 4:25 p.m. and told him to be ready to move to the Capitol. Mr. McCarthy discussed by telephone the plan he and the D.C. officials developed with the FBI's Deputy Director, who provided a location for DCNG personnel to meet with law enforcement. Mr. McCarthy and other witnesses said that Mr. McCarthy called Mr. Miller again at approximately 4:30 p.m. Mr. McCarthy briefed Mr. Miller, who concurred with the plan to have the DCNG meet with and follow the MPD to conduct perimeter security and clearance operations as part of a joint USCP, FBI, MPD, and DCNG operation to clear the Capitol. Witnesses explained that "perimeter and clearance operations" meant reinforcing the perimeter and clearing the area outside the Capitol of protesters, but not entering the Capitol.

Mr. McCarthy called MG Walker at approximately 4:35 p.m. and told him that Mr. Miller approved the re-mission request. Mr. McCarthy told MG Walker to immediately move all available DCNG personnel from the Armory to Lot 16 at the corner of 1st Street and D Street and meet with

the MPD Assistant Chief to perform perimeter and clearance operations.<sup>69</sup> After Mr. McCarthy gave MG Walker the deployment order, he handed the telephone to BG LaNeve, who told MG Walker of the plan's details.

BG LaNeve recalled that when Mr. Miller approved the re-mission plan, there was still no meeting point established. He told us that Mr. McCarthy directed him to get the DCNG moving to the Capitol. BG LaNeve said that he then called MG Walker, telling him to make sure his troops were ready to move to the Capitol and that he [BG LaNeve] would identify the linkup meeting point. BG LaNeve said that approximately 20 or 30 minutes later, at around 5:00 p.m., that he again called MG Walker, and at this time provided the location for DCNG personnel to meet with law enforcement. We reviewed contemporary handwritten notes from Mr. McCarthy's aide, which indicated that at 4:36 p.m., BG LaNeve and a witness coordinated with MG Walker, advised him to mobilize 150 DCNG personnel, and move, under police escort, to 1st Street and D Street. DCNG personnel would meet FBI personnel there and move into position to establish an inner cordon.<sup>70</sup>

Mr. McCarthy spoke on the telephone with the Maryland Governor at 4:40 p.m. The Governor offered to send Maryland NG forces to D.C. to help, and Mr. McCarthy accepted.

Mr. Miller told us that at various points during the afternoon, he spoke to several Members of Congress. He informed them of the National Guard mobilization and that he authorized the National Guard to respond to the events at the Capitol. He also spoke to and provided the Vice President a situation report. He did not speak to the President on January 6, 2021.

#### *Events From 5:00 p.m. Through 5:59 p.m.*

The DCNG's Routine Report for the SecArmy for 1700 (5:00 p.m.) reported that:

- MG Walker is Senior Leader on site (at the Armory);
- demonstrators breached the Capitol at 1:50 p.m. and the MPD Emergency Operations Center reported shots fired in the Capitol; the USCP evacuated and cleared the Capitol; two officers were reported shot and one civilian was reported killed on Capitol grounds; no Service member casualties occurred; SecDef and SecArmy approved encampment of the DCNG;
- thousands of demonstrators remained on Capitol grounds and law enforcement was in the process of clearing the Capitol; two suspicious pipe bomb-like devices were cleared at 4:30 p.m. by the MPD and USPP; Mayor Bowser imposed a 6:00 p.m. curfew;
- The Ellipse had 80,000 peaceful demonstrators at Lincoln Memorial/Mall and 10,000 demonstrators with significant civil disturbance activity at Capitol Hill;
- USCP requested an additional 200 DCNG personnel to support the USCP;

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<sup>69</sup>There are two 1st and D Street intersections near the U.S. Capitol. A DCNG official confirmed the linkup (meeting) point was 1st and D Streets Northeast, next to USCP headquarters.

<sup>70</sup> 1st and D Streets Northeast.

- DCNG members were not targets, but collateral threats existed; the risk of small arms was significant; and
- there were no recommendations for Army Senior Leader actions.

Notes that Mr. McCarthy's aide took as events happened stated that at 5:00 p.m., Mr. McCarthy "launches – riot gear – NG QRF from MPD thru [BG] LaNeve." We asked the aide to clarify this note, and he told us that Mr. McCarthy, believing MG Walker received the approval to act and information he needed 30 minutes earlier, called [DCNG HQ] to ask if the DCNG was "on station" at the Capitol, and learned they had not yet moved (from the Armory to the Capitol). The aide stated that Mr. McCarthy "re-issued the same 'go' order" that he gave MG Walker approximately 30 minutes earlier.

TCP personnel returned to the Armory at approximately 5:00 p.m. At the Armory, they turned in their riot gear for those personnel who might need it, rested, and waited to find out what their mission would be on January 7, 2021. These individuals did not deploy to the Capitol. BG Ryan told us he did not repurpose the day shift troops for the QRF or as a civil disturbance unit because they had already been deployed during the day.

At approximately 5:00 p.m., BG LaNeve again called MG Walker and gave him the location to meet with law enforcement. Another witness who was with Mr. McCarthy at MPD Headquarters told us that MG Walker did not get "approval to do the specific actions" until close to or just after 5:00 p.m. This witness confirmed to us that no one conveyed to MG Walker the specific meeting point and other details until after 5:00 p.m.

At approximately 5:00 p.m., GEN McConville re-joined the VTC bridge the Army Staff established earlier in the afternoon to plan a response to events at the Capitol. GEN McConville said that at approximately 5:05 p.m., he asked MG Walker, who was also in the VTC, if he "had authority to go [to the Capitol]," and MG Walker replied, "Yep. What do you want me to do?" GEN McConville said that he advised MG Walker that the best thing to do would be to "Go command. Go do the right thing, the right way, get out there and do what you need to do."

MG Walker stated that he received the authorization to go to the Capitol at 5:08 p.m. or 5:09 p.m. According to MG Walker, he had approximately 155 Guardsmen ready to deploy, but he could have sent that number (155) "earlier in the afternoon" and had them at the Capitol "in 20 minutes." MG Walker stated that the DCNG personnel arrived at the Capitol at 5:20 p.m. and that he arrived between 5:20 p.m. and 5:30 p.m. According to MG Walker, the USCP swore in the DCNG personnel as "Special Police," and the DCNG forces helped establish a security perimeter on the east side of the Capitol. The DCNG [REDACTED] told us that at 5:20 p.m., the DCNG had 156 Guardsmen at the Capitol to support civil disturbance operations.

According to a witness, Mr. McCarthy had to reissue the deployment order to MG Walker 30 minutes after he originally conveyed it to MG Walker, which the witness believed contradicts MG Walker's March 3, 2021 testimony to the Senate Homeland Security and Governmental Affairs and Senate Rules and Administration Committees. The witness told us that MG Walker's assertion to those committees that the DCNG could have responded to the Capitol in 20 minutes was not true. The witness said, "It took 27 minutes for [MG Walker] to get the order from [Mr. McCarthy] around [4:35 p.m.] to actually get his wheels moving on the bus." In addition, the witness said "mischaracterization" was the word the witness would use to describe MG Walker's response to questions from congressional committees.

Other witnesses, including on-scene DCNG personnel, provided varying accounts of times, actions, and personnel numbers. BG Ryan told us that 154 DCNG personnel moved to the Capitol at 5:08 p.m. He said that the 154 personnel, whom he described as the expanded QRF, included 40 Air National Guardsmen previously staged at JBA as the original QRF, 90 Guardsmen originally detailed as the night shift at the TCPs, and 24 Guardsmen who would have been part of the night shift at the Metro stations. BG Ryan also told us that four buses left the Armory and “staged at a rally point.” Once staged, the Guardsmen “got off the buses, assembled, and then moved under the direction of civil authority to establish the perimeter and expand the perimeter security purposes at the Capitol.” He added that the Guardsmen assigned to the morning TCPs and Metro stations returned to the Armory, but did not move out “with that element [QRF] of four buses ... to the Capitol.”

The TF Guardian Commander told us that BG Ryan called him sometime between 4:50 p.m. and 5:39 p.m. and advised that the QRF was on the way. Like BG Ryan, the TF Guardian Commander said that 154 DCNG personnel moved to the Capitol.

The TCP Deputy OIC recalled that the authorization to depart the Armory occurred closer to 5:00 p.m. and put the total number for the now-expanded QRF at approximately 136. The buses did not leave the Armory until 5:23 p.m. The buses arrived at Lot 16 at 160 D Street Northeast at 5:45 p.m., the USCP swore the QRF in as “Special Police,” and then they waited for approximately 45 minutes before moving towards the Capitol.

MG Walker stated that when he received permission to deploy to the Capitol, “I already had the Guardsmen on the buses,” but the QRF OIC told us that at 5:10 p.m., “someone came running down” and said, “Everybody on the buses now.” He said that he and “59 or 60” personnel boarded the buses and departed for the Capitol at 5:15 p.m.

At 5:15 p.m., Mr. McCarthy updated Mr. Miller and GEN Milley via phone on how things were going. They discussed planning considerations, including troop levels, mission duration, and how to tighten the coordination loops with other Federal agencies.

At 5:28 p.m., the DCNG pulled into a parking lot at the corner of 2nd and C Streets Northeast, outside the USCP HQ building. The TF Guardian Commander told us that he coordinated with the USCP on where the QRF would assemble and relayed the location (Lot 16) to the QRF OIC. At 5:29 p.m. the QRF OIC responded, “Apparently we pulled into the wrong [parking] lot. Trying to reroute to Lot 16 now.” The QRF OIC confirmed that the response force arrived at the wrong parking lot at approximately 5:29 p.m. and had to move to a different lot. Mr. Sund told us that the DCNG personnel arrived at the Capitol and were sworn in as “Special Police” by 5:40 p.m.; however, the QRF OIC told us that the DCNG troops were sworn in at USCP HQ in the parking lot.

The QRF OIC told us that they waited for about 20 minutes before the buses left again with a police escort and arrived at the east side of the Capitol, and the QRF got off the buses at approximately 5:55 p.m.; this DCANG group and the TCP Deputy OIC’s DCARNG group totaled about 100 personnel. Before arriving at the Capitol, they received no information about what the task would be or whom they would support. The QRF OIC, as the senior officer, took charge, and the DCARNG and DCANG operated as one unit. The TCP Deputy OIC told us that the groups were “side-by-side” but that he remained in charge of his contingent.

The Washington Headquarters Services Acting Director sent an e-mail at 5:50 p.m. to the Office of the Secretary of Defense staff members advising them that 20 Pentagon Force Protection

Agency line officers were deployed to the Capitol under the mutual law enforcement aid agreement and were in-processing with the USCP.

*Events From 6:00 p.m. Through 6:59 p.m.*

The QRF OIC told us that the DCNG response force moved into the line of law enforcement personnel holding the perimeter on the west side of the Capitol at approximately 6:00 p.m. The OIC and his personnel followed a senior USCP officer around the north side of the Capitol to the west side where they relieved law enforcement officers on the front line. The DCNG [REDACTED] told us that the QRF immediately provided civil disturbance support on the front of the Capitol, clearing the crowds off the grounds and onto the National Mall. According to the QRF OIC, up to a “couple thousand” protesters were still on the front line in a compact area, and there was shouting and some pushing, and protestors threw projectiles at the DCNG personnel. He said that from approximately 6:00 p.m. until approximately 7:25 p.m. they remained on the line while pushing the crowd back an estimated 300-400 yards.

Mr. McCarthy briefed Mr. Miller, GEN Milley, the White House Counsel, the National Security Advisor, and officials from DHS, DoI, DoJ, and the FBI by telephone at approximately 6:00 p.m. He reported that there were 150 DCNG and 350 FBI personnel at the Capitol, with another 150 DCNG personnel on the way. The group set a goal to clear the Capitol and reconvene Congress by 9:00 p.m.

The AOC forwarded DHS NOC Update #5, as of 6:00 p.m., to HQDA at 6:09 p.m. Update #5 reported, in part, that 1,000 police officers were on Capitol grounds and that the building was “clear” as of 6:04 p.m. Update #5 also included open-source reports that:

- the MPD joined ATF, USPP, and USCP officers at the Capitol to “continue to clear rioters” (3:47 p.m.);
- [REDACTED]
- the NGB and DoD were planning with the DoJ to clear the Capitol (4:17 p.m.);
- four police officers were injured amid protests at the Rayburn House Office Building (4:17);
- protesters breached the north door of the Capitol a second time (4:22 p.m.);
- the USCP cleared rioters from the U.S. Senate floor (4:46 p.m.);
- Mayor Bowser declared a riot (4:55 p.m.); and
- tear gas was deployed at the Capitol (5:57 p.m.).<sup>71</sup>

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<sup>71</sup> Open source information may be defined as information which is publicly available and that anyone can lawfully obtain by request, purchase or observation. Open source information may not be regarded as credible unless the source is known and trusted, or if the information is verified by other means.

The DCNG Operations Director notified GEN Hokanson at 6:07 p.m. that MG Walker was with Mr. McCarthy at the Capitol.

According to a DoD-established official timeline, by 6:14 p.m., the USCP and MPD, with help from the DCNG, established a perimeter on the west side of the Capitol.

Mr. McCarthy spoke on the telephone with the FBI Deputy Director at 6:29 p.m. to maintain shared situational awareness and discuss resources needed to secure the Capitol. At 6:50 p.m., Mr. McCarthy spoke on the telephone with the Virginia Governor to thank him for sending a large personnel contingent to provide support at the Capitol.

Maj Gen Nordhaus told us that approximately 3-4 hours after Mr. Miller gave oral authorization to mobilize the National Guard, the Maryland National Guard committed 500 troops, Virginia committed 2,000, Pennsylvania committed 1,000, New York committed 1,000, New Jersey committed 500, and Delaware committed 200. GEN Hokanson added that “we had commitments of 6,200” Guardsmen, and all would operate under Title 32 orders.

#### *Events From 7:00 p.m. Through 7:59 p.m.*

A DCNG official e-mailed Mr. McCarthy, MG Walker, LTG Piatt, and BG LaNeve at 7:03 p.m. and reported that the USCP declared the Capitol’s interior and east front were clear of demonstrators as of 6:45 p.m., and that the DCNG and law enforcement were clearing the west front.

The QRF OIC told us that sometime after 7:00 p.m., law enforcement officers began ordering the protesters to leave the area. He said that the DCNG personnel formed a “protective corridor” that would facilitate arrests by law enforcement officers of those who refused to disperse, and added that DCNG personnel did not take part in any arrests.

At approximately 7:15 p.m., Mr. Miller, Mr. McCarthy, GEN Milley, Mayor Bowser, Chief Contee, and Mr. Rosen had a telephone call with the Vice President, Speaker of the House of Representatives, and the Senate Majority and Minority Leaders to discuss the situation at the Capitol. Mr. McCarthy told us that they informed the Vice President and Members of Congress that Congress could reconvene at 8:00 p.m.

The TF Guardian Commander told us that after leaving USCP HQ, he proceeded to the west side of the Capitol at 7:10 p.m. to check on the QRF personnel. Between 7:18 p.m. and 7:23 p.m., he saw the QRF personnel posted in a line formation and recalled rioters throwing unknown items at the QRF that “sounded like either like [*sic*] screws, or nails, or something was hitting their [DCNG] shields.” At that point, the MPD:

formed a line using D.C. Guard on each side basically like a lane and they started grabbing rioters and pulling them through and walking them onto a bus they had to—as they made their arrest and from that point on that night everybody that remained just they were [*sic*] getting arrested.

The DCNG 33rd CST Commander told us that his CST unit was not at the Capitol.

MG Walker met with Mr. McCarthy at approximately 7:52 p.m. at MPD HQ. The witness described how MG Walker told Mr. McCarthy the day shift would go home, to which Mr. McCarthy



responded, “No. No they’re not.” Mr. McCarthy directed that all available DCNG personnel remain on duty; there would be no shift change for those who began the day at Metro stations and TCPs, or for the NG personnel who were at the Capitol. A witness to this call told us that Mr. McCarthy wanted to deploy every available asset to the Capitol. Mr. McCarthy also told MG Walker to begin planning to integrate out-of-state NG personnel arriving in D.C.

*Events From 8:00 p.m. Through 8:59 p.m.*

The TCP Deputy OIC stated that there had not been time to issue radios to DCNG personnel before leaving the Armory, and the QRF used cellular telephones and hand signals to communicate until a DCNG officer issued radios between 8:30 p.m. and 9:00 p.m. The DCANG personnel who came from JBA had no experience in operating the radios or in using proper radio communications protocols, and the QRF OIC continued to use his personal cellular telephone to communicate with DCNG leadership, the MPD, and the USCP.

The QRF OIC estimated that 20-30 additional DCARNG personnel arrived between 8:00 p.m. and 9:00 p.m. He noted that by then only a few protesters and some news reporters remained on the Capitol grounds. He said that the USCP asked DCNG personnel to continue to maintain a security perimeter, which they did until relieved at approximately 2:30 a.m., January 7, 2021. DCANG personnel relieved the QRF at 1:12 a.m.

GEN Hokanson received an email from Mr. Miller’s office at 8:51 p.m. that contained a memorandum from Mr. Miller directing GEN Hokanson identify state NG units near the District of Columbia that could respond and conduct civil disturbance or support law enforcement operations. For the units identified, Mr. Miller authorized additional training under 32 U.S.C. § 502(f), which authorizes commanders to order NG members to perform training or other duties to carry out operations or missions at the request of the President or SecDef.

*Events From 9:00 p.m. Through 11:59 p.m.*

Mr. Miller, Mr. McCarthy, GEN Milley, and GEN Hokanson spoke on the telephone at approximately 9:00 p.m. They discussed the number of DCNG personnel currently at the Capitol (250-270) and planned for the expected arrival over the next several days of up to 6,200 out-of-state NG personnel.

According to the TCP OIC, “there was some back and forth about whether we repurpose the TCP mission to go to the Capitol or whether we put them back on the TCP.” At approximately 9:00 p.m., she was told of the decision to continue with the TCP mission for January 7, 2021, as this remained the primary duty for DCNG personnel in accordance with the D.C. RFA.

BG Smith e-mailed senior DoD and Army leaders at 9:56 p.m. and reported that since the DHS NOC Update #5 at 6:09 p.m.:

- approximately one company of DCNG personnel had arrived at the Capitol and integrated with Federal law enforcement;
- planning was ongoing to add additional Guardsmen in support of the USCP;

- planning was ongoing to augment the DCNG with out-of-state NG personnel upon receipt of “validated requests for assistance”; and
- the Army Staff was facilitating procurement and assembly of fencing at the Capitol.<sup>72</sup>

Mr. McCarthy left MPD HQ at approximately 9:45 p.m., and at 9:58 p.m., he met with MG Walker and senior DCNG leaders at the Armory. They discussed putting DCNG personnel on 30-day mobilization orders and plans to integrate large numbers of NG personnel who would report from various states.

After leaving the Armory, Mr. McCarthy arrived at the Capitol at 10:15 p.m., viewed the scene, and visited with DCNG personnel performing the perimeter security mission. He held a meeting with Mr. Sund, MG Walker, and the TF Guardian Commander between 10:20 p.m. and 10:30 p.m. At this meeting, Mr. Sund thanked MG Walker for the DCNG’s help, and Mr. McCarthy promised Mr. Sund that additional Guardsmen from other states would arrive to help.

Mr. McCarthy left the Capitol and arrived at MPD HQ at 11:00 p.m., where he coordinated with Chief Contee and again spoke on the telephone with Mr. Miller.

Maj Gen Nordhaus notified the NG Joint Force Headquarters in Virginia, Maryland, Pennsylvania, New York, New Jersey, and Delaware at 11:27 p.m. that they were “now approved to begin movement into the D.C. area.” A “DCNG CDO Force Flow” briefing chart showed that 255 DCNG personnel were supporting Federal law enforcement by the end of January 6, 2021. The chart also showed the expected inflow of forces for January 7 through 10, 2021. It noted that Mr. McCarthy set a goal of having 850 Guardsmen on site by noon on January 7, 2021.

GEN Hokanson reached out to BG Dean and the DCNG staff on the status of Joint Reception Staging Onward Movement and Integration operations. He wanted to know the location of the operations staging area and how soon they would be ready to receive out-of-state personnel.<sup>73</sup> According to GEN Hokanson, “The last thing we ever want to do is have [the out-of-state troops] go directly into an environment that they know nothing about.”

### *Witnesses’ Reflections on the DoD’s January 6, 2021 Actions*

Mr. McCarthy summarized the day’s events by stating that the DCNG’s “posture in the day was for traffic control points and Metro crowd facilitation,” and the “intelligence didn’t warrant” preparing to support anything other than what D.C. officials requested in the D.C. RFA. He said that he understood that civilian leaders were under duress and “wanted things to be faster,” but there was a “lack of clarity, and a lack of focus, rehearsal, and preparation. It was a cold start.” He also told us that the DoD did not deny any request for civil disturbance support and no one recommended to him that he should deny any request.

Regarding the DoD’s preparations for January 6, 2021, LTG Flynn and LTG Piatt told us that protecting the Capitol is a law enforcement mission, not a DoD mission. Four Army Staff witnesses

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<sup>72</sup> This report does not address any procurement matters or fencing installed at the Capitol.

<sup>73</sup> The Joint Reception Staging Onward Movement and Integration process identifies incoming personnel, their mission capabilities, and the assets they bring, and then pairs them with the support request from the host state NG and civil authorities during a crisis or natural disaster. The complete life cycle of the process begins with receiving personnel and equipment, transporting assets to their requested locations, and providing the logistical support required to safely conduct operations. Then they must return personnel and equipment to their home station when NG or Federal support is no longer required, all while maintaining 100 percent accountability.

told us that the DoD, including the Army and the DCNG, responded quickly under the circumstances. LTG Piatt in particular praised the DCNG's response. He said:

The time that it [the response] took was [the] time [to] withdraw from one mission, re-equip, re-mission, recall forces, and reconfigure support packages for a completely new mission. ... get back to your headquarters, in this case the Armory. Get a new set of mission orders, get your equipment issued, reconfigure, and head to a different mission that was never even in our wildest estimates was [sic] going to be a part of their mission set for this time [January 5-7, 2021]. ... I think they did [it] extremely fast and I don't think anyone delayed them. I think there's confusion, there's fog, there's friction, there's frustration, but we knew that we could not just commit a force to an unknown mission with an unclear ... task and purpose ... .

[Paragraph omitted]

If we would have piecemealed forces in there without a mission we would have run the risk of doing incredible harm and probably losing the force that was going to be needed to secure the Capitol. In my professional observation this was done with extreme professionalism and extreme speed.

GEN McConville stated that if any law enforcement organization "wanted a robust military deterrent at the Capitol [for January 6, 2021] one should have been requested," as was the case for the January 20, 2021 presidential inauguration.<sup>74</sup> He continued by saying that the DoD must be very careful about domestic employment of military resources for a law enforcement mission. GEN McConville told us that the scope of our review of January 6, 2021 events could have been different if the DoD had rushed Soldiers, without a plan, into a chaotic situation and the Soldiers were not properly trained and equipped for riot control and became casualties, or they were equipped and armed and shot civilians to defend themselves.

Mr. McCarthy told us that the DoJ, as the lead Federal agency for the events of early June 2020, established a command and control structure, coordinated between the supporting organizations, and assigned tasks and resources. Mr. McCarthy's assessment was that the DoJ did not perform its necessary lead Federal agency functions on January 6, 2021. To stress the complexity that required the whole-of-government leadership of a lead Federal agency, he pointed out that the MPD, USPP, and USSS all were at The Ellipse in the morning. The crowd crossed multiple different Federal and local jurisdictions as it converged on the Capitol from The Ellipse and other locations in the city, yet no single law enforcement agency was in charge.

Witnesses distinguished between the way civilian law enforcement agencies and the military respond to calls for help, explaining that individual law enforcement officers respond immediately to distress calls while the military sends units after determining mission details and issuing orders. One of these witnesses told us that the Army would not send individual Guardsmen, who did not have riot gear, directly from their homes or TCPs to the Capitol. GEN McConville stated that the Army's most ready and trained units require 2 to 3 hours to respond. LTG Flynn added that the DCNG had to re-position, re-organize, re-orient, and then re-mission forces, and did a very good job responding quickly under the circumstances on January 6, 2021.

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<sup>74</sup> DHS designated the January 20, 2021 presidential Inauguration as a National Special Security Event. For information about this, visit <https://www.secretservice.gov/protection/events/credentialing#:~:text=What%20is%20a%20National%20Special,grants%20the%20Secretary%20this%20authority.>

### *Significant Events After January 6, 2021*

Mr. McCarthy traveled to USCP HQ, where he met with Mr. Sund and an Assistant USCP Chief at approximately 12:23 a.m. on January 7, 2021. They discussed the previous day's events and what was still to come, and Mr. McCarthy assured Mr. Sund of the DoD's continued support. A witness who accompanied Mr. McCarthy told us that the MPD's Assistant Chief said that the USCP had no credible evidence in advance that anything like the attack on the Capitol was going to happen.

At 2:15 a.m., January 7, 2021, the DCNG reported that 740 Guardsmen were in support of operations at the Capitol. According to the DCNG [REDACTED], the Guardsmen conducted support at the Capitol and the necessary command and control, medical support, sustainment operations, and functions. Guardsmen also initiated the activities required for the Reception, Statement, Onward Movement and Integration process. At approximately 2:30 a.m., additional NG personnel relieved the QRF personnel who arrived just before 6:00 p.m. on the previous night, January 6, 2021.

The TCP mission continued on January 7, 2021, from 7:30 a.m. to between 6:00 p.m. and 8:00 p.m. Although the 30 TCPs were renumbered, the intersections remained the same. The remaining TCP personnel were then broken down into platoons. Some personnel did not report for duty due to possible COVID-19 exposure. The DCNG staffed all 30 TCPs, some with only two DCNG personnel and at least one MPD officer. According to the TCP OIC, the Pennsylvania NG eventually relieved the DCNG personnel at the TCPs after a couple of days, but the TCP mission continued through the January 20, 2021 presidential inauguration. The TCP OIC added that during the TCP mission, her personnel sustained no injuries, but encountered one incident involving some Proud Boys yelling racially derogatory language.

On January 7, 2021, at 9:07 a.m., the NGB Operations Directorate e-mailed Maj Gen Nordhaus the number of NG forces expected to report to the Armory over the next several days. Following reception and staging at the Armory, the forces would integrate with DCNG forces supporting Federal law enforcement. A spreadsheet attached to the e-mail showed the total numbers, by state, as of 9:04 a.m. It indicated that the DoD expected 2,100 Guardsmen to be on duty at the Capitol by the end of Thursday, January 7, 2021; 5,200 by the end of Friday, January 8, 2021; and 6,200 by the end of Saturday, January 9, 2021. Table 3 is an excerpt from the spreadsheet and indicates the number of National Guardsmen by state.

*Table 3. Number of National Guardsman by State January 7 through 9, 2021*

	Jan. 7 Thurs AM	Jan. 7 Thurs PM	Jan. 8 Fri AM	Jan. 8 Fri PM	Jan. 9 Sat AM	Jan. 9 Sat PM
<b>DC</b>	1,000	1,000	1,000	1,000	1,000	1,000
<b>VA</b>	500	500	500	2,000	2,000	2,000
<b>MD</b>	500	500	500	500	500	500
<b>PA</b>	0	50	200	500	800	1,000
<b>NY</b>	0	50	200	500	800	1,000
<b>NJ</b>	0	0	0	500	500	500
<b>DE</b>	0	0	0	200	200	200

The e-mail to Maj Gen Nordhaus also stated that Guardsmen would be on orders for up to 30 days, and that four different states lacked between 77 and 700 sets of riot control gear.

Army National Guard (ARNG) Execution Order 100-21 detailed the mission, intent, end-state, equipment, and other information for ARNG forces arriving in D.C. to support the DCNG.<sup>75</sup> The Execution Order stated, in part, that the SecDef directed the ARNG to assemble troops prepared to support law enforcement to prevent further civil unrest and restore law and order. The ARNG would mobilize and deploy DCNG personnel in D.C. on January 7, 2021, to augment the DCNG in its support of civil authorities to protect life and infrastructure. Soldiers would deploy with individual weapons, riot gear, small arms protective plates, and personal protective equipment.

Mr. Sund signed a letter to MG Walker, dated January 7, 2021. He wrote:

I confirm the emergency request, made in accordance with sections 1970 and 1974 of Title 2, U.S. Code, conveyed on the evening of January 6, 2021, for Department of Defense support in protecting Members of Congress and other Congressional personnel, and in securing the grounds and property of the United States Capitol.

Specifically, the Board requests that the Department of Defense make available a minimum of 1,500, and a maximum of 6,200 National Guard personnel to assist in protecting the perimeter of the U.S. Capitol, with a minimum of 850 per shift.

[Paragraph omitted]

This support is required through January 24, 2021.

Mr. Rosen signed a letter to Mr. McCarthy, dated January 12, 2021, that acknowledged his January 4, 2021 informal advice that Executive Order 11485 and the D.C. Code authorized the planned DCNG support of the D.C. civil authorities for January 5 through 7, 2021, as requested in the D.C. RFA. [REDACTED]

Mr. Rapuano signed a memorandum for Mr. Miller on January 15, 2021, to document approval for NG support to the USCP in response to incidents at the Capitol on January 6, 2021. He attached Mr. Sund's January 7, 2021 written request to MG Walker and wrote:

You approved the requested support verbally [orally], and ordered full mobilization of the DCNG in response to this request, including the Quick Reaction Force (QRF), and the temporary re-missioning of any DCNG personnel who had otherwise been supporting the DC Metropolitan Police Department as authorized by you on January 4, 2021.

You also directed the Chief of the National Guard Bureau to request on your behalf that State officials order NG personnel to duty under Section 502(f) of Title 32, U.S. Code to assist in fulfilling the request.

DoD may provide assistance to the USCP in accordance with Section 1970 of Title 2, U.S. Code, in the performance of its duties related to protection. When

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<sup>75</sup> ARNG Execution Order 100-21, "Civil Disturbance Operations (CDO) in the District of Columbia (D.C.)," January 8, 2021.

such assistance is temporary, DoD may provide it on a non-reimbursable basis. Because you have authority to provide support under Section 1970, you may authorize NG personnel, including DCNG personnel, to fulfill the request in a Section 502(f) of Title 32, U.S. Code, duty status.

Based on your authorization of duty under Section 502(f), and at your request, State Governors ordered their NG forces to duty to support this mission, and those forces remain under the command and control of their respective State Governors.

Section 277 of Title 10, U.S. Code, requires reimbursement for NG personnel providing support to law enforcement agencies using NG personnel performing duty under Section 502(f) of Title 32, U.S. Code, notwithstanding any other provision of law. Pursuant to Section 277(c), the Secretary of Defense may waive this requirement for reimbursement if such support results in a benefit to the NG personnel providing the support that is substantially equivalent to that which would otherwise be obtained from military operations or training.

Mr. Rapuano recommended that Mr. Miller authorize the support on a non-reimbursable basis, in accordance with 10 U.S.C. § 277, "Reimbursement," paragraph (c). Mr. Rapuano also recommended that the NGB Chief request, on Mr. Miller's behalf, that State officials order NG personnel to duty under 32 U.S.C. § 502(f). He added that this included the QRF, and the temporary re-missioning of any DCNG personnel who had otherwise been supporting the MPD as authorized on January 4, 2021. Mr. Miller initialed the memorandum on January 19, 2021, indicating that he approved Mr. Rapuano's recommendations. Mr. Rapuano coordinated the memorandum with Mr. McCarthy, GEN Hokanson, the DoD OGC, and the Joint Staff before he sent it to Mr. Miller for approval.

#### *DoD OIG Conclusions on DoD Actions On and After January 6, 2021*

We concluded that the DoD's actions to respond to the USCP's RFA on January 6, 2021, were appropriate, supported by requirements, consistent with the DoD's roles and responsibilities for DSCA, and complied with laws, regulations, and other applicable guidance. In particular, we determined that the decisions made by Mr. Miller, Mr. McCarthy, and other senior DoD officials, and the actions taken by the DoD in response to the civil disturbance at the Capitol on January 6, 2021, were reasonable in light of the circumstances that existed on that day and requests from D.C. officials and the USCP.

We reached our conclusion based on the following.

- The Capitol Police Board authorized and Mr. Sund made an oral emergency RFA to the DoD at 2:08 p.m. on January 6, 2021. Mr. Sund followed up on January 7, 2021, with a written version of the request.
- Mr. Miller was the appropriate approval authority for the USCP's RFA, and there was no requirement for him to obtain presidential approval to respond because:
  - DoD policy states that the SecDef is the approval authority for requests for direct assistance in support of civilian law enforcement agencies,

- Executive Order 11485 authorized the SecDef, through the DCNG CG, to command the DCNG when the DCNG is in a militia status, and
- Section 1970, title 2, United States Code, "Assistance by executive departments and agencies," authorizes the DoD to help the USCP when the Capitol Police Board requests assistance.
- Subordinate commanders, including Mr. McCarthy and MG Walker, had to get Mr. Miller's approval to fulfill the USCP RFA. They did not have immediate response authority because that authority does not apply to supporting civilian law enforcement activities. They could not exercise emergency authority because exercising that authority requires that it be impossible to communicate through the chain of command to obtain a presidential authorization to conduct civil disturbance operations, and those circumstances did not exist on January 6, 2021.
- Mr. Miller approved the USCP RFA.
- Mr. Miller ordered the DCNG to mobilize.
- Mr. Miller properly requested that state officials order NG personnel to duty under 32 U.S.C. § 502(f) to help with DoD's response to the USCP RFA.
- Mr. Miller directed GEN Hokanson to request that officials from several neighboring states order NG personnel to duty to help with the DoD response.
- Mr. Miller approved the CONOPS that Mr. McCarthy developed for the DCNG's response to the events at the Capitol.

We also determined that DoD officials did not improperly delay or obstruct the DoD's response to the USCP RFA on January 6, 2021. We made this determination based on the following.

- We determined that the overall response time from receipt of the USCP RFA to the arrival of DCNG personnel at the Capitol was approximately 3¼ to 3½ hours.
- We did not identify a standard that required the DoD to fulfill a DSCA RFA within a specified amount of time after receiving one.
- Following the issuance of Executive Order 11485, the SecDef delegated to the SecArmy, through the DCNG CG, command of all DCNG operations in a militia status when aiding D.C. civil authorities.
- The only DCNG force available to respond to the events at the Capitol between the time rioters began to breach the Capitol perimeter and approximately 4:30 p.m. was the 40-person QRF. The DCNG did not move the 114 troops on duty at TCPs and Metro stations and these troops remained on station until they returned to the Armory, and they were not deployed to the Capitol. The DCNG did not supplement the QRF with additional troops until after troops assigned to the evening shift at TCPs and Metro stations began to report to the Armory for duty and were equipped with riot gear and added to the response force.

