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10
11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **SOUTHERN DIVISION**

14
15 JOHN C. EASTMAN

16 Plaintiff,

17 vs.

18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.
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Case No. 8:22-cv-00099-DOC-DFM

CONGRESSIONAL DEFENDANTS'
BRIEF IN OPPOSITION TO
PLAINTIFF'S PRIVILEGE
ASSERTIONS

Date: March 8, 2022

Time: 9:00 a.m.

Location: Courtroom 9D

INTRODUCTION

The Select Committee is investigating the violent attack on our Capitol on January 6, 2021, and an effort by the former President of the United States to remain in office by obstructing Congress’ count of the electoral votes. Plaintiff John Eastman purports to have been the former President’s lawyer in connection with that effort. But Plaintiff’s role was not simply as an advisor; he spoke at the rally on the morning of January 6, spreading proven falsehoods to the tens of thousands of people attending that rally, and appears to have a broader role in many of the specific issues the Select Committee is investigating. The Select Committee requires a detailed understanding of all of Plaintiff’s activities in order to inform Congress’ legislative judgments and to help ensure that no President can threaten the peaceful transition of power ever again.

Plaintiff has already invoked his Fifth Amendment right against self-incrimination in response to 146 separate questions posed by the Select Committee.¹ Now he is attempting to conceal a range of relevant documents behind claims of attorney-client privilege and work-product protection. Below, the Select Committee focuses on Plaintiff’s (and apparently Mr. Trump’s) claims for documents dated January 4-7, 2021, and respectfully urges the Court to reject every such claim.

First, to the extent attorney-client privilege applies in the context of a Congressional subpoena,² “[a] party asserting [privilege] has the burden of establishing the relationship *and* the privileged nature of the communication.” *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) (internal quotation omitted). Plaintiff here fails to carry his burden of establishing the existence of a legitimate attorney-client relationship with former President Donald Trump during the period at issue. And even if Plaintiff could make such a showing, many of the communications during this period included individuals outside of any attorney-client or confidential relationship—and Plaintiff has not demonstrated the necessary common interest arrangement with these

¹ Ex. A, Eastman Deposition.

² *Infra* at 37-39

1 third parties to preserve the privilege. And even if Plaintiff could establish an attorney-
 2 client relationship and some broad common interest agreement, Plaintiff chose to
 3 distribute these communications over an unprotected university server even after he was
 4 expressly admonished by the University President and reminded that he was not free to
 5 use University email and computers in support of a political candidate. Finally, Plaintiff
 6 admitted that President Trump authorized him to discuss their communications in public,
 7 apparently in an effort to establish some form of defense for President Trump's conduct.
 8 Any privilege over these subjects was, therefore, waived.

9 *Second*, as to work product, Plaintiff falls far short of meeting his burden to
 10 establish that the documents are prepared by party, or a party's representative, in
 11 anticipation of litigation. Even had Plaintiff met that burden, the work product doctrine
 12 provides nothing close to absolute protection from disclosure. Courts have already held
 13 that former President Trump's interests in secrecy of certain materials ordinarily shielded
 14 by executive privilege are outweighed by the Select Committee's interests. *Trump v.*
 15 *Thompson*, No. 21-5254, 2021 U.S. App. LEXIS 36315, at *60 (D.C. Cir. Dec. 9, 2021),
 16 *stay denied*, 142 S. Ct. 680 (2022) (holding that any such privilege was overcome by the
 17 Select Committee's "uniquely compelling need," the sitting President's judgment that
 18 release was in the country's best interest, and the careful compromise negotiated between
 19 the two branches of government). Here, Mr. Trump's (or Plaintiff's) interests in
 20 protecting work product are outweighed by the Select Committee's substantial need; the
 21 Select Committee cannot, without undue hardship, obtain their substantial equivalent by
 22 other means.

23 *Third*, Plaintiff's documents should be reviewed *in camera* by this Court for
 24 application of the crime/fraud exception. The Court inquired about that exception, and
 25 the Select Committee has seriously considered that issue.³ Although the investigation is
 26 continuing and will provide substantial further relevant information, sufficient

27
 28 ³ See Scheduling Conference Tr. 6, ECF No. 113.

information already exists to justify *in camera* review and likely rejection of those privileges.

Finally, this Court should deny Plaintiff’s effort to shoehorn into this current briefing on privilege issues a motion to reconsider this Court’s prior constitutional holdings.

SUMMARY OF BACKGROUND⁴

Before the 2020 election even took place, President Trump and his supporters began to lay the groundwork to cast doubt on the results.⁵ On election night, Mr. Trump began falsely asserting, without basis, that he had prevailed and called on States to stop counting mail-in and absentee votes.⁶ In the six weeks that followed, President Trump’s legal team and his supporters took their allegations to the courts, ultimately litigating and losing more than 60 challenges to the election results in seven States.⁷ State Bars of both

⁴ The Select Committee is in the midst of its investigation, but has already developed many thousands of pages of evidence. A full recitation of that evidence—with attached exhibits—would be overwhelmingly lengthy, so the Select Committee here briefly summarizes key points relevant to the documents at issue. The Select Committee stands ready to make further submissions on specific relevant topics of interest to the Court (under seal, if appropriate). Order re: Prod. and Priv. Log (Jan. 26, 2022), ECF No. 50, at 3. Several other federal courts have already summarized the events of January 6, 2021. *See, e.g., Trump v. Thompson*, No. 21-5254, 2021 U.S. App. LEXIS 36315 (D.C. Cir. Dec. 9, 2021), *stay denied*, 142 S. Ct. 680 (2022); *United States v. Nordean*, No. 21-175, (D.D.C.) Mem. Op. (Dec. 28, 2021) (ECF No. 263).

⁵ Kevin Liptak, *A List of the Times Trump Has Said He Won’t Accept the Election Results or Leave Office if He Loses*, CNN (September 24, 2020), <https://www.cnn.com/2020/09/24/politics/trump-election-warnings-leaving-office/index.html>.

⁶ *President Trump Remarks on Election Status*, C-SPAN (November 4, 2020), <https://www.c-span.org/video/?477710-1/president-trump-remarks-election-status> (“This is a fraud on the American public. This is an embarrassment to our country. We were getting ready to win this election. Frankly, we did win this election.”).

⁷ William Cummings, Joey Garrison and Jim Sargent, *By the numbers: President Donald Trump’s failed efforts to overturn the election*, USA Today (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>. For relevant examples of decisions

1 New York and Washington, D.C. suspended the law license of one of President Trump's
 2 lead attorneys, Rudolph Giuliani. *In re Rudolph W. Giuliani*, 2021 Slip Op. 04086 (N.Y.
 3 1st Dept. June 24, 2021) (explaining that Giuliani had “communicated demonstrably
 4 false and misleading statements to courts, lawmakers and the public at large in his
 5 capacity as lawyer” and emphasizing that “[t]he seriousness of [Giuliani’s]
 6 uncontroverted misconduct cannot be overstated”); *see also In re Rudolph W. Giuliani*,
 7 Order, App. D.C., No. 21-BG-423 (July 7, 2021). Other counsel in litigation challenging
 8 the election have also faced sanctions. *See King v. Whitmer*, 20-cv-13134, 2021 WL
 9 3771875, at *1 (E.D. Mich. 2021). (sanctioning Lin Wood, Sidney Powell, and seven
 10 others and explaining, “[i]t is one thing to take on the charge of vindicating rights
 11 associated with an allegedly fraudulent election. It is another to take on the charge of
 12 deceiving a federal court and the American people into believing that rights were
 13 infringed, without regard to whether any laws or rights were in fact violated. This is
 14 what happened here”). On March 1, 2022, the State Bar of California’s Chief Trial
 15 Counsel announced an investigation into Plaintiff’s actions “following and in relation to
 16 the November 2020 presidential election.”⁸

17
 18 addressing President Trump’s claims of fraud and irregularities, *see, e.g., Donald J.*
 19 *Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 906 (M.D. Pa. 2020)
 20 (“[T]his Court has been presented with strained legal arguments without merit and
 21 speculative accusations, unpled in the operative complaint and unsupported by
 22 evidence.”); *Ward v. Jackson*, No. CV-20-0343-AP/EL, 2020 Ariz. LEXIS 313, at *2, 6-
 23 7 (Dec. 8, 2020) (plaintiff failed “to present any evidence of ‘misconduct,’ ‘illegal votes’
 24 or that the Biden Electors ‘did not in fact receive the highest number of votes for office,’
 25 let alone establish any degree of fraud or a sufficient error rate that would undermine the
 26 certainty of the election results”); *Trump v. Wis. Elections Comm’n*, 506 F. Supp. 3d 620
 27 (E.D. Wis. 2020); *Trump v. Wis. Elections Comm’n*, 983 F.3d 919, 927 (7th Cir. 2020);
 28 *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1331 (N.D. Ga. 2020); *Wood v.*
Raffensperger, 981 F.3d 1307, 1310 (11th Cir. 2020).

⁸ State Bar of California, *State Bar Announces John Eastman Ethics Investigation* (Mar.
 1, 2022), <https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-announces-john-eastman-ethics-investigation>. Disciplinary investigations are launched if
 a complainant “sufficiently alleges misconduct,” including a potential interview of

As the courts were overwhelmingly ruling against President Trump’s claims of election misconduct, he and his associates began to plan extra-judicial efforts to overturn the results of the election and prevent the President-elect from assuming office.⁹ At the heart of these efforts was an aggressive public misinformation campaign to persuade millions of Americans that the election had in fact been stolen. The President and his associates persisted in making “stolen election” claims even after the President’s own appointees at the Department of Justice and the Department of Homeland Security, along with his own campaign staff, had informed the President that his claims were wrong.

According to the President’s senior campaign advisor, soon after the election, a campaign data expert told the President “in pretty blunt terms” that he was going to lose.¹⁰ On November 12, 2020, the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (CISA) issued a public statement noting “unfounded claims and opportunities for misinformation” about the election, and affirming that “[t]here is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised.”¹¹ The following month, Attorney General William Barr

complainants, and a review of open-sourced and legal documents. California State Bar, *2020 Annual Discipline Report*, at C-2 (Apr. 27, 2021), <https://www.calbar.ca.gov/Portals/0/documents/reports/2020-Annual-Discipline-Report.pdf>. While Plaintiff is entitled to a presumption of innocence in that process, the Bar’s Chief Trial Counsel has determined that the public announcement was “warranted for protection of the public.” State Bar of California, *State Bar Announces John Eastman Ethics Investigation* (Mar. 1, 2022), <https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-announces-john-eastman-ethics-investigation> (citing Cal. Bus. And Prof. Code, s. 6086.1(b)(2); State Bar Rule of Procedure 2302(d)(1).)

⁹ President Trump’s January 30, 2022 public statement acknowledges that he was attempting to “overturn” the election on January 6, 2021. *See Statement by Donald J. Trump, 45th President of the United States of America*, SAVE AMERICA (Jan. 30, 2022), <https://www.donaldjtrump.com/news/news-hktthafwz61481>.

¹⁰ Ex. D, Jason Miller Deposition 90-91.

¹¹ CISA, *Joint Statement from Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees* (November 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election> (concluding that “[t]he

1 stated publicly that the “U.S. Justice Department ha[d] uncovered no evidence of
 2 widespread voter fraud that could change the outcome of the 2020 election,” a position
 3 he reiterated on December 21 when rejecting calls to appoint a special prosecutor to
 4 investigate election fraud.¹² A senior advisor to the President’s campaign agreed with
 5 Barr’s analysis and said that to the President on multiple occasions.¹³

6 Evidence obtained by the Select Committee reveals that Acting Attorney General
 7 Jeffrey Rosen and Acting Deputy Attorney General Richard Donoghue discussed
 8 allegations of voter fraud with President Trump on multiple occasions in December of
 9 2020—and informed him, both as to specific allegations and more generally, that the
 10 President’s claims of massive fraud sufficient to overturn the election were not supported
 11 by the evidence.¹⁴ According to Rosen, at a December 15, 2020 meeting at the White
 12 House that included Rosen, Donoghue, Ken Cuccinelli (Department of Homeland
 13 Security), Pat Cipollone (White House Counsel), and Mark Meadows (White House
 14 Chief of Staff), participants told the President that “people are telling you things that are

15 _____
 16 November 3rd election was the most secure in American history,” and “[t]here [wa]s no
 17 evidence that any voting system deleted or lost votes, changed votes, or was in any way
 18 compromised”).

19 ¹² Michael Balsamo, *Disputing Trump, Barr says no widespread election fraud*,
 20 ASSOCIATED PRESS (December 1, 2020); *AG Barr says he won't appoint a special*
 21 *counsel to investigate voter fraud*, YAHOO NEWS (December 21, 2020). In a new book,
 22 Mr. Barr reportedly blames the President for the events of January 6, stating that Trump
 23 had “lost his grip” and that “[t]he absurd lengths to which [the President] took his ‘stolen
 24 election’ claim led to the rioting on Capitol Hill.” Sadie Gurman, *Ex-Attorney General*
 25 *William Barr Urges GOP to Move On From Trump*, WALL. ST. J. (Feb. 27, 2022),
 26 [https://www.wsj.com/articles/ex-attorney-general-william-barr-urges-gop-to-move-on-](https://www.wsj.com/articles/ex-attorney-general-william-barr-urges-gop-to-move-on-from-trump-11645959600)
 27 [from-trump-11645959600](https://www.wsj.com/articles/ex-attorney-general-william-barr-urges-gop-to-move-on-from-trump-11645959600).

28 ¹³ Ex. D, Miller Tr. 118-19.

¹⁴ See Interview of Jeffrey Rosen (Aug. 7, 2021), United States Senate Committee on the
 Judiciary, at 30, <https://www.judiciary.senate.gov/rosen-transcript-final>; see also Ex. B,
 Donoghue Tr. 59–62 (discussing specific allegations that Donoghue and Rosen
 discredited to the President, including a 68% error rate in Michigan; a truck driver who
 had allegedly driven ballots from New York to Pennsylvania; suitcases of fraudulent
 ballots allegedly counted in Georgia; and the repeated scanning of ballots, among many
 others).

1 not right.”¹⁵ According to Donoghue, he personally informed the President on a
 2 December 27, 2020 phone call “in very clear terms” that the Department of Justice had
 3 done “dozens of investigations, hundreds of interviews,” had looked at “Georgia,
 4 Pennsylvania, Michigan, Nevada” and concluded that “the major allegations are not
 5 supported by the evidence developed.”¹⁶

6 The President nevertheless continued to insist falsely through January that he had
 7 “won the election in a landslide.” And despite being repeatedly told that his allegations of
 8 campaign fraud were false, the President continued to feature those same false allegations
 9 in ads seen by millions of Americans.¹⁷ (The Select Committee will address these issues
 10 in detail in hearings later this year.)

11
 12 As the President and his associates propagated dangerous misinformation to the
 13 public, Plaintiff was a leader in a related effort to persuade state officials to alter their
 14 election results based on these same fraudulent claims.

15 President Trump, Plaintiff, and several other associates of the President reached
 16 out directly to state officials to communicate unsubstantiated allegations of election fraud
 17

18 ¹⁵ Interview of Jeffrey Rosen (Aug. 7, 2021), United States Senate Committee on the
 19 Judiciary, at 30, <https://www.judiciary.senate.gov/rosen-transcript-final>.

20 ¹⁶ *Id.* at 59-60; *see also id.* at 61-62 (reflecting Donoghue’s notes of a phone call, which
 21 state, “Told [the President] flat out that much of the information he’s getting is false
 22 and/or just not supported by the evidence. We look[ed] at the allegations but they don’t
 23 pan out.”). *See also* Interview of Richard Donoghue (Aug. 6, 2021), United States
 24 Senate Committee on the Judiciary, at 59, 156, [https://www.judiciary.senate.gov/richard-](https://www.judiciary.senate.gov/richard-donoghue-transcript)
 25 [donoghue-transcript](https://www.judiciary.senate.gov/richard-donoghue-transcript).

26 ¹⁷ *See* Alex Wayne, Mario Parker, and Mark Niquette, *Trump Campaign to Run Ads*
 27 *Promoting Effort to Overturn Election*, Bloomberg (Dec. 11, 2020),
 28 [https://www.bloomberg.com/news/articles/2020-12-11/trump-campaign-to-run-ads-](https://www.bloomberg.com/news/articles/2020-12-11/trump-campaign-to-run-ads-promoting-effort-to-overturn-election)
[promoting-effort-to-overturn-election](https://www.bloomberg.com/news/articles/2020-12-11/trump-campaign-to-run-ads-promoting-effort-to-overturn-election); Donald J. Trump, The evidence is overwhelming –
 FRAUD!, FACEBOOK,
<https://www.facebook.com/DonaldTrump/videos/1803802073100806/>; Donald J. Trump,
 Stop the Steal, FACEBOOK,
<https://www.facebook.com/officialteamtrump/videos/711114792881749/>.

1 and request that state legislatures disregard popular election results.¹⁸ On January 2,
 2 2021, the President and Plaintiff convened a video conference with hundreds of state
 3 legislators from swing states won by candidate Biden.¹⁹ The Trump team reportedly
 4 urged the legislators to “decertify” the election results in their States.²⁰ According to
 5 Michigan State Senator Ed McBroom, this call focused (without any valid legal or factual
 6 basis) on the purported power of state legislators to reject the rulings of federal and state
 7 courts and overturn already certified election results.²¹ That same day, President Trump
 8 spoke with Georgia Secretary of State Brad Raffensperger, pressing false and
 9 unsubstantiated claims of election fraud, and ultimately asking Raffensperger to “find
 10 11,780 votes” for Trump in the State.²²

11 President Trump also took steps that would have corrupted the Department of
 12 Justice; he offered the role of Acting Attorney General to another Justice Department

13
 14 ¹⁸ The Select Committee has interviewed a number of state officials, and their accounts
 15 are consistent with the press reports cited in the paragraph that accompanies this footnote.
 16 Plaintiff has claimed privilege over several communications with state legislators
 17 referring to potential legislative action. *See, e.g.*, 024762 (“Comm with agent of potential
 18 client re statistical report in anticipation of legislative action or litigation.”); 024778
 19 (“Comm with co-counsel re possible legislative action in support of pending litigation”).

20 ¹⁹ M. Leahy, *President Trump Joins Call Urging State Legislators to Review Evidence*
 21 *and Consider Decertifying ‘Unlawful’ Election Results*, BREITBART (Jan. 3, 2021),
 22 [https://www.breitbart.com/politics/2021/01/03/president-trump-joins-call-urging-state-](https://www.breitbart.com/politics/2021/01/03/president-trump-joins-call-urging-state-legislators-to-review-evidence-and-consider-decertifying-unlawful-election-results/)
 23 [legislators-to-review-evidence-and-consider-decertifying-unlawful-election-results/](https://www.breitbart.com/politics/2021/01/03/president-trump-joins-call-urging-state-legislators-to-review-evidence-and-consider-decertifying-unlawful-election-results/); *see*
 24 *also* J. Alemany, *Ahead of Jan. 6, Willard Hotel in Downtown DC was a Trump Team*
 25 *‘Command Center’ for Effort To Deny Trump the Presidency*, WASHINGTON POST (Oct.
 26 23, 2021), [https://www.washingtonpost.com/investigations/willard-trump-eastman-](https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html)
 27 [giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html](https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html).

28 ²⁰ J. Alemany, *Ahead of Jan. 6, Willard Hotel in Downtown DC was a Trump Team*
 29 *‘Command Center’ for Effort To Deny Trump the Presidency*, WASHINGTON POST (Oct.
 30 23, 2021), [https://www.washingtonpost.com/investigations/willard-trump-eastman-](https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html)
 31 [giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html](https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html).

²¹ *Id.*

²² A. Gardner, *Here’s the full transcript and audio of the call between Trump and*
 32 *Raffensperger*, Washington Post (Jan. 5, 2021),
 33 [https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-](https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html)
 34 [vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html).

1 political appointee, Jeffrey Clark, knowing that Mr. Clark was pressing to issue official
2 letters to multiple state legislatures falsely alerting them that the election may have been
3 stolen and urging them to reconsider certified election results.²³ The Department's senior
4 leadership and President Trump's White House Counsel threatened to resign if President
5 Trump elevated Clark and fired those who were resisting Clark's requests.²⁴

6 Mr. Trump's team also mounted an effort to obtain false election certificates
7 purporting to demonstrate that the electors of seven States were committed to President
8 Trump rather than President Biden. (The Select Committee has deposed several signers
9 of these false certificates, and plans to interview others.) Michigan Republican Co-Chair,
10 Meshawn Maddock publicly stated, for example, that she "fought to seat the electors"
11 because "the Trump campaign asked us to do that."²⁵ The certificates included false
12 statements that they were official.²⁶

13 When the Electoral College met on December 14, 2020, and confirmed the
14 certified results of the election, the results of the election should have been final. But
15 Plaintiff advised President Trump to press an unconstitutional plan to disregard those
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19 ²³ See Ex. B, Donoghue Tr. 77-81, 123-24 (discussing the proposed letter to states and
20 Oval Office meeting).

21 ²⁴ Ex. C, Rosen Tr. at 105-106, 118; Ex. B, Donoghue Tr. 125-27.

22 ²⁵ *MAGA confession: Trump lawyer admits fraudulent electors plot*, MSNBC (Jan. 21,
2022), <https://www.msnbc.com/the-beat-with-ari/watch/maga-confession-trump-lawyer-admits-fraudulent-electors-plot-131436613579>.

23 ²⁶ Five of the seven certificates submitted to federal officials on behalf of Trump-Pence
24 electors in the States falsely claimed to be "the duly elected and qualified Electors for
25 President and Vice President of the United States of America from the State of [Arizona,
26 Georgia, Michigan, Nevada, Wisconsin]." Ex. E, NARA Unofficial Certificates. The
27 certificate submitted on behalf of the Trump-Pence electors in two other States included
28 language indicating that the undersigned electors "might later be determined [to be]"
(Pennsylvania) or may "ultimately [be] recognized as" (New Mexico) the duly elected
and qualified electors. Ex. E, NARA production 37941, 37944, 37945, 37946, 37947,
38948, 37949.

1 results on January 6.²⁷ The text of the Twelfth Amendment to the Constitution clearly
2 describes Congress’s obligation to count certified electoral votes: “The President of the
3 Senate shall, in the presence of the Senate and House of Representatives, open all the
4 certificates and the votes shall then be counted; the person having the greatest Number of
5 votes for President, shall be the President.” U.S. Const., amend. XII. Nothing in the
6 Constitution permits Congress or the presiding officer (the President of the Senate,
7 Michael R. Pence) to refuse to count certified electoral votes in this context, yet that is
8 precisely what Plaintiff suggested. Plaintiff’s proposal was the subject of heated
9 discussions in the White House in the days before January 6, including with the Vice
10 President’s legal counsel and others who told Plaintiff that what he was proposing was
11 illegal.²⁸

12 This did not deter either Plaintiff or President Trump. Describing his own
13 proposals in a now-public memorandum, Plaintiff characterized his proposed options as
14 “BOLD, Certainly,” but necessary because “this Election was Stolen by a strategic
15 Democrat plan to systematically flout existing election laws for partisan advantage,”
16 advising that “we’re no longer playing by Queensbury Rules.”²⁹

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20 ²⁷ See Ex. F, Jacob Tr. 89-96. Plaintiff’s proposals, in the form of two memoranda, are
21 now in the public domain. See *READ Trump lawyer’s memo on six-step plan for Pence*
22 *to overturn the election*, CNN (September 21, 2021),
23 <https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html> and Jan. 3
24 Memo on Jan. 6 Scenario, CNN,
25 [http://cdn.cnn.com/cnn/2021/images/09/21/privileged.and.confidential.--](http://cdn.cnn.com/cnn/2021/images/09/21/privileged.and.confidential.--jan.3.memo.on.jan.6.scenario.pdf)
26 [jan.3.memo.on.jan.6.scenario.pdf](http://cdn.cnn.com/cnn/2021/images/09/21/privileged.and.confidential.--jan.3.memo.on.jan.6.scenario.pdf) (provided by Plaintiff to CNN per CNN reporting, see
27 Tweet by @jeremyherb, Sept. 21, 2021 at 5:46PM,
28 <https://twitter.com/jeremyherb/status/1440432387263922185>).

²⁸ See, e.g., Ex. F, Jacob Tr. 105-11, 127-28.

²⁹ *Id.* The Marquess of Queensberry rules are “a code of fair play presumed to apply in
any fight” and were developed to regulate boxing matches. *Marquis of Queensberry*
Rules, Merriam-Webster, [https://www.merriam-](https://www.merriam-webster.com/dictionary/Marquis%20of%20Queensberry%20rules)
[webster.com/dictionary/Marquis%20of%20Queensberry%20rules](https://www.merriam-webster.com/dictionary/Marquis%20of%20Queensberry%20rules).

1 Following this advice from Plaintiff—advice that Plaintiff admitted no member of
2 the Supreme Court would accept³⁰—President Trump repeatedly attempted to instruct,
3 direct, or pressure the Vice President, in his capacity as President as of the Senate, to
4 refuse to count the votes from six States. For example, on January 4, 2021, President
5 Trump and Plaintiff met with Vice President Pence and his staff. In that meeting,
6 according to one participant, Plaintiff tried to persuade the Vice President to take action
7 on the electors.³¹ Again the next day, Plaintiff tried to persuade the Vice President and
8 his staff that the Vice President should reject certain electors.³²

9 The pressure continued on January 6. At 1:00 a.m., President Trump tweeted, “If
10 Vice President @Mike_Pence comes through for us, we will win the Presidency . . . Mike
11 can send it back!”³³ At 8:17 a.m., the President tweeted, “States want to correct their
12 votes . . . All Mike Pence has to do is send them back to the States, AND WE WIN. Do
13 it Mike, this is a time for extreme courage!”³⁴ Shortly after this tweet, President Trump
14 placed a phone call to Vice President Pence.³⁵ He later connected with the Vice
15 President by phone around 11:20 a.m.³⁶ General Keith Kellogg and others were with
16 President Trump during that call, and General Kellogg described the pressure that Trump
17 put on Pence:

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19
20 ³⁰ Ex. F, Jacob Tr. 109-11, 117 (“[Plaintiff] had acknowledged that he would lose 9-0 at
the Supreme Court.”).

21 ³¹ Ex. F at 82, 95.

22 ³² *Id.* at 92.

23 ³³ Twitter, @realdonaldtrump “Donald J. Trump” Jan. 6, 2021 1:00:50 AM EST,
[https://web.archive.org/web/20210106060056/https://twitter.com/realdonaldtrump/status/](https://web.archive.org/web/20210106060056/https://twitter.com/realdonaldtrump/status/1346698217304584192)
24 [1346698217304584192](https://web.archive.org/web/20210106060056/https://twitter.com/realdonaldtrump/status/1346698217304584192).

25 ³⁴ Twitter, @realdonaldtrump “Donald J. Trump” Jan. 6, 2021 8:17:22 AM EST,
[https://web.archive.org/web/20210106131747/https://twitter.com/realdonaldtrump/status/](https://web.archive.org/web/20210106131747/https://twitter.com/realdonaldtrump/status/1346808075626426371)
26 [1346808075626426371](https://web.archive.org/web/20210106131747/https://twitter.com/realdonaldtrump/status/1346808075626426371).

27 ³⁵ Ex. I, Short Tr. 12.

28 ³⁶ Ex. H, Private Schedule, P-R000285 (handwritten notes on President’s private
schedule indicate call with VPOTUS at 11:20 AM)]; *see also* Ex. I, Short Tr. at 16; Ex.
F, Jacob Tr. 168.

1 Q: It's also been reported that the President said to the Vice President that
2 something to the effect of, "You don't have the courage to make a hard
3 decision." And maybe not those exact words, but something like that. Do
4 you remember anything like that?

5 A: Words—and I don't remember exactly either, but something like that,
6 yeah. Like you're not tough enough to make the call.³⁷

7 In his speech to the crowd and television crews that came to the capital on January
8 6, President Trump explicitly identified the advice given by Plaintiff Eastman when
9 imploring Vice President Pence:

10 John [Eastman] is one of the most brilliant lawyers in the country and he
11 looked at this, and he said what an absolute disgrace that this could be
12 happening to our Constitution, and he looked at Mike Pence, and I hope Mike
13 is going to do the right thing. I hope so. I hope so because if Mike Pence
14 does the right thing, we win the election. . . . And Mike Pence, I hope you're
15 going to stand up for the good of our Constitution and for the good of our
16 country. And if you're not, I'm going to be very disappointed in you.³⁸

17 Vice President Pence had repeatedly made clear that he would not unilaterally
18 reject electors or return them to the states.³⁹ Nevertheless, just before President Trump
19 spoke, Plaintiff falsely alleged widespread manipulation and fraud with voting machines,
20 purportedly altering the election outcome, and then delivered this message to the crowd:

21 And all we are demanding of Vice President Pence is this afternoon at 1:00
22 he let the legislators of the state look into this so we get to the bottom of it,
23 and the American people know whether we have control of the direction of
24 our government, or not. We no longer live in a self-governing republic if we
25 can't get the answer to this question. This is bigger than President Trump. It
26 is a very essence of our republican form of government, and it has to be done.

27 ³⁷ Ex. G, Kellogg Tr. 87, 90-92.

28 ³⁸ Donald J. Trump Speech on January 6, 2021. The speech transcript can be found at
https://wehco.media.clients.ellingtoncms.com/news/documents/2021/01/13/Trump_Jan._6_speech.pdf.

³⁹ See, e.g., Ex. I, Short Tr. 26-27.

1 And anybody that is not willing to stand up to do it, does not deserve to be in
2 the office. It is that simple.⁴⁰

3 Shortly thereafter—with the assault on the United States Capitol already
4 underway—Trump tweeted at 2:24 p.m., “Mike Pence didn’t have the courage to do what
5 should have been done to protect our Country and our Constitution, giving States a
6 chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they
7 were asked to previously certify. USA demands the truth!”⁴¹ The evidence obtained by
8 the Select Committee indicates that President Trump was aware that the violent crowd
9 had breached security and was assaulting the Capitol when Mr. Trump tweeted.⁴² The
10 evidence will show that rioters reacted to this tweet, resulting in further violence at the
11 Capitol.⁴³ Indeed, rioters at the Capitol were shouting for the Vice President to be
12
13
14

15 ⁴⁰ John Eastman at January 6 Rally, C-SPAN, <https://www.c-span.org/video/?c4953961/user-clip-john-eastman-january-6-rally>.

16 Rudy Giuliani likewise described this plan in his January 6, 2021 rally speech. *See* Rudy
17 Giuliani Speech, March for Trump, (Jan. 6, 2021) (“[Vice President Pence] can decide on
18 the validity of these crooked ballots, or he can send it back to the legislators, give them
19 five to 10 days to finally finish the work.”), <https://www.rev.com/blog/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat>.

20 ⁴¹ Tweet by @realDonaldTrump “Donald J. Trump” Jan. 6, 2021 2:24:22PM ET,
21 <https://web.archive.org/web/20210106192450/https://twitter.com/realdonaldtrump/status/1346900434540240897>.

22 ⁴² *See, e.g.,* Ex. J, Williamson Tr. 60-65.

23 ⁴³ *See United States of America v. Derrick Evans*, <https://www.justice.gov/usaodc/pressrelease/file/1351946/download> (“They’re making an announcement right now
24 saying if Pence betrayed us you better get your mind right because we’re storming that
25 building.”); *United States of America v. Marhsall Neefe and Charles Bradford Smith*,
26 <https://www.justice.gov/usaodc/case-multi-defendant/file/1432686/download> (“Then we
27 heard the news on [P]ence . . . And lost it . . . So we stormed.”); *United States of America*
28 *v. Joshua Matthew Black*, <https://www.justice.gov/opa/page/file/1354806/download>
29 (“Once we found Pence turned on us and that they had stolen the election, like officially,
30 the crowd went crazy. I mean, it became a mob. We crossed the gate.”).

1 hanged.⁴⁴ A minute after President Trump’s tweet, Plaintiff sent an email to Vice
2 President Pence’s lawyer stating: “The ‘siege’ is because YOU and your boss did not do
3 what was necessary to allow this to be aired in a public way so the American people can
4 see for themselves what happened.”⁴⁵

5 Later that evening, Plaintiff made a final plea to the Vice President’s lawyer: “I
6 implore you to consider one more relatively minor violation [of the Electoral Count Act]
7 and adjourn for 10 days to allow the legislatures to finish their investigations, as well as
8 to allow a full forensic audit of the massive amount of illegal activity that has occurred
9 here.”⁴⁶ Plaintiff *knew* what he was proposing would violate the law, but he nonetheless
10 urged the Vice President to take those actions.

11 The Vice President rejected Plaintiff’s pleas that he violate the law, and has since
12 indicated that what the President and Plaintiff were insisting he do was “Un-American.”⁴⁷
13 Former Fourth Circuit Judge Michael Luttig—for whom Plaintiff had previously worked
14 as a law clerk—described Plaintiff’s view of the Vice President’s authority as “incorrect
15 at every turn.”⁴⁸ Evidence obtained by the Select Committee to date indicates that
16 President Trump’s White House Counsel confronted Plaintiff before the rally, and
17 rejected Plaintiff’s advice to Mr. Trump. And Plaintiff admitted that not a single Justice
18 of the Supreme Court would agree with his view that the Vice President could refuse to
19 count certain electoral votes.⁴⁹

21 ⁴⁴ A. Parker, *How the rioters who stormed the Capitol came dangerously close to Pence*,
22 Washington Post (Jan. 15, 2021), [https://www.washingtonpost.com/politics/pence-](https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207_story.html)
23 [rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207_story.html](https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207_story.html).

24 ⁴⁵ Ex. L (005379, Email from John Eastman (via his Chapman University email account)
25 to Gregory Jacob on January 6, 2021, 12:25 p.m. MST).

26 ⁴⁶ Exs. L, M (005479, Email from John Eastman (via his Chapman University email
27 account) to Gregory Jacob on January 6, 2021, 9:44 p.m. MST).

28 ⁴⁷ *See Pence slams Trump for 'un-American' bid to overturn vote*, BBC News (Feb. 4,
2022), <https://www.bbc.com/news/av/world-us-canada-60268412>.

⁴⁸ Tweets by @judgeluttig, Sept. 21, 2021 at 11:50 PM,
<https://twitter.com/judgeluttig/status/1440523766920933389>.

⁴⁹ Ex. F, Jacob Tr. 117.

1 As documents now available to the Select Committee demonstrate, Plaintiff used
2 his Chapman University email account to email Greg Jacob, Counsel to the Vice
3 President, on January 5 and 6 urging the Vice President to take illegal action and refuse
4 to count electoral votes.⁵⁰

5 * * *

6 The Select Committee's investigation is continuing to gather evidence on the
7 planning for the violent assault, communications between those who participated, and
8 communications by the Trump team from the Willard war room and elsewhere. Various
9 individuals planned for violence that day, including with the placement of pipe bombs,
10 the accumulation of weaponry for potential use on January 6 across the river in Virginia,
11 and the use of tactical gear and other weaponry.⁵¹ Evidence also indicates that the violent
12 rioters who attacked police, breached the Capitol, and obstructed and impeded the
13 electoral vote were provoked by President Trump's fraudulent campaign to persuade the
14 American people that the election was in fact stolen.⁵² Indeed, the President's rhetoric

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16 ⁵⁰ Exs. L, M [Chapman005235, Chapman005236, Chapman005479].

17 ⁵¹ See Grand Jury Indictment, *United States v. Crowl et al.*, No. 21-cr-28-APM (Jan 12,
18 2022), available at: <https://www.justice.gov/opa/press-release/file/1462476/download>
19 ("Rhodes and certain regional leaders of the Oath Keepers began recruiting others to
20 travel to Washington, D.C., to participate in operations aimed at stopping the transfer of
21 presidential power. They coordinated travel across the country to enter Washington,
22 D.C., equipped themselves with a variety of weapons, donned combat and tactical gear,
23 and were prepared to answer Rhodes's call to take up arms at Rhodes's direction. Some
24 also amassed firearms on the outskirts of Washington, D.C., distributed them among
25 'quick reaction force' ('QRF') teams, and planned to use the firearms in support of their
26 plot to stop the lawful transfer of presidential power.").

27 ⁵² See *United States v. Chrestman*, No. 1:21-mj-00218 (DDC),
28 <https://www.justice.gov/usao-dc/defendants/chrestman-william>; K. Polantz, , *Sobbing*
Capitol rioter described his assault of police Officer Michael Fanone: 'My God. What
did I just do?', CNN (December 1, 2021) (rioter charged with assaulting Metropolitan
Police Department Officer Michael Fanone on January 6 with an "electroshock weapon"
told investigators: "Trump called us. Trump called us to D.C. . . . If he's the commander
in chief and the leader of our country, and he's calling for help—I thought he was calling

1 persuaded thousands of Americans to travel to Washington for January 6, some of whom
2 marched on the Capitol, breached security, and took other illegal actions. The Select
3 Committee's hearings will address those issues in detail.

4 Ultimately, President Trump issued a video and a tweet urging the rioters to leave
5 the Capitol, stressing "[w]e love you, you're very special. You've seen what happens,
6 you see the way others are treated that are so bad and so evil. I know how you feel."⁵³ At
7 6:00 p.m., the President tweeted: "These are the things and events that happen when a
8 sacred landslide election victory is so unceremoniously & viciously stripped away from
9 great patriots who have been badly & unfairly treated for so long. Go home with love &
10 in peace. Remember this day forever!"⁵⁴

11 The January 6 attack resulted in multiple deaths, physical harm to more than 140
12 law enforcement officers, and trauma among government employees, press, and

13 _____
14 for help"); *United States v. Grayson*, No. 1:21-mj-00163 (DDC),
15 <https://www.justice.gov/opa/page/file/1360506/download>; *United States v. Cua*, No. 21-
16 CR-107 (DDC), [https://www.justice.gov/usao-dc/case-multi-](https://www.justice.gov/usao-dc/case-multi-defendant/file/1365571/download)
17 [https://www.justice.gov/usao-dc/case-multi-](https://www.justice.gov/usao-dc/case-multi-defendant/file/1365571/download)
18 [https://www.justice.gov/usao-dc/case-multi-](https://www.justice.gov/usao-dc/case-multi-defendant/file/1365571/download)
19 [https://www.justice.gov/usao-dc/case-multi-](https://www.justice.gov/usao-dc/case-multi-defendant/file/1365571/download)
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28 [https://www.justice.gov/usao-dc/case-multi-](https://www.justice.gov/usao-dc/case-multi-defendant/file/1365571/download)
for help"); *United States v. Grayson*, No. 1:21-mj-00163 (DDC),
<https://www.justice.gov/opa/page/file/1360506/download>; *United States v. Cua*, No. 21-
CR-107 (DDC), [https://www.justice.gov/usao-dc/case-multi-](https://www.justice.gov/usao-dc/case-multi-defendant/file/1365571/download)
Sergeant Aquilino Gonell Testimony, House Select
Committee to Investigate the January 6th Attack on the United States Capitol, *The Law*
Enforcement Experience on January 6th (July 27, 2021) (Capitol Police Sergeant
Aquilino Gonell testifying that during hand-to-hand combat with rioters "all of them, all
of them, were telling us 'Trump sent us.'"). A number of defendants in pending criminal
cases have identified President Trump's allegations about the "stolen election" as a
motivation for their activities at the Capitol; several also specifically cite President
Trump's tweets asking that supporters come to Washington, D.C. on January 6. *See, e.g.,*
United States v. Sandlin, <https://www.justice.gov/opa/page/file/1362396/download>: ("I'm
going to be there to show support for our president and to do my part to stop the steal and
stand behind Trump when he decides to cross the rubicon."); *United States v. Neefe et al.*,
<https://www.justice.gov/usao-dc/case-multi-defendant/file/1432686/download> ("Trump is
literally calling people to DC in a show of force. Militias will be there and if there's
enough people they may fucking storm the buildings and take out the trash right there.").

