No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP,
Petitioner,
v.
NORMA ANDERSON, ET AL.,
Respondents.

On Writ of Certiorari to the Colorado Supreme Court

JOINT APPENDIX VOL. III OF IV (JA1002-JA1319)

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DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO
1437 Bannock Street
Denver, Colorado 80203

Case Number 2023CV032577, Courtroom 209

CERTIFIED STENOGRAPHER'S TRIAL TRANSCRIPT
TRIAL DAY 5: November 3, 2023
NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN,
Petitioners,
v.
JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and
DONALD J. TRUMP,
Respondents,
and
COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, and DONALD J. TRUMP,
Intervenors.

The trial in the above-entitled matter commenced on Thursday, November 2, 2023, at 8:01 a.m., before the HONORABLE SARAH B. WALLACE, Judge of
the District Court.

This transcript is a complete transcription of the proceedings that were had in the

above-entitled matter on the aforesaid date.
Stenographically reported by:
Lisa A. Knight, RDR, CRR, RSA
[p.2]
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PROCEEDINGS

THE COURT: Are the intervenors ready to present their witness?

MR. GESSLER: Yes, Your Honor. We are. I understand, although I've not been privy to the conversations, there are some evidentiary issues to discuss. I don't know if you want to discuss them now or wait until a little bit later today, Your Honor.

THE COURT: Do they have to do with Mr. Delahunty?

MR. GESSLER: I believe they do not.

MR. MURRAY: Your Honor, the petitioners have one issue related to Mr. Delahunty, just logistically, if I may for a moment.

THE COURT: Sure. Sure.

MR. MURRAY: I didn't want to object— interrupt the direct testimony with extensive objections to Mr. Delahunty. But we do have objections to both his qualifications and his methodology under Rule 702, and we also object to much of his testimony as purely legal opinion rather than history or other helpful expertise.

And we were wondering if we could just get a standing objection on those questions during direct examination and then renew those objections and [p.8]
request a ruling after that portion of cross-examination.

THE COURT: Yeah. And I would—most likely what I'll do is defer any 702 ruling until the findings of facts and conclusions of law that I'm going to be issuing. But I certainly want to allow you to make your record, but I am – it's my intention to let Professor Delahunty testify.

MR. GRIMSLEY: Understood. I didn't want to disrupt the proceedings with repeated objections, but I also want to make sure that we've preserved it.

THE COURT: Yeah. So consider it preserved. And you're welcome to, you know, renew the motion— 702 motion at the end of the proceedings today. But in all likelihood, I will just address that in conjunction with my final ruling.

MR. GRIMSLEY: Understood, Your Honor. And if I may, for petitioners today, Jason Murray, Eric Olson, Martha Tierney, Nikhel Sus, Mario Nikolais, and Sean Grimsley.

THE COURT: Okay. And why don't we get—start with an entry of appearance from other—Colorado Republican Party. And we'll let—

[p.9]

MS. RASKIN: Good morning, Your Honor.

Jane Raskin on behalf of the Republican State Central Committee. With me are Michael Melito, Nathan Moelker, Bob Kitsmiller.

THE COURT: And why don't we get—why don't we take care of the respondents, and then you can introduce people and tell me what the other issue is we need to deal with.

MR. KOTLARCZYK: Good morning, Your Honor. Michael Kotlarczyk from the Attorney General's Office on behalf of the respondent, Jena Griswold, Secretary of State, in her official capacity. With me at counsel table is Jennifer Sullivan from the Attorney General's Office and Deputy Secretary of State Christopher Beall.

THE COURT: Great. Thank you.

MR. KOTLARCZYK: Thank you.

THE COURT: Mr. Gessler.

MR. GESSLER: Good morning, Your Honor. Scott Gessler on behalf of President Trump. With me is Mr.

Chris Halbohn. I don't know if his pro hac vice has been finished.

THE COURT: It has been.

MR. GESSLER: It has been. So I don't [p.10] expect him to talk, but he may. Mr. Geoff Blue as well, Mr. Jacob Roth, and Mr. Justin North.

THE COURT: And you had an evidentiary issue you wanted to address?

MR. GESSLER: I don't think I want to address it now. We'll do it a little later. I would defer to Mr. Blue. He's had those conversations with opposing counsel.

MR. BLUE: Your Honor, I think it makes sense to just go ahead with Professor Delahunty, and then we'll deal with all these housekeeping matters at the end of the day.

THE COURT: Okay. Oh, okay. We need to take a pause while the court reporter deals with some technical issues.

THE COURT: Let's proceed.

MR. GESSLER: Thank you, Your Honor. For our next witness, we will call Mr. Robert Delahunty.

THE COURT: Will you raise your hand.

ROBERT DELAHUNTY, having been first duly sworn/affirmed, was examined and testified as follows:

THE COURT: Great. Have a seat and just [p.11] make sure to speak into the microphone.

THE WITNESS: Thank you.

DIRECT EXAMINATION BY MR. GESSLER:

Q. Good morning, Mr. Delahunty. So I'm going to be asking you some questions today. And you're here – we've called you as an expert. Let me ask you, have you ever testified – let me start with this. Could you please state and spell your name.

A. Yes. Robert Jay Delahunty, D-e-l-a-h-u-n-t-y.

Q. Okay. And, Mr. Delahunty, have you— have you ever testified in court as an expert before?

A. No.

Q. Okay. So this is your first time?

A. It is.

Q. So let me— let me start with asking you a little bit about your professional background. What's your— what's your current position, if any?

A. I am retired.

Q. Okay. As someone who is retired, are [p.12] you— are you involved in any law-related activities?

A. Well, I write articles or other shorter pieces on law –

Q. Okay.

A. and public policy.

Q. Okay.

A. And in June, late June, a book which I co-authored, a semipopular book, was published. It's called "The Politically Incorrect Guide to the Supreme Court." So that reflects legal writing that I have done—

Q. Okay.

A.—quite recently.

THE COURT: Professor, you're leaning back.

THE WITNESS: Oh, I'm sorry.

THE COURT: Just try to get closer to the microphone.

THE WITNESS: So I'll try to get closer.

THE COURT: You may be able to move the microphone, but make sure you speak into it.

THE WITNESS: Can you hear now?

Q. (By Mr. Gessler) Yeah. Professor, sometimes it's a challenge whether you're supposed to answer me or the Court when you're speaking, but since [p.13] we— since

there's a fair amount of media coverage, just try and stay close to that microphone.

A. I will.

Q. Let me ask you to start with your legal background in chronological order. What—what's your education?

A. Well, I graduated in 1968 from Columbia University and had a summa cum laude degree there. I then won a Kellett Fellowship from Columbia to study at Oxford University, England. I studied a subject called Greats, which consisted of two parts, classical history and classical and modern philosophy. And I got first class honors in Greats. I then did a second degree at Oxford University, a bachelor's of philosophy. I wrote a thesis on Aristotle. I then had a career in Britain, both at Oxford and Durham University teaching philosophy. I was tenured at Durham University as what they call a lecturer on the philosophy faculty. That was the equivalent, really, of associate professor in the United States. At that point, about 1980, I decided to return to this country and—to study the law. And I studied the law at Harvard Law School and graduated cum laude from there. And then—this is not [p.14] educational background, but it's the past. I spent three years on Wall Street at a law firm called Sullivan & Cromwell. And then I joined the Department of Justice, the appellate section on Civil Rights Division, in 1986. And then at the start of 1989, the start of the first George H.W. Bush administration, William Barr, later twice Attorney General, invited me to become a staff attorney at the Office of Legal Counsel in the Department of Justice. And so I began working there in early 1989. I don't remember the year, but I was eventually promoted to the Senior Executive Service in the Department of Justice. And from 1989 until 2004, I served primarily in the Office of Legal Counsel, although for about a year, I was the special

counsel to the Solicitor of the Department of Labor, the U.S. Department of Labor. He had been a college friend of mine in England. And then I served— I was on unpaid leave of absence but still employed by OLC for a year to be a visiting professor at the Columbus School of Law in Washington, D.C., which was part of the Catholic University of America. And while at St. Thomas—I was there [p.15] from 2004 until the end of 2020. At the end of 2020, I retired, and now I am a fellow for the Claremont Institute Center for the American Way of Life in Washington, D.C., and do—give them legal advice from time to time. And I published an article and a book, a collection of essays I put together. That also came out—

Q. Okay.

A.— in June.

Q. Let me interrupt you for just a moment.

THE COURT: And I'm just—I think the court reporter probably needs a breath. Because that was a crazy long answer.

THE WITNESS: Sorry.

THE COURT: So let's just— I think it helps everybody if you let him kind of guide you through your testimony.

THE WITNESS: Fine.

MR. GESSLER: May I offer that it was also an erudite long answer, Your Honor?

Q. (By Mr. Gessler) Okay. Let me ask you a little bit about your—your time. You said you had—you worked at St. Thomas School of Law—

A. Yes.

[p.16]

Q. from 2004 to 2020. What did you do there?

A. taught constitutional law. And every year I was there— I'm not absolutely certain that I did or did not

teach it in the year I was on—half year I was on sabbatical. But constitutional law, including, of course, the Fourteenth Amendment. That, in fact, was the centerpiece of my teaching. And I taught public international law. And one term I gave a seminar on the law of genocide, which is international law.