- The officer designated to lead the QRF on January 4, 2021, had no law enforcement or civil disturbance experience.
- Only 16 members of the QRF were law enforcement specialists. Eight members of the QRF were transferred to other duties and replaced before January 6, 2021.
- QRF members received limited time on January 6 to train as a unit and were not trained on how to operate their tactical radios.
- Mr. McCarthy acted within his authority and discretion when he required a CONOPS before he would authorize MG Walker to deploy the DCNG to the Capitol in response to the USCP RFA.
- A CONOPS could be oral and needed only to identify a mission, task, and purpose, and basic command, control, communications, and logistics details.
- Concerns about optics and a potentially negative public impression created by sending NG forces to the Capitol while the Congress was certifying the Electoral College count did not impact DoD's response on January 6, 2021, because Mr. McCarthy was already requesting Mr. Miller's approval of the USCP RFA within minutes of the start of the teleconference in his office.

## **VI. DOD OIG REVIEW OBSERVATIONS AND RECOMMENDATIONS**

In Sections IV and V of this report, we detail and make conclusions about the DoD's actions before and on January 6, 2021. In this section, we detail our observations and make recommendations that the DoD, the Army, and the DCNG should consider to improve DSCA operations, policies, and procedures.

Many questions have surfaced in the media and in questions and comments from congressional committees about the DoD's response time to the Capitol on January 6, 2021. There is a longstanding principle in U.S. law, codified in statutes and DoD directives that requires civilian control of military operations in a domestic environment. The DCNG operations require SecDef authorization followed by SecArmy direction and guidance for any DCNG DSCA response to civilian authorities. Before and on the morning of January 6, 2021, DoD leadership had no indication that later that day the USCP would make an emergency DSCA RFA to the DoD for an immediate response to the Capitol. We also note that on January 5 and in the morning on January 6, no incidents occurred that foreshadowed the events of the afternoon of January 6 at the Capitol, and no Federal agency, including the USCP, requested DoD assistance for anticipated civil disturbances. Initial reports the DoD received about ongoing events during the early afternoon of January 6, 2021, were contradictory. For example, after the first breach of the Capitol perimeter, the Army Operations Center received information from the DHS suggesting that no major incidents were occurring.

While events unfolded on January 6, 2021, a chaotic and confusing situation developed that affected the conference call at approximately 2:20 p.m. between senior leaders from the DoD, Army Staff, DCNG, D.C. government, and USCP. This was critical because the USCP made its request for immediate emergency assistance during the conference call. Following Mr. Miller's subsequent



approval of the USCP RFA, Mr. McCarthy spent 25 minutes on multiple telephone calls to reassure civilian leaders and to correct inaccurate media reports that the Army denied the USCP RFA.

Differences also existed between the approaches Mr. McCarthy and DCNG leadership took to emergency response planning. This, coupled with the incorrect media reports, resulted in Mr. McCarthy traveling to MPD HQ to reassure Mayor Bowser personally that the DCNG would respond and to work with key civilian leaders to develop a CONOPS to deploy the DCNG to the Capitol.

Civilian law enforcement and the U.S. Armed Forces follow different doctrines for emergency responses to civilian incidents. Civilian law enforcement is configured and has a duty to respond immediately, as individual patrols, to emergency calls for help from the public and other law enforcement agencies. Civilian law enforcement normally has communications equipment that allows multiple jurisdictions to interact with and coordinate between the individual responders. Military personnel are trained to respond to civilian emergency events, not by sending individuals into an uncertain situation as they become available, but by assembling and deploying a force capable of decisive operations. Military doctrine requires that commanders first determine essential details, conduct a mission analysis, and then develop a thorough CONOPS. This is the process the DoD followed to support the December 31, 2020 D.C. RFA for only limited DCNG personnel for TCP and Metro Station support. In exigent circumstances, all of the planning steps can be completed orally, including the CONOPS.

The vast majority of DCNG personnel are not active duty personnel and the DCNG is not an emergency response organization equivalent to a police or fire department. The DoD has no units configured for immediate response to civil disturbances in the NCR, and the DCNG has no civil disturbance capability available for immediate response unless a force is requested and mobilized before a civil disturbance event. We note in Sections IV and V of this report that civilian authorities did not request DCNG civil disturbance response capability before the breach of the Capitol on January 6, 2021. The December 31, 2020 D.C. RFA, which requested limited DCNG support for TCPs and Metro stations on January 5-7, 2021, was not an emergency request.

The unprecedented events of January 6, 2021, highlighted areas where the DoD, Army, and DCNG could improve DSCA operations, policies, and procedures. Based on our review and for the reasons stated below, we recommend that the Secretary of Defense and the Secretary of the Army review and take appropriate action regarding the following.

#### *Operational Commander/Command and Control*

Executive Order 11485 places the SecDef in the DCNG chain of command. The SecDef subsequently delegated to the SecArmy the responsibility to command and control DCNG operations when conducted to support D.C. civil authorities. The SecArmy is not an operational military commander. The U.S. Northern Command (USNORTHCOM) was created on October 1, 2002. Part of USNORTHCOM's mission includes planning, organizing, and executing homeland defense and civil support missions throughout the United States. One of NORTHCOM's subordinate commands is Joint Force Headquarters National Capitol Region, Fort McNair, Washington, D.C. Although the NCR and D.C. fall within USNORTHCOM's area of responsibility, USNORTHCOM's roles and responsibilities are not clearly defined in the DSCA process for the D.C. RFA, the USCP RFA, or an immediate emergency response to assist civilian authorities within Washington, D.C. We recommend that the DoD take the following actions.

1. Review and update DoD DSCA policy and guidance concerning:
  - a. USNORTHCOM's role in providing support to civilian authorities within D.C. and the NCR; and
  - b. The command and control of the DCNG, including an operational commander for DSCA matters.
2. Integrate DoD's command and control with civilian authorities within the NCR in accordance with the National Emergency Communications Plan.

### *Communication*

Between January 5 and 6, 2021, the DCNG and Army Staff leaders defaulted to using mobile telephones, in many cases their personal devices, as the primary means of communication, including communications with supported local and Federal law enforcement agencies. In addition, Air Force elements of the DCNG response force, including members of the QRF, had no training on the use of multiband radios and radio communication protocols employed on January 6, 2021. Furthermore, some DCNG personnel did not receive multiband radios until after the USCP placed them into protective positions at the Capitol. We recommend that the DoD take the following actions.

1. Ensure DCNG and Army Staff leaders have reliable and functioning DoD-issued communications equipment.
2. Ensure DCNG personnel receive proper communications equipment before commencing civil disturbance operations.
3. Ensure DCNG personnel are fully trained on the use of multiband radios and communication protocols.

### *Planning*

The DSCA RFA process to request DCNG support is not codified in any directive. We also found no contingency plan that that DoD could have used on January 6, 2021, for a response to a civil disturbance within the NCR. We recommend that the DoD take the following actions.

1. Review and codify in policy the specific processes for Federal and non-Federal agencies to request military support for DSCA matters.
2. Consider formulating contingency plans for how the DoD and the DCNG should respond to major civil disturbance events within the NCR.
3. Conduct training with Federal and non-Federal agencies on how to submit a DSCA RFA to the DoD. The training should include information required by the DoD along with an explanation of the DoD approval process.
4. Establish information-sharing meetings with Federal and local agencies within the NCR when large-scale events are planned. These meetings should occur at a level below the SecArmy and be in accordance with established laws and DoD policies.

### *Training*

DCNG members assigned to the QRF were not sufficiently trained to conduct high-intensity civil disturbance operations such as the situation presented on January 6, 2021. Many of the DCNG's QRF personnel either had minimal or no CDO training or experience. Fewer than half of the personnel assigned to QRF duty had law enforcement or civil disturbance operations experience. Eight DCNG personnel were assigned to the QRF on the morning of January 6, 2021, and received minimal training before being deployed to the Capitol. We recommend that the DoD take the following actions.

1. Establish selection criteria and appropriate training for personnel performing as members of the DCNG QRF. This training should include scenarios and, where possible, training with Federal and non-Federal agencies.
2. Establish a QRF certification process for all personnel assigned to the DCNG QRF.
3. The DCNG QRF OIC should be someone with a background or experience in law enforcement or civil disturbance operations.

## APPENDIX A: STANDARDS<sup>76</sup>

### *Title 2, United States Code, "The Congress"*

#### 2 U.S.C. § 1970, "Assistance by Executive departments and agencies"

##### (a) Assistance

- 1) **In General:** Executive departments and Executive agencies may assist the United States Capitol Police in the performance of its duties by providing services (including personnel), equipment, and facilities on a temporary and reimbursable basis when requested by the Capitol Police Board and on a permanent and reimbursable basis upon advance written request of the Capitol Police Board; except that the Department of Defense and the Coast Guard may provide such assistance on a temporary basis without reimbursement when assisting the United States Capitol Police in its duties directly related to protection under sections 1922, 1961, 1966, 1967, and 1969 of this title and sections 5101 to 5107 and 5109 of title 40. Before making a request under this paragraph, the Capitol Police Board shall consult with appropriate Members of the Senate and House of Representatives in leadership positions, except in an emergency.
  
- 4) **Provision of Assistance:** Assistance under this section shall be provided-
  - (A) Consistent with the authority of the Capitol Police under sections 1961 and 1966 of this title;
  
  - (B) Upon the advance written request of
    - I. the Capitol Police Board; or
  
    - II. in an emergency –
      - i. The Sergeant at Arms and Doorkeeper of the Senate in any matter relating to the Senate; or
  
      - ii. The Sergeant at Arms of the House of Representatives in any matter relating to the House of Representatives; and
  
  - (C)
    - I. on a temporary and reimbursable basis;
  
    - II. on a permanent reimbursable basis upon advance written request of the Capitol Police Board; or
  
    - III. on a temporary basis without reimbursement by the Department of Defense and the Coast Guard as described under paragraph (1).

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<sup>76</sup> In this appendix, we present only relevant excerpts of laws, executive orders, and DoD policy that governed our review of DoD actions taken or, in some cases, not taken. In general, these standards governed by authorizing, limiting, or prohibiting action; prescribing procedures; and assigning responsibilities. All of these standards are open source and available for viewing in full text on the Internet.

## 2 U.S.C. § 1974, "Capitol Police special officers"

(a) **In general.** In the event of an emergency as determined by the Capitol Police Board or in a concurrent resolution of Congress, the Chief of the Capitol Police may appoint—

- 1) any law enforcement officer from any Federal agency or State or local government agency made available by that agency to serve as a special officer of the Capitol Police within the authorities of the Capitol Police in policing the Capitol buildings and grounds; and
- 2) any member of the uniformed services, including members of the National Guard, made available by the appropriate authority to serve as a special officer of the Capitol Police within the authorities of the Capitol Police in policing the Capitol buildings and grounds.

(b) **Conditions of appointment.** An individual appointed as a special officer under this section shall –

- 1) serve without pay for service performed as a special officer (other than pay received from the applicable employing agency or service);
- 2) serve as a special officer no longer than a period specified at the time of appointment;
- 3) not be a Federal employee by reason of service as a special officer, except as provided under paragraph (4); and
- 4) shall be an employee of the Government for purposes of chapter 171 of title 28 if that individual is acting within the scope of his office or employment in service as a special officer.

(e) **Approval.** Any appointment under this section shall be subject to initial approval by the Capitol Police Board and to final approval by the Speaker of the House of Representatives (in consultation with the Minority Leader of the House of Representatives) and the President pro tempore of the Senate (in consultation with the Minority Leader of the Senate), acting jointly.

*Title 10, United States Code, "Armed Forces"*

## 10 U.S.C. § 101, "Definitions"

d. Duty Status.—The following definitions relating to duty status apply in this title:

- 5) The term "full-time National Guard duty" means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

10 U.S.C. § 252, “Use of militia and armed forces to enforce Federal authority.”

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

10 U.S.C. § Section 277, “Reimbursement”

- (a) Subject to subsection (c), to the extent otherwise required by section 1535 of title 31 (popularly known as the “Economy Act”) or other applicable law, the Secretary of Defense shall require a civilian law enforcement agency to which support is provided under this chapter to reimburse the Department of Defense for that support.
- (b) –
- 1) Subject to subsection (c), the Secretary of Defense shall require a Federal agency to which law enforcement support or support to a national special security event is provided by National Guard personnel performing duty under section 502(f) of title 32 to reimburse the Department of Defense for the costs of that support, notwithstanding any other provision of law. No other provision of this chapter shall apply to such support.
  - 2) Any funds received by the Department of Defense under this subsection as reimbursement for support provided by personnel of the National Guard shall be credited, at the election of the Secretary of Defense, to the following:
    - (A) The appropriation, fund, or account used to fund the support.
    - (B) The appropriation, fund, or account currently available for reimbursement purposes.
- (c) An agency to which support is provided under this chapter or section 502(f) of title 32 is not required to reimburse the Department of Defense for such support if the Secretary of Defense waives reimbursement. The Secretary may waive the reimbursement requirement under this subsection if such support—
- 1) is provided in the normal course of military training or operations; or
  - 2) results in a benefit to the element of the Department of Defense or personnel of the National Guard providing the support that is substantially equivalent to that which would otherwise be obtained from military operations or training.

10 U.S.C. § Section 12406, “National Guard in Federal Service”

Whenever—

- 1) the United States, or any of the Commonwealths or possessions, is invaded or is in danger of invasion by a foreign nation;

- 2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or
- 3) the President is unable with the regular forces to execute the laws of the United States;

the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States or, in the case of the District of Columbia, through the commanding general of the National Guard of the District of Columbia.

*Title 32, United States Code, "National Guard"*

32 U.S.C. § 502, "Required drills and field exercises," states, in part,

(f) -

- 1) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—
  - (A) without his consent, but with the pay and allowances provided by law; or
  - (B) with his consent, either with or without pay and allowances, be ordered to perform training or other duty in addition to that prescribed under subsection (a).
- 2) The training or duty ordered to be performed under paragraph (1) may include the following:
  - (A) Support of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense.
  - (B) Support of training operations and training missions assigned in whole or in part to the National Guard by the Secretary concerned, but only to the extent that such training missions and training operations—
    - i. are performed in the United States or the Commonwealth of Puerto Rico or possessions of the United States; and
    - ii. are only to instruct active duty military, foreign military (under the same authorities and restrictions applicable to active duty troops), Department of Defense contractor personnel, or Department of Defense civilian employees.
- 3) Duty without pay shall be considered for all purposes as if it were duty with pay.

*Title 18, United States Code, "Crimes and Criminal Procedure"*

18 U.S.C. § 1385, "Use of Army and Air Force as posse comitatus"

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>77, 78</sup>

*Title 50, United States Code, "War and National Defense"*

50 U.S.C. § 1631, "Declaration of national emergency by Executive order; authority; publication in Federal Register; transmittal to Congress"

When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act. Such specification may be made either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress.

*Public Law 104-321, 104th Congress, October 19, 1996, "Emergency Management Assistance Compact"*

The Emergency Management Assistance Compact, states, in part, the following.

ARTICLE I.

PURPOSE AND AUTHORITIES.

The purpose of this compact is to provide for mutual assistance between the states entering into this compact in managing any emergency disaster that is duly declared by the Governor of the affected state, whether arising from natural disaster, technological hazard, man-made disaster, civil emergency aspects of resources shortages, community disorders, insurgency, or enemy attack.

This compact shall also provide for mutual cooperation in emergency-related exercises, testing, or other training activities using equipment and personnel simulating performance of any aspect of the giving and receiving of aid by party states or subdivisions of party states during emergencies, such actions occurring outside actual declared emergency periods. Mutual assistance in this compact may include the use of the states' National Guard forces, either in accordance with the National Guard Mutual Assistance Compact or by mutual agreement between states.

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<sup>77</sup> From the Center for Law and Military Operations, The Judge Advocate General's Legal Center & School, U.S. Army, "Domestic Operational Law: 2018 Handbook for Judge Advocates," September 2018. As amended, this generally prohibits the use of active duty personnel to enforce U.S. laws within the borders of the United States. The purpose of the Act was to limit direct military involvement with civilian law enforcement, without congressional or constitutional authorization.

<sup>78</sup> From the Cornell Law School, Legal Information Institute, U.S. Constitution Annotated, Article II. Executive Department, Section III, "The President as Law Enforcer, Military Power in Law Enforcement: The Posse Comitatus." The prohibition applies to NG personnel when they serve in Title 10 status. It does not apply to them when they are serving on state active duty or activated pursuant to Title 32.



## ARTICLE II.

## GENERAL IMPLEMENTATION.

Each party state entering into this compact recognizes that many emergencies transcend political jurisdictional boundaries and that intergovernmental coordination is essential in managing these and other emergencies under this compact. Each state further recognizes that there will be emergencies which require immediate access and present procedures to apply outside resources to make a prompt and effective response to such an emergency. This is because few, if any, individual states have all the resources they may need in all types of emergencies or the capability of delivering resources to areas where emergencies exist.

The prompt, full, and effective utilization of resources of the participating states, including any resources on hand or available from the federal government or any other source, that are essential to the safety, care, and welfare of the people in the event of any emergency or disaster declared by a party state, shall be the underlying principle on which all articles of this compact shall be understood.

## ARTICLE III.

## PARTY STATE RESPONSIBILITIES

B. Requests shall provide the following information:

2. The amount and type of personnel, equipment, materials and supplies needed, and a reasonable estimate of the length of time they will be needed.

## ARTICLE XIII.

## ADDITIONAL PROVISIONS.

Nothing in this compact shall authorize or permit the use of military force by the National Guard of a state at any place outside that state in any emergency for which the President is authorized by law to call into federal service the militia, or for any purpose for which the use of the Army or the Air Force would in the absence of express statutory authorization be prohibited under section 1385, title 18, United States Code.<sup>79</sup>

*Executive Order 11485, "Supervision and control of the National Guard of the District of Columbia," October 1, 1969*

By virtue of the authority vested in me as President of the United States and Commander-in-Chief of the Armed Forces of the United States and the National Guard of the District of Columbia under the Constitution and laws of the United States, including section 6 of the Act of March 1, 1889, 25 Stat. 773 (District of Columbia Code, sec. 39-112), and section 110 of title 32 and section 301 of title 3 of the United States Code, it is hereby ordered as follows.

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<sup>79</sup> The EMACweb website states that since ratification and signing into law in 1996 (Public Law 104-321), 50 states, the District of Columbia, Puerto Rico, Guam, U.S. Virgin Islands and the Northern Mariana Islands have enacted legislation to become EMAC members. The National Guard deploy through EMAC in both State Active Duty and Title 32 to assist Member States.

**Section 1.** The Secretary of Defense, except as provided In section 3, is authorized and directed to supervise, administer and control the Army National Guard and the Air National Guard of the District of Columbia (hereinafter "National Guard") while in militia status. The Commanding General of the National Guard shall report to the Secretary of Defense or to an official of the Department of Defense designated by the Secretary on all matters pertaining to the National Guard. Through the Commanding General, the Secretary of Defense shall command the military operations, including training, parades and other duty, of the National Guard while in militia status. Subject to the direction of the President as Commander-in-Chief, the Secretary may order out the National Guard under title 39 of the District of Columbia Code to aid the civil authorities of the District of Columbia.

**Section 2.** The Attorney General is responsible for: (1) advising the President with respect to the alternatives available pursuant to law for the use of the National Guard to aid the civil authorities of the District of Columbia; and (2) for establishing after consultation with the Secretary of Defense law enforcement policies to be observed by the military forces in the event the National Guard is used in its militia status to aid civil authorities of the District of Columbia.

**Section 3.** The Commanding General and the Adjutant General of the National Guard will be appointed by the President. The Secretary of Defense, after consultation with the Attorney General, shall at such times as may be appropriate submit to the President recommendations with respect to such appointments.

**Section 4.** The Secretary of Defense and the Attorney General are authorized to delegate to subordinate officials of their respective Departments any of the authority conferred upon them by this order.

**Section 5.** Executive Order No. 10030 of January 26, 1949, is hereby superseded.

*Secretary of Defense Memorandum, "Supervision and Control of the National Guard of the District of Columbia," October 10, 1969*

The President, by Executive Order Number 11485, October 1, 1969, authorized and directed me to supervise, administer, and control the Army National Guard and the Air National Guard of the District of Columbia (hereinafter "National Guard") while in a militia status except as provided in Section 3 of the Executive Order. The President also directed that I command (through the Commanding General of the National Guard) the military operations, including training, parades and other duty of the National Guard while in militia status and authorized me to delegate to subordinate officials any of the authority conferred upon me by the Executive Order.

I hereby direct the Secretary of the Army to act for me in the above matters pertaining to the Army National Guard and the Secretary of the Air Force to act for me in matters pertaining to the Air National Guard. The Commanding General of the National Guard shall report to the Secretary concerned for their respective elements of the National Guard and the Secretaries will exercise this authority through the Commanding General of the National Guard while the National Guard is in militia status.

As to the use of the National Guard in militia status to aid civil authorities, I hereby direct the Secretary of the Army to command, through the Commanding General of the National Guard, all operations of the Army and Air National Guard elements as an exception to the above. The Secretary of the Army, after consultation with me and subject to the direction of the President as

Commander-in-Chief, and in accordance with the Interdepartmental Action plan for Civil Disturbance, may order out the National Guard under Title 39 of the District of Columbia code to aid the civil authorities of the District of Columbia.

The Secretary of the Army and the Secretary of the Air Force are authorized to delegate the foregoing authority to the Under Secretary or Assistant Secretary for Manpower and Reserve Affairs of their respective military departments.

*Title 5, Code of the District of Columbia, "Police, Firefighters, Medical Examiner, and Forensic Sciences"*

Section 129.03, title 5, "Appointment of Special Police without Pay," states that the Mayor of the District of Columbia may, upon any emergency of riot, pestilence, invasion, insurrection, or during any day of public election, ceremony, or celebration, appoint as many special privates without pay, from among the citizens, as he may deem advisable, and for a specified time. During the term of service of such special privates, they shall possess all the powers and privileges and perform all the duties of the privates of the standing police force of the District and such special privates shall wear an emblem to be presented by the Mayor.

*DoD Directive (DoDD) 3025.18, "Defense Support of Civil Authorities (DSCA)," December 2, 2010, (Incorporating Change 2, March 19, 2018)*

DoDD 3025.18, states, in part, the following.

1. PURPOSE. This Directive:

- a. Establishes policy and assigns responsibilities for DSCA.
- d. Provides guidance for the execution and oversight of DSCA when requested by civil authorities or by qualifying entities and approved by the appropriate DoD official, or as directed by the President, within the United States, including the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States or any political subdivision thereof.
- e. Authorizes immediate response authority for providing DSCA, when requested.
- f. Authorizes emergency authority for the use of military force, under dire circumstances, as described in paragraph 4.k. above the signature of this Directive.
- g. Incorporates the Deputy Secretary of Defense Memorandum (Reference (e)), which is hereby cancelled.

4. POLICY. It is DoD policy

- d. All requests for DSCA shall be written, and shall include a commitment to reimburse the Department of Defense in accordance with sections 5121, et. seq., of Reference (g) (also known as "The Stafford Act"), section 1535 of title 31, U.S.C. (also known as "The Economy Act" (Reference (y))), or other authorities except requests for support for

- immediate response, and mutual or automatic aid, in accordance with paragraphs 4.i. and 4.o. of this section. Unless approval authority is otherwise delegated by the Secretary of Defense, all DSCA requests shall be submitted to the office of the Executive Secretary of the Department of Defense. For assistance provided according to paragraph 4.i of this section, civil authorities shall be informed that oral requests for assistance in an emergency must be followed by a written request that includes an offer to reimburse the Department of Defense at the earliest available opportunity. States also must reimburse the United States Treasury in accordance with section 9701 of Reference (y). Support may be provided on a non-reimbursable basis only if required by law or if both authorized by law and approved by the appropriate DoD official.
- e. All requests from civil authorities and qualifying entities for assistance shall be evaluated for:
1. Legality (compliance with laws).
  2. Lethality (potential use of lethal force by or against DoD Forces).
  3. Risk (safety of DoD Forces).
  4. Cost (including the source of funding and the effect on the DoD budget).
  5. Appropriateness (whether providing the requested support is in the interest of the Department).
  6. Readiness (impact on the Department of Defense's ability to perform its other primary missions).
- j. The authority of State officials is recognized to direct a State immediate response using National Guard personnel under State command and control (including personnel in a title 32, U.S.C. (Reference (f)) (hereafter referred to as "Title 32") status) in accordance with State law, but National Guard personnel will not be placed in or extended in Title 32 status to conduct State immediate response activities.
- l. Except for immediate response and emergency authority as described in paragraphs 4.i. and 4.k. of this section, only the Secretary of Defense may approve requests from civil authorities or qualifying entities for Federal military support for:
1. Defense assistance in responding to civil disturbances (requires Presidential authorization) in accordance with Reference (c).
  2. Defense response to chemical, biological, radiological, nuclear, and high-yield explosives (CBRNE) incidents, except as authorized in paragraph 4.s. of this section.
  3. Defense assistance to civilian law enforcement organizations, except as authorized in paragraph 4.s. of this section and Reference (c).
  4. Assistance in responding with assets with potential for lethality. This support includes loans of arms; vessels or aircraft; or ammunition. It also includes assistance under section 282 of Reference (d) and section 831 of title 18, U.S.C. (Reference (ac)); all support to counterterrorism operations; and all support to civilian law enforcement authorities in situations where a confrontation between civilian law enforcement and civilian individuals or groups is reasonably anticipated.

- s. The ASD(HD&GS) may approve requests for the following types of DoD support of civilian law enforcement agencies in accordance with the Deputy Secretary of Defense Memorandum (Reference (af)):
  1. Non-lethal support that is unrelated to law enforcement functions such as arrest, search, seizure, or crowd or traffic control.
  2. Support provided by non-military personnel under section 2564 of Reference (d), including support contracted by DoD to support civilian law enforcement agencies during certain sporting events.
  3. CBRNE detection and response capabilities for pre-planned events, with the concurrence of the force providers, the Chairman of the Joint Chiefs of Staff, and other DoD officials as appropriate.

### **Glossary, Part II. Definitions.**

**DSCA.** Support provided by U.S. Federal military forces, DoD civilians, DoD contract personnel, DoD Component assets, and National Guard forces (when the Secretary of Defense, in coordination with the Governors of the affected States, elects and requests to use those forces in title 32, U.S.C., status) in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events.

**Emergency authority.** A Federal military commander's authority, in extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances because 1) such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order or (2) duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions.

**Immediate response authority.** A Federal military commander's, DoD Component Head's, and/or responsible DoD civilian official's authority temporarily to employ resources under their control, subject to any supplemental direction provided by higher headquarters, and provide those resources to save lives, prevent human suffering, or mitigate great property damage in response to a request for assistance from a civil authority, under imminently serious conditions when time does not permit approval from a higher authority within the United States. Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory. (State immediate response is addressed in paragraph 4.j. above the signature of this Directive.)

*DoD Instruction 3025.21, "Defense Support of Civilian Law Enforcement Agencies," February 27, 2013, (Incorporating Change 1, Effective February 8, 2019)*

4. Policy. It is DoD policy that,
  - a. DoD shall be prepared to support civilian law enforcement agencies consistent with the needs of military preparedness of the United States, while recognizing

and conforming to the legal limitations on direct DoD involvement in civilian law enforcement activities.

Enclosure 2, Responsibilities:

9. CJCS. The CJCS, in addition to the responsibilities in section 7 of this enclosure, shall:
  - c. Advise the Secretary of Defense, ASD(HD&GS), or Heads of the DoD Components, upon request, on the effect on military preparedness of the United States of any request for defense assistance with respect to CDO.

Enclosure 3, Participation Of DoD Personnel In Civilian Law Enforcement Activities:

1. GUIDING STATUTORY REQUIREMENTS AND SUPPORTING POLICIES

a. Statutory Restrictions.

- 1) The primary restrictions on DoD participation in civilian law enforcement activities is the Posse Comitatus Act. It provides that whoever willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute U.S. laws, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, shall be fined under [Title 18, United States Code], or imprisoned not more than 2 years, or both.

- b. "Permissible Direct Assistance." Categories of active participation in direct law enforcement-type activities (e.g., search, seizure, and arrest) that are not restricted by law or DoD policy are:

- 3) When permitted under emergency authority in accordance with [DoD Directive 3025.18], Federal military commanders have the authority, in extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances because:

(a) Such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order; or,

(b) When duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions. Federal action, including the use of Federal military forces, is authorized when necessary to protect Federal property or functions.

5) Actions taken under express statutory authority to assist officials in executing the laws, subject to applicable limitations. The laws that permit direct DoD participation in civilian law enforcement include:

(f) Protection of the President, Vice President, and other designated dignitaries in accordance with section 1751 of [Title 18, United States Code] and Public Law 94-524 (Reference (x)).

c. Restrictions on Direct Assistance.

(1) Except as authorized in this Instruction (e.g., in Enclosures 3 and 4), DoD personnel are prohibited from providing the following forms of direct civilian law enforcement assistance:

(b) A search or seizure.

(c) An arrest; apprehension; stop and frisk; engaging in interviews, interrogations, canvassing, or questioning of potential witnesses or suspects; or similar activity.

(d) Using force or physical violence, brandishing a weapon, discharging or using a weapon, or threatening to discharge or use a weapon except in self-defense, in defense of other DoD persons in the vicinity, or in defense of non-DoD persons, including civilian law enforcement personnel, in the vicinity when directly related to an assigned activity or mission.

(f) Surveillance or pursuit of individuals, vehicles, items, transactions, or physical locations, or acting as undercover agents, informants, investigators, or interrogators.

5. APPROVAL AUTHORITY. Requests by civilian law enforcement officials for use of DoD personnel to provide assistance to civilian law enforcement agencies shall be forwarded to the appropriate approval authority.

a. The Secretary of Defense is the approval authority for requests for direct assistance in support of civilian law enforcement agencies, including those responding with assets with the potential for lethality, except for the use of emergency authority as provided in subparagraph 1.b. (3) of this enclosure and in Reference (c) [DoDD 3025.18], and except as otherwise provided [in this instruction].

c. The Secretaries of the Military Departments and the Directors of the Defense Agencies may, in coordination with the ASD(HD&GS), approve the use of DoD personnel:

1) To provide training or expert advice in accordance with paragraphs 1.e. and 1.f. of this enclosure.

2) For equipment maintenance in accordance with paragraph 1.d. of this enclosure.

- 3) To monitor and communicate the movement of air and sea traffic in accordance with subparagraphs 1.d. (5)(b) 1 and 4 of this enclosure.
- d. All other requests, including those in which subordinate authorities recommend disapproval, shall be submitted promptly to the ASD(HD&GS) for consideration by the Secretary of Defense, as appropriate.
- f. All requests that are to be considered by the Secretary of Defense or the ASD(HD&GS) that may involve the use of Reserve Component personnel or equipment shall be coordinated with the ASD(M&RA). All requests that are to be considered by the Secretary of Defense or the ASD(HD&GS) that may involve the use of NG personnel also shall be coordinated with the Chief, NGB. All requests that are to be considered by the Secretary of Defense or the ASD(HD&GS) that may involve the use of NG equipment also shall be coordinated with the Secretary of the Military Department concerned and the Chief, NGB.

#### Enclosure 4, "DoD Support of CDO"

### 1. GUIDING STATUTORY REQUIREMENTS AND SUPPORTING POLICIES

- a. The President is authorized by the Constitution and laws of the United States to employ the Armed Forces of the United States to suppress insurrections, rebellions, and domestic violence under various conditions and circumstances. Planning and preparedness by the Federal Government, including DoD, for civil disturbances is important due to the potential severity of the consequences of such events for the Nation and the population.
- b. The primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in State and local governments. Supplementary responsibility is vested by statute in specific agencies of the Federal Government other than DoD. The President has additional powers and responsibilities under the Constitution of the United States to ensure that law and order are maintained.
- c. Any employment of Federal military forces in support of law enforcement operations shall maintain the primacy of civilian authority and unless otherwise directed by the President, responsibility for the management of the Federal response to civil disturbances rests with the Attorney General. The Attorney General is responsible for receiving State requests for Federal military assistance, coordinating such requests with the Secretary of Defense and other appropriate Federal officials, and presenting such requests to the President who will determine what Federal action will be taken.
- d. The employment of Federal military forces to control civil disturbances shall only occur in a specified civil jurisdiction under specific circumstances as authorized by the President, normally through issuance of an Executive order or other Presidential directive authorizing and directing the Secretary of Defense to provide for the restoration of law and order in a specific State or locality in accordance with sections 251-254 of Reference (d) [Title 10 U.S.C.].



#### 4. ROLE OF THE NG

- b. NG forces may be ordered or called into Federal service to ensure unified command and control of all Federal military forces for CDO when the President determines that action to be necessary in extreme circumstances.

#### 6. APPROVAL AUTHORITY

- a. The President is the approval authority for requests for assistance for CDO, except for emergency authority as provided in subparagraph 1.b.(3) of Enclosure 3 and in Reference (c) [DoD Directive 3025.18].

*DoD Instruction 3025.22, "The Use of the National Guard for Defense Support of Civil Authorities," July 26, 2013, (Incorporating Change 1, May 15, 2017)*

This Instruction states, in part, the following.

1. PURPOSE. This instruction establishes policy, assigns responsibilities, and provides procedures for the use of the National Guard for Defense Support of Civil Authorities (DSCA) in accordance with the authority in section 502(f) of Title 32, United States Code (U.S.C.) (Reference (a)), DoD Directive (DoDD) 5111.1 (Reference (b)), and Deputy Secretary of Defense Memorandum (Reference (c)); the responsibilities and functions in accordance with DoDD 5111.13 (Reference (d)); and the guidance in DoDD 3025.18 (Reference (e)).
3. POLICY. It is DoD policy that:
  - b. In accordance with Reference (e), DSCA is initiated by a request for DoD assistance from civil authorities or qualifying entities, or is authorized by the President or Secretary of Defense. Any request for assistance that is the responsibility of another federal department or agency will be redirected to the appropriate department or agency.
  - d. The use of the National Guard to support a Federal support a federal department or agency or qualifying entity request for assistance will only be conducted in a duty status pursuant to Reference (f) or section 502(f) of Reference (a), unless otherwise authorized by the Secretary of Defense.
    1. The National Guard will be considered for DSCA in accordance with the Global Force Management (GFM) process.
    2. The recommendation to approve funding for the National Guard in a duty status pursuant to section 502(f) of Reference (a) will be made to the Secretary of Defense after:
      - a) The National Guard has been selected as the recommended sourcing solution to perform a DSCA mission.
      - b) It has been determined that the National Guard in a duty status in accordance with section 502(f) of Reference (a) is more appropriate than in a duty status in accordance with Reference (f).

- g. Support may be provided on a non-reimbursable basis only if required by law or if both authorized by law and approved by the Secretary of Defense.