⁵³ *President Trump Video Statement on Capitol Protesters*, C-Span (Jan. 6, 2021),
[https://www.c-span.org/video/?507774-1/president-trump-claims-election-stolen-tells-](https://www.c-span.org/video/?507774-1/president-trump-claims-election-stolen-tells-protesters-leave-capitol)
[protesters-leave-capitol](https://www.c-span.org/video/?507774-1/president-trump-claims-election-stolen-tells-protesters-leave-capitol).

⁵⁴ Tweet by @realDonaldTrump "Donald J. Trump" Jan. 6, 2021 6:01:04 PM ET,
[https://web.archive.org/web/20210106230114/https://twitter.com/realdonaldtrump/status/](https://web.archive.org/web/20210106230114/https://twitter.com/realdonaldtrump/status/1346954970910707712)
[1346954970910707712](https://web.archive.org/web/20210106230114/https://twitter.com/realdonaldtrump/status/1346954970910707712)

Members of Congress. *See* H. Res. 503, Preamble. Law enforcement eventually cleared the rioters, and the electoral count successfully resumed at 8:06 p.m. in the Senate after a nearly six-hour delay.

PROCEDURAL HISTORY

In furtherance of its duty to investigate the facts, circumstances, and causes of the attack on January 6, the Select Committee has issued subpoenas to various government agencies, private companies, and numerous individuals, including Plaintiff and his former employer, Chapman University. In a cover letter accompanying the subpoena at issue here, Chairman Thompson explained that the Select Committee had “credible evidence” that Plaintiff knew about, and “may have participated in, attempts to encourage the Vice President of the United States to reject the electors from several states or, at the very least, to delay the electoral college results to give states more time to submit different slates of electors.” Nov. 8, 2021 Select Committee Cover Letter to Eastman at 1.⁵⁵ Chairman Thompson noted that Plaintiff wrote “two memoranda offering several scenarios for the Vice President to potentially change the outcome of the 2020 Presidential election.” *Id.* Chairman Thompson also explained that Plaintiff had “participated in a briefing for nearly 300 state legislators from several states regarding purported election fraud,” “testified to Georgia state senators regarding alleged voter fraud and reportedly shared a paper that argued that the state legislature could reject election results and directly appoint electors,” was “at the Willard Hotel ‘war room’ with Steve Bannon and others on the days leading up to January 6 where the focus was on delaying or blocking the certification of the election,” and on January 6, “spoke at the rally at the White House Ellipse.” *Id.* at 2.

After Plaintiff refused to produce any documents responsive to a subpoena issued to him directly (which is not before this Court), and invoked the Fifth Amendment

⁵⁵ Available at <https://perma.cc/ZV8J-P2QS>.

1 privilege against forced self-incrimination repeatedly during his deposition, the Select
2 Committee issued a separate subpoena to Chapman for certain documents in its
3 possession “attributable to Dr. John Eastman, that are related in any way to the 2020
4 election or the January 6, 2021 Joint Session of Congress.” Compl. Ex. B at 4, ECF No.
5 1-2. That subpoena requested documents from November 3, 2020 to January 20, 2021.
6 *Id.* The deadline to produce the subpoenaed documents was January 21, 2022. *Id.* at 3.

7 The day before the subpoena’s deadline, Plaintiff initiated this action and sought to
8 enjoin Chapman from producing responsive records. In his application for emergency
9 injunctive relief, Plaintiff made broad assertions of attorney-client privilege without
10 identifying individual communications to which these privileges applied. This Court
11 granted Plaintiff’s request for a four-day *ex parte* temporary restraining order until the
12 parties appeared for a January 24 hearing to discuss Plaintiff’s request for a temporary
13 restraining order. *See* Civil Minutes, Jan. 20, 2022, ECF No. 12.

14 At the January 24 hearing, the parties agreed that Plaintiff would expeditiously
15 produce a privilege log with particularized assertions of privilege. The Court denied
16 Plaintiff’s application to maintain the temporary restraining order, rejected his First
17 Amendment, Fourth Amendment, and Congressional authority claims, and ordered
18 Plaintiff to produce all non-privileged, responsive documents to the Select Committee on
19 a rolling basis. The Court also denied Plaintiff’s blanket attorney-client privilege and
20 attorney work product protection claims with the proviso that Plaintiff retained the right
21 to raise these claims as to specific documents during production. *See* Order, Jan. 25,
22 2020, ECF No. 43.

23 Although Plaintiff produced the requested logs, those logs failed to provide
24 sufficient information to allow the Select Committee to assess the privilege assertions’
25 validity. After several efforts to secure adequate information from Plaintiff,
26 Congressional Defendants asked this Court to establish a briefing schedule to address
27 Plaintiff’s outstanding privilege assertions and the insufficiency of the information
28 provided on his daily logs. *See* Notice, Feb. 11, 2022, ECF No. 101. This Court granted

1 that request as to the privilege assertions on Plaintiff’s January 4-7 document logs and set
2 a hearing to address these issues. *See* Civil Minutes, Feb. 14, 2022, ECF No. 104. At
3 Congressional Defendants’ request, the Court also ordered Plaintiff to produce “evidence
4 of all attorney-client and agent relationships asserted in the privilege log,” including
5 “evidence documenting any attorney-client relationships that existed with his clients.”
6 *Id.* The Court’s order did not address motions for reconsideration.

7 **STANDARD OF REVIEW**

8 “As with all evidentiary privileges, the burden of proving that the attorney-client
9 privilege applies rests not with the party contesting the privilege, but with the party
10 asserting it.” *Weil v. Inv./Indicators, Rsch. & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir.
11 1981) (citations omitted); *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011).
12 The same is true of the work product doctrine. *United States v. City of Torrance*, 163
13 F.R.D. 590, 593 (C.D. Cal. 1995); *Cameron v. City of El Segundo*, No. 20-CV-04689,
14 2021 WL 3466324, at *12 (C.D. Cal. Apr. 30, 2021). “Evidentiary privileges in
15 litigation” like those at issue here “are not favored.” *Herbert v. Lando*, 441 U.S. 153,
16 175 (1979).

17 “[A] party asserting the attorney-client privilege has the burden of establishing the
18 relationship *and* the privileged nature of the communication.” *United States v. Ruehle*,
19 583 F.3d 600, 607 (9th Cir. 2009) (internal quotation omitted). “Because it impedes full
20 and free discovery of the truth, the attorney-client privilege is strictly construed.” *United*
21 *States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002), *as amended on denial of reh’g* (Mar.
22 13, 2002) (internal quotation omitted).

23 **ARGUMENT**

24 “[T]he power of inquiry—with process to enforce it—is an essential and
25 appropriate auxiliary to the legislative function.” *McGrain v. Daugherty*, 273 U.S. 135,
26 174 (1927). Inherent in this investigative authority, Congress can compel production of
27 documents and testimony through legislative subpoenas. It should now be beyond
28 dispute that the Select Committee is operating properly with an appropriate legislative

1 purpose. Order, Dkt. No. 43 at 10 (holding that “the issues surrounding the 2020 election
2 and the January 6th attacks” are “clearly ‘subjects on which legislation could be had’”);
3 *see also Thompson*, No. 21-5254, 2021 U.S. App. LEXIS 36315, at *6 (describing
4 “Congress’s uniquely vital interest in studying the January 6th attack on itself to
5 formulate remedial legislation and to safeguard its constitutional and legislative
6 operations).

7 **I. Plaintiff Has Not Met His Burden to Establish Application of the Common**
8 **Law Attorney-Client Privilege**

9 **A. Plaintiff Has Neither Met His Burden to Establish the Attorney-Client**
10 **Relationship Nor Has He Sufficiently Established the Privileged Nature**
11 **of the Communications**

12 Plaintiff claims that “[t]he attorney-client relationship between Dr. Eastman and
13 President Trump should be beyond dispute,” Br. at 11, and declares that he filed briefs on
14 behalf of the Trump campaign in state litigation in December 2020. Pl.’s Ex. 1, Eastman
15 Decl. ¶ 20. But Plaintiff does not even attempt in his declaration to claim attorney-client
16 privilege over the relevant matters and the relevant time at issue here.

17 Over the past months, the Congressional Defendants repeatedly asked Plaintiff to
18 disclose the engagement letters that show the identity of his client and the period of the
19 representation. Ex. 1, Email Exchange Between Douglas Letter and Charles Burnham.
20 Appended to his declaration, Plaintiff finally revealed what he purports is an engagement
21 letter. That letter identifies the client as “Donald J. Trump for President, Inc.” Ex. A to
22 Ex. 1 at 1. But—despite a clearly delineated signature page with lines for the client and
23 attorney to sign—that letter is unsigned. Ex. A to Ex. 1 at 4. *See In re W/B Assocs.*, 307
24 B.R. 476, 483 (Bankr. W.D. Pa. 2004), *aff’d sub nom. Est. Partners, Ltd. v. Leckey*, No.
25 04CV1404, 2005 WL 4659380 (W.D. Pa. Aug. 31, 2005), *aff’d sub nom. In re W/B*
26 *Assocs.*, 196 F. App’x 105 (3d Cir. 2006) (“An unsigned agreement, in and of itself,
27 raises material questions as to its validity and applicability.”); *Solis v. Taco Maker, Inc.*,
28 No. 1:09-CV-3293, 2013 WL 4541912, at *5 (N.D. Ga. Aug. 27, 2013) (unsigned

1 engagement letter insufficient to establish attorney client relationship).⁵⁶ And Plaintiff
2 provided no declaration from his client regarding the scope of his representation.

3 The lack of signatures is critical because the letter itself states that it becomes
4 operative “[u]pon the proper signatures by all parties hereto.” Ex. A to Ex. 1 at 1. By the
5 terms of the letter, therefore, the absence of signatures suggests the letter was not
6 operative. Plaintiff’s declaration, moreover, does not authenticate this unsigned letter,
7 nor does Plaintiff include the cover email by which the engagement letter was
8 “transmitted.” Ex. 1, Eastman Decl. ¶ 23.⁵⁷ Although Plaintiff had the burden to
9 establish the elements of the privilege in his opening brief, this unsigned and
10 unauthenticated engagement letter is insufficient to establish an attorney-client
11 relationship during the period at issue (January 4 through 7) as to either President Trump
12 the individual or President Trump’s campaign. Any belated effort to cure this defect in
13 his reply by appending a signed engagement letter or the cover email to the letter should
14 not be permitted. *See U.S. ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal.
15 2000) (“It is improper for a moving party to introduce new facts or different legal
16 arguments in the reply brief than those presented in the moving papers.”).

17 Nor can Plaintiff meet his burden by noting his involvement prior to the election in
18 a so-called “Election Integrity Working Group.” Ex. 1, Eastman Decl. ¶ 25. No
19 documentation accompanies this assertion, which in any event provides no indication that

20 ⁵⁶ Plaintiff emphasizes his appearances in a number of cases, but simply naming these
21 cases does not meet Plaintiff’s burden to show that the disputed communications related
22 to any of those cases. One of the cases had already concluded before the time at issue
23 here, *see State of Texas v. Commonwealth of Pennsylvania, et al.*, No. 22O155 (motion
24 for leave to file a bill of complaint denied on December 11, 2020), and nowhere do
Plaintiff’s privilege logs identify communications linked to either of the other cases.

25 ⁵⁷ Plaintiff had the burden to establish the elements of the privilege in his opening brief.
26 Any belated effort to cure this defect in his reply by appending a signed engagement
27 letter or the cover email to the letter should not be permitted. *See U.S. ex rel. Giles v.*
28 *Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) (“It is improper for a moving party
to introduce new facts or different legal arguments in the reply brief than those presented
in the moving papers.”).

1 Plaintiff had a relevant attorney-client relationship during January 4 through January 7.
2 “[T]he burden of establishing the existence of the relationship rests on the claimant of the
3 privilege against disclosure. That burden is not, of course, discharged by mere conclusory
4 or ipse dixit assertions, for any such rule would foreclose meaningful inquiry into the
5 existence of the relationship, and any spurious claims could never be exposed.” *In re*
6 *Bonanno*, 344 F.2d 830, 833 (2d Cir. 1965). Nor does Plaintiff provide any basis to
7 conclude that the “Working Group” was providing legal advice at the client’s request.

8 Furthermore, 004722, 004723, 004744, 004745, 004766, 004767, and 004788
9 were received by various third parties, and Plaintiff fails to meet his burden to show that
10 such disclosure did not destroy the privilege. “[V]oluntarily disclosing privileged
11 documents to third parties will generally destroy the privilege.” *In re Pac. Pictures*
12 *Corp.*, 679 F.3d 1121, 1126–27 (9th Cir. 2012); *see also Reiserer v. United States*, 479
13 F.3d 1160, 1165 (9th Cir. 2007) (“there is no confidentiality where a third party . . . either
14 receives or generates the documents”). “Because the attorney-client privilege applies
15 only where the communication between attorney and client is confidential, there is no
16 privilege protecting the documents the [Select Committee] seeks in the present action.”
17 *Reiserer*, 479 F.3d at 1165.

18 “The mere presence of a third party at an attorney-client meeting does not
19 necessarily destroy the privilege,” *United States v. Landof*, 591 F.2d 36, 39 (9th Cir.
20 1978) because “[t]he attorney-client privilege may extend to communications with third
21 parties who have been engaged to assist the attorney in providing legal advice,” *Richey*,
22 632 F.3d at 566. But “a shared desire to see the same outcome in a legal matter is
23 insufficient to bring a communication between two parties within this [common interest]
24 exception.” *In re Pac. Pictures Corp.*, 679 F.3d at 1129. To invoke the common interest
25 exception, “the parties must make the communication in pursuit of a joint strategy in
26 accordance with some form of agreement—whether written or unwritten.” *Id.*
27 Moreover, “[a] person who is not represented by a lawyer and who is not himself or
28 herself a lawyer cannot participate in a common-interest arrangement.” Restatement

(Third) of the Law Governing Lawyers § 76 (2000); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 365 (3d Cir. 2007), *as amended* (Oct. 12, 2007) (common interest privilege “only applies when clients are represented by separate counsel”).⁵⁸

Plaintiff makes no effort to meet his burden of establishing that the third-party recipients of his emails were retained to assist Plaintiff in providing legal advice, nor does he even try to establish that Plaintiff and these parties had “some form of agreement” to pursue a joint legal strategy. *In re Pac. Pictures Corp.*, 679 F.3d at 1129. This Court instructed Plaintiff to “file with the Court and the Select Committee evidence of all attorney-client and agent relationships asserted in the privilege log.” Order, ECF No. 104. ¶ 2. Plaintiff did not identify a single common interest agreement. Plaintiff’s self-serving assertion of a common interest “on information and belief” and conclusory claims about a general common interest—as opposed to an actual agreement—do not satisfy his burden to show that these third parties were brought within the ambit of the privilege such that inclusion of these third parties did not destroy any privilege. Br. 17-21; *see also, e.g., Sony Computer Ent. Am., Inc. v. Great Am. Ins. Co.*, 229 F.R.D. 632, 634 (N.D. Cal. 2005) (“Where a third party is present, no presumption of confidentiality obtains, and the usual allocation of burden of proof, resting with the proponent of the

⁵⁸ *See also Sec. & Exch. Comm’n v. Aequitas Mgmt., LLC*, No. 16-CV-438, 2017 WL 6329716, at *3 (D. Or. July 7, 2017), *objections overruled*, 2017 WL 6328150 (D. Or. Dec. 11, 2017) (common interest privilege “only applies when clients are represented by separate counsel”); *Swortwood v. Tenedora de Empresas, S.A. de C.V.*, No. 13CV362, 2014 WL 895456, at *4 (S.D. Cal. Mar. 6, 2014), *clarified on denial of reconsideration sub nom. Swortwood v. Empresas*, No. 13CV362, 2014 WL 12026069 (S.D. Cal. Apr. 18, 2014) (“Since Mr. Diez Barroso was not individually represented by counsel, Defendant can not establish the applicability of the common interest doctrine.”); *Finisar Corp. v. U.S. Bank Tr. Nat. Ass’n*, No. C 07-04052, 2008 WL 2622864, at *4 (N.D. Cal. June 30, 2008) (“Under the strict confines of the common interest doctrine, the lack of representation for the remaining parties vitiates any claim to a privilege.”) (quoting *Cavallaro v. United States*, 153 F. Supp. 2d 52, 61 (D. Mass. 2001), *aff’d*, 284 F.3d 236 (1st Cir. 2002)); *OTR Wheel Eng’g, Inc. v. W. Worldwide Servs., Inc.*, No. CV-14-085, 2015 WL 11117150, at *2 (E.D. Wash. June 1, 2015) (for common interest to apply, “[t]he communications, however, must be shared by attorneys for the separate parties”).

1 privilege, applies in determining whether confidentiality was preserved under [the
2 relevant privilege statute].”); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951
3 F.2d 1414, 1427 (3d Cir. 1991) (voluntary disclosure to third party waives attorney-client
4 privilege even if third party agrees not to further disclose communication).⁵⁹

5 Ninth Circuit precedent is clear: “A party claiming the privilege must identify
6 specific communications and the grounds supporting the privilege as to each piece of
7 evidence over which privilege is asserted.” *Martin*, 278 F.3d at 1000. Plaintiff’s
8 privilege log and brief instead summarily label a multitude of documents as privileged
9 without properly identifying a client, establishing the advice as legal (as opposed to
10 political or strategic), or showing that the third parties included on the communication
11 were agents of the client. Such “[b]lanket assertions [of privilege] are ‘extremely
12 disfavored.’” *Id.* (quoting *Clarke v. Am. Com. Nat’l Bank*, 974 F.2d 127, 129 (9th
13 Cir.1992)). Accordingly, Plaintiff’s attorney-client claims must be rejected.

14 In addition, to the extent that the Court finds that Plaintiff was providing advice on
15 political or campaign strategy rather than law, the communications are not privileged,
16 because “advice on political, strategic, or policy issues . . . would not be shielded from
17 disclosure by the attorney-client privilege.” *In re Lindsey*, 148 F.3d 1100, 1106 (D.C.
18 Cir. 1998); *Md. Restorative Just. Initiative v. Hogan*, No. 16-01021, 2017 WL 4280779,
19 at *3 (D. Md. Sept. 27, 2017) (“A claim of attorney-client privilege is only legitimate
20 where the client has sought the giving of *legal*, not *political*, advice.”).

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25 ⁵⁹ “It is appropriate that the proponent of the privilege has the burden of proving that a
26 third party was present to further the interest of the proponent because, in this situation,
27 where the privilege turns on the nature of the relationship and content of communications
28 with the third party in question, the proponent is in the better posture to come forward
with specific evidence explaining why confidentiality was not broken.” *Sony Computer
Ent. Am., Inc.*, 229 F.R.D. at 634 n.1.

B. Plaintiff Cannot Invoke Attorney-Client Privilege Over Documents on Chapman's Server⁶⁰

“Confidentiality is an aspect of a communication that must be shown to exist to bring the communication within the attorney-client communication privilege. When the confidentiality element is not shown to exist, the assertion of the attorney-client privilege to safeguard a communication from disclosure, is improper.” *Long v. Marubeni Am. Corp.*, No. 05CIV.639, 2006 WL 2998671, at *3 (S.D.N.Y. Oct. 19, 2006) (use of employer email or internet not privileged when policy disclaimed any right to personal privacy and company retained right to monitor data flowing through its systems).

As the Supreme Court explained, an employee's expectation of privacy “may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.” *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987). In the context of email communication over an employer's email system, “the question of privilege comes down to whether the intent to communicate in confidence was objectively reasonable.” *Doe I v. George Washington Univ.*, 480 F. Supp. 3d 224, 226 (D.D.C. 2020), *reconsideration denied*, — F. Supp. 3d —, 2021 WL 5416631 (D.D.C. Nov. 19, 2021) (quoting *Convertino v. U.S. Dep't of Just.*, 674 F. Supp. 2d 97, 110 (D.D.C. 2009)); *see also In re Asia Glob. Crossing, Ltd.*, 322 B.R. 247, 258 (Bankr. S.D.N.Y. 2005).

Courts confronting the issue have applied four factors: “(1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?” *George Washington Univ.*, 480 F. Supp. 3d at 226 (quoting *In re Asia Glob. Crossing, Ltd.*, 322 B.R. at 257). These factors point to the conclusion that any intent Plaintiff may have had to communicate confidentially over the Chapman server was not objectively reasonable.

⁶⁰ Plaintiff's assertion that the Congressional Defendants waived this argument, Br. 22-23, is addressed at 53-57, *infra*.

1 Chapman's Computer and Network Policy directly undermines any purported
2 expectation of confidentiality. That policy is clear: "Users should not expect privacy in
3 the contents of University-owned computers or e-mail messages." *Policies and*
4 *Procedures: Computer and Network Acceptable Use Policy*, Chapman University,
5 <https://perma.cc/7ZUA-ZALN> (last visited Mar. 2, 2022) (emphasis added).

6 The policy also expressly bans personal use on its network and computing systems.
7 *Id.* (all university computing and network systems and services are a "University-owned
8 resource and business tool to be used only by authorized persons for educational
9 purposes or to carry out the legitimate business of the University"). And through its
10 policy, Chapman reserves "the right to retrieve the contents of University-owned
11 computers and e-mail messages for legitimate reasons." *Id.*

12 Chapman's policy is notable in that, in response to the known risks to privilege
13 posed by university email policies, many other universities have in the past decade
14 developed policies that are more protective of user privacy.⁶¹ The use of "bare-bones-
15 no-privacy policies" like Chapman's, in which users are warned "that they do not have an
16 expectation of privacy," is followed by only a "small minority" of universities. Sisk &
17 Halbur, *supra* at n.61, at 1297, 1301; *Policies and Procedures: Computer and Network*
18

19 ⁶¹ See, e.g., UCLA Policy 410: Nonconsensual Access to Electronic Communications
20 Records (effective on Aug. 16, 2010) (requiring the consent of the user before accessing
21 electronic communications records except in exceptional circumstances),
22 <https://perma.cc/3CP4-QSYD>; Stanford Administrative Guide, Privacy and Access to
23 Electronic Information 6.1.1 (last updated on Oct. 4, 2016) (acknowledging the
24 importance of users' right to privacy and requiring the consent of the user before
25 accessing electronic communications except in exceptional circumstances),
26 <https://perma.cc/E4C5-Z37P>; see generally American Bar Association, Standing
27 Committee on Ethics and Professional Responsibility, Formal Opinion 11-459 (2011)
28 <https://perma.cc/VF5N-VFFB>; State Bar of California, Standing Committee on
Professional Responsibility and Conduct, Formal Opinion 2010-179 §3(a)(iii) (2010),
<https://perma.cc/6737-D8NV>; G. Sisk & N. Halbur, *A Ticking Time Bomb? University*
Data Privacy Policies and Attorney-Client Confidentiality in Law School Settings, 2010
Utah L. Rev. 1277 (2010).

1 *Acceptable Use Policy*, Chapman University (“Users should not expect privacy in the
2 contents of University-owned computers or e-mail messages”).

3 Plaintiff was notified of Chapman’s relatively stringent policy and can be
4 presumed to be aware of the it. Plaintiff served on the Chapman faculty for over twenty
5 years and was previously the Dean of Chapman’s law school. According to the
6 University, whenever Plaintiff logged on to Chapman’s network during the relevant
7 period he received a “splash screen” message stating: “Use of this computer system
8 constitutes your consent that your activities on, or information you store in, any part of
9 the system is subject to monitoring and recording by Chapman University or its agents,
10 consistent with the Computer and Acceptable Use Policy without further notice.” Decl.
11 of Janine DuMontelle ¶ 6, ECF No. 17-1.

12 Moreover, in reference to Plaintiff’s representation of President Trump in Supreme
13 Court litigation, Chapman’s President publicly emphasized the university’s “clear
14 policies in place regarding outside activity,” explaining that “acting privately, Chapman
15 faculty and staff are not free to use Chapman University’s email address, physical
16 address or telephone number in connection with the support of a political candidate.”
17 Dawn Bonker, *President Struppa’s Message on Supreme Court Case*, Chapman
18 University (Dec. 10, 2020), <https://perma.cc/3CTG-4DBN>.

19 At this Court’s hearing on January 15, Chapman’s counsel emphasized that
20 President Trump “was not a clinic client, nor would he have been eligible to be a clinic
21 client of Chapman,” that Plaintiff’s representation of the President was “improper” and
22 “unauthorized,” and that Plaintiff’s use of his Chapman account for such representation
23 was like “having contraband on our system.” Hearing Tr. Re: Pl.’s App. for TRO at 29.

24 Putting all of this together, Plaintiff certainly had no legitimate expectation of
25 confidentiality during the dates at issue here—January 4-7, 2021—nearly one month after
26 the University President’s public statement.

27 Plaintiff insists that this Court should disregard Chapman’s policy because
28 Plaintiff is a professor, not a student. The information provided by the university to this

1 Court provides no indication that this makes any difference. To the contrary, less than a
2 month before the period at issue here, Chapman's President admonished Plaintiff's use of
3 the Chapman server and email address for the very purpose used here, and was crystal
4 clear that the policy applied to "*faculty and staff*." See Bonker, *supra* (emphasis added).

5 Plaintiff's reliance on *Convertino v. U.S. Dep't of Just.* is misplaced. *Convertino*,
6 like the cases the Congressional Defendants cite above, holds that "for documents sent
7 through e-mail to be protected by the attorney-client privilege there must be a subjective
8 expectation of confidentiality that is found to be objectively reasonable." 674 F. Supp.
9 2d at 110. "Because his expectations were reasonable," the District Court for the District
10 of Columbia held in that situation that "[the official's] private e-mails will remain
11 protected by the attorney-client privilege." *Id.* Here, by contrast, Plaintiff had no
12 reasonable expectation that his documents would remain protected. Not only was the
13 University's policy clear, but any expectation of confidentiality was manifestly
14 unreasonable following the admonishment by Chapman's President. See Bonker, *supra*.

15 For the same reason, *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006) is
16 inapposite. See Br. at 28 (relying on *Long*). Applying a clearly erroneous standard, the
17 Court of Appeals for the Armed Forces concluded there that the lower court did not err in
18 finding a subjective expectation of privacy because "the agency [had a] practice of
19 recognizing the privacy interest of users in their e-mail." *Long*, 64 M.J. at 63. By
20 contrast, here, as we have highlighted, the University President (in specific reference to
21 Plaintiff and his political work for President Trump) emphasized that Plaintiff and other
22 faculty had staff had no privacy interest. This fact is also fatal to Plaintiff's reliance on
23 his prior practices violating Chapman's policy. See Br. 29-30.

24 Likewise, Plaintiff's suggestion that his unauthorized use of Chapman's system is
25 "irrelevant" because "[t]he privilege is held by the client," Br. 30, makes little legal
26 difference. As the Ninth Circuit has recognized, "[t]here are several instances in which
27 an attorney's behavior may waive the privilege, even without an explicit act by the
28 client." *In re Pac. Pictures Corp.*, 679 F.3d at 1130. Plaintiff's decision to continue

1 using a server and email account in an unauthorized way after being specifically
2 admonished by the University President against doing so is precisely such an instance
3 where, as the attorney, Plaintiff's actions defeated application of the privilege.

4 **C. President Trump Waived Privilege By Expressly Asking for Disclosure**
5 **to Third Parties**

6 "[A] fundamental prerequisite to assertion of the privilege" is "confidentiality both
7 at the time of the communication and maintained since." *Coastal States Gas Corp. v.*
8 *Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). "Voluntary disclosure of
9 privileged communications constitutes waiver of the privilege for all other
10 communications on the same subject." *Richey*, 632 F.3d at 566 (citation omitted); *see*
11 *also United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020).

12 Plaintiff has stated publicly that President Trump authorized Plaintiff's discussion
13 of advice relating to the election and the events leading up to January 6. Two
14 memoranda that Plaintiff wrote outlining how former Vice President Pence could
15 overturn the results of the Presidential election are already in the public domain and have
16 been provided to the media, and discussed, by Plaintiff.⁶²

17 Plaintiff discussed the advice in his legal memo at length on a podcast, noting that
18 Plaintiff himself provided the memorandum to author Bob Woodward, and saying at the
19 outset that Mr. Trump had "authorized" him "to talk about these things."⁶³ Plaintiff has
20 also made extensive public remarks regarding the events of January 6 and his advice to
21 President Trump on numerous other occasions.⁶⁴ These "[v]oluntary

22 ⁶² *READ Trump lawyer's memo on six-step plan for Pence to overturn the election*, CNN
23 (Sept. 21, 2021), <https://perma.cc/LP48-JRAF>; Jan. 3 Memo on Jan. 6 Scenario, CNN,
24 <https://perma.cc/B8XQ-4T3Z> (provided by John Eastman to CNN per CNN reporting,
25 *see* Jeremy Herb (@jeremyherb), Twitter (Sept. 21, 2021, 5:46 PM),
<https://perma.cc/GX4R-MK9B>.

26 ⁶³ *Another Way: Discussing the John Eastman Memo with Eastman*, Equal Citizens
(Sept. 27, 2021), <https://perma.cc/A2RZ-MFWP>.

27 ⁶⁴ *See, e.g.*, M. Schmidt, *The Lawyer Behind the Memo on How Trump Could Stay in*
28 *Office*, N.Y. Times (Oct. 2, 2021), <https://perma.cc/9BQQ-5Y39>; John McCormack, *John*

1 disclosure[s] . . . constitute[] waiver of the privilege for all other communications on the
2 same subject” of the events surrounding the January 6, 2021 joint session of Congress.
3 *United States v. Richey*, 632 F.3d at 566.

4 Plaintiff asserts that “[t]he statements about President Trump attributed to Dr.
5 Eastman by the defendants make no reference to privilege,” Br. 24, but nowhere does he
6 cite authority that waiver must make explicit reference to privilege. And, undermining
7 Plaintiff’s representation, Plaintiff indeed recognized the privileged nature of attorney-
8 client relationships. On May 5, 2021, Plaintiff appeared on the Peter Boyles Show and
9 stated that “I would normally not talk about a private conversation I have with a client,
10 but I have express authorization from my client, the President of the United States at the
11 time, to describe what occurred—to truthfully describe what occurred in that
12 conversation.”⁶⁵

13 Plaintiff states the unremarkable proposition that “[c]ourts have long recognized
14 that disclosure of privileged information on a particular subject does not necessarily
15 imply a complete waiver of the privilege.” Br. 25.⁶⁶ But no one here has asserted a
16 “complete waiver of the privilege.” At issue is former President Trump’s waiver of the
17 subject matter of issues the events of January 6 and Plaintiff’s advice about the effort to
18 interfere with the counting of the electoral votes on January 6 in violation of the Electoral
19 Count Act.

20 Plaintiff insists that this statement does not waive privilege because his “statements
21 in the very same interview that the conversation in question occurred in the presence of

22 *Eastman vs. the Eastman Memo*, Nat’l Rev. (Oct. 22, 2021), [https://perma.cc/VD6N-](https://perma.cc/VD6N-R9Q9)
23 *R9Q9*; John C. Eastman, *John Eastman: Here’s the Advice I Actually Gave Vice*
24 *President Pence on the 2020 Election*, Sacramento Bee (Oct. 7, 2021),
<https://www.sacbee.com/opinion/op-ed/article254812552.html>.

25 ⁶⁵ *Peter Boyles Show: Peter Boyles May 5 8am*, 710KNUS News/Talk (May 5, 2021),
26 <https://perma.cc/Q6YE-KD5F>.

27 ⁶⁶ Plaintiff relies on *Weil*, 647 F.2d at 25, which is inapposite. Whereas *Weil* involved a
28 company’s *inadvertent* disclosure, Plaintiff’s disclosure was both intentional and
repeated.

1 three non-clients in addition to the President.” Br. 24. Waiver, however, does not attach
2 to individual “conversations;” instead, it applies to “all other communications *on the*
3 *same subject.*” *Richey*, 632 F.3d at 566 (emphasis added and citation omitted). President
4 Trump—presumably for strategic and political gain—approved of Plaintiff’s public
5 disclosures of his advice on the subject of the effort to interfere with the counting of the
6 electoral votes on January 6 in violation of the Electoral Count Act. He cannot now
7 come back and reclaim privilege over communications “on the same subject.” *Richey*,
8 632 F.3d at 566. Neither former President Trump nor Plaintiff can use attorney-client
9 privilege “both as a sword and a shield.” *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156,
10 1162 (9th Cir. 1992) (citation omitted); *In re EchoStar Commc’ns Corp.*, 448 F.3d 1294,
11 1301-02 (Fed. Cir. 2006).

12 **II. The Documents Sought from Chapman Are Not Protected by the Common** 13 **Law Attorney Work-Product Doctrine**

14 “The work-product doctrine is a qualified privilege that protects from discovery
15 documents and tangible things prepared by a party or his representative in anticipation of
16 litigation.” *Sanmina Corp.*, 968 F.3d at 1119 (internal quotation marks and citation
17 omitted). To qualify for work-product protection, documents must: “(1) be prepared in
18 anticipation of litigation or for trial and (2) be prepared by or for another party or by or
19 for that other party’s representative.” *Richey*, 632 F.3d at 567 (internal quotation marks
20 and citation omitted).

21 “The party claiming work product immunity has the burden of proving the
22 applicability of the doctrine.” *Verizon California Inc. v. Ronald A. Katz Tech. Licensing,*
23 *L.P.*, 266 F. Supp. 2d 1144, 1147 (C.D. Cal. 2003) (citations omitted). The work product
24 doctrine does not protect against disclosure if the party seeking the discovery “has
25 substantial need for the materials to prepare its case and cannot, without undue hardship,
26 obtain their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(ii). Plaintiff
27 fails both steps of the test. *First*, he fails to satisfy his burden to invoke the work product
28 doctrine because he cannot show that the disputed materials were prepared in anticipation

1 of litigation (as opposed to political purposes). *Second*, Plaintiff fails to undercut the
2 Select Committee’s substantial need for the documents.

3 **A. Plaintiff Failed To Meet His Burden To Invoke The Work Product**
4 **Doctrine**

5 Plaintiff has failed to meet his burden to establish that these materials were
6 prepared in anticipation of litigation, as opposed to primarily for another purpose.
7 Numerous documents make no reference to any pending litigation and or anticipated
8 litigation for which these materials were prepared.⁶⁷ Indeed, Plaintiff emphasized “[t]he
9 main thing here is that Pence should do this without asking for permission—either from a
10 vote of the joint session *or from the Court*.”⁶⁸ (emphasis added).

11 Even if litigation was of some concern, Plaintiff does not prove that these materials
12 were created “because of” the prospect of litigation—Plaintiff does not and cannot
13 establish that these documents “would not have been created in substantially similar form
14 but for the prospect of . . . litigation.” *Am. C.L. Union of N. California v. United States*
15 *Dep’t of Just.*, 880 F.3d 473, 485-86 (9th Cir. 2018); *United States v. Richey*, 632 F.3d
16 559, 568 (9th Cir. 2011). Congressional Defendants believe that many (if not the vast
17 majority) of the communications at issue involved efforts to interfere with the counting
18 of the electoral votes on January 6 in violation of the Electoral Count Act. *See* 20-24,
19

20 ⁶⁷ *See* 004494; 004496; 004547; 004553; 004707; 004708; 004713; 004720; 004721;
21 004722; 004723; 004744; 004745; 004766; 004767; 004788; 004789; 004790; 004791;
22 004792; 004793; 004794; 004827; 004828; 004833; 004834; 004835; 004839; 004841;
23 004963; 004964; 004976; 004977; 004979; 004990; 004992; 005011; 005012; 005014;
24 005017; 005018; 005023; 005024; 005045; 005046; 005061; 005064; 005066; 005067;
25 005068; 005091; 005094; 005096; 005097; 005101; 005113; 005114; 005130; 005131;
26 005134; 005135; 005154; 005155; 005156; 005157; 005158; 005159; 005160; 005161;
27 005248; 005249; 005251; 005252; 005261; 005268; 005283; 005299; 005300; 005329;
28 005338; 005412; 005423; 005424; 005433; 005484; 005488; 005489; 005490; 005491;
005492; 005498; 005510; 005515; 005519; 005547; 005551; 005578; 005667; 005668;
005672; 005676; 005677; 005678; 005680; 005704; 005874; 005876; 006023; 006024;
006028; 006032; 006035; 006039; 006041; 006591; 006592; 006601.

⁶⁸ *See supra* n.27.

1 *supra*. There is no reason to believe that such communications would not have been
2 “created in substantially similar form” absent the possibility that litigation would
3 somehow ensue. Plaintiff’s repeated and unsupported assertions that the documents were
4 prepared “in anticipation of litigation” do not make it so.

5 Furthermore, it would pervert the purpose of the work-product doctrine to allow
6 Plaintiff to claim protection for his advice aimed at—to put it bluntly—overturning a
7 democratic election. Because the purpose of the work-product doctrine “is to protect the
8 integrity of the adversary process[,] ... it would be improper to allow an attorney to
9 exploit the privilege for ends that are antithetical to that process.” *United States v.*
10 *Christensen*, 828 F.3d 970, 1010 (9th Cir. 2015) (quoting *Parrott v. Wilson*, 707 F.2d
11 1262, 1271 (11th Cir. 1983)); *see also* 38-53, *infra* (discussing the crime-fraud
12 doctrine). Conduct that is “merely unethical, as opposed to illegal” is “enough to vitiate
13 the work product doctrine” here. *Id.* As noted above, *see* n.8 *supra*, Plaintiff is currently
14 the subject of a California State Bar ethics investigation.

15 Second, Plaintiff fails to establish that all the documents over which he asserts
16 work-product protection were “prepared by or for another party or by or for that other
17 party’s representative.” *Richey*, 632 F.3d at 567. In numerous documents, Plaintiff has
18 asserted privileges over communications with like-minded lawyers, pundits, and “scholar
19 advisors” that purportedly contain work product prepared on behalf of President Trump.

20 ⁶⁹ Plaintiff’s overreach here is twofold. First, the paltry descriptions in his privilege
21 claims can scarcely support a claim that his own communications were work product for

22 ⁶⁹ *See* 004494; 004496; 004547; 004707; 004722; 004723; 004744; 004745; 004766;
23 004767; 004788; 004789; 004790; 004791; 004792; 004793; 004794; 004833; 004834;
24 004835; 004839; 004841; 004963; 004964; 004976; 004977; 004979; 004990; 004992;
25 005011; 005012; 005014; 005023; 005024; 005061; 005130; 005131; 005134; 005135;
26 005248; 005249; 005251; 005252; 005261; 005268; 005283; 005299; 005300; 005329;
27 005338; 005423; 005424; 005433; 005484; 005488; 005489; 005490; 005491; 005492;
28 005498; 005510; 005515; 005519; 005547; 005551; 005578; 005668; 005672; 005676;
005677; 005678; 005680; 005874; 005876; 006023; 006024; 006028; 006032; 006035;
006039; 006041; 006591; 006592; 006601.