Q. Okay. During your time in any of these positions—and it looks as though you spent most of your— or a large portion of your career, large chunks, at both the Office of Legal Counsel at the Department of Justice as well as St. Thomas School of Law. Did you have an opportunity to work with historical documents?

A. Oh, yes. Indeed.

Q. Can you describe some of that?

A. Well, I could go on I hope not too much. But let me give you maybe three examples. One of the first assignments I had in the[p.17] Appellate section of the Civil Rights Division of Justice, which would have been in 1986, was to do research into the Civil Rights Act of 1866, which is now codified as section — it's —

THE WITNESS: I'm sorry, Your Honor. I'm blanking on the site.

A. Section 1981 of Title 42 of the U.S. Code. And that involved research including looking at dictionary definitions from the 19th century of the meaning of the term "race." But that was in connection with an amicus brief that the government eventually did not file in a case called Shaare Tefila versus Cobb. So my whole research led me to draft an amicus brief for the government. That was never filed, but it did, right at the start of my career in the Justice Department, entail research into private documents and into the background of the Civil Rights Act of 1866.

Q. (By Mr. Gessler) Okay.

A. More recently—

Q. I was about to ask you for your second example.

A. Yeah. This was a Law Review article [p.18] published three or four years ago, maybe four or five years ago. I'm interested in the law and Shakespeare, and so I wrote a lengthy article about the law in his play "King John." This entailed the research into the English law of intestacy and bastardy in Shakespeare's period, the Tudor period and the Stuart period. And I made quite extensive use of a database compiled by the University of Michigan, which is called Early English Books Online. It is a collection of thousands of legal and other documents, proclamations, sermons, books of the Tudor and Stuart periods. And so I did that kind of research into English legal history of the early modern period and, indeed, the Middle Ages, because the play is set in the Middle Ages, on the law of intestacy and the law of illegitimacy using those historical materials which were archived at the University of Michigan. And if I am permitted to give another example?

Q. Yeah. Let's do one more example—

A. Yes.

Q. and then we'll move on.

A. Some years ago in the Cornell Law Quarterly, a law journal, I published an article on [p.19] the Declaration of War clause of the –of Article 1of the Constitution. And I did the primary research or research into other primary materials from English law, English legal cases— I think it was prize law— from the middle of the 18th century, consulting the original case materials.

Q. Okay. Have you written any pieces or articles involving the electoral— the Vice President and the electoral count?

A. Yes. In 2022, along with my often-coauthor, John Yoo, who is a professor— chaired professor of law at the University of California at Berkeley, we published an article on the Twelfth Amendment and the— as we understand it, the constitutional authority of Congress to regulate the vote count process in presidential elections, and the constitutional role of the Vice President in the vote count, the count of the electors, presidential electors' votes. Incidentally, that also involved research into materials from the early republic.

MR. GESSLER: Okay. Your Honor, I—to be frank here, we had prepared to provide extensive testimony on Mr. Delahunty's background, but in light of your earlier ruling to keep the proceedings moving, [p.20] at this point I would proffer Mr. Delahunty as an expert in the use of historical documents, legal historical documents, and interpretation of legal statutes arising from that historical analysis on constitutional issues.

MR. MURRAY: And, Your Honor, we would ask that you defer ruling until we have a chance to explore those subjects on cross.

THE COURT: I'm going to—I'm going to accept Professor Delahunty on what sounds to me as a very specific subject, which is the use of historical documents and interpretation of legal statutes arising from historical analysis on constitutional issues. He was a law professor for 16 years and had a lengthy career before then. And obviously, you can cross-examine him, and I will consider that in the weight of his testimony.

MR. MURRAY: Understood.

THE COURT: But at the same time,

Mr. Gessler, I don't want to short-circuit your examination in any way, so you should feel free to ask him whatever you want to ask him for the record.

MR. GESSLER: Thank you, Your Honor. Your Honor, I would like to clarify legal [p.21] interpretation of statutes as well as constitutional provisions.

THE COURT: Okay. I was reading from what you said.

MR. GESSLER: That's why I clarified. I am—

THE COURT: But I will expand it to statutes and constitutional provisions.

MR. GESSLER: I'm accepting responsibility for lack of clarity. And, Your Honor, I would also note that we specifically proffered Mr. Delahunty as a rebuttal expert to Professor Magliocca as well. So he'll directly address the items raised in Professor Magliocca's testimony.

THE COURT: Okay. Professor Magliocca, if I recall, was offered as an expert on section— on Amendment 14 and specifically Section 3. I'm not prepared at this point to designate Professor Delahunty as an expert on that specific provision. But you haven't asked me to either.

MR. GESSLER: Okay. Your Honor, we would then seek to proffer him as an expert on the Fourteenth Amendment, as he taught constitutional law for 16 years on the Fourteenth – taught [p.22] constitutional law for 16 years, with a specific focus on the Fourteenth Amendment.

THE COURT: Okay. Why don't we hear a little bit more from him on what he meant when he said that. Because most of the people, it seems like, in the courtroom went to law school. My recollection of constitutional law was that it covered a lot more than just the Fourteenth Amendment. So let's find out what he meant when he said that.

MR. GESSLER: Okay. And, Your Honor, I would also note that we— I mean, to be straightforward with the Court, we obviously raised a 702 objection to Professor

Magliocca. And our view is that all of this, Professor Magliocca's testimony and Professor Delahunty's, is akin to legal analysis and interpretation, which normally tends to be excluded by courts. And we understand that it's here to help you. And we understand also that you recognize there are other published professors in the field that you will look to as well, so . . .

THE COURT: And just on that, I—and maybe this will help with your focus on Professor Delahunty's testimony. [p.23] Professor Magliocca largely talked about historical interpretation and did not—I do not think, in large part, if— and, maybe not if all, he testified as to the law. He testified as to the original documents that he had uncovered in looking at the formation and the purpose of the amendment in the first place. And that was what I found to be helpful.

MR. GESSLER: Okay. And I think you will hear from Professor Delahunty the interpretation of original documents as well.

THE COURT: Great. Thank you.

MR. GESSLER: Okay.

THE COURT: So why don't we just stay—I think it would be helpful for the Court if you could explore further with Professor Delahunty on exactly what work he did on the Fourteenth Amendment and if any of that focused on Section 3.

Q. (By Mr. Gessler) Okay. Professor Delahunty, you said you taught law school for, I believe, 16 years at St. Thomas, and that a substantial focus of your teachings was on the Fourteenth Amendment. Could you provide some more detail on that?

[p.24]

A. Yes, indeed. I would think about half of the course consisted of the study of the Fourteenth Amendment. I

was, I think, quite unusual among American law professors in starting the course with the Fourteenth Amendment, and that took over half of the term. Then I gave attention primarily to separation of powers in the final, let's say, 40 percent of the course. And I focused on the Fourteenth Amendment because I agree with the view that it was a second founding, constitutionally speaking. And it was also the focus of a lot of contemporary discussion and litigation, and I wanted to make sure my students were quite well aware of what it meant, what its origins were. I was, I think again, pretty unusual among American constitutional law teachers in discussing in some depth, actually, the Dred Scott case as a background to the ratification of the Fourteenth Amendment, and how parts of Section 1 of that amendment were framed against the backdrop and in connection to the Dred Scott decision. Most constitutional law professors, I think, don't discuss the Dred Scott case, and I did.

Q. And why did you—why did you focus—[p.25] well, what is the Dred Scott case, and why did you focus on that?

A. Well, the relevant part of that—of the opinion of Chief Justice Taney in that case was that African-Americans, even those not held to bondage and slavery, were not and never could be, citizens of the United States. And the naturalization provision of—the citizenship provision, rather, of Section 1 ensures that they all were citizens of the United States, entitled to privileges and immunities of citizens of the United States. So it helps to explicate the meaning of those parts actually of Section 1. I taught the Slaughter-House case every year. And so I am not just focusing on the history of the framing and

ratification of the Fourteenth Amendment, but both the case law—Supreme Court case law before it and after.

Q. Did you also, as part of your course, introduce or teach your students how to view and interpret and analyze historical documents?

A. Well, the Slaughter-House case is itself a historical document, as is the Dred Scott case, so yes. In that sense, yes. But this was a—this was not a course [p.26] in legal history. It was a course in constitutional law. It wasn't a course in historical scholarship generally or even in legal historical scholarship. It was a course largely, mainly dedicated to extricating the meaning of the Fourteenth Amendment.

Q. Okay. Did you introduce some elements of historical legal scholarship to your students and—or did you—and—I'll ask you the next question after that.

A. Not that I recall, no.

Q. Okay. In preparing your courses, did you engage in historical scholarship, looking at some of the history of documents surrounding the formation and ratification of the Fourteenth Amendment?