*DoD Manual 3025.01, "Defense Support of Civil Authorities," August 11, 2016, (Incorporating Change 1, Effective April 13, 2017)*

**"Purpose:** This manual is composed of several volumes, each containing its own purpose. In accordance with the authority in DoD Directives (DoDDs) 5111.13 and 3025.18:

The manual:

- Assigns responsibilities and establishes procedures for Defense Support of Civil Authorities (DSCA).
- Identifies authorities for DoD Components to provide support of civil authorities and non-DoD entities. For DoD support described in this manual that is not under the oversight of the Assistant Secretary of Defense for Homeland Defense and Global Security (ASD(HD&GS)), this manual identifies the offices of responsibility and oversight.

This volume provides a general overview of DSCA."

### Volume 1: Overview

Section 3: "Overview of DSCA" states, in part:

3.1. DoD has capabilities and resources to defend the United States and fight its wars. These capabilities and resources are also well suited to support civil authorities and other non-DoD entities. DSCA, in general, is in response to a request for assistance from civil authorities for domestic emergencies, law enforcement agency support, and other domestic activities. The most visible support is provided during major natural and man-made disasters and other incidents (see Section 4 of Volume 2 of this manual). However, DoD also frequently provides support to a wide range of non-DoD entities.

3.2. A key factor in determining whether DoD should provide support of non-DoD entities is identifying the authority that directs or allows the support. U.S. law, Presidential Executive Orders and directives, federal regulations, and DoD policies provide the framework and authorities for DoD to provide support of non-DoD entities. A number of the DoD Components (e.g., the Defense Agencies) have specific authorities and appropriations to provide support of non-DoD entities.

Section 9: "Capabilities" states:

9.1. DoD has many capabilities that are well suited to support civil authorities in times of need. Some military capabilities that are frequently requested may be provided to civil authorities under separate authorities and policies.

9.2. DoD SAR is a capability that is often requested during major disasters but is also used during small-scale accidents and incidents. See Appendix 9A for additional information on DoD's SAR capabilities.

9.3. DoD has CBRN defense capabilities designed for combat environments that may be applied for domestic civil support. In addition, DoD has CBRN forces uniquely trained and equipped for domestic operations as part of the CBRN Response Enterprise. This enterprise comprises both CBRN defense and general purpose units from the active and reserve components. See Appendix 9B for additional information on DoD's CBRN defense capabilities.

9.4. The DoD medical system is designed to treat military members, dependents, and other authorized persons. During major disasters, the civilian medical community can be quickly overwhelmed with patients. DoD will likely be involved in life-saving activities in support of civil authorities. See Appendix 9C for additional information on DoD's medical capabilities.

9.5. The USSS routinely request EOD and EDD during National Special Security Events for the protection of the President and high-level officials and dignitaries. See Appendixes 9D and 9E for additional information on DoD's EOD and EDD capabilities.

## Volume 2: DoD Incident Response

Section 3: "Incident Response" states, in part:

3.1. DoD has a long history of supporting civil authorities in response to disasters and emergencies. Defense support is primarily drawn from the existing warfighting capabilities of DoD.

3.2. The majority of natural and man-made disasters are handled at the local and State levels; DoD support as portrayed in the media is mostly in response to large-scale natural disasters, such as hurricanes and severe weather. Following a Presidential declaration in accordance with the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Section 5121, et. seq., of Title 42, United States Code (U.S.C.), referred to in this volume as the "Stafford Act"), the Department of Homeland Security (DHS)/Federal Emergency Management Agency (FEMA) acts as the lead federal agency for coordinating the federal response.

3.3. In accordance with DoDD 3025.18, DoD officials have immediate response authority to respond temporarily to a request from civil authorities facing imminently serious conditions in order to save lives, prevent human suffering, or mitigate great property damage. Immediate response authority may be used in incidents where limited time does not permit approval from higher authority through the normal request for DoD assistance processes.

Section 5: "Immediate Response Authority" states, in part:

5.1. GENERAL. There are two specific authorizations provided to DoD officials in DoDD 3025.18: immediate response authority and emergency authority. The procedures for the provisions of emergency authority and their comparison with immediate response authority are found in Appendix 14A of this volume.

- a. DoDD 3025.18 prescribes policy regarding responding to the request of a civil authority pursuant to immediate response authority, which may be used to save lives, prevent human suffering, or mitigate great property damage. Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory.

- d. Immediate response authority may be used whether the incident is a small, local emergency or a complex catastrophe.

5.3. EXAMPLES OF POSSIBLE DOD SUPPORT USING IMMEDIATE RESPONSE AUTHORITY.  
Some examples of possible DoD support using immediate response authority include:

- a. Rescue, evacuation, and emergency medical treatment of casualties, maintenance, or restoration of emergency medical capabilities, and safeguarding the public health.
- b. Emergency restoration of essential public services (including firefighting, water, communications, transportation, power, and fuel).
- c. Emergency clearance of debris, rubble, and explosive ordnance from public facilities and other areas to permit rescue or movement of people and restoration of essential services.
- d. Monitoring and decontaminating radiological and chemical effects, and controlling contaminated areas.
- e. Management of biological effects and reporting through national warning and hazard control systems.
- f. Roadway movement planning.
- g. Collecting, and distributing water, food, essential supplies, and materiel on the basis of critical priorities.
- i. Damage assessment.
- j. Interim emergency communications.
- k. MCM distribution support.
- l. Explosive ordnance disposal.
  - 1) DoD explosive ordnance disposal personnel may provide immediate response for explosive ordnance disposal support of civil authorities, when requested, in accordance with DoDD 3025.18 and DoDI 3025.21, and may provide disposition of military munitions in accordance with Parts 260-270 of Title 40, CFR.
  - 2) Domestic explosive ordnance disposal support of civilian law enforcement agencies is provided in accordance with DoDI 3025.21.

Section 14: CIVIL DISTURBANCE OPERATIONS states, in part, the following.

#### 14.1. GENERAL.

- a. The primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in State and local governments. Governors

employ National Guard forces in State active duty to support State and local government agencies for disaster responses and in domestic emergencies, including response to civil disturbances; the Governor directs, commands, and controls such activities in accordance with State or territorial law and federal law.

- b. The U.S. Constitution and laws of the United States authorize the President to employ military forces to suppress insurrections, rebellions, and domestic violence under various conditions and circumstances. The employment of federal military forces to control civil disturbances may occur only in a specified civil jurisdiction under specific circumstances, as authorized by the President.

#### 14.3. EXAMPLES OF POSSIBLE DOD SUPPORT.

- a. Dispersing unauthorized assemblages.
- b. Patrolling disturbed areas.
- c. Maintaining essential transportation and communications systems.
- d. Setting up roadblocks.
- e. Cordoning off areas.

#### Appendix 14A: EMERGENCY AUTHORITY

##### 14A1. GENERAL

- b. Emergency authority differs from immediate response authority. Table 14 compares and contrasts emergency authority and immediate response authority.

Table 14. Comparison of Emergency Authority with Immediate Response Authority

	<b>Emergency Authority</b>	<b>Immediate Response Authority</b>
<b>Authority</b>	Paragraph 4.i of DoDD 3025.18	Paragraph 4.g. of DoDD 3025.18
<b>Situation requiring usage</b>	Civil disturbances	Disaster or emergency
<b>Purpose</b>	<ul style="list-style-type: none"> <li>- Prevent significant loss of life</li> <li>- Prevent wanton destruction of property</li> <li>- Restore governmental function</li> <li>- Restore public order</li> <li>- Protect federal property</li> <li>- Protect federal functions</li> </ul>	<ul style="list-style-type: none"> <li>- Save lives</li> <li>- Prevent human suffering</li> <li>- Mitigate great property damage</li> </ul>
<b>Probability of using authority</b>	Extremely rare	Very limited
<b>Lethal force</b>	If necessary	Not allowed
<b>Law enforcement actions</b>	If necessary	Not allowed
<b>Request from civil authority</b>	Not required	<b>Required</b>
<b>Reimbursable</b>	No	Yes (must seek)
<b>Authorization extends to:</b>	Federal military commanders	<ul style="list-style-type: none"> <li>- DoD officials</li> <li>- Federal military commanders</li> <li>- DoD Component heads</li> <li>- Responsible DoD civilian officials</li> </ul>

- c. It is very likely that the situations or incidents that allow federal military commanders to exercise emergency authority also will involve conditions for commanders to exercise immediate response authority, but not the reverse. Emergency authority is only available in extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control large-scale, unexpected civil disturbances. The classic example of when emergency authority and immediate response authority were both used was during the earthquake and fires of San Francisco in 1906.

14A3. EXAMPLES OF CIRCUMSTANCES THAT MAY LEAD TO THE USE OF EMERGENCY AUTHORITY. Examples of the types of circumstances that may result in a federal military commander being **unable** to obtain authorization from the President include:

- a. Electromagnetic pulse that disables electronic devices in a large area.
- b. Massive solar flare that disables the power grid and destroys communications equipment.
- c. Crippling computer attacks that disable critical infrastructure, especially the communications sector.
- d. Catastrophic earthquake.
- e. IND detonation.

Volume 3: Pre-planned DoD Support of Law Enforcement Agencies, Special Events,  
Community Engagement, and Other Non-DoD Entities

SECTION 3: PRE-PLANNED DOD SUPPORT

3.1. DoD may provide support to civil authorities that is not in response to emergencies or disasters, but is generally planned in advance of the assistance provided. Support may be provided based on statute, DoD policies, and/or agreements with other agencies. Approving authorities may be at various levels within DoD.

3.2. DoD support of civilian law enforcement agencies is closely monitored from within and outside DoD. Military commanders and DoD officials must be aware of the limitations and restrictions placed on military members based on statute, Executive orders, and DoD policies on conducting domestic civilian law enforcement activities. DoD policy for DoD support of civilian law enforcement agencies is described in Section 4 of this volume. The U.S. Secret Service (USSS) is a civilian law enforcement agency to which DoD routinely provides military support (see Section 5 of this volume).

SECTION 4: DOD SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES

4.3 EXAMPLES OF POSSIBLE DOD SUPPORT.

- a. Specialized personnel and units.
- b. Equipment.
- c. Facilities.
- d. Training.
- e. Expert advice.

## APPENDIX B: DSCA AND THE DCNG

### DCNG Fact Sheet

# DISTRICT OF COLUMBIA NATIONAL GUARD FACT SHEET

Created in 1802 by President Thomas Jefferson, the District of Columbia National Guard is the first military responder to defend and support the nation's capital, the nation's leaders, residents, workers and visitors by assisting district and federal agencies in the District of Columbia. Known as the Capital Guardians, the DCNG maintains trained and equipped forces as reserve components of the Air Force and Army, uniquely poised to perform sustained ground missions and federal air missions as directed to defend and protect the homeland. Commanded by Maj. Gen. William J. Walker, the District of Columbia National Guard is the only National Guard that reports only to the U.S. president.



## HISTORY

The roots of the DCNG are older than the District of Columbia, older than the active duty military and older than the United States. Before there was a District of Columbia, Citizen Soldiers were forming militia units in Georgetown and Bladensburg. These militiamen were among those who would fight—and win—the American War of Independence. The DCNG is the only National Guard with a national mission—to protect our Federal Government as the President's Guard.

Supervision and control of DCNG was delegated by the President of the United States to the Secretary of Defense pursuant to Executive Order 10030 in

Jan. 26, 1949, with authority given to the Secretary to designate officials of the National Military Establishment to administer affairs of the DCNG.

The DCNG is the only U.S. military force empowered to function in a state or, in this case, a district status. Those functions range from limited actions during non-emergency situations to full-scale law enforcement of martial law when local law enforcement officials can no longer maintain civil control. The National Guard may be called into federal service in response to a call by the President or Congress.

## DCNG VISION

To cultivate a continuously adapting, growing and ever evolving cohesive Army and Air National Guard team that while striving for perfection steadily becomes the premier National Guard in the Nation with an unmatched relevant, resilient and responsive professional joint force ready at a moment's notice for virtually any Department of Defense, federal or district government mission.

## DCNG MISSION

To proactively anticipate requirements and be prepared to rapidly deploy where directed, and confidently execute the orders of the President of the United States, the Secretary of Defense, the Secretary of the Army and the Secretary of the Air Force in times of peace and war with a highly disciplined, motivated and focused professional force that is well led and optimally manned, trained and equipped to meet the expectations of the Department of Defense, our federal and District of Columbia government partners, and the needs of our fellow citizens.

## STATE PARTNERSHIP PROGRAM



**Burkina Faso**



**Jamaica**

The State Partnership Program (SPP) is a joint program of the United States Department of Defense, the U.S. State Department, and the individual states, territories, and the District of Columbia. Guided by U.S. foreign policy goals, the SPP is administered by the National Guard Bureau and supports theater commanders' security cooperation objectives. The program has been successfully building mutually beneficial relationships around the globe for 25 years. In February 2019, the DCNG partnered with Burkina Faso. The pairing of Burkina Faso is the 76th state partner under the SPP. Burkina Faso is the DCNG's second state partnership. The DCNG formalized a partnership with the Jamaican Defense Forces in 1999. Since the partnership began, the DCNG has completed more than 40 exchanges with Jamaican partners ranging from humanitarian assistance and disaster relief preparedness to military policing, medical readiness, maintenance of vehicles and civil engineering capacity building.

## STRATEGIC GOALS

**Goal 1:** Obtain and sustain comprehensive "right now" mission readiness

**Goal 2:** Train to and consistently meet the One Army and Air Force standard

**Goal 3:** Build innovative leaders at all levels with active talent management

**Goal 4:** Become widely known for discipline, professionalism and success



# DISTRICT OF COLUMBIA NATIONAL GUARD FACT SHEET

## JOINT TASK FORCE – DISTRICT OF COLUMBIA

Joint Task Force-District of Columbia (JTF-DC), is an element of the District of Columbia National Guard. It leverages unique National Guard capabilities to support a wide range of challenging federal and community incidents. It usually is constituted as part of a larger local or federal effort to prepare for or react to an emerging situation, including National Special Security Events.



## MULTI-AGENCY AUGMENTATION COMMAND

The Multi-Agency Augmentation Command (MAC) is a command aligned under the District of Columbia Army National Guard. It provides trained personnel for staff augmentation and operational support to Headquarters, Department of the Army, Operations Center, the Alternate Army Operations Center, the Domestic Operations Support Division, the National Guard Coordination Center, Army National Guard Domestic Operation Center, National Guard Bureau – Legislative Liaison and other operations centers in support of routine, national crisis or wartime requirements. The MAC also supports National Special Security Events and the State of the Union Address. As required, the command provides staff capability packages to augment the JTF-DC for Domestic Support to Civil Authorities operations.

## QUICK FACTS

- Headquarters: 2001 East Capital Street SE, Washington, D.C. 20003
- Number of Soldiers: 1,350
- Number of Airmen: 1,100
- Aircraft: F-16 Fighting Falcon, C-40 (civilian equivalent: Boeing 737), Fairchild C-26E Metroliner
- Helicopters: Sikorsky UH-60 Black Hawk and the Eurocopter UH-72 Lakota

## 113TH WING, AIR NATIONAL GUARD



The 113th Wing, District of Columbia Air National Guard is located at Joint Base Andrews, Md. The 113th Wing is the air component of the District of Columbia National Guard. As the only federal National Guard unit, its chain of command extends from the President of

the United States, through the Secretary of the Army, to the Commanding General, D.C. National Guard.

The 113th Wing fiercely defends the National Capitol Region with an unrivaled F-16 fighter aircraft 24/7 Aerospace Control Alert force and provides domestic operation capabilities in support of the District of Columbia.

The 113th Wing engages globally through exceptional C-40 airlift for national leaders and provides lethal fighter aircraft and agile combat support forces for Combatant Commanders.

## COUNTERDRUG PROGRAM

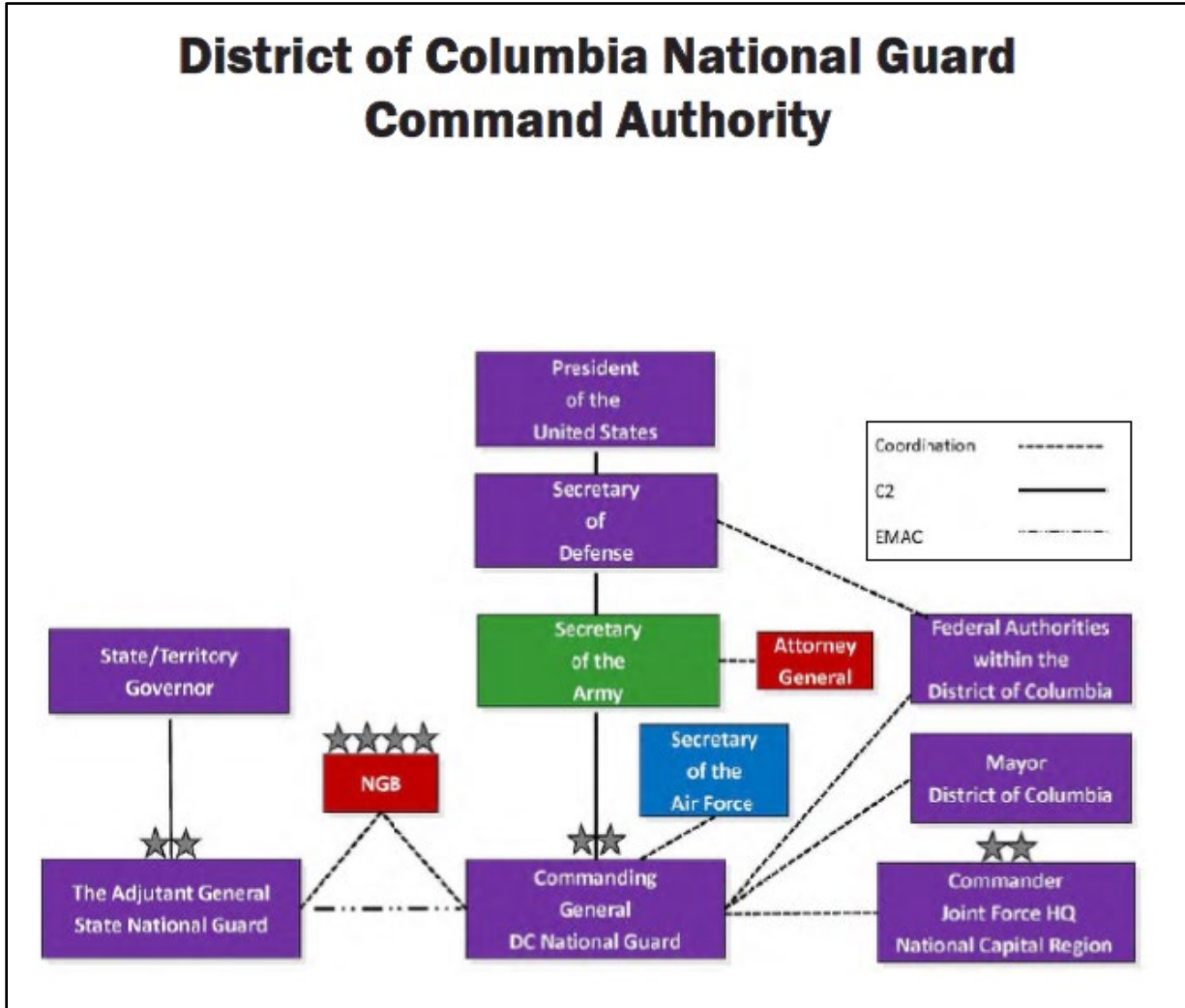
The DCNG Counterdrug Program conducts a full-spectrum campaign that bridges the gap between Department of Defense and non-DoD institutions in the fight against illicit drugs. The program centers around three pillars:

1. Assist community-based organizations to better educate the community.
2. Assist in criminal intelligence gathering and information sharing.
3. Disrupt the drug market by supporting arrest operations.



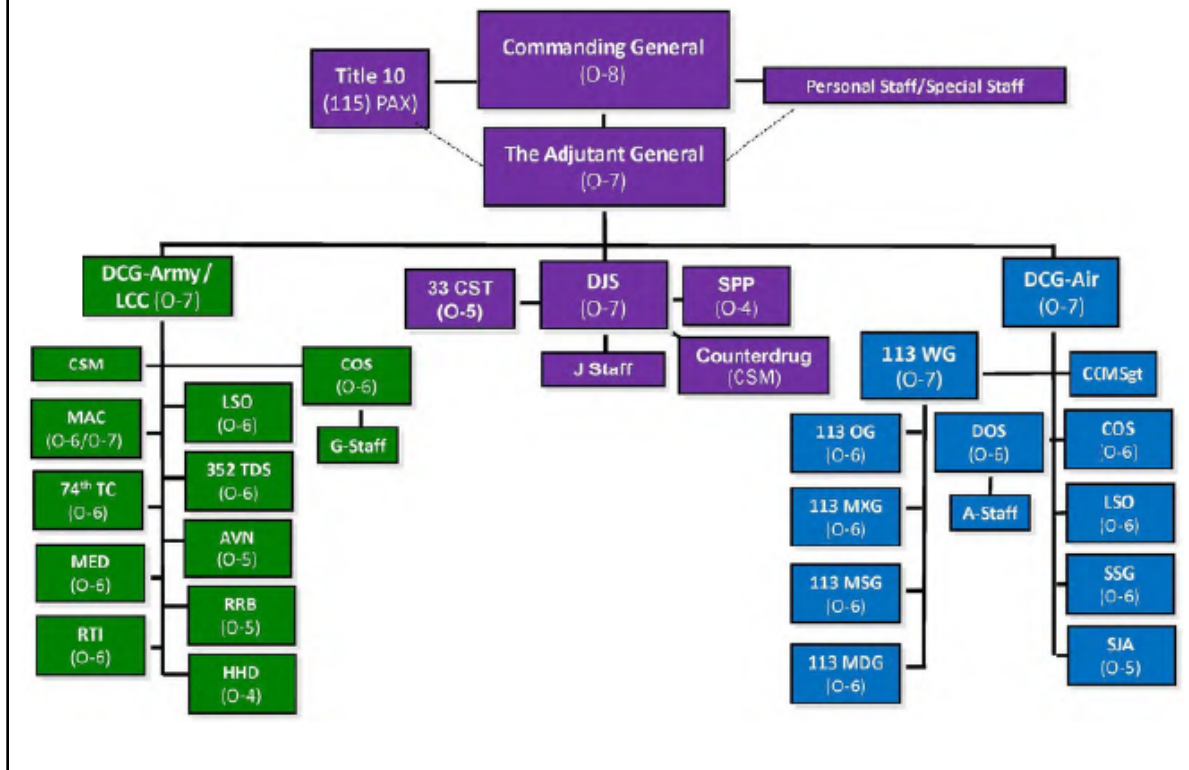
**PROTECTING THE CAPITAL AND DEFENDING THE NATION SINCE 1802**

*The DCNG Senior Leadership and Organizational Structure<sup>80</sup>*



<sup>80</sup> From the DCNG's 2019 Annual Report.

# District of Columbia National Guard Organizational Structure

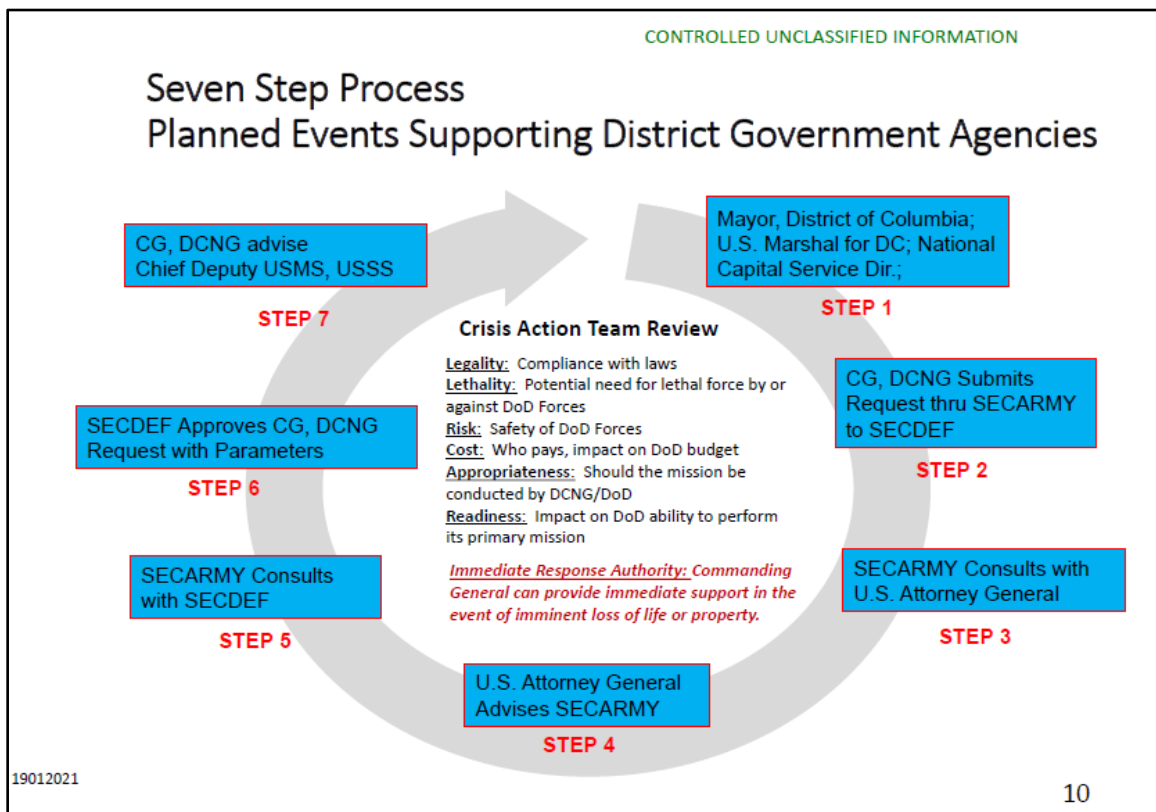


### Approving Requests for DCNG Support in the District of Columbia

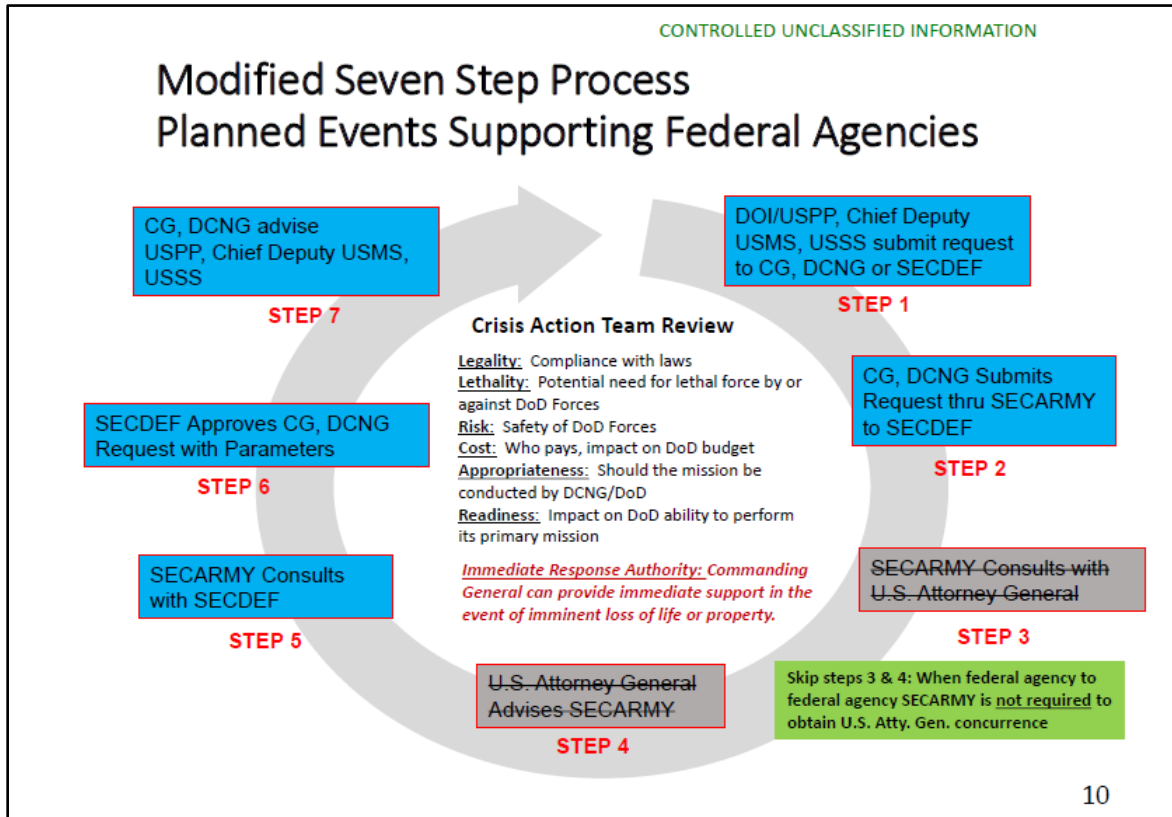
DoDD 3025.18 identifies six factors that DoD officials must consider for all RFAs.

- Legality (compliance with laws)
- Lethality (potential use of deadly force by or against DoD personnel)
- Risk (safety of DoD personnel)
- Cost (including the source of funding and the effect on the DoD budget)
- Appropriateness (whether providing the requested support is in the interest of the DoD)
- Readiness (impact on the DoD's ability to perform its other primary missions)

#### RFAs From the D.C. Government



RFAs From a Federal Agency in the District of Columbia



**APPENDIX C: CORRESPONDENCE RELATED TO THE D.C. GOVERNMENT'S  
DECEMBER 31, 2020 REQUEST FOR ASSISTANCE (RFA)**

*Mayor Bowser's December 31, 2020 RFA*



**MURIEL BOWSER**  
MAYOR

December 31, 2020

Major General William J. Walker  
Commanding General  
District of Columbia National Guard  
2001 East Capitol Street, SE  
Washington, DC 20003


Dear Major General Walker:

As you know, First Amendment demonstrations permitted by the National Park Service are scheduled to occur in the District of Columbia on Tuesday, January 5, 2021 and Wednesday, January 6, 2021. As a result, District Government requests DC National Guard (DCNG) support, as these demonstrations will follow similar events on November 14, 2020 and December 12, 2020, which resulted in a large influx of participants, violence and criminal activity.

The District of Columbia is requesting personnel from the DCNG. Further, DCNG will support operations for both the Metropolitan Police Department and the DC Fire and Emergency Medical Services. Finally, no DCNG personnel shall be armed during this mission, and at no time, will DCNG personnel or assets be engaged in domestic surveillance, searches, or seizures of US persons.

Director Christopher Rodriguez of the District's Homeland Security and Emergency Management Agency will provide the requirements of and more details related to the mission. I request that you immediately connect with Director Rodriguez to discuss this critical request. Thank you for your immediate assistance.

Sincerely,

  
Muriel Bowser  
Mayor



*The DCHSEMA Director's December 31, 2020 RFA*

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
HOMELAND SECURITY AND EMERGENCY MANAGEMENT AGENCY

Muriel Bowser  
Mayor  
Dr. Christopher Rodriguez  
Director

December 31, 2020

District of Columbia National Guard  
ATTN: General William Walker  
2001 East Capitol Street, SE  
Washington, DC 20003

**Sent via email**

Dear General Walker,

As you know, First Amendment demonstrations permitted by the National Park Service are scheduled to occur in the District of Columbia on Tuesday, January 5, 2021 and Wednesday, January 6, 2021. As a result, District Government requests DC National Guard (DCNG) support, as these demonstrations will follow similar events on November 14, 2020 and December 12, 2020, which resulted in a large influx of participants, violence, and criminal activity. I can confirm that the requesting DC agencies below have exhausted their organic capabilities in accordance with the Seven Step Call-Up process for DCNG support. This request is made on behalf of, and with concurrence from, The Honorable Muriel Bowser, Mayor of Washington, DC.

First, to support the Metropolitan Police Department's (MPD) security mission, it is requested that members of DCNG be activated to assist MPD. Due to the size of these events, all available MPD resources will be deployed and the assistance of DCNG will be essential in supporting the security plan. The mission of DCNG during this activation will primarily be crowd management and assistance with blocking vehicles at traffic posts. Specifically, DCNG is requested to provide:

- Six (6) crowd management teams to manage crowds at specified Metro stations and prevent overcrowding on Metro platforms;
- A team to assist at thirty (30) designated traffic posts.

DCNG should be prepared to staff these locations from 0730 hours until 2400 hours on both Tuesday, January 5, 2021 and Wednesday, January 6, 2021. In addition, it is requested that DCNG members be equipped with visibility vests and lighted traffic wands to assist with this mission. The availability of resources to assist MPD would greatly enhance our ability to successfully accomplish our mission of securing the safety of the residents and visitors of the District of Columbia.

HSEMA.DC.GOV

 GOVERNMENT OF THE  
DISTRICT OF COLUMBIA  
DC MURIEL BOWSER, MAYOR

Second, the DC Fire and Emergency Medical Services Department (FEMS) requests that members of the Civil Support Team (CST) conduct the following five (5) tasks on request: (1) Chemical, Biological, Radiation, Nuclear monitoring, and hazardous material on-site support; (2) provide liaisons at all required locations; (3) provide technical decontamination support; (4) provide Analytical Laboratory System support; and (5) provide CST Operations and Communications capability support. FEMS would like CST support to begin at 0700 hours on Tuesday, January 5, 2021 and conclude at 0700 hours on Thursday, January 7, 2021—or when released by FEMS. The CST will be partnered with FEMS throughout this mission, and DCNG will coordinate with FEMS to ensure support requirements are complete. DCNG's chain-of-command will remain intact for purposes of administrative and operational control.

No DCNG personnel will be armed during this mission. At no time will DCNG personnel or assets be engaged in domestic surveillance, searches, or seizures of US persons. If there are any questions about this request, please contact me. Thank you for your assistance in this matter.

Respectfully,



Dr. Christopher Rodriguez  
Director, HSEMA



*MG Walker's January 1, 2021 Letter to Mr. McCarthy About the D.C. Government's RFA*

**JOINT FORCE HEADQUARTERS  
DISTRICT OF COLUMBIA NATIONAL GUARD  
OFFICE OF THE COMMANDING GENERAL  
2001 EAST CAPITOL STREET, SE  
WASHINGTON, DC 20003-1719**

January 1, 2021

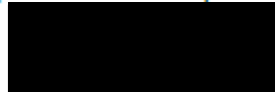
The Honorable Ryan D. McCarthy  
Secretary of the Army  
101 Army Pentagon, Room 3E560  
Washington, D.C. 20310-0101

Dear Secretary McCarthy:

Enclosed are letters from Mayor Muriel Bowser, and Dr. Christopher Rodriguez, Director, District of Columbia Homeland Security and Emergency Management Agency (HSEMA), on behalf of the District of Columbia Metropolitan Police Department (MPD) and District of Columbia Fire and Emergency Service (DCFEMS), (see enclosures 1 and 2). The Mayor requests the District of Columbia National Guard (DCNG) provide support from 0700 until 2400, 5-6 January 2021 to respond to planned First Amendment demonstrations. The details of the HSEMA request includes crowd management at Metropolitan Transit Stations, to stage vehicles at designated traffic control points for MPD; and for DCFEMS that the 33rd Civil Support Team (CST) conduct their core tasks for detection, technical decontamination, analytical laboratory suite support, and CST operations and communications capability from 0700 until release 5-7 January 2021 (see enclosure 2).