1 a client, rather than mere discussions about the election with like-minded correspondents.
2 *See, e.g.*, 023956 (describing a communication “re legal perspectives on the election and
3 possible litigation”). Second, Plaintiff’s correspondents themselves are often not
4 lawyers, *e.g.*, 005338; even when they are—and even when they are lawyers working on
5 election-related matters—he has not met his burden to demonstrate that they were
6 generating work product on behalf of President Trump. Indeed, Plaintiff has presented
7 no evidence that he had an agent relationship with any of these people, despite this
8 Court’s order instructing Plaintiff to “file with the Court and the Select Committee
9 evidence of all attorney-client and agent relationships asserted in the privilege log.”
10 Order, ECF No. 104. ¶ 2. In his declaration (Ex. 1 Eastman Decl. ¶ 29), he claims to
11 have communicated extensively with “statistical and other experts,” but makes no
12 attempt to show that these people—or any of the others on his logs—had agent or
13 attorney-client relationships. Plaintiff cannot retrospectively designate communications
14 with ideological or political confreres as deserving work-product protection absent
15 establishing that those people were representatives of his client.

16 Finally, Plaintiff waived any claim to work product protection when he shared
17 these materials with “potential adversaries.” *Sanmina*, 968 F.3d at 1121. *See, e.g.*,
18 004494 (journalists); 005489 (“advisor[s]”); 005283 (“scholar advisors”); 024795
19 (“legislative allies”). Not only is Plaintiff’s disclosure “inconsistent with the
20 maintenance of secrecy,” *id.*, Plaintiff acted with complete disregard of the maintenance
21 of secrecy against someone with interests that were potentially adverse to his or those of
22 his client, especially Congress. *See United States v. Caldwell*, 7 F.4th 191, 207 (4th Cir.
23 2021) (“[W]hen an attorney freely and voluntarily discloses the contents of otherwise
24 protected work product to someone with interests adverse to his or those of the client,
25
26
27
28

1 . . . he may be deemed to have waived work product protection.”) (quoting *In re Doe*, 662
2 F.2d 1073, 1081 (4th Cir. 1981)).⁷⁰

3 For example, in 004494-95 and 004496-538, Plaintiff lists as “W/P” an email
4 exchange with [REDACTED]. Plaintiff cannot claim
5 work product protection over an email with a journalist, who could well have published
6 the exchange.⁷¹ Plaintiff’s

7 voluntary disclosure of his alleged work product to present or potential
8 adversaries, in this instance, constituted a waiver of the work product
9 privilege. It was [Plaintiff’s] self-interested decision to disclose information
10 to [the Vice President, his staff, and state officials] so as to [facilitate
11 reversal of the election result]. Yet, [Plaintiff] now seeks work product
12 protection for those same disclosures and documents against different
13 adversaries in suits revolving around the same matters disclosed[.]

14 *Loustalet v. Refco, Inc.*, 154 F.R.D. 243, 248 (C.D. Cal. 1993). The work-product
15 doctrine does not stretch that far.

16 Further, whether Plaintiff “intended that result or not,” work-product protection
17 should cease here because fairness requires it. *Sanmina*, 968 F.3d at 1122. When
18 assessing the fairness principle underlying waivers, “the overriding concern in the work-
19 product context is not the confidentiality of a communication, but the protection of the

20 ⁷⁰ To the extent the work product doctrine can apply to legislative subpoenas, the term
21 “potential adversaries” should be read broadly. Plaintiff cannot have it both ways: He
22 cannot apply a *litigation* privilege to a *legislative* subpoena but at the same time restrict
23 waiver of that privilege to *litigation* adversaries.

24 ⁷¹ See *Flaherty v. Seroussi*, 209 F.R.D. 300, 307 (N.D.N.Y. 2002) (“dissemination of
25 materials prepared by plaintiff’s counsel to the media is conceptually inconsistent with
26 his claim that those documents provide an indication of his closely guarded trial strategy,
27 and should therefore be shielded from disclosure”); *Anderson v. SeaWorld Parks & Ent.,*
28 *Inc.*, 329 F.R.D. 628, 637 (N.D. Cal. 2019) (“Work product protection does not attach to
an attorney’s work directing a public relations campaign, nor is there any expectation of
confidentiality where [attorney] directed the consultants to share the list with a
journalist.”); *Montesa v. Schwartz*, No. 12CIV6057, 2016 WL 3476431, at *9 (S.D.N.Y.
June 20, 2016) (“Plaintiffs cannot argue that their adversaries in this litigation were not
substantially more likely to obtain this information by virtue of its disclosure to a
journalist, who very well could have published this entire e-mail exchange.”)

adversary process.” *Id.* at 1124. Here, Plaintiff’s selective disclosure of information he now contends is work product weighs heavily against applying the protection.⁷² Plaintiff “cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.” *Weil v. Inv./Indicators, Rsch. & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981).

“[U]nder the totality of the circumstances, [Plaintiff] acted in such a way that is inconsistent with the maintenance of secrecy” against the Select Committee regarding the contested documents. *Sanmina*, 968 F.3d at 1124.

B. The Select Committee Has A Substantial Need For The Documents And Cannot Obtain The Substantial Equivalent Of The Documents Without Undue Hardship

Even had Plaintiff sufficiently invoked the work product doctrine, the Select Committee has a substantial need for the documents and cannot, without undue hardship, obtain their substantial equivalent by other means. *See Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1494 (9th Cir. 1989) (“work-product materials nonetheless may be ordered produced upon an adverse party’s demonstration of substantial need or inability to obtain the equivalent without undue hardship”). “The undue hardship prong examines the burden obtaining the information from an alternate source would impose on the party requesting discovery.” *Fletcher v. Union Pac. R.R. Co.*, 194 F.R.D. 666, 671 (S.D. Cal. 2000).

Here, the Select Committee has already sought the materials from an alternate source: Chapman University. This case involves Plaintiff’s attempt to impede the Select Committee from obtaining the documents from that alternate source. Even if some third source were available for the requested documents, Plaintiff would likely attempt to prevent disclosure in that circumstance as well. Because the disputed documents are pivotal to the Select Committee’s investigation and it would be nearly impossible to access these communications otherwise, the work product doctrine does not apply. *See*

⁷² It also indicates that these documents were created for political or strategic purposes and not “because of” anticipated litigation. *Am. C.L. Union of N. California*, 880 F.3d at 485-86.

1 *U.S. v. McGraw-Hill Companies, Inc.*, 2014 WL 8662657, at *6-7 (C.D. Cal.) (party
2 established entitlement to opinion work product by showing (1) it would be nearly
3 impossible to get these communications otherwise; (2) the work product was pertinent to
4 the party’s “most salient defense”; and (3) the attorney’s mental impressions were a
5 pivotal issue).

6 Plaintiff was a central figure in the effort to encourage the former Vice President
7 to reject the electors from several states and in the strategy to facilitate different slates of
8 electors. He may also have played other important roles in the events under
9 investigation. Plaintiff’s “strategy, mental impressions and opinion” concerning these
10 efforts “are directly at issue” in the Select Committee’s investigation. *Reavis v. Metro.*
11 *Prop. & Liab. Ins. Co.*, 117 F.R.D. 160, 164 (S.D. Cal. 1987). The Select Committee,
12 therefore, has a substantial need for these materials.⁷³

13 Plaintiff claims that Congressional Defendants have “offered no argument or
14 evidence of the Select Committee’s need for any of these particular documents in pursuit
15 of any valid legislative purpose, much less [sic] a need that would qualify as substantial
16 or compelling in support of a legislative purpose.” Br. 16. Congressional Defendants
17 cannot specifically address documents they have not seen, many of which are scantily
18 described in the privilege logs. *See, e.g.*, 004707 (“[c]omm with co-counsel”); 004494
19 (“[c]omm re statistical evidence”); 004708 (“[c]omm with co-counsel re legal advice”);
20 004720 (“comm with co-counsel re legal strategy”); 005874 (“comm re fact
21 information”); 004964 (“[a]ttachment”). But as this Court has noted, Plaintiff’s “actions
22 clearly fall within the bounds of an investigation into ‘the influencing factors that
23 fomented such an attack on American representative democracy,’” ECF No. 43 at 9 (Jan.
24

25 ⁷³ Plaintiff’s privilege log does little to reveal whether the materials he seeks to withhold
26 are ordinary work product or opinion work product. The Select Committee, however,
27 meets either test: It has both a “substantial need” and a “compelling need” for the
28 materials sought. *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th
Cir. 1992) (“opinion work product may be discovered and admitted when mental
impressions are at issue in a case and the need for the material is compelling”).

25, 2022) (quoting H.R. Res. 503 § 3(1)) and “there are numerous plausible legislative measures that could relate to Dr. Eastman’s communications,” *id.* at 10. The pressing need to complete a full investigation into an unprecedented attack on American democracy by reviewing documents involving a key participant is both substantial and compelling.⁷⁴

III. The Court Should Review the Documents *In Camera* Under the Crime Fraud Exception

Communications in which a “client consults an attorney for advice that will serve him in the commission of a fraud or crime” are not privileged from disclosure. *In re Grand Jury Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016) (internal quotations omitted). This exception to the attorney-client privilege applies where (1) “the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme,” and (2) the attorney-client communications for which production is sought are “sufficiently related to” and were made “in furtherance of [the] intended, or present, continuing illegality.” *Id.* at 381-83 (internal quotation marks omitted).

It bears emphasizing that this is true even if “the attorney is unaware that his advice may further an illegal purpose.” *United States v. Laurins*, 857 F.2d 529, 540 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989). And it is likewise true where the crime or

⁷⁴ Congress has consistently taken the view that its investigative committees are not bound by judicial common law privileges such as the attorney-client privilege or the work product doctrine. *See generally*, Congressional Research Service, Congressional Oversight Manual 61-62 (March 21, 2021). This aspect of Congress’s investigative authority is rooted in the separation of powers inherent in the Constitution’s structure. *Id.* Congress and its committees make decisions regarding such common law privileges by balancing the important institutional, constitutional, and individual interests at stake on a case-by-case basis. Here, Congressional Defendants have determined, consistent with their prerogatives, not to submit an argument on this point. This is not, however, intended to indicate, in any way, that Congress or its investigative committees will decline to assert this institutional authority in other proceedings.

1 fraud is ultimately unsuccessful. *In re Grand Jury Proceedings (Corporation)*, 87 F.3d
2 377, 382 (9th Cir. 1996).

3 Critically for this case, an *in camera* review of the documents is warranted when
4 the party seeking production has provided “a factual basis adequate to support a good
5 faith belief by a reasonable person that in camera review of the materials may reveal
6 evidence to establish the claim that the crime-fraud exception applies.” *United States v.*
7 *Zolin*, 491 U.S. 554, 572 (1989) (citation omitted). That standard has plainly been met
8 here. As discussed in the Background section above, evidence and information available
9 to the Committee establishes a good-faith belief that Mr. Trump and others may have
10 engaged in criminal and/or fraudulent acts, and that Plaintiff’s legal assistance was used
11 in furtherance of those activities. Accordingly, this Court should conduct an *in camera*
12 review of the documents to determine whether the crime-fraud exception applies.

13 **A. Obstruction of an Official Proceeding**

14 The evidence detailed above provides, at minimum, a good-faith basis for
15 concluding that President Trump has violated section 18 U.S.C. § 1512(c)(2). The
16 elements of the offense under 1512(c)(2) are: (1) the defendant obstructed, influenced or
17 impeded, *or attempted* to obstruct, influence or impede, (2) an official proceeding of the
18 United States, and (3) that the defendant did so corruptly. *Id.* (emphasis added). To date,
19 six judges from the United States District Court for the District of Columbia have
20 addressed the applicability of section 1512(c) to defendants criminally charged in
21 connection with the January 6th attack on the Capitol. Each has concluded that
22 Congress’s proceeding to count the electoral votes on January 6th was an “official
23 proceeding” for purposes of this section, and each has refused to dismiss charges against
24 defendants under that section.⁷⁵

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26 ⁷⁵ *United States v. DeCarlo*, No. 21-73, (D.D.C.) Minute Entry (Jan. 21, 2022) (rejecting
27 motion to dismiss for “the reasons stated on the record,” after deciding to rule orally
28 “rather than adding a sixth written opinion to those already excellent opinions written by
my colleagues”); *United States v. Nordean*, No. 21-175, (D.D.C.) Mem. Op., at 9-12

1 Section 1512(c) requires a nexus between the obstructive conduct and a “specific
2 official proceeding” that was either “pending or was reasonably foreseeable[.]” *United*
3 *States v. Lonich*, 2022 U.S. App. LEXIS 623*, at *49-*50 (9th Cir. 2022). The statutory
4 definition of “official proceeding” includes proceedings of various kinds, one of which
5 (as noted above) is “a proceeding before the Congress[.]” 18 U.S.C. § 1515(a)(1)(B).
6 Although the Ninth Circuit has not defined “corruptly,” as used in Section 1512(c), it has
7 held that the *mens rea* component of Section 1512(c) is, if anything, more than satisfied
8 simply by proving that a person acted with “consciousness of wrongdoing.” *Lonich*,
9 2022 U.S. App. LEXIS 623*, at *52-*53; *see also United States v. Watters* 717 F.3d 733,
10 735 (9th Cir. 2013) (upholding district court’s jury instructions). Section 1512(c) does
11 not require proof that the accused acted “with an evil or wicked purpose.” *Id.* at 735-36
12 (distinguishing *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005)).

13 Congressional proceedings to count electoral votes are governed by the Twelfth
14 Amendment to the U.S. Constitution and by the Electoral Count Act. The Twelfth
15 Amendment requires presidential electors to meet in their respective States and *certify*
16 their State’s votes for President and Vice President. U.S. Const., amend. XII. The
17 Twelfth Amendment’s text regarding the counting of votes is clear and unequivocal in
18 this context: “The President of the Senate shall, in the presence of the Senate and House
19 of Representatives, open all the certificates and the votes shall then be counted; The
20 person having the greatest Number of votes for President, shall be the President.” *Id.*
21 Although some have theorized that there may be ambiguity about which slate to count if
22 a state submits two slates officially certified by the state’s Governor, no such ambiguity
23 was present on January 6, 2021. Each state submitted only one officially-certified
24

25 (Dec. 28, 2021) (ECF No. 263); *United States v. Montgomery*, No. 21-46 (D.D.C.), Mem.
26 Op. and Order, at 8-21 (Dec. 28, 2021) (ECF No. 87); *United States v. Mostofsky*, No.
27 21-138 (D.D.C.), Mem. Op., at 21-24 (Dec. 21, 2021) (ECF No. 88); *United States v.*
28 *Caldwell*, No. 21-28 (D.D.C.) Mem. Op. and Order, at 8-16 (Dec. 20, 2021) (ECF No.
558); *United States v. Sandlin*, No. 21-88, (D.D.C.) Mem. Op., at 5-9 (Dec. 10, 2021)
(ECF No. 63).)

1 electoral slate. Also, the specific text of the Twelfth Amendment makes clear that the
2 presiding officer cannot delay the count in this context, by instructing that the presiding
3 officer shall “open all the certificates and the votes shall then be counted . . .” It is not
4 permissible to wait 10 days or any other extended period before counting certified
5 electoral votes.

6 The Electoral Count Act of 1887 provides for objections by House and Senate
7 members, and a process to resolve such objections through votes in each separate
8 chamber. 3 U.S.C. §§ 5, 6, 15. Nothing in the Twelfth Amendment or the Electoral
9 Count Act provides a basis for the presiding officer of the Senate to unilaterally refuse to
10 count electoral votes—for any reason. Any such effort by the presiding officer would
11 violate the law. This is exactly what the Vice President’s counsel explained at length to
12 Plaintiff and President Trump before January 6.⁷⁶ Plaintiff acknowledged that the
13 Supreme Court would reject such an effort 9-0.⁷⁷ And the Vice President made this
14 crystal clear in writing on January 6: any attempt by the Vice President to take the course
15 of action the President insisted he take would have been *illegal*.⁷⁸

16 Nevertheless, pursuant to Plaintiff’s plan, the President repeatedly asked the Vice
17 President to exercise unilateral authority illegally, as presiding officer of the Joint
18 Session of Congress, to refuse to count electoral votes. *See supra* at 11-13. In service of
19 this effort, he and Plaintiff met with the Vice President and his staff several times to
20 advocate that he unilaterally reject and refuse to count or prevent the counting of certified
21

22 ⁷⁶*See, e.g.*, Ex. F, Jacob Tr. 82, 96-97, 107-10 (“[Plaintiff] had acknowledged that he
23 would lose 9-0 at the Supreme Court.”); Ex. N, Email Exchange Between John Eastman
24 and Gregory Jacob (“Respectfully, it was gravely, gravely irresponsible for you to entice
25 the President with an academic theory that had no legal viability, and that you well know
we would lose before any judge who heard and decided the case.”).

26 ⁷⁷ Ex. N, Email Exchange Between John Eastman and Gregory Jacob.

27 ⁷⁸ Public Letter from Michael R. Pence to Congress (Jan. 6, 2021),
28 <https://int.nyt.com/data/documenttools/pence-letter-on-vp-and-counting-electoral-votes/9d6f117b6b98d66f/full.pdf>. *See also* Ex. N, Email Exchange Between John Eastman and Gregory Jacob.

1 electoral votes, and both also engaged in a public campaign to pressure the Vice
2 President. *See supra* at 3-17.

3 The President and Plaintiff also took steps to alter the certification of electors from
4 various States. *See supra* at 18. For example, the President called and met with state
5 officials, met numerous times with officials in the Department of Justice, tweeted and
6 spoke about these issues publicly, and engaged in a personal campaign to persuade the
7 public that the election had been tainted by widespread fraud.

8 As indicated, there can be no legitimate question that the Joint Session of Congress
9 held on January 6th pursuant to the Twelfth Amendment and the Electoral Count Act
10 constitutes an “official proceeding” under Section 1512(c).⁷⁹

11 The evidence supports an inference that President Trump and members of his
12 campaign knew he had not won enough legitimate state electoral votes to be declared the
13 winner of the 2020 Presidential election during the January 6 Joint Session of Congress,
14 but the President nevertheless sought to use the Vice President to manipulate the results
15 in his favor. By December 14, 2020, the Electoral College had voted to send 306
16 certified electoral votes for Biden and 232 certified electoral votes for Trump.⁸⁰ No state
17 legislature had certified an alternate slate between that time and January 6, 2021.
18 Moreover, no court had endorsed the Trump campaign’s numerous attempts to challenge
19 state election results in the wake of the election.⁸¹ Thus, even if the Vice President had
20 authority to reject certified electoral certificates (and he did not), there was no valid
21 lawful basis to do so. *See supra* at 3-17.

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23 ⁷⁹ *See supra* at 40 n.75 (citing cases).

24 ⁸⁰ M. Sherman, *Electoral College makes it official: Biden won, Trump lost*, Associated
25 Press (Dec. 14, 2020), <https://apnews.com/article/joe-biden-270-electoral-college-vote-d429ef97af2bf574d16463384dc7cc1e>.

26 ⁸¹ *See supra* at 3-5. In the single case the President won, his campaign challenged a state-
27 ordered deadline extension in Pennsylvania for the submission of personal identification
28 for mailed ballots, affecting a small number of votes. *See Order, Trump v. Boockvar*, No.
602 M.D. 2020 (Pa. Commonwealth Ct. Nov. 12, 2020),
<https://www.pacourts.us/Storage/media/pdfs/20210604/020642-file-10440.pdf>.

1 Nevertheless, as shown above (*see supra* at 11-13), the President and Plaintiff
2 engaged in an extensive public and private campaign to convince the Vice President to
3 reject certain Biden electors or delay the proceedings, without basis, so that the President
4 and his associates would have additional time to manipulate the results. Had this effort
5 succeeded, the electoral count would have been obstructed, impeded, influenced, and (at
6 the very least) delayed, all without any genuine legal justification and based on the false
7 pretense that the election had been stolen. There is no genuine question that the President
8 and Plaintiff *attempted* to accomplish this specific illegal result.

9 The evidence is also more than sufficient to establish a good faith belief that
10 Plaintiff's advice was used to further these ends. Plaintiff was the architect of the
11 strategies proposed to the Vice President both directly and through his staff. His memos
12 provided the basis for arguments made to the Vice President by both the President and
13 Plaintiff himself. Plaintiff was likewise personally involved in persuading state
14 legislators that they had authority to reject the election results and submit alternate slates
15 of electors to Congress.⁸² And he was even involved in the effort to spread false
16 allegations of election fraud to the public.⁸³

17 **B. Conspiracy to Defraud the United States**

18 The Select Committee also has a good-faith basis for concluding that the President
19 and members of his Campaign engaged in a criminal conspiracy to defraud the United
20 States in violation of 18 U.S.C. § 371.

21 An individual “defrauds” the government for purposes of Section 371 if he
22 “interfere[s] with or obstruct[s] one of its lawful governmental functions by deceit, craft
23 or trickery, or at least by means that are dishonest.” *Hammerschmidt v. United States*,
24 265 U.S. 182, 188 (1924). The conspiracy need not aim to deprive the government of
25 property. *See Haas v. Henkel*, 216 U.S. 462, 479 (1910). It need not involve any
26 detrimental reliance by the government. *See Dennis v. United States*, 384 U.S. 855, 861-

27
28 ⁸² *See supra* at 8, 11.

⁸³ *See supra* at 13 n.40.

62 (1966). And “[n]either the conspiracy’s goal nor the means used to achieve it need to be independently illegal.” *United States v. Boone*, 951 F.2d 1526, 1559 (9th Cir.1991).

To establish a violation Section 371’s “defraud” clause, “the government need only show” that (1) the defendant entered into an agreement (2) to obstruct a lawful function of the government (3) by deceitful or dishonest means, and (4) that a member of the conspiracy engaged in at least one overt act in furtherance of the conspiracy. *United States v. Meredith*, 685 F.3d 814, 822 (9th Cir. 2012) (citation omitted). The “agreement” need not be express and can be inferred from the conspirators’ conduct in furtherance of their common objectives. *Ianelli v. United States*, 420 U.S. 770, 777 & n.10 (1975); *see also United States v. Renzi*, 769 F.3d 731 (9th Cir. 2014).

“This is a very broad provision, which subjects a wide range of activity to potential criminal penalties.” *United States v. Caldwell*, 989 F.2d 1056, 1059 (9th Cir. 1993), *partially overruled on unrelated grounds as recognized by United States v. Conti*, 804 F.3d 977, 980 (9th Cir. 2015).

The evidence supports an inference that President Trump, Plaintiff, and several others entered into an agreement to defraud the United States by interfering with the election certification process, disseminating false information about election fraud, and pressuring state officials to alter state election results and federal officials to assist in that effort. As noted above, in particular, the President and Plaintiff worked jointly to attempt to persuade the Vice President to use his position on January 6, 2021, to reject certified electoral slates submitted by certain States and/or to delay the proceedings by sending the count back to the States. *See supra* at 11-13. Plaintiff first crafted a “plan” to justify this course of action.⁸⁴ Plaintiff and the President then met and spoke with the Vice President

⁸⁴ *READ Trump lawyer’s memo on six-step plan for Pence to overturn the election*, CNN (Sept. 21, 2021), <https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html>; Jan. 3 Memo on Jan. 6 Scenario, CNN, <http://cdn.cnn.com/cnn/2021/images/09/21/privileged.and.confidential.--jan.3.memo.on.jan.6.scenario.pdf> (provided by John Eastman to CNN per CNN reporting, *see* Tweet by @jeremyherb, Sept. 21, 2021 at 5:46PM, <https://twitter.com/jeremyherb/status/1440432387263922185>).

1 and members of his staff on several occasions on January 4-6 in an attempt to execute
2 Plaintiff's plan.⁸⁵ Plaintiff continued these efforts to persuade the Vice President via
3 ongoing conversations with the Vice President's staff, and the President employed
4 numerous public statements to exert additional pressure on Pence.⁸⁶ The evidence
5 developed to date indicates that these actions were all part of a concerted effort to
6 achieve a common goal: to prevent or delay the certification of the 2020 presidential
7 election results.

8 In addition to the legal effort to delay the certification, there is also evidence that
9 the conspiracy extended to the rioters engaged in acts of violence at the Capitol. In a
10 civil case filed against the President and others by several members of Congress, Judge
11 Amit Mehta in the District of Columbia specifically found that it was plausible to believe
12 that the President entered into a conspiracy with the rioters on January 6, 2021, "to
13 disrupt the Certification of the Electoral College vote through force, intimidation, or
14 threats." *Thompson v. Trump*, No. 21-cv-00400 (APM), --- F.3d ---, 2022 WL 503384, at
15 *33. (D.D.C. Feb. 18, 2022). Judge Mehta's opinion demonstrates the breadth of
16 conspiratorial conduct and further supports the existence of common law fraud.

17 As part of the effort described above, the conspirators also obstructed a lawful
18 governmental function by pressuring the Vice President to violate his duty to count the
19 electoral certificates presented from certain States. As an alternative, they urged the Vice
20 President to delay the count to allow state legislatures to convene and select alternate
21 electors. The apparent objective of these efforts was to overturn the results of the 2020
22 presidential election and declare Donald Trump the winner. In this way, the conspiracy
23 aimed to obstruct and interfere with the proper functioning of the United States
24 government.

25 As summarized *supra* at 11-13, the President and Plaintiff engaged in an extensive
26 campaign to persuade the public, state officials, members of Congress, and Vice

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28 ⁸⁵ See *supra* at 11.

⁸⁶ See *supra* at 11-13.

1 President Pence that the 2020 election had been unlawfully “stolen” by Joseph Biden.
2 The President continued this effort despite repeated assurances from countless sources
3 that there was no evidence of widespread election fraud. *See supra* at 6. On November
4 12, 2020, CISA issued a joint statement of election security agencies stating: “There is no
5 evidence that any voting system deleted or lost votes, changed votes, or was in any way
6 compromised.”⁸⁷ At around the same time, researchers working for the President’s
7 campaign concluded that several the claims of fraud relating to Dominion voting
8 machines were false.⁸⁸

9 In December, Attorney General Barr publicly announced that there was no
10 widespread election fraud.⁸⁹ By January 6, more than 60 court cases had rejected legal
11 claims alleging election fraud.⁹⁰ The New York court that suspended Giuliani’s law
12 license said that certain of his allegations lacked a “scintilla of evidence.”⁹¹ On multiple
13 occasions, acting Attorney General Rosen and acting Deputy Attorney General
14 Donoghue told the President personally that the Department of Justice and Federal

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16 ⁸⁷ Department of Homeland Security Cybersecurity and Infrastructure Security Agency,
17 *Joint Statement from Elections Infrastructure Government Coordinating Council & The*
18 *Election Infrastructure Sector Coordinating Executive Committees* (November 12, 2020),
19 [https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-](https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election)
20 [government-coordinating-council-election](https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election); *see also* Christopher Krebs, *Opinion: Trump*
21 *fired me for saying this, but I’ll say it again: The election wasn’t rigged*, WASHINGTON
22 POST (Dec. 1, 2020), [https://www.washingtonpost.com/opinions/christopher-krebs-](https://www.washingtonpost.com/opinions/christopher-krebs-trump-election-wasnt-hacked/2020/12/01/88da94a0-340f-11eb-8d38-6aealadb3839_story.html)
23 [trump-election-wasnt-hacked/2020/12/01/88da94a0-340f-11eb-8d38-](https://www.washingtonpost.com/opinions/christopher-krebs-trump-election-wasnt-hacked/2020/12/01/88da94a0-340f-11eb-8d38-6aealadb3839_story.html)
24 [6aealadb3839_story.html](https://www.washingtonpost.com/opinions/christopher-krebs-trump-election-wasnt-hacked/2020/12/01/88da94a0-340f-11eb-8d38-6aealadb3839_story.html).

25 ⁸⁸ *Read the Trump campaign’s internal memo*, N.Y. Times (Sept. 21, 2021),
26 <https://www.nytimes.com/interactive/2021/09/21/us/trump-campaign-memo.html>.

27 ⁸⁹ Michael Balsamo, *Disputing Trump, Barr says no widespread election fraud*,
28 ASSOCIATED PRESS (December 1, 2020); AG Barr says he won’t appoint a special
counsel to investigate voter fraud, YAHOO NEWS (December 21, 2020).

⁹⁰ William Cummings, Joey Garrison and Jim Sergeant, *By the numbers: President*
Donald Trump’s failed efforts to overturn the election, USA Today (Jan. 6, 2021),
[https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-](https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/)
[efforts-overturn-election-numbers/4130307001/](https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/).

⁹¹ *In re Rudolph W. Giuliani*, 2021 Slip Op. 04086 (N.Y. 1st Dept. June 24, 2021); *see*
also In re Rudolph W. Giuliani, Order, App. D.C., No. 21-BG-423 (July 7, 2021).

1 Bureau of Investigations had found no evidence to substantiate claims being raised by the
2 President.⁹² Georgia Secretary of State Brad Raffensperger likewise rebutted many of the
3 President's allegations of fraud in Georgia.⁹³ Despite these refutations and the absence of
4 any evidence to support the allegations he was making, the President and his associates
5 continued to publicly advance the narrative that the election had been tainted by
6 widespread fraud.⁹⁴

7 As noted above, the President called and met with state officials regarding the
8 election results, met numerous times with officials in the Department of Justice, tweeted
9 and spoke about these issues publicly, and engaged in a personal campaign to persuade
10 the Vice President to alter the certification results. *See supra* at 11-13. For his part,
11 Plaintiff drafted legal memoranda outlining several possible ways to ensure that Donald
12 Trump would be named the winner of the 2020 election, met with the Vice President and
13 his staff to press this plan, and spoke publicly on these issues in advance of the attack on
14 the Capitol. *See supra* at 12.

15 A review of the documents at issue is likely to reveal that the President engaged
16 Plaintiff's counsel in furtherance of these conspiratorial ends.

17
18 ⁹² Senate Judiciary Committee Staff Report, Subverting Justice, How the Former
19 President and His Allies Pressured DOJ to Overturn the 2020 Election, at 5, 14-16, 19,
20 27-28,
21 [https://www.judiciary.senate.gov/imo/media/doc/Interim%20Staff%20Report%20FINAL](https://www.judiciary.senate.gov/imo/media/doc/Interim%20Staff%20Report%20FINAL.pdf)
22 [.pdf](https://www.judiciary.senate.gov/imo/media/doc/Interim%20Staff%20Report%20FINAL.pdf); *see also* Interview of Richard Donoghue (Aug. 6, 2021), United States Senate
23 Committee on the Judiciary, at 59, 156, [https://www.judiciary.senate.gov/richard-](https://www.judiciary.senate.gov/richard-donoghue-transcript)
24 [donoghue-transcript](https://www.judiciary.senate.gov/richard-donoghue-transcript); Interview of Jeffrey Rosen (Aug. 7, 2021), United States Senate
25 Committee on the Judiciary, at 30, [https://www.judiciary.senate.gov/rosen-transcript-](https://www.judiciary.senate.gov/rosen-transcript-final)
26 [final](https://www.judiciary.senate.gov/rosen-transcript-final);

27 ⁹³ Amy Gardner & Paulina Firozi, *Here's the full transcript and audio of the call between*
28 *Trump and Raffensperger*, Washington Post (Jan. 5, 2021),
29 [https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-](https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html)
30 [vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html).

31 ⁹⁴ *See, e.g., Donald Trump Rally Speech Transcript Dalton, Georgia: Senate Runoff*
32 *Election*, The Rev (Jan. 4, 2021), [https://www.rev.com/blog/transcripts/donald-trump-rally-](https://www.rev.com/blog/transcripts/donald-trump-rally-speech-transcript-dalton-georgia-senate-runoff-election)
33 [speech-transcript-dalton-georgia-senate-runoff-election](https://www.rev.com/blog/transcripts/donald-trump-rally-speech-transcript-dalton-georgia-senate-runoff-election) (reiterating numerous allegations of
34 election fraud before crowd in Dalton, Georgia on January 4th).

C. Common Law Fraud

There is also evidence to support a good-faith, reasonable belief that *in camera* review of the materials may reveal that the President and members of his Campaign engaged in common law fraud in connection with their efforts to overturn the 2020 election results.

The District of Columbia, where these events occurred, defines common law fraud as: (1) a false representation; (2) in reference to material fact; (3) made with knowledge of its falsity; (4) with the intent to deceive; and (5) action is taken in reliance upon the representation. *Atraqchi v. GUMC Unified Billing Servs.*, 788 A.2d 559, 560 (D.C. 2002).⁹⁵

As described above, the evidence shows that the President made numerous false statements regarding election fraud, both personally and through his associates, to the public at-large and to various state and federal officials. *See supra* at 6-7. These statements referred to material facts regarding the validity of state and federal election results. *See supra* at 7-8. And the evidence supports a good-faith inference that the President did so with knowledge of the falsity of these statements and an intent to deceive his listeners in hopes they would take steps in reliance thereon.

In addition to the numerous refutations of fraud mentioned above, *see supra* at 7-8, a specific example helps illustrate the point: On December 3, 2020, Trump’s YouTube channel posted an edited video clip, purporting to show Georgia officials pulling suitcases of ballots from under a table after poll workers had left for the day.⁹⁶ The next morning, a Georgia official responded to the allegation on Twitter, indicating that the video “was watched in its entirety (hours) by @GaSecofState investigators” and

⁹⁵ The definition of fraudulent deceit under California law largely tracks these elements. *See Small v. Fritz Cos., Inc.*, 65 P.3d 1255, 1258 (Cal. 2003) (requiring 1) a misrepresentation; 2) knowledge of falsity (or scienter); 3) intent to defraud, *i.e.*, to induce reliance; 4) justifiable reliance; and 5) resulting damage).

⁹⁶ Donald J. Trump, *Video from GA shows suitcases filled with ballots pulled from under a table AFTER poll workers left*, YOUTUBE, https://www.youtube.com/watch?v=nVP_60Hm4P8.

1 “[s]how[ed] normal ballot processing.”⁹⁷ That same day, a local news outlet ran a fact-
2 checking segment debunking the President’s claims.⁹⁸ After the broadcast, the Georgia
3 official tweeted: “You can watch the @wsbtv report to show that the President’s team is
4 intentionally misleading the public about what happened at State Farm Arena on election
5 night. They had the whole video too and ignored the truth.”⁹⁹

6 The next day, the Georgia Secretary of State’s office released the full video to
7 local news outlets, which thoroughly debunked the President’s claims.¹⁰⁰ On December
8 6, 2020, the Chief Investigator in the Georgia Secretary of State’s Office issued a sworn
9 declaration affirming that “there were no mystery ballots that were brought in from an
10 unknown location and hidden under tables as has been reported by some” and explaining
11 the context of the video clip.¹⁰¹ The following day, Georgia election officials addressed
12 the issue yet again in a public press conference, stating that “what you saw, the secret
13 suitcases with magic ballots, were actually ballots that had been packed into those
14 absentee ballot carriers by the workers in plain view of the monitors and the press.”¹⁰²

15 Nevertheless, on December 11, 2020, and December 23, 2020, the Trump
16 campaign ran two advertisements on Facebook with the same selectively edited footage

17
18 ⁹⁷ Gabriel Sterling, Twitter (6:41 A.M., Dec. 4, 2020),
<https://twitter.com/gabrielsterling/status/1334825233610633217>.

19 ⁹⁸ Stephen Fowler, *Fact Checking Rudy Giuliani’s Grandiose Georgia Election Fraud*
20 *Claim*, GPB (Dec. 4, 2020), <https://www.gpb.org/news/2020/12/04/fact-checking-rudy-giulianis-grandiose-georgia-election-fraud-claim>.

21 ⁹⁹ Gabriel Sterling, Twitter (2:58 P.M., Dec. 4, 2020),
22 <https://twitter.com/gabrielsterling/status/1334950232526884873>.

23 ¹⁰⁰ Georgia election officials shows frame-by-frame of State Farm Arenda Election Night
24 video,” WSB-TV (Dec. 5, 2020), available at: https://www.youtube.com/watch?v=h-9jFuieH_U.

25 ¹⁰¹ *Coreco Ja’Qan Pearson, et al. v. Brian Kemp, et al.*, 1:20-cv-4809 (N.D. Ga.) (Docket
26 No. 72-1), available at: <https://www.documentcloud.org/documents/20420664-frances-watson-affidavit>.

27 ¹⁰² Transcript, Press Conference: Georgia Election Officials Briefing Transcript
28 December 7: Will Recertify Election Results Today (Dec. 7, 2020), available at:
<https://www.rev.com/blog/transcripts/georgia-election-officials-briefing-transcript-december-7-will-recertify-election-results-today>.

1 and the same claim that the video showed “suitcases of ballots added in secret in
2 Georgia.”¹⁰³ On December 27 and 31, 2020, Acting Deputy Attorney General Donoghue
3 again debunked this claim directly to the President.¹⁰⁴

4 Undeterred, the Trump campaign continued to run the ads on Facebook. And the
5 President continued to rely on this allegation in his efforts to overturn the results of the
6 election. During a January 2, 2021, telephone conversation with Georgia Secretary of
7 State Brad Raffensperger, the President suggested that suitcases of illicit ballots
8 explained a “minimum” of 18,000 votes for President Biden, ultimately asking
9 Raffensperger to “find 11,780 votes” for him in Georgia.¹⁰⁵ During this call,
10 Raffensperger explained to the President that the video in question had been selectively
11 edited, and that Raffensperger’s office had reviewed the full tape and found no evidence
12 of fraud.¹⁰⁶ Raffensperger also offered to provide the President a link to the full video, to
13 which the President responded: “I don’t care about the link. I don’t need it.”¹⁰⁷ The
14 following day, the President tweeted: “I spoke to Secretary of State Brad Raffensperger
15 yesterday about Fulton County and voter fraud in Georgia. He was unwilling, or unable,
16 to answer questions such as the ‘ballots under table’ scam, ballot destruction, out of state
17
18
19

20 ¹⁰³ Donald J. Trump, *The evidence is overwhelming – FRAUD!*, FACEBOOK,
21 <https://www.facebook.com/DonaldTrump/videos/1803802073100806/>; Donald J. Trump,
22 *Stop the Steal*, FACEBOOK,
<https://www.facebook.com/officialteamtrump/videos/711114792881749/>.

23 ¹⁰⁴ [Cite Donoghue TI at 43] (informing President Trump that the “allegations about
24 ballots being smuggled in a suitcase and run through the machines several times, it was
25 not true, that we had looked at it, we looked at the video, we interviewed the witnesses,
26 and it was not true”).

27 ¹⁰⁵ Amy Gardner & Paulina Firozi, *Here’s the full transcript and audio of the call
28 between Trump and Raffensperger*, Washington Post (Jan. 5, 2021),
https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

1 ‘voters’, dead voters, and more. He has no clue!”¹⁰⁸ On January 6th, Trump once again
2 reiterated the claim that Georgia “election officials [had] pull[ed] boxes . . . and suitcases
3 of ballots out from under a table” in his speech just before rioters attacked the Capitol.¹⁰⁹

4 The evidence also shows that many members of the public acted in reliance on the
5 President’s statements. *See infra* at 52-53. Several defendants in pending criminal cases
6 identified the President’s allegations about the “stolen election” as a motivation for their
7 activities at the Capitol. And a number specifically cited the President’s tweets asking
8 his supporters to come to Washington, D.C. on January 6. For example, one defendant
9 who later pled guilty to threatening Nancy Pelosi texted a family member on January 6 to
10 say: “[Trump] wants heads and I’m going to deliver.”¹¹⁰ Another defendant released a
11 statement through his attorney, stating: “I was in Washington, D.C. on January 6, 2021,
12 because I believed I was following the instructions of former President Trump and he
13 was my president and the commander-in-chief. His statements also had me believing the
14

15 ¹⁰⁸ Jason Braverman, *Trump asks Georgia election officials to ‘find’ votes during call*
16 *with Sec. of State*, 11Alive,
17 [https://www.11alive.com/article/news/politics/elections/trump-tweets-about-fulton-](https://www.11alive.com/article/news/politics/elections/trump-tweets-about-fulton-county-brad-raffensperger-brian-kemp/85-a503efec-df8a-42ee-a92f-70271eac840f)
18 [county-brad-raffensperger-brian-kemp/85-a503efec-df8a-42ee-a92f-70271eac840f](https://www.11alive.com/article/news/politics/elections/trump-tweets-about-fulton-county-brad-raffensperger-brian-kemp/85-a503efec-df8a-42ee-a92f-70271eac840f)
(original tweet link broken
19 <https://twitter.com/realDonaldTrump/status/1345731043861659650>).