A. Well, I think only to the extent I've already explained.

Q. Okay.

A. I did not, that I recall, drill into the ratification or framing of the Fourteenth Amendment, no.

Q. Okay.

A. This was a first-year law student course.

Q. I'm sorry. What was that?

A. This was a course for first-year law [p.27] students, and I did not go into—I mean, I discussed the Civil Rights Act of 1866. I don't know if that would kind of answer you or not. But yes—

Q. Okay.

A. – things like that.

Q. Okay.

MR. GESSLER: Your Honor, I would renew my proffer. Does that answer your questions?

MR. MURRAY: Your Honor, we would continue to object. Teaching a first-year law school course does not mean that he's made contributions to the scholarly literature on the history of the Fourteenth Amendment and Section 3 in particular.

MR. GESSLER: Your Honor, if I may, we're going to go through his resume at length this morning, so this may be a while.

THE COURT: Yeah.

MR. GESSLER: This may be a long morning, but we'll do it.

Q. (By Mr. Gessler) Professor Delahunty, I saw that one of your articles is "Is the Uniform Faithful Presidential Elector Act Constitutional?" Do you remember that article?

A. Can you tell me where it appeared and [p.28] when?

Q. It was Cardozo Law School online publication—

A. Oh, yes. Yes, I remember that.

Q. Okay. Can you tell us about your work on that particular case?

A. Well—

Q. On that particular article. I'm sorry.

A. That particular article. It involved going to the meaning of what counted as an elector in—at the—in the framing of the original Constitution, and whether electors, as understood at that period in 1787, were considered to be people who had essentially unfettered freedom to decide whom to vote for in—as the leading figure in the state. So, for example, I found that the King of England was an elector for the emperor of the Holy

Roman Empire. And the framers, as subjects of the King of England before the American Revolution, were probably aware of the King's role as an elector. He was not just the King of England. He was the King of Hanover in Germany. And as such, he counted as an elector for the Empire. And my conclusion, broadly, was that electors in—presidential electors in this country [p.29] had the freedom to vote for a candidate who they were not—who they were not pledged to support. In other words, that they were not bound by state restrictions on their ability as presidential electors to select the candidate who best suited — in their judgment was best suited to be President. That view, which was based on original material, was rejected by the U.S. Supreme Court in the Chiafalo case, which upheld the binding quality of the pledges electors made to vote in a certain way. But it was an attempt to clarify, using contemporary dictionaries and so forth, the meaning of what an elector was in the electoral colleges.

Q. Okay. I saw that you also wrote an article on "Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count." I think we've spoken a little bit about that. Can you tell me what that was about and your use, if any, of historical documents and scholarship?

A. Well, there was extensive use of historical materials, both from the framing period, 1787, and much later. And it wasn't just documents. It was historical practice, such as the role the Vice President had played in the electoral vote count when [p.30] John Adams was in the chair and had—and then George Washington—was George Washington's Vice President. And then Thomas Jefferson as Vice President also oversaw the electoral vote count. They both assumed they had authority to admit or reject—

Q. Okay.

A.—contended votes.

Q. Okay. You also wrote an article, it looks, back in 2006 entitled "Executive Power Versus International Law"?

A. Uh-huh.

Q. Can you tell me a little bit about that?

A. Honestly, I don't remember that one. It was, as is the tradition, I think, at OLC—I was certainly steeped in that culture—a defense of presidential power, executive power in wartime. I don't—it's been a long while since I looked at or thought about that. I think, however, it made reference to the prize cases, which is one of the cases that is helpful in construing Section 3 of the Fourteenth Amendment.

Q. Okay. Let me ask you this: In your work, have you—well, let me—let me—before I [p.31] go there. You said you spent time in the Office of Legal Counsel—

A. Yes.

Q.—correct?

A. Yes.

Q. What were your duties or activities there?

A. Essentially, preparing legal opinions, primarily on constitutional law, and reviewing bills before Congress to determine whether in the view of the executive branch the bills included unconstitutional provisions.

Q. Okay. Did you have an opportunity to work with historical documents in those instances?

A. Yes. Yes.

Q. Describe what that—an example or what that process might look like.

A. Well, I remember one frantic weekend when I had to write an opinion on the constitutional validity of President Clinton's appointment of a member of Congress

to be our first ambassador to Vietnam since the war in Vietnam ended. And that involved looking at historical practice and opinions going back, as I recollect, at least as far as James [p.32] Madison.

Q. Okay.

A. But it was—how shall I say it?—the meat and potatoes of OLC to—and my work there, to opine on constitutional questions across the board.

Q. Okay. In your work, have you spent time looking at and analyzing records of congressional proceedings?

A. Yes.

Q. Okay. So are you familiar with the

11 congressional reporters—

A. Yes.

Q.— as they were developed then?

A. Yes.

Q. Okay. In your work have you spent time—and if you can describe this—of working with historical legal opinions?

A. Oh, yes.

Q. Have you spent time working with sort of congressional debate issues and historical legal cases—

A. Yes.

Q.—from the 19th century?

A. Yes.

Q. Can you speak on it?

[p.33]

A. Yes, yes.

Q. Okay. Have you spent time over your years of experience working with contemporaneous reports on congressional and public debates involving constitutional issues?

A. Yes.

Q. Okay. I think you testified, but I want to confirm, have you spent time analyzing and researching and reviewing historical definitions of words and phrases?

A. Oh, yes. Yes.

Q. Have you spent time looking at sort of historical executive orders and statements as an aid to interpretation of law?

A. Yes.

Q. Okay. Now, you reviewed the congressional debates or records of congressional debates, historical cases, contemporaneous debates, dictionary definitions, and executive orders in rendering your opinion on the Section 3 of the Fourteenth Amendment; is that correct?

A. I'm sorry. Could you repeat that?

Q. That was a very long question.

A. Yes.

Q. In preparing and rendering your opinion [p.34] today, did you rely on congressional — records of congressional debates?

A. Yes.

Q. Okay. And do the records of congressional debates for Article—I'm sorry, for Fourteenth Amendment, Section 3, do they differ in approach or quality or any way that you may be able to describe from congressional records used to interpret other constitutional provisions?

A. No, not that I can see. Maybe there are fewer—less discussion of Section 3 than some other provisions. But, no, in quality—maybe in quantity there's less, but in quality they're the same.

Q. They're all—they're both—they were written in the English language as—

A. Yes—

(Simultaneous speaking.)

THE STENOGRAPHER: One at a time, please.

THE COURT: You need to wait for Mr. Gessler to finish his question before you start answering—

THE WITNESS: I'm sorry.

THE COURT:—because the court reporter can't—
[p.35]

THE WITNESS: Oh, I'm sorry.

MR. GESSLER: Yes. In court we have to be exceptionally polite and never talk over one another.

THE WITNESS: That's fine. I apologize.

Q. (By Mr. Gessler) So in your experience, were they written in the same English language syntax as other forms of 19th century documents?

A. Yes.

MR. MURRAY: Objection. Leading.

THE COURT: Overruled. He's just laying a foundation.

MR. GESSLER: Thank you.

Q. (By Mr. Gessler) And you've discussed your—

MR. GESSLER: I'll even try to be a little bit more open-ended, Your Honor.

Q. (By Mr. Gessler) You've discussed your research of legal cases, historical legal cases. How do those compare with the legal cases that you reviewed and analyzed in preparation of your opinion here today on the Fourteenth Amendment?

A. In no way.

Q. I'm sorry. You say "no way." How do they differ, if at all?
[p.36]

A. Again, I would have to ask for the question to be repeated, because I've lost it.

Q. So the — so you reviewed a number of — you have in your work over the last three or four decades interpreted historical cases from the 19th century —

A. Yes.

Q.— is that correct?

A. Yes.

Q. And do the four — do the historical cases that you reviewed for the Fourteenth Amendment, in your opinion, do they differ or how do they differ as far as their — in any characteristics? Is their writing, their modes of analysis, do they differ — and if so, how — from the types of cases that you've analyzed in the past from the 19th century?

A. No. Not that I can think of, no.

Q. When you say "no," does that mean you were not able to identify any types of differences?

A. Not that occur to me.

Q. Okay. In looking at — in looking at reports involving sort of public reports or what we would say are called media reports, newspaper reports of congressional and public debates from the 19th [p.37] century, did those differ in any manner—and if so, describe it—from the types of documents involving public and congressional debates that you reviewed for your opinion?

A. Well, I don't immediately recall reading newspaper articles from the 19th century. But if there were reports of cases, no, they would be equivalent, I think, to a case reporter now.

Q. Okay. And have you had experience reviewing sort of dictionary definitions from the period of the 1860s and 1870s in your work?

A. The case I can recall where I did that was research on the background of the Chiafalo—for a potential filing of amicus brief in Chiafalo versus Cobb.

Q. So in—

A. But, I mean, I also looked at 18th-century dictionaries of the English language, like Dr. Samuel

Johnson's. I think I did that in preparation for—research I did for the piece on the electoral college and the rights of electors to decide independently. So I think I used Samuel Johnson's dictionary of the English language, which was in the 18th century, in connection with the research for that [p.38] article which—in Cardozo.

Q. So your review of—so did you review dictionary definitions for the opinion that you rendered on the Fourteenth Amendment, Section 3?