The DCNG analyzed the request for support (see enclosure 3) and determined the support constitutes valid training and operational practices; is within our current capabilities and funding; is an appropriate use of DCNG forces, and will not detract from our readiness. The DCNG will not conduct domestic surveillance or law enforcement activities. The DCNG will not be armed for this event however, MPD requests that DCNG members be equipped with safety vests and lighted traffic wands to assist with this mission (see enclosures 1 thru 3). Further, MPD requests DCNG personnel supporting the mission be appointed as "Special Police" pursuant to D.C. Code § 5-129.03. MPD officers will accompany and be in the vicinity of DCNG personnel. DCNG members will provide support in a Title 32 U.S.C § 502(f) status.

I have concluded that providing this support benefits our training, readiness and retention. Dr. Rodriguez indicates that the aforementioned agencies have exhausted their organic capabilities and require DCNG assistance. Therefore, I would like to honor Mayor Bower's request for support. Accordingly, I respectfully seek your approval for the DCNG to support this mission in accordance with all applicable laws, Department of Defense policies and regulations.

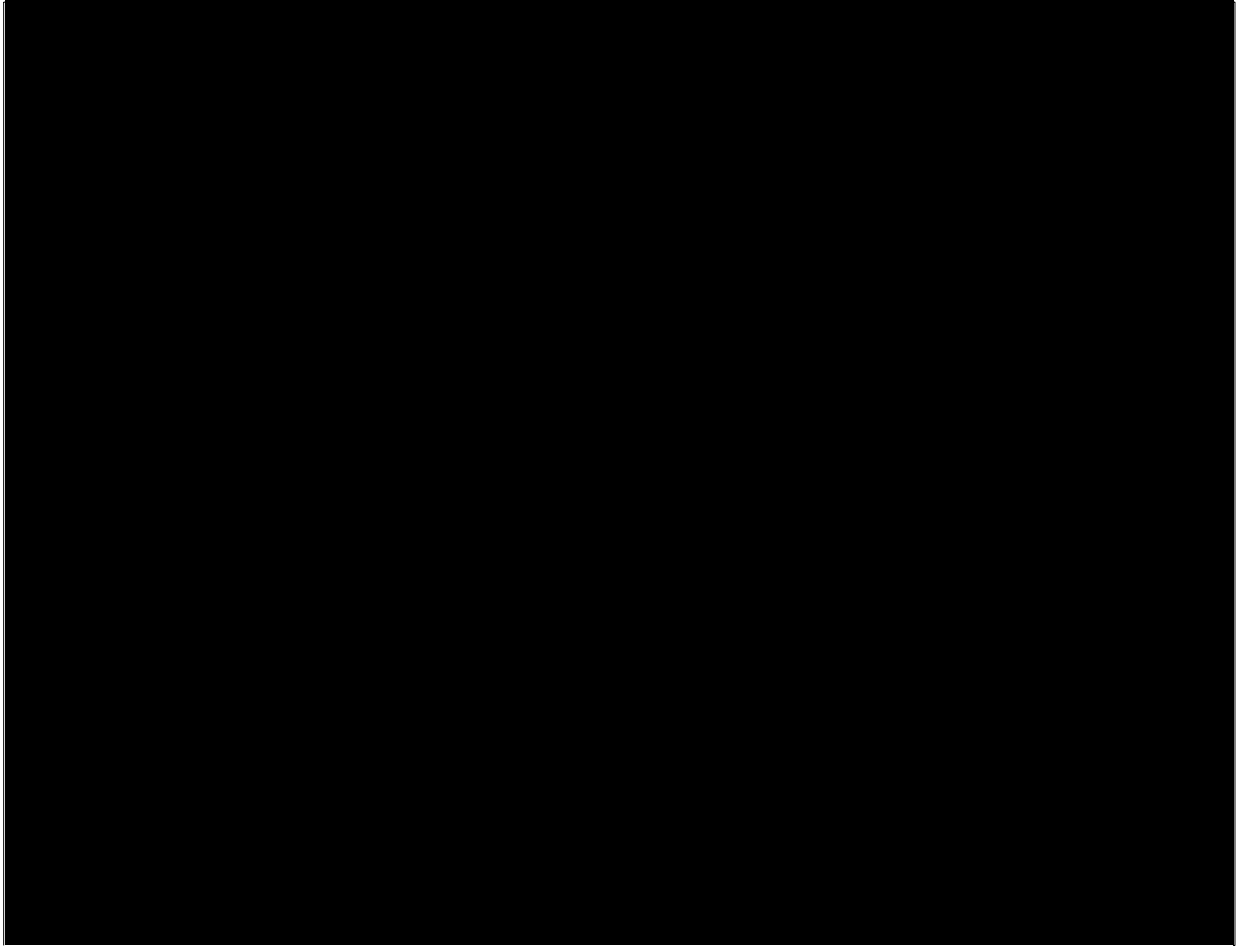


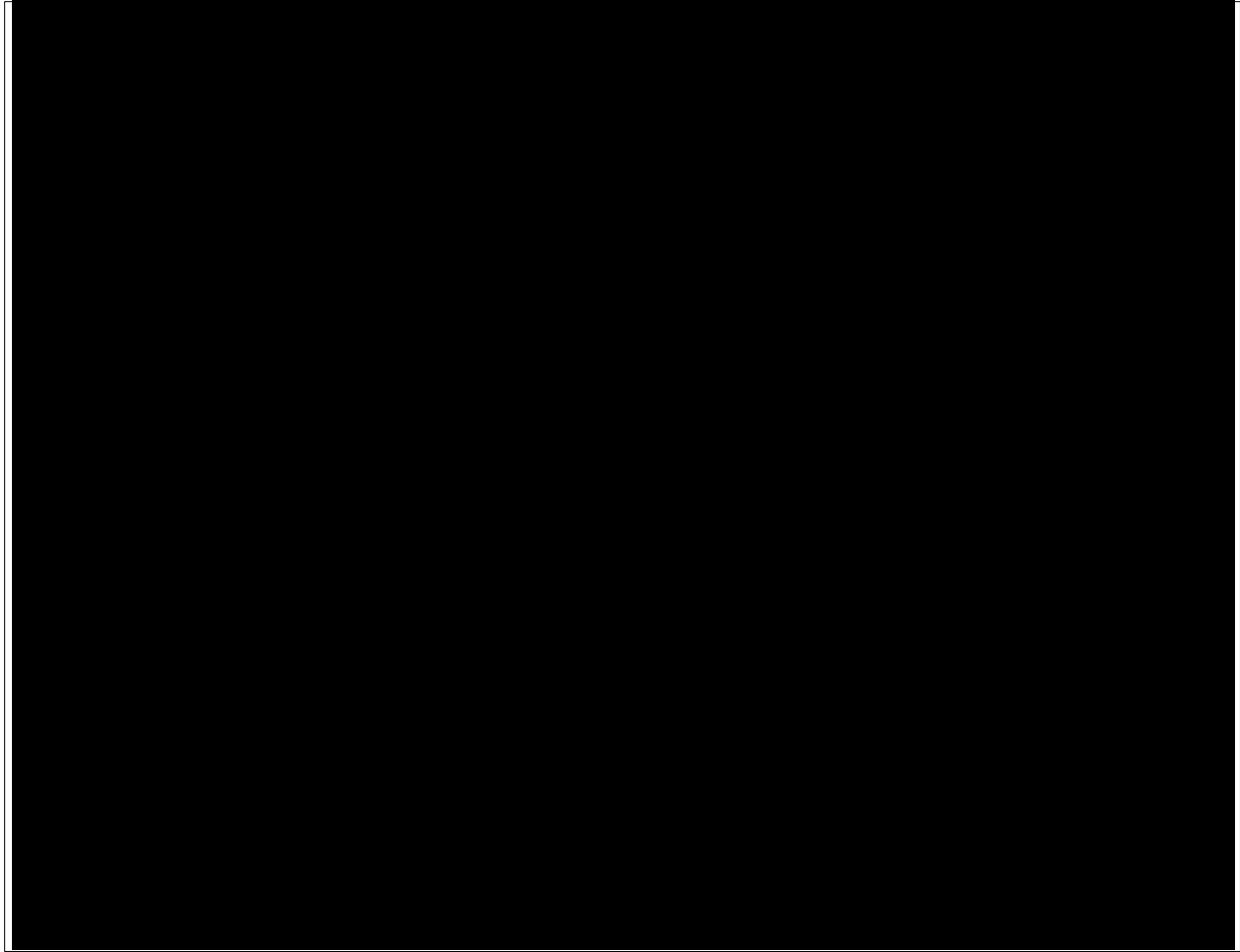
WILLIAM J. WALKER  
Major General, USA  
Commanding General

Encls (4)

1. Mayor Muriel Bower Request
2. Dr. Christopher Rodriguez Request
3. DCNG Mission Analysis
4. RUF/ROC (Special Police, visible vests and lighted traffic wands)

*Enclosure to MG Walker's Letter to Mr. McCarthy – Rules for the Use of Force by Unarmed Special Police*





*The DCNG's January 1, 2021 Mission Analysis for the D.C. Government's RFA*

**JOINT FORCE HEADQUARTERS  
DISTRICT OF COLUMBIA NATIONAL GUARD  
2001 EAST CAPITOL STREET, SE  
WASHINGTON, DC 20003-1719**

NGDC-J3

1 January 2021

MEMORANDUM FOR MG William J. Walker, Commanding General, District of Columbia National Guard (DCNG), 2001 East Capitol Street, SE, Washington, DC 20003-1719

SUBJECT: Mission analysis for District of Columbia National Guard support on 5-7 January 2021

1. The Director, District of Columbia Homeland Security and Emergency Management Agency (HSEMA), with the concurrence of the Mayor, requests District of Columbia National Guard (DCNG) support to provide crowd management, Traffic Control Points (TCPs) and the 33<sup>rd</sup> Civil Support Team (CST) from 5-7 January 2021. HSEMA requests that the DCNG provide direct support to the Metropolitan Police Department (MPD) and the Fire and Emergency Medical Services Department (FEMS) as follows:

a. MPD – Daily support from 0730-2400 on 5-6 January 2021

- (1) Provide six crowd management teams at specified Metro stations and prevent overcrowding on Metro platforms;
- (2) A team to assist at 30 designated traffic posts.

b. FEMS – Support from 0700 on 5 January to 0730 on 7 January 2021 or when released by FEMS

- (1) Chemical, Biological, Radiological, Nuclear monitoring and hazardous material on-site support;
- (2) Liaisons at all required locations;
- (3) Technical decontamination support;
- (4) Analytical Laboratory System support;
- (5) CST operations and communications capability support.

3. The Joint Staff has analyzed these requests and determined that the DCNG requires approximately [REDACTED] Guardsmen to execute this mission. This number includes our command, staff, liaisons, maintenance teams, food services,

administrative support, communication support and medical support requirements.

4. In order to conduct the specified tasks above, to include all implied tasks, recommend an initial **troop cap** of [REDACTED] Army and Air Guardsmen. Additional support, if required, is postured with [REDACTED] Guardsmen on 3-hour response and [REDACTED] Guardsmen on 6-hour response.

5. Guardsmen will partner with MPD or FEMS throughout the course of this mission and the support activities listed will benefit individual and unit training readiness. The DCNG will maintain command and control of Guardsmen and serve solely in a support role. Any DCNG engagement in law enforcement activities will require Guardsmen to be sworn in as special police by the Metropolitan Police Department or Federal Law Enforcement agency prior to conducting such activities. All Guardsmen will serve in a reserve status pursuant to Title 32 U.S.C. § 502(f). The Federal Tort Claims Act, 28 U.S.C. 2671-2680, is applicable to National Guard serving under Title 32 orders. Therefore, all Guardsmen acting within the course and scope of their duties for purposes of this mission possess civil liability protection. Guardsmen will be unarmed during the mission and at no time will the Guardsmen or assets engage in domestic surveillance, searches or seizures of U.S. persons.

6. The POC for this memorandum is the undersigned at [REDACTED]

*The DCHSEMA Director's Updated Letter to MG Walker – Designation of DCNG Personnel as Special Police*



GOVERNMENT OF THE DISTRICT OF COLUMBIA  
HOMELAND SECURITY AND EMERGENCY MANAGEMENT AGENCY

Muriel Bowser  
Mayor  
Dr. Christopher Rodriguez  
Director

December 31, 2020

District of Columbia National Guard  
ATTN: General William Walker  
2001 East Capitol Street, SE  
Washington, DC 20003

**Sent via email**

Dear General Walker,

As you know, First Amendment demonstrations permitted by the National Park Service are scheduled to occur in the District of Columbia on Tuesday, January 5, 2021 and Wednesday, January 6, 2021. As a result, District Government requests DC National Guard (DCNG) support, as these demonstrations will follow similar events on November 14, 2020 and December 12, 2020, which resulted in a large influx of participants, violence, and criminal activity. I can confirm that the requesting DC agencies below have exhausted their organic capabilities in accordance with the Seven Step Call-Up process for DCNG support. This request is made on behalf of, and with concurrence from, The Honorable Muriel Bowser, Mayor of Washington, DC.

First, to support the Metropolitan Police Department's (MPD) security mission, it is requested that members of DCNG be activated to assist MPD. Due to the size of these events, all available MPD resources will be deployed and the assistance of DCNG will be essential in supporting the security plan. The mission of DCNG during this activation will primarily be crowd management and assistance with blocking vehicles at traffic posts. Specifically, DCNG is requested to provide:

- Six (6) crowd management teams to manage crowds at specified Metro stations and prevent overcrowding on Metro platforms;
- A team to assist at thirty (30) designated traffic posts.

DCNG should be prepared to staff these locations from 0730 hours until 2400 hours on both Tuesday, January 5, 2021 and Wednesday, January 6, 2021. In addition, it is requested that DCNG members be equipped with visibility vests and lighted traffic wands to assist with this mission. The availability of resources to assist MPD would greatly enhance our ability to successfully accomplish our mission of securing the safety of the residents and visitors of the District of Columbia.

HSEMA.DC.GOV

WE ARE  
DISTRICT OF COLUMBIA  
DC GOVERNMENT OF THE  
DISTRICT OF COLUMBIA  
MURIEL BOWSER, MAYOR

Second, the DC Fire and Emergency Medical Services Department (FEMS) requests that members of the Civil Support Team (CST) conduct the following five (5) tasks on request: (1) Chemical, Biological, Radiation, Nuclear monitoring, and hazardous material on-site support; (2) provide liaisons at all required locations; (3) provide technical decontamination support; (4) provide Analytical Laboratory System support; and (5) provide CST Operations and Communications capability support. FEMS would like CST support to begin at 0700 hours on Tuesday, January 5, 2021 and conclude at 0700 hours on Thursday, January 7, 2021—or when released by FEMS. The CST will be partnered with FEMS throughout this mission, and DCNG will coordinate with FEMS to ensure support requirements are complete.

Prior to the commencement of any duties on January 5, 2021, the Mayor of the District will designate all DCNG personnel providing traffic control support to MPD as "Special Police" of MPD, empowering them with law enforcement authority commensurate with that of DC civilian police officers IAW D.C. Official Code (2001 ed.), Title 5, § 5-129.03. At all times, the DCNG military chain-of-command will remain intact for purposes of administrative and operational control.

No DCNG personnel will be armed during this mission. At no time will DCNG personnel or assets be engaged in domestic surveillance, searches, or seizures of US persons. If there are any questions about this request, please contact me. Thank you for your assistance in this matter.

Respectfully,



Dr. Christopher Rodriguez  
 Director, HSEMA



*Mr. McCarthy's January 4, 2021 Letter to Mr. Miller – Conditional Recommendation to Approve the D.C. Government's December 31, 2020 RFA*



SECRETARY OF THE ARMY  
WASHINGTON

JAN 04 2021

Secretary of Defense  
1000 Defense Pentagon  
Washington, DC 20301-1000

Mr. Secretary,

On 31 December 2020, Mayor Muriel Bowser and Dr. Christopher Rodriguez, Director, District of Columbia Homeland Security and Emergency Management Agency (HSEMA), on behalf of the District of Columbia Metropolitan Police Department (MPD) and District of Columbia Fire and Emergency Service (DCFEMS) requested support from the District of Columbia National Guard (DCNG). Mayor Bowser requests DCNG support from 0700 to 2400 on 5 and 6 January 2021, to support the MPD and DCFEMs response to planned First Amendment demonstrations. The HSEMA request for DCNG support includes crowd management at Metropolitan Transit Stations and establishment of traffic control points manned by DCNG Soldiers and vehicles in support of MPD. The DCFEMs requests support from the 33rd Civil Support Team (CST) to conduct their core tasks of detection, technical decontamination, analytical laboratory suite support, and CST operations and communications support from 0700 on 5 January until mission complete on 7 January 2021.

The DCNG will support MPD with 340 total personnel. DCNG Disposition:

- a. Traffic Control Points: [REDACTED] personnel ([REDACTED] total/2 shifts) operating in non-tactical vehicles
- b. Metro station support: [REDACTED] personnel ([REDACTED] total/2 shifts)
- c. CST Support: [REDACTED] personnel
- d. Quick Reaction Support: 40 personnel staged at Joint Base Andrews
- e. Internal C2 and Support [REDACTED] personnel

On 1 January 2021, MG Walker submitted his request and concept of operation for my approval. I recommend DCNG support this mission if the following conditions are met:

- a. The establishment of a lead federal agency, other than DoD, to enable enhanced coordination of all entities.
- b. The estimated numbers for the demonstrations exceed the local and federal agencies' ability to address the risk.
- c. All other federal agencies have exhausted their assets to support these events.

I directed MG Walker to prepare to recall DCNG personnel to support this event. The DCNG will be postured to support; however, will not commit until the request for support is approved. DCNG are not authorized to perform any additional tasks or duties not authorized in this memorandum.

[REDACTED]  
Ryan D. McCarthy



*Mr. Miller's January 4, 2021 Memorandum for Mr. McCarthy – DCNG Employment Guidance*



SECRETARY OF DEFENSE  
1000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1000

JAN - 4 2021

MEMORANDUM FOR SECRETARY OF THE ARMY

SUBJECT: Employment Guidance for the District of Columbia National Guard

This memorandum responds to your January 4, 2021 memorandum regarding the District of Columbia request for District of Columbia National Guard (DCNG) support in response to planned demonstrations from January 5-6, 2021. You are authorized to approve the requested support, subject to my guidance below and subject to consultation with the Attorney General, as required by Executive Order 11485.

Without my subsequent, personal authorization, the DCNG is not authorized the following:

- To be issued weapons, ammunition, bayonets, batons, or ballistic protection equipment such as helmets and body armor.
- To interact physically with protestors, except when necessary in self-defense or defense of others, consistent with the DCNG Rules for the Use of Force.
- To employ any riot control agents.
- To share equipment with law enforcement agencies.
- To use Intelligence, Surveillance, and Reconnaissance (ISR) assets or to conduct ISR or Incident, Awareness, and Assessment activities.
- To employ helicopters or any other air assets.
- To conduct searches, seizures, arrests, or other similar direct law enforcement activity.
- To seek support from any non-DCNG National Guard units.

At all times, the DCNG will remain under the operational and administrative command and control of the Commanding General of the DCNG, who reports to the Secretary of Defense through the Secretary of the Army.

You may employ the DCNG Quick Reaction Force (QRF) only as a last resort and in response to a request from an appropriate civil authority. If the QRF is so employed, DCNG personnel will be clearly marked and/or distinguished from civilian law enforcement personnel, and you will notify me immediately upon your authorization.

[REDACTED]  
Christopher C. Miller  
Acting  
[REDACTED]

*Mr. McCarthy's January 5, 2021 Letter to MG Walker – RFA Approval and Limitations*

SECRETARY OF THE ARMY  
WASHINGTON

05 JAN 2021

Major General William J. Walker  
Commanding General  
District of Columbia National Guard  
2001 East Capitol Street SE  
Washington, DC 20003-1719

Dear General Walker:

This responds to your letter dated January 1, 2021 recommending approval of the request of Mr. Christopher Rodriguez, Director of District of Columbia Homeland Security and Emergency Management Agency (DCHSEMA), on behalf of the District of Columbia Fire and Emergency Service (DCFEMS) and DC Metropolitan Police Department (MPD) dated December 31, 2020, requesting the District of Columbia National Guard (DCNG) 33rd Civil Support Team (CST) and traffic management and crowd control for planned demonstrations in DC from 5-7 January 2021.

**Support to the Civil Authorities of the District of Columbia**

DCHSEMA requested that the DCNG CST conduct the following tasks, upon request, for each event: (1) Chemical, Biological, Radiological, and Nuclear (CBRN) monitoring and hazardous material (HAZMAT) on-site support; (2) liaisons at all required locations; (3) technical decontamination support (on call);<sup>1</sup> (4) Analytical Laboratory Suite (ALS) support (on call); and (5) CST operations and communications capability support. The CST personnel will be partnered with personnel from DCFEMS throughout the course of these missions and will serve solely in a support role to emergency fire and medical first responders.

DCHSEMA also requested six crowd management teams at specified Metro stations and to prevent overcrowding on Metro platforms; and teams to assist at 30 designated traffic posts.

Your mission analysis determined that the DCNG could provide all of the requested support. I approve the DCNG to support the MPD with 340 total personnel. DCNG Disposition will include:

- a. Traffic Control Points: [REDACTED] personnel [REDACTED] total/2 shifts) operating in non-tactical vehicles
- b. Metro station support: [REDACTED] personnel [REDACTED] total/2 shifts)

<sup>1</sup> The requested technical decontamination support will be limited to first responders working with the CST. It will not include the mass decontamination of civilians.

-2-

c. CST Support: [REDACTED] personnel

d. Quick Reaction Support: 40 personnel staged at Joint Base Andrews

e. Internal C2 and Support: [REDACTED] personnel

DCNG are not authorized to perform any additional tasks or duties not authorized in this memorandum. In addition, without my personal authorization, the DCNG is not authorized the following:

- a. To be issued weapons, ammunition, bayonets, and batons.
- b. To interact physically with protestors, except when necessary in self-defense or defense of others, consistent with the DCNG Rules for the Use of Force other than those who pose an immediate threat of physical harm to Federal personnel or destruction of Federal facilities.
- c. To employ any riot control agents.
- d. To share equipment with law enforcement agencies.
- e. To use Intelligence, Surveillance, and Reconnaissance (ISR) assets or to conduct ISR or Incident, Awareness, and Assessment (IAA) activities.
- f. To employ helicopters or any other air assets.
- g. To conduct searches, seizures, arrests, or other similar direct law enforcement activity.
- h. To seek support from any non-DCNG National Guard units.

DCNG Soldiers have the inherent right to self-defense. DCNG Soldiers will store their helmets and body armor within vehicles or buildings in close proximity to their positions. In the event of an elevation of the threat requiring immediate donning of this equipment for self-defense, DCNG leadership will immediately notify the Secretary of Army.

At all times, the DCNG will remain under the operational and administrative command and control of the Commanding General of the DCNG, who reports to the Secretary of Defense through the Secretary of the Army.

-3-

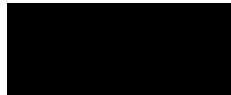
I withhold authority to approve employment of the DCNG Quick Reaction Force (QRF) and will do so only as a last resort, in response to a request from an appropriate civil authority. I will require a concept of operation prior to authorizing employment of the QRF. If the QRF is employed, DCNG personnel will be clearly marked and/or distinguished from civilian law enforcement personnel. You will notify me immediately of any requests for QFR employment.

The support mission for the CST will begin at approximately 0700 hours on January 5, 2021, and will end on January 7, 2021 when DCHSEMA, in coordination with DCFEMS, determines that the mission is complete. Finally, your mission analysis determined that the requested support constitutes valid military training; is within the current capabilities of the DCNG, and will not detract from the readiness of the DCNG.

**Approval**

Pursuant to my request, the Deputy Attorney General reviewed and concurred with your plan for support to the civil authorities of the District of Columbia.

All DCNG personnel associated with this support mission will serve under the provisions of Title 32, U.S.C., Section 502(f). They will serve solely in a support role to the named civil authorities and remain under the command and control of DCNG leadership at all times. DCNG will not be armed for this event however, MPD requests that DCNG members be equipped with safety vests and lighted traffic wands to assist with this mission. Further, MPD requests DCNG personnel supporting the mission be appointed as "Special Police" pursuant to D.C. Code § 5-129.03. They will not engage in the domestic surveillance of U.S. persons.



Ryan D. McCarty

CF:  
Office of the Assistant Secretary of Defense (Homeland Defense and Global Security)  
Office of the Department of Defense General Counsel  
Department of Defense Executive Secretary  
Chief, National Guard Bureau  
Deputy Chief of Staff, G-3/5/7  
Office of the Army General Counsel

*Mr. McCarthy's January 4, 2021 Letter to Mr. Rosen – Confirming DoJ Approval of the D.C. Government's December 31, 2020 RFA*



SECRETARY OF THE ARMY  
WASHINGTON

JAN 04 2021

Jeffrey A. Rosen  
Deputy Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Mr. Rosen:

By letter dated January 1, 2021, Major General (MG) William J. Walker, Commanding General, District of Columbia National Guard (DCNG), transmitted a request from the District of Columbia Homeland Security and Emergency Management Agency (DCHSEMA) for DCNG support for planned First Amendment demonstrations from 5-7 January. The Mayor of the District of Columbia concurred with the submission of this request for support. By this letter, I am confirming your approval, consistent with Executive Order 11485, of the request for assistance to the civil authorities of the District of Columbia described below.

DCHSEMA requested that the DCNG Civil Support Team (CST) conduct the following tasks, upon request, for each event: (1) Chemical, Biological, Radiological, and Nuclear (CBRN) monitoring and hazardous material (HAZMAT) on-site support; (2) liaisons at all required locations; (3) technical decontamination support (on call);<sup>1</sup> (4) Analytical Laboratory Suite (ALS) support (on call); and (5) CST operations and communications capability support. The CST personnel will be partnered with personnel from DCFEMS throughout the course of these missions and will serve solely in a support role to emergency fire and medical first responders. The support mission will begin at approximately 0700 hours on January 5, 2021, and it will end when DCHSEMA, in coordination with DCFEMS, determines that the mission is complete on January 7, 2021.

DCHSEMA also requested support to the MPD. They requested DCNG provide crowd management teams at specified Metro stations and to help prevent overcrowding on Metro platforms; additionally, they requested teams to assist at designated traffic posts.

MG Walker's mission analysis determined that approximately 340 DCNG personnel are needed to accomplish the mission; determined that the requested support constituted valid military training; was within the current capabilities of the DCNG; and would not detract from the readiness of the DCNG.

<sup>1</sup> The requested technical decontamination support will be limited to first responders working with the CST. It will not include the mass decontamination of civilians.

-2-

I approved the DCNG to support MPD with 340 total personnel. Following your concurrence, I will provide my decision and your concurrence to the Acting Secretary of Defense. The DCNG disposition follows:

- a. Traffic Control Points: [REDACTED] personnel ([REDACTED] total/2 shifts) operating in non-tactical vehicles
- b. Metro station support: [REDACTED] personnel ([REDACTED] total/2 shifts)
- c. CST Support: 20 personnel
- d. Quick Reaction Support: 40 personnel staged at Joint Base Andrews
- e. Internal C2 and Support: [REDACTED] personnel

DCNG are not authorized to perform any additional tasks or duties not authorized in this memorandum. In addition, without my personal authorization, the DCNG is not authorized the following:

- a. To be issued weapons, ammunition, bayonets, batons, or ballistic protection equipment such as helmets and body armor.
- b. To interact physically with protestors, except when necessary in self-defense or defense of others, consistent with the DCNG Rules for the Use of Force other than those who pose an immediate threat of physical harm to Federal personnel or destruction of Federal facilities.
- c. To employ any riot control agents.
- d. To share equipment with law enforcement agencies.
- e. To use Intelligence, Surveillance, and Reconnaissance (ISR) assets or to conduct ISR or Incident, Awareness, and Assessment (IAA) activities.
- f. To employ helicopters or any other air assets.
- g. To conduct searches, seizures, arrests, or other similar direct law enforcement activity.
- h. To seek support from any non-DCNG National Guard units.

MG Walker will employ the DCNG Quick Reaction Force (QRF) only as a last resort, in response to a request from an appropriate civil authority and with my prior approval. I will require a concept of operation prior to authorizing employment of the QRF. If the QRF is employed, DCNG personnel will be clearly marked and/or distinguished from civilian law enforcement personnel, and MG Walker will notify me immediately upon his authorization. At all times, the DCNG will remain under the operational and administrative command and control of the Commanding General of the DCNG, who reports to the Secretary of Defense through the Secretary of the Army.

All DCNG personnel associated with this support mission will serve under the provisions of Title 32, U.S.C., Section 502(f). They will serve solely in a support role to the named civil authorities and remain under the command and control of DCNG leadership at all times. DCNG will not be armed for this event, however; MPD requests that DCNG members be equipped with safety vests and lighted traffic wands to assist

-3-

with this mission. Further, MPD requests DCNG personnel supporting the mission be appointed as "Special Police" pursuant to D.C. Code § 5-129.03. They will not engage in domestic surveillance of U.S. persons nor conduct search or seizure activities.

My point of contact for this matter is [REDACTED]

Sincerely,

[REDACTED]  
Ryan D. McCarthy

Attachments  
as

CF:  
Office of the Department of Defense General Counsel  
Office of the Assistant Secretary of Defense (Homeland Defense and Global Security)  
Department of Defense Executive Secretary



*Mayor Bowser's January 5, 2021 Letter to Mr. Miller, Mr. McCarthy, and Mr. Rosen – The D.C. Government Did Not Request Other Federal Law Enforcement Assistance*



**MURIEL BOWSER**  
MAYOR

January 5, 2021

The Honorable Jeffery Rosen  
Acting United States Attorney General  
950 Pennsylvania Ave, NW  
Washington, DC 20530

The Honorable Ryan D. McCarthy  
Secretary of the Army  
101 Army Pentagon  
Washington, DC 20310

The Honorable Chris Miller  
Acting Secretary of Defense  
1000 Defense Pentagon  
Washington, DC 20301

Dear Acting Attorney General Rosen, Secretary McCarthy, and Acting Secretary Miller:

As the law enforcement agency charged with protecting residents and visitors throughout the District of Columbia, the Metropolitan Police Department (MPD) is prepared for this week's First Amendment activities. MPD has coordinated with its federal partners, namely the US Park Police, US Capitol Police and the US Secret Service—all of whom regularly have uniformed personnel protecting federal assets in the District of Columbia. This week, MPD has additional logistical support of unarmed members of the DC National Guard, who will work under the direction of, and in coordination with, MPD.

The District of Columbia Government has not requested personnel from any other federal law enforcement agencies. To avoid confusion, we ask that any request for additional assistance be coordinated using the same process and procedures.

We are mindful that in 2020, MPD was expected to perform the demanding tasks of policing large crowds while working around unidentifiable personnel deployed in the District of Columbia without proper coordination. Unidentifiable personnel—in many cases, armed—caused confusion among residents and visitors and could become a national security threat with no way for MPD and federal law enforcement to decipher armed groups.

To be clear, the District of Columbia is not requesting other federal law enforcement personnel and discourages any additional deployment without immediate notification to, and consultation with, MPD if such plans are underway. The protection of persons and property is our utmost concern and responsibility. MPD is well trained and prepared to lead the law enforcement, coordination and response to allow for the peaceful demonstration of First Amendment rights in the District of Columbia.