20 ¹⁰⁹ Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR
21 (Feb. 10, 2021) (“Then election officials pull boxes, Democrats, and suitcases of ballots
22 out from under a table. You all saw it on television, totally fraudulent. And illegally
23 scanned them for nearly two hours, totally unsupervised. Tens of thousands of votes. This
24 act coincided with a mysterious vote dump of up to 100,000 votes for Joe Biden, almost
25 none for Trump. Oh, that sounds fair. That was at 1:34 a.m.”),
26 [https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-](https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial)
27 [impeachment-trial](https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial).

28 ¹¹⁰ Jordan Fischer et al., *Georgia man who wanted to ‘remove some craniums’ on*
January 6 sentenced to more than 2 years in prison, WUSA9 (Dec. 14, 2021),
[https://www.wusa9.com/article/news/national/capitol-riots/georgia-man-cleveland-](https://www.wusa9.com/article/news/national/capitol-riots/georgia-man-cleveland-meredith-jr-who-wanted-to-remove-some-craniums-on-january-6-sentenced-to-more-than-2-years-in-prison-trump-noggin-pelosi-bowser/65-e3e4de7e-cf5e-4c62-af1f-53fb214576f0)
[meredith-jr-who-wanted-to-remove-some-craniums-on-january-6-sentenced-to-more-](https://www.wusa9.com/article/news/national/capitol-riots/georgia-man-cleveland-meredith-jr-who-wanted-to-remove-some-craniums-on-january-6-sentenced-to-more-than-2-years-in-prison-trump-noggin-pelosi-bowser/65-e3e4de7e-cf5e-4c62-af1f-53fb214576f0)
[than-2-years-in-prison-trump-noggin-pelosi-bowser/65-e3e4de7e-cf5e-4c62-af1f-](https://www.wusa9.com/article/news/national/capitol-riots/georgia-man-cleveland-meredith-jr-who-wanted-to-remove-some-craniums-on-january-6-sentenced-to-more-than-2-years-in-prison-trump-noggin-pelosi-bowser/65-e3e4de7e-cf5e-4c62-af1f-53fb214576f0)
[53fb214576f0](https://www.wusa9.com/article/news/national/capitol-riots/georgia-man-cleveland-meredith-jr-who-wanted-to-remove-some-craniums-on-january-6-sentenced-to-more-than-2-years-in-prison-trump-noggin-pelosi-bowser/65-e3e4de7e-cf5e-4c62-af1f-53fb214576f0).

1 election was stolen from him.”¹¹¹ There are many other examples of this kind.¹¹² Indeed,
2 even today, polling suggests that “[m]ore than 40% of Americans still do not believe that
3 Joe Biden legitimately won the 2020 presidential election despite no evidence of
4 widespread voter fraud.”¹¹³

5 As explained at length above, it appears that President Trump’s false statements to
6 his supporters and government officials were informed by Dr. Eastman’s extensive
7 advice that the election was stolen and that Congress or the Vice President could change
8 the outcome of the election on January 6.¹¹⁴

14 ¹¹¹ Dan Mangan, *Capitol rioter Garret Miller says he was following Trump’s orders,*
15 *apologizes to AOC for threat*, CNBC (Jan. 25, 2021).

16 ¹¹² See, e.g., *United States v. Sandlin*,
17 <https://www.justice.gov/opa/page/file/1362396/download> (“I’m going to be there to show
18 support for our president and to do my part to stop the steal and stand behind Trump
19 when he decides to cross the rubicon.”); *United States v. Neeffe et al.*,
20 <https://www.justice.gov/usao-dc/case-multi-defendant/file/1432686/download> (“Trump is
21 literally calling people to DC in a show of force. Militias will be there and if there’s
22 enough people they may fucking storm the buildings and take out the trash right there.”);
23 *United States v. Caldwell et al.*, [https://www.justice.gov/usao-dc/case-multi-](https://www.justice.gov/usao-dc/case-multi-defendant/file/1369071/download)
24 [defendant/file/1369071/download](https://www.justice.gov/usao-dc/case-multi-defendant/file/1369071/download) (“Trump said It’s gonna be wild!!!!!! It’s gonna be
25 wild!!!!!! He wants us to make it WILD that's what he's saying. He called us all to the
26 Capitol and wants us to make it wild!! ! Sir Yes Sir!!! Gentlemen we are heading to DC
27 pack your shit!!”).

28 ¹¹³ Maya Yang, *More than 40% in US do not believe Biden legitimately won election – poll*, GUARDIAN (Jan. 5, 2022), [https://www.theguardian.com/us-](https://www.theguardian.com/us-news/2022/jan/05/america-biden-election-2020-poll-victory)
news/2022/jan/05/america-biden-election-2020-poll-victory.

¹¹⁴ This does not represent the entirety of the evidence obtained by the Select Committee with respect to these issues. In addition, the Select Committee is receiving new evidence on a regular basis as part of its ongoing investigation. The Select Committee can make additional evidence available to the Court as requested.

1 **IV. The Select Committee Has Not Waived Its Arguments That Plaintiff Is Not**
2 **Entitled To Attorney-client Or Work-Product Protections Over The**
3 **Documents At Issue**

4 Plaintiff contends that the Select Committee has “waived” its right to object to
5 privilege based on Plaintiff’s public statements, the “particulars” of the Chapman
6 University email system, or “any other ‘generalized’ waiver argument.” Br. at 22. That
7 contention is obviously wrong.

8 Plaintiff reasons that the Select Committee “necessarily conceded the possibility
9 that at least some privileged content exists in the Chapman materials” because it
10 “conced[ed] that a privilege log is appropriate.” Br. at 22. The Select Committee made
11 no such concessions. As reflected in the statement quoted in Plaintiff’s brief, counsel for
12 the Select Committee stated at the hearing, “if this [a privilege review] is considered
13 something that is important to do now, we would certainly entertain it.” *Id.* That is, *if*
14 this Court believed that an initial privilege review and log were appropriate, the Select
15 Committee would not object to such a process. In no way did counsel’s statement
16 concede that any of the documents at issue may ultimately be withheld because of
17 privilege.

18 Indeed, as Plaintiff recognizes, Br. at 22, the Select Committee argued in its brief
19 in opposition to a temporary restraining order that Plaintiff could not claim attorney-
20 client privilege or work product protection over any of the documents at issue (*see* ECF
21 No. 23-1 at 17-23), and the Select Committee never abandoned that argument. To the
22 contrary, in each of the notices the Select Committee has filed with its privilege log
23 objections, it has explicitly “preserve[d] its ability to argue in subsequent briefing on
24 Plaintiff’s privilege claims that, as a general matter, none of the documents contained in
25 the Chapman University production set can be withheld on the basis of attorney-client or
26 work product privilege.” *See, e.g.*, ECF No. 71 at 2. Plaintiff cites no case law
27 supporting his view of waiver, and the Select Committee is aware of none.
28

V. This Court Should Not Revisit Its Ruling Rejecting Plaintiff's First and Fourth Amendment Claims

Plaintiff asks this Court to “revisit” its holding denying a preliminary injunction based on Plaintiff’s First and Fourth Amendment claims. Br. at 31-37. That request is procedurally improper. This Court directed Plaintiff to “file briefing ... supporting his assertions of privilege for each document between January 4 and January 7, 2021.” ECF No. 104. Inserting into such briefing a request for reconsideration of the Court’s ruling on Plaintiff’s First and Fourth Amendment claims—which are not relevant to the privilege claims—is entirely inappropriate.

Local Rule 7-18 describes the proper procedure for seeking the Court’s reconsideration of a previous ruling, and the grounds on which such a request may be made. Barring a showing of good cause, the rule requires that a motion be made no later than 14 days after the Order at issue was entered. In this case, the relevant Order was entered on January 25, almost one month before Plaintiff filed this brief. *See* ECF No. 43. Thus, Plaintiff both failed to submit his request in the proper format of a motion for reconsideration and failed to file it in a timely manner.

Moreover, under Local Rule 7-18, a motion for reconsideration may only be made on the following grounds:

(a) a material difference in fact or law from that presented to the Court that, in the exercise of reasonable diligence, could not have been known to the party moving for reconsideration at the time the Order was entered, or (b) the emergence of new material facts or a change of law occurring after the Order was entered, or (c) a manifest showing of a failure to consider material facts presented to the Court before the Order was entered.

Consistent with this rule, “the Federal Rules of Civil Procedure provide that a motion for reconsideration ‘should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.’” *Zhur v. Neufeld*, No. 17-9203, 2018 WL 4191325, *1 (C.D. Cal. Aug. 29, 2018) (citing Fed. R. Civ. P. 59(e));

1 *see also Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th
2 Cir. 1993).

3 Contrary to Plaintiff's assertion that his First and Fourth Amendment claims were
4 not fully briefed (Br. at 31), the claims were first raised in Plaintiff's Complaint, the
5 Select Committee responded to these claims in their opposition, ECF No. 23-1 at 24-25,
6 and Plaintiff addressed the First and Fourth Amendments claims in his reply, ECF No. 27
7 at 23). Following briefing and oral argument, this Court denied Plaintiff's request for a
8 temporary restraining order or preliminary injunction, specifically rejecting his First and
9 Fourth Amendment claims. *See* ECF No. 43 at 12-14. For the reasons stated in the
10 Select Committee's opposition and this Court's Order, that ruling was correct.

11 Instead of relying on new evidence or intervening case law, Plaintiff simply
12 reargues the merits, relying on precedents addressed in both the Select Committee's
13 opposition and the Court's Order. With respect to the First Amendment claim, Plaintiff
14 discusses "at some length" the Supreme Court's decision in *Watkins v. United States*, 354
15 U.S. 178 (1957), a decision that this Court correctly applied in its Order. *See* Br. at 32;
16 ECF No. 43, at 12. Similarly, in reraising his Fourth Amendment claim, Plaintiff
17 unpersuasively attempts to distinguish two "historic" Supreme Court decisions (cited in
18 his Complaint), on which this Court correctly relied in denying a preliminary injunction.
19 *See* Compl. ¶¶ 95, 98; ECF No. 43, at 13; Br. at 36 (citing *Oklahoma Press Pub. Co. v.*
20 *Walling*, 327 U.S. 186, 209 (1946); *McPhaul v. United States*, 364 U.S. 372, 382 (1960)).
21 Plaintiff offers no explanation as to how his argument raises "a material difference in fact
22 or law from that presented to the Court" previously or "the emergence of new material
23 facts or a change of law." Local Rule 7-18. It does not.

24 In addition, Plaintiff has not shown that this Court committed clear error. The
25 Court appropriately analyzed the interests at stake in rejecting Plaintiff's First
26 Amendment claim. To determine whether the First Amendment bars the Select
27 Committee's access to information it seeks through a duly-authorized subpoena depends
28 on a balancing of "the competing private and public interests at stake in the particular

1 circumstances shown.” *Barenblatt v. United States*, 360 U.S. 109, 126 (1959). The
2 Court considered the competing interests at stake and found that “[t]he public interest
3 here is weighty and urgent,” ECF No. 43, at 12, and that Plaintiff identified no “specific
4 associational interest threatened by” or “any particular harm likely to result from”
5 production of the materials sought by the Select Committee. *Id.* at 12-13.

6 Plaintiff’s brief fails to address the substantial public interest in the Select
7 Committee’s investigation, instead arguing that “the Select Committee’s resolution poses
8 the same First Amendment risks of unrestrained congressional power that the Supreme
9 Court identified in *Watkins*.” Br. at 34. But, again, Plaintiff has not identified any
10 specific associational interest threatened by production of his Chapman communications
11 or any particular harm likely to result from their production. *See* ECF No. 43, at 12-13.
12 His vague reference to communications that “reveal much” about third-parties’
13 “identities, associational choices, political beliefs and other protected First Amendment
14 interests”—and the notion that “having disfavored views on the 2020 election” can be
15 “personally damaging”—is insufficient. Br. at 35-36. The Court’s rejection of Plaintiff’s
16 First Amendment claim was thus unquestionably correct, and Plaintiff provides no
17 persuasive reason for the Court to reconsider it now.

18 The Court also appropriately rejected Plaintiff’s Fourth Amendment claim, finding
19 that the subpoena is not “overbroad or indefinite given its context.” ECF No. 43, at 14.
20 A subpoena is not impermissibly overbroad so as to violate the Fourth Amendment as
21 long as its call for documents or testimony are within the scope of the Congressional
22 inquiry at issue. *See McPhaul*, 364 U.S. at 382. The requests at issue are well within the
23 scope of the Select Committee’s inquiry. *See* ECF No. 23-1 at 25. And Plaintiff’s
24 belated attempt to distinguish *McPhaul* and *Oklahoma Press* is unavailing. Relying on
25 recent Supreme Court decisions in distinct Fourth Amendment contexts, the most
26 Plaintiff can say is that “if *McPhaul* and *Oklahoma Press* were to be decided today they
27 would be likely to come out quite differently.” Br. 36-37. Even if that doubtful
28

1 proposition were correct, Plaintiff does not (and cannot) argue that this Court is free to
2 disregard those Supreme Court rulings.

3 **CONCLUSION**

4 For the reasons set forth above, Plaintiff's claims of privilege should be rejected,
5 leaving Chapman University free to comply with the House subpoena at issue here as it
6 has stated it wishes to do.

7
8 Respectfully submitted,

9 /s/ Douglas N. Letter

10 DOUGLAS N. LETTER

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Dated: March 2, 2022

CERTIFICATE OF SERVICE

WASHINGTON, DISTRICT OF COLUMBIA

I am employed in the aforesaid county, District of Columbia; I am over the age of 18 years and not a party to the within action; my business address is:

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
5140 O'Neill House Office Building
Washington, D.C. 20515

On March 2, 2022, I served the **CONGRESSIONAL DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S PRIVILEGE ASSERTIONS** on the interested parties in this action:

Anthony T. Caso
Constitutional Counsel Group
174 W Lincoln Ave #620
Anaheim, CA 92805-2901
atcaso@ccg1776.com

Charles Burnham
Burnham & Gorokhov PLLC
1424 K Street NW, Suite 500
Washington, DC 20005
charles@burnhamgorokhov.com

Attorneys for Plaintiff John C. Eastman

☒ **(BY E-MAIL OR ELECTRONIC TRANSMISSION)**

The document was served on the following via The United States District Court – Central District's CM/ECF electronic transfer system which generates a Notice of Electronic Filing upon the parties, the assigned judge, and any registered user in the case:

☒ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on March 2, 2022 here, at Bethesda, Maryland.

/s/ Douglas N. Letter

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OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
5140 O'Neill House Office Building
Washington, D.C. 20515

SHER TREMONTE LLP
90 Broad Street, 23rd Floor
New York, New York 10004

ARNOLD & PORTER
601 Massachusetts Ave, NW
Washington, D.C. 20001

Counsel for the Congressional Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JOHN C. EASTMAN

Plaintiff,

vs.

BENNIE G. THOMPSON, *et al.*,

Defendants.

Case No. 8:22-cv-00099-DOC-DFM

**DECLARATION OF DOUGLAS N.
LETTER IN SUPPORT OF
CONGRESSIONAL DEFENDANTS'
OPPOSITION TO PLAINTIFF'S
PRIVILEGE ASSERTIONS**

Date: March 8, 2022

Time: 9:00 a.m.

Location: Courtroom 9D

1 I, Douglas N. Letter, declare as follows:

2 1. I am the General Counsel, of the U.S. House of Representatives and counsel
3 for the Congressional Defendants in this action.

4 2. I make this declaration in support of the Congressional Defendants'
5 Opposition to Plaintiff's Privilege Assertions.

6 3. Attached hereto as Exhibit 1 are true and accurate copies of email messages
7 between myself and Plaintiff's counsel, Charles Burnham, that occurred on Monday,
8 January 31, 2022 at 4:06p EST, Thursday, February 3, 2022 at 7:13p EST, and Tuesday,
9 February 8, 2022 at 3:05p EST.

10 I declare under penalty of perjury that the foregoing is true and correct, to the best
11 of my knowledge.

12
13 Executed on March 2, 2022, in Bethesda, Maryland.

14
15 /s/ Douglas N. Letter
16 Douglas N. Letter
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9 601 Massachusetts Ave, NW
10 Washington, D.C. 20001

11 Counsel for the Congressional Defendants

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **SOUTHERN DIVISION**

15 JOHN C. EASTMAN

16 Plaintiff,

17 vs.

18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.

Case No. 8:22-cv-00099-DOC-DFM

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25 **Exhibit 1**
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From: Letter, Douglas
Sent: Monday, January 31, 2022 4:06 PM
To: Charles Burnham
Cc: Tatelman, Todd; Fahsel, Stacie; Columbus, Eric
Subject: RE: US v. Eastman

Charles:

The Select Committee will agree to exclusion of mass mailing type emails from your review, but only after the Select Committee has an opportunity to review and approve the list of sender email addresses that you propose excluding.

In response to your request to exclude documents that “on their face” are not responsive to the Select Committee’s subpoena, we do not read Judge Carter’s orders as giving your client the ability to remove from the population of documents that Chapman has produced in response to the subpoena those documents that you determine are not responsive. However, we recognize that there may be personal communications within the set and are willing to agree to include the email addresses of Dr. Eastman’s immediate family on the exclusion list along with mass email sender email addresses. The Select Committee is also amenable to you including on your log any documents you determine should not be produced based on your determination that they are not responsive.

We are also amenable to some redactions of personally identifiable information, though the Select Committee reserves the right to request the production of information redacted from specific documents based on the Committee’s investigative needs. Specifically, we agree to Dr. Eastman redacting social security numbers, home addresses, and all but the last 4 digits of phone numbers. We do not agree to the redaction of email addresses.

In response to your request that we agree to a pace of review and production lower than 1,500 pages per day, we understand your concern. What is your proposal as to the appropriate number of pages to be reviewed each day? We are happy to agree to a reasonable accommodation on the number of pages per day, as long as you make the reciprocal accommodation of prioritizing the review first of emails sent or received on January 6 and 7, 2021 and then those emails sent or received on January 4 and 5, 2021. We had stated this proposal previously, but did not receive an answer on it.

We note that the initial privilege log you provided does not contain information sufficient to conclude whether each recipient other than the author (and other than Dr. Eastman) is an attorney, nor the affiliation of any individual. We request that you include email addresses in the “Email From,” “Email CC,” and “Email BCC” fields along with an asterisk to denote which sender(s) or recipient(s) is/are attorneys.

Finally, now that we know that you do not intend to use the Select Committee’s vendor, please provide us with the cost of the electronic review service you are using for this review.

All the best --

From: Charles Burnham <charles@burnhamgorokhov.com>
Sent: Monday, January 31, 2022 1:39 PM
To: Letter, Douglas <Douglas.Letter@mail.house.gov>
Cc: Tatelman, Todd <Todd.Tatelman@mail.house.gov>; Fahsel, Stacie <Stacie.Fahsel@mail.house.gov>; Columbus, Eric

<Eric.Columbus@mail.house.gov>

Subject: Re: US v. Eastman

Douglas,

Your vendor was not able to get us set up in the system in time for Friday's deadline so we went with an alternate vendor (as I alluded to in my status report). However, our vendor should be able to eliminate mass emails. Per your quest, we will not produce "mass mailings, list serves, or possible spam accounts" even if they are technically responsive to your subpoena. We may not be able to accomplish this in time for today's production but will start tomorrow.

More generally, will you agree we do not have to produce documents which, on their face, are not responsive to the subpoena even if those documents were generated in response to the search terms provided to Chapman?

With respect to the remaining documents, once mass emails and such are removed many of the documents left for production will contain personal identifying information such as phone numbers and addresses. Do you have an objection to our redacting this info?

Finally, if the production is narrowed down largely to substantive emails to and from Dr. Eastman personally, we will be unable to maintain the 1500 a day pace. Even if the review and privilege analysis of substantive emails takes an average of 1 minute per page (which is unlikely), that works out to 25 hours per day. Will you agree to a reasonable reduction in the daily production quota?

Please give me a call if you would like to discuss.

On Mon, Jan 31, 2022 at 11:46 AM Letter, Douglas <Douglas.Letter@mail.house.gov> wrote:

Charles:

We have reviewed the initial production of not privileged documents that you produced to the Select Committee on Friday, January 28, and noted that the overwhelming majority of the emails were from mass mailing lists, listservs, or possible spam accounts. (Of the 537 emails produced it appears that as few as 5 were emails written directly to or from Dr. Eastman).

While they contain relevant search terms, the Select Committee is not interested in these mass mailing type documents and believes that eliminating them from the review population would significantly reduce the review population, thus streamlining the production and privilege log process. The vendor the Select Committee has made available to Dr. Eastman (Driven) can perform an analysis of all the emails in the population to identify specific senders that can be excluded from the review population. (For a few examples from the initial production: National Review, Blabber Buzz Alerts, [Newsmax.com](https://www.newsmax.com), and Big League Politics).

Please let us know as soon as possible if you are open to utilizing the vendor's expertise on this issue and we can arrange a call to discuss the logistics.

We look forward to hearing from you.

Douglas N. Letter

General Counsel

Office of General Counsel

U.S. House of Representatives

5140 O'Neill House Office Building

Washington, DC 20515

Douglas.Letter@mail.house.gov

202-225-9700

--

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Counsel for the Congressional Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JOHN C. EASTMAN

Plaintiff,

vs.

BENNIE G. THOMPSON, *et al.*,

Defendants.

Case No. 8:22-cv-00099-DOC-DFM

**DECLARATION OF JOHN WOOD IN
SUPPORT OF CONGRESSIONAL
DEFENDANTS' OPPOSITION TO
PLAINTIFF'S PRIVILEGE
ASSERTIONS**

Date: March 8, 2022

Time: 9:00 a.m.

Location: Courtroom 9D

DECLARATION OF JOHN F. WOOD

1 I, John Wood declare as follows:

2 1. I am Senior Investigative Counsel and Of Counsel to the Vice Chair, Select
3 Committee to Investigate the January 6th Attack on the U.S. Capitol, U.S. House of
4 Representatives.

5 2. I make this declaration in support of Congressional Defendants' Brief in
6 Opposition to Plaintiff's Privilege Assertions.

7 3. Attached hereto as Exhibit A is a true and accurate copy of the transcript of
8 the deposition of John Eastman by the Select Committee to Investigate the January 6th
9 Attack on the U.S. Capitol on December 9, 2021.

10 4. Attached hereto as Exhibit B is a true and accurate copy of certain pages
11 from the interview of Richard Peter Donoghue by the Select Committee to Investigate the
12 January 6th Attack on the U.S. Capitol on October 1, 2021.

13 5. Attached hereto as Exhibit C is a true and accurate copy of certain pages
14 from the interview of Jeffrey A. Rosen by the Select Committee to Investigate the
15 January 6th Attack on the U.S. Capitol on October 13, 2021.

16 6. Attached hereto as Exhibit D is a true and accurate copy of certain pages
17 from the deposition of Jason Miller by the Select Committee to Investigate the January
18 6th Attack on the U.S. Capitol on February 3, 2022.

19 7. Attached hereto as Exhibit E are true and accurate copies of certain
20 documents produced by the National Archives and Records Administration ("NARA") to
21 the Select Committee to Investigate the January 6th Attack on the U.S. Capitol.

22 8. Attached hereto as Exhibit F is a true and accurate copy of certain pages
23 from the deposition of Greg Jacob by the Select Committee to Investigate the January 6th
24 Attack on the U.S. Capitol on February 1, 2022.

25 9. Attached hereto as Exhibit G is a true and accurate copy of certain pages
26 from the deposition of Keith Kellogg, Jr. by the Select Committee to Investigate the
27 January 6th Attack on the U.S. Capitol on December 14, 2021.

28

DECLARATION OF JOHN F. WOOD

1 10. Attached hereto as Exhibit H is a true and accurate copy of a document
2 produced by NARA to the Select Committee to Investigate the January 6th Attack on the
3 U.S. Capitol.

4 11. Attached hereto as Exhibit I is a true and accurate copy of certain pages
5 from the deposition of Marc Short by the Select Committee to Investigate the January 6th
6 Attack on the U.S. Capitol on January 26, 2022.

7 12. Attached hereto as Exhibit J is a true and accurate copy of certain pages
8 from the deposition of Benjamin Williamson by the Select Committee to Investigate the
9 January 6th Attack on the U.S. Capitol on January 25, 2022.

10 13. Attached hereto as Exhibit K is a true and accurate copy of an email from
11 John Eastman (via his Chapman University email account) to Gregory Jacob on January
12 5, 2021, 7:29 PM MST, along with the attachment thereto, produced to the Select
13 Committee to Investigate the January 6th Attack on the U.S. Capitol as Chapman005235
14 and Chapman005236.

15 14. Attached hereto as Exhibit L is a true and accurate copy of an email from
16 John Eastman (via his Chapman University email account) to Gregory Jacob on January
17 6, 2021, 12:25 PM MST, produced to the Select Committee to Investigate the January 6th
18 Attack on the U.S. Capitol as Chapman005379.

19 15. Attached hereto as Exhibit M is a true and accurate copy of an email from
20 John Eastman (via his Chapman University email account) to Gregory Jacob on January
21 6, 2021, 4:45 PM MST, produced to the Select Committee to Investigate the January 6th
22 Attack on the U.S. Capitol as Chapman005442.

23 16. Attached hereto as Exhibit N is a true and accurate copy of an email from
24 John Eastman (via his Chapman University email account) to Gregory Jacob on January
25 6, 2021, 9:44 PM MST, produced to the Select Committee to Investigate the January 6th
26 Attack on the U.S. Capitol as Chapman005479.

27 I declare under penalty of perjury that the foregoing is true and correct, to the best
28 of my knowledge.

DECLARATION OF JOHN F. WOOD

Executed on March 2, 2022, in Washington, DC.

/s/ John F. Wood
John F. Wood

DECLARATION OF JOHN F. WOOD

1 OFFICE OF GENERAL COUNSEL
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10 Washington, D.C. 20001

11 Counsel for the Congressional Defendants

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **SOUTHERN DIVISION**

15 JOHN C. EASTMAN

16 Plaintiff,

17 vs.

18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.

20 Case No. 8:22-cv-00099-DOC-DFM

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26 **Exhibit A**
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5 SELECT COMMITTEE TO INVESTIGATE THE
6 JANUARY 6TH ATTACK ON THE U.S. CAPITOL,
7 U.S. HOUSE OF REPRESENTATIVES,
8 WASHINGTON, D.C.

9

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12 DEPOSITION OF: JOHN EASTMAN

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16 Thursday, December 9, 2021

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18 Washington, D.C.

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21 The interview in the above matter was held in Room 1309, Longworth House
22 Office Building, commencing at 12:57 p.m.

23 Present: Representatives Lofgren, Raskin, Cheney, and Kinzinger.

1

2 Appearances:

3

4

5 For the SELECT COMMITTEE TO INVESTIGATE

6 THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL:

7

8 JOHN WOOD, SENIOR INVESTIGATIVE COUNSEL

9 AND OF CHAIR TO THE VICE CHAIR

10 CASEY LUCIER, INVESTIGATIVE COUNSEL

11 JOE MAHER, DETAILEE

12 DAN GEORGE, SENIOR INVESTIGATIVE COUNSEL

13 JENNA HOPKINS, PROFESSIONAL STAFF

14 EVAN MAULDIN, CHIEF CLERK

15

16

17 For JOHN EASTMAN:

18

19 CHARLES BURNHAM

1

2

3 Mr. Wood. Good afternoon.

4 This is a deposition of Dr. John Eastman conducted by the House Select
5 Committee to Investigate the January 6th Attack on the U.S. Capitol.

6 My name is John Wood. I'm a senior investigative counsel for the committee,
7 and I'm also of counsel to the vice chair of the committee, Representative Liz Cheney.

8 And I'll let everybody introduce themselves.

9 Mr. Maher. Joe Maher, senior counsel to the vice chair.

10 Ms. Lucier. Casey Lucier, investigative counsel to the select committee.

11 Mr. George. Dan George, senior investigative counsel to the committee.

12 Ms. Hopkins. Jenna Hopkins, professional staff member.

13 Mr. Burnham. Charles Burnham, counsel for Dr. John Eastman.

14 The Witness. Dr. John Eastman.

15 Mr. Wood. And just to let you know, there may be members of the committee
16 that will either come in person or participate by video. We will keep an eye on that to
17 try to let you know and say on the record when members join.

18 We probably won't say on the record when they leave just because if they're by
19 video, they can just hit exit and we won't necessarily notice when they leave. So the
20 record might not always show when the members leave.

21 The questions will be led by staff, but we will occasionally pause and see if any of
22 the members want to ask any questions before we move on.

23 As you know, there is a court reporter here.

24 And why don't we go ahead and administer the oath?

25 The Reporter. Please raise your right hand.

1 Do you solemnly declare and affirm under the penalty of perjury that the
2 testimony you are about to give will be the truth, the whole truth, and nothing but the
3 truth?

4 The Witness. I do.

5 Mr. Wood. So, Dr. Eastman, as you know, there is a court reporter here who will
6 be making a verbatim transcript of the interview. You will be given an opportunity -- or
7 your counsel -- to review the transcript, probably here in the House office buildings, and
8 to identify any errors you identify. The committee can take those into consideration
9 before finalizing the transcript. Also, as we said, there's a video as well as audio
10 recording.

11 As far as logistics, if at any time you want to take a break, we'd be happy to allow
12 that. Just say so. If the witness needs to speak with counsel privately, we can take a
13 break for that to occur.

14 Dr. Eastman, I want to make sure you understand that you're appearing pursuant
15 to the subpoena dated November 8th, 2021, which is exhibit 1 in the binder that you've
16 been provided.

17 I want to make sure you also understand that you're under oath, so any knowing
18 false statements could constitute perjury or violation of other Federal laws, such as 18
19 U.S.C. 1001, so it's important that you always tell the truth.

20 If you either don't hear a question or don't understand a question, please say so,
21 so that we can either repeat it or try to clarify it. Also, if you don't recall or don't know
22 the answer, feel free to say so.

23 With that said, I'll turn to Mr. Burnham, who I understand wants to make a
24 statement for the record.

25 Mr. Burnham. Thank you, Mr. Wood.

1 First, on December 1st, I sent a letter to Chairman Thompson raising our objection
2 to the subpoena you referred to, and I'd like to ask if that could be made a part of the
3 official record of today's deposition.

4 Mr. Wood. Yes. And I believe that is in the binder as exhibit 2. And so that
5 will be in the record.

6 Mr. Burnham. Okay.

7 And then just -- I hadn't planned to say this, but you mentioned earlier that
8 committee members might be joining here and there. To the extent possible, can you
9 let us know who's here and who's coming?

10 Mr. Wood. Yes. So we will try to keep an eye on the video screen. It should
11 pop up with their names on it. Sometimes it's only a first name or a last name, but we
12 will try to notice it when we do, between questions, pause, and note for the record that
13 they've joined.

14 Mr. Burnham. And I can watch it. They'll show up on this big TV here?

15 Mr. Wood. Yes.

16 Mr. Burnham. All right. So I can watch as well. Thank you.

17 With that said, short statement on behalf of my client.

18 We wish to preserve the objections in full noted in the letter I referred to a
19 moment ago, but need not elaborate on them further here, with one exception.

20 I wish to emphasize to the committee the importance of the Fifth Amendment to
21 the United States Constitution, which I have counseled my client to invoke.

22 This right is fundamental to our system of justice. As I stated in my letter, our
23 Supreme Court has called the Fifth Amendment a safeguard against heedless, unfounded,
24 or tyrannical prosecution to protect the innocent, as well as the guilty.

25 Invoking the Fifth Amendment is not an admission of guilt and no one should

1 describe it as such. We make no apologies for seeking Fifth Amendment protection as
2 so many law-abiding Americans have done throughout history.

3 In asserting this privilege on my client's behalf, I cannot reveal information
4 protected by the attorney-client privilege. Doing so would violate my duty as a lawyer,
5 the importance of which I need not explain to a committee with distinguished lawyers
6 among its members and staff.

7 But, in fact, there is no need to reveal privileged information to establish Dr.
8 Eastman's basis for Fifth Amendment protection. One need only look to the public
9 record to understand why claiming the Fifth Amendment is a necessity forced upon Dr.
10 Eastman.

11 I have detailed on pages 8 and 9 of my letter, which is now a part of the record,
12 examples of statements from committee members and other voices of influence which
13 made clear that Dr. Eastman has a legitimate fear of criminal prosecution.

14 I could offer many additional examples beyond those in my letter, but out of
15 respect for this committee's time, I will limit myself to two further examples beyond what
16 I've already put in the letter.

17 The first one: According to news reports, on December 1st a United States
18 district judge, who herself has a background in Federal prosecution, stated during the
19 criminal sentencing of a defendant charged with committing crimes on January 6th that
20 the President, former President Trump, and others who spoke at the rally on the Ellipse
21 that day, quote, "bear greater responsibility and should be held accountable," unquote.
22 This from a judge in the very courthouse where over 600 people were criminally charged
23 in connection with January 6th.

24 My second example, second and final example, is there is an active bar complaint
25 against Dr. Eastman in California bearing on the exact subject matter of this deposition.

1 The bar complaint alleges that Dr. Eastman may have assisted former President Donald
2 Trump in criminal conduct in connection with the 2020 election and January 6th.

3 In other words, there is currently pending today against Dr. Eastman formal legal
4 process specifically alleging criminal activity in connection with the very event described
5 in the cover letter to this committee's subpoena.

6 I submit that based on these facts, Dr. Eastman has a clear case, as clear a case for
7 Fifth Amendment protection as this committee -- or indeed any committee -- is ever likely
8 to encounter.

9 In closing, I wish to emphasis that Dr. Eastman's purpose here is simply to do his
10 duty as a citizen. Dr. Eastman is a distinguished lawyer and scholar of the law. He
11 recognizes his legitimate responsibilities to the United States Congress.

12 The law is clear that invocation of the Fifth Amendment must, if Congress
13 requested, be offered on a question-by-question basis. This committee has made such a
14 request and Dr. Eastman has come here today from far out of town, at his own expense,
15 to comply.

16 And with that, the committee may inquire. Thank you.

17 Mr. Wood. Great. Thank you, Mr. Burnham, for your statement. Both your
18 statement, which you've just provided to the committee, as well as your letter of
19 December 1st, are in the record.

20 And I would note for the record, I believe two members of the committee have
21 joined us, Vice Chair Cheney and Mr. Raskin. The way it's set right now, unfortunately,
22 we can't see both of them, but we will try to get it switched to grid view so that we can
23 keep track of who's joining.

24 I am going to just very quickly, in order to save time, go over a little bit of the
25 witness' professional background.

1 EXAMINATION

2 BY MR. WOOD:

3 Q Dr. Eastman, you are a lawyer, correct?

4 A Correct.

5 Q And are you a graduate of the University of Chicago Law School?

6 A Yes.

7 Q And I know of your very distinguished clerkships. Can you tell us who you
8 clerked for after law school?

9 A Judge Michael Luttig and Justice Clarence Thomas -- like you, John.

10 Q Yes. And then did you practice at a law firm following your clerkships?

11 A I did, at Kirkland & Ellis.

12 Q For how long?

13 A Two years.

14 Q And following that --

15 A Not including time as summer associate.

16 Q I understand. And what did you do after leaving Kirkland & Ellis?

17 A I went into teaching and founded a public interest law firm called the Center
18 for Constitutional Jurisprudence at the Claremont Institute.

19 Q And do I understand that you both have taught in an academic setting and
20 also represented clients as well?

21 A That's correct.

22 Q If nobody has any questions about the background of the witness, I'll just
23 start getting into the more substantive questions.

24 Dr. Eastman, in an interview with Larry Lessig and Matt Seligman on the "Another
25 Way" podcast, September 27th, 2021, you were asked about the memoranda that you

1 wrote regarding the role of the Vice President in counting the electoral college votes on
2 January 6th, and you said, quote, "Although I did have a client in this, the client, the
3 President, the former President of the United States, has authorized me to talk about
4 these things. I want to make that clear upfront," close quote.

5 Did President Trump authorize you to talk publicly about the memoranda that you
6 wrote?

7 Mr. Burnham. I beg the committee's indulgence.

8 The Witness. On the advice of counsel, I hereby assert my Fifth Amendment
9 right against being compelled to be a witness against myself. And with the committee's
10 permission, I will invoke this right as necessary in response to further questions by simply
11 stating "The Fifth."

12 BY MR. WOOD:

13 Q So is it your position that you can discuss those memoranda in public
14 settings, but will not discuss those memoranda with the committee pursuant to a
15 subpoena?

16 A Fifth.

17 Q On May 5th, 2021, in an interview with -- of the "Peter Boyle Show," you
18 said, "I met with the President and the Vice President on January 4th in the Oval Office
19 and the President had been advised, based on law review articles that were done after
20 the 2000 election, that, in fact, maybe the Vice President had unilateral authority to
21 determine the validity of contested electoral votes."

22 You said later in the interview that, quote, "I would normally not talk about a
23 private conversation I had with a client, but I have express authorization from my client,
24 the President of the United States, at that time to describe what occurred, to truthfully
25 describe what occurred in that conversation," close quote.

1 Did President Trump authorize you to discuss publicly your January 4th, 2021,
2 conversation with him?

3 A Fifth.

4 Q So is it your position that you can discuss in the media direct conversations
5 you had with the President of the United States, but you will not discuss those same
6 conversations with this committee?

7 A Fifth.

8 Mr. Burnham. And, committee's indulgence, just to be clear, I advised my client
9 not only to take the Fifth, but we're not in a position to go into the basis of the Fifth
10 without defeating the position itself, which is likely to be answers to -- similar answers
11 will be offered to questions such as the one just asked, if that helps.

12 BY MR. WOOD:

13 Q Dr. Eastman, you've not produced any documents in response to the
14 subpoena, which is in exhibit 1. Why have you not produced any documents to the
15 committee?

16 A Fifth.

17 Q Just so I understand, is it your position that the act of producing documents,
18 as opposed to the content of the documents themselves, could tend to incriminate you?

19 A Fifth.

20 Q Dr. Eastman, did you use a Chapman University email account for any
21 communications related to the 2020 election?

22 A Fifth.

23 Q Dr. Eastman, did you use a Gmail account for any communications related to
24 the 2020 election?

25 A Fifth.

1 Q Dr. Eastman, did you use any other email account for communication related
2 to the 2020 election?

3 A Fifth.

4 Q Did you send or receive any text messages related to the 2020 election using
5 your personal cell phone?

6 A Fifth.

7 Q Do you have any documents regarding the 2020 election on your personal
8 computer?

9 A Fifth.

10 Q Do you have any documents regarding the 2020 election on any server?

11 A Fifth.

12 Q Dr. Eastman, were you in Philadelphia in connection with your participation
13 in a panel on federalism and separation of powers at the Federalist Society National
14 Lawyers Conference that took place in November 2020?

15 A Fifth.

16 Q While you were in Philadelphia, did you meet with Corey Lewandowski?

17 A Fifth.

18 Q Dr. Eastman, did you represent President Trump or his campaign in
19 challenging the results of the 2020 election?

20 A Fifth.

21 Q Dr. Eastman, do you have an engagement letter or other document
22 memorializing your relationship with President Trump or his campaign?