MR. MURRAY: Objection, Your Honor. No such dictionary definitions are disclosed anywhere in his report.

A. There is a definite reference to—

THE COURT: Hold on.

THE WITNESS: I'm so sorry, Your Honor.

THE COURT: Response?

MR. GESSLER: Your Honor, he was in general viewed as a rebuttal expert to Mr. Magliocca. And to the extent Professor Magliocca relied upon those, we've had Professor Delahunty review Magliocca's testimony, as he is allowed to do, and to render an opinion on that. We're not looking to go substantially outside of Professor Magliocca's report, and nor are we looking to go outside of Professor Delahunty's report if there's an objection specifically to an opinion. But I believe in his report he did mention various definitions. To the extent there is an objection about a specific, we're certainly willing to take that [p.39] up. But as a general matter, the point is that Professor Delahunty has reviewed dictionary definitions, contemporaneous, similar to any ones in this case.

THE COURT: I'm going to let him testify about the dictionary definitions that Professor Magliocca testified about.

MR. GESSLER: Okay.

THE COURT: If he's talking about different dictionary definitions from the 18th, 19th century that haven't been disclosed, that's another story.

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

THE COURT: So objection overruled.

THE WITNESS: May I ask you a question?

THE COURT: Okay. That's not normal, but what's your question?

THE WITNESS: Well, I think a lot hinges on what we mean exactly by a dictionary.

THE COURT: Oh. You can address this—

Q. (By Mr. Gessler) So Professor Delahunty, why don't I ask you a few of those questions. And feel free to ask me. We'll clear it up. [p.40] So in rendering your opinion, you—I think both you and Professor Magliocca discussed an executive order or executive statement, I should say, from President Grant?

A. Yes.

Q. And I want to be a little more concrete here.

In reviewing that executive statement, did that differ from the types of executive orders or executive statements that you've reviewed in the past and worked with from that period of history?

A. No.

MR. GESSLER: Your Honor, I renew my proffer.

MR. MURRAY: We would renew our objection.

THE COURT: Yeah. I'm not sure—he's already been endorsed as an expert in constitutional law and the application of historical documents to 19th-century statute and constitutional provisions. So I'm not sure he needs to be designated as an expert on Section 3, because I'm going to let him testify on what he did regarding Section 3. I don't think that—unlike Professor Magliocca, who has clearly, you know, spent years [p.41] studying it

and is an expert on Section 3—no, I don't think he is. But I don't think it matters because what he's done is he's looked at historical documents, which he's an expert in and is going to hopefully testify as to what his findings were using that expertise regarding Section 3.

MR. GESSLER: Your Honor, we endorse that perspective. I don't know if I could ask to have it admitted into evidence, but we endorse it, Your Honor.

Q. (By Mr. Gessler) Okay. Let's talk about the substance of your opinion, Professor. Did you listen to or review Professor Magliocca's expert testimony on Wednesday?

A. I did.

Q. Okay.

A. The live-streamed testimony? Yes, I both watched it and read the preliminary transcript of it.

Q. Okay. And—

A. In fact, if I might add, I've read his reports thereto. I've read them very closely and several times.

Q. Okay. And so are you prepared to respond to—

[p.42]

A. I am.

Q.—Professor Magliocca's analysis?

A. Yes.

Q. Okay. Let's start as a general matter. He testified that Section 3 of the Fourteenth Amendment is not limited to the events of the Civil War. What do you think of that statement?

A. I do agree with that. I think there are scholars who might dispute that, but after—and frankly, it was—when I was—when this issue of Section 3 began to come up, my attitude was, how can that possibly be? It's clearly confined to the Civil War. But as I delved more closely into the matter, it—I think the better view on—is that it's

not time-bound in that way. It's not restricted to the events of the Civil War or to the people involved in the Civil War. And I think there are three reasons in support of that. One is that the text itself of Section 3 does not, in express terms, limit its application to the Civil War. Second, there is some highly relevant congressional testimony by the framers of Section 3 [p.43] that it was meant to extend into the future. And thirdly, practice, although limited, has been to extend it, apply it to events involving people who had no role whatever in the Civil War.

THE COURT: Professor, can we take a slight pause? I want to talk to the court reporter for a second.

MR. GESSLER: Okay. You want us to take a five-minute break, Your Honor, or . . .

THE COURT: Less time.

(Pause in the proceedings.)

Q. (By Mr. Gessler) So, Professor Delahunty, I want to talk a little bit—we're just going to dive into some of the main subjects here. I want to talk about the definition of

"insurrection." And Professor Magliocca provided a very specific definition of "insurrection" and looked at historical documents of insurrection examples or events and judicial decisions and the treatment of the law during the Civil War. Can you— what's your review of those documents tell you about the definition of insurrection?

A. Well, some of the materials that he offered are offered overly—quite broad definitions [p.44] of "insurrection." Some others are narrower ones. So they differ. And in particular, he cites the definition of "insurrection" that is offered—was drafted by Professor Francis Lieber, who was one of President Abraham Lincoln's chief legal advisors during the Civil War. And

Lieber's definition of insurrection appears in Lincoln's General OrderNumber 100 to the Union Army.And Professor Magliocca says that Lieber was—I don't have his transcript before me, but in effect, the leading legal scholar of his period. And Lieber actually taught at Columbia, which I'm proud of. And in General Order Number 1 [sic], which I have studied and taught about for quite a while, Lieber says —- again, I don't have the text right in front of me, but he says in effect an insurrection is a rising of the people in arms. So if you accept Lieber's definition as definitive, or at least very weighty evidence of the meaning of "insurrection," an insurrection would have to be in arms. Insurrectionists would have to use arms. And that's, I think, inconsistent with [p.45] many, if not all, but anyway many, of the other definitions, including the case law that Professor Magliocca cites. So there's some— "contradiction" is perhaps too strong a word— tension between the accounts of insurrection that some of his sources supply, which don't require that the insurrectionists be armed and Lieber's definition.

Q. Okay. Professor Magliocca also cited to a Webster dictionary definition of "insurrection" in 1828. Do you remember that?

A. I remember that he cites it, yes. And I remember the quotation, yes.

Q. And I'll quote to you that it's a "rising against civil or political authority, the open or active opposition of a number of persons to the execution of a law in a city or state."

And then he also cited to a John Row dictionary definition of "insurrection" as being identical to the Webster definition. What—what do you make of that interpretation? What's your interpretation?

A. Well, the Webster definition specifically refers, as you quoted, to states and [p.46] counties. Obviously, it's highly relevant, competent evidence about the meaning of "insurrection" in Section 3. But it's by no means identical, because "insurrection," as used in Section 3, must be against the Constitution of the United States. The United States is—

THE STENOGRAPHER: United States is what?

THE WITNESS: Is not—oh, I'm sorry. Is not a state or county.

Q. (By Mr. Gessler) And what's the – when you say "insurrection against the Constitution of the United States," what's the — what's the importance of that distinction?

A. I think that is really crucial because while it is certainly very helpful to know what "insurrection" was understood to mean or likely understood to mean in 18 — from 1866 to 1868, while that's certainly very useful, Professor Magliocca himself emphasizes that there is this important limiting principle which is found in the text of Section 3. It's not just any plain-vanilla insurrection. It's an insurrection against the Constitution of the United States. [p.47] And that's in the text, and it is a critical element of the offense at issue, that the insurrection be an insurrection against the Constitution of the United States. In other words, "insurrection" is not a freestanding term in Section 3. It's coupled with — by Professor Magliocca's own insistence really, it's coupled with that other phrase, "insurrection against the Constitution." So what really needs to be explicated and decided is not the sort of plain vanilla, as I called it, meaning of "insurrection,"" but the whole phrase, "insurrection against the Constitution of the United States." And there's no, to my knowledge, any

dictionary definition or definition in a legal dictionary of that phrase.

Q. Okay. Professor Magliocca also testified that before 1862 there was no federal crime of insurrection, and that the cases that discussed insurrection were really treason cases. And so, for example, he cited a grand jury charge from the U.S. Circuit Court in Missouri from 1861, which specifically said that "conspiracy and insurrection connected with it must be to effect something of a public nature concerning the U.S.," and [p.48] that included, quote, "overthrowing the government" or "to nullify and totally hinder the execution of some U.S. law or the U.S. Constitution or some part thereof; or to compel its abrogation, repeal, modification or change, by a resort to violence." What's your view on the use of that grand jury charge and the importance of that, or lack of importance—

MR. MURRAY: Your Honor—

Q. (By Mr. Gessler)—with respect to defining insurrection?

MR. MURRAY: — I'm going to object again. They've had Professor Magliocca's report in this case for about a month before they submitted the rebuttal report in this case. And the rebuttal report in this case did not discuss any of these sources.

THE COURT: I'm going to overrule the objection. I am, though, going to ask, Mr. Gessler, when you read from the—

MR. GESSLER: Be slower?

THE COURT: —- be slower for the court reporter.

MR. GESSLER: I just got that. I'm sorry, Your Honor. I'll calm down and work on being [p.49] slow. My apologies.

THE COURT: You are both offending. You both are hard to understand and hard to report for the court reporter.