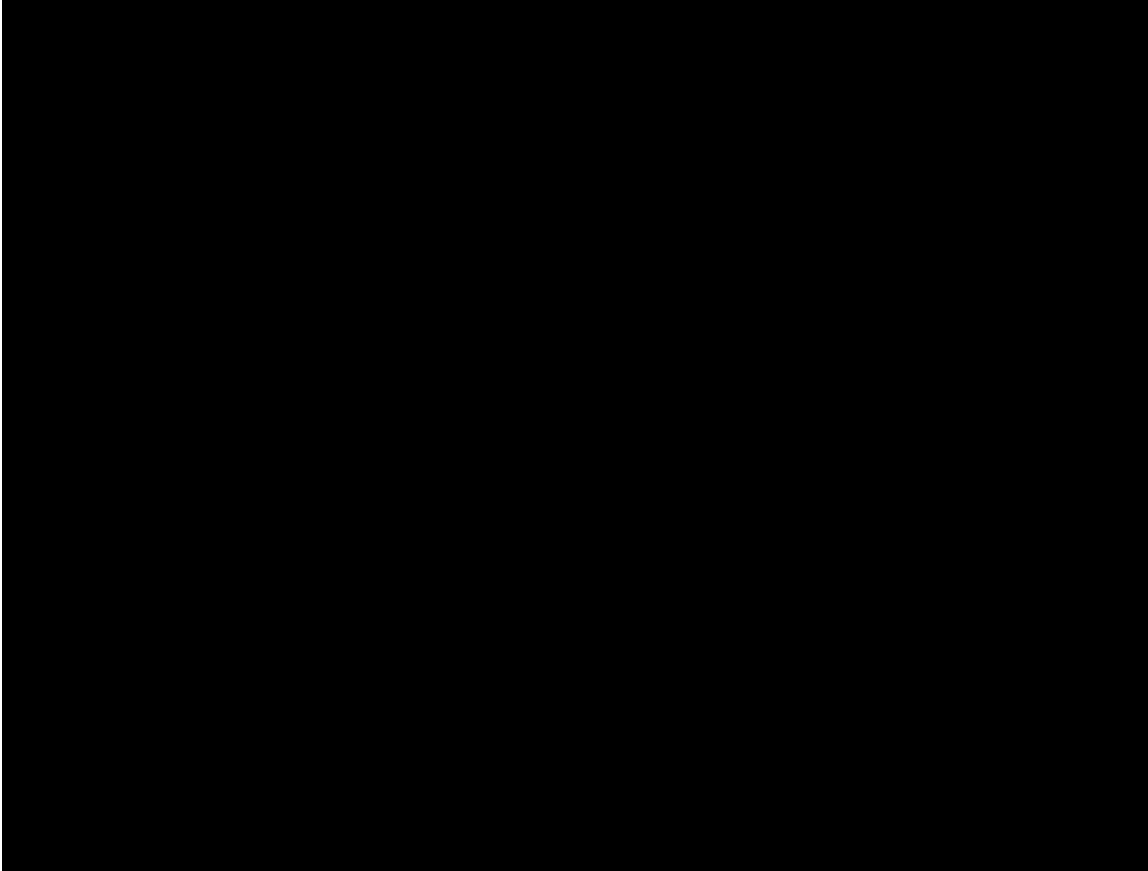
Muriel Bowser  
Mayor

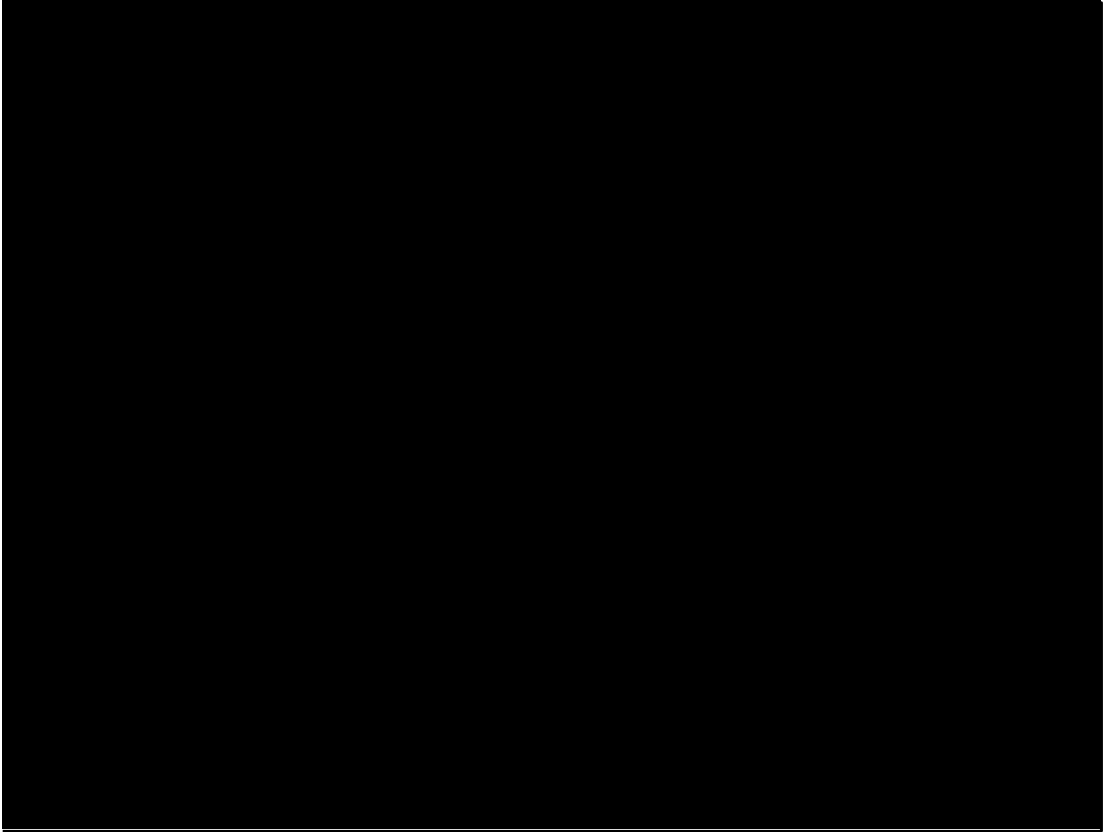
Cc: Congresswoman Eleanor Holmes Norton

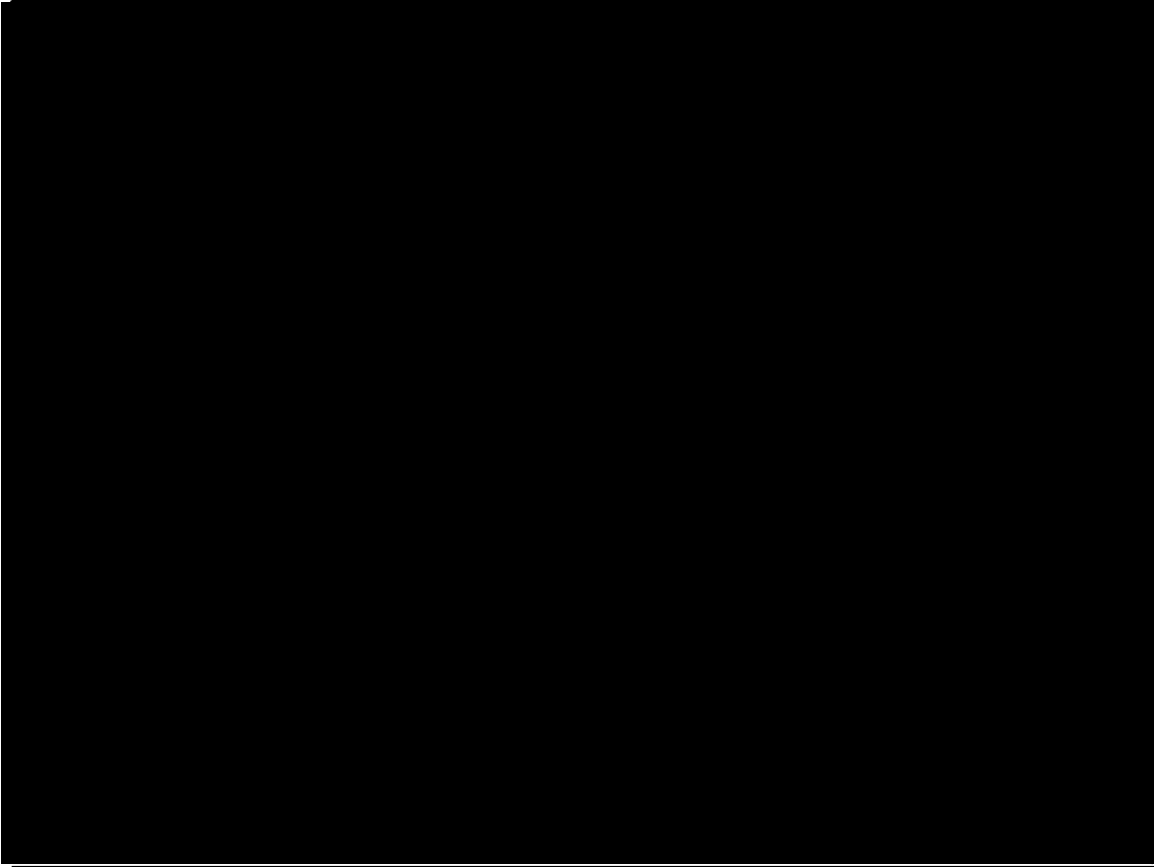


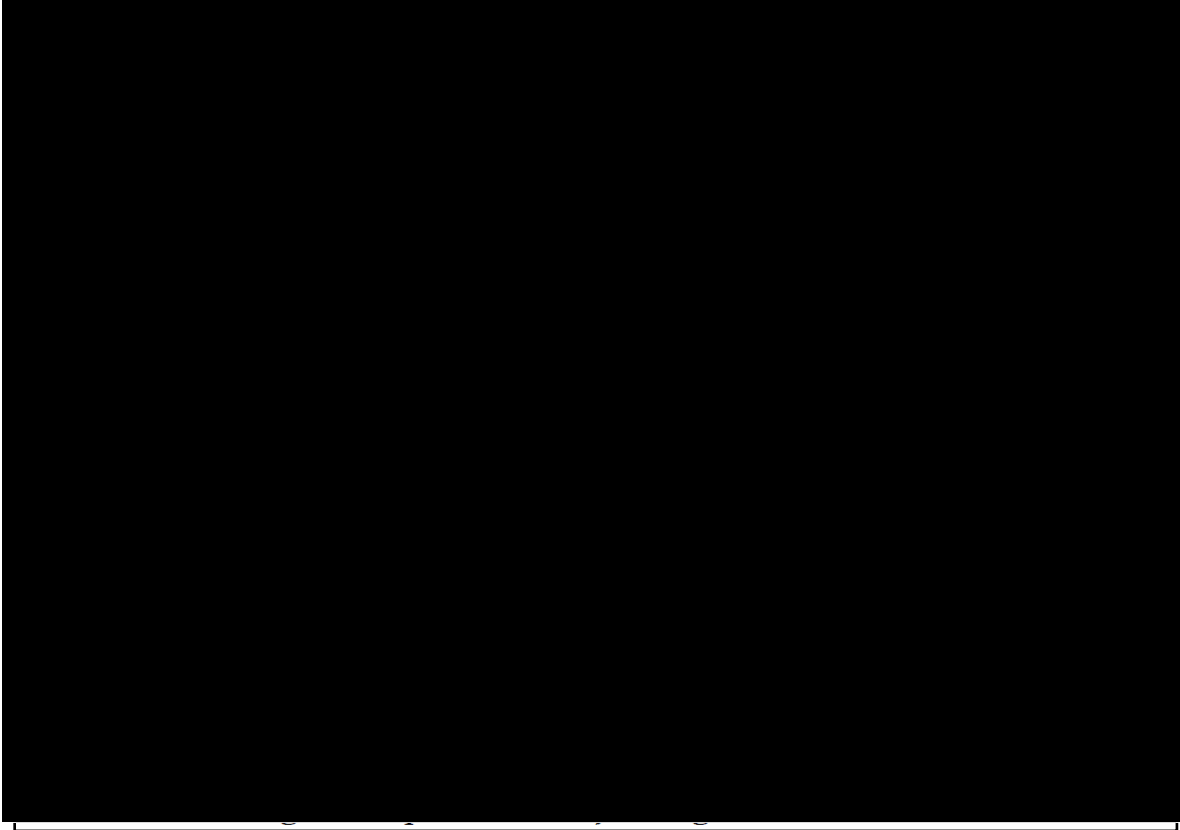
**APPENDIX D: DCNG BRIEFINGS AND ASSOCIATED MAPS OF THE DISTRICT OF COLUMBIA**

*DCNG December 31, 2020 Presentation for Mr. McCarthy*

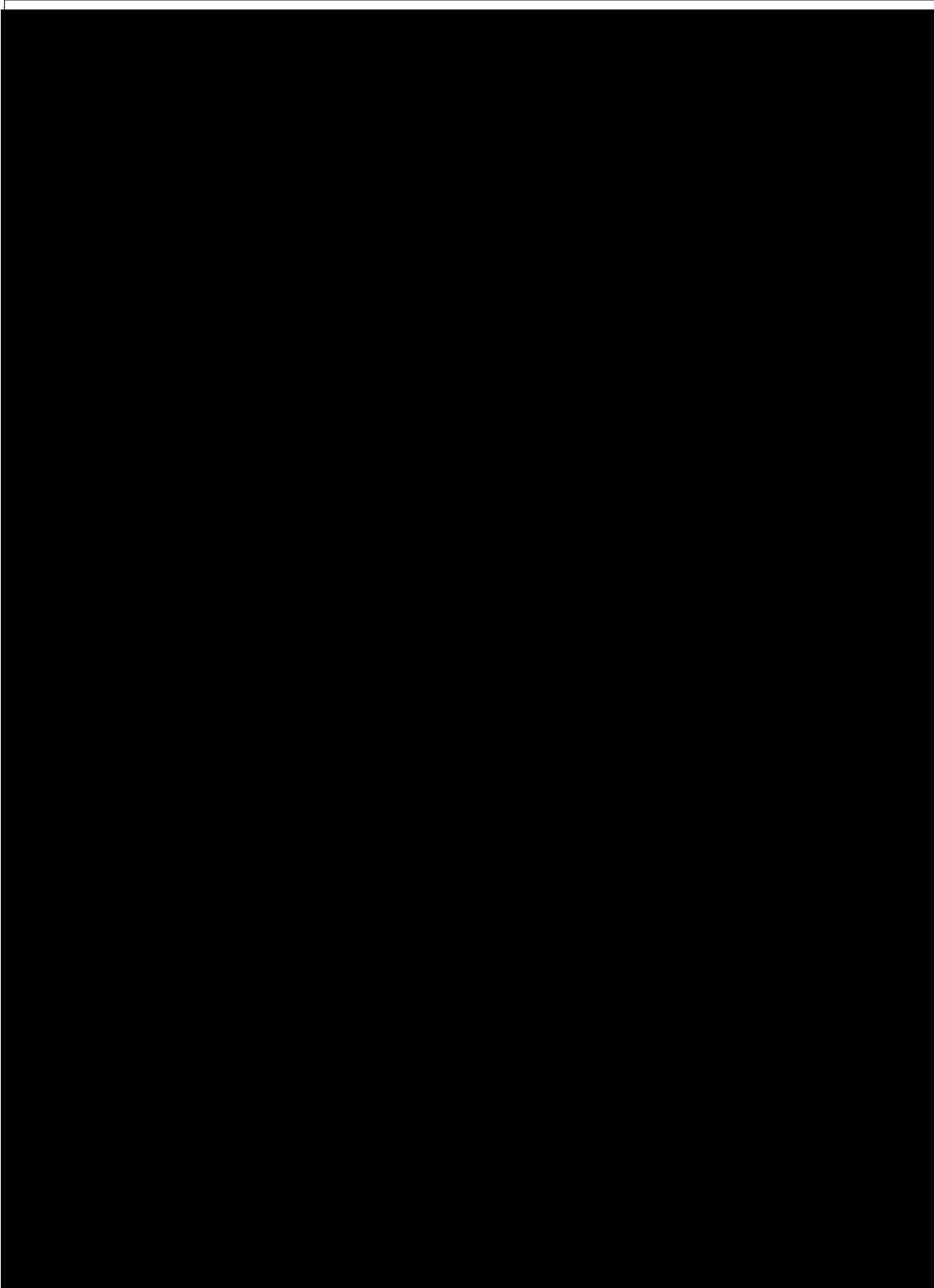


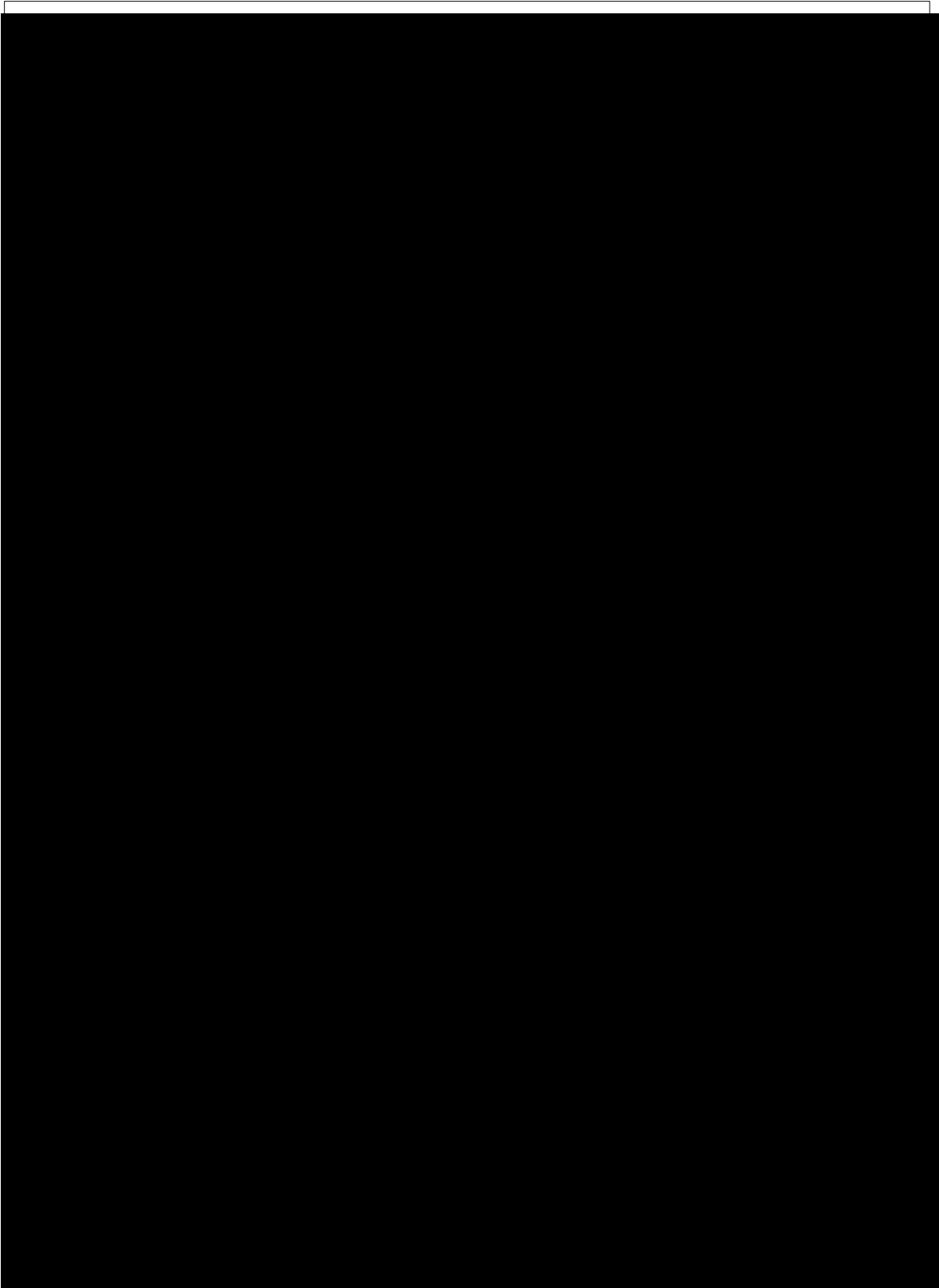


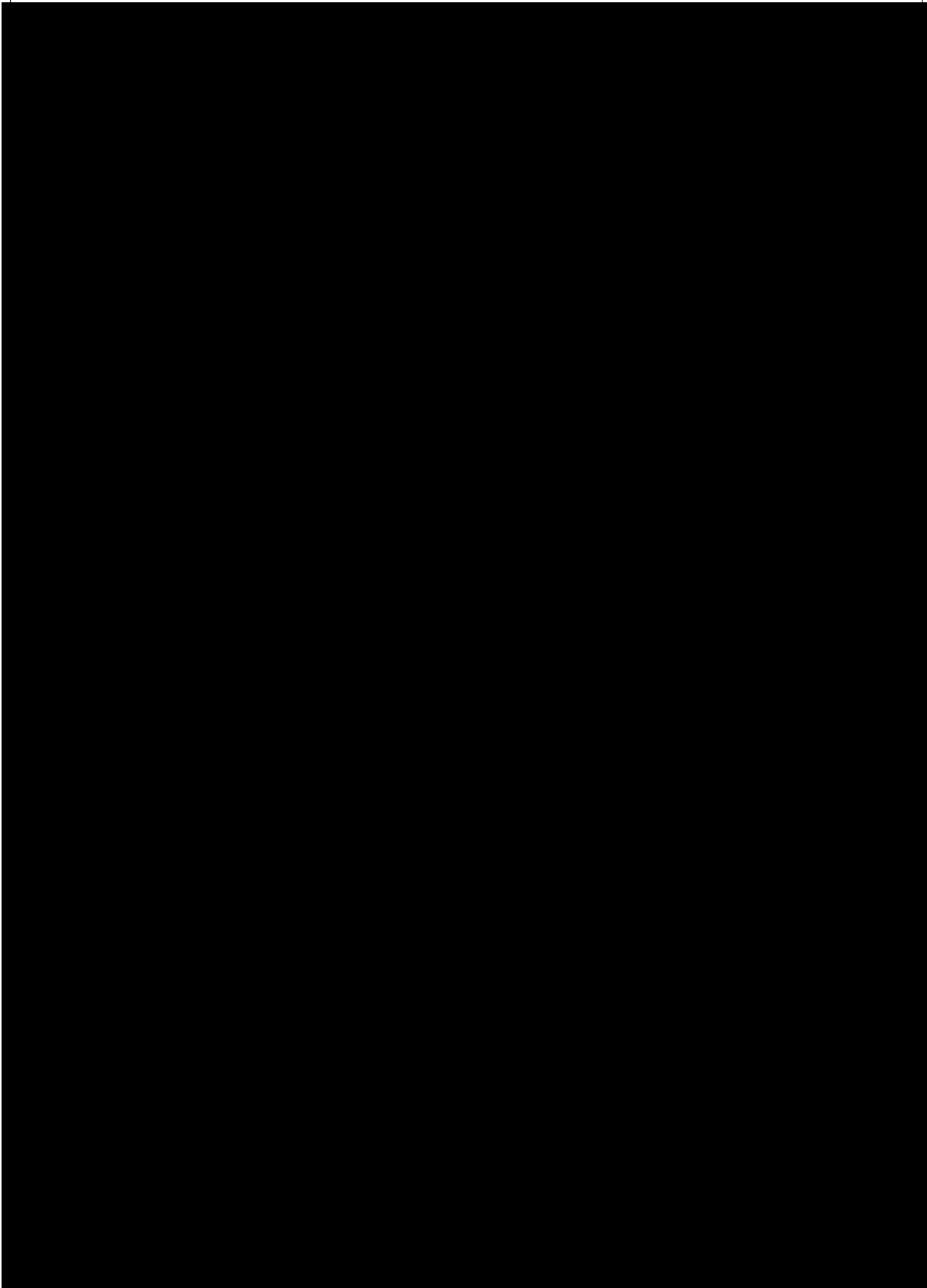


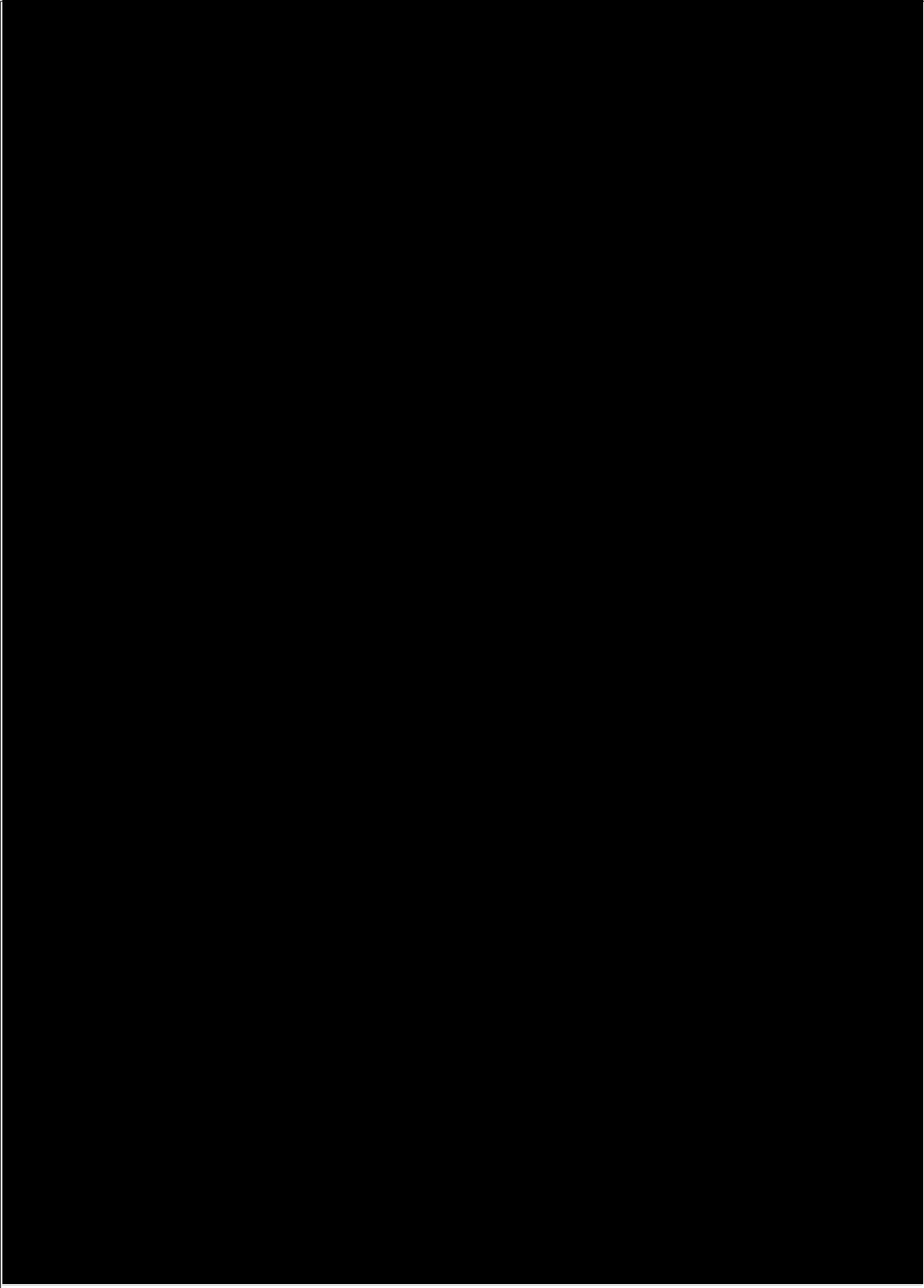