23 A Fifth.

24 Q Dr. Eastman, did you receive any legal fees for your work on behalf of
25 President Trump or his campaign?

1 A Fifth.

2 Q During a Georgia State Senate Judiciary Committee hearing dated
3 December 3rd, 2020, Mayor Rudy Giuliani stated that the legislators were provided with
4 copies of a 7-page paper that you authored.

5 Will you produce to the committee this document that was previously shared with
6 Georgia legislators?

7 A Fifth.

8 Q Okay. Dr. Eastman, did you reach out to State legislators after the 2020
9 Presidential election?

10 A Fifth.

11 Q Okay. Just so I understand, we've been trying to save -- allow you to save
12 some time by saying "Fifth," but I just want to make sure that with regard to the question
13 of whether you reached out to State legislators after the 2020 Presidential election,
14 you're invoking your Fifth Amendment right on the grounds that answering the question
15 could potentially incriminate you?

16 Mr. Burnham. That's correct.

17 Mr. Wood. I think I need the witness to say it.

18 The Witness. I'm claiming the Fifth.

19 BY MR. WOOD:

20 Q Dr. Eastman, did you contact any State legislative leadership in Arizona?

21 A Fifth.

22 Q Dr. Eastman, did you contact the office of Arizona House Speaker Rusty
23 Bowers in mid-December?

24 A Fifth.

25 Q Dr. Eastman, are you going to take -- invoke your Fifth Amendment right

1 against self-incrimination with regard to any other questions that I would ask regarding
2 whether you reached out to State legislators regarding the 2020 election?

3 Mr. Burnham. If I may, Dr. Eastman will probably assert the Fifth in response to
4 that question, but from my perspective as counsel the answer is yes.

5 Mr. Wood. Okay. And Ms. Lofgren, I believe, has joined us. And we're going
6 to need to take just a very short break, and we'll go off the record.

7 [Discussion off the record.]

8 Mr. George. I think we just need to hear from Dr. Eastman the invocation of the
9 Fifth that counsel just made.

10 The Witness. Yes. I'm taking advice of counsel and invoking the Fifth.

11 Mr. Wood. Okay. We'll take a 5-minute break and then we'll come back on the
12 record. And I'll just remind you that the camera is still rolling. If you want to talk
13 privately, you can use that room. I think we need to speak amongst each other also.
14 So 5 minutes.

15 [Recess.]

16 Mr. Wood. Okay. We'll go back on the record.

17 I believe Mr. Kinzinger has joined us. So I believe we have Vice Chair Cheney, Mr.
18 Raskin, Ms. Lofgren, and Mr. Kinzinger on.

19 BY MR. WOOD:

20 Q Dr. Eastman, if you could turn your attention to exhibit 7 in your binder,
21 which has a cover memo dated December 14th, 2020. If you turn to the next page, it's a
22 document entitled, "Certificate of the votes of the 2020 electors from Arizona."

23 Dr. Eastman, have you seen that document before?

24 A Fifth.

25 Q Dr. Eastman, did you have any role in drafting that document?

1 A Fifth.

2 Q Dr. Eastman, do you know who drafted that document?

3 A Fifth.

4 Q Dr. Eastman, did you draft any certificates of electoral votes for any other
5 States?

6 A Fifth.

7 Mr. Wood. Okay. I think Mr. Raskin may have a question.

8 Mr. Raskin. Yes. Thank you.

9 I wanted to ask Dr. Eastman whether he's asserting the Fifth just with respect to
10 the actions he took on January 6th and days leading up or whether he is asserting the
11 Fifth with respect to the ideas that he has promoted about the electoral college.

12 Mr. Burnham. I beg the Congressman's pardon. As I mentioned to Mr. Wood a
13 moment ago, I've instructed my client that he should claim the Fifth not only in response
14 to questions about the subject matter of the subpoena, but also as to questions about the
15 basis for the Fifth Amendment, as doing so would defeat the protection of the Fifth
16 Amendment itself.

17 But to help, as best as I can, I suspect that most of the questions asked under the
18 heading of the general subject matters that were just offered would probably result in an
19 invocation.

20 I hope that's helpful.

21 Mr. Raskin. I appreciate that. But I'm not asking with respect to the basis for
22 his invocation of the Fifth. I'm asking for which questions he will answer and which not.

23 Will he answer questions with respect to the substantive content of his ideas
24 about the Vice President and the electoral college?

25 Mr. Burnham. I've advised him not to answer such questions on Fifth

1 Amendment grounds.

2 Mr. Raskin. Well, then, if he's going to assert it, would he assert it so I can hear
3 that?

4 Mr. Burnham. Certainly.

5 The Witness. Yes. On advice of counsel, I'm asserting the Fifth.

6 Mr. Raskin. Okay. So to be clear, you're asserting the Fifth Amendment as to
7 whether or not you were answering -- you're asserting the Fifth as to whether or not
8 you're refusing to answer questions just about all of your actions or also about the ideas
9 that you have about the electoral college. Is that right?

10 The Witness. And on advice of counsel, yes, I'm asserting the Fifth.

11 Mr. Raskin. Thank you. I yield back.

12 Mr. Wood. Do any other members have questions?

13 BY MR. WOOD:

14 Q Dr. Eastman, if you could turn your attention to exhibit 10 in your binder,
15 which has a -- the first page is an email from Jeffrey Clark at the Department of Justice
16 dated December 28th, 2020, and then the next several pages are a draft of a letter to
17 Governor Brian Kemp, Speaker of the House David Ralston, President Pro Tem of the
18 Senate Butch Miller, all of the State of Georgia.

19 Have you seen this letter before?

20 A Fifth.

21 Q Dr. Eastman, did you have any role in drafting this letter?

22 A Fifth.

23 Q Dr. Eastman, did you speak to Jeffrey Clark about this letter?

24 A Fifth.

25 Q Dr. Eastman, did you speak with anyone else at the Department of Justice

1 regarding efforts to overturn the results of the 2020 Presidential election?

2 A Fifth.

3 Q Dr. Eastman, regarding the 2020 election, did you speak with Representative
4 Scott Perry?

5 A Fifth.

6 Q Dr. Eastman, with regard to the 2020 election and any efforts to change the
7 outcome of the election, did you speak with Senator Josh Hawley?

8 A Fifth.

9 Q And just so I understand, Dr. Eastman, with regard to whether you had any
10 conversations with Senator Josh Hawley about efforts to overturn the results of the 2020
11 election, you're taking the Fifth Amendment on the grounds that your answer could tend
12 to incriminate you?

13 A Fifth.

14 Q Is that a yes?

15 Mr. Burnham. That was an invocation of the Fifth in response to your question
16 about his basis for taking the Fifth, but I think it could be taken as a yes.

17 Mr. Wood. Okay. Just to be clear, I wasn't trying to ask about the basis for
18 taking the Fifth, I just wanted to clarify that he was taking the Fifth on the grounds that it
19 could incriminate him, not anything about the factual basis or legal basis underlying that.

20 BY MR. WOOD:

21 Q Dr. Eastman, did you clerk with now Senator Ted Cruz.

22 A Yes.

23 Q Dr. Eastman, did you have any communications with Senator Ted Cruz
24 regarding efforts to change the outcome of the 2020 election?

25 A Fifth.

1 Q Dr. Eastman, did you have any conversations with any other Members of
2 Congress regarding the efforts to overturn the outcome of the 2020 election?

3 A Fifth.

4 Q Dr. Eastman, it's been publicly reported that on or about December 31st,
5 2020, a member of the Trump legal team reached out to you while you were on vacation
6 with your family in Texas.

7 Dr. Eastman, who contacted you from the Trump legal team?

8 A Fifth.

9 Q Did that person ask you to do anything?

10 A Fifth.

11 Q Did the Trump legal team ask you to prepare a memorandum regarding the
12 Vice President's role in the counting of electoral votes at the joint session of Congress on
13 January 6th, 2021?

14 A Fifth.

15 Q Dr. Eastman, did you have a conversation with Senator Mike Lee?

16 A Fifth.

17 Q Dr. Eastman, when asked about a call with Senator Mike Lee by the National
18 Review, you stated to the National Review that you had a conversation with Senator Lee
19 and that, quote, "We were working on broader things," close quote.

20 Dr. Eastman, what were those broader things on which you were working with
21 Senator Mike Lee?

22 A Fifth.

23 Mr. Wood. Okay. I'll pause. Anybody have any questions?

24 Do any members have any questions at this time?

25 Mr. Raskin. I'd like to ask one further question if I could.

1 Mr. Wood. Yes, of course.

2 Mr. Raskin. I'd like to ask Dr. Eastman whether the Vice President has ever
3 exercised unilateral authority to reject electoral college votes coming from a particular
4 State before in American history?

5 The Witness. Fifth.

6 Mr. Raskin. I yield back.

7 BY MR. WOOD:

8 Q Just so I understand, in response to Mr. Raskin's question about a historical
9 fact, not about your conduct, you are invoking your Fifth Amendment right against
10 self-incrimination?

11 A I claim the Fifth.

12 Q Dr. Eastman, on January 2nd, 2021, you appeared on Steve Bannon's "War
13 Room" podcast. I'm going to read you some brief excerpts there.

14 Mr. Bannon said, quote, "Are we to assume that this is going to be a climactic
15 battle?" close quote.

16 Dr. Eastman, you said, quote, "Well, I think a lot of that depends on the courage
17 and the spine of the individuals involved," close quote.

18 Dr. Eastman, what did you understand Mr. Bannon to mean when he said on this
19 podcast asking whether there could be a climactic battle?

20 A Fifth.

21 Q Dr. Eastman, at the time that you engaged in the podcast on January 2nd,
22 2021, with Mr. Bannon, had you heard that there would be protests on January 6th?

23 A Counsel, can you clarify the date of the "War Room" podcast in your last
24 question? I thought you had said January 21st.

25 Q I certainly didn't mean to. If I did, I apologize. The date of the podcast

1 was January 2nd, 2021. So I'm happy to repeat the question.

2 A If you would, please.

3 Q When you were on the January 2nd, 2021, podcast with Steve Bannon called
4 the "War Room," had you heard that there would be protests on January 6th?

5 A Fifth.

6 Q When you were on the podcast with Mr. Bannon, had anyone mentioned to
7 you the possibility that protests on January 6th could turn violent?

8 A Fifth.

9 Q So on that podcast, after you said, "Well, I think a lot of that depends on the
10 courage and the spine of the individuals involved," Mr. Bannon said, quote, "When you
11 just said the courage and the spine, are you talking on the other side of the football?
12 Would you be -- would you be -- that'd be a nice way to say a guy named Mike, Vice
13 President Mike Pence," close quote.

14 Your answer: "Yes."

15 What did you mean when you stated that a lot of that would depend on the
16 courage and spine of Vice President Mike Pence?

17 A Fifth.

18 Q On that same podcast, you also told Mr. Bannon that Mayor Rudy Giuliani
19 was working in the Senate to stop the election certification. What work was Mayor
20 Giuliani doing in the Senate to stop the certification?

21 A Fifth.

22 Q Dr. Eastman, did you speak with any United States Senators about stopping
23 the certification on January 6th?

24 A Fifth.

25 Q Dr. Eastman, will you answer any of my questions regarding your public

1 appearance on Steve Bannon's "War Room" podcast on January 2nd, 2021?

2 A No. Fifth.

3 Mr. Wood. I'll move on.

4 Any members have any questions at this point?

5 Okay.

6 Dr. Eastman, I'm going to ask you some questions about your involvement in a
7 so-called "war room" at the Trump -- I'm sorry. No.

8 First, I'm going to ask you about some meetings at both the Trump Hotel and the
9 Willard, the latter of which meaning the Willard, we understand, had a war room.

10 Did you stay at the Willard Hotel between January 3rd and January 8th, 2021?

11 Mr. Burnham. Can I interpose a point of order?

12 Mr. Wood. Yes.

13 Mr. Burnham. It just occurred to me that on several occasions both the
14 Congressman and yourself have asked questions along the lines of, Dr. Eastman, will you
15 answer any questions about some category of topics, like the podcast, and he said no.

16 Mr. Wood. Uh-huh.

17 Mr. Burnham. I just want to make clear that that's not meant to be a blanket
18 assertion. If any of the members of the committee or yourself want to ask however
19 many questions as you want about any subject, we're happy to answer them.

20 Mr. Wood. Okay. Answer them or invoke privileges?

21 Mr. Burnham. Most likely the latter.

22 Mr. Wood. Okay. I understand that and I appreciate it. I'm also trying to save
23 some time. So if on any of these topics if I ask a question whether or not he'd be willing
24 to answer, I'm asking would he be willing to answer any of them without invoking the
25 Fifth Amendment. If for any of them he is willing, then I would have a much longer list

1 of questions.

2 Mr. Burnham. I understand.

3 Mr. Wood. Okay. So are you comfortable with me asking that type of question
4 or do you prefer that I go through question by question?

5 Mr. Burnham. Perfectly comfortable with that type of question.

6 Mr. Wood. Okay.

7 Mr. Burnham. I just wanted to make clear we weren't trying to do an improper
8 blanket assertion.

9 Mr. Wood. No, I understand.

10 Mr. Burnham. I appreciate the question.

11 Mr. Wood. Yeah. Thank you for that clarification.

12 BY MR. WOOD:

13 Q Dr. Eastman, did you stay at the Willard Hotel between January 3rd and
14 January 8th, 2021?

15 A Fifth.

16 Q With whom did you meet at the Willard Hotel between January 3rd and
17 January 8th, 2021?

18 A Fifth.

19 Q Dr. Eastman, did you participate in a so-called "war room" at the Willard
20 Hotel between January 3rd and January 8th, 2021?

21 A Fifth.

22 Q Dr. Eastman, what was the purpose of this war room?

23 A Fifth.

24 Q Dr. Eastman, while you were at the war room between January 3rd and
25 January 8th, 2021, did you have any conversations with President Donald Trump?

1 A Fifth.

2 Q Just so I understand, Dr. Eastman, with regard to the question of whether
3 you had any conversations with President Donald Trump while at the Willard Hotel war
4 room, you're invoking the Fifth Amendment right against self-incrimination?

5 A Fifth Amendment right not to be compelled to be a witness against myself.

6 Mr. Wood. All right. Before I move on to some of the legal memoranda you
7 wrote, I'll pause to see if anybody has any other questions.

8 Nope?

9 Okay.

10 BY MR. WOOD:

11 Q Dr. Eastman, I'm going to ask you about a couple of legal memoranda that, I
12 believe, don't have your name on them, but have been in public reports attributed to you.

13 If you could look at exhibit 14 in your binder. There is a two-page memorandum.
14 And just for ease of reference, I may refer to this as the two-page memorandum to
15 distinguish it from another memorandum that I believe you wrote later.

16 Dr. Eastman, did you write this two-page memorandum?

17 A Fifth.

18 Q Just so I understand, Dr. Eastman, you're invoking your Fifth Amendment
19 right against self-incrimination with regard to whether you are the author of this legal
20 memorandum?

21 A I'm invoking my Fifth Amendment right not to be compelled to be a witness
22 against myself.

23 Q Dr. Eastman, did anyone ask you to write this memorandum?

24 A Fifth.

25 Q Dr. Eastman, did you discuss this memo with Jenna Ellis?

1 A Fifth.

2 Q Dr. Eastman, to whom did you give this memo?

3 A Fifth.

4 Q Dr. Eastman, the first sentence of the memo starts off by saying, "7 States
5 have transmitted dual slates of electors to the President of the Senate."

6 Is that statement in this memo true?

7 A Fifth.

8 Q Dr. Eastman, at the bottom of page 1 this memorandum states, "So here's
9 the scenario we propose."

10 Dr. Eastman, who is the "we" you were -- who is the "we" that the author of this
11 memo referred to?

12 A Fifth.

13 Q Dr. Eastman, on the next page there are six numbered paragraphs. The
14 one that starts with third reads, quote, "At the end, he announces that because of the
15 ongoing dispute in the 7 States, there are no electors that can be deemed validly
16 appointed in those States," close quote, and so President Trump would have a majority of
17 the electors counted, and, quote, "Pence then gavel's President Trump as re-elected,"
18 close quote.

19 Dr. Eastman, did you advise the President of the United States that the Vice
20 President could reject electors from seven States and declare that the President had been
21 re-elected?

22 A Fifth.

23 Q In the paragraph starting with -- paragraph No. 4, it starts with, "Howls, of
24 course" -- you describe that the Vice President could declare that no candidate received a
25 majority of the electoral votes and, therefore, the election would go to the House of

1 Representatives, where Republicans control the majority of State delegations and
2 President Trump is re-elected there as well.

3 Dr. Eastman, did you advise the President of the United States that the Vice
4 President could reject electors from seven States and cause the selection of the President
5 of the United States to be made by the U.S. House of Representatives?

6 A Fifth.

7 Q Dr. Eastman, in the paragraph No. 5 that starts with, "One last piece," the
8 memo states -- and I'm not quoting here, but summarizing -- when the Vice President got
9 to the electoral votes for Arizona and Members of Congress objected, someone in the
10 Senate should filibuster in order to create more time for States to send alternate slates of
11 electors.

12 Dr. Eastman, did you advise the President of the United States that he should have
13 Members of Congress object to the electors from several States in order to create more
14 time for States to send alternate slates of electors?

15 A Fifth.

16 Q And, again, are you invoking your Fifth Amendment right against
17 self-incrimination with regard to that question?

18 A I'm invoking the Fifth Amendment right not to be compelled to be a witness
19 against myself.

20 Q Dr. Eastman, did the President of the United States encourage Members of
21 Congress to object to electors from several States in order to create more time for States
22 to send alternate slates of electors?

23 A Fifth.

24 Q Dr. Eastman, did you discuss with any Members of Congress your plan to
25 have Members of Congress object to State electors in order to prevent certification of the

1 electoral votes on January 6th, 2021?

2 A Fifth.

3 Q If you look at exhibit 16 -- I'm staying on the topic of that two-page
4 memo -- but exhibit 16 is an opinion and commentary under the heading "Viewpoints"
5 published in The Sacramento Bee. It indicates that it was authored by you.

6 In that commentary, you describe your two-page memo, which I believe is the one
7 we just went over, as, quote, "a preliminary and incomplete one, a draft of a more
8 complete memo that outlined all the scenarios that had become topics of discussion
9 following the November 2020 election," close quote.

10 Do you know whether your two-page memo, despite being preliminary and
11 incomplete, was provided to the President of the United States?

12 A Fifth.

13 Q Do you know whether that memo was provided to any advisers of the
14 President of the United States?

15 A Fifth.

16 Q Dr. Eastman, did you write the opinion piece that's in tab 16?

17 A Fifth.

18 Q Okay. Just so I understand, Dr. Eastman, you're invoking your Fifth
19 Amendment right against self-incrimination to question whether this opinion and
20 commentary piece with the byline John C. Eastman, you're invoking the Fifth Amendment
21 right to not answer that question?

22 A On advice of counsel, I'm invoking the Fifth.

23 Mr. Wood. Okay. I'm going to pause there to see if any members have any
24 questions. And we're still on the first memo, so we haven't yet gotten to the longer
25 version of the memo.

1 Does anybody have any questions about the two-page memo?

2 Mr. Raskin. Yeah, I do have a question about that.

3 In this commentary, Dr. Eastman takes exception to Dean Chemerinsky's
4 statements that he was involved in trying to overthrow the government or stage a coup.

5 Why did you take exception to those statements?

6 The Witness. Fifth.

7 Mr. Wood. Anything else?

8 Mr. Raskin. I'm sorry. Did he assert the Fifth Amendment about that?

9 Mr. Wood. He did.

10 Mr. Raskin. Okay. I just wanted to go back to something that was asked
11 before.

12 Did you -- were you acting as a lawyer for Donald Trump during the events leading
13 up to January 6th?

14 The Witness. Fifth.

15 Mr. Raskin. Are you asserting the Fifth Amendment in your capacity as a lawyer
16 and a citizen or just as a citizen?

17 The Witness. Fifth.

18 Mr. Raskin. Okay. I yield back.

19 Mr. Wood. Any other members have questions?

20 Any other staff have questions?

21 Go ahead.

22 BY MR. GEORGE:

23 Q Along those lines, Mr. Eastman, if you could turn to exhibit No. 5. And this
24 is a filing in the Supreme Court of the United States that is titled, "A Motion of Donald J.
25 Trump, President of the United States, to Intervene in His Personal Capacity as Candidate

1 for Re-Election, Proposed Bill of Complaint in Intervention, and Brief in Support of Motion
2 to Intervene."

3 And you are listed, John C. Eastman, as counsel of record, from One University
4 Drive in Orange, California, with an email address at Chapman University.

5 Are you the person that's listed on that Supreme Court filing at exhibit No. 5?

6 A Fifth.

7 Q Could you please turn to exhibit No. 8? That is another filing in the
8 Supreme Court of the United States that is titled, "Motion for Expedited Consideration,"
9 where, again, John C. Eastman, Esq., is listed as counsel for petitioner, which is Donald J.
10 Trump for President, Inc.

11 Are you the person that's listed there as counsel of record in exhibit No. 8?

12 A On advice of counsel, I'm asserting the Fifth.

13 Q If you could turn to exhibit No. 9. That is a filing in the Supreme Court of
14 the United States that's titled, "Reply to Secretary Boockvar's Response in Opposition to
15 the Motion for Expedited Consideration of the Petition for a Writ of Certiorari."

16 And that is Donald J. Trump for President, Inc. as petitioner, with Kathy Boockvar,
17 Secretary of the Commonwealth of Pennsylvania, as respondent, with John C. Eastman
18 listed as counsel of record for the petitioner.

19 Is that you who is listed on that filing in the United States Supreme Court?

20 A On advice of counsel, I'm asserting the Fifth.

21 Q And just to be clear, are you asserting the Fifth Amendment because a
22 truthful answer might tend to incriminate you --

23 A I'm asserting --

24 Q -- on this question?

25 A I'm asserting the Fifth.

1 BY MR. WOOD:

2 Q Okay. While we're on those documents, tab 9 has a John C. Eastman, and
3 then at the bottom there has a Gmail account. And I'm not going to read the address in
4 case you still use that email account.

5 Do you still have access to the emails in the Gmail account referenced in the
6 bottom of that page?

7 A Fifth.

8 Q And going back to tab 5, similarly, there's a John C. Eastman, counsel of
9 record. At the bottom, there is a Chapman.edu email address.

10 Do you still have access to the emails in the Chapman email account?

11 A Fifth.

12 Q Okay. Going back to exhibit 16, on the fourth page, sort of in the middle of
13 the page, with regard -- and the context is the Vice President's authority to reject
14 electors.

15 The John C. Eastman who wrote this article, whether that's you or not, wrote, "But
16 as The New York Times confirmed through thorough investigation and reporting on this
17 critical issue, I did not advise Pence to exercise such authority."

18 You further wrote, quote, "It would be foolish to exercise it" -- meaning that
19 authority -- "in the absence of certifications of alternate Trump electors from the
20 contested States' legislatures," close quote.

21 Dr. Eastman, do you acknowledge that there were no alternate electors sent from
22 contested States?

23 A Fifth.

24 Q Dr. Eastman, if, in fact, there were no alternate electors from contested
25 States, why did you write in the first sentence of the two-page memo that, quote, "7

1 States have transmitted dual slates of electors to the President of the Senate," close
2 quote?

3 A Fifth.

4 Q Dr. Eastman, the passage that I read to you from The Sacramento Bee found,
5 at tab 16, where it says, "I did not advise Pence to exercise such authority," why did you
6 write the two-page memorandum stating, "Here's the scenario we propose," if, in fact,
7 you were not proposing that scenario?

8 A Fifth.

9 Q Dr. Eastman, did your views change regarding the Vice President's authority
10 after you wrote the two-page memo?

11 A Fifth.

12 Q Dr. Eastman, do you now disagree with the scenario you proposed in the
13 two-page memo?

14 A Fifth.

15 Mr. Wood. Okay. I will pause there before I turn to the longer six-page memo.

16 Do any members have any questions?

17 Staff?

18 Okay.

19 BY MR. WOOD:

20 Q Dr. Eastman, if you turn to tab 15, this is another memorandum, which for
21 ease of reference and to distinguish it from the other memo that we went over, I'll refer
22 to the memo in tab 15 as being the six-page memo.

23 Dr. Eastman, did you write this memo?

24 A Fifth.

25 Q Dr. Eastman, did anyone ask you to write this memo?

1 A Fifth.

2 Q Dr. Eastman, was anyone else involved in writing this memo?

3 A Fifth.

4 Q Okay. Going back to exhibit 16, again, the Sacramento Bee article, you
5 wrote, quote, "Neither version of the memo reflects the advice I gave to then-Vice
6 President Pence, paren, (though, to be precise, the final scenario laid out in the complete
7 memo does), close paren," close quotes.

8 Was this six-page memo, which you say does not reflect the advice you gave to
9 the Vice President, nonetheless given to President Donald Trump?

10 A Fifth.

11 Q Dr. Eastman, was the six-page memo given to any advisers of the President?

12 A Fifth.

13 Q Dr. Eastman, did you write a memo that did not reflect your actual advice?

14 A Fifth.

15 Q Dr. Eastman, did your view regarding the Vice President's role change after
16 you wrote the six-page memo?

17 A Fifth.

18 Q Turning to the memo itself, the memo then, quote, "war games," close
19 quote, several scenarios, including scenarios in which the Vice President rejects ballots
20 from certain States and President Trump is elected.

21 Dr. Eastman, on the bottom of page 4 of your memo, did you advise the President
22 of the United States that if State legislatures in contested States certified the Trump
23 electors, the Vice President could count those electors and, quote, "Trump wins," close
24 quote?

25 A Fifth.

1 Q And, again, just so I understand, you're invoking your Fifth Amendment right
2 against self-incrimination in refusing to answer the question of whether you advised the
3 President of the United States that if State legislatures from contested States certified the
4 Trump electors, the Vice President could count those electors and Trump wins.

5 A I'm invoking my Fifth Amendment, which specifically says in its text not to be
6 a witness -- compelled to be a witness against myself.

7 Q On the bottom of page 4, did you advise the President of the United States
8 that even if the seven States did not send alternate slates of electors, Vice President
9 Pence, nonetheless, could still refuse to count electors from those States and declare that
10 Trump wins?

11 A Fifth.

12 Q And, again, you're invoking your Fifth Amendment right against
13 self-incrimination. Is that correct?

14 A The language of the Fifth Amendment is I shall not be compelled to be a
15 witness against myself, and that's what I'm invoking.

16 Q On page 5 of the memo, did you advise the President of the United States
17 that Vice President Pence could refuse to count electors from seven States because of
18 ongoing election disputes and that, therefore, the U.S. House of Representatives would
19 pick the next President, and that under that scenario Trump wins?

20 A Fifth.

21 Q On page 5, did you advise the President of the United States that Vice
22 President Pence could adjourn the joint session of Congress and allow State legislatures
23 to convene and certify alternate slates of electors, allowing President Trump to be
24 re-elected?

25 A Fifth.

1 Q Dr. Eastman, did you discuss this six-page memo with the President of the
2 United States?

3 A Fifth.

4 Mr. Wood. Okay. Next, I'm going to ask you about a January 4th, 2021,
5 meeting with President Trump and the Vice President of the United States, but before I
6 do that, I'm going to pause to see if any members have questions on the six-page memo.

7 Ms. Lofgren. I have a question really related to a prior comment made by our
8 witness.

9 No person shall be held to answer for a capital, or otherwise infamous crime,
10 unless on a presentment or indictment of a grand jury, except in cases arising in the land
11 or naval forces, or in the militia, when in actual service in time of war or public danger;
12 nor shall any person be subject for the same offense to be put twice in jeopardy of life or
13 property; nor shall be compelled in any criminal case to be a witness against himself.

14 Is that in the Fifth Amendment, Dr. Eastman?

15 Mr. Burnham. Madam Congresswoman, I've instructed my client, as I've
16 discussed with your colleagues, I think, before you may have joined, that I've counseled
17 him not to discuss the basis for his invoking the Fifth. I would offer only an --

18 Ms. Lofgren. I'm not asking the basis. I'm just asking, is that what the Fifth
19 Amendment says?

20 Mr. Burnham. I expect he'll invoke his Fifth in response to that question. As far
21 as I could tell, it was quoted correctly, and I would just refer this body to cases such as
22 Watkins from the Supreme Court that hold that the Fifth applies in congressional
23 proceedings, and we're invoking it on that basis today.

24 Ms. Lofgren. I yield back.

25 Mr. Raskin. Could I just follow up on that for a moment?

1 Counsel invoked the bar proceeding which is taking place against Dr. Eastman in
2 California. Is it the bar proceeding that is troubling Dr. Eastman with respect to
3 answering these questions or is it something else, Dr. Eastman?

4 Mr. Burnham. If I could respond to the question. The bar proceeding is just
5 one of many, many bases that led us to take the -- make the invocation we're making
6 here today.

7 Mr. Raskin. Okay. But, Dr. Eastman, you understand that a bar proceeding is
8 civil in nature, do you not?

9 The Witness. Yes.

10 Mr. Raskin. Okay. So when you're asserting the Fifth Amendment, it is with
11 respect to other potential criminal prosecutions. Is that right?

12 The Witness. Fifth.

13 Mr. Raskin. Okay. I yield back.

14 Mr. Wood. Okay. Do any other members have questions?

15 And I think we've noted the members as they have joined. As you can see, Vice
16 Chair Cheney and Mr. Raskin are still on. Ms. Lofgren was on, but may have left. And I
17 believe Mr. Kinzinger might still be on. Nope, Ms. Lofgren and Mr. Kinzinger are both
18 still on.

19 BY MR. WOOD:

20 Q So, Dr. Eastman, I'm now going to ask you some questions about the
21 January 4th, 2021, meeting with President Donald Trump and others in the Oval Office.

22 Dr. Eastman, did you meet with the President of the United States on January 4th,
23 2021, to provide advice regarding the Vice President's role in counting the electoral votes
24 on January 6th?

25 A Fifth.

1 Q Dr. Eastman, if I could turn your attention to exhibit 17. This is a National
2 Review article dated October 22nd, 2021, by John McCormack. The title is, "John
3 Eastman vs. The Eastman Memo."

4 And the bottom of page 7 says, "A source close to Pence tells National Review that
5 the position of Trump and some of his advisers was initially to pressure Pence to reject
6 outright the count of the electoral college votes in decisive States."

7 Dr. Eastman, did President Trump pressure Vice President Pence to reject outright
8 the electors from contested States?

9 A Fifth.

10 Q And, Dr. Eastman, I want to be clear here. I'm not asking about anything
11 you did. I'm asking whether or not President Donald Trump pressured Vice President
12 Pence to reject outright the electors from contested States?

13 A Fifth.

14 Q That same article on page 9 states, "According to the source close to Pence,
15 quote" -- and now it's quoting a source -- "'In the last 24 hours or so [before January 6th],
16 it became crystal clear finally -- even though the Vice President had been telling them this
17 for three weeks -- it's finally sunk in he wasn't going to do that. So, then their position
18 moved to: Well, would you delay it and send it back [to the State legislatures]?" close
19 quote.

20 And I'll note there were some brackets in there.

21 Dr. Eastman, did President Donald Trump change his position from pressuring the
22 Vice President to reject electors to instead pressuring Vice President Pence to delay
23 certification and send the election back to State legislatures?

24 A Fifth.

25 Q And again, Dr. Eastman, I'm not asking here about your conduct. I'm asking

1 whether President Donald Trump changed his position from pressuring Vice President
2 Pence to reject electors to instead pressuring Vice President Pence to delay certification
3 and send the election back to State legislatures.

4 A Fifth.

5 Q Dr. Eastman, did your position change from the position in your first memo,
6 what I referred to as the two-page memo, that the Vice President could reject electors, to
7 the position that the Vice President should instead delay certification beyond January 6th
8 to give States more time to send alternate slates of electors?

9 A Fifth.

10 Q Dr. Eastman, regarding your position that the certification of the election
11 should be delayed beyond January 6th, isn't that exactly what the rioters who attacked
12 the Capitol were trying to accomplish on January 6th?

13 A Fifth.

14 Mr. Wood. I'll pause there to see if there are other questions regarding that
15 meeting with the President in the Oval Office.

16 No members?

17 Any staff?

18 Okay.

19 Dr. Eastman, I'm now going to ask you about a meeting that we understand you
20 had with the staff to Vice President Pence the next day, so January 5th, 2021.

21 Dr. Eastman, did you meet with Marc Short, chief of staff for the Vice President,
22 and Greg Jacob, counsel to the Vice President, in the Eisenhower Executive Office Building
23 on January 5th, 2021?

24 The Witness. Fifth.

1

2 [1:57 p.m.]

3 BY MR. WOOD:

4 Q Dr. Eastman, what did you discuss with Vice President Pence's staffers?

5 A Fifth.

6 Q Dr. Eastman, if you look at exhibit 13, there's a Washington Post article
7 dated October 29th, 2021. It says, "Read: Pence aide Greg Jacob's draft opinion article
8 denouncing Trump's outside lawyers."

9 Just to make clear on the record, what this appears to be is The Washington Post
10 reprinting something written by Greg Jacob who previously had been counsel to Vice
11 President Pence.

12 In that piece, Mr. Jacob writes that, quote, "One of the President's key outside
13 lawyers agreed with me the day before the events at the Capitol that not a single
14 member of the Supreme Court would support his position," close quote.

15 Dr. Eastman, when Mr. Jacob refers to one of the President's key outside lawyers,
16 was he referring to you?

17 A Fifth.

18 Q Dr. Eastman, did you, in fact, agree with Mr. Jacob that not a single member
19 of the Supreme Court would support your position?

20 A Fifth.

21 Q And, Dr. Eastman, which position was that that Mr. Jacobs said not a single
22 member of the Supreme Court would support?

23 A Fifth.

24 Q Mr. Jacob then writes that this outside lawyer, quote, "acknowledged that
25 230 years of historical practices were firmly against it, and that no reasonable person

1 would create a rule that invested a single individual with unilateral authority to determine
2 the validity of disputed electoral votes for President of the United States," close quote.

3 Did Mr. Jacob accurately describe what you said to him on January 5th?

4 A Fifth.

5 Q Dr. Eastman, Mr. Jacob then writes that a fallback plan of this lawyer he
6 refers to was that the Vice President could instead stop the electoral vote count and refer
7 it out to the States.

8 Of this fallback plan, Mr. Jacob writes, quote, "That suggestion violated several
9 provisions of the Electoral Count Act, had no historical analog, and would deprive
10 Congress of its historical and statutory role in vote counting decisions," close quote.

11 Dr. Eastman, how do you respond to Mr. Jacob's description of the legal advice
12 you gave the President and Vice President of the United States?

13 A Fifth.

14 Q Dr. Eastman, at the beginning of the meeting on January 5th, 2021, with
15 Marc Short and Greg Jacob, did you, on behalf of the President of the United States, ask
16 that the Vice President reject electors from contested States on January 6th, 2021?

17 A Fifth.

18 Q And just so I understand it, in response to the last question, you're invoking
19 your Fifth Amendment right not to be a witness against yourself?

20 A Yes.

21 Mr. Wood. Okay. Do any members have any questions?

22 Mr. Raskin. I have a question. I'd like to ask Dr. Eastman about the judicial
23 authority going up to January 6th.

24 More than 60 Federal and State courts have rejected every claim of electoral fraud
25 and corruption advanced by the Trump campaign.

1 Did you have any reason then, or do you have any reason today, to believe that
2 there was electoral fraud and corruption in the States that materially affected the
3 outcome of the Presidential election?

4 Mr. Burnham. If I could have the committee's indulgence.

5 [Discussion off the record.]

6 The Witness. I claim the Fifth.

7 Mr. Raskin. Attorney General Bill Barr famously called Donald Trump's claims of
8 electoral fraud and corruption "bullshit." Do you disagree with that conclusion?

9 The Witness. Fifth.

10 Mr. Raskin. I yield back.

11 Mr. Wood. Do any other members have questions? Okay.

12 Dr. Eastman, I've asked you a series of questions about the January 5th meeting
13 with Greg Jacob and Marc Short.

14 Dr. Eastman, did Greg Jacob on January 6th send you an email summarizing your
15 conversation?

16 The Witness. Fifth.

17 Mr. Wood. Dr. Eastman, would you provide to the select committee the email
18 that Greg Jacob sent you on January 6th summarizing your January 5th conversation?

19 Mr. Burnham. I beg your pardon. Could you repeat the last question?

20 Mr. Wood. Yes.

21 BY MR. WOOD:

22 Q I was asking Dr. Eastman, would he provide to the select committee the
23 January 6th email from Greg Jacob to Dr. Eastman that summarized their January 5th
24 conversation?

25 A Fifth.

1 Q And is it your position that the mere act of producing such email could tend
2 to incriminate you?

3 A On advice of counsel, I invoke the Fifth.

4 Q Okay. I'm now going to ask you some questions about the January 6th,
5 2021, speech at the so-called "Stop the Steal" rally.

6 Dr. Eastman, did you speak at the White House Ellipse before a large crowd on
7 January 6th, 2021?

8 A Fifth.

9 Q Okay. Dr. Eastman, if I could turn your attention to tab 12. This is a
10 transcript of speeches given at the Ellipse on January 6th, 2021.

11 At the bottom of page 1, Mayor Rudy Giuliani -- I recognize this is Mayor Giuliani,
12 not you -- but Mayor Giuliani says, "Last night one of the experts that has examined these
13 crooked Dominion machines has absolutely what he believes is conclusive proof that in
14 the last 10 percent, 15 percent of the vote counted, the votes were deliberately changed.
15 By the same algorithm that was used in cheating President Trump and Vice President
16 Pence. Same algorithm, same system, same thing was done with the same machines."

17 Dr. Eastman, do you have any evidence to support Mayor Giuliani's allegations
18 that the Dominion voting machine algorithm switched votes from President Trump to
19 Vice President Biden?

20 A Fifth.

21 Q Dr. Eastman, in the middle of the second page of that transcript -- and now
22 it's quoting you -- it says, "We know there was fraud, traditional fraud that occurred.
23 We know that dead people voted. But we now know, because we caught it live last time
24 in real time, how the machines contributed to that fraud," close quote.

25 Dr. Eastman, what evidence do you have to support your statement that there

1 was traditional fraud?

2 A Fifth.

3 Q Dr. Eastman, what evidence do you have that dead people voted?

4 A Fifth.

5 Q Dr. Eastman, are you aware that the secretary of state of Georgia conducted
6 a review of this allegation and found that only four votes were cast in the name of dead
7 people?

8 A Fifth.

9 Q Dr. Eastman, when you said, quote, "how the machines contributed to that
10 fraud," close quote, do you have evidence that Dominion voting machines changed votes
11 from President Donald Trump to Vice President Biden?

12 A Fifth.

13 Q Dr. Eastman, you made that statement in front of tens of thousands of
14 people and many, many television cameras. It's now your position that you will not
15 answer the select committee's question regarding the factual basis for alleging that
16 machines contributed to fraud?

17 A Fifth.

18 Q Dr. Eastman, what factual research did you do regarding the voting machines
19 before telling tens of thousands of angry people that the machines contributed to fraud?

20 A Fifth.

21 Q Okay. Dr. Eastman, at the bottom of page 2 of the transcript you state, and
22 this is a fairly lengthy quote, "And let me, as simply as I can, explain it. You know the old
23 way was to have a bunch of ballots sitting in a box under the floor, and when you needed
24 more, you pulled them out in the dark of night. They put those ballots in a secret folder
25 in the machines, sitting there waiting until they know how many they need. And then

1 the machine, after the close of polls, we now know who's voted, and we know who
2 hasn't. And I can now in that machine match those unvoted ballots with the unvoted
3 voter and put them together in the machine.

4 "And how do we know that happened last night in real time? You saw when it
5 got to 99 percent of the vote total, and then it stopped. The percentage stopped, but
6 the votes didn't stop.