MR. GESSLER: I think it's just the slowness of the internet connection, Your Honor. I'm sorry. I'll work on that, Your Honor.

THE COURT: So I think you probably need to repeat the question.

Q. (By Mr. Gessler) So, Professor Delahunty, I gave you a very long quote —

A. Yes.

Q. — from a grand jury charge —

A. Yes.

Q.— from Missouri.

A.— Yes.

Q. Do you need me to repeat that or are you able to—

A. If you could give it to me in abbreviated form. I'm familiar with the — Justice Catron's discussion of the meaning of insurrection quoted by Professor Magliocca.

Q. So it says the "conspiracy and the insurrection connected with it must be to effect something of a public nature." And it included [p.50] "overthrowing the government to nullify and totally hinder the execution of a law, Constitution, some part of it, or to compel its abrogation, repeal, modification, or change by a resort to violence." What do you think of that use of that sort of historical document?

A. I think it's relevant to discussing the meaning of "insurrection" as understood — as that term was understood in the immediate run-up to the Civil War. I think it is helpful in that connection, especially because it comes not from a state court or a lower federal court, but from a justice of the U.S. Supreme Court.

Q. And how does that definition compare with other definitions that Professor Magliocca testified to?

A. Well, I can't remember in detail the other definitions, the framing — the phrasing. I just — it's —he says that it's relevant to understanding Section 3, and it is. And is it consistent with other definitions from roughly the middle of to late 19th century? I think it's certainly not in contradiction. But then he said Lieber —no, it's not even in contradiction with Lieber because I think at the very [p.51] end he talks about violence.

Q. So is it a more sweeping definition than some of the other definitions that you reviewed?

A. Probably.

Q. Okay.

A. I mean, "in something of a public nature" is really broad.

Q. Okay. The — Professor Magliocca also discussed the Whiskey and Fries rebellions —-

A. Yeah.

Q. — as insurrections. How do they relate, in your view, to the interpretation of the meaning "insurrection against the Constitution"?

A. Well, Professor Magliocca says that they are not the kind of insurrection that is covered by Section 3. And whether that's true or not depends on how you interpret "against the Constitution" in Section 3. He offers his own interpretation. It's not a dictionary definition. It's his interpretation of what "insurrection against the Constitution" means. And he says, under his interpretation of that constitutional clause, the Whiskey and Fries rebellions are not insurrections against the [p.52] Constitution of the United States. I think that depends on the meaning of "insurrection against the United States." And there could be a broad or narrow

reading of that constitutional language under which both insurrections were against the Constitution of the United States.

Q. And what would that reading be?

A. So Professor Magliocca offers this interpretation, that an insurrection against the Constitution of the United States is an insurrection that interferes with the execution of the Constitution. And the question becomes, well, what is the execution of the Constitution? And in substance, as I understand it. He's saying the execution of the Constitution is interference with the federal government's political branches' and judicial branch's performance of their constitutionally appointed functions, if it interferes with the discharge of their constitutional responsibilities. And he argues that certainly the events of January 6 are interference with the congressional duties assigned by the Twelfth Amendment to, at least minimally, to observe a vote count. Now, on that definition of interfering [p.53] with the execution of the Constitution, it seems to me that there could be many other events that were similarly insurrections against the Constitution, even in the sense of executing the Constitution. For example, if there is an interference with the execution of the judicial — sorry — judicial function of adjudicating cases, clearly a responsibility of the federal judiciary under Article 3, if you interfere with the execution of their constitutionally appointed judicial responsibilities, that would also — by burning down a courthouse or disrupting judicial proceedings, that would also, I guess, under that understanding of "against the Constitution," be an insurrection against the Constitution or against the execution of the Constitution. Or take another case. The Constitution assigns to the Senate the lead role of debating and deciding on presidential

nominations to principal offices of the United States. So it's appointments to the federal judiciary. If you have a crowd disrupting the Senate's vote on a presidential nomination, that would seem to be an interference with the execution of the Constitution. In fact, you could —d I think, myself, [p.54] under that definition of "interfering with the execution of the Constitution," that even disrupting the delivery of the mail, which was the issue in the Supreme Court's decision in the Debs case, would count as interference with the execution of the Constitution because the President has the constitutional duty to ensure that federal law is faithfully executed. So you're interfering with the President's execution of his constitutional duty to execute the postal law.

Q. And why do you say the postal service?

A. Well, because Article 1 mentions the postal service. And it's apparently, as Debs understands it, a duty of Congress to execute that power and to create and instruct the President how to administer the statute regarding the post office. So what I'm — to cut it to the chase basically, I think that under even Professor Magliocca's interpretation of "against the Constitution," disrupting the delivery of the mail is interference with the execution of the Constitution. And you could go on and on with examples of interference with the execution of their responsibilities by the President, by the Senate, by the House, by the courts that would count as against [p.55] the Constitution, as he understands that. So what is meant to be a limiting principle is, I think, a very expansive one, unless you attach a more limited scope to the meaning of — the meaning of "against the Constitution." On what I think is his understanding, it could — it does cover whether he denounces the Whiskey insurrection and the Fries insurrection.

Q. So that definition also includes intimidation, correct Or are there sources that talk about mere intimidation as the necessary threat for violence for insurrection?

A. I'm sorry. I don't really understand the question.

Q. Okay. Let me move to a slightly different area.

THE COURT: I'm just going to ask you a question. So as I understand it, what you're saying is, is that if you take Professor Magliocca's interpretation of what insurrection is, it's simply that it could just apply to a litany of different —

THE WITNESS: Correct.

THE COURT: — things?

THE WITNESS: Yes. Many. Almost all, [p.56] if not all, interferences with the execution of the duties of the President, the Senate, the House, and the federal judiciary.

THE COURT: Okay.

THE WITNESS: It is a —

THE COURT: I assume we'll get to what he thinks the definition — what he thinks it should be.

MR. GESSLER: To the extent that's possible, yes, Your Honor, from the texts.

Q. (By Mr. Gessler) Let me ask you this: Professor Magliocca also testified that the "shall have engaged in insurrection or rebellion" language means any voluntary act in furtherance of an insurrection against the Constitution, including words of incitement. And he based this on judicial decisions and a U.S. Attorney General opinion of Attorney General Stanbery. What's your opinion on the use of Stanbery's opinion on defining what insurrection is?

A. Well, I would have three thoughts, I guess, about that part of Professor Magliocca's testimony and report. First of all, I would say it's a linguistic point. I think

"engage in insurrection" [p.57] has a more restricted meaning than he supposes. Let me give you — this is sort of — speakers of the English language, I think, would think this. If we use a case like engage in hostilities, we probably have in mind combat, not the preparatory actions that would go with engaging in hostilities. I think, to a degree, we would distinguish engaging in hostilities from engaging in incitement, let's say, to hostilities. So that's just a linguistic point. But the backdrop to the Constitution's Section 3's use of "engaging in insurrection," part of it is the Second Confiscation Act, which I think Professor Magliocca cites, which itself distinguishes between various preparatory or accompaniments of engaging in insurrection or rebellion and engaging itself. That's the language of the Second Confiscation Act. So it — the Act distinguishes between, let's say, inciting an insurrection or rebellion versus engaging in it. Congress had that template before it — and cut it out or at least didn't include all this [p.58] other language. And in Section 3, it narrows it to engagement in insurrection or rebellion, which I think very strongly suggests that it was not covering the same class of activities as the Second Confiscation Act did. So engaging in insurrection in Section 3 has a narrower meaning than the comprehensive, sweeping account of what — of the activities associated with insurrection or rebellion that you can see listed, enumerated, in the Second Confiscation Act. I agree with Professor Magliocca that Attorney General Stanbery's two interpretations of statutes, the —- in the Military Reconstruction Acts of 1867, I agree with him that the Attorney General's opinions are certainly good evidence as to the meaning of "engaging in insurrection" in Section 3. They were opinions that were written while Section 3 was being

debated and in the process of ratification, and he actually — Stanbery actually kind of has a section in the first of his opinions dealing with the statutory language of what it means to engage in insurrection. So it's contemporaneous. It's from a high officer of the executive branch. It is about a statute, but it sheds light on what [p.59] "engaging in insurrection" means for Section 3 purposes.

Q. And looking at the Stanbery opinions, what's your view on how he defined "insurrection" and its application to Article — I'm sorry — Amendment 14, Section 3.