*DCNG January 1, 2021 Operations Order 001-2021 – Operation Guardian*

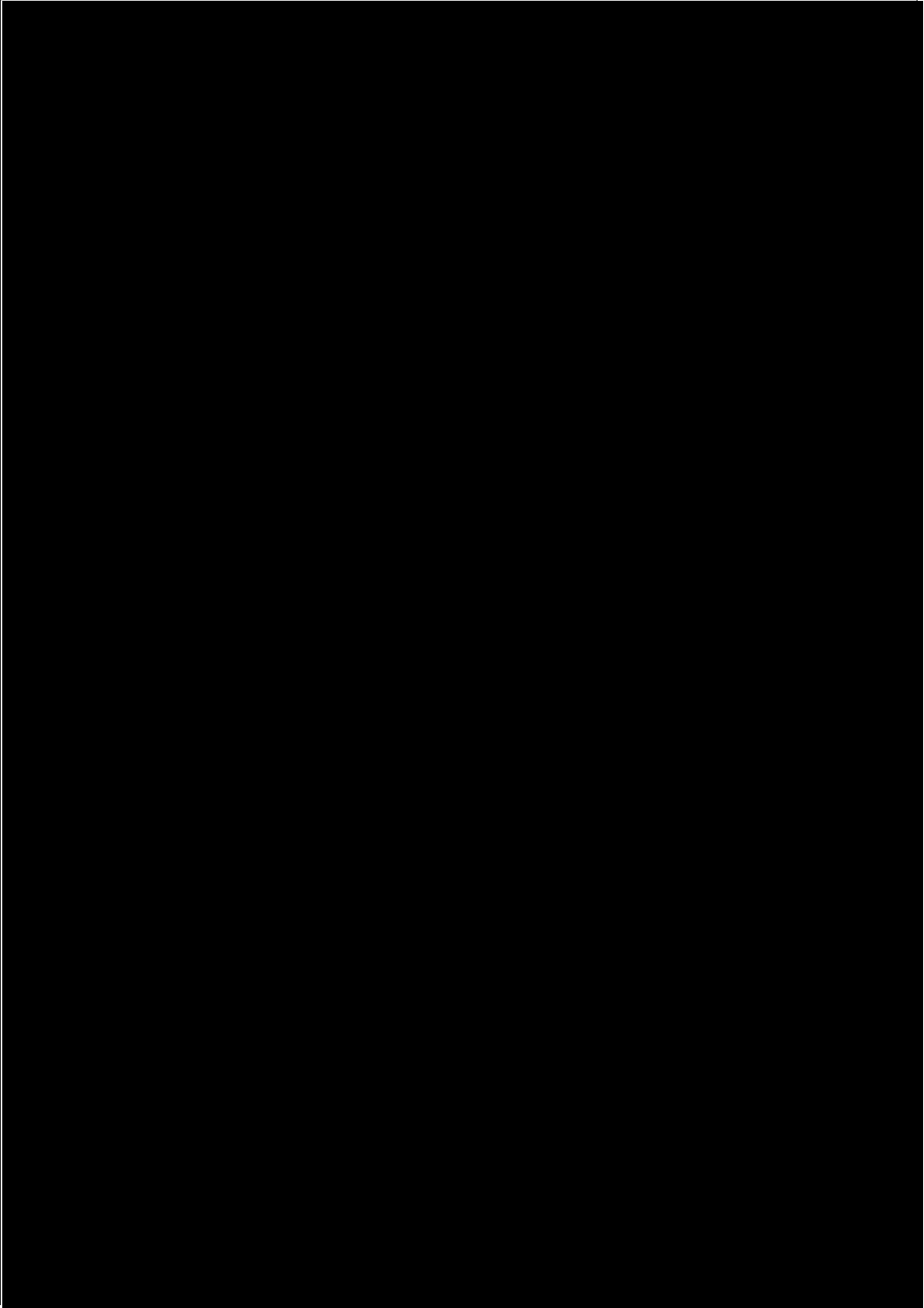


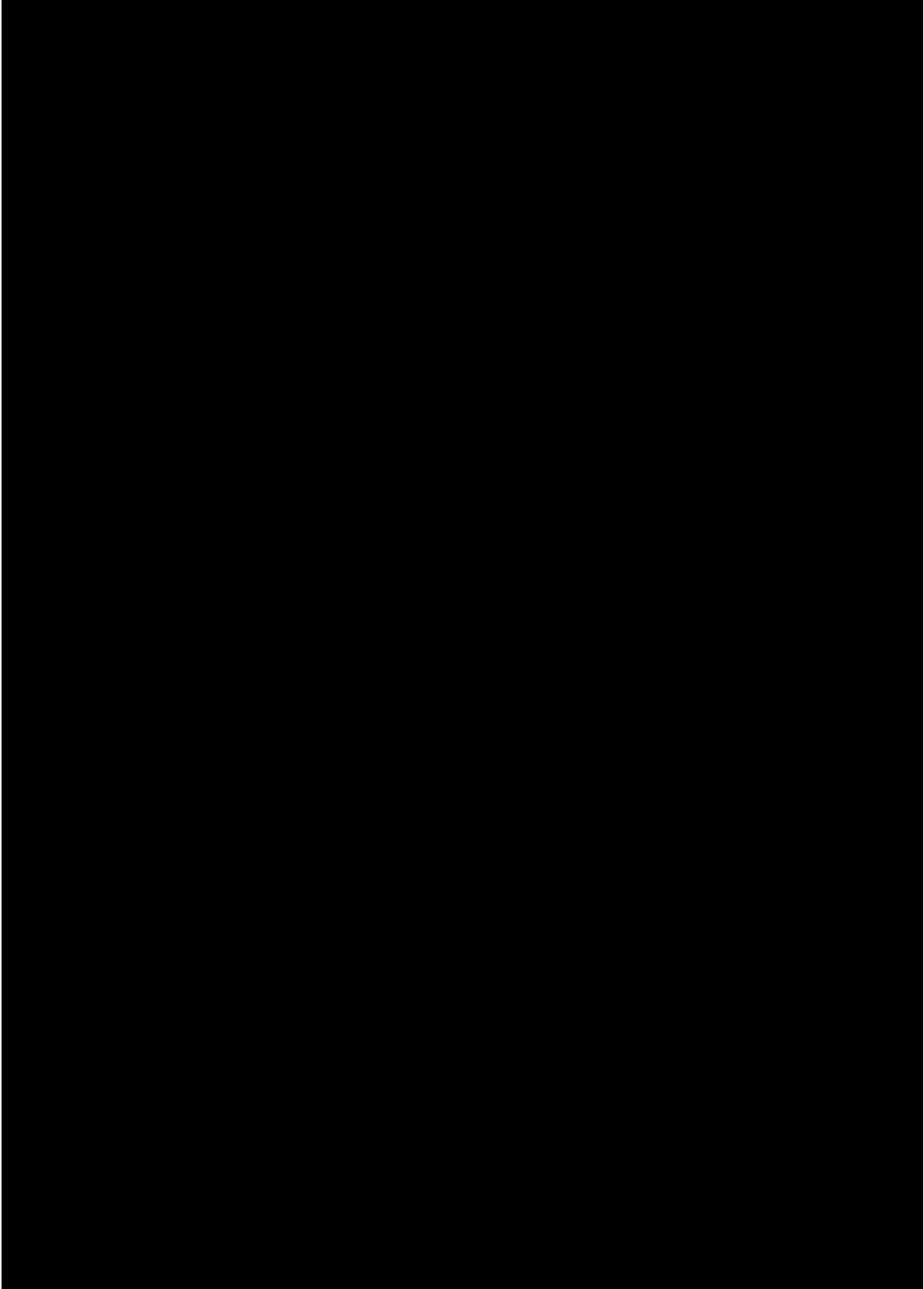


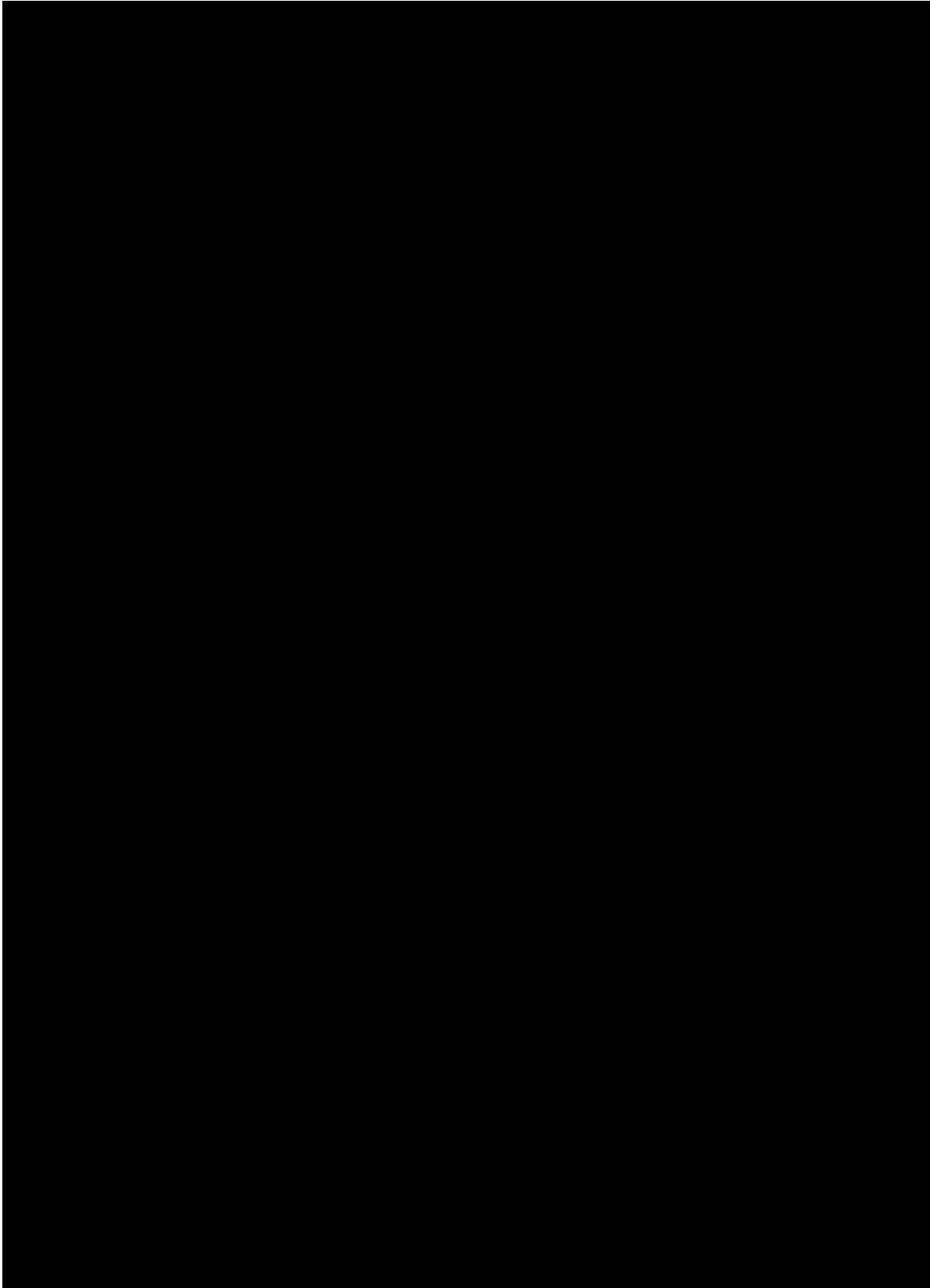


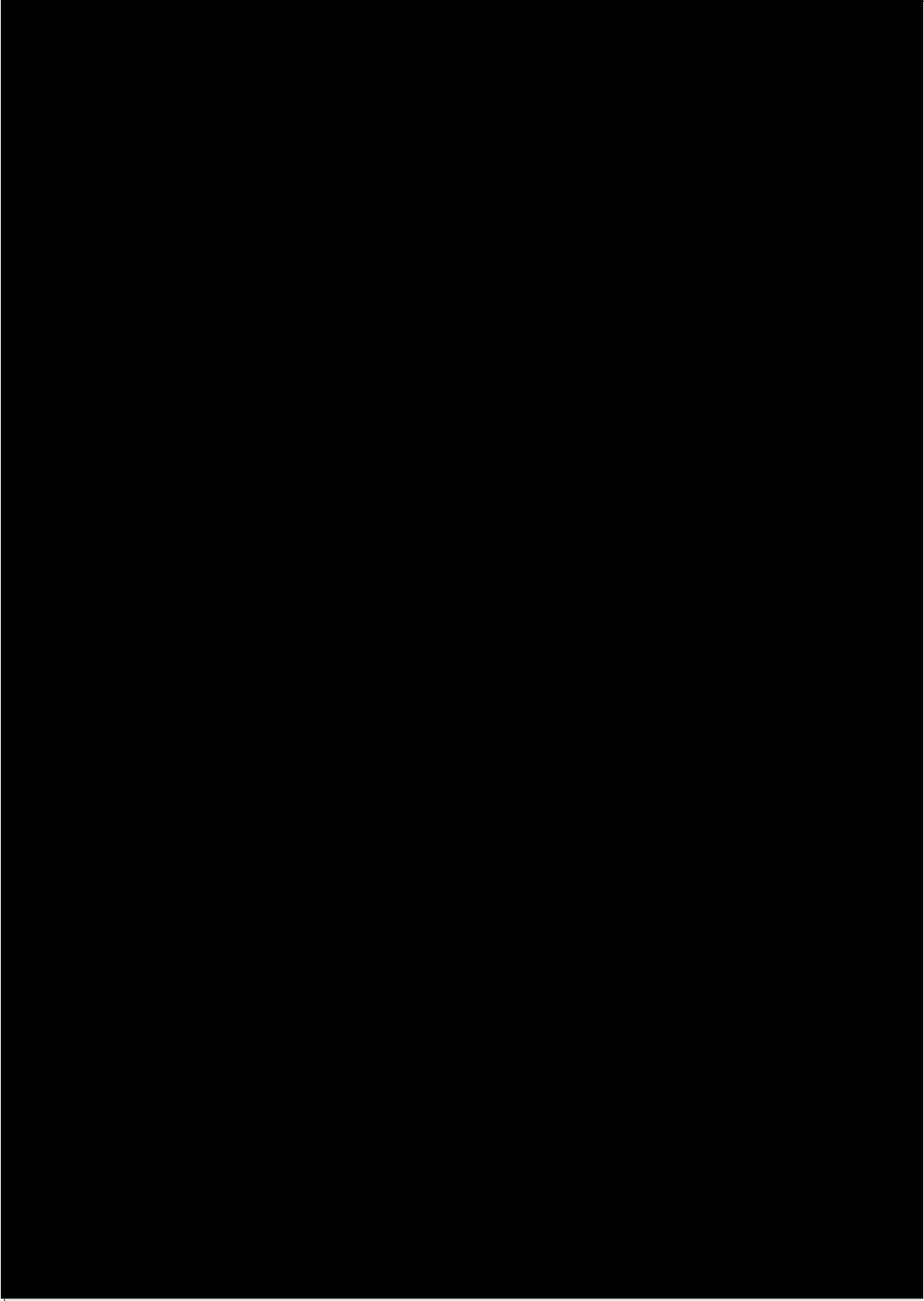




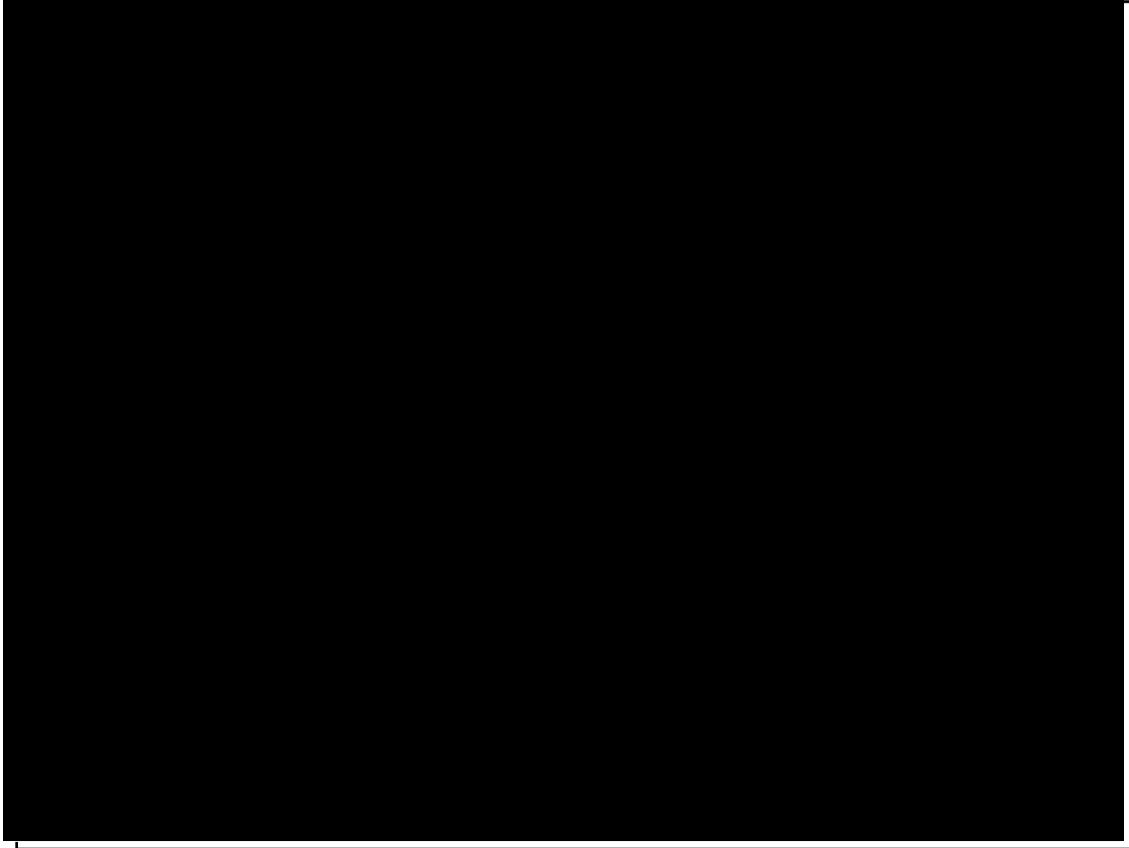


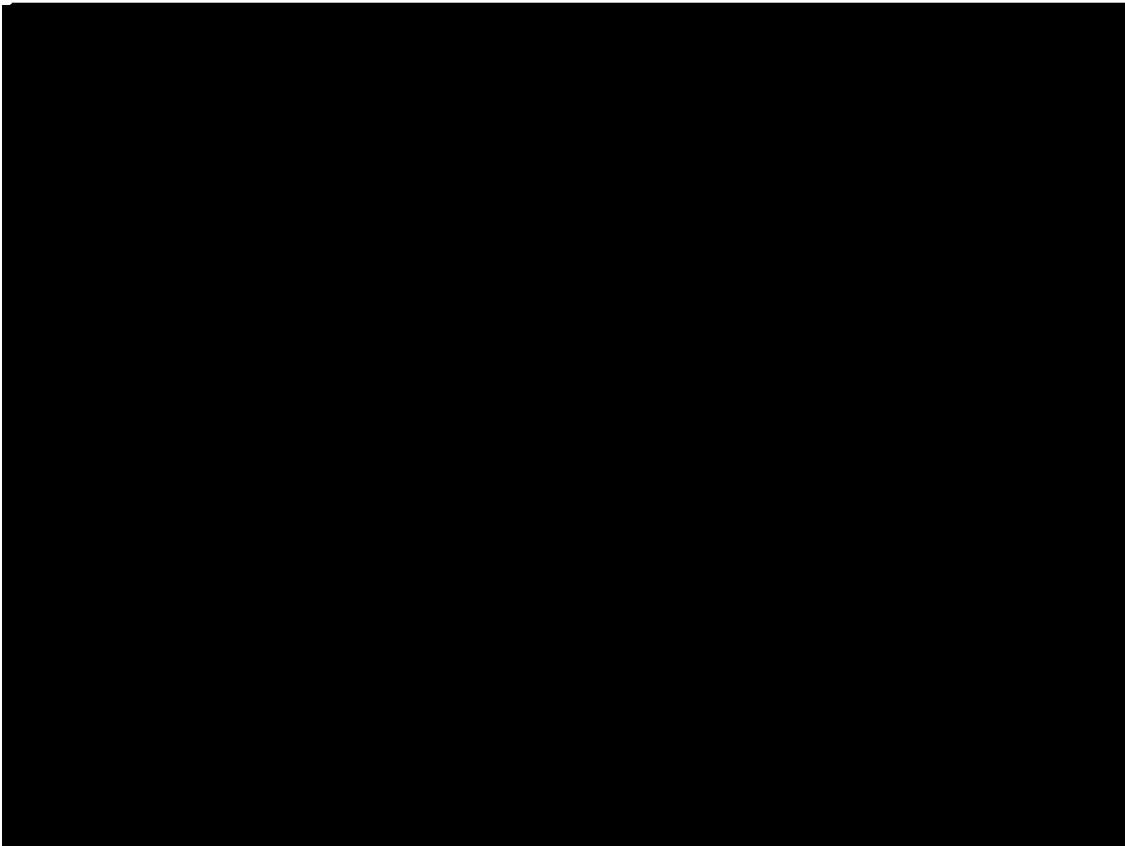
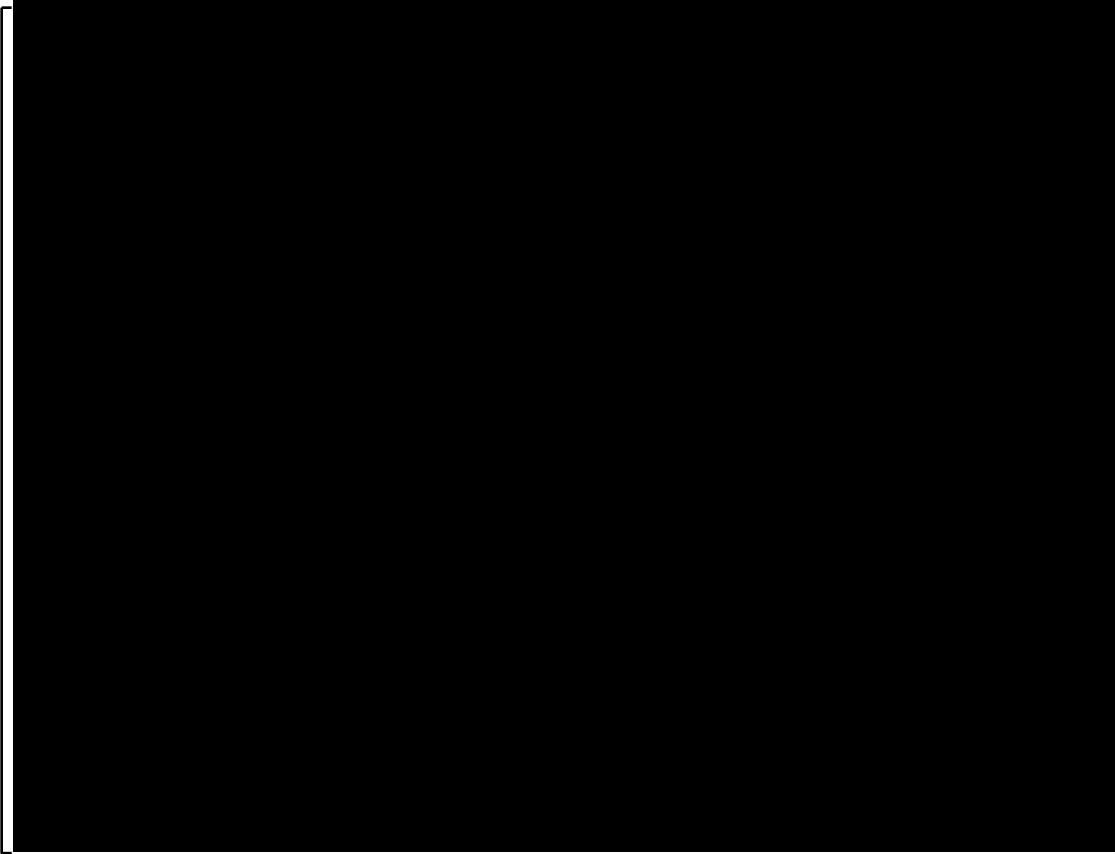


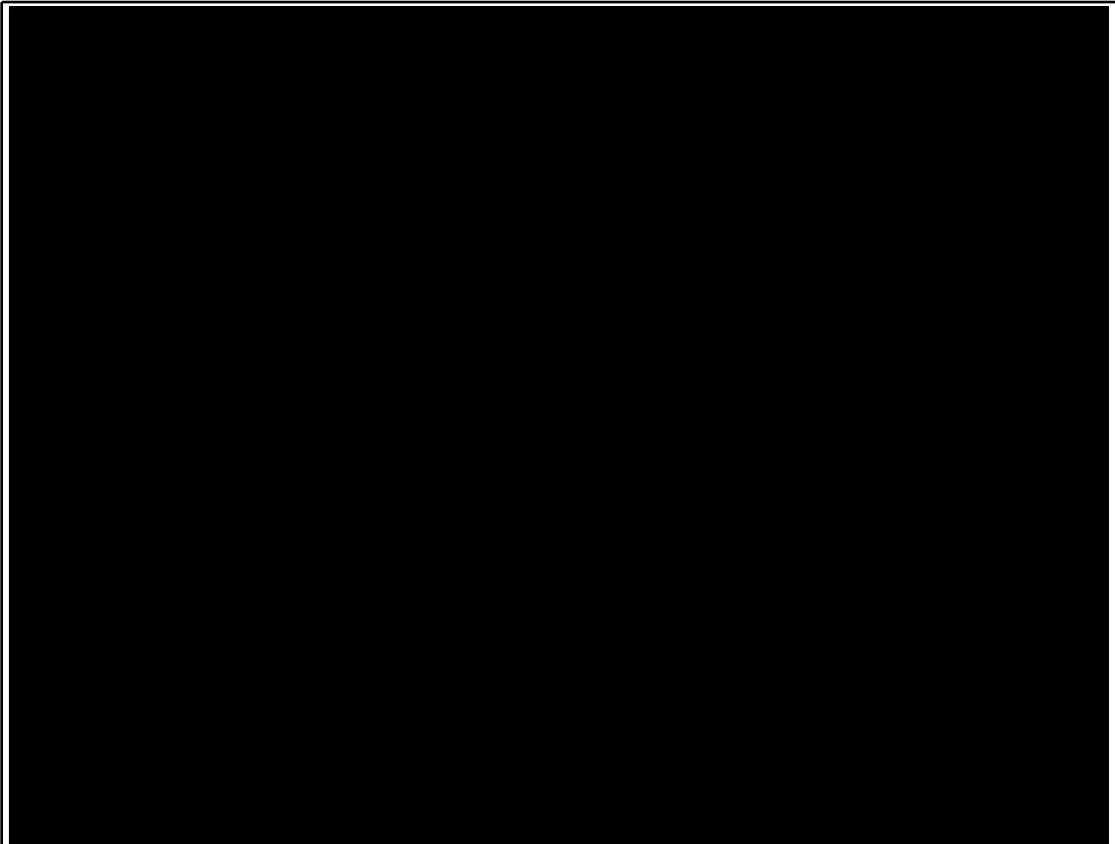


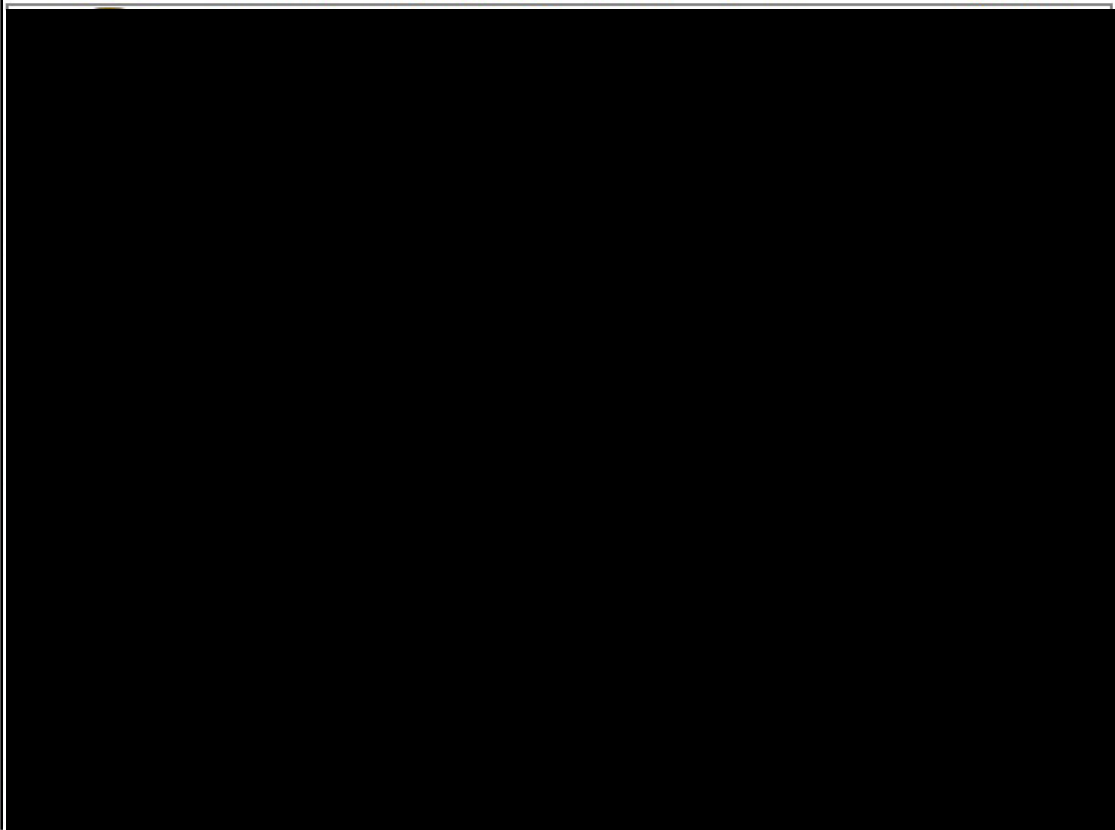
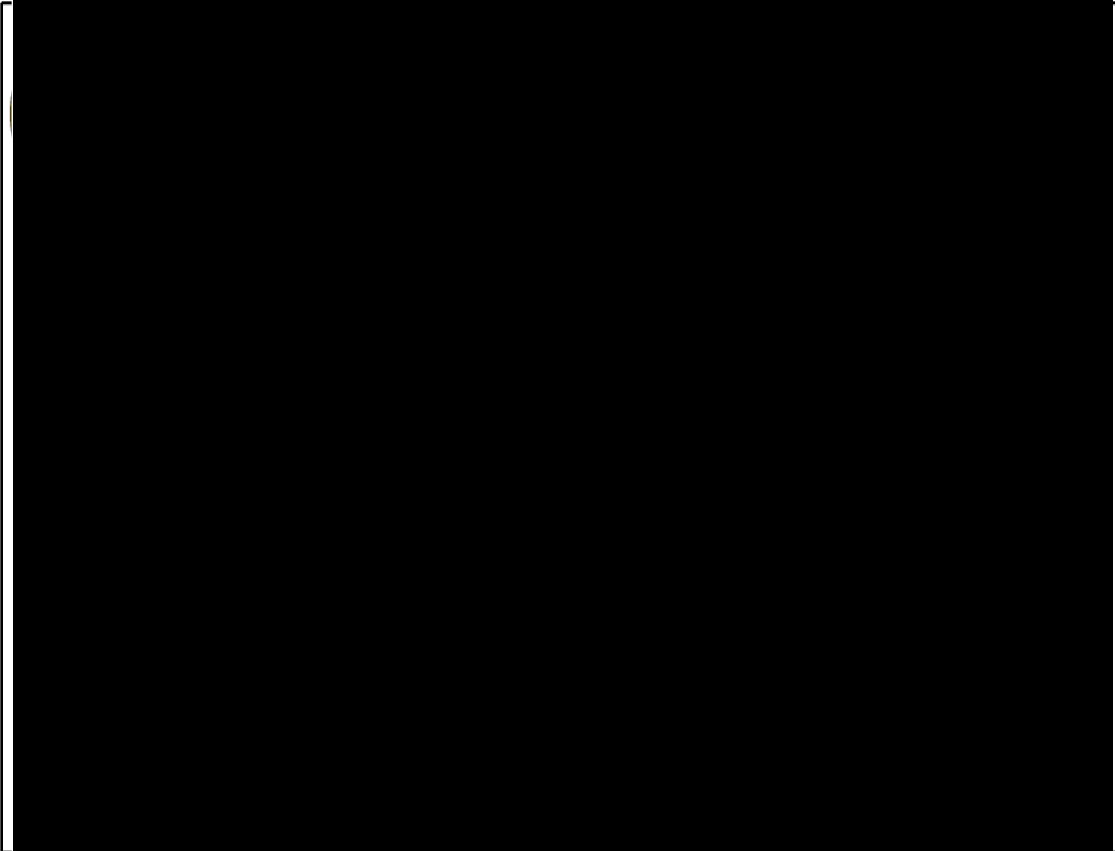