7 "What happened, and you don't see this on FOX or any of the other stations, but
8 the data shows that the denominator, how many ballots remain to be counted, how else
9 do you figure out the percentage that you have, how many remain to be counted, that
10 number started moving up. That means they were unloading the ballots from that
11 secret folder, matching them to the unvoted voter, and, voila, we have enough votes to
12 barely get over the finish line," close quote.

13 Dr. Eastman, what evidence do you have to support your allegation that there
14 were secret folders of ballots that were matched against the names of people who had
15 not voted and then loaded into the machines?

16 A Fifth.

17 Q Dr. Eastman, what factual research did you do regarding this allegation of
18 secret folders of ballots before tens of thousands -- before you made it before tens of
19 thousands of angry people on January 6th?

20 A Fifth.

21 Q On page 3 of the transcript you state, quote, "And all we are demanding of
22 Vice President Pence is this afternoon at 1 o'clock he let the legislators of the State look
23 into this so we get to the bottom of it, and the American people know whether we have
24 control of the direction of our government or not," close quote.

25 Dr. Eastman, did you call upon Vice President Pence to delay certification so State

1 legislators could have more time to send alternate slates of electors?

2 A Fifth.

3 Q Dr. Eastman, what did you think would happen next if State legislators sent
4 alternate slates of electors?

5 A Fifth.

6 Q Dr. Eastman, who asked you to speak at the Ellipse on January 6th?

7 A Fifth.

8 Q Dr. Eastman, were you told in advance that you would be speaking at the
9 Ellipse on January 6th?

10 A Fifth.

11 Q Dr. Eastman, did you have time to prepare your remarks before you were
12 asked to speak on the Ellipse on January 6th?

13 A Fifth.

14 Q Dr. Eastman, do you know whether Senators Hawley and Cruz were invited
15 to speak on the Ellipse on January 6th?

16 A Fifth.

17 Q Dr. Eastman, do you know why Senators Hawley and Cruz did not, in fact,
18 speak on the Ellipse on January 6th?

19 A Fifth.

20 Mr. Wood. Okay. I'm going to pause here and see if any members have
21 questions about the speeches on the Ellipse.

22 No?

23 Staff?

24 Okay.

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BY MR. WOOD:

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Q Dr. Eastman, I'm going to turn your attention back to exhibit 13, which again is the Washington Post publication of Greg Jacob's draft opinion article dated October 29th, 2021.

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In that piece, Mr. Jacob writes that one of the President's lawyers emailed him during the assault on the Capitol, quote, "The 'siege' is because YOU and your boss did not do what was necessary to allow this to be aired in a public way so that the American people can see for themselves what happened," close quote.

10

11

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14

Dr. Eastman, are you the person who emailed the Vice President's counsel on January 6th to say that the siege was because of him and his boss -- meaning the Vice President of the United States -- for not doing what was necessary to allow this to be aired in a public way so that the American people can see for themselves what happened?

15

16

17

A Fifth.

Q Dr. Eastman, do you dispute the accuracy of the quote that Greg Jacob provided to The Washington Post?

18

19

20

21

A Fifth.

Q Dr. Eastman, did you email Greg Jacob on January 6th, after the riot had ended, to say that the Vice President still should send the election back to the States rather than certifying it?

22

23

24

25

A Fifth.

Mr. Wood. Anybody else have anything?

Okay. I'm at the end of my prepared questions. Do any members of the committee have questions on that or anything else for Dr. Eastman?

1 Yes. Mr. Raskin.

2 Mr. Raskin. Thank you.

3 Going back to the short memorandum, after recommending that the electoral
4 votes from six or seven States be returned and rejected by Congress, you wrote in that
5 memorandum, Dr. Eastman, "Pence should do this without asking permission -- either
6 from a vote of the joint session or from the Court." And you concluded, "The fact is that
7 the Constitution assigns this power to the Vice President as the ultimate arbiter."

8 What was your basis for writing that?

9 The Witness. Fifth.

10 Mr. Raskin. You write in the longer 6-page memorandum that, "This election
11 was stolen by a strategic Democrat plan to systematically flout existing election laws for
12 partisan advantage."

13 What is your basis for having written that?

14 The Witness. Fifth.

15 Mr. Raskin. Okay. Your client, President Trump, has said, "The mob takes the
16 Fifth. If you're innocent, why are you taking the Fifth Amendment?"

17 Do you agree with that?

18 The Witness. Fifth.

19 Mr. Raskin. Because I do not.

20 Okay. All right. I yield back.

21 Mr. Wood. Do any other members have questions?

22 Okay. Why don't we take just another 5-minute break, and -- oh. Do you have
23 something to ask.

24 Mr. George. A quick followup. Just a couple questions.

25 In exhibit 14, which is the shorter memorandum that Mr. Raskin was just

1 mentioning, it says at the top that seven States had transmitted dual slates of electors to
2 the President of the Senate.

3 And then in exhibit 15, which is the longer one, on page 2 it says that the Trump
4 electors in the above six States, plus New Mexico -- meaning Georgia, Pennsylvania,
5 Wisconsin, Michigan, Arizona, Nevada, and New Mexico -- met on December 14th to cast
6 their electoral votes and transmitted those votes to the President of the Senate -- in
7 parentheses -- (Vice President Pence).

8 Do you know whether Trump electors met in any of those States to send those
9 elector -- alternate electoral votes?

10 The Witness. Fifth.

11 Mr. Wood. Dr. Eastman, do you believe that the Electoral Count Act is
12 constitutional?

13 The Witness. Fifth.

14 Mr. Wood. Dr. Eastman, do you have any recommendations to the select
15 committee on how it can help prevent the horrific events of January 6th from ever
16 happening again?

17 The Witness. Fifth.

18 Mr. Wood. Okay. Why don't we take a 5-minute break to see if there are any --

19 Ms. Cheney. [Inaudible.]

20 Mr. Wood. Yes. Go ahead, Representative Cheney.

21 Ms. Cheney. I have a quick question.

22 Dr. Eastman, do you believe that the violence on January 6th was justified?

23 The Witness. Fifth.

24 Ms. Cheney. I yield back.

25 Mr. Wood. Okay. We'll take a 5-minute break just to see if there's anything we

1 want to cover before we leave for the day, and we'll go off the record now.

2 [Recess.]

3 Mr. Wood. Okay. We're back, and we'll go back on the record.

4 We have just a couple of topics that my colleague, Dan George, wanted to ask
5 about, and then at least one member had some questions to wrap up.

6 BY MR. GEORGE:

7 Q Dr. Eastman, were you in attendance at a December 21st meeting at the
8 White House with Members of Congress and the President?

9 A Fifth.

10 Q On January 2nd, 2021, it's been reported that you participated in a briefing
11 with members of State legislatures as well as others, including officials from the campaign
12 and the President.

13 Were you a participant to that Zoom meeting or call?

14 A Fifth.

15 Q On that call you reportedly stated, quote, "The duty of the legislature is to fix
16 this, this egregious conduct, and make sure that we're not putting in the White House
17 some guy that didn't get elected."

18 Is that an accurate quote from your statements during this briefing?

19 A Fifth.

20 Q Did you speak with any of the State legislators who participated in that call
21 afterwards?

22 A Fifth.

23 Mr. Wood. Okay. Mr. Raskin has some questions.

24 Mr. Raskin. Thank you.

25 Dr. Eastman, the effort to force Vice President Pence to reject electoral college

1 votes was surrounded, as you know, by a lot of violence.

2 Do you believe that violence was necessary to succeed in the plan of prevailing in
3 the electoral college for Donald Trump?

4 The Witness. Fifth.

5 Mr. Raskin. Did you participate in any conversations about the demonstrations
6 that became a violent riot?

7 The Witness. Fifth.

8 Mr. Raskin. Okay. I yield back.

9 Mr. Wood. Do any other members have questions? Okay.

10 Dr. Eastman, is there anything else that you think that the select committee
11 should know.

12 Mr. Burnham. No, thank you. We're done.

13 Mr. Wood. Okay. So with that, we will recess the deposition subject to the call
14 of the chair. And we'll go off the record now.

15 [Whereupon, at 2:24 p.m., the deposition was concluded.]

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Certificate of Deponent/Interviewee

I have read the foregoing ____ pages, which contain the correct transcript of the answers made by me to the questions therein recorded.

Witness Name

Date

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11 Counsel for the Congressional Defendants

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **SOUTHERN DIVISION**

15 JOHN C. EASTMAN

16 Plaintiff,

17 vs.

18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.

Case No. 8:22-cv-00099-DOC-DFM

20
21
22
23
24
25 **Exhibit B**
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27
28

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4 SELECT COMMITTEE TO INVESTIGATE THE
5 JANUARY 6TH ATTACK ON THE U.S. CAPITOL,
6 U.S. HOUSE OF REPRESENTATIVES,
7 WASHINGTON, D.C.

8

9

10

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12 INTERVIEW OF: RICHARD PETER DONOGHUE

13

14

15 Friday, October 1, 2021

16

17 Washington, D.C.

18

19

20 The interview in the above matter was held via Webex, commencing at 10:02 a.m.

21 Present: Representatives Schiff, Lofgren, Murphy, Raskin, and Cheney.

1 Appearances:

2

3

4

5 For the SELECT COMMITTEE TO INVESTIGATE

6 THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL:

7

8 TIM HEAPHY, CHIEF INVESTIGATIVE COUNSEL

9 MARC HARRIS, SENIOR INVESTIGATIVE COUNSEL

10 SOUMYA DAYANANDA, SENIOR INVESTIGATIVE COUNSEL

11 JOE MAHER, DETAILEE

12 DAN GEORGE, SENIOR INVESTIGATIVE COUNSEL

13 JACOB NELSON, RESEARCHER

14 JENNA HOPKINS, PROFESSIONAL STAFF

15 EVAN MAULDIN, CHIEF CLERK

16 KRISTIN AMERLING, DEPUTY STAFF DIRECTOR

17 SAMANTHA STILES, CHIEF ADMINISTRATIVE OFFICER

18

19 For the DEPARTMENT OF JUSTICE:

20

21 KIRA ANTELL, OFFICE OF LEGISLATIVE AFFAIRS

22 BRAD WEINSHEIMER, OFFICE OF THE DEPUTY ATTORNEY GENERAL

1

2 For RICHARD PETER DONOGHUE:

3

4 GREG ANDRES

5 CHARLES KLUG

6 KATHERINE SWAN

7 BROOK JACKLING

8 Davis Polk

9 901 15th Street, NW

10 Washington, D.C. 20005

1 that they came up in subsequent conversations with the President. And DAG Rosen and
2 I essentially told him, "We looked into that, and it's just not true."

3 Ms. Cheney. Okay. So he was informed?

4 Mr. Donoghue. I told the President myself that several times, in several
5 conversations, that these allegations about ballots being smuggled in in a suitcase and
6 run through the machines several times, it was not true, that we had looked at it, we
7 looked at the video, we interviewed the witnesses, and it was not true.

8 Ms. Cheney. And that timeframe of those -- when you informed the President,
9 do you have a sense of the dates when that would've occurred?

10 Mr. Donoghue. I believe it was in the phone call on December 27th. It was also
11 in a meeting in the Oval Office on December 31st. I believe I mentioned that specifically
12 both times.

13 Ms. Cheney. Okay.

14 Okay. And then do we have a date for the briefing that you mentioned with AG
15 Barr, Rosen, Wray? I think this would've been the briefing with CISA about the Antrim
16 County.

17 Mr. Donoghue. I don't remember specifically. It may be on a calendar
18 someplace. But we did that somewhere between December 14th and December 18th.
19 Because --

20 Ms. Cheney. Okay.

21 Mr. Donoghue. -- the email from Ken Cuccinelli on December 18th was pursuant
22 to that briefing and the discussion we had at the briefing.

23 Ms. Cheney. Okay.

24 And then, just to note for the record -- and, Tim, you might have done this,
25 but -- the exhibit 3, that email that we received, the subject line here is "From POTUS." I

1 corrupt, that he's asking, essentially, not for you to resolve all of these specific
2 allegations, but just say that the election was corrupt, leave the rest to this political
3 strategy?

4 A Right. So the Department had zero involvement in anyone's political
5 strategy. I think he understood that, right?

6 Q Uh-huh.

7 A So he wanted us to say it was corrupt, you know, for whatever reason. I'll
8 leave that to him or others to explain or determine. But he wanted us to say that it was
9 corrupt.

10 And this was consistent with some things he said at other points about, the
11 Department should publicly say that the election is corrupt or suspect or not reliable. At
12 one point, he mentioned the possibility of having a press conference. We told him we
13 were not going to do that.

14 Q Yeah.

15 A So this was something that was brought up more than once.

16 Q Yeah. So, again, there was a focus on public statements that something
17 was corrupt, as opposed to trying specifically to get to the bottom of the individual
18 allegations.

19 A Right.

20 Q All right. You at this point start talking. Is that right? You
21 directly -- "RPD" I assume, Mr. Donoghue, refers to statements that you now made on the
22 call.

23 A Yes. So I tried to, again, put this in perspective and to try to put it in very
24 clear terms to the President. And I said something to the effect of, "Sir, we've done
25 dozens of investigations, hundreds of interviews. The major allegations are not

1 supported by the evidence developed."

2 We've looked in "Georgia, Pennsylvania, Michigan, Nevada."

3 "We are doing our job. Much of the info you're getting is false." And then I
4 went into, "For instance, this thing from Michigan, this report about 68 percent error
5 rate -- reality is, it was only 0.0063 percent error rate, less than 1 in 15,000."

6 So the President accepted that. He said, "Okay, fine. But what about the
7 others?"

8 And, again, this gets back to the point that there were so many of these
9 allegations that, when you gave him a very direct answer on one of them, he wouldn't
10 fight us on it, but he would move to another allegation.

11 So then I talked a little bit about the Pennsylvania truck driver. This is another
12 allegation that had come up. And this claim was by a truck driver who believed, perhaps
13 honestly, that he had transported an entire tractor-trailer truck full of ballots from New
14 York to Pennsylvania. And this was, again, out there in the public and discussed.

15 And I essentially said, look, we looked at that allegation, we looked "at both ends,"
16 both the people who load the truck and the people who unload the truck, and that that
17 allegation was not supported by the evidence.

18 Again, he said, "Okay." And then he said, "Note, I didn't mention that one.
19 What about the others?"

20 And I said, okay, well, with regard to Georgia, we "looked at the tape, we
21 interviewed the witnesses. There is no suitcase." The President kept fixating on this
22 suitcase that supposedly had fraudulent ballots and that the suitcase was rolled out from
23 under the table. And I said, no, sir, there is no suitcase. You can watch that video over
24 and over; there is no suitcase. There is a wheeled bin where they carry the ballots, and
25 that's just how they move ballots around that facility. There's nothing suspicious about

1 that at all.

2 I told him that there was "no multiple scanning of the ballots." One part of that
3 allegation was that they were taking one ballot and scanning it through three or four or
4 five times to rack up votes presumably for Vice President Biden. I told him that the
5 video did not support that.

6 Then he went off on "double voting," at the top of the next page. He said "dead
7 people" are voting, "Indians are getting paid" to vote. He meant people on Native
8 American reservations. He said, there's "lots of fraud" going on here.

9 Then he said, in Arizona, "I only lost by 9,000 votes. There's clearly more fraud
10 than that" just in Arizona alone.

11 Then he got into these civil cases that were being brought around the country,
12 and he says -- and I think this was in response to DAG Rosen saying, look, the Department
13 has nothing to do with many of these allegations. To the extent you want to challenge
14 the way that the election was conducted in various States -- we understood that there
15 were complaints about the rules being changed by certain State officials after the fact and
16 that it was not done pursuant to State legislatures' power.

17 DAG Rosen tried to say, we, the Department, have nothing to do with that.
18 You're free to bring lawsuits. Your campaign can bring lawsuits. That can be litigated
19 before judges. But we, the Department, don't do that. We do, essentially, criminal
20 investigations and civil-rights matters.

21 And so the President's response was, well, the "judges keep saying, where's the
22 DOJ? Why is the DOJ not filing these cases?" And we both responded, "we," the
23 Department, "are not in a position based on the evidence. We can only act on the
24 actual evidence developed."

25 My next note says, "Told him flat out that much of the information he's getting is

1 false and/or just not supported by the evidence. We look at the allegations but they
2 don't pan out."

3 The President was getting very frustrated. He said, "This is electioneering fraud."

4 And then, again, I have a quote from him: "We have an obligation to tell people
5 that this was an illegal, corrupt election."

6 Then he said, "People tell me Jeff Clark is great" and that "I should put him in.
7 People want me to replace DOJ leadership."

8 At which point I responded, sir, that's fine, you should have the leadership you
9 want, but understand, changing the leadership in the Department won't change anything.
10 The --

11 Q All right. Let me stop you there.

12 A -- Department operates --

13 Q Let me stop you there, Mr. Donoghue. Just two things.

14 So, going back to, "We have an obligation to tell people that this was an illegal,
15 corrupt election," is it fair to say that what he was asking you to do, primarily, was tell
16 people, in some form, a press conference or otherwise, that there was corruption so that
17 some other political strategy could unfold? Was it your impression that the precise ask
18 from the President was more about a public statement than actually the day-to-day
19 investigative work?

20 A I think he probably cared about both of them, but -- I don't want to
21 speculate about what was in his mind, but this is what he said. And I think what you
22 take away from that, logically, is that he wanted the Department to say something
23 publicly.

24 Q Right. So there's pressure on you and Mr. Rosen, to which you push back,
25 to say something publicly, to say something publicly without basis, that there is an illegal,

1 But we weren't reporting back to the White House simply because the President
2 mentioned some allegations.

3 Q I see. It wouldn't be consistent with protocol for you to go back to the
4 President every time something that comes up in a discussion is investigated or resolved?

5 A He didn't instruct us to do that, and we weren't going to do it. So.

6 Q Yeah. All right. I want to turn your attention, if you can now to
7 exhibit 10, which we get back into Mr. Clark. The next day, December 28th, you and Mr.
8 Rosen get an email from Mr. Clark, and he is asking for two urgent action items. Tell us
9 about this email, the two actions that he requested, and what your response was.

10 A Right. So DAG Rosen and I spoke, I think, probably several times on the
11 27th and certainly the 28th because that was a Monday. DAG Rosen and Jeff Clark had
12 a long personal and professional relationship. They had known each other for decades.
13 They had worked at the same law firm together. He knew Jeff Clark much better than I
14 did. And, you know, we discussed why Jeff Clark's name was coming up, why it was
15 coming from the President, why it was coming from this Congressman. And Jeff Rosen
16 said: Well, look, I am going to talk to Jeff Clark to find out what's going on here. We
17 got to get to the bottom of this.

18 So I think he had conversations with Jeff Clark earlier on the 28th. They
19 preceded this email, which came fairly late in the day. I did not talk to Jeff Clark before
20 this.

21 So, at 4:40, I received this email from Jeff Clark. I read it. I read the
22 attachment. I had to read it more than once to make sure I really understood what he
23 was proposing. And then I drafted a response. I don't know where Jeff Rosen was at
24 this point, but I went to his office, and he wasn't there. So I didn't get to discuss my
25 response with him before I sent it. But I sent it out. And then I saw him shortly

1 afterward, and he was very upset by Jeff Clark's request. And he said that he had
2 instructed one of his administrative support personnel to get Jeff Clark in his conference
3 room. He was -- he was a little angry. And he said: I want him down here. We
4 need to talk to this guy and find out what's going on.

5 So I think there's some emails that show up.

6 Q Yeah. And I don't want to jump ahead too much, Mr. Donoghue, because I
7 want to get to that conversation. But let's go back to Mr. Clark's email. The first thing
8 he asks of you is: I would like to have your authorization -- "you" meaning you and Mr.
9 Rosen -- to get a classified briefing tomorrow from ODNI led by DNI Ratcliffe on foreign
10 election interference issues. And he mentions activating the IEEPA and 2018 EO powers
11 about the Dominion machine access to the internet through a smart thermostat with a
12 net connection trail leading back to China. He is essentially asking if you can get a
13 briefing about this allegation of Chinese control of Dominion machines through a
14 thermostat. Did that strike you as odd, and what was your reaction to that specific
15 request?

16 A Yes, it struck me as odd. I won't go into details, but we received briefing
17 about what the IC, the intelligence community, knew about the election in advance.
18 This was inconsistent with what we had been told. And I had not heard anything about
19 smart thermostats and internet connections leading back to China and things like that.
20 So the whole thing struck me as very odd.

21 Q Yeah, and that Mr. Clark, the head -- acting head of the Civil Division is asking
22 for a classified briefing with the Director of National Intelligence about this allegation.
23 That also procedurally was odd?

24 A Yes.

25 Q Okay. He also then -- the second ask is this draft letter, which I believe is

1 attached to the email that he sends you and Mr. Rosen. And that letter is a draft letter
2 that you and Mr. Rosen and he, Mr. Clark, would sign to the Governor, the Speaker of the
3 House, and the president pro tempore of the Georgia legislature, essentially asking them
4 to stand down and not certify the results of their election. How did that request strike
5 you, and what did you do about it?

6 A It struck me as very strange and somewhat alarming. And, as I said, I had
7 to read it more than once to make sure I understood what he was proposing here. It
8 was completely inconsistent with the Department's role, generally. And it was
9 inconsistent with what our investigations, to date, had revealed. And so I think I made
10 my views known in the email response I sent to him.

11 Q Yeah, which we'll get to. To be clear, he asks that -- a version of this letter
12 be sent to each relevant State. So was his request to send this letter, drafted for
13 Georgia, not just to Georgia officials but to officials in other States where there had been
14 allegations of election fraud?

15 A Yes. That was my understanding of his proposal.

16 Q All right. He writes that he put it together quickly -- "it" being the
17 letter -- but other messages suggest that it may have been drafted by Ken Klukowski.
18 Do you know Ken Klukowski and what his role may have been within the Department's
19 Civil Division at that time?

20 A No. I don't.

21 Q Okay. Did you know whether or not Mr. Clark was talking to anyone else in
22 the Department about this letter or other election issues?

23 A No. I had no reason to think that.

24 Q All right. So you respond, Mr. Donoghue. We get to your response, which
25 is tab 11. You drafted a pretty comprehensive, specific response reflecting your

1 frustration on the 28th, just about a little over an hour later, at 5:50. I won't ask you to
2 read it to us, but just summarize for us your overall reaction and what's reflected in the
3 email.

4 A I tried to make it clear to him that this is not the Department's role. Again,
5 we don't do quality control for State elections. The States run the elections. We
6 investigate crimes, and we look at civil rights matters. So I tried to make it clear to him
7 that this is simply not our role, to recommend to the States what they do and, secondly,
8 that we have conducted investigations and that the factual claim he was making here was
9 simply not accurate. And so I reminded him that AG Barr had made public statements
10 on this point, less than a week prior, or, I guess, exactly a week prior was the last time he
11 had made some public statements, and that this was just completely unacceptable and
12 not anything that I would ever sign. And I know Jeff Clark -- or Jeff Rosen, rather, had
13 the same response.

14 Q You say in the first paragraph: There's no chance that I would sign this
15 letter or anything remotely like this. You sort of lead with the conclusion. You then, in
16 the first paragraph, challenge his factual assumptions. You said: The investigations
17 that I am aware of relate to suspicions of misconduct that are of such a small scale that it
18 would simply not impact the outcome of the election. AG Barr made that clear to the
19 public only last week, and I am not aware of intervening developments that would change
20 that conclusion.

21 So, setting aside whether it would be appropriate for the Department to tell a
22 State what to do, you're challenging -- is it fair to say you're challenging the factual basis
23 included in his letter to the State official?

24 A That's right. And he himself, Jeff Clark, would have no way of knowing
25 what investigations we had conducted or not because he was not involved in election

1 matters.

2 Q Right. You then, in the second paragraph, Mr. Donoghue, you say: I
3 cannot imagine a scenario in which the Department would recommend that a State
4 would assemble its legislature to determine whether already certified election results
5 should somehow be overridden by legislative action. This would be a grave step for the
6 Department to take and could have tremendous constitutional, political, and social
7 ramifications for the country.

8 Is that your sort of procedural response here that this is just not the Department's
9 role to be quality control for State elections and tell a State legislature what to do?

10 A Yes. That's the point I was making. Yes.

11 Q All right. So, when you and Mr. Rosen get this letter, you compose the
12 response. You indicated previously that Mr. Rosen essentially summons Mr. Clark up to
13 the 5th floor for a face-to-face meeting. Does that meeting then occur?

14 A Yes. He is on the 4th floor. But, yes, in the DAG conference on the 4th
15 floor.

16 Q Okay. So you are personally present, Mr. Donoghue, for that meeting
17 between Clark and Rosen?

18 A Yes. It was the three of us.

19 Q Tell us about the conversation there with Mr. Clark.

20 A Mr. Clark explained that he had been looking at some of these allegations on
21 his own, that he had information, that he had concerns about the reliability of the
22 outcome of the election. He mentioned this smart thermostat thing. It was clear that
23 he had been reading some affidavits that were attached to some of the civil filings in
24 some of the cases that were pending or already dismissed around the country. He had
25 various theories that seemed to be derived from the internet about why the outcome of

1 so when you joined at the President's invitation?

2 A That's right.

3 Q All right. And who was inside the meeting when you got there?

4 A When I entered the Oval Office, the President was behind the desk, and it
5 was Pat Cipollone, Pat Philbin, a White House lawyer named Eric Herschmann, Jeff Clark,
6 Jeff Rosen, Steve Engel, and then me.

7 Q Are you sure Mr. Herschmann was a White House lawyer?

8 A He was a lawyer who worked at the White House. I'm not -- initially I
9 thought he worked in the White House Counsel's Office, but I think later someone told
10 me that wasn't the case. I don't remember. His role was never clear to me. I know
11 he was a lawyer from New York. I know he had been a prosecutor at some point. But I
12 don't know what his title exactly was. I'd seen him in some meetings previously, but I
13 didn't know exactly what his role was.

14 Q Okay.

15 All right. And, again, no notes of this meeting. Is that right? You don't take
16 notes -- you were inside the Oval Office and, you indicated before, didn't take notes when
17 you were in discussions inside that office.

18 A No.

19 Q All right. Well, tell us what you remember, then, about the conversation.

20 What was the topic when you arrived, and how did it evolve from there?

21 A The meeting took about another 2-1/2 hours from the time I entered. It
22 was entirely focused on whether there should be a DOJ leadership change. So the
23 election allegations played into this, but they were more background than anything else.

24 And the President was basically trying to make a decision and letting everyone
25 speak their minds. And it was a very blunt, intense conversation that took several

1 hours. And Jeff Clark certainly was advocating for change in leadership that would put
2 him at the top of the Department, and everyone else in the room was advocating against
3 that and talking about what a disaster this would be.

4 Q What were Clark's purported bases for why it was in the President's interest
5 for him to step in? What would he do, how would things change, according to Mr. Clark
6 in the meeting?

7 A He repeatedly said to the President that, if he was put in the seat, he would
8 conduct real investigations that would, in his view, uncover widespread fraud; he would
9 send out the letter that he had drafted; and that this was a last opportunity to sort of set
10 things straight with this defective election, and that he could do it, and he had the
11 intelligence and the will and the desire to pursue these matters in the way that the
12 President thought most appropriate.

13 Q You said everyone else in the room was against this. That's Mr. Cipollone,
14 Mr. Philbin, Mr. Herschmann, you, and Mr. Rosen. What were the arguments that you
15 put forth as to why it would be a bad idea for him to replace Rosen with Clark?

16 A So, at one point early on, the President said something to the effect of,
17 "What do I have to lose? If I do this, what do I have to lose?" And I said,
18 "Mr. President, you have a great deal to lose. Is this really how you want your
19 administration to end? You're going hurt the country, you're going to hurt the
20 Department, you're going to hurt yourself, with people grasping at straws on these
21 desperate theories about election fraud, and is this really in anyone's best interest?"

22 And then other people began chiming in, and that's kind of the way the
23 conversation went. People would talk about the downsides of doing this.

24 And then -- and I said something to the effect of, "You're going to have a huge
25 personnel blowout within hours, because you're going to have all kinds of problems with

1 resignations and other issues, and that's not going to be in anyone's interest."

2 And so the President said, "Well, suppose I do this" -- I was sitting directly in front
3 of the President. Jeff Rosen was to my right; Jeff Clark was to my left. The President
4 said, "Suppose I do this, suppose I replace him," Jeff Rosen, "with him," Jeff Clark, "what
5 do you do?" And I said, "Sir, I would resign immediately. There is no way I'm serving
6 1 minute under this guy," Jeff Clark.

7 And then the President turned to Steve Engel, and he said, "Steve, you wouldn't
8 resign, would you?" And Steve said, "Absolutely I would, Mr. President. You'd leave
9 me no choice."

10 And I said, "And we're not the only ones. You should understand that your
11 entire Department leadership will resign. Every AAG will resign." I didn't tell him
12 about the call or anything, but I made it clear that I knew what they were going to do.

13 And I said, "Mr. President, these aren't bureaucratic leftovers from another
14 administration. You picked them. This is your leadership team. You sent every one
15 of them to the Senate; you got them confirmed. What is that going to say about you,
16 when we all walk out at the same time? And I don't even know what that's going to do
17 to the U.S. attorney community. You could have mass resignations amongst your
18 U.S. attorneys. And then it will trickle down from there; you could have resignations
19 across the Department. And what happens if, within 48 hours, we have hundreds of
20 resignations from your Justice Department because of your actions? What does that say
21 about your leadership?"

22 So we had that part of the conversation. Steve Engel, I remember, made the
23 point that Jeff Clark would be leading what he called a graveyard; there would be no one
24 left. How is he going to do anything if there's no leadership really left to carry out any of
25 these ideas?

1 I made the point that Jeff Clark is not even competent to serve as the Attorney
2 General. He's never been a criminal attorney. He's never conducted a criminal
3 investigation in his life. He's never been in front of a grand jury, much less a trial jury.

4 And he kind of retorted by saying, "Well, I've done a lot of very complicated
5 appeals and civil litigation, environmental litigation, and things like that." And I said,
6 "That's right. You're an environmental lawyer. How about you go back to your office,
7 and we'll call you when there's an oil spill."

8 And so it got very confrontational at points.

9 And Pat Cipollone weighed in at one point, I remember, saying, you know, "That
10 letter that this guy wants to send, that letter is a murder-suicide pact. It's going to
11 damage everyone who touches it. And we should have nothing to do with that letter.
12 I don't ever want to see that letter again." And so we went along those lines.

13 I remember Eric Herschmann chimed in several times, saying that, whatever Jeff
14 Clark wanted to do or thought he could do, there was no reason to think he could really
15 do it.

16 I remember saying at some point that, you know, Jeff wouldn't even know how to
17 find his way to Chris Wray's office, much less march in there and direct the FBI what to
18 do, and that, if you walked into Chris Wray's office, he wouldn't even know who you are.

19 So we had these conversations that went around and around and were very blunt
20 and direct. And that went on for 2-1/2 hours.

21 Q At one point, did the President disparage Mr. Rosen or talk about
22 Mr. Rosen's inaction or unwillingness to do anything about the election?

23 A He did say several times, "You two," pointing at Mr. Rosen and me, "You two
24 haven't done anything. You two don't care. You haven't taken appropriate actions.
25 Everyone tells me I should fire you," and things of that nature.

1 He came back to that at the very end when he decided against a leadership
2 change. And he announced that, and then he came back to that point and he said, "And
3 I know that these two here, they're not going to do anything. They're not going to fix
4 this. But that's the way it is, and I'm going to let it go anyway."

5 Q Did Mr. Cipollone say anything about what he would do with respect to a
6 potential resignation if the President made this change?

7 A He did at some point. I guess that was on the heels of us talking about how
8 there would be resignations in the Department. And I think Pat Cipollone said, "Well,
9 I'm not going to stand for this, I'm not going to be here if this happens either."

10 Q So he said he would resign or not stand for it, would not be here, if the
11 President made this change.

12 A Right.

13 Q Who, Mr. Donoghue, was, sort of, the primary advocate or voice against the
14 leadership change? Was it you personally, or was it sort of a consensus and everyone
15 was sort of equally chiming in? Or just give me a better sense as to, sort of, who was
16 doing most of the talking and was the most strenuous advocate.

17 A It was definitely a consensus. We were all on the same page except for Jeff
18 Clark. But we played different roles.

19 For one thing, Jeff Rosen was in a bad position because he was defending his own
20 job. So anything he said, obviously, was very self-interested. And so he wasn't in the
21 best position to make some of these arguments. And by demeanor, he just has a
22 different demeanor, as does Pat Cipollone, as does Steve Engel. So everyone played
23 their own role. My demeanor is more aggressive and more blunt, and so I played that
24 role.

25 And so everyone was on the same page, advocating for the same thing in very

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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **SOUTHERN DIVISION**

15 JOHN C. EASTMAN

16 Plaintiff,

17 vs.

18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.

20 Case No. 8:22-cv-00099-DOC-DFM

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25 **Exhibit C**
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SELECT COMMITTEE TO INVESTIGATE THE
JANUARY 6TH ATTACK ON THE U.S. CAPITOL,
U.S. HOUSE OF REPRESENTATIVES,
WASHINGTON, D.C.

INTERVIEW OF: JEFFREY A. ROSEN

Wednesday, October 13, 2021

Washington, D.C.

The interview in the above matter was held in Room 4480, O'Neill House Office Building, commencing at 10:00 a.m.

Present: Representatives Murphy, Luria, and Cheney.

Appearances:

For the SELECT COMMITTEE TO INVESTIGATE

THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL:

TIM HEAPHY, CHIEF INVESTIGATIVE COUNSEL

SOUMYA DAYANANDA, SENIOR INVESTIGATIVE COUNSEL

EVAN MAULDIN, CHIEF CLERK

SAMANTHA STILES, CHIEF ADMINISTRATIVE OFFICER

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DAMON MARKS, RESEARCHER

For the DEPARTMENT OF JUSTICE:

KIRA ANTELL

BRAD WEINSHEIMER

EMILY LOEB

For JEFFREY A. ROSEN:

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He also defended his own credentials against some of the attacks that were being made. He argued that the rest of the room were being self-defeating, you know, that, if you don't try it, you don't know what's going to happen, I think was the nature of that.

Let me think. This was a very, very long meeting.

Q Yeah.

A And everybody spoke at one time or another. Some people spoke repeatedly. The President interjected some places. There were a few places he spoke at greater length, but a lot of the meeting, he let other people talk.

Q Uh-huh.

A And so I'm trying to remember the different places that Jeff Clark spoke. Because he spoke more than once. And I have more the image, that he would get in a debate, you know, that Rich Donoghue and he would have back-and-forth, and Steve Engel and he would have back-and-forth, and Eric Herschmann and he would have back-and-forth --

Q Yeah.

A -- that that occurred numerous times.

But the overall substance was, different people in the room were saying, this is not legally well-founded, this is not the Department's role, this letter is inappropriate. They challenged Jeff Clark's qualifications to even be making these arguments. They challenged both whether he was qualified to be Attorney General but also is he even qualified to address election fraud, you know, even from his current position, let's say.

Q Uh-huh.

A And so there's this range of issues.

Now, at more than one juncture, a number of people do raise that, if this goes ahead, there are going to be resignations. And I think lots of people raised that. I let

other people speak to that, for obvious reasons, that they were speaking in support of me, so it wasn't my place to speak to. Jeff Clark didn't speak to that, but I think almost everybody else did. I remember Pat Cipollone spoke to it, Rich Donoghue.

There was one moment where I remember Steve Engel, and Steve was explaining why he thought it was inappropriate for the Department of Justice to be sending a letter to Georgia and that he had multiple reasons for that. And he commented that, if it went, that there would be resignations. And, again, this is in substance. I don't remember the exact words.

And then Steve Engel, when he was saying that, the President said to him, "Well, Steve, you've been at Justice the whole time. You wouldn't resign." And Steve -- I remember this because it was very vivid -- said, "No, Mr. President. If you replace Jeff Rosen with Jeff Clark and send this letter, I would have no choice. I would have to resign."

And the President looked to me, startled, and said, "Steve, you wouldn't resign." And Engel repeated it. He said, "Mr. President, I would have no choice. I would have to resign."

So that was highly corroborative of what had been said by other folks.

Q Uh-huh.

So the only substantive election-related action that was discussed was the sending of the letter? Was there also a discussion of the special counsel or the press conference or the Supreme Court brief, the litany of possible things that had been considered that you mentioned in your opening statement?

A I don't remember them being discussed in individual -- you know, what about the Supreme Court brief --

Q Yeah.

Mr. Flynn, but Sidney Powell, Mike Lindell -- there were media accounts of these going on.

I wasn't present at them, and I didn't have anybody reporting to me what happened at them, but I had a just general awareness from media accounts that that has happened.

Ms. Cheney. And did Pat Cipollone ever tell you what he thought about the President's claims about election fraud?

Mr. Rosen. So the way you've stated that, I'm not sure. Because the way the conversations with him went more was that he was supportive of the Department's position, you know, that "the Department should do what you think is right," "I agree the Department should proceed the way you think best."

I would be surprised if he didn't agree on the Department's posture that there had not been widespread fraud, but I don't know if I can specifically remember that or not. But I have more of this big-picture recollection that he was very supportive of the Department and me. And I maybe -- I'm not sure if I assumed he agreed or he said he agreed.

Ms. Cheney. And then my last question: In the meeting on the 3rd, did he speak out and say, I also will resign?

Mr. Rosen. Yes.

Ms. Cheney. And did Pat Philbin as well?

Mr. Rosen. He may have. I think Pat Cipollone recited that lots of people were going to resign and that it would include him. And while I don't have a specific, you know, again, word-for-word kind of recollection, if he did that the way I remember it, I'm sure he would've included Pat Philbin, because they were very closely aligned.

So Pat Cipollone was one of the people who said that there would be lots of

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15 JOHN C. EASTMAN

16 Plaintiff,

17 vs.

18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.

Case No. 8:22-cv-00099-DOC-DFM

20
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25 **Exhibit D**
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4 SELECT COMMITTEE TO INVESTIGATE THE
5 JANUARY 6TH ATTACK ON THE U.S. CAPITOL,
6 U.S. HOUSE OF REPRESENTATIVES,
7 WASHINGTON, D.C.

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10

11 DEPOSITION OF: JASON MILLER

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13

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15 Thursday, February 3, 2022

16

17 Washington, D.C.

18

19

20 The deposition in the above matter was held via Webex, commencing at 10:04
21 a.m.

22 Present: Representatives Aguilar, Lofgren, Murphy, Cheney, and Kinzinger.

1 Appearances:

2

3 For the SELECT COMMITTEE TO INVESTIGATE
4 THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL:

5

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1 Mr. Heaphy. Yeah.

2 BY MR. HEAPHY:

3 Q Mr. Miller, I appreciate your answers to Mr. George's questions.

4 One other subject matter, did anyone in the meeting raise the campaign's internal
5 polling data and whether it was consistent with the result as called by the networks?

6 A I don't remember any polling data being discussed. I mean, especially 5
7 days or so after an election, I think at that point pre-election data probably would have
8 been relatively worthless. For sure we would have discussed the -- again, the piece of
9 information that we had that were forming are decisionmaking was essentially was that
10 we didn't see where the ballots would ultimately come from to deliver victory.

11 Q Okay. So the campaign didn't -- was not in any way or you in this meeting
12 were not relying in any way on sort of internal exit or other polling data to compare to
13 the results? That wasn't part of the calculus?