A. So I think that Professor Magliocca under-describes what Attorney General Stanbery is writing about when —in the first of these two opinions of the Military Reconstruction Acts. In the first of them, Stanbery has a Section called something like "Engaging in insurrection and rebellion." But I think it's actually called "Engaging in rebellion and insurrection." So Stanbery says, okay, this is what he's going to explicate, this language in the statute. And he starts by saying that — engaging in there has — you have to distinguish between active and passive engagement, participation in rebellion. Stanbery, here, is primarily addressing what it means to engage in rebellion, not insurrection. So you have to start, Stanbery says, by distinguishing between active and passive participation. And passive participation in rebellion [p.60] doesn't count under the statute. So that's his first sort of distinction. Then he says there's a distinction to be drawn between voluntary and compulsory or involuntary participation in the rebellion. So not only does the participation have to be active, but it has to be voluntary. If you are coerced to assist the rebellion, that doesn't bring you within the meaning of the statute. So one distinction, active/passive; two, voluntary or compelled. And then he has a third distinction between

participation in an official capacity and participation in the purely individual capacity. And he has a pretty extensive discussion, Stanbery does, of what official, voluntary, active participation in the rebellion would be. That would include things like being the so-called Confederate states' ambassador to France, okay? That clearly is not being combative, right? But then there's also a discussion of what it means to participate in the rebellion in an individual capacity. And so the statute has to be understood in one way if the charge of engaging in insurrection [p.61] is going to be charged against someone acting in an official capacity and then against someone who is charged with acting in an individual capacity. So to bring you under the statute, you — if you are acting in an individual capacity, it would seem to require different tests from acting in an official capacity. And okay. Let's talk about Professor — President Trump. One thing —- if you just map on the interpretations Stanbery offers on —

MR. MURRAY: I'm going to object to any opinion as to what President Trump did or did not do as both undisclosed and outside the scope of his expertise.

THE COURT: I don't know what he was going to say, but I'm going to sustain that objection.

MR. GESSLER: Okay.

Q. (By Mr. Gessler) Let me ask you about Stanbery's definitions as well. You said he was —

THE COURT: Could we go back? I just have some questions.

MR. GESSLER: Sure.

THE COURT: So you kept referring to the statute. What was —

THE WITNESS: It's the Military [p.62] Reconstruction Act.

THE COURT: Okay. And that's what Stanbery —

THE WITNESS: Yes.
THE COURT: — was opining on?
THE WITNESS: Yes. Sometimes called the Reconstruction Act. I think that's probably the more common.

THE COURT: Okay.

Q. (By Mr. Gessler) And you said Stanbery was talking or opining about rebellion primarily?

A. Primarily, yes.

Q. Can you talk a little bit more about the differences, both in his analysis, rebellion versus insurrection, and how that applies to Section 3 of the Fourteenth Amendment?

A. Well, most of Stanbery's discussion, in the first opinion at least, is about the meaning of engaging in rebellion.

Q. And why does that matter?

A. Well, it's not directly on point as to what engaging in insurrection means under the statute. It certainly sheds light. I am not disputing that. 'm just saying it's not directly about engaging in insurrection under the statute. [p.63] So it's certainly helpful, but to cut to the chase, I'm not sure that everything that Stanbery says in connection with engaging in rebellion carries over automatically to engaging in insurrection. The statute which carries over automatically into the meaning of engaging in insurrection is Section 3. These are all steps in the process. And then if someone is charged with engaging in insurrection, it would have to be determined whether that engagement was in an official capacity or an individual capacity. So if it was applied to someone, you would have to ask whether that engagement on his or her part was in an official capacity or an individual capacity, which could be quite problematic to decide legally.

Q. And why is that? How would Stanbery's opinion, to the extent it's possible to determine, apply to activity in an individual versus official capacity?

A. Well, this is all kind of unchartered territory. But not everything that Professor Magliocca says about Stanbery's opinion — he quotes from it quite at length. But not everything he says immediately translates into every single case. You have to decide whether the language [p.64] he quotes about engaging in rebellion in an official capacity also carries over to whether that is true of someone who engages in insurrection in an individual capacity. So you — before applying his account, Stanbery's account, you have to decide is this person acting in an individual capacity or not? Is he or she acting individually? And does that matter? Does everything Stanbery says about engaging in rebellion in an official capacity immediately carry over into such an engagement in an individual capacity? So construing Stanbery is quite difficult in itself, let alone bringing whatever he says into — about the statute into Section 3.

Q. So did Stanbery provide standards or guidance as to exactly what constitutes or what type of liability attaches for actions in an individual capacity with respect to rebellion?

A. No. I don't think he talks about — at least not in the part headed "Engagement in," I don't think he talks about the liability to which one is exposed, no. He offers examples more than standards about how to apply the statutory term, but he doesn't discuss the liability to which you're — not on that [p.65] part — doesn't discuss the liability to which someone who is found to have engaged in insurrection is exposed.

Q. Does he discuss exactly how to determine whether a person has engaged in rebellion when they're acting in their individual capacity?

A. He does discuss that. And I don't recall exactly the language, but if we just focused on that part of Stanbery's opinion, you'd have to make the threshold decision whether individual capacity or official capacity applies here. But he does offer some language about how you have engaged in rebellion in an individual capacity, yes. What that language is, I don't have directly in hand, but . .

Q. Okay. Now, he also — Professor Magliocca also compared the Stanbery opinions to the Worthy cases from — the Worthy case from North Carolina.

A. Right.

Q. And he said that they were —- that they were — the definition for engaging in insurrection was the same in the Stanbery opinions and the Worthy case from North Carolina. What's your opinion on that?

A. Well, Stanbery is talking about a [p.66] statutory term, and the North Carolina opinion, the Worthy case, is talking about Section 3.

Q. And tell me about the Worthy case. When you say talks about Section 3, that was a North Carolina state case —

A. Right.

Q. — correct?

A. Yes. And it's decided under a state statute that incorporates Section 3 by reference and applies it — North Carolina had operationalized the enforcement of Section 3, at least as to state officials, state offices. Not to federal offices or federal — federal officers or offices. So it's relevant to understand — I don't think it's relevant to understand what engaging in rebellion or insurrection means in the Constitution, Section 3. It's more —

Q. And why is that? Why —

A. It's really more relevant — well, it's not identical with what Stanbery offers, but it's more relevant to the question of whether Section 3 is self-executing than it is, I think, to — if it says the same thing as Stanbery, then it doesn't carry the ball further.

Q. Okay. We'll get to the holding in just [p.67] a minute. But is it your opinion that the — that the definitions with respect to engaging in rebellion differ between the Stanbery opinion and the Worthy case?

A. Not that I can think of, no.

Q. Okay.

THE WITNESS: Excuse me. May I just get a little more water?

MR. GESSLER Go ahead.

Q. (By Mr. Gessler) So you had talked a little bit about "insurrection against the Constitution," as used in Section 3, correct?

A. Yes.

Q. Okay. What, if any — well, let me ask you this: To what extent do the historical sources allow us to create a specific definition of "insurrection against the Constitution"?

A. Well, I'm not aware of any discussion in Congress or the ratification debates about that limiting principle, against the meaning of the Constitution. I don't know of any.

Q. And so you — you've looked at Professor Magliocca's sort of approach to limiting the Constitution. [p.68] Are you able to create a definition of "insurrection against the Constitution" based on the historical documents?

A. Well, I would say this: I would look to guidance more to the remarks that Senator Jacob Howard makes

in introducing the Fourteenth Amendment to the Senate, which are — those remarks of Senator Howard are cited, I think, twice in Magliocca's report. And I don't have Senator Howard's exact language, though it appears both in Magliocca's report and mine. But Howard says something to the effect that this section of the Constitution is meant to cover actions — to sanction actions that — acts that are — that pose — I just don't have the exact language, but essentially grave — to the — threaten to — I don't — it would help me if I could have —

Q. Let's bookmark that.

A. Okay.

Q. We're going to pull up the language for you in a second.

A. Essentially — that would destroy. "Destroy" was the term Howard used. It would destroy the Constitution. So given Howard's role in the enactment — the ratification, rather, of the [p.69] Fourteenth Amendment, it would seem to me — I would start by looking at Howard's remarks and explicating the phrase, for better words, "insurrection against the Constitution." And there would be acts that threaten — that destroy the Constitution.

MR. MURRAY: Your Honor, I'm going to object and move to strike the last answer on the grounds that his report never purported to offer any definition of "insurrection" or "rebellion against the Constitution." This is all completely new testimony.

MR. GESSLER: Your Honor, I don't think he said that Article — I'm sorry, I keep saying "Article" — Amendment 14, Section 3, has to be 14 defined that way. So the starting point is to look at Senator Howard's

viewpoint as an analogy or basis. I don't think he said he has to — that has to be the definition.

THE COURT: Well, did he disclose his opinion on the senator's remarks?

MR. MURRAY: No, Your Honor.

MR. GESSLER: If you could give me just a few minutes, Your Honor, let me look through his report and give you a point.

THE COURT: Can we come back to it?

[p.70]

MR. GESSLER: Sure, Your Honor.

THE COURT: I think we'll probably break in the next 20 minutes, and we can revisit that.

MR. GESSLER: Okay.

Q. (By Mr. Gessler) Professor Delahunty, why — without — we won't discuss Senator Howard's remarks at the moment. But why would you start from that as a foundation, looking at the remarks of a congressional debate?

MR. MURRAY: Same objection.

THE COURT: Well, I don't think he's offering a different definition as he's — as to why he would start looking there. It would be helpful if we could see the remarks. I don't know if that's possible.

MR. GESSLER: We're pulling them up right now, Your Honor.

THE COURT: Okay.

MR. GESSLER: We may even have them. Your Honor, we're going to need to just spend a few minutes on this. If we could come back to it a little bit later.