*DCNG January 2, 2021 Presentation for Mr. McCarthy*

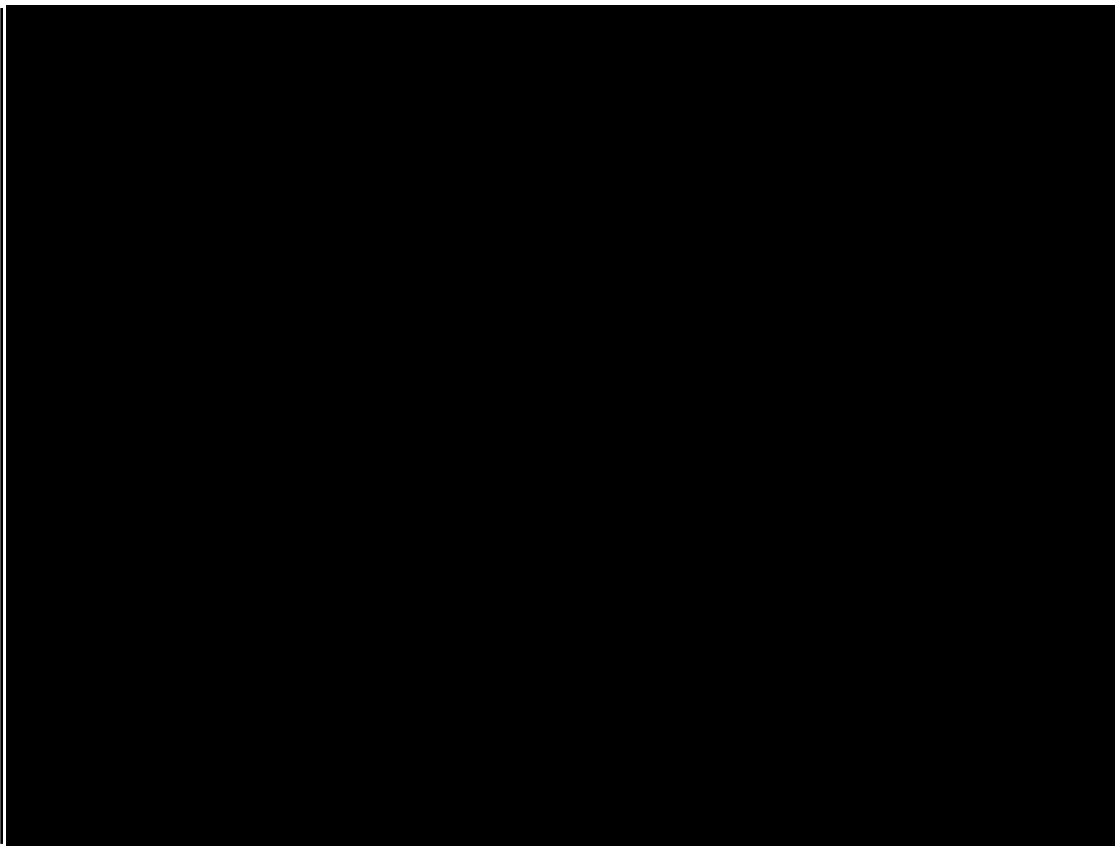




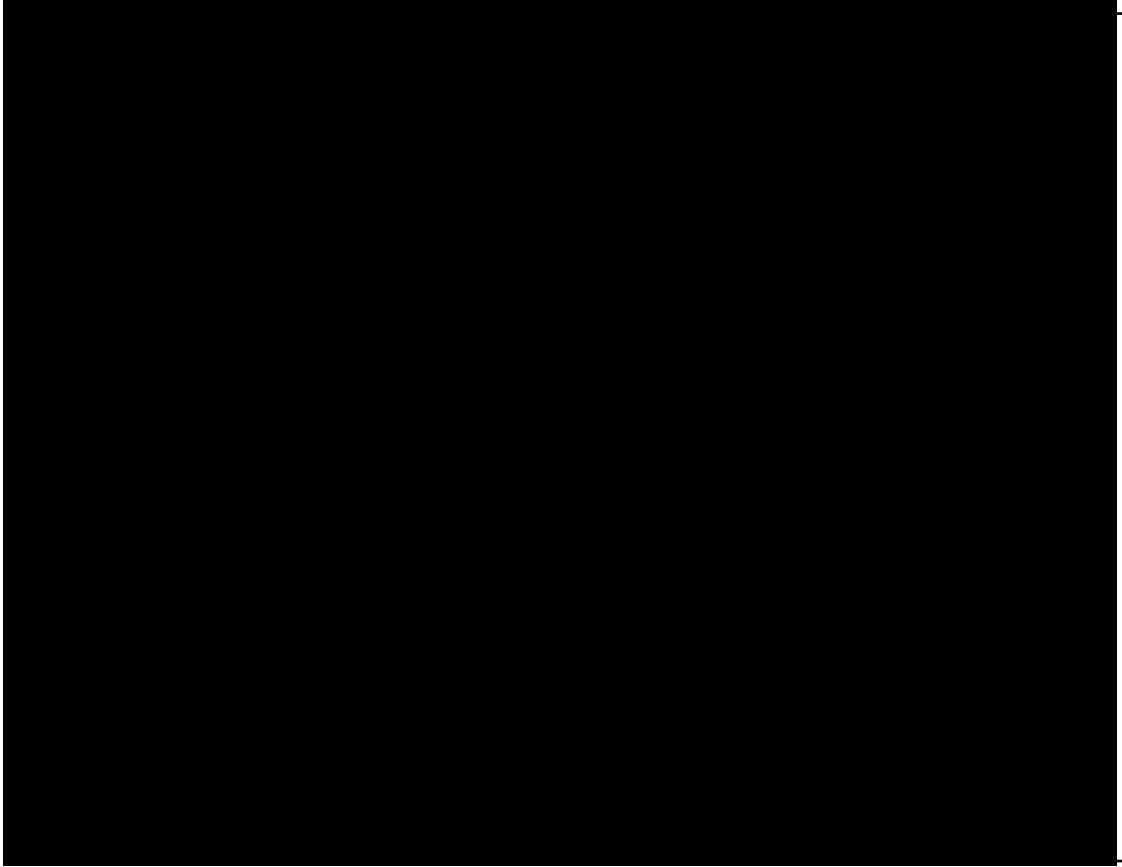


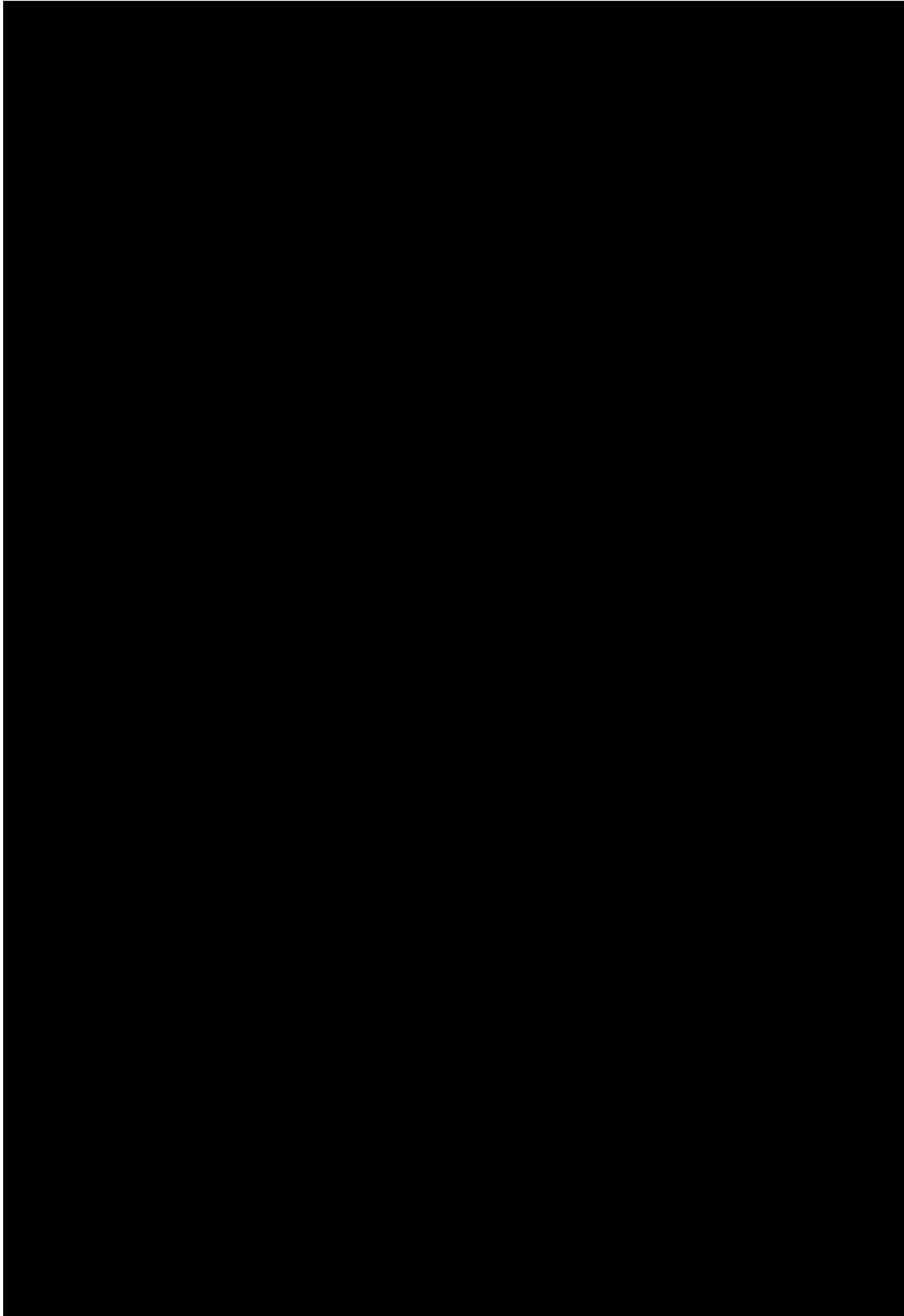


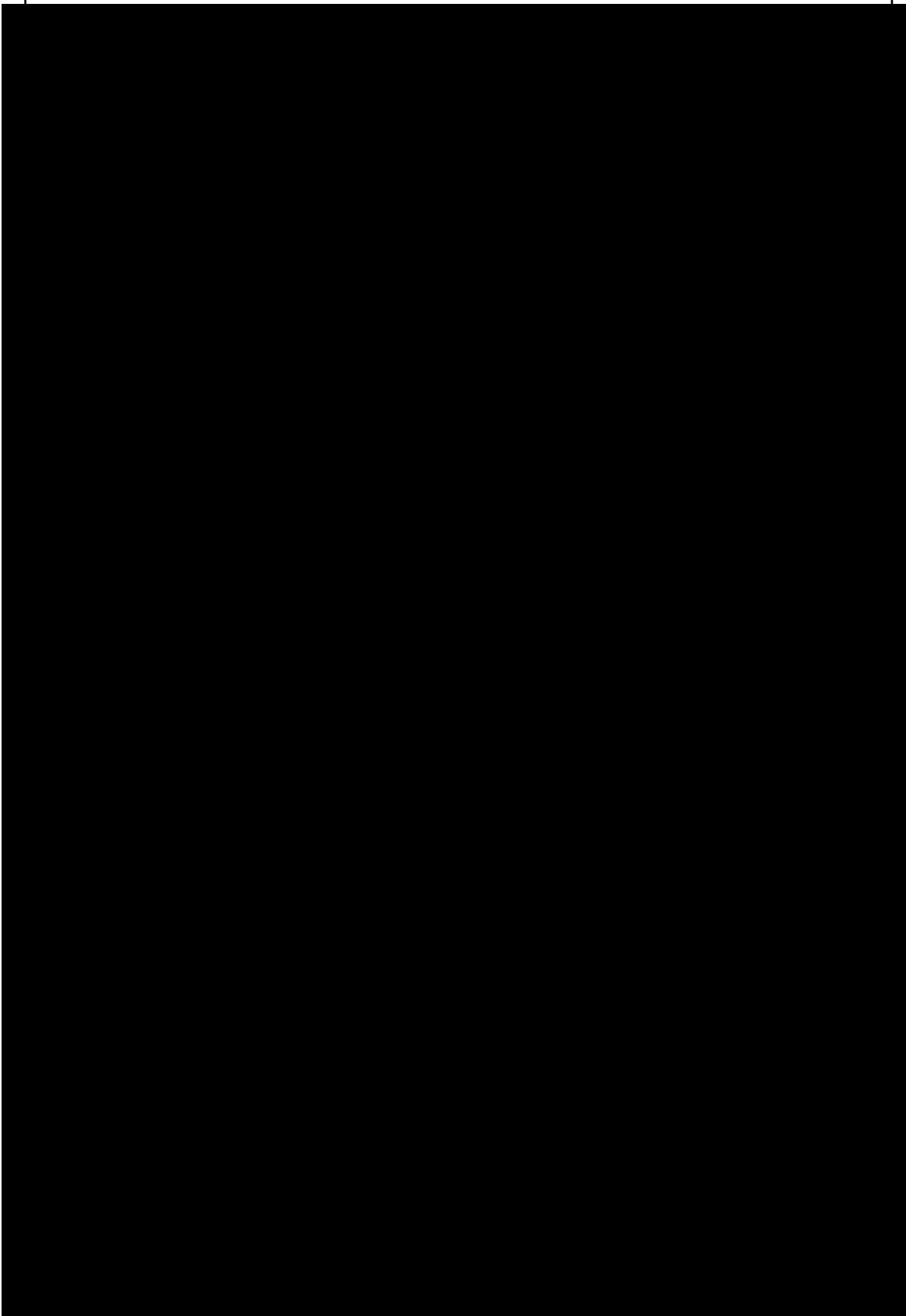


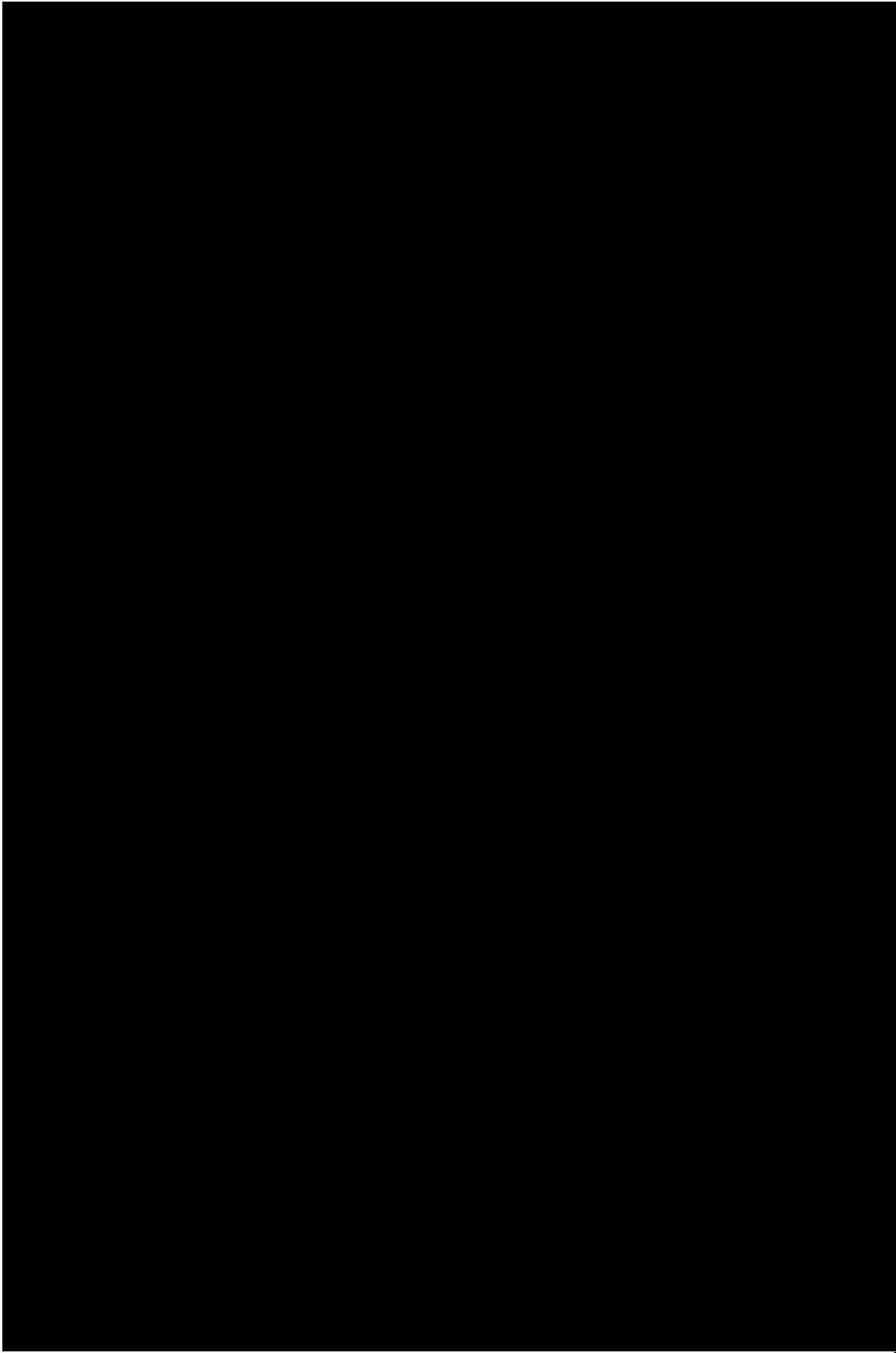


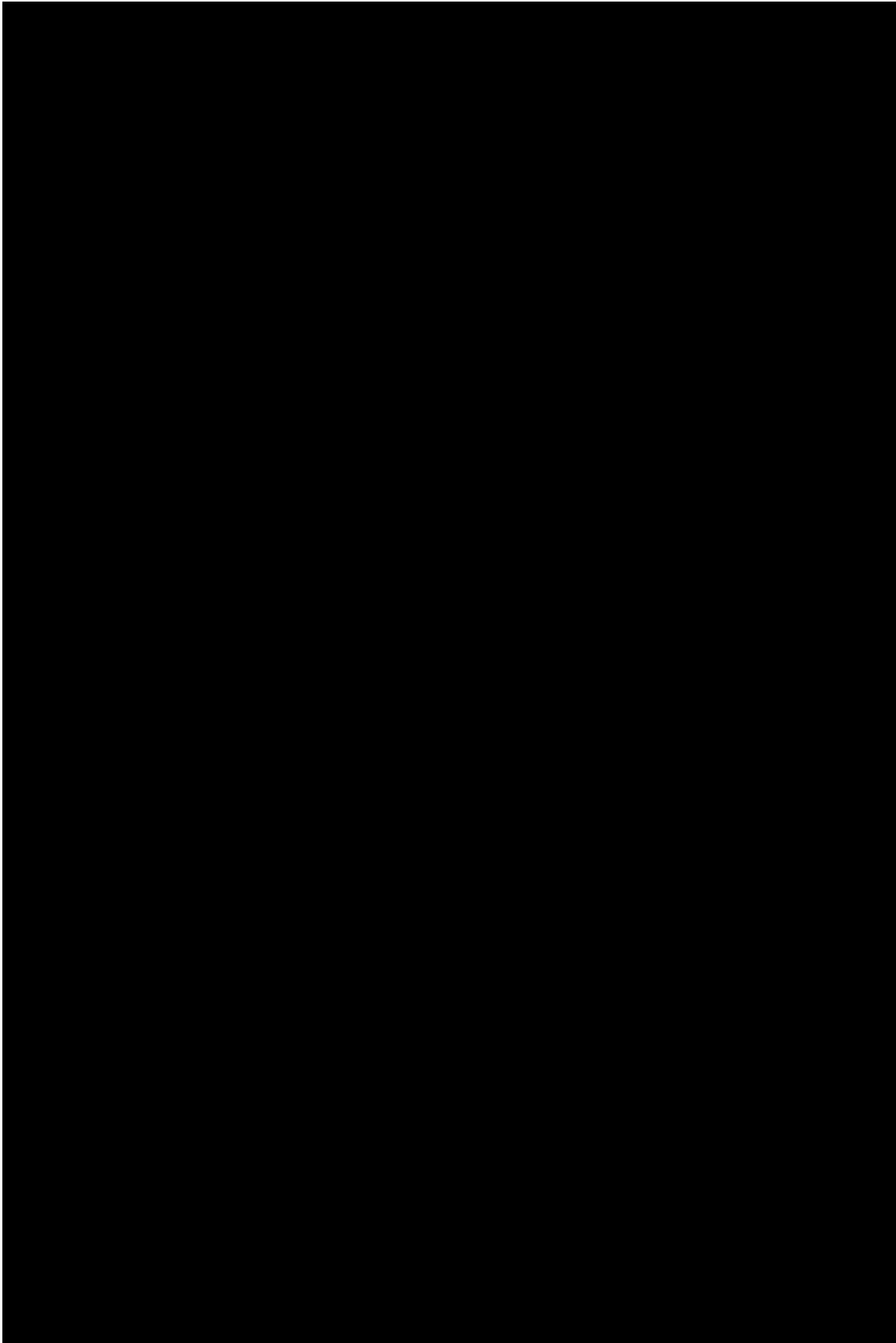
*DCNG January 4, 2021 Presentation (Pre-Mission Briefing) for Mr. McCarthy*









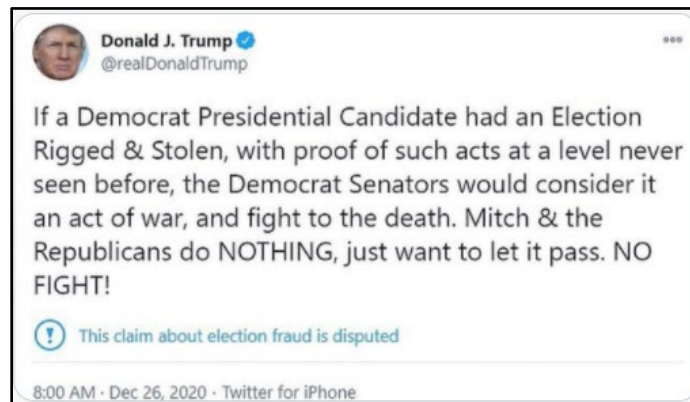


## APPENDIX E: PRESIDENT'S TWEETS

DECEMBER 19, 2020



DECEMBER 26, 2020



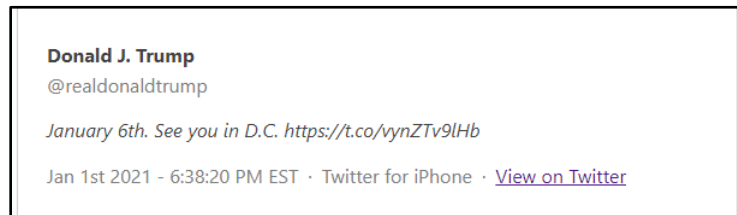
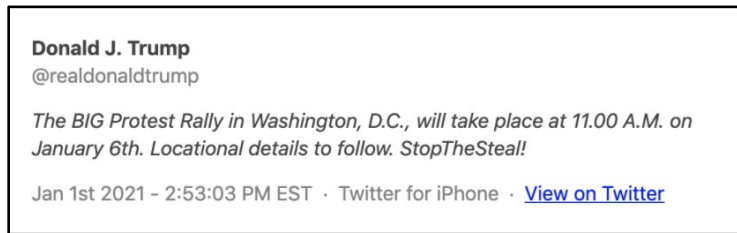
DECEMBER 27, 2020



DECEMBER 30, 2020



JANUARY 1, 2021



JANUARY 3, 2021






JANUARY 5, 2021

**Donald J. Trump**  
@realdonaldtrump

*See you in D.C. <https://t.co/ti4bChnPKz>*


Jan 5th 2021 - 10:27:41 AM EST · Twitter for iPhone · [View on Twitter](#)

 **Donald J. Trump** ✓  
@realDonaldTrump

I hope the Democrats, and even more importantly, the weak and ineffective RINO section of the Republican Party, are looking at the thousands of people pouring into D.C. They won't stand for a landslide election victory to be stolen.  
[@senatemajldr](#) [@JohnCornyn](#) [@SenJohnThune](#)

4:12 PM · Jan 5, 2021

56.9K 25.6K people are Tweeting about this

 **Donald J. Trump** ✓  
@realDonaldTrump

Washington is being inundated with people who don't want to see an election victory stolen by emboldened Radical Left Democrats. Our Country has had enough, they won't take it anymore! We hear you (and love you) from the Oval Office. MAKE AMERICA GREAT AGAIN!

5:05 PM · Jan 5, 2021 · Twitter for iPhone

**Donald J. Trump**  
@realdonaldtrump

*I will be speaking at the SAVE AMERICA RALLY tomorrow on the Ellipse at 11AM Eastern. Arrive early — doors open at 7AM Eastern. BIG CROWDS!  
<https://t.co/k4bLXESc0c>*

Jan 5th 2021 - 5:43:07 PM EST · Twitter for iPhone · [View on Twitter](#)

## ACRONYMS AND ABBREVIATIONS

<b>AG</b>	Attorney General
<b>antifa</b>	Anti-fascist
<b>AOC</b>	Army Operations Center
<b>Armory</b>	D.C. Armory
<b>ARNG</b>	Army National Guard
<b>BG</b>	Brigadier General, U.S. Army
<b>Brig Gen</b>	Brigadier General, U.S. Air Force
<b>CBRN</b>	Chemical, biological, radiological, and nuclear
<b>CDO</b>	Civil Disturbance Operations
<b>CG</b>	Commanding General
<b>CONOPS</b>	Concept of Operations
<b>CST</b>	Civil Support Team
<b>DCANG</b>	D.C. Air National Guard
<b>DCARNG</b>	D.C. Army National Guard
<b>DCFEMS</b>	D.C. Fire and Emergency Medical Services
<b>DCHSEMA</b>	District of Columbia Homeland Security and Emergency Management Agency
<b>DCNG</b>	District of Columbia National Guard
<b>DHS</b>	Department of Homeland Security
<b>DoDD</b>	DoD Directive
<b>DoI</b>	Department of the Interior
<b>DoJ</b>	Department of Justice
<b>DSCA</b>	Defense Support of Civil Authorities
<b>EMAC</b>	Emergency Management Assistance Compact
<b>FBI</b>	Federal Bureau of Investigation

<b>GEN</b>	General
<b>HQDA</b>	Headquarters, Department of the Army
<b>ISR</b>	Intelligence, Surveillance, and Reconnaissance
<b>ITCB</b>	Intelligence/Counter-Terrorism Branch
<b>JBA</b>	Joint Base Andrews
<b>JCS</b>	Joint Chiefs of Staff
<b>LTG</b>	Lieutenant General
<b>MG</b>	Major General
<b>MPD</b>	Metropolitan Police Department
<b>NCR</b>	National Capitol Region
<b>NG</b>	National Guard
<b>NGB</b>	National Guard Bureau
<b>NOC</b>	Network Operations Center
<b>NORTHCOM</b>	Northern Command
<b>OASD(HD&amp;GS)</b>	Office of the Assistant Secretary of Defense for Homeland Defense and Global Security
<b>OGC</b>	Office of General Counsel
<b>OIC</b>	Officer in Charge
<b>OIG</b>	Office of Inspector General
<b>OPORD</b>	Operations Order
<b>QRF</b>	Quick Reaction Force
<b>RFA</b>	Request for assistance
<b>RUF</b>	Rules for the Use of Force
<b>SecArmy</b>	Secretary of the Army
<b>SecDef</b>	Secretary of Defense
<b>SIR</b>	Situational Information Report

<b>TCP</b>	Traffic Control Point
<b>TF Guardian</b>	Task Force Guardian
<b>U.S.C.</b>	United States Code
<b>USCP</b>	U.S. Capitol Police
<b>USMS</b>	U.S. Marshals Service
<b>USPP</b>	U.S. Park Police
<b>USSS</b>	U.S. Secret Service
<b>VTC</b>	Video Teleconference

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### **U.S. DEPARTMENT OF DEFENSE**

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## **For more information about DoD OIG reports or activities, please contact us:**

### **Congressional Liaison**

703.604.8324

### **Media Contact**

[public.affairs@dodig.mil](mailto:public.affairs@dodig.mil); 703.604.8324

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### **DoD Hotline**

[www.dodig.mil/hotline](http://www.dodig.mil/hotline)

**CUI**

**DODIG-2022-039**

**REVIEW OF THE DOD'S ROLE, RESPONSIBILITIES, AND ACTIONS TO PREPARE FOR  
AND RESPOND TO THE PROTEST AND ITS AFTERMATH AT THE U.S. CAPITOL  
CAMPUS ON JANUARY 6, 2021**



**DEPARTMENT OF DEFENSE | OFFICE OF INSPECTOR GENERAL**

4800 Mark Center Drive  
Alexandria, Virginia 22350-1500  
[www.dodig.mil](http://www.dodig.mil)  
DoD Hotline 1.800.424.9098

**CUI**

Findings of the Final Report of the January 6th Select Committee

Below please find the relevant findings of the *Final Report of the U.S. House Select Committee to Investigate the January 6th Attack on the United States Capitol* (“Jan. 6th Report”).<sup>1</sup> This document has been updated as of November 8, 2023 to remove certain findings which were included in the preliminary version of this exhibit, disclosed to the court and opposing counsel on October 6, 2023. DATE FILED: November 23, 2023 12:03 PM

**Finding 5:**

Without any evidentiary basis and contrary to State and Federal law, Donald Trump unlawfully pressured State officials and legislators to change the results of the election in their States.

Jan. 6th Report at 4.

**Finding 6:**

Donald Trump oversaw an effort to obtain and transmit false electoral certificates to Congress and the National Archives.

Jan. 6th Report at 4.

**Finding 7:**

Donald Trump pressured Members of Congress to object to valid slates of electors from several States.

Jan. 6th Report at 5.

**Finding 10:**

Knowing that a violent attack on the Capitol was underway and knowing that his words would incite further violence, Donald Trump purposely sent a social media message publicly condemning Vice President Pence at 2:24 p.m. on January 6th.

Jan. 6th Report at 5.

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<sup>1</sup> H. Rep. 117-663, 117th Cong., 2d Sess., at 8, (Dec. 22, 2022). To aid readability, counsel for Petitioners made formatting changes and removed footnotes and citations from the quotations below. In certain instances, counsel added ellipses to omit portions of the quoted text.

**Finding 11:**

Knowing that violence was underway at the Capitol, and despite his duty to ensure that the laws are faithfully executed, Donald Trump refused repeated requests over a multiple hour period that he instruct his violent supporters to disperse and leave the Capitol, and instead watched the violent attack unfold on television. This failure to act perpetuated the violence at the Capitol and obstructed Congress's proceeding to count electoral votes.

Jan. 6th Report at 5.

**Finding 12:**

Each of these actions by Donald Trump was taken in support of a multi-part conspiracy to overturn the lawful results of the 2020 Presidential election.

Jan. 6th Report at 5.

**Finding 14:**

Intelligence gathered in advance of January 6th did not support a conclusion that Antifa or other left-wing groups would likely engage in a violent counter-demonstration, or attack Trump supporters on January 6<sup>th</sup> . . . Ultimately, none of these groups was involved to any material extent with the attack on the Capitol on January 6th.

Jan. 6th Report at 5.

**Finding 15:**

Neither the intelligence community nor law enforcement obtained intelligence in advance of January 6th on the full extent of the ongoing planning by President Trump, John Eastman, Rudolph Giuliani and their associates to overturn the certified election results. Such agencies apparently did not (and potentially could not) anticipate the provocation President Trump would offer the crowd in his Ellipse speech, that President Trump would "spontaneously" instruct the crowd to march to the Capitol, that President Trump would exacerbate the violent riot by sending his 2:24 p.m. tweet condemning Vice President Pence, or the full scale of the violence and lawlessness that would ensue. Nor did law enforcement anticipate that President Trump would refuse to direct his supporters to leave the Capitol once violence began. No intelligence community advance analysis predicted exactly how President Trump would behave; no such analysis recognized the full scale and extent of the threat to the Capitol on January 6th.

Jan. 6th Report at 6.



**Finding 17:**

President Trump had authority and responsibility to direct deployment of the National Guard in the District of Columbia, but never gave any order to deploy the National Guard on January 6th or on any other day. Nor did he instruct any Federal law enforcement agency to assist. Because the authority to deploy the National Guard had been delegated to the Department of Defense, the Secretary of Defense could, and ultimately did deploy the Guard. Although evidence identifies a likely miscommunication between members of the civilian leadership in the Department of Defense impacting the timing of deployment, the Committee has found no evidence that the Department of Defense intentionally delayed deployment of the National Guard. The Select Committee recognizes that some at the Department had genuine concerns, counseling caution, that President Trump might give an illegal order to use the military in support of his efforts to overturn the election.

Jan. 6th Report at 6–7.

**Finding 20:**

Knowing that violence was underway at the Capitol, and despite his duty to ensure that the laws are faithfully executed, Donald Trump refused repeated requests over a multiple hour period that he instruct his violent supporters to disperse and leave the Capitol, and instead watched the violent attack unfold on television. This failure to act perpetuated the violence at the Capitol and obstructed Congress's proceeding to count electoral votes.

Jan. 6th Report at 5.

**Finding 22:**

Capitol Police leadership did not anticipate the scale of the violence that would ensue after President Trump instructed tens of thousands of his supporters in the Ellipse crowd to march to the Capitol, and then tweeted at 2:24 p.m.

Jan. 6th Report at 6.

**Finding 24:**

President Trump had authority and responsibility to direct deployment of the National Guard in the District of Columbia, but never gave any order to deploy the National Guard on January 6th or on any other day. Nor did he instruct any Federal law enforcement agency to assist.

Jan. 6th Report at 6–7.

**Finding 26:**

In the weeks before election day 2020, Donald Trump's campaign experts, including his campaign manager Bill Stepien, advised him that the election results would not be fully known on election night. This was because certain States would not begin to count absentee and other mail-in votes until election day or after election-day polls had closed. Because Republican voters tend to vote in greater numbers on election day and Democratic voters tend to vote in greater numbers in advance of election day, it was widely anticipated that Donald Trump could initially appear to have a lead, but that the continued counting of mail-in, absentee and other votes beginning election night would erode and could overcome that perceived lead. Thus, as President Trump's campaign manager cautioned, understanding the results of the 2020 election would be a lengthy "process," and an initial appearance of a Trump lead could be a "red mirage." This was not unique to the 2020 election; similar scenarios had played out in prior elections as well.

Jan. 6th Report at 8.

**Finding 29:**

President Trump's decision to declare victory falsely on election night and, unlawfully, to call for the vote counting to stop, was not a spontaneous decision. It was premeditated. The Committee has assembled a range of evidence of President Trump's preplanning for a false declaration of victory.

Jan. 6th Report at 9–10.

**Finding 30:**

As votes were being counted in the days after the election, President Trump's senior campaign advisors informed him that his chances of success were almost zero.

Jan. 6th Report at 11.

**Finding 31:**

In the weeks that followed the election, President Trump's campaign experts and his senior Justice Department officials were informing him and others in the White House that there was no genuine evidence of fraud sufficient to change the results of the election.

Jan. 6th Report at 12.

**Finding 32:**

As the Committee’s hearings demonstrated, President Trump made a series of statements to White House staff and others during this time period indicating his understanding that he had lost.

Jan. 6th Report at 12.

**Finding 36:**

In short, President Trump was informed over and over again, by his senior appointees, campaign experts and those who had served him for years, that his election fraud allegations were nonsense.

How did President Trump continue to make false allegations despite all of this unequivocal information? President Trump sought out those who were not scrupulous with the facts, and were willing to be dishonest. He found a new legal team to assert claims that his existing advisors and the Justice Department had specifically informed him were false. President Trump’s new legal team, headed by Rudolph Giuliani, and their allies ultimately lost dozens of election lawsuits in Federal and State courts.

Jan. 6th Report at 16.

**Finding 39:**

By mid-December 2020, Donald Trump had come to what most of his staff believed was the end of the line. The Supreme Court rejected a lawsuit he supported filed by the State of Texas in the Supreme Court . . . On December 14, 2020, the Electoral College met to cast and certify each State’s electoral votes. By this time, many of President Trump’s senior staff, and certain members of his family, were urging him to concede that he had lost.

Jan. 6th Report at 20–21.

**Finding 50:**

But as January 6th approached, President Trump nevertheless embraced the new Eastman theories, and attempted to implement them. In a series of meetings and calls, President Trump attempted to pressure Pence to intervene on January 6th to prevent Congress from counting multiple States’ electoral votes for Joe Biden. At several points in the days before January 6th, President Trump was told directly that Vice President Pence could not legally do what Trump was asking. For example, at a January 4th meeting in the Oval Office, Eastman acknowledged that any variation of his proposal—whether rejecting electoral votes outright or delaying certification to send them back to the States—would violate several provisions of the Electoral Count Act.

...

And, during a phone call with President Trump and Eastman on the evening of January 5, 2021, Eastman again acknowledged that his proposal also would violate several provisions of the Electoral Count Act.

...

Jan. 6th Report at 32–33.

**Finding 55:**

Once Trump returned to the White House, he was informed almost immediately that violence and lawlessness had broken out at the Capitol among his supporters.

Jan. 6th Report at 38.

**Finding 56:**

At 2:24 p.m., President Trump applied yet further pressure to Pence (see *infra*), posting a tweet accusing Vice President Mike Pence of cowardice for not using his role as President of the Senate to change the outcome of the election: “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!”

Almost immediately thereafter, the crowd around the Capitol surged, and more individuals joined the effort to confront police and break further into the building.

The sentiment expressed in President Trump’s 2:24 p.m. tweet, already present in the crowd, only grew more powerful as the President’s words spread.

[PORTION EXCLUDED]

Minutes after the tweet—at 2:35 p.m.—rioters continued their surge and broke a security line of the DC Metropolitan Police Department, resulting in the first fighting withdrawal in the history of that force.

President Trump issued this tweet after he had falsely claimed to the angry crowd that Vice President Mike Pence could “do the right thing” and ensure a second Trump term, after that angry crowd had turned into a violent mob assaulting the Capitol while chanting, “Hang Mike Pence!” and after the U.S. Secret Service had evacuated the Vice President from the Senate floor.

One minute after the President’s tweet, at 2:25 p.m., the Secret Service determined they could no longer protect the Vice President in his ceremonial office near the Senate Chamber, and

evacuated the Vice President and his family to a secure location, missing the violent mob by a mere 40 feet.

Further evidence presented at our hearing shows the violent reaction following President Trump's 2:24 p.m. tweet and the efforts to protect Vice President Pence in the time that followed.

Jan. 6th Report at 38–39.

**Finding 57:**

Despite the fact that all major election lawsuits thus far had failed, President Trump and his co-conspirators in this effort, including John Eastman and Kenneth Chesebro, pressed forward with the fake elector scheme.

Jan. 6th Report at 43.

**Finding 58:**

Ultimately, these false electoral slates, five of which purported to represent the “duly elected” electoral college votes of their States, were transmitted to Executive Branch officials at the National Archives, and to the Legislative Branch, including to the Office of the President of the Senate, Vice President Mike Pence.

Jan. 6th Report at 43.

**Finding 61:**

Despite pressure from President Trump, Vice President Pence and the Senate parliamentarian refused to recognize or count the unofficial fake electoral votes.

Jan. 6th Report at 43.

**Finding 75:**

In Michigan, President Trump focused on Republican Senate Majority Leader Mike Shirkey and Republican House Speaker Lee Chatfield. He invited them to the White House for a November 20, 2020, meeting during which President Trump and Giuliani, who joined by phone, went through a “litany” of false allegations about supposed fraud in Michigan's election ... When President Trump couldn't convince Shirkey and Chatfield to change the outcome of the election in Michigan during that meeting or in calls after, he or his team maliciously tweeted out Shirkey's personal cell phone number and a number for Chatfield that turned out to be wrong.

None of Donald Trump's efforts ultimately succeeded in changing the official results in any State. That these efforts had failed was apparent to Donald Trump and his co-conspirators

well before January 6th. By January 6th, there was no evidence at all that a majority of any State legislature would even attempt to change its electoral votes.

Jan. 6th Report at 47.

**Finding 77:**

In the weeks after the 2020 election, Attorney General Barr advised President Trump that the Department of Justice had not seen any evidence to support Trump’s theory that the election was stolen by fraud. Acting Attorney General Jeffrey Rosen and his Deputy repeatedly reinforced to President Trump that his claims of election fraud were false when they took over in mid-December. Also in mid-December 2020, Attorney General Barr announced his plans to resign. Between that time and January 6th, Trump spoke with Acting Attorney General Jeff Rosen and Acting Deputy Richard Donoghue repeatedly, attempting to persuade them and the Department of Justice to find factual support for his stolen election claims and thereby to assist his efforts to reverse election results.

...

As discussed earlier, Justice Department investigations had demonstrated that the stolen election claims were false; both Rosen and Donoghue told President Trump this comprehensively and repeatedly.

Jan. 6th Report at 48–49.

**Finding 82:**

The Committee has assembled detailed material demonstrating the effects of these communications on members of far-right extremist groups, like the Proud Boys, Oath Keepers, Three Percenters, and others, and on individuals looking to respond to their president’s call to action. President Trump’s supporters believed the election was stolen because they listened to his words, and they knew what he had called them to do; stop the certification of the electoral count.

Jan. 6th Report at 55–56.

**Finding 83:**

Chapter 8 of this report documents how the Proud Boys led the attack, penetrated the Capitol, and led hundreds of others inside. Multiple Proud Boys reacted immediately to President Trump’s December 19th tweet and began their planning. Immediately, Proud Boys leaders reorganized their hierarchy, with Enrique Tarrio, Joseph Biggs, and Ethan Nordean messaging groups of Proud Boys about what to expect on January 6th.

Jan. 6th Report at 56.

**Finding 85:**

The Department of Justice has charged a number of Oath Keepers with seditious conspiracy. Specifically, the government alleges that “[a]fter the Presidential Election, Elmer Stewart Rhodes III conspired with his co-defendants, introduced below, and other coconspirators, known and unknown to the Grand Jury, to oppose by force the lawful transfer of presidential power.” A jury agreed, convicting Stewart Rhodes and Kelly Meggs—the leader of the Florida Oath Keepers chapter—of seditious conspiracy. The jury also convicted Rhodes and Meggs, as well as fellow Oath Keepers Jessica Watkins, Kenneth Harrelson, and Thomas Caldwell, of other serious felonies for their actions on January 6th.

Jan. 6th Report at 57.

**Finding 89:**

[D]ocumentation received by the Committee from the Secret Service demonstrates a growing number of warnings both that January 6th was likely to be violent, and specifically that the Capitol would likely be the target, including intelligence directly regarding the Proud Boys and Oath Keepers militia groups.

Jan. 6th Report at 61.

**Finding 105:**

Testimony indicated that President Trump was briefed on the risk of violence on the morning of the 6th before he left the White House.

Jan. 6th Report at 67.

**Finding 107:**

Hours before the Ellipse rally on January 6th, the fact that the assembled crowd was prepared for potential violence was widely known. In addition to intelligence reports indicating potential violence at the Capitol, weapons and other prohibited items were being seized by police on the streets and by Secret Service at the magnetometers for the Ellipse speech. Secret Service confiscated a haul of weapons from the 28,000 spectators who did pass through the magnetometers: 242 cannisters of pepper spray, 269 knives or blades, 18 brass knuckles, 18 tasers, 6 pieces of body armor, 3 gas masks, 30 batons or blunt instruments, and 17 miscellaneous items like scissors, needles, or screwdrivers. And thousands of others purposely remained outside the magnetometers, or left their packs outside.

Jan. 6th Report at 68.

**Finding 108:**

Others brought firearms. Three men in fatigues from Broward County, Florida brandished AR-15s in front of Metropolitan police officers on 14th Street and Independence Avenue on the morning of January 6th. MPD advised over the radio that one individual was possibly armed with a “Glock” at 14th and Constitution Avenue, and another was possibly armed with a “rifle” at 15th and Constitution Avenue around 11:23 a.m. The National Park Service detained an individual with a rifle between 12 and 1 p.m. Almost all of this was known before Donald Trump took the stage at the Ellipse.

Jan. 6th Report at 68–69.

**Finding 109:**

By the time President Trump was preparing to give his speech, he and his advisors knew enough to cancel the rally. And he certainly knew enough to cancel any plans for a march to the Capitol. According to testimony obtained by the Select Committee, President Trump knew that elements of the crowd were armed, and had prohibited items, and that many thousands would not pass through the magnetometers for that reason. Testimony indicates that the President had received an earlier security briefing, and testimony indicates that the Secret Service mentioned the prohibited items again as they drove President Trump to the Ellipse.

Jan. 6th Report at 69.

**Finding 111:**

Although President Trump and his advisors knew of the risk of violence, and knew specifically that elements of the crowd were angry and some were armed, from intelligence and law enforcement reports that morning, President Trump nevertheless went forward with the rally, and then specifically instructed the crowd to march to the Capitol:

“Because you’ll never take back our country with weakness. You have to show strength and you have to be strong. We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated.”

Jan. 6th Report at 71.



**Finding 114:**

Trump used the word “peacefully,” written by speech writers, one time. But he delivered many other scripted and unscripted comments that conveyed a very different message:

Because you’ll never take back our country with weakness. You have to show strength and you have to be strong. We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated. . . .

And we fight. We fight like hell. And if you don’t fight like hell, you’re not going to have a country anymore . . . .

Jan. 6th Report at 72.

**Finding 119:**

More than 140 Capitol and Metropolitan police were injured, some very seriously. A perimeter security line of Metropolitan Police intended to secure the Capitol against intrusion broke in the face of thousands of armed rioters—more than 2,000 of whom gained access to the interior of the Capitol building. A woman who attempted to forcibly enter the Chamber of the House of Representatives through a broken window while the House was in session was shot and killed by police guarding the chamber. Vice President Pence and his family were at risk, as were those Secret Service professionals protecting him. Congressional proceedings were halted, and legislators were rushed to secure locations.

Jan. 6th Report at 76.

**Finding 120:**

From the outset of the violence and for several hours that followed, people at the Capitol, people inside President Trump’s Administration, elected officials of both parties, members of President Trump’s family, and Fox News commentators sympathetic to President Trump all tried to contact him to urge him to do one singular thing—one thing that all of these people immediately understood was required: Instruct his supporters to stand down and disperse—to leave the Capitol.