14 A I don't remember it being a numbers-heavy conversation.

15 Q Okay. Do you know if anyone in the meeting conveyed to the President,
16 separate from the legal strategy, that crunching of the numbers, evaluation of the actual
17 results made it unlikely that he would win or essentially confirming that he had lost?
18 Again, not the litigation, but: Hey, we've looked at the numbers. We've evaluated the
19 results, and the numbers aren't there. You've lost, or, you know, this is correct.
20 Something along those lines?

21 A That conversation I believe happened the day before with the data team or
22 at least the lead of data team joining by phone.

23 Q Okay. The day before this conversation with the President, there was a
24 discussion about the -- sort of the numbers and what they showed?

25 A Yes.

1 Q Okay. Tell us more about that. Who was present for that conversation?

2 A I don't remember who all was present in person. I was in the Oval Office.

3 And at some point in the conversation Matt Oczkowski, who was the lead data person,
4 was brought on, and I remember he delivered to the President in pretty blunt terms that
5 he was going to lose.

6 Q And that was based, Mr. Miller, on Matt and the data team's assessment of
7 this sort of county-by-county, State-by-State results as reported?

8 A Correct.

9 Q Okay. And what was the President's reaction then when Matt said to him,
10 "Hey, we've looked at the numbers, you're going to lose"?

11 A I think it's safe to say he disagreed with Matt's analysis.

12 Q On what basis? Did he give a basis?

13 A He believed that Matt was not looking at the prospect of legal challenges
14 going our way and that Matt was looking at purely from what those numbers were
15 showing as opposed to broader things to include legality and election integrity issues
16 which, as a data guy, he may not have been monitoring.

17 Q I see. Okay. Who else, Mr. Miller, was present that you recall in the Oval
18 Office for that meeting that was more focused on the numbers and the data?

19 A I believe we had -- I -- to the best of my memory, I think it was Jared
20 Kushner, Bill Stepien, and Justin Clark. But again, that's -- that's the best of my memory.
21 The Oval Office meetings were frequently people coming in and out at various times.
22 And so it is tough to say who was definitely in a meeting or not.

23 Q Yeah. And I appreciate that. I know where you're going on memory here.
24 So you were present, along with Matt. And you mentioned Mr. Kushner, Mr. Stepien,
25 Mr. Clark, Justin Clark, and the President? Those are the folks you remember being

1 A Meaning the post-press-conference coverage was not positive, even by FOX
2 News, for example.

3 Q Why did that upset him?

4 A Because this was supposed to be a press conference where a number of
5 these details were going to be laid out, these irrefutable details, and they weren't.

6 Q Did he know that some of the claims that she was making were not true?

7 A I can't speak to what necessarily he knew or didn't know specific to
8 Ms. Powell's claims.

9 Q Did you ever tell the -- we just spoke about dead people voting and your
10 team's analysis of that. Did you ever communicate your team's findings to the
11 President, that there were some instances that you thought there might be dead people
12 voting but there wasn't widespread -- a proof of widespread dead people voting?

13 A Well, I said that, from what we had been able to determine -- but keep in
14 mind, my team -- when I say "my team," meaning the remnants of the campaign team
15 that were still around -- were relying on evidence that had been pulled by outside people.
16 So it's not as though the inside campaign team was out doing the original research.
17 They were just verifying the results.

18 Q Okay. But did you communicate those findings? Understanding they may
19 be kind of from a limited set here, but did you communicate that to the President?

20 A I don't remember if I specifically talked about the numbers that we had from
21 the limited findings. I just don't remember.

22 Q Do you remember ever telling him -- well, let me back up.

23 In early December, I believe, Attorney General Barr made a public statement that
24 DOJ had looked into issues and he had not seen widespread fraud that would change the
25 outcome of the election.

1 A, is that consistent with your understanding about the allegations of fraud in the
2 election?

3 A My understanding is that I think there are still very valid questions and
4 concerns with the rules that were changed under the guise of COVID, but, specific to
5 election day fraud and irregularities, there were not enough to overturn the election.

6 Q And did you give your opinion on that to the President?

7 A Yes.

8 Q What was his reaction when you told him that?

9 A "You haven't seen or heard" -- I'm paraphrasing, but -- "you haven't seen or
10 heard all the different concerns and questions that have been raised."

11 Q How many times did you have this conversation with the President?

12 A Several. I couldn't put a specific number on it, though.

13 Q But more than one?

14 A Correct.

15 Q Did he say what the types of things he was seeing were?

16 A Sometimes, although I didn't commit to memory what specific examples he
17 was hinging on, for example, as there were so many different issues being raised during
18 that stretch, it was tough to keep track of all of them.

19 Q Did you do anything or have your team do anything to look into any of the
20 allegations he was raising?

21 A Again, by that point, most of the investigative-type work would've been
22 done by Rudy and his legal team as opposed to anyone in-house, or if there was
23 quasi-still-in-house.

24 Q All right.

25 So Mr. Kerik has publicly stated through his attorney that, as investigator for

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11 Counsel for the Congressional Defendants

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **SOUTHERN DIVISION**

15 JOHN C. EASTMAN

16 Plaintiff,

17 vs.

18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.

Case No. 8:22-cv-00099-DOC-DFM

20
21
22
23
24
25 **Exhibit F**
26
27
28

1

2

3

4 SELECT COMMITTEE TO INVESTIGATE THE
5 JANUARY 6TH ATTACK ON THE U.S. CAPITOL,
6 U.S. HOUSE OF REPRESENTATIVES,
7 WASHINGTON, D.C.

8

9

10

11 DEPOSITION OF: GREG JACOB

12

13

14

15 Tuesday, February 1, 2022

16

17 Washington, D.C.

18

19

20 The deposition in the above matter was held in room 5480, O'Neill House Office
21 Building, commencing at 10:05 a.m.

22 Present: Representatives Aguilar, Schiff, Murphy, Raskin, Cheney, and Kinzinger.

1

2 Appearances:

3

4

5 For the SELECT COMMITTEE TO INVESTIGATE

6 THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL:

7

8 KATIE ABRAMS, STAFF ASSOCIATE

9 KRISTIN AMERLING, DEPUTY STAFF DIRECTOR & CHIEF COUNSEL

10 STEPHEN DEVINE, SENIOR LEGISLATIVE COUNSEL

11 MAGGIE EMAMZADEH, STAFF ASSOCIATE

12 SADALLAH A. FARAH, RESEARCHER

13 DANIEL A. GEORGE, SENIOR INVESTIGATIVE COUNSEL

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16 JOE MAHER, DETAILEE, DEPARTMENT OF HOMELAND SECURITY

17 EVAN B. MAULDIN, CHIEF CLERK

18 BARRY PUMP, PARLIAMENTARIAN

19 GRANT SAUNDERS, STAFF ASSOCIATE

20 JOHN F. WOOD, SENIOR INVESTIGATIVE COUNSEL AND OF COUNSEL TO THE VICE CHAIR

21 BRITTANY M.J. RECORD, COUNSEL

1

2 For THE WITNESS:

3

4 A.B. CULVAHOUSE

5 AMANDA SANTELLA

6 O'Melveny & Myers

7 1625 Eye Street, NW

8 Washington, D.C. 20006

1 When, as far as you can recall, was the first time you had interaction with Dr. Eastman
2 regarding the 2020 election?

3 A To the best of my recollection, it was at the Oval Office meeting on
4 January 4th.

5 Q And do you know how that January 4th meeting in the Oval Office came
6 about?

7 A So what I do know is the Vice President and Marc were down in Georgia that
8 morning at a rally for Senators Perdue and Loeffler, and I received a call, I believe
9 midmorning, and I think it was from Marc giving me a heads up that I was going to be
10 asked down for a meeting in the Oval Office.

11 Q Do you know -- so that's sort of how you learned about it, but do you know
12 how the meeting was initiated?

13 A No.

14 BY MR. HEAPHY:

15 Q And I'm sorry. When you say "Marc," you mean Marc Short, or
16 Mark Meadows?

17 A Marc Short.

18 Q Okay.

19 BY MR. WOOD:

20 Q And then did you, in fact, attend such a meeting?

21 A Yes.

22 Q Okay. Who else attended the meeting?

23 A Marc Short and the Vice President, John Eastman, the President. There
24 was about a 5-minute period that Mark Meadows came in on a different subject and then
25 left.

1 advocated for Pence to reject electors, do you agree or disagree with that statement by
2 Dr. Eastman?

3 A So I think the most accurate way to -- because I think a yes-and-no question
4 is going to be difficult on this. I think, at the meeting on the 4th, Eastman expressed the
5 view that both paths were legally viable, but that the preferred course would be a
6 procedural course where the Vice President would send it back to the States, that that
7 would be more palatable than a mere invocation of raw authority to determine
8 objections himself.

1

2 [1:18 p.m.]

3 BY MR. WOOD:

4 Q Did he start out with that position, or did he gravitate towards that position
5 over the course of the meeting?

6 A I think that was threaded throughout, that, again, both were legally viable
7 but that the preferred course would be to send it back to the States.

8 Q Okay. Then exhibit 31, the next one in your binder, is the longer
9 version -- or a longer version of a memo. Again, I'll represent to you that this is from
10 John Eastman. I assume that -- I think you said actually earlier that you didn't see either
11 of his memos --

12 A I don't recall seeing it.

13 Q -- while you were in the White House.

14 Do you have any idea whether this was written before or after the one we already
15 looked at?

16 A Since it's longer, I assume after, but I have no basis to know.

17 Q This goes through several different scenarios. Page 4, Roman numeral III,
18 "War Gaming the Alternatives," some of which Biden wins; some of which Trump wins.

19 Can you tell us whether Dr. Eastman went through all of these alternatives with
20 the President in the meeting on the 4th?

21 A I don't think he said.

22 Q Can you tell us whether he went through some of these alternatives in the
23 meeting with the President on the 4th?

24 A Not at length. We had a longer discussion of them on the 5th. And I just
25 don't recall. It's hard for me to disaggregate what he might have said in shorthand

1 during the conversation on the 4th.

2 Q Okay. So I'm going to share with you another description that Dr. Eastman
3 gave of his meeting that you attended with the President and the Vice President on
4 January 4th.

5 Mr. Wood. Do we have this one?

6 Mr. Saunders. One?

7 Mr. Wood. So Boyles, yes.

8 Mr. Saunders. Yes.

9 Mr. Wood. Okay. So why don't we go ahead and play it.

10 And this is a podcast, I believe, where -- or a radio show, I believe, where Dr.
11 Eastman was interviewed by Peter Boyles.

12 [Audio recording played.]

13 Mr. Wood. You can stop.

14 BY MR. WOOD:

15 Q Do you think that's an accurate description of the advice Dr. Eastman gave to
16 the President and Vice President?

17 A Not all of it.

18 Q Okay. Can you tell us which parts -- and we can go sentence by sentence if
19 you want or you can just tell us which parts you take issue with.

20 A Well, it's the part where he -- up to the point where he says, "Open
21 question," that sounds -- he might have used those words. I don't recall whether he
22 used them specifically.

23 As I've noted before, he thought that the more prudent course was a procedural
24 send it back to the States, rather than reject electors.

25 But I do not recognize the statements that he makes thereafter where he says

1 that it would be foolish to reject the slates. I don't recall him using that word, and I
2 would be shocked if he had. And I don't recall any of that sequence that sort of goes
3 from that point forward.

4 Q And what he describes there as being a foolish move, meaning the Vice
5 President unilaterally rejecting electors, is that exactly what he urged the Vice President
6 to do when he met with you on the 5th?

7 A When he met on the 5th -- and I have contemporaneous notes of that
8 meeting that reflect this -- he came in and said, "I'm here asking you to reject the
9 electors." That's how he opened at the meeting.

10 Q Did he say, "I'm here on behalf of the President to ask you to reject the
11 electors"?

12 A I don't -- I don't recall. I don't think that he specifically said on behalf of the
13 President.

14 Q Okay. But I believe you had said that in at least one email around that
15 time, whether it was before or after, he stated that he was representing the President?

16 A In an email on the 6th, he referred to the President as his client.

17 Q And prior to that he had been -- I can represent to you he had been listed on
18 pleadings as representing the President, whether you're aware of that or not.

19 So I'm going to ask you more about the meeting on the 5th later, but I don't want
20 to forget to follow up on what you just mentioned about contemporaneous notes.

21 Are those contemporaneous notes that you have in your personal possession or
22 are those in the Archives, or where would they be?

23 A No, they're personal notes, about three lines of notes, and I think we have
24 them. You're welcome to them.

25 Q Okay. Great. Maybe during a break we can ask you to give us to

1 them -- give them to us.

2 Mr. Culvahouse. You have them with you, right?

3 Ms. Santella. Uh-huh.

4 Mr. Wood. Great. So we'll get to that. But before we do that, I want to play
5 another clip here. And I think this is -- is this next one from the same radio show
6 interview?

7 Mr. Saunders. Immediately afterwards.

8 Mr. Wood. Okay.

9 [Audio recording played.]

10 BY MR. WOOD:

11 Q So we'll leave aside that Dr. Eastman got your name egregiously wrong and
12 we'll leave aside whether or not Marc Short, in fact, leaked something to The New York
13 Times.

14 But Dr. Eastman describes as a false story the reporting that he had asked the Vice
15 President to simply unilaterally declare President Trump reelected.

16 I know you said that he presented alternatives. Is it, in fact, false to say that Dr.
17 Eastman at some point during the meeting asked the Vice President to simply unilaterally
18 declare President Trump reelected?

19 A So I've got to disaggregate the 4th and the 5th.

20 Q Okay. On the 4th.

21 A On the 4th, I think that he said that both were legally viable options. But I
22 do think that he said that he was not saying that that was the one that the Vice President
23 should do.

24 Q Okay.

25 A That it would be more prudent to do the other.

1 Q And we're going to get to more detail on the 5th, but since you brought it
2 up, what was his advice on the 5th?

3 A He, again, came into the meeting saying, "What I'm here to ask you to do is
4 to reject the electors."

5 And aside from my contemporaneous notes from that meeting, which weren't
6 much, you have my email from January 6th where I refer to the fact that he retreated to a
7 position the evening of the 5th asking for what I would call the procedural solution of
8 send it back to the States as opposed to what he had been asking for in the earlier
9 meeting.

10 Q So it sounds like you're saying that at the beginning of the meeting on the
11 5th, Dr. Eastman was taking an even more aggressive position regarding the role of the
12 Vice President than the position he took in the Oval Office on the 4th?

13 A Yes.

14 Q And do you know what caused him to take the more aggressive position on
15 the 5th?

16 A I don't.

17 Q At the meeting on the 4th, did the President take a position?

18 A Again, I can't speak to the President's communications in that meeting. I'm
19 happy to confirm or deny accounts with respect to Mr. Eastman.

20 Q Okay. Did you believe -- well, I'll ask it this way.

21 In light of the conversation you had had with the President and others on the 4th,
22 were you surprised by the position that Dr. Eastman took at the beginning of the meeting
23 on the 5th?

24 A So I was at least mildly surprised because I had done a -- well, you have the
25 memorandum that I did for the Vice President analyzing what I had understood Mr.

1 Eastman's proposal, you know, the thing that he thought was the preferred course of
2 action, from the night before. And so I was surprised that we instead had a stark ask to
3 just reject electors.

4 Mr. Wood. Okay. I'm going to get to that in a moment, but I will ask if we
5 should take a lunch break now, or does anybody want to ask a question before we get to
6 the lunch break?

7 Mr. Heaphy. Yeah. Can I just quickly follow up on the January 4th meeting?

8 BY MR. HEAPHY:

9 Q Did you or the Vice President or Mr. Short make clear during that meeting
10 what the Vice President's now consistently held position was about his authority?

11 A So the Vice President mostly asked a series of questions in that meeting of
12 Mr. Eastman. And from my -- and, again, I mentioned this before -- from my very first
13 conversation with the Vice President on the subject, his immediate instinct was that there
14 is no way that one person could be entrusted by the Framers to exercise that authority.
15 And never once did I see him budge from that view, and the legal advice that I provided
16 him merely reinforced it.

17 So everything that he said or did during that meeting was consistent with his first
18 instincts on this question.

19 Q Yeah. And were you -- was your impression going into that meeting that
20 his position, the Vice President's position, was clear to Mr. Eastman and the President
21 before that meeting began on January 4th?

22 A I mean, it was clear to me that Mr. Eastman was trying to persuade the Vice
23 President to what he understood to be a different place than where the Vice President
24 was.

25 Q Okay. And when you talk about the preferred course -- you a couple of

1 times have said the preferred course or the more prudent course -- was your impression
2 that Mr. Eastman thought it was preferred because it might be more palatable to the Vice
3 President or it was preferred on the merits of a constitutional analysis?

4 A So on the -- in one of my conversations with him on the 5th, the afternoon of
5 the 5th, or maybe early evening, he acknowledged that the legal basis for the two
6 positions was the same. You couldn't get there either way unless you -- because to get
7 to the procedural position, you had to set aside a number of the positions of the Electoral
8 Count Act, which you couldn't do unless the President basically had plenary constitutional
9 authority to resolve these things.

10 So the legal theory wasn't different. He thought that it was more politically
11 palatable. I don't think that he ever termed that in terms of more palatable to the Vice
12 President as opposed to -- my impression was he was thinking more acceptance of the
13 country of the action taken.

14 Q I see. So my question is really was he -- you described it as trying to
15 convince the Vice President, to move the Vice President. Was this preferred course of
16 just delay, in your sense, an attempt to get something that he thought the Vice President
17 could potentially agree to as opposed to a unilateral rejection of or acceptance of
18 alternate electors?

19 A So it's possible with respect to the 4th.

20 So on the 5th we have the meeting that starts late morning because he was
21 delayed for the Georgia proceedings, and there he makes it clear: Reject.

22 When he comes back with the procedural theory later, at that point he's very
23 clear, "I know you are not going to just reject. Would you consider this?"

24 Q Yeah. It's been described to us as a pivot, that he takes the pivots from,
25 okay, if you're not going to reject these electors, maybe you will just delay, send it back to

1 the States for some period of time.

2 It sounds like to me -- first of all, would you agree that it was a pivot? And, if so,
3 did it occur really late on the 5th as opposed to before the meeting on the 4th?

4 A So, yes. I mean, there was -- before the meeting on the 4th, there was
5 nothing for him to pivot from.

6 Q Okay.

7 A That was the first time that I saw Mr. Eastman or heard anything from him
8 with respect to the whole thing.

9 I agree that it was a pivot, and he was quite clear in saying, "I've heard you loud
10 and clear. You're not going to do that. Would you now consider this?"

11 Q I see. And that occurred in an evening conversation on the 5th, which I
12 think Mr. Wood will get to.

13 A Starts in the afternoon and then a couple of calls into the evening.

14 Mr. Heaphy. That's great. Thank you.

15 Mr. Wood. Okay. Take a lunch break?

16 Mr. Maher. Actually, can I ask one more question about the 4th?

17 Mr. Wood. Yes.

18 Mr. Maher. So after the meeting on the 4th, did anybody from the White House
19 Counsel's Office reach out and ask you your view of the legality of any of those issues?

20 The Witness. So I want to be careful in general with respect to conversations
21 with the White House Counsel's Office. I think on this one I'm, given this narrow
22 timeframe, I'm happy to say no. But I'm also sensitive to the fact that they've robustly
23 invoked privilege with respect to my interactions with Counsel's Office.

24 So if I was concerned that an answer would start to give away substance of any of
25 that, I wouldn't be able to answer. But the answer to that is no.

1 January 5th as it pertains to the Vice President's role in the 2020 election.

2 A Sure. So at the end of the meeting on the 4th, it had been left that I would,
3 as I've indicated, I would meet with Mr. Eastman, I would receive whatever materials it
4 was that he wanted us to look at that he thought supported his view.

5 This sort of serves two functions. One, it freed the Vice President up to just
6 focus on getting his statement done, because he was working on it up at the residence
7 that morning; and it enabled me to make sure that there were no, sort of what I would
8 call procedural faults on our part, that there was nothing we had ever failed to look at.
9 No one was ever going to say that the Vice President only reached this conclusion
10 because we just didn't take the time to look.

11 So I think we were originally supposed to meet first thing in the morning, but he
12 had an argument in court in Georgia that went long.

13 So my recollection is that he got over at about 11 o'clock. We met in Marc
14 Short's office. The meeting --

15 Q Which office, in the West Wing or in the Old Executive Office Building.

16 A Marc's office in the West Wing was about the size of the inside of this U right
17 here [indicating].

18 [Laughter.]

19 So in the Old Executive Office Building. And it was me, Marc, and Eastman.
20 And he came in and said that the request that he was there to make of us is that we
21 reject the electors.

22 He acknowledged that there had been discussions of other possibilities the day
23 before, but that's what he was here to talk about today.

24 Q Okay. I'm just going to interrupt you briefly.

25 So you've given us handwritten notes. I'd like to have this marked as exhibit 86.

1 And feel free to refer to that.

2 A I'm not sure I actually have a copy myself.

3 Q Okay.

4 A But, yes, you'll see what I -- I didn't write down a lot because there wasn't a
5 lot that he said that was new to me.

6 Ah, I do have a copy.

7 So, yes, the first thing that I wrote was, "Requesting VP reject." That was the
8 context.

9 Q And that meant Dr. Eastman was requesting that the Vice President reject
10 the Biden electors from certain contested States. Is that right?

11 A Yes, from a set of between five and seven contested States. New Mexico
12 and Nevada, as I understood it, were sort of on the bubble in his thinking as to whether
13 they were disputed or not. But the other five, Georgia, Arizona, Michigan, Wisconsin,
14 Pennsylvania, were all in the clearly disputed bucket. And then there were two that
15 were of a more uncertain status, as I understood it.

16 Q And I think you answered this earlier, but he -- is it correct that Dr. Eastman
17 did not expressly state whether the President had asked him to make this request?

18 A I don't recall him saying that.

19 Q Okay. But you were aware that he was a representative of the President in
20 some capacity, weren't you?

21 Let me rephrase that.

22 As you sit here today, knowing everything you know, is it fair to say that he was
23 there in some capacity representing the President of the United States?

24 A He represented to me on the 6th that the President was his client, and there
25 was nothing inconsistent about the interactions I had with him on the 5th or the 4th with

1 that representation. So I don't know it to be true, but I assumed it to be true for
2 purposes of my interactions with him.

3 Q And what was your reaction when he requested that the Vice President
4 reject electors from certain States?

5 A So I was surprised because it was one of the things that I felt he had been
6 pinned down on the day before, was that he was not saying that that's what we should
7 do, but now that's what we were being asked to do.

8 But it also, to some extent, simplified things for me because the complications of
9 the procedural case and having to go through all the different sections of the Electoral
10 Count Act that were at issue with that became somewhat less pertinent to the discussion.

11 So from his perspective, his objective was to persuade me. I sort of viewed it as
12 my challenge to use Socratic questioning during the course of the thing to see if I could
13 persuade him that there's just no way that a small mind -- a small government
14 conservative would ever adopt the position that he was taking. So that was my basic
15 reaction.

16 And we then had a very long discussion that covered the entire history of
17 constitutional provisions. We discussed examples, like the Adams example and the
18 Jefferson example, both of which were brought to prominence by Bruce Ackerman, a law
19 review article that we were well aware of.

20 And I essentially got Mr. Eastman to -- or Dr. Eastman, I guess -- to acknowledge
21 that neither of those served as examples for the proposition that he was trying to support
22 of a Vice Presidential assertion of authority to decide disputes because no dispute was
23 raised in either case during the joint session.

24 And, moreover, there was no dispute as to the outcomes in those States. In the
25 Jefferson example, everybody knew that Jefferson won Georgia, there was no question

1 about that, nor was any question raised about it in the Congressional Record for the
2 count.

3 There is a newspaper article from a few days after the count where one of the
4 tellers allegedly told someone that there was an irregularity with the certificate for
5 Georgia where a page was missing. No question as to the authenticity of the page that
6 was received. They had simply failed to attach a page that should have been there.

7 It was a technical defect. No question about the outcome. And Jefferson had
8 not called it to the attention of the larger body, according to the newspaper article,
9 despite the fact that the teller had expected him to.

10 That was hardly an example of a Vice President asserting authority to decide
11 disputes over electoral certificates. And that was really the example Mr. Eastman kind
12 of pinned most of his hopes on, I suppose, in terms of a historical example of Vice
13 Presidential authority.

14 So we also walked through the history of all of the different disputes that had
15 arisen in Congress up to the Electoral Count Act. He acknowledged -- by this point, I had
16 determined the Nixon example was not a counter example, and he agreed with me that,
17 indeed, since the Electoral Count Act had gone into effect, there were no instances of
18 departing from the Electoral Count Act.

19 And we sort of summed it up at the end saying that, so what we have here is an
20 admittedly not well-drafted sentence in the Constitution that simply does not provide for
21 the possibility of objections or how to resolve them. It's just not in the constitutional
22 sentence.

23 The constitutional sentence refers to two activities. The Vice President or the
24 President of the Senate shall open the certificates, and switches to the passive voice, and
25 they shall be counted. Doesn't even specify who does the counting.

1 So there's nothing about objections. There's nothing about resolution of
2 objections.

3 So you start with that. And his premise was, well, the Vice President is the one
4 who does the counting because nobody else is mentioned and the Vice President opens
5 the certificate.

6 The constitutional provision doesn't say that, but that's his premise. And his best
7 argument for that is actually a piece of paper that was attached to a copy of the
8 Constitution that was sent out to the different States.

9 They realized, wait a second, there was something that we forgot about here,
10 which is we won't have a sitting Vice President come the first count for George
11 Washington's election as President.

12 And so they recommended that a Senator be appointed to the role of presiding
13 over that session and serve as President of the Senate, even though they wouldn't have
14 one, and that he would do the counting.

15 So that was his best example, was that the Framers did seem to think that the Vice
16 President would have a real role in counting. That's a far cry from resolving objections
17 or even thinking that there would be objections.

18 So he acknowledged that there was an ambiguous provision with 100 percent
19 consistent historical practice since the time of the Founding that the Vice President did
20 not have -- did not ever assert or exercise authority to do what he was suggesting we
21 should do.

22 And the 130 years of practice of following the Electoral Count Act every single
23 time. We went through examples like Al Gore.

24 "Are you really saying, John, that Al Gore could have just declared himself the
25 winner of Florida and moved along?"

1 "Well, no, no, there wasn't enough evidence for that."

2 So it was a very contingent position in Mr. Eastman's mind about all of the
3 underlying unconstitutional things that he thought were happening in the States this time
4 around, and it wasn't clear how he drew the line that that worked.

5 But he acknowledged by the end that, first of all, no reasonable person would
6 actually want that clause read that way because if indeed it did mean that the Vice
7 President had such authority, you could never have a party switch thereafter. You
8 would just have the same party win continuously if indeed a Vice President had the
9 authority to just declare the winner of every State.

10 He acknowledged that he didn't think Kamala Harris should have that authority in
11 2024; he didn't think Al Gore should have had it in 2000; and he acknowledged that no
12 small government conservative should think that that was the case.

13 And I said, "If this case got to the Supreme Court, we'd lose 9-0, wouldn't we, if we
14 actually took your position and it got up there?" And he started out at 7 to 2.

15 And I said, "Who are the two?"

16 And he said, "Well, I think maybe Clarence Thomas."

17 And I said, "Really? Clarence Thomas?"

18 And so we went through a few Thomas opinions and, finally, he acknowledged,
19 "Yeah, all right, it would be 9-0." Except that his fallback --

20 Q Did he say who the other one was?

21 A I don't recall. I don't recall.

22 But he ultimately acknowledged that none of them would actually back this
23 position when you took into account the fact that what you have is a mildly ambiguous
24 phrase, a nonsensical result that has all kinds of terrible policy implications, and uniform
25 historical practice against it. It just didn't work.

1 So I kind of wound up, "Can't we just acknowledge that this is a really bad idea?"

2 And he didn't quite say yes, but, he said, "Well, all right. I get everything you're
3 saying." He said, "They're going to be really disappointed."

4 I don't know who the "they" is. You can -- I know what your follow-up question
5 is going to be. He said, "They're going to be really disappointed."

6 Q My follow-up question is, who's the "they"?

7 [Laughter.]

8 A I don't know. I don't know.

9 He said, "They're going to be really disappointed that I wasn't able to persuade
10 you." And he left.

11 I will say the one other thing that we had a lot of discussion on was the political
12 question doctrine and -- because once he acknowledged that they would lose in the
13 Court, he said, "Well, but I think that, you know, it's a political question and they
14 shouldn't get involved at all."

15 And a lot of our discussion was my view, A, that they would because they would
16 recognize if it wasn't them who was going to step in on a question that -- it's a pretty
17 easily presented question, right? Here we have a statute, and the question is, is the
18 statute consistent with the text of the Constitution?

19 His view was that the Vice -- that the constitutional text has the Vice President
20 having the sole authority to do the counting, and that with that comes the authority to
21 resolve objections, and, therefore, anything in the Electoral Count Act to the contrary is
22 unconstitutional.

23 And indeed, if that's what the constitutional clause actually said, you couldn't have
24 a statute that was -- that contradicted that authority or removed it from the authority of
25 the Vice President. But that's where he was.

1 about.

2 A So it might have come up. It certainly -- on one of the phone calls later in
3 the day when they had -- I think he used the word "pivot" before, once they pivoted away
4 from reject the electors and back to send it back to the States in some form, he had said
5 when addressing the viability of his legal theory as to why that worked, he said, "You
6 know, just between us University of Chicago chickens, you and I will understand this is the
7 same basic legal theory underneath it. It's just more palatable in terms of the actual
8 claim being made to the public as to what the Vice President's authorities are."

9 Q But at that point had he already admitted that the legal underpinnings for
10 what I'll call the more aggressive position were flawed?

11 A So as I said, at the very end of our session he sort of all but admitted --

12 Q Okay.

13 A -- that it didn't work.

14 So he certainly knew we weren't going to do that and that we thought that the
15 position was -- wouldn't be accepted by any member of the Supreme Court, by any judge,
16 by any of the Framers, et cetera.

17 He had acknowledged that he would lose 9-0 at the Supreme Court. He didn't
18 quite get to saying yes when I had asked him, "John, isn't this just a terrible idea?" But it
19 was a near concession on that.

20 Q So when he said that comment over the phone about just between us
21 University of Chicago type chickens, or whatever he said, did you understand him to be
22 suggesting that even the fallback legal position was a flawed legal theory, but that the
23 Vice President should pursue it anyway?

24 A That it was an uphill climb on the underlying legal opinions position
25 certainly, flawed in the sense that he had ambiguous constitutional text, no history, no

1 The third is: At the end of the joint session, direct that the electoral certificates for
2 these States will not be counted until each State's legislature certifies which of the
3 competing slates of electors for the State is true and correct.

4 I should note this memo is dated January 5th.

5 So you discussed the pivot by at least Dr. Eastman, if not also his client. Where
6 in the course of that pivot were things when you wrote this?

7 A So I think that this memo -- and this is -- I'll say, prior to getting documents
8 to refresh my recollection, I thought that this memo might have been written the evening
9 of the 5th. Based on the time stamps that I saw with the emails that go along with this, I
10 think that this may have been written probably through the evening of the 4th after I met
11 with Mr. Eastman, and then, that morning, sent off to the Vice President, who was up at
12 the residence before Mr. Eastman arrived for the meeting.

13 So -- and one of the reasons I think that is that Professor Eastman does not
14 recommend -- we had talked before as to the term "should." I think that does not
15 recommend had been an important concession that the Vice President had gotten sort of
16 during the meeting on the 4th from Mr. Eastman, that that was not the course that he
17 was recommending.

18 So then, from the 4th, we have a pivot into the morning of the 5th, where he
19 says -- comes in and says, "No, we want you to reject," and then sort of a pivot back to
20 send it back to the States.

21 Q Under the heading "Legal Analysis" on the first page, you wrote: Professor
22 Eastman acknowledges that his proposal violates several provisions of statutory law.
23 And then you've got several bullets there.

24 Can you describe -- you don't have to describe what's in your memo because that
25 speaks for itself. But, to the extent you can -- and I know it may be somewhat

1 redundant of what you've already told us -- can you describe your recollection of in what
2 way Dr. Eastman acknowledged that his proposal violated several provisions statutory
3 law?

4 A Well, and I've already largely discussed this, but, to do what he was
5 suggesting, A, the 10-day adjournment would violate a provision of the Electoral Count
6 Act. Not allowing the Senators to object and instead to report to him -- have a
7 procedure where the State legislatures would decide those instead was inconsistent.

8 He would not have us calling for objections, which would trigger that, but the
9 Electoral Count Act says: You shall call for objections. Again, this had been one of
10 the -- the "shalls" were important to us, which was one of the reasons we had made sure
11 that the transcript or the scripts for January 6th had the call for objections because that
12 was one of the things that the statute specifically required.

13 So the memo lays out the four ways in which the proposal would violate
14 provisions of the Electoral Count Act, and he acknowledged as much in our conversations.

15 Now, most of that acknowledgement sort of on a point-by- point basis was in the
16 conversations the afternoon of the 5th. We didn't get into all of the details on that in
17 the meeting on the 4th.

18 Q Okay. So then the last paragraph of the memo says: Conclusion. If the
19 Vice President implemented Professor Eastman's proposal, he would likely lose in court.

20 And that's something you've already discussed with us, that even Dr. Eastman
21 acknowledged that, if the court were to decide, rather than deeming it a political
22 question doctrine, that basically every judge would rule against the Vice President. Is
23 that correct?

24 A Yes.

25 Q And then you wrote: In a best case scenario in which the courts refused to

1 Pennsylvania Legislature, has tons of blank signature lines on it, indicating this is not even
2 one house of the Arizona Legislature speaking.

3 Q Okay. So when you got to the Vice President's residence on the morning of
4 the 6th, what was his demeanor?

5 A I would say he was mostly -- he was warm with the staff and appreciative of
6 all the work that we had done to get things ready and sort of ready to face whatever the
7 day might bring.

8 Q And did you work with him on the statement further?

9 A At that point there were no substantive changes or rearrangements. It was
10 really a matter -- I think he wanted to make sure that we were okay with the changes that
11 he had made the night before and that morning and that we didn't have any negative
12 reactions to those. Otherwise, it was a matter of proofing it and getting it out.

13 Q Okay. If you'll look at exhibit 51, "Daily Diary of President Donald J.
14 Trump."

15 On the third page, the top entry is 11:17 a.m., the President talked on a phone call
16 to an unidentified person.

17 Do you know whether that was -- does that sound like around the time that the
18 President and Vice President talked that day?

19 A So there was a time while we were up there that the Vice President left the
20 room to take a call from the President. That could have been at 11:17, but I don't know
21 for sure.

22 Q When the President -- when the Vice President came back, did he tell you
23 anything about his call with the President?

24 A The Vice President's rule was never to divulge the contents of his
25 conversations with the President.

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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **SOUTHERN DIVISION**

15 JOHN C. EASTMAN

16 Plaintiff,

17 vs.

18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.

Case No. 8:22-cv-00099-DOC-DFM

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21
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25 **Exhibit G**
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6 SELECT COMMITTEE TO INVESTIGATE THE
7 JANUARY 6TH ATTACK ON THE U.S. CAPITOL,
8 U.S. HOUSE OF REPRESENTATIVES,
9 WASHINGTON, D.C.

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13 DEPOSITION OF: KEITH KELLOGG, JR.

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17 Tuesday, December 14, 2021

18

19 Washington, D.C.

20

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22 The interview in the above matter was held in Room 4480, O'Neill House Office
23 Building, commencing at 10:02 a.m.

24 Present: Representatives Aguilar and Cheney.

1 Appearances:

2

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4

5 For the SELECT COMMITTEE TO INVESTIGATE

6 THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL:

7 TIM HEAPHY, CHIEF INVESTIGATIVE COUNSEL

8 DAN GEORGE, SENIOR INVESTIGATIVE COUNSEL

9 JENNA HOPKINS, PROFESSIONAL STAFF

10 SAMANTHA STILES, CHIEF ADMINISTRATIVE OFFICER

11 SADALLAH FARAH, RESEARCHER

12 EVAN MAULDIN, CHIEF CLERK

13 JOHN WOOD, SENIOR INVESTIGATIVE COUNSEL

14 AND OF COUNSEL TO THE VICE CHAIR

15

16

17 For KEITH KELLOGG, JR.:

18 JOHN COALE

1 experts on election procedures.

2 Q So is that how you learned that the election -- through those conversations
3 and maybe similar ones like them -- is that how you learned that the election -- the
4 results weren't going to change?

5 A No. It was my own personal belief.

6 Q Okay.

7 A Because I saw -- what I saw happen, I just knew by the process and what I
8 think, that wasn't going to happen at all.

9 Q Did you talk to Justin Clark after the November 2020 election about
10 challenges?

11 A No.

12 Mr. George. Okay. Ms. Cheney, I noted that you unmuted. Do you have any
13 questions on this topic?

14 Ms. Cheney. No. I wanted to make sure we were back on the day of the 6th
15 and going moment by moment through that.

16 Mr. George. That's exactly where we're headed now, Ms. Cheney.

17 Ms. Cheney. Great. Thank you.

18 BY MR. GEORGE:

19 Q All right. So you mentioned earlier that you walked in, you saw Don, Jr.,
20 Lara, Eric Trump, and Kimberly. And then it sounds like you went to the Oval?

21 A Uh-huh.

22 Q Is that right?

23 A Yes. That's correct.

24 Q Okay. All right. Approximately when was that, if you could guess?

25 A Maybe around 9.

1 A I was.

2 Q Okay. Was that before or after you were going over the President's
3 speech?

4 A It happened about the same time.

5 Q Okay. So let's talk about that then first.

6 What do you remember about that phone call to the Vice President?

7 A First of all, that was a muted phone call. What I mean by that is, we
8 didn't -- I didn't hear the response -- nobody could hear the response of the Vice
9 President.

10 Q So you could only hear what the President said --

11 A You only hear the President speaking back and forth going there. And he
12 told the Vice President that, you know, he has legal authority to send these folks back to
13 the respective States.

14 And that's the reason I made a comment earlier -- I think I made it to you,
15 Tim -- that the White House Counsel was there and he didn't say anything.

16 Q The White House Counsel being the gray-haired guy?

17 A Yeah.

18 Q Okay.

19 A I wish I could remember his name. It was not Pat Cipollone.

20 Q Okay.

21 Mr. Wood. Can I just interrupt?

22 If we found a photo --

23 The Witness. If you can give me his name, I'd remember the name.

24 Mr. Wood. Well, Eric Herschmann was --

25 The Witness. I think it was Eric. I'm pretty sure it was Eric because -- I'm pretty

1 sure that's who it was.

2 Mr. Heaphy. He's a lawyer and he has gray hair.

3 The Witness. That's him. Pretty sure it was Eric.

4 Mr. Wood. If we found his photo and then showed it to you --

5 The Witness. I can show it to you, yeah, for sure.

6 Mr. Wood. I can do that if you want.

7 Mr. George. Yeah.

8 BY MR. GEORGE:

9 Q And while John's pulling that up, so you said he told the Vice President that
10 he has the legal authority to reject certain votes. Is that what you said?

11 A That he had the constitutional authority to do that, yes.

12 Q Okay. As President of the Senate in his Vice President's role --

13 A I think -- I didn't -- I can't recall, Dan, the exact words.

14 Q Okay.

15 A But words to the effect, in his role, what he was going to do that day, the
16 answer's yes.

17 Q What else did he say to the Vice President?

18 A That's it. He was just, you know, disappointed that he was not apparently
19 going to do that. But it was like that was kind of the conversation. And then by that
20 time, the President, the Vice President -- excuse me, Dan.

21 Q Yeah. Of course.

22 A That's him.

23 Q Eric Herschmann?

24 Mr. Wood. Yes.

25 The Witness. Because the Vice President was en route to the Capitol. I think

1 he had -- at that time he had gotten there, the conversation was over.