THE COURT: Okay. I mean, in general, it's been a little difficult to follow what he's [p.71] talking about because he's talking about kind of things that we can't see. So to the extent that we can see the remarks that he's

talking about, et cetera, definitely would be helpful to the Court.

MR. GESSLER: Okay. Your Honor, may I propose a morning break? That will give us a little bit of time.

THE COURT: Sure. Why don't we just break until 10:30 and —

MR. GESSLER: Okay.

THE COURT: — and come back to it.

(Recess from 10:12 a.m. to 10:34 a.m.)

THE COURT: You may be seated. You're back on, Mr. Gessler.

MR. GESSLER: Thank you, Your Honor.

Q. (Mr. Gessler) Professor Delahunty, I've been asking you a little bit about — talking about certain case law to arrive at a definition of "insurrection." But in your report —- and I may have been going about it the wrong way in questioning you. In your report, you talk about difficulties of interpreting Section 3's offense element in defining what it means to have engaged in an insurrection. Do you remember that?

[p.72]

A. Yes.

Q. Okay. And when you say "interpreting Section 3's offense element" — what are you referring to when you say "the offense element" in Section 3?

A. Well, Section 3 has essentially four elements. One of them — it's the language towards the end of Section 3 — identifies the class of people who are subject to potential sanctions under Section 3. That, in my report, I called the

jurisdictional element. Then there's what I've called the offense element. And here I'm following, by the way, Professors Tillman and Blackman. The offense element defines what kind of conduct by the persons whose — who

is subject to Section 3 have engaged in that would trigger liability. And the offense element is the language to which you referred, having engaged in rebellion or insurrection against the Constitution. Then the third element is the disqualification element, which says from what offices the persons who were subject to the section and had committed the offense in question would be thereafter excluded. And then the fourth section is the [p.73] amnesty provision, which empowers Congress to extend amnesty either individually or collectively to those who are jurisdictionally subject to Section 3 and have been found to commit the offense element and would have been excluded from the relevant offices but for the amnesty, if Congress chose to give them one.

Q. Okay. So let's focus on the offense element, which you describe as engaged in insurrection.

A. Uh-huh.

Q. And you've looked at a number of historical sources to try and derive what that meaning is, correct?

A. Yeah.

Q. Okay. And in your report, you talk about the difficulties of arriving at a conclusion, correct?

A. Yes.

Q. Okay. Tell me about why you found it, or currently find it, very difficult to identify a — to reach a conclusion as to the offense element based on the historical sources.

A. Well, it's really this, that I'm not aware of any direct definition of what it means to engage in insurrection against the Constitution. I [p.74] don't believe there's any case law on that. Professor Magliocca proffers his interpretation of what that phrase means. And that, as I have said and testified, it is essentially to engage in interference with the — to commit insurrection against the execution of the Constitution. And that, in turn, is a

phrase that is opaque, I would say. And really, all of the — I don't offer my own definition of what it means to engage in insurrection against the Constitution of the United States because — other than to gesture towards Senator Howard's remarks because I don't know of any really good source to interpret that. Which, I mean, is — now, my point is to underscore the difficulties a Court would have, or really anybody would have, in interpreting that phrase, which is the crucial phrase, without such guidance, especially from Congress, which could define under Section 5 powers what it means to engage in the insurrection against the Constitution of the United States. Congress hasn't enacted a statute that purports to provide us with that definition. That leads me to the conclusion that the Courts, as a [p.75] matter of Constitutional policy, should defer to Congress and not decide a case on the merits of whether or not someone had engaged in insurrection against the Constitution. There's just inadequate guidance, so far as I can tell, from relevant sources, authorities. So this is really — goes — the difficulty I experience in offering a definition —- although Professor Magliocca seems more confident about it. The difficulty I experience I think should—if only for reasons of prudence, but really sort of Constitutionally inflected reasons, lead a Court to abstain from deciding what that phrase means and toss the ball over to Congress to act under Section 5.

Q. Now, Professor Delahunty, I'm looking at our Court, who I think has an inquisitorial look on her face.

MR. GESSLER: Your Honor, if you have a question, I'm certainly willing to defer for a moment.

THE COURT: I'm just trying — do you have examples of situations in which a Court has basically said, "The Constitution's too hard for me to interpret;

therefore, I'm going to let Congress tell me what it means"? [p.76] I'm just — I mean, in general, I think that's exactly the job of the Court, is to interpret the Constitution. And so I'd love to hear from you as to why you think in this instance that what I need to do is say, "It's too hard. Congress, tell me what it means."

THE WITNESS: No, I don't have case law to cite. This really — it sort of broaches the question of whether Section 5 — Section 3 is self-executing or not. It goes more to that as sort of a prudential or, as I said, constitutionally inflected, separation of powers inflected reason.

THE COURT: Okay. So it's really the self-execution —

THE WITNESS: Correct.

THE COURT: — question?

THE WITNESS: Yes.

Q. (By Mr. Gessler) Let me ask you this, Professor Delahunty: You looked at a number of —a number of sources in an attempt to reach a meaningful definition of "engage in insurrection" under Article 3 —

A. Uh-huh.

Q. correct? And you looked at the prize cases. [p.77] Do you remember that?

A. Not in that connection. But I do remember the prize cases, yes.

Q. Now, do you think the prize cases were able to give you sort of a confidence on what the meaning of "engage in insurrection" means?

A. Well, they — they — first of all, the prize cases — which is probably the most important Supreme Court case during the Civil War. The prize cases do help with distinguishing between organized rebellion, rebellion, and insurrection. So, of course, they're relevant in that

connection, in defining what "insurrection" means. It's certainly something, to a degree, less than rebellion. They're helpful in that way. But only so — only so far. I mean, it's not — it doesn't explicate because it wasn't in the Constitution at the time.

THE STENOGRAPHER: What wasn't in the Constitution?

A. The prize cases do not explicate what it means to engage in insurrection against the Constitution, because the Fourteenth Amendment hadn't been ratified. Not until July of 1868. So they're not helpful. They are [p.78] helpful in a general way in suggesting — saying that insurrection is different from a rebellion and something sort of more high grade than a riot, but something lower than a rebellion. An insurrection — I think the Court there says something like insurrections tend, in many, many circumstances, to lead to rebellion, but they don't have to amount to rebellion. So it helps in that way, sort of suggesting a gradient between rebellion, insurrection, and other kinds of disorderly conduct.

Q. (By Mr. Gessler) I'm going to ask you to stay a little bit closer to the microphone when you speak, Professor. I suffer from the same challenge here. And then you also looked at the charges — In re Grand — In re Charge to the Grand Jury, correct? There was a particular case from 1894 from the Northern District of Illinois. Do you remember that?

A. Yeah. I think I do, yes.

Q. Okay And after looking at that, were you able to have any confidence of what "engaged in
insurrection against the Constitution" meant?

A. Well, I think that — no, not as to the [p.79] meaning of that precise phrase, no. It does help to understand what "insurrection" meant, at least later in the 19th century.

Q. Okay. And then you also looked at in the case of Davis, which was a federal judicial opinion talking about how insurrection or rebellion may be committed by giving counsel to enemies or others raising insurrection. Do you remember that?

A. I don't have it before me.

Q. As a general matter?

A. Yes.

Q. And my question really goes to all of these cases that you identify. Do they give you a sense of confidence in creating a definition of what "engaging in insurrection against the Constitution" is?

A. Not really. Engaging in insurrection against the Constitution? Only minimally. They help you understand what "engage" was taken to mean — what "insurrection" was taken to mean.

Q. And even from the prize cases, the most you were able to glean is that insurrection is something more than a riot and something less than a rebellion? [p. 80]

A. Yeah. That's — yes, that's right.

Q. Okay. In your view, looking at the sources and Article — or Section 3 of the Fourteenth Amendment — and I think you've talked about this. But how does — does insurrection equate to insurrection against the Constitution?

A. No.

Q. And why is that?

A. Well, self-evidently, they're different terms. And I agree with Professor Magliocca that some limiting principle should be imported into the term "insurrection" as used in Section 3.

THE COURT: So when you — I understood your testimony before to be that the problem you have with Professor Magliocca's opinion is that he's saying

insurrection against the Constitution is essentially an insurrection against a constitutional proceeding.

THE WITNESS: Against the execution of the Constitution —

THE COURT: The execution of the Constitution. And that those words —

THE WITNESS: An example of what is and what isn't, such as an interference with the execution of the Constitution, yes.

THE COURT: Right. The words "execution [p.81] of Constitution" aren't in there. And I guess that I understand what you're saying is that you don't know what execution — what "insurrection against the Constitution" means without adding those extra words, and that's why you think that Congress needs to decide?

THE WITNESS: Yes.

THE COURT: Okay.

Q. (By Mr. Gessler) Okay. Let me mercifully move on from the subject of insurrection.

A. Okay.

Q. And I'd like to talk a little bit about the doctrine of —- or the application of preemption in the enforcement of Section 3 by a state court. And do you remember opining about that in your expert report?

A. Yes. I certainly do remember. This is one of the really crucial issues in this case, and other cases. I opined my — in my report, opined that the meaning of "officer of the United States" as used in Section 3, opined about whether Section 3 is judicially enforceable, whether by state or federal courts, without some enforcement-implementing legislation from Congress. And it opined about what it means, in [p. 82] the Constitutional sense, to have engaged in insurrection against the United States —

Q. Okay.

A. and what difficulties there would be —

Q. So —

A. — without congressional guidance in defining that term.

Q. Okay. So we've covered the difficulties of defining "insurrection." Let's talk about — let me ask you — we've got two more subjects I'd like to talk about. One is to whom Section 3 applies and whether it's enforceable in state or federal judicial courts. Let's talk about the enforcement provision, if we may, okay? And there were several instances of —several actions that Professor Magliocca believed constituted enforcement. Obviously you have a different viewpoint. Why do you believe that —

THE COURT: Can we start just with what exactly — what provision — what clause in the — in that — in the article he is referring to as the enforcement.

MR. GESSLER: Okay.

[p.83]

Q. (By Mr. Gessler) What's the basis for your view that Section 3 is not enforceable by state or federal courts?

A. Well, it could be enforceable if there were appropriate legislation under Section 5. But just standing alone, I'm not really talking about a clause because —

Q. Let's stay a little closer to the microphone. You're being a professor and moving about to keep the audience engaged, but I'm going to ask you to be glued to that microphone, please.

A. The question is how is Section 3 to be enforced. Can it be enforced by a Court, state or federal, independent of any action by Congress or not by some enforcement mechanism that Congress provides necessary for the enforcement of Section 3? Put it in — simply: Can I just show up at a courthouse one day and ask for Section 3 to

be enforced, or does it have to be some implementing mechanism to enforce Section 3 that Congress has provided?

Q. And what's the basis for your opinion that — that as currently, based on the historical documents, that the Section 3 — I'm sorry — Section 3 is not enforceable absent action from [p.84] Congress?

A. Well, my reasoning is this: First of all, as a general matter, the Constitution should not be understood to provide enforcement actions for its provisions directly, sort of taking the naked Section 3 or a case — there's two cases from the Supreme Court. The Supremacy Clause, which declares that federal law is — the Constitution, statutes, acts of Congress, and treaties — are supreme law. So in these two Supreme Court cases, the latter of which was from 2015, the Court ruled that the Supremacy Clause was not directly enforceable.

MR. MURRAY: And, Your Honor, I'm going to object. To the extent he wants to talk about historical sources, that's one thing, but to the extent that he wants to talk about his interpretation of contemporary judicial precedent, I don't think that's proper here.

MR. GESSLER: I think we'll be able to tie it up, but I'm certainly happy to start with a different approach, Your Honor.

THE COURT: Okay. Because I tend to agree with Mr. Murray. So I'm going to sustain that objection.

MR. GESSLER: Okay.

[p.85]

Q. (By Mr. Gessler) Looking at the historical record, I believe that you referred at one point in your report to the — and as Professor Magliocca — the Griffin's case?

A. Yeah.

Q. Could you explain how that's relevant to the self- or non-self-executing nature of the Fourteenth Amendment, Section 3?

A. Of Section 3? Well, the Griffin's case is decided not so long after the Fourteenth Amendment, including Section 3, is ratified. And I think it helps us to understand what, in the mind of the framers and ratifiers and voters, generally Section 3 was understood to mean. And it's an opinion by the Chief Justice of the United States, Samuel [sic] Chase, that addresses the question of whether Section 3 can be directly enforceable without implementing legislation or whether implementing legislation is required. That's one of the three bases of Chase's opinion. And Chase was not only the Chief — it's not an opinion of the Supreme Court. It's an opinion by Justice — Chief Justice Chase writing cert. But it's soon after the Section 3 is ratified and put into [p.86] the Constitution. And it's by someone who was not only Chief Justice but a very fine lawyer and a politician and potential candidate for the presidency at the time. And it's soon — it's soon after the ratification of Section 3. So I think it's weighty authority as to what Section 3 does and does not do in the absence of action by Congress under Section 5, the enforcement provision of the Fourteenth Amendment. And Chase holds that — it's one of his three holdings — that Section 3 is not directly judicially enforceable. And that strikes me as very powerful evidence. I'm not saying it's a binding precedent. For one thing, it's by a Justice of the Supreme Court alone. It's not — it's not a decision of the Supreme Court. But it strikes me as very powerful evidence as to the original public understanding of what Section 3 did. And there was consideration given in Congress. Even before Chase's opinion in Griffin's case, there was consideration about the

need to enforce Section 3 by acting under Section 5. And that ripened into the enactment in 1870, after Chase's opinion, the enactment of the Enforcement Act of 1870. So Congress sent the signal from Chase [p.87] that Section 3 needed enforcement. There were other reasons even before Chase to think that it needed enforcement. And that is Stevens, who was the departing Speaker of the House, told the House it needed to step up to the plate and enforce — provide legislative mechanisms to enforce Section 3. But it is relevant to the question before the Court here about whether it can, without congressional action, decide whether to reach the merits or whether it needs some congressional action or does it. This applies to both state and federal courts. Now, the Worthy case, I think you mentioned that, and it's certainly pretty prominent in Professor Magliocca's testimony. The Worthy case is a North Carolina case which is decided before Griffin's case. It doesn't take account of it. Certainly, doesn't undercut Chase's opinion, because it's — the Worthy case is decided in January of 1869. Chase's opinion comes down in late July of 1869. If I were a judge in North Carolina and knew of it and studied Chase's opinion in Griffin's case, I would have discussed it in my opinion in Worthy. Worthy came six months after Griffin's case. I would have certainly taken account, positively or [p.88] negatively, but I would have taken account of what the Chief Justice of the United States had to say in Griffin.

Q. What was the Worthy case about? Was that actually a direct interpretation of the U.S. Constitution?

A. Well, as I read it, the court — the North Carolina court is acting under a North Carolina statute that incorporates and makes state law qualifications based on Section 3. It's not direct enforcement of Section 3, per se. It's enforcement of a state statute that takes Section 3,

incorporates it, and applies it to state officials and state offices. Which, of course, a state can do. A state can rule on the qualifications or disabilities or whatever of its own state government officials. That, it can do. And I think that's what North Carolina did, or was attempting to do. So as to whether globally Section 3, per se, is self-enforcing, I don't think Worthy has much — or has any real relevance.

Q. Okay.

A. If you parse out that case closely, I think you see it's acting under North Carolina [p.89] statute.

Q. Now, shortly after Chief Justice Chase issued a decision in the Griffin's case with respect to the self-executing nature, he also ruled in another case, a second Griffin's case that was — I believe Professor Magliocca and others have stated that it contradicts his earlier viewpoint on — or his earlier ruling on self-execution. Can you address that, please?

A. Yeah. The argument that Professor Magliocca and others make is that Chase took inconsistent positions on the enforceability of Section 3 in the Jefferson Davis case from what he said in Griffin's case. First of all, I would say it's not absolutely clear what Chase said, or wrote, in the Jefferson Davis case. That's a dispute among scholars. But I'm going to assume that he was of the view and — that in the Jefferson Davis case, Section 3 was not self-executing. So let's posit that there was a contradiction between Chase in Jefferson Davis and Chase in Griffin. Let's posit that. I don't think that matters, because judges, professors can change their minds, and maybe he did. [p.90] But the real thing to look at is the quality of his judicial reasoning in Griffin's case. We don't really have an account of any judicial reasoning he may or may not have had in Jefferson Davis' case. So we do have this leading

authority in Griffin's case by a Chief Justice. If he's trapped in some kind of contradiction, does that really matter? Look at the quality of the reasoning in Griffin's case. But in any event, even if we do catch Chase in some kind of opposition, contradiction, I think — even if we think we have, I would say that the two cases are reconcilable because Jefferson Davis' legal counsel appeared to have been threatening to use Section 3 as a defense in Jefferson Davis's — it never happened, but in his forthcoming trial on violating the federal treason statute. So that would have been a defensive use of Section 3. And maybe Section 3 can be used defensively against a charge of criminal treason. I'm kind of — I'm just not sure about that. We don't have any ruling because what happened with Jefferson Davis was that President Johnson pardoned him, and that short-circuited any trial. It just didn't occur. It never happened. Pardoned him from the charge of [p.91] having committed the federal crime of treason. So Jefferson Davis's lawyers were — said that they were planning to use Section 3 as a shield, defensively, to — they sort of thought that Section 3 had displaced or overcome the treason statute, in his respect. Whereas in Griffin, Chase was really saying that Section 3 could not independently, directly, be used as a sword to — on which to base a claim to affirmative relief. nd the plaintiff, who was a — he was a prisoner — was seeking federal habeas relief, so affirmative relief, based on Section 3. That would be using Section 3 as a sword. And Chase reasoned it's not self-executing in that sense. And that opinion, Chase's opinion in Griffin's case, was cited affirmatively. And even the sword/shield distinction in it was approved of in a 1979 Fourth Circuit opinion. So Chase's view that the way in which Section 3 was non-self-executing, Chase's view was considered good law until —

at least until 1979. I think it's good law, but so what? But certainly in