As the evidence overwhelmingly demonstrates, President Trump specifically and repeatedly refused to do so—for multiple hours—while the mayhem ensued. Chapter 8 of this report explains in meticulous detail the horrific nature of the violence taking place, that was directed at law enforcement officers at the Capitol and that put the lives of American lawmakers at risk. Yet in spite of this, President Trump watched the violence on television from a dining room adjacent to the Oval Office, calling Senators to urge them to help him delay the electoral count, but refusing to supply the specific help that everyone knew was unequivocally required.

As this report shows, when Trump finally did make such a statement at 4:17 p.m.—after hours of violence—the statement immediately had the expected effect; the rioters began to disperse immediately and leave the Capitol.

Jan. 6th Report at 76.

**Finding 121:**

To fully understand the President’s behavior during those hours—now commonly known as the “187 minutes”—it is important to understand the context in which it occurred. As outlined in this report, by the afternoon of January 6th, virtually all of President Trump’s efforts to overturn the outcome of the 2020 election had failed. Virtually all the lawsuits had already been lost. Vice President Mike Pence had refused Trump’s pressure to stop the count of certain electoral votes. State officials and legislators had refused to reverse the election outcomes in every State where Trump and his team applied pressure. The Justice Department’s investigations of alleged election fraud had all contradicted Trump’s allegations. The only factor working in Trump’s favor that might succeed in materially delaying the counting of electoral votes for President-elect Biden was the violent crowd at the Capitol. And for much of the afternoon of January 6th, it appeared that the crowd had accomplished that purpose. Congressional leaders were advised by Capitol Police at one or more points during the attack that it would likely take several days before the Capitol could safely be reopened.

Jan. 6th Report at 76–77.

**Finding 123:**

Minutes after arriving back at the White House, the President ran into a member of the White House staff and asked if they had watched his speech on television. “Sir, they cut it off because they’re rioting down at the Capitol,” the employee said. The President asked what they meant by that.

...

Not long thereafter, as thousands of Trump supporters from the Ellipse speech continued to arrive at the Capitol, the DC Metropolitan Police Department declared a riot at the Capitol at 1:49 p.m., the same time Capitol Police Chief Steven Sund informed the DC National Guard “that there was a dire emergency on Capitol Hill and requested the immediate assistance” of as many national guard troops as possible.

Jan. 6th Report at 77.

**Finding 127:**

Republican Leader Kevin McCarthy tried repeatedly to reach President Trump, and did at least once. He also reached out for help to multiple members of President Trump’s family, including Ivanka Trump and Jared Kushner.

Jan. 6th Report at 83.

**Finding 128:**

Kevin McCarthy told Fox News at 3:09 p.m. about his call with the President and elaborated about its contents in a conversation with CBS News’s Norah O’Donnell at around 3:30 p.m.:

...

O’Donnell: Leader McCarthy, the President of the United States has a briefing room steps from the Oval Office. It is, the cameras are hot 24/7, as you know. Why hasn’t he walked down and said that, now?

Leader McCarthy: I conveyed to the President what I think is best to do, and I’m hopeful the President will do it.

Jan. 6th Report at 83–84.

**Finding 133:**

Almost immediately after the 2:24 p.m. tweet, Eric Herschmann went upstairs in the West Wing to try to enlist Ivanka Trump’s assistance to persuade her father to do the right thing. Ivanka rushed down to the Oval Office dining room. Although no one could convince President Trump to call for the violent rioters to leave the Capitol, Ivanka persuaded President Trump that a tweet could be issued to discourage violence against the police.

At 2:38 p.m., President Trump sent this tweet:

“Please support our Capitol Police and Law Enforcement. They are truly on the side of our Country. Stay peaceful!”

Jan. 6th Report at 90.

**Finding 134:**

At 3:13 p.m., President Trump sent another tweet, but again declined to tell people to go home:

“I am asking for everyone at the U.S. Capitol to remain peaceful. No violence! Remember, WE are the Party of Law & Order—respect the Law and our great men and women in Blue. Thank you!”

Almost everyone, including staff in the White House also found the President’s 2:38 p.m. and 3:13 p.m. tweets to be insufficient because they did not instruct the rioters to leave the Capitol.

...

Evidence showed that neither of these tweets had any appreciable impact on the violent rioters. Unlike the video-message tweet that did not come until 4:17 finally instructing rioters to leave, neither the 2:38 nor the 3:13 tweets made any difference.

Jan. 6th Report at 90–91.

**Finding 138:**

President Trump did not contact a single top national security official during the day. Not at the Pentagon, nor at the Department of Homeland Security, the Department of Justice, the F.B.I., the Capitol Police Department, or the D.C. Mayor’s office. As Vice President Pence has confirmed, President Trump didn’t even try to reach his own Vice President to make sure that Pence was safe. President Trump did not order any of his staff to facilitate a law enforcement response of any sort.

Jan. 6th Report at 94.

**Finding 139:**

Some have suggested that President Trump gave an order to have 10,000 troops ready for January 6th. The Select Committee found no evidence of this.

Jan. 6th Report at 95.

**Finding 147:**

President Trump, through others acting at his behest, submitted slates of fake electors to Congress and the National Archives.

Jan. 6th Report at 107.

**Finding 150:**

For example, Chief of Staff Mark Meadows told White House Counsel Pat Cipollone that the President “doesn’t want to do anything” to stop the violence. Worse, at 2:24 p.m., the President inflamed and exacerbated the mob violence by sending a tweet stating that the Vice President “didn’t have the courage to do what should have been done.” The President threw gasoline on the fire despite knowing that there was a violent riot underway at the Capitol. Indeed, video and audio footage from the attack shows that many of the rioters specifically mentioned Vice President Pence. And immediately after President Trump sent his tweet, the violence escalated. Between 2:25 p.m. and 2:28 p.m., rioters breached the East Rotunda doors, other rioters breached the police line in the Capitol Crypt, Vice President Pence had to be evacuated from his Senate office, and Leader McCarthy was evacuated from his Capitol office.

Evidence developed in the Committee’s investigation showed that the President, when told that the crowd was chanting “Hang Mike Pence,” responded that perhaps the Vice President deserved to be hanged. And President Trump rebuffed pleas from Leader McCarthy to ask that his supporters leave the Capitol stating, “Well, Kevin, I guess these people are more upset about the election than you are.”

Jan. 6th Report at 110–11.

**Finding 162:**

On November 7th, the Associated Press called Pennsylvania and the overall presidential election for former Vice President Biden.

Jan. 6th Report at 206.

**Finding 163:**

“We’ve proven” the election was stolen, but “no judge, including the Supreme Court of the United States, has had the courage to allow it to be heard.” That was how President Trump described efforts to overturn the election in court one day before the electoral college met on December 14, 2020. That was false.

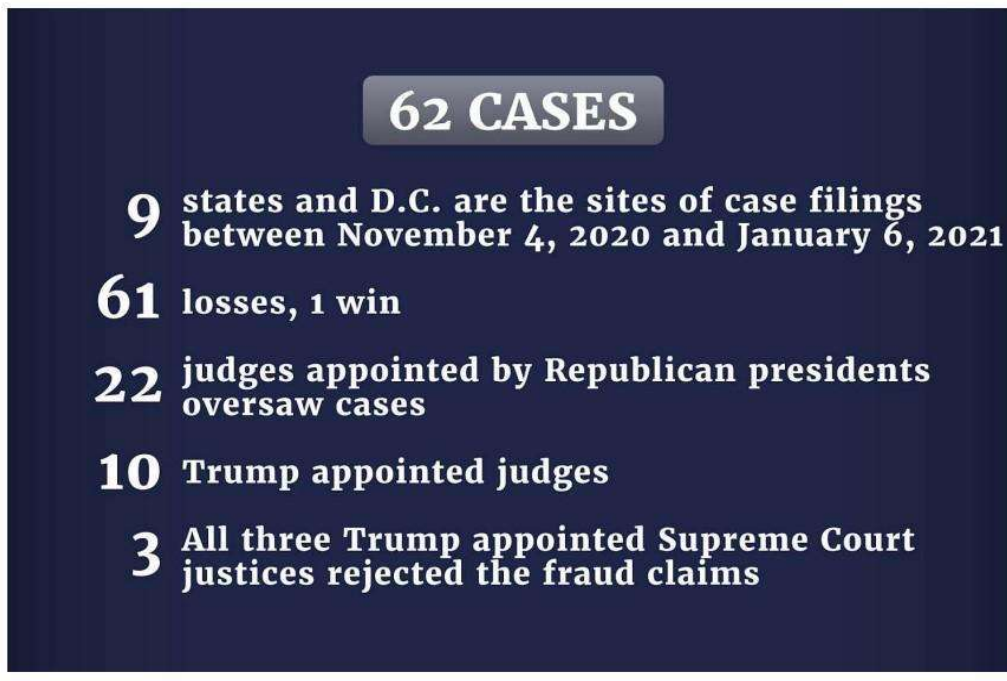
Jan. 6th Report at 210.

**Finding 164:**

In total, the Trump Campaign and allies of President Trump filed 62 separate lawsuits between November 4, 2020, and January 6, 2021, calling into question or seeking to overturn the election results. Out of 62 cases, only one case resulted in a victory for the President Trump or his allies, which affected relatively few votes, did not vindicate any underlying claims of fraud,

and would not have changed the outcome in Pennsylvania. Thirty of the cases were dismissed by a judge after a hearing on the merits.

In every State in which claims were brought, one or more judges specifically explained as part of their dismissal orders that they had evaluated the plaintiffs' allegations or supposed proof of widespread election fraud or other irregularities, and found the claims to be entirely unconvincing. . . .



Jan. 6th Report at 210.

**Finding 171:**

In all, the judges who heard these post-election cases included 22 Federal judges appointed by Republican presidents.

President Trump and his lawyers were well-aware that courts were consistently rejecting his claims. During a December 18th meeting in the Oval Office with President Trump, Sidney Powell and others, White House Senior Advisor Eric Herschmann pointed out that President Trump's lawyers had their opportunity to prove their case in court, and failed.

Jan. 6th Report at 212-13.

### **Finding 180:**

In a now infamous telephone call on January 2, 2021, President Trump pressured Georgia Secretary of State Brad Raffensperger for more than an hour. The President confronted him with multiple conspiracy theories about the election—none of which were true. Raffensperger and other Georgia officials debunked these allegations, one after another, during their call. Under Raffensperger’s leadership, Georgia had, by that time, already conducted a statewide hand recount of all ballots. That recount and other post-election reviews proved that there was no widespread fraud, and that voting machines didn’t alter the outcome of the election. This should have put President Trump’s allegations to rest. But, undeterred by the facts, the President badgered Raffensperger to overturn the Georgia results.

President Trump insisted that “the ballots are corrupt” and someone was “shredding” them. He issued a thinly veiled threat, telling Raffensperger, “it is more illegal for you than it is for them because you know what they did and you’re not reporting it.” Of course, the Georgia officials weren’t doing anything “illegal,” and there was nothing to “report.” Even so, President Trump suggested that both Raffensperger and his general counsel, Ryan Germany, could face criminal jeopardy. “That’s a criminal, that’s a criminal offense. And you can’t let that happen,” the President said. “That’s a big risk to you and to Ryan, your lawyer . . . I’m notifying you that you’re letting it happen.”

And then the President made his demand. “So look. All I want to do is this. I just want to find 11,780 votes, which is one more than we have,” President Trump told Raffensperger.

Jan. 6th Report at 263.

### **Finding 185:**

The Select Committee estimates that in the two months between the November election and the January 6th insurrection, President Trump or his inner circle engaged in at least 200 apparent acts of public or private outreach, pressure, or condemnation, targeting either State legislators or State or local election administrators, to overturn State election results. This included at least:

- 68 meetings, attempted or connected phone calls, or text messages, each aimed at one or more State or local officials;
- 18 instances of prominent public remarks, with language targeting one or more such officials; and

- 125 social media posts by President Trump or senior aides targeting one or more such officials, either explicitly or implicitly, and mostly from his own account.

Jan. 6th Report at 271.

**Finding 196:**

Corman called back and spoke to President Trump, who insisted that he had won the election in Pennsylvania and said something to the effect of, “Jake, this is a big issue. We need your help.” Corman told the President that he couldn’t do what the Trump team was asking; President Trump replied, “I’m not sure your attorneys are very good.” Corman wanted to end the call and offered to have his lawyers speak again with President Trump’s, but they never had another call with the President’s lawyers.

Jan. 6th Report at 284.

**Finding 208:**

President Trump and his allies prepared their own fake slates of electoral college electors in seven States that President Trump lost: Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin. And on December 14, 2020—the date when true, certified electors were meeting to cast their electoral votes for the candidate who had won the popular vote in each of those States—these fake electors also met, ostensibly casting electoral votes for President Trump, the candidate who had lost.

Jan. 6th Report at 341.

**Finding 210:**

But there never were real, competing slates of electors. By the time the fake Trump electors met on December 14th, appropriate government officials in each of the seven States had already certified their State’s official election results for former Vice President Biden. No court had issued an order reversing or calling into question those results, and most election related litigation was over. And as detailed in Chapter 2, despite the illicit efforts of President Trump and his allies, no State legislature had agreed to the President’s request to reverse the result of the election by appointing a different slate of electors.

Jan. 6th Report at 342.

**Finding 247:**

Vice President Mike Pence released the “Dear Colleague” letter he had been working on for days with his staff ... Vice President Pence explained that his “role as presiding officer is



largely ceremonial” and dismissed the arguments that he could take unilateral action as contrary to his oath to support and defend the Constitution.

Jan. 6th Report at 461–62.

**Finding 248:**

The Vice President Waited to Release His Statement Out of Deference to President Trump, Who Was Still Speaking on the Ellipse, and Ultimately Released It Just Minutes Before the Joint Session Convened at 1:00 p.m.

Jan. 6th Report at 461.

**Finding 252:**

At 2:25 p.m., the Secret Service rushed the Vice President, his family, and his senior staff down a flight of stairs, through a series of hallways and tunnels to a secure location.

Jan. 6th Report at 466.

**Finding 254:**

President Trump had no intention of conceding. As he plotted ways to stay in power, the President summoned a mob for help.

At 1:42 a.m., on December 19th, President Trump tweeted: “Big protest in D.C. on January 6th. Be there, will be wild!”

The President’s tweet galvanized tens of thousands of his supporters around the country. President Trump had been lying to them since election day, claiming he won, and that the Democrats had stolen victory from him. Now, with a single tweet, the President focused his supporters’ anger on the joint session of Congress in Washington, DC on January 6th.

Jan. 6th Report at 499.

**Finding 263:**

Other “Stop the Steal” events helped pave the way for the events of January 6th. Two rallies in Washington D.C.—on November 14 and December 12, 2020—were critically important. Alexander’s “Stop the Steal” was not the only protest organization present at these events. Both were called “Million MAGA Marches” and drew in other rally organizers. One of these other protests was called the “Jericho March” prayer rally. Regardless, the same constellation of actors that appeared in Atlanta also incited Trump supporters in Washington.

Jan. 6th Report at 505.

**Finding 264:**

In the days following President Trump’s tweet, rally organizers secured permits for about one dozen events in Washington, DC on January 5th and 6th. At 7:12 a.m., not even 6 hours after President Trump’s tweet, Cindy Chafian, an executive at Women for America First (WFAF), emailed the National Park Service (NPS) about an event that had been planned to coincide with President-elect Biden’s inauguration on January 20, 2021. Chafian’s ask was simple: “Can I change the date to January 6th?” Jan. 6th Report at 505–06.

**Finding 267:**

As the crowds gathered in Washington on December 12th, President Trump was publicly lobbying the Supreme Court to hear his fictitious claims of election fraud. The President assailed the Supreme Court on Twitter throughout the day.

Jan. 6th Report at 505.

**Finding 268:**

After the Jericho March event ended, Jones, his InfoWars co-host Owen Shroyer, and Ali Alexander led a march on the Supreme Court. Once there, the crowd chanted slogans such as “Stop the Steal!”, “1776!!”, “Our revolution!”, and “The fight has just begun!!”

Jan. 6th Report at 505.

**Finding 275:**

On December 20, 2020, Tarrío established a “national rally planning committee” and created an encrypted MOSD chat to organize their activities. Tarrío added Proud Boys leaders from across the country, including several who played lead roles in the violence on January 6th. In the ensuing weeks, the Proud Boys traded equipment recommendations, shared maps marked with law enforcement positions, and established command and control structures. A separate encrypted chat, named “Boots on the Ground,” was established for foot soldiers who would be in Washington, DC on January 6th.

Jan. 6th Report at 510.

**Finding 276:**

The Proud Boys began to reorient and formalize their operations to focus on January 6th after President Trump’s December 19th tweet. Inspired, in part, by Bertino’s stabbing, the Proud Boys centered their new hierarchy in group chats that used terms such as “Ministry of Self Defense” (MOSD). However, the words “Self Defense” were misleading: Enrique Tarrío and

others would soon go on the offense. And the MOSD served as their organizational scaffolding for the January 6, 2021, attack.

Jan. 6th Report at 510.

**Finding 280:**

In the days that followed, the Oath Keepers planned for violence. They used encrypted chats on Signal to discuss travel plans, trade tips on tactical equipment to bring, and develop their plans for once they were on the ground in the DC area.

Jan. 6th Report at 514–15.

**Finding 289:**

The Oath Keepers were not the only anti-government extremists who viewed President Trump’s December 19th, tweet as a call to arms. Militias around the country were similarly inspired to act.

Jan. 6th Report at 521.

**Finding 311:**

Trump met with Katrina Pierson on January 4 to express his views on the speaker lineup, including his support for some of the more inflammatory and fringe voices to maintain their speaking slots.

Jan. 6th Report at 536.

**Finding 312:**

Eventually, Deere suggested that President Trump should focus his speech on his administration’s accomplishments, rather than on his claim that the election had been stolen. But the President told Deere that while they had accomplished a lot, the crowd was going to be “fired up” and “angry” the next day because they believed the election had been stolen and was rigged. President Trump knew the crowd was angry because he could hear them.

Jan. 6th Report at 539.

**Finding 315:**

At 1:10 p.m. on January 6th, President Trump concluded his speech at the Ellipse. By that time, the attack on the U.S. Capitol had already begun. But it was about to get much worse. The President told thousands of people in attendance to march down Pennsylvania Avenue to the Capitol. He told them to “fight like hell” because if they didn’t, they were “not going to have a

country anymore.” Not everyone who left the Ellipse did as the Commander-in-Chief ordered, but many of them did. The fighting intensified during the hours that followed.

Jan. 6th Report at 577.

**Finding 316:**

By 1:21 p.m., President Trump was informed that the Capitol was under attack. He could have interceded immediately. But the President chose not to do so. It was not until 4:17 p.m. that President Trump finally tweeted a video in which he told the rioters to go home.

Jan. 6th Report at 577.

**Finding 317:**

President Trump’s closest advisors—both inside and out of the White House—implored him to act sooner. Earlier in the week, two of the President’s most trusted aides, Eric Herschmann and Hope Hicks, both wanted President Trump to emphasize that January 6th would be a peaceful protest. President Trump refused.

Jan. 6th Report at 578.

**Finding 320:**

None of the preceding drafts mentioned Vice President Pence whatsoever. But now, at the very last minute, President Trump slipped in the following sentences calling the Vice President out by name:

“Today, we will see whether Republicans stand strong for the integrity of our elections. And we will see whether Mike Pence enters history as a truly great and courageous leader. All he has to do is refer the illegally-submitted electoral votes back to the states that were given false and fraudulent information where they want to recertify. With only 3 of the 7 states in question we win and become President and have the power of the veto.”

Jan. 6th Report at 581–82.

**Finding 321:**

As recounted in Chapter 5, President Trump called Vice President Pence at 11:17 a.m. The call between the two men—during which the President soon grew ‘frustrat[ed] or heated,’ visibly upset, and ‘angry’ — lasted nearly 20 minutes. And President Trump insulted Vice President Pence when he refused to obstruct or delay the joint session.

Jan. 6th Report at 583.

**Finding 323:**

From a tent backstage at the Ellipse, President Trump looked out at the crowd of approximately 53,000 supporters and became enraged. Just under half of those gathered—a sizable stretch of about 25,000 people—refused to walk through the magnetometers and be screened for weapons, leaving the venue looking half-empty to the television audience at home.

According to testimony received by the Committee, earlier that morning at the White House, the President was told that the onlookers were unwilling to pass through the magnetometers because they were armed.

Jan. 6th Report at 585.

**Finding 325:**

What happened during the 187 minutes from 1:10 p.m. to 4:17 p.m., when President Trump finally told the rioters to go home, is—from an official standpoint—undocumented.

For instance, the Presidential Daily Diary—the schedule that tracks every meeting and phone call in which the President partakes—is inexplicably blank between 1:21 p.m. and 4:03 p.m.<sup>129</sup> When asked to explain the gap in record-keeping on and around January 6th, White House officials in charge of its maintenance provided no credible explanation, including: “I don’t recall a specific reason.”

The men who spent most of the afternoon in that room with the President, Mark Meadows and Dan Scavino, both refused to comply with lawful subpoenas from the Select Committee.<sup>131</sup> Others in the dining room appeared before the Select Committee but cited executive privilege to avoid answering questions about their direct communications with President Trump. Others who worked just outside of the Oval Office, like the President’s personal secretaries Molly Michael and Austin Ferrer Piran Basauldo, claimed not to remember nearly anything from one of the most memorable days in recent American history.

The White House photographer, Shealah Craighead, had been granted access to photograph the President during his January 6th speech, but once she got to the White House—and it became clear that an attack was unfolding on the Capitol’s steps—she was turned away.

Jan. 6th Report at 593.

**Finding 326:**

Here’s what President Trump did during the 187 minutes between the end of his speech and when he finally told rioters to go home: For hours, he watched the attack from his TV screen. His channel of choice was Fox News. He issued a few tweets, some on his own

inclination and some only at the repeated behest of his daughter and other trusted advisors. He made several phone calls, some to his personal lawyer Rudolph Giuliani, some to Members of Congress about continuing their objections to the electoral certification, even though the attack was well underway.

Here's what President Trump did not do: He did not call any relevant law enforcement agency to ensure they were working to quell the violence. He did not call the Secretary of Defense; he did not call the Attorney General; he did not call the Secretary of Homeland Security. And for hours on end, he refused the repeated requests—from nearly everyone who talked to him—to simply tell the mob to go home.

Jan. 6th Report at 593–94.

**Finding 329:**

In the minutes before the tweet, Fox News—on the President's screen—relayed that the Capitol was on lockdown; that Capitol police officers were injured; that rioters were in the building and “just feet from the House chamber.” In the minutes afterward, networks would report there was tear gas in the Capitol, forcing Members of Congress to evacuate in protective masks. At 2:39 p.m., Secret Service agents reported that “[m]ore just got in.” Jan. 6th Report at 601.

**Finding 330:**

At any moment in the afternoon, it would have been easy for President Trump to get before cameras and call off the attack. The White House Press Briefing Room is just down the hallway from the Oval Office, past the Cabinet Room and around the corner to the right. It would have taken less than 60 seconds for the President to get there. The space, moreover, is outfitted with cameras that are constantly “hot,” meaning that they are on and ready to go live at a moment's notice. The White House press corps is also situated in the West Wing, right by the briefing room. The whole affair could have been assembled in minutes. However, it was not until nearly 3 hours after the violence began that President Trump finally agreed to tell the mob to go home.

Jan. 6th Report at 604–05.

**Finding 331:**

It was not until it was obvious that the riot would fail to stop the certification of the vote that the President finally relented and released a video statement made public at 4:17 p.m.

Jan. 6th Report at 606.

**Finding 338:**

Approximately 28,000 rally-goers did pass through the magnetometers. The Secret Service confiscated a significant number of prohibited items from these people, including: 269 knives or blades, 242 canisters of pepper spray, 18 brass knuckles, 18 tasers, 6 pieces of body armor, 3 gas masks, 30 batons or blunt instruments, and 17 miscellaneous items like scissors, needles, or screwdrivers.

Jan. 6th Report at 640.

**Finding 342:**

Mark Andre Mazza drove from Indiana, bringing a Taurus revolver, a .45-caliber weapon that he loaded with both shotgun and hollow-point rounds. After assaulting a police officer, he lost the weapon, dropping it or losing it on the steps of the lower West Plaza leading to the Capitol's West Front Terrace.

Jan. 6th Report at 641.

**Finding 343:**

Lonnie Leroy Coffman from Falkville, Alabama, parked by the Capitol building before walking nearly 2 miles to the Ellipse to hear the President speak. In his car, he had stocked a handgun, a rifle, a shotgun, hundreds of rounds of ammunition, large-capacity ammunition feeding devices, machetes, camouflage smoke devices, a bow and arrow, and 11 Mason jars filled with gasoline and styrofoam, as well as rags and a lighter (tools needed to make Molotov cocktails). Police found two more handguns on Coffman when he was arrested later that day.

Jan. 6th Report at 641.

**Finding 346:**

Members of the mob carried flags and turned the flagpoles into weapons. Michael Foy, from Wixom, Michigan, carried a hockey stick to the Ellipse—he draped a Trump flag over it. Just hours later, Foy used that hockey stick to repeatedly beat police officers at the inaugural tunnel. Former New York City police officer Thomas Webster carried a Marine flag, which he later used to attack an officer holding the rioters back at the lower West Plaza. Another individual, Danny Hamilton, carried a flag with a sharpened tip, [PORTION EXCLUDED]. On January 5th, Hallgren took a tour of the Capitol with Representative Barry Loudermilk, during which he took pictures of hallways and staircases.

The mob President Trump summoned to Washington, DC, on January 6th, was prepared to fight.

Jan. 6th Report at 642.

**Finding 347:**

When the Proud Boys arrived back at the Peace Circle at 12:49 p.m., they still had about 200 to 300 members and many other protestors had joined them. Shortly after arriving, the Proud Boys incited the crowd with antagonistic chants such as ‘1776.’ [PORTION EXCLUDED].

In less than a minute, at 12:54 p.m., the rioters pushed USCP officers to the ground, removed the fencing, and quickly stormed east towards the U.S. Capitol building. Officer Edwards was thrown to the ground, causing her to hit her head on concrete steps.

Two Proud Boys from New York, Dominic Pezzola and William Pepe, were among those leading the march to the next line of security barriers. Pepe, an employee of the Metropolitan Transportation Authority in upstate New York, took sick leave to travel to Washington for the January 6th events. Pepe dragged part of the fence away at the next security barrier, ensuring that USCP officers were left defenseless. The Proud Boys’ actions were not spontaneous. [PORTION EXCLUDED]. Bertino understood that storming the Capitol or its grounds would be illegal and would require using force against police or other government officials.

Parallel to the Peace Circle, at the Garfield Circle walkway located at the southeast corner of the Capitol grounds, rioters breached the fencing at 12:55 p.m. and began rushing the West Plaza where they would converge with others from the Peace Circle.

Jan. 6th Report at 645–46.

**Finding 361:**

White supremacists and Confederate-sympathizers were among the first rioters to enter the U.S. Capitol. Kevin Seefried and his son, Hunter, entered the building at approximately 2:13 p.m. through the Senate wing window smashed by Proud Boy Dominic Pezzola. Kevin Seefried carried a Confederate Battle Flag with him and unfurled it inside the building. According to some historians, while the Confederate Flag has appeared in the building before, it was the first time that an insurrectionist ever carried the banner inside the U.S. Capitol.

Jan. 6th Report at 653–54.

**Finding 367:**

While the Proud Boys and other extremists were overwhelming law enforcement at the West Plaza scaffolding, another group led the attack on security barriers on the East Plaza. At



2:06 p.m., a crowd broke through security barriers and charged a set of doors just outside the Rotunda. The mob's surge occurred just minutes after Alex Jones arrived on the scene. The crowd's cheers and celebration as they move up the steps can be heard while Jones's camera crew negotiates with USCP officers nearby.

Once rioters had filled the Rotunda stairs, Jones and his team, along with the Proud Boy Walter, ascended the stairs. They moved into the thick of the crowd at the top of the stairs, where Jones began calling for peace but also revolution, leading the crowd in chants of "1776" and other bellicose rhetoric. Publicly available video shows that Jones reached the top of the stairs at 2:18 p.m. At 2:24 p.m., rioters gained entrance to the Capitol through the doors leading into the

Rotunda, an entrance that was only a few feet directly behind Jones as he was speaking. As the Rotunda was breached by rioters, Jones and Alexander left the area and decided to leave the Capitol complex area altogether. Law enforcement officials were able to thwart the initial breach of the doors leading into the Rotunda. By 2:28 p.m., they temporarily regained control and stopped rioters from entering. But their success was shortlived. Within ten minutes, the doors were breached once again. And two members of the Proud Boys—Ronald Loehrke and James Haffner—helped lead the attack. Loehrke was allegedly recruited by Nordean, the Proud Boys leader, for January 6th. In late December 2020, Nordean asked Loehrke via text message if he was coming to "DC." After

Loehrke indicated he was, Nordean said he wanted Loehrke "on the front line" with him. Loehrke replied, "Sounds good man." Loehrke and Haffner marched with the Proud Boys from the Washington Monument to the Capitol grounds and were present during the breach at the Peace Circle. The pair made their way to the east side of the Capitol, where they began removing the security barriers and resisting USCP officers. Other members of the crowd joined. Eventually, the rioters breached these barriers too, allowing them to reach the doors of the Rotunda.

When the rioters reached the Columbus Doors, they were again stopped by USCP officers. But as the officers explained to the Select Committee, the rioters pushed them against the doors and sprayed them with OC spray (commonly known as pepper spray), making it impossible to defend the Capitol. James Haffner was one of the rioters who allegedly sprayed the Officers.

Shortly after Haffner and others assaulted the USCP officers, they were able to breach the Columbus Doors at approximately 2:38 p.m. A Proud Boys contingent—including Haffner, Loehrke, and Joe Biggs—then entered the Capitol. It was the second time that Biggs entered the U.S. Capitol that day.

A military-style "stack" of Oath Keepers entered through the Columbus Doors as well. The Oath Keeper members attended the Ellipse rally, where they were provided personal security

details for VIPs in attendance. Afterwards, they marched to the Capitol, as directed by President Trump.

Jan. 6th Report at 656–58.

**Finding 374:**

After Dominic Pezzola and others breached the Capitol at 2:13 p.m., a mob quickly entered and headed towards the Senate and House Chambers, where Members were meeting. As the crowd moved through the Capitol, they chanted “Fight for Trump” and “Stop the Steal!” They also chanted “Nancy, Nancy” as they searched for Speaker Pelosi. At 2:18 p.m., the House went into recess as hundreds of rioters confronted USCP officers inside the Crypt, which is a short distance from the first breach point.

Jan. 6th Report at 659–60.

**Finding 382:**

One of the most brutal attacks of the day occurred outside the tunnel when rioters dragged MPD Officer Michael Fanone into the crowd, and then tased, beat, and robbed him while a Blue Lives Matter flag fluttered above him. Albuquerque Head, a rioter from Tennessee, grabbed Officer Fanone around the neck and pulled him into the mob. “I got one!” Head shouted.

Lucas Denney, the Three Percenter, “swung his arm and fist” at Officer Fanone, grabbed him, and pulled him down the stairs. Daniel Rodriguez then tased him in the neck. Kyle Young lunged towards Officer Fanone, restraining the officer’s wrist. While Young held him, still another rioter, Thomas Sibick, reached towards him and forcibly removed his police badge and radio. Officer Fanone feared they were after his gun. Members of the crowd yelled: “Kill him!” “Get his gun!” and “Kill him with his own gun!”

Jan. 6th Report at 663.

**Finding 390:**

Shortly after law enforcement officers evacuated the House and Senate Members, they started to clear rioters out of the Capitol and off the grounds. Starting before 3:00 p.m., law enforcement spent approximately three hours pushing rioters out of the Capitol building and off the East and West Plazas. In general, law enforcement cleared rioters out of the Capitol through three doors: (1) the House side door located on the northeast side of the Capitol; (2) the Columbus Doors (East Rotunda Doors); and (3) the Senate wing door, which was next to the first breach point. As discussed above, the Proud Boys and other extremists led the charge at the latter two locations during the early stages of the attack.

Jan. 6th Report at 666.

### **Finding 392:**

After rioters first breached the Senate wing door on the first floor, they immediately moved south towards the House Chamber. This route took them to the Crypt with the mob filling this room by 2:24 p.m. This was also one of the first rooms that law enforcement cleared as they started to secure the building. By 2:49 p.m., law enforcement officers cleared the Crypt by pushing towards the Senate wing door and up the stairs to the Rotunda.

Around the same time that police officers cleared the Crypt, they also removed rioters from hallways immediately adjacent to the House and Senate Chambers. On the House side, rioters were pushed out shortly before 3:00 p.m. The House hallway immediately in front of the House Chamber's door was cleared at 2:56 p.m. The mob outside of the Speaker's lobby was pushed out of the House side door at 2:57 p.m.

Jan. 6th Report at 666–67.

### **Finding 393:**

USCP officers were able to quickly clear out the Senate Chamber, which was initially breached at 2:42 p.m. Rioters were cleared from the hallways outside the Senate by 3:09 p.m. Surveillance shows officers checking the Senate Gallery and hallways for rioters; there are no people on camera by this time.

Jan. 6th Report at 667.

### **Finding 394:**

The Rotunda served as a key point where the mob settled during the Capitol attack. For example, at 2:45 p.m., hundreds of people can be seen standing in the Rotunda. It appears law enforcement officers funneled rioters from other parts of the Capitol into the Rotunda. Once they had President Trump's supporters herded there, law enforcement started to push them towards the east doors shortly after 3:00 p.m. At 3:25 p.m., law enforcement successfully pushed rioters out of the Rotunda and closed the doors so that the room could remain secure. By 3:43 p.m., just 18 minutes after the Rotunda doors were closed, law enforcement successfully pushed the rioters out of the east doors of the Capitol.

Jan. 6th Report at 667.

### **Finding 395:**

The last rioters in the Capitol building were cleared out of the Senate wing door—the same location where rioters first breached the building at 2:13 p.m. Like the other locations inside the Capitol, law enforcement began forcing rioters out of the Senate wing door after 3:00

p.m. By 3:40 p.m., law enforcement had successfully pushed many of the rioters out of the door and onto the upper West Plaza. However, officers were unable to close the doors because some rioters remained in the doorway and attempted to re-enter the building. At 4:23 p.m., a combination of USCP and MPD officers forced these people out of the doorway and successfully secured the door.

Jan. 6th Report at 667.

**Finding 409:**

DC FEMS statistics help describe the scope of the January 6th riot at the Capitol. Over the course of the day, DC FEMS reported 22 EMS responses, 14 EMS transports, including two cardiac arrests and two critical injury transports. There were an estimated 250 injured law enforcement officers from numerous agencies. One hundred-fourteen USCP officers reported injuries. Five police officers who were at the Capitol on January 6th died in the days following the riot.

Jan. 6th Report at 711.