2 BY MR. GEORGE:

3 Q Okay. So you said the President was disappointed.

4 A Uh-huh.

5 Q I would assume from that phone call that the Vice President probably
6 sounded like he told him he wasn't going to --

7 A I would, based on what has happened, I would probably assume that, yes.

8 Q Okay. Let me rephrase that for the record's benefit.

9 I would assume from that call, what the President said to the Vice President, that
10 the Vice President told the President he wasn't going to use that authority that the
11 President said he had to reject certain votes?

12 A Yeah. I would make the same assumption, Dan, yeah.

13 Q Okay. It's also been reported that the President said to the Vice President
14 that something to the effect of, "You don't have the courage to make a hard decision."
15 And maybe not those exact words, but something like that.

16 Do you remember anything like that?

17 A Words -- and I don't remember exactly either, but something like that, yeah.
18 Like you're not tough enough to make the call.

19 Q Okay. Do you remember anything else along those lines?

20 A No, because it was a relatively short conversation.

21 Q What was the President's demeanor like during the call?

22 A Well, he was -- his demeanor, I would say, was frustrated. He hung up.
23 And after he hung up, we went right back to speech prep. He didn't get up, walk out,
24 yell, throw things. He just said okay and went back to the speech discussion.

25 Q Okay. And we're going to talk about that speech discussion, but it's been

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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **SOUTHERN DIVISION**

15 JOHN C. EASTMAN

16 Plaintiff,

17 vs.

18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.

Case No. 8:22-cv-00099-DOC-DFM

20
21
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23
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25 **Exhibit H**
26
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11:10 - Eric Trump, Don Jr., Kimberly Guilfoyle, IMT, CUS, Eric Herschmann,
) Gen. Kellogg
11:17 - c w/ Sen. Kelly Loeffler (~11:20)
11:20 - c w/ VPOTUS()

PRIVATE

Wednesday, January 6, 2021

10:50 AM Depart The White House en route The Ellipse
(5 min)

11:00 AM **REMARKS AT THE**
(30 min) **SAVE AMERICA RALLY**
Press: Open
Location: The Ellipse

11:35 AM Depart The Ellipse en route The White House
(5 min)

11:40 AM Arrive The White House

RON: The White House

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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **SOUTHERN DIVISION**

15 JOHN C. EASTMAN

16 Plaintiff,

17 vs.

18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.

20 Case No. 8:22-cv-00099-DOC-DFM
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Exhibit I

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4 SELECT COMMITTEE TO INVESTIGATE THE
5 JANUARY 6TH ATTACK ON THE U.S. CAPITOL,
6 U.S. HOUSE OF REPRESENTATIVES,
7 WASHINGTON, D.C.

8

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11 DEPOSITION OF: MARC SHORT

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15 Wednesday, January 26, 2022

16

17 Washington, D.C.

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20 The deposition in the above matter was held in Room 5480, O'Neill House Office
21 Building, commencing at 10:13 a.m.

22 Present: Representatives Lofgren, Schiff, Raskin, Aguilar, Murphy, Cheney and
23 Kinzinger.

1 Appearances:

2

3

4

5 For the SELECT COMMITTEE TO INVESTIGATE

6 THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL:

7

8 KATIE ABRAMS, STAFF ASSOCIATE

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21 AND OF COUNSEL TO THE VICE CHAIR

22

23

24 For MARC SHORT:

25

1 EMMET FLOOD
2 RICHARD CLEARY
3 Williams & Connolly LLP
4 725 Twelfth Street, N.W.
5 Washington, D.C. 20005

1 A There was a phone call from the President, and the Vice President excused
2 himself to take that call upstairs in his residence.

3 Q I see. All right. Let me turn to page -- to exhibit 30 in your binder and the
4 second page of that. This is a Presidential call log from the White House switchboard.
5 And at the very top of page 2, it indicates that, at 9:02 a.m., the President instructed the
6 operator to call back with the Vice President. And then, a couple of lines down, it
7 indicates at 9:15 the operator informed the President that a message was left for the Vice
8 President at 9:15.

9 Do you remember any discussion, Mr. Short, early during your time at the
10 residence that the President wanted to reach Vice President Pence?

11 A No. The only -- the only recollection I have is at some point during our
12 meeting a military aide knocked on the door and said the President was holding for the
13 Vice President, at which point he excused himself to take the call.

14 Q I see. And you said he went upstairs, so he was out of your earshot.

15 A Correct.

16 Q Okay. After he -- how long did the conversation -- or how long was he
17 gone?

18 A My best guess would be 15, 20 minutes.

19 Q Upon his return, did he share any details of the conversation with you?

20 A No.

21 Mr. Flood. Take your time. That was a yes or no, and you answered it.

22 BY MR. HEAPHY:

23 Q What was his demeanor when he returned?

24 A I think that the Vice President was focused on what we had to do as our
25 office that day. And so it was finishing, finalizing the letter and moving forward

1 A Correct.

2 Q Well, on the third page of that document, at the very top, at 11:17, it
3 indicates: The President talked on a phone call to an unidentified person.

4 Reconstructing the testimony from other witnesses, that seems to us to be the
5 time in which he spoke to the Vice President. Does that roughly coincide with your
6 sense of the timing?

7 A I would -- that would make sense to me.

8 Q Okay. And that's the call that you described for which you were not
9 present?

10 A Correct.

11 Q Okay. Just to sort of complete this, the next tab is No. 34. This is another
12 White House document that indicates at the very top in handwriting: 11:20 call with
13 VPOTUS.

14 Again, is that consistent, roughly, with the timing, your understanding of when
15 that phone call between the President and the Vice President took place?

16 A No, it makes sense.

17 Q Okay. Now, I understand that you weren't on the call, but I just want to
18 read you something that was quoted in Bob Woodward's book "Peril," that he indicated
19 in "Peril" that the President said: If you don't do it, I picked the wrong man 4 years ago.
20 The President said: You're going to wimp out. He reportedly said to the Vice
21 President: You can be a hero, or you can be a pussy.

22 Do those -- do you have any recollection of having the Vice President recount to
23 you those words from the President?

24 A No.

25 Q In your involvement, Mr. Short, in discussing these issues and understanding

1 Vice President did not think he had that authority and would not execute a discussion to
2 unilaterally reject electors.

3 And, at that point, there seemed to be a pivot to say, well, maybe you'd entertain
4 the notion of just sending them back. And I recognize there were other lawyers who
5 had argued that earlier.

6 But it was my opinion that the President's viewpoint shifted somewhere toward
7 the end of this time period. So those tweets that you referenced, John, are a revised
8 appeal to the Vice President. Instead of rejecting them, would you send them back to
9 the States.

10 Q And then Mr. Heaphy asked you about some quotes that have been publicly
11 reported from what President Trump allegedly said to the Vice President in that phone
12 call on the morning of the 6th. And I know you said that the Vice President at that time
13 did not tell you about the conversation they had, but did Vice President Pence ever later,
14 after these reports came out, such as the books, did Vice President Pence ever tell you
15 whether those reports about that phone call were accurate?

16 A I never felt the need to ask specifics on that, and I don't think he ever felt the
17 need to divulge specifics on that conversation.

18 Q So, no, he didn't tell you whether it was accurate?

19 A He has not specified the accuracy on that call.

20 BY MR. HEAPHY:

21 Q But just to pick up on that, Mr. Short, was it your impression that the Vice
22 President had directly conveyed his position on these issues to the President, not just to
23 the world through a Dear Colleague Letter, but directly to President Trump?

24 A Many times.

25 Q And had been consistent in conveying his position to the President?

1 A Very consistent.

2 Mr. Heaphy. Okay. All right. Any other questions on the letter?

3 BY MR. HEAPHY:

4 Q Okay. Then I want to move on into the day.

5 Now that you're in the Capitol, it looks like the President began his speech on the
6 Ellipse at about noon. Then, at about 12:30, the President's supporters begin to
7 assemble at the Capitol. While he's still speaking, there's a crowd gathering at the
8 Capitol. At almost exactly 1 o'clock, Mr. Short, from video, Senators and the Vice
9 President are entering the House Chamber where the joint session is convened.

10 The Vice President shortly after 1 o'clock opens, and he reads a script about
11 ascertainment. There's been a lot of discussion about this. And I actually want to play
12 for you a clip of what the Vice President said at the beginning of the joint session and
13 compare it to what other Vice Presidents have said at the beginning of the session.

14 So, if we could turn to the screen, we've got a clip that I want to ask you some
15 questions about after.

16 [Video played.]

17 BY MR. HEAPHY:

18 Q All right. So, obviously, Vice President Pence in 2021 alters, amplifies, adds
19 language to the script that had been read by Vice Presidents reaching back 20 or 30 years.
20 Tell us about the decision, the purposeful decision by Vice President Pence to add that
21 language to the ascertainment script.

22 A Well, I should say that these scripts were coordinated with the
23 Parliamentarian to make sure they were in accord with regular -- whatever the House and
24 Senate rules require. But the predominant reason was that the Vice President wanted
25 to be as transparent as possible because, to the previous exhibit you asked me to look at,

1 OFFICE OF GENERAL COUNSEL
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3 5140 O'Neill House Office Building
4 Washington, D.C. 20515

5 SHER TREMONTE LLP
6 90 Broad Street, 23rd Floor
7 New York, New York 10004

8 ARNOLD & PORTER
9 601 Massachusetts Ave, NW
10 Washington, D.C. 20001

11 Counsel for the Congressional Defendants

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **SOUTHERN DIVISION**

15 JOHN C. EASTMAN

16 Plaintiff,

17 vs.

18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.

Case No. 8:22-cv-00099-DOC-DFM

20
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24
25 **Exhibit J**
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4 SELECT COMMITTEE TO INVESTIGATE THE
5 JANUARY 6TH ATTACK ON THE U.S. CAPITOL,
6 U.S. HOUSE OF REPRESENTATIVES,
7 WASHINGTON, D.C.

8

9

10

11 DEPOSITION OF: BENJAMIN WILLIAMSON

12

13

14

15 Tuesday, January 25, 2022

16

17 Washington, D.C.

18

19

20 The interview in the above matter was held via Webex, commencing at 10:07 a.m.

21 Present: Representatives Aguilar, Lofgren, Murphy, Cheney, and Kinzinger.

1

2 Appearances:

3

4

5 For the SELECT COMMITTEE TO INVESTIGATE

6 THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL:

7

8 KATIE ABRAMS, STAFF ASSOCIATE

9 RICHARD R. BRUNO, ADMIN ASSISTANT AND SCHEDULER

10 DANIEL A. GEORGE, SENIOR INVESTIGATIVE COUNSEL

11 TIMOTHY HEAPHY, CHIEF INVESTIGATIVE COUNSEL

12 JOE MAHER, DETAILEE, DEPARTMENT OF HOMELAND SECURITY

13 EVAN B. MAULDIN, CHIEF CLERK

14 GRANT SAUNDERS, STAFF ASSOCIATE

15

16

17 For BENJAMIN WILLIAMSON:

18

19 MIKE HOWELL

1 Mr. George. Sure. That's all very fair, and I guess part of it I would ask
2 Mr. Williamson when he first learned about any events going on at the Capitol that
3 precipitated violence or that included violence. So I think it's been widely reported and
4 known that rioters went to the Capitol, breached the barricades around the Capitol,
5 ultimately broke into the Capitol and were inside the Capitol for a long period of time.
6 There were violent episodes throughout that. So that's what I'm talking about when I
7 talk about the attack on the Capitol.

8 BY MR. GEORGE:

9 Q And to your point, I'll first say, when did you first learn that rioters were
10 either approaching or had proceeded past any barricades at the Capitol?

11 A I was in my office and I had the TV on in the office, which was on a quad
12 screen setup, four networks, one in each corner. And I was in my office eating lunch,
13 and I don't remember what time exactly, but there was a point where I saw the situation
14 starting to devolve over at the Capitol a little bit from there.

15 Q Okay. Do you remember what you saw that made you think it was starting
16 to devolve?

17 A Yes. There was a pepper spray exchange between some of the group that
18 was over at the Capitol and Capitol Police, I don't remember from which direction. And
19 there were obviously barricades that were being used against Capitol Police that I could
20 see on the screen. And that's the last thing that I remember seeing.

21 Q All right. Now, and forgive me because we had the break, but were you
22 with Ms. Matthews at that point? Do you remember?

23 A I don't remember exactly at that point, Dan. I don't remember.

24 Q Do you remember being with Ms. Matthews, seeing what was happening at
25 the Capitol and then you split off essentially, she went to talk to Ms. McEnany and you

1 went to talk with Mr. Meadows? Do you remember anything like that?

2 A I don't remember exactly when. At some point when that was going on, I
3 know she was in my office. I don't recall her ever splitting off to seeing Ms. McEnany.
4 That's possible. And I -- to answer the last part of your question, I don't remember if
5 that coordinated for -- with when I went to go see Mr. Meadows.

6 But individually, I can answer those two things. I don't remember what Sarah
7 exactly did, but at some point, I did go off to split off and see Mr. Meadows, that's
8 correct.

9 Q All right. Before you split off or before you went off to see Mr. Meadows,
10 what was the conversation like? What were you talking about with Ms. Matthews?

11 A I don't remember much of what was said if anything at all. I think obviously
12 we were both, you know, upset about what we were seeing, but I don't recall exactly
13 what was said between the two of us.

14 Q Can you explain that. Why were you upset?

15 A Oh, it just -- obviously, it was a difficult situation at the Capitol. It was -- it
16 looked like the situation was devolving, and so that was really it. And obviously both
17 Ms. Matthews and I used to work at the Capitol, so naturally we were concerned about
18 what was going on there.

19 Q You still had friends there, I imagine?

20 A Yes.

21 Q Do you remember when, relative to events at the Capitol, you went and
22 spoke to Mr. Meadows? And I guess I'll use breaking windows at the Capitol as a
23 moment in time. Do you remember if you spoke to him before the rioters began
24 breaking windows?

25 A I don't remember exactly what time or where it was in relation to the broken

1 windows, no.

2 Q All right. You did say that you went -- broke off and went to speak to
3 Mr. Meadows. Why did you do that?

4 A I believe I had sent him a text saying that we may want to put out some sort
5 of statement because the situation was getting a little hairy over at the Capitol. And
6 then it was common for, after I would text him, I would just go down and see him in
7 person for really anything, just, you know -- just not knowing whether he would have his
8 phone on him or not. And so that was why I went down to see him was just to kind of
9 follow up after I sent a text about what was going on.

10 Q All right. So let's pull up exhibit No. 7. And while that's coming up, you
11 think you went to speak with him after you sent this text?

12 A Yes, I'm fairly certain that's correct.

13 Q Do you remember seeing him or talking to him before you sent this text,
14 which is at 2:02 p.m., on January the 6th, and up on the screen?

15 A I don't remember, no. I don't remember.

16 Q Okay.

17 Mr. George. Ms. Cheney, I see you turned on your camera.

18 Ms. Cheney. I just wondered, Mr. Williamson, do you remember seeing bike
19 racks being breached?

20 The Witness. Yes, on the TV, correct, Congresswoman.

21 Ms. Cheney. Okay. And that would've been before you went to talk to
22 Mr. Meadows?

23 The Witness. I don't remember exactly what time, but I believe so, yes. I
24 believe seeing that on the TV before I went over.

25 Ms. Cheney. Okay. Thank you.

1 BY MR. GEORGE:

2 Q All right. So we've pulled up exhibit No. 7, which is the text message I
3 believe you've been referring to and that I just mentioned, 2:02 p.m., on January the 6th.
4 You say, "Would recommend POTUS put out a tweet about respecting the police over at
5 the Capitol -- getting a little hairy over there," as you just mentioned. That's a tweet
6 that you -- or, excuse me, a text message that you sent to Mr. Meadows?

7 A Yes.

8 Q And just for context, the recipient, at least that's shown on this text message
9 at the top, says "OLD Mark." You also provided a text message to just Mark Meadows.
10 Is there a difference between that? Are there two different phones you were texting?

11 A No. There was only one phone -- well, that would've been his work phone
12 at the time, which I don't think I had texted him on. I think when I took these screen
13 shots at two different periods I had labeled it differently in the process of gathering
14 documents for you all just to make it clear. If there's a discrepancy there, I apologize.
15 But these should all be from the same number, other than I think one document, which I
16 think was a text exchange in our work phones, but I'm not sure if there is or not.

17 Q I see. But this is certainly Mark Meadows?

18 A Yeah, this is Mark Meadows, correct.

19 Q So you -- you made that comment about putting out a tweet. Can you
20 explain why, what you thought that would -- or what you hoped that would accomplish
21 and what it should be?

22 A Oh, I think I say it in the text there that it would be -- would recommend
23 putting out something about respecting the police, because I could see that there was a
24 group of people there that were obviously engaging in behavior toward police that was
25 inappropriate.

1 Q And why a tweet in particular was your recommendation?

2 A It'd be common way of putting out a statement that was easily distributed.

3 Q Did -- was there a difference in your mind between a tweet or a press
4 conference or a video as far as reaching people the fastest?

5 A Not necessarily, no. I -- generally, when the President wanted to get
6 something out quickly, we would talk about doing a tweet, and that's all that I was
7 thinking of in the moment.

8 Q And is that because, to your understanding, the President's supporters
9 followed him on Twitter?

10 A No, not necessarily. It's -- again, it's just the way that we would talk about
11 getting something out the quickest was through the President doing a tweet.

12 Q All right. You went down to speak with Mark Meadows after this. What
13 was that conversation?

14 A Very brief. I went down and told him the same thing I have in the text, that
15 I can recall. And I don't remember anything that was said between us other than I told
16 him that. And to my recollection, he immediately got up and left his office.

17 Q Do you know where he went?

18 A Yes. I followed him down the hallway, and I followed him into the outer
19 Oval corridor, which is the hallway between the Oval Office hallway and the outer Oval
20 section of the Oval Office. I followed him into that little corridor hallway. I saw him
21 walk into outer Oval. I maybe took a step into outer Oval and then left. And I don't
22 know where he went outside of that, but it looked like he was headed in the direction of
23 the Oval Office.

24 Q So did you actually see him enter the Oval?

25 A I did not. I turned around and left because I needed to get back to my staff.

1 Q In that conversation, you said there was little exchange with Mr. Meadows.
2 Did he -- did he do anything to indicate whether he agreed with your recommendation or
3 disagreed?

4 A Yes. He immediately looked like he had heard what I had to say and was
5 jumping to it. He got up and immediately walked down the hallway. And like I said, I
6 followed him in that direction. And that was all that I could remember from that.

7 Q But you don't remember what he said to you, though, other than just
8 saying --

9 A I do not. I don't. And I apologize for interrupting. I don't. I don't
10 recall anything that was exchanged back and forth other than what I had said, which is
11 depicted in the text you just had put up on the screen earlier.

12 Q Now, I understand that the President may have been in the dining room off
13 the Oval. Do you know where the President was at that time?

14 A I do not.

15 Q Did you ever see the President that afternoon in the Oval Office?

16 A I did not.

17 Q Did you ever see him in the dining room?

18 A I did not. It's possible that I may have passed him at some point while he
19 was in there, maybe a door was open or something. But I did not see him that
20 afternoon in the dining room, no.

21 Q If the President was in the dining room when Mr. Meadows walked in that
22 direction, would Mr. Meadows have to go the route he took to get to the dining room, or
23 is there another way to the dining room?

24 A There are two entrances to the dining room. I don't know which way he
25 would've taken. You could take one through the Oval or you could take one through the

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15 JOHN C. EASTMAN

16 Plaintiff,

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18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.

20 Case No. 8:22-cv-00099-DOC-DFM
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Exhibit K

Sent: Tuesday, January 05, 2021 7:29 PM MST

To: Jacob, Gregory F. EOP/OVP <Gregory.F.Jacob@ovp.eop.gov>

Subject: Pennsylvania letter

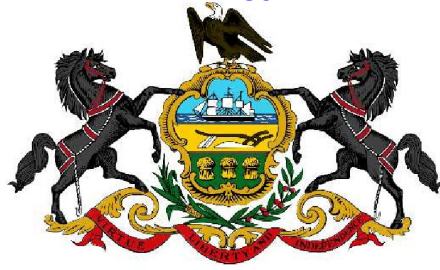
Attachment(s): "US Republican Leadership Letter.pdf"

Greg,

Good talk earlier tonight.

Major new development attached. This is huge, as it now looks like PA Legislature will vote to recertify its electors if Vice President Pence implements the plan we discussed.

John



Senate of Pennsylvania

January 4, 2021

Honorable Mitch McConnell
The Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

Honorable Kevin McCarthy
Republican Leader – US House of
Representatives
2468 Rayburn House Office Building
Washington, DC 20515

Dear Leader McConnell and Leader McCarthy,

As members of the Pennsylvania Senate, we believe in the integrity of the election process. After speaking with our colleagues, a majority of the State Senate is troubled by the many inconsistencies that happened in our Commonwealth during the 2020 election.

Due to numerous unlawful violations taken by Pennsylvania Governor, Tom Wolf; Secretary of State, Kathy Boockvar; and the rogue State Supreme Court, the balance of power was taken from the State Legislature, who by the U.S. and PA Constitutions, set the time, place and manner of holding elections.

Act 77 of 2019 that was signed into law, provides the following clear provisions:

- All mail-in ballots must be received by 8:00 p.m. election night
- Officials at polling places must authenticate the signatures of voters
- County Election Boards may begin pre-canvassing of absentee and mail-in ballots after 8:00 a.m. on election day
- Poll watchers selected by candidates and political parties are permitted to observe the process of canvassing absentee and mail-in ballots.
- No provisions were made for drop boxes or “curing” of ballots

Seven weeks before the 2020 General Election the PA Supreme Court overstepped their bounds by ruling that:

- Mail-in ballots could be received and counted up to three days later
- Ballots mailed without a postmark would be counted
- Signatures on mail-in ballots would not need to be verified

Secretary of State, Kathy Boockvar also usurped legislative authority by:

- Allowing for a proliferation of unsecured drop boxes in key Democratic areas
- On the day before the election, encouraged some counties (not all) to notify party and candidate representatives of mail-in voters whose ballots contained disqualifying defects and allowing them to “cure” these defects

In addition to these inconsistencies, certified Republican poll watchers in Philadelphia were prohibited from overseeing the canvassing of ballots. After a court ordered these poll watchers to be allowed to observe, they were “corralled” so far from the canvassing of ballots, that they could not view the activities.

Requests from legislators for independent investigations have been ignored by the administration.

Due to these inconsistent and questionable activities, we believe that PA election results should not have been certified by our Secretary of State.

Members, we ask for more time given the fact that the U.S. Supreme Court is to hear Trump vs. Boockvar in the coming days. We ask that you delay certification of the Electoral College to allow due process as we pursue election integrity in our Commonwealth.

Very respectfully,

Members of the PA Senate

cc: Republican US Senate Members
Republican US House Members



Jake Corman
President Pro Tempore



Kim Ward
Majority Leader



Judy Ward
Senator, 30th District



Kristin Phillips-Hill
Senator, 28th District



Mike Regan
Senator, 31st District



David G. Argall
Senator, 29th District



Dave Arnold
Senator, 48th District



Camera Bartolotta
Senator, 46th District



Gene Yaw
Senator, 23rd District



Bob Mensch
Senator, 24th District



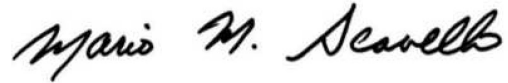
Michele Brooks
Senator, 50th District



Scott Hutchinson
Senator, 21st District



Wayne Langerholm
Senator, 35th District



Mario Scavello
Senator, 40th District



Cris Dush
Senator, 25th District



Joe Pittman
Senator, 41st District



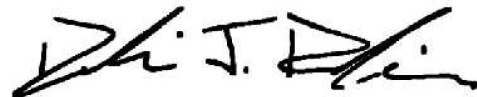
Pat Stefano
Senator, 32nd District



Scott Martin
Senator, 13th District



Ryan Aument
Senator, 36th District



Devlin Robinson
Senator, 37th District



Doug Mastriano
Senator, 33rd District

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12 **UNITED STATES DISTRICT COURT**
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14 **SOUTHERN DIVISION**

15 JOHN C. EASTMAN

16 Plaintiff,

17 vs.

18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.

20 Case No. 8:22-cv-00099-DOC-DFM

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25
26 **Exhibit L**
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From: Eastman, John
Sent: Wednesday, January 06, 2021 12:25 PM MST
To: Jacob, Gregory F. EOP/OVP <Gregory.F.Jacob@ovp.eop.gov>
Subject: RE: [EXTERNAL] Pennsylvania letter

My "bullshit" – seriously? You think you can't adjourn the session because the ECA says no adjournment, while the compelling evidence that the election was stolen continues to build and is already overwhelming. The "siege" is because YOU and your boss did not do what was necessary to allow this to be aired in a public way so the American people can see for themselves what happened.

From: Jacob, Gregory F. EOP/OVP <Gregory.F.Jacob@ovp.eop.gov>
Sent: Wednesday, January 6, 2021 12:14 PM
To: Eastman, John <jeastman@chapman.edu>
Subject: Re: [EXTERNAL] Pennsylvania letter

John, very respectfully, I just don't in the end believe that there is a single Justice on the United States Supreme Court, or a single judge on any of our Courts of Appeals, who is as "broad minded" as you when it comes to the irrelevance of statutes enacted by the United States Congress, and followed without exception for more than 130 years. They cannot be set aside except when in direct conflict with the Constitution that our revered Framers handed us. And very respectfully, I don't think that a single one of those Framers would agree with your position either. Certainly, Judge Luttig has made clear he does not. And there is no reasonable argument that the Constitution directs or empowers the Vice President to set a procedure followed for 130 years before it has even been resorted to.

Lincoln suspended the writ when the body entrusted with that authority was out of session, and submitted it to them as soon as it returned. I understand your argument that several state legislatures were out of session. But the role for state legislatures has for our entire history ended at the time that electoral certificates are submitted to Congress. Congress has debated submissions, including competing submissions. It has never once referred them out to state legislatures to decide.

I respect your heart here. I share your concerns about what Democrats will do once in power. I want election integrity fixed. But I have run down every legal trail placed before me to its conclusion, and I respectfully conclude that as a legal framework, it is a results oriented position that you would never support if attempted by the opposition, and essentially entirely made up.

And thanks to your bullshit, we are now under siege.

Sent from my iPhone

On Jan 6, 2021, at 1:33 PM, Eastman, John <jeastman@chapman.edu> wrote:

I'm sorry Greg, but this is small minded. You're sticking with minor procedural statutes while the Constitution is being shredded. I gave you the Lincoln example yesterday. Here's another. In the situation room at the White House during the first Iraq war, the Sec of Interior said the law required an environmental impact assessment before the President could order bombing of the Iraq oil fields. Technically true. But nonsense. Luckily, Bush got statesmanship advice and ignored that statutory requirement.

Dr. John C. Eastman
Chapman University School of Law
(877) 855-3330 x2

(Sent from my mobile device. Please excuse any typos or brevity.)

On Jan 6, 2021, at 10:44 AM, Jacob, Gregory F. EOP/OVP <Gregory.F.Jacob@ovp.eop.gov> wrote:

External Message

Thanks, John. Will call.

Is it unconstitutional for the ECA to direct that the members should do objections, at least in the first instance? Would the constitutional imperative you argue for not kick in only after that statutorily required mechanism has been applied, and failed to uphold the Constitution?

Sent from my iPhone

On Jan 5, 2021, at 9:32 PM, Eastman, John <jeastman@chapman.edu> wrote:

Greg,

Good talk earlier tonight.

Major new development attached. This is huge, as it now looks like PA Legislature will vote to recertify its electors if Vice President Pence implements the plan we discussed.

Give me a call once you've had your sit-down with the VP and let me know where we stand.

Again, thank you.

John

<US Republican Leadership Letter.pdf>

NOTE: This email originated from outside Chapman's network. Do not click links or open attachments unless you recognize the sender and know content is safe.

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15 JOHN C. EASTMAN

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19 Defendants.

20 Case No. 8:22-cv-00099-DOC-DFM
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Exhibit M

From: Eastman, John
Sent: Wednesday, January 06, 2021 4:45 PM MST
To: Jacob, Gregory F. EOP/OVP <Gregory.F.Jacob@ovp.eop.gov>
Subject: RE: [EXTERNAL] Pennsylvania letter

He's been so advised, as you know because you were on the phone when I did it. I should not discuss other conversations that I may or may not have had privately on that score with someone who is a client. But you know him – once he gets something in his head, it is hard to get him to change course.

When this is over, we should have a good bottle of wine over a nice dinner someplace.

John

From: Jacob, Gregory F. EOP/OVP <Gregory.F.Jacob@ovp.eop.gov>
Sent: Wednesday, January 6, 2021 4:29 PM
To: Eastman, John <jeastman@chapman.edu>
Subject: Re: [EXTERNAL] Pennsylvania letter

John,

Did you advise the President that in your professional judgment the Vice President DOES NOT have the power to decide things unilaterally? Because that was pushed publicly, repeatedly, by the President and by his surrogates this week. And without apparent legal correction.

I acknowledge that the final proposal as to actual actions to be taken by the Vice President in violation of the ECA that was retreated to last night was more modest. But the legal theory is not. And it does not appear that the President ever got the memo.

Respectfully,
Greg

Sent from my iPhone

On Jan 6, 2021, at 6:09 PM, Eastman, John <jeastman@chapman.edu> wrote:

Greg,

I appreciate tamping down the rhetoric. I will respond in kind.

With all due respect, the VP's statement today claimed the most aggressive position that had been discussed and rejected. "Some believe that as Vice President, I should be able to accept or reject electoral votes unilaterally." But we had given a much more limited option, merely to adjourn to allow state legislatures to continue their work. I remain of the view not only would that have been the most prudent course as it would have allowed for the opportunity for this thing to be heard out, but also had a fair chance of being approved (or at least not enjoined) by the Courts.

Alas.

John

From: Jacob, Gregory F. EOP/OVP <Gregory.F.Jacob@ovp.eop.gov>
Sent: Wednesday, January 6, 2021 1:05 PM
To: Eastman, John <jeastman@chapman.edu>
Subject: Re: [EXTERNAL] Pennsylvania letter

I do apologize for that particular language, which was unbecoming of me, and reflective of a man whose wife and three young children are currently glued to news reports as I am moved about to locations where we will be safe from people, "mostly peaceful" as CNN might say, who believed with all their hearts the theory they were sold about the powers that could legitimately be exercised at the Capitol on this day. Please forgive me for that.

But the advice provided has, whether intended to or not, functioned as a serpent in the ear of the President of the United States, the most powerful office in the entire world. And here we are.

For the record, we were in the middle of an open, widely televised debate that was airing every single point that you gave members of Congress to make when all of this went down and we had to suspend.

I am not for a moment suggesting that you intended this result, but we were in fact giving you precisely the transparent debate that you suggest we were not. It was then up to you and the legal team to arm members with a case at least sufficient to convince a Senate that our own party controls. I'm not hearing that case at the moment, which I was anticipating with great interest (having previously reviewed many of the underlying filed materials), because the Senate floor has been abandoned.

Respectfully, it was gravely, gravely irresponsible for you to entice the President with an academic theory that had no legal viability, and that you well know we would lose before any judge who heard and decided the case. And if the courts declined to hear it, I suppose it could only be decided in the streets. The knowing amplification of that theory through numerous surrogates, whipping large numbers of people into a frenzy over something with no chance of ever attaining legal force through actual process of law, has led us to where we are.

I do not begrudge academics debating the most far-flung theories. I love doing it myself, and I view the ferment of ideas as a good and helpful thing. But advising the President of the United States, in an incredibly constitutionally fraught moment, requires a seriousness of purpose, an understanding of the difference between abstract theory and legal reality, and an appreciation of the power of both the office and the bully pulpit that, in my judgment, was entirely absent here.

I'll say no more. And perhaps at some future Federalist Society Convention, we can more fully engage in the academic debate.

God bless.

Sent from my iPhone

On Jan 6, 2021, at 2:25 PM, Eastman, John <jeastman@chapman.edu> wrote:

My "bullshit" – seriously? You think you can't adjourn the session because the ECA says no adjournment, while the compelling evidence that the election was stolen continues to build and is already overwhelming. The "siege" is because YOU and your boss did not do what was necessary to allow this to be aired in a public way so the American people can see for themselves what happened.

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Sent: Wednesday, January 6, 2021 12:14 PM
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Subject: Re: [EXTERNAL] Pennsylvania letter

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Sent from my iPhone

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#2149
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Dr. John C. Eastman
Chapman University School of Law
(877) 855-3330 x2

(Sent from my mobile device. Please excuse any typos or brevity.)

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External Message

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Again, thank you.
John
<US Republican Leadership Letter.pdf>

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4 Washington, D.C. 20515

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6 90 Broad Street, 23rd Floor
7 New York, New York 10004

8 ARNOLD & PORTER
9 601 Massachusetts Ave, NW
10 Washington, D.C. 20001

11 Counsel for the Congressional Defendants

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **SOUTHERN DIVISION**

15 JOHN C. EASTMAN

16 Plaintiff,

17 vs.

18 BENNIE G. THOMPSON, *et al.*,

19 Defendants.

Case No. 8:22-cv-00099-DOC-DFM

20
21
22
23
24
25 **Exhibit N**
26
27
28

From: Eastman, John
Sent: Wednesday, January 06, 2021 9:44 PM MST
To: Jacob, Gregory F. EOP/OVP <Gregory.F.Jacob@ovp.eop.gov>
Subject: RE: [EXTERNAL] Pennsylvania letter

The Senate and House have both violated the Electoral Count Act this evening – they debated the Arizona objections for more than 2 hours. Violation of 3 USC 17. And the VP allowed further debate or statements by leadership after the question had been voted upon. Violation of 3 USC 17. And they had that debate upon motion approved by the VP, in violation of the requirement in 3 USC 15 that after the vote in the separate houses, “they shall immediately again meet.”

So now that the precedent has been set that the Electoral Count Act is not quite so sacrosanct as was previously claimed, I implore you to consider one more relatively minor violation and adjourn for 10 days to allow the legislatures to finish their investigations, as well as to allow a full forensic audit of the massive amount of illegal activity that has occurred here. If none of that moves the needle, at least a good portion of the 75 million people who supported President Trump will have seen a process that allowed the illegality to be aired.

John

From: Jacob, Gregory F. EOP/OVP <Gregory.F.Jacob@ovp.eop.gov>
Sent: Wednesday, January 6, 2021 4:29 PM
To: Eastman, John <jeastman@chapman.edu>
Subject: Re: [EXTERNAL] Pennsylvania letter

John,

Did you advise the President that in your professional judgment the Vice President DOES NOT have the power to decide things unilaterally? Because that was pushed publicly, repeatedly, by the President and by his surrogates this week. And without apparent legal correction.

I acknowledge that the final proposal as to actual actions to be taken by the Vice President in violation of the ECA that was retreated to last night was more modest. But the legal theory is not. And it does not appear that the President ever got the memo.

Respectfully,
Greg

Sent from my iPhone

On Jan 6, 2021, at 6:09 PM, Eastman, John <jeastman@chapman.edu> wrote:

Greg,

I appreciate tamping down the rhetoric. I will respond in kind.

With all due respect, the VP's statement today claimed the most aggressive position that had been discussed and rejected. “Some believe that as Vice President, I should be able to accept or reject electoral votes unilaterally.” But we had given a much more limited option, merely to adjourn to allow state legislatures to continue their work. I remain of the view not only would that have been the most prudent course as it would have allowed for the opportunity for this thing to be heard out, but also had a fair chance of being approved (or at least not enjoined) by the Courts.

Alas.

John

From: Jacob, Gregory F. EOP/OVP <Gregory.F.Jacob@ovp.eop.gov>
Sent: Wednesday, January 6, 2021 1:05 PM
To: Eastman, John <jeastman@chapman.edu>
Subject: Re: [EXTERNAL] Pennsylvania letter

I do apologize for that particular language, which was unbecoming of me, and reflective of a man whose wife and three young children are currently glued to news reports as I am moved about to locations where we will be safe from people, “mostly peaceful” as CNN might say, who believed with all their hearts the theory they were sold about the powers that could legitimately be exercised at the Capitol on this day. Please forgive me for that.

But the advice provided has, whether intended to or not, functioned as a serpent in the ear of the President of the United

States, the most powerful office in the entire world. And here we are. #2152

For the record, we were in the middle of an open, widely televised debate that was airing every single point that you gave members of Congress to make when all of this went down and we had to suspend.

I am not for a moment suggesting that you intended this result. But we were in fact giving you precisely the transparent debate that you suggest we were not. It was then up to you and the legal team to arm members with a case at least sufficient to convince a Senate that our own party controls. I'm not hearing that case at the moment, which I was anticipating with great interest (having previously reviewed many of the underlying filed materials), because the Senate floor has been abandoned.

Respectfully, it was gravely, gravely irresponsible for you to entice the President with an academic theory that had no legal viability, and that you well know we would lose before any judge who heard and decided the case. And if the courts declined to hear it, I suppose it could only be decided in the streets. The knowing amplification of that theory through numerous surrogates, whipping large numbers of people into a frenzy over something with no chance of ever attaining legal force through actual process of law, has led us to where we are.

I do not begrudge academics debating the most far-flung theories. I love doing it myself, and I view the ferment of ideas as a good and helpful thing. But advising the President of the United States, in an incredibly constitutionally fraught moment, requires a seriousness of purpose, an understanding of the difference between abstract theory and legal reality, and an appreciation of the power of both the office and the bully pulpit that, in my judgment, was entirely absent here.

I'll say no more. And perhaps at some future Federalist Society Convention, we can more fully engage in the academic debate.

God bless.

Sent from my iPhone

On Jan 6, 2021, at 2:25 PM, Eastman, John <jeastman@chapman.edu> wrote:

My "bullshit" – seriously? You think you can't adjourn the session because the ECA says no adjournment, while the compelling evidence that the election was stolen continues to build and is already overwhelming. The "siege" is because YOU and your boss did not do what was necessary to allow this to be aired in a public way so the American people can see for themselves what happened.

From: Jacob, Gregory F. EOP/OVP <Gregory.F.Jacob@ovp.eop.gov>
Sent: Wednesday, January 6, 2021 12:14 PM
To: Eastman, John <jeastman@chapman.edu>
Subject: Re: [EXTERNAL] Pennsylvania letter

John, very respectfully, I just don't in the end believe that there is a single Justice on the United States Supreme Court, or a single judge on any of our Courts of Appeals, who is as "broad minded" as you when it comes to the irrelevance of statutes enacted by the United States Congress, and followed without exception for more than 130 years. They cannot be set aside except when in direct conflict with the Constitution that our revered Framers handed us. And very respectfully, I don't think that a single one of those Framers would agree with your position either. Certainly, Judge Luttig has made clear he does not. And there is no reasonable argument that the Constitution directs or empowers the Vice President to set a procedure followed for 130 years before it has even been resorted to.

Lincoln suspended the writ when the body entrusted with that authority was out of session, and submitted it to them as soon as it returned. I understand your argument that several state legislatures were out of session. But the role for state legislatures has for our entire history ended at the time that electoral certificates are submitted to Congress. Congress has debated submissions, including competing submissions. It has never once referred them out to state legislatures to decide.

I respect your heart here. I share your concerns about what Democrats will do once in power. I want election integrity fixed. But I have run down every legal trail placed before me to its conclusion, and I respectfully conclude that as a legal framework, it is a results oriented position that you would never support if attempted by the opposition, and essentially entirely made up.

And thanks to your bullshit, we are now under siege.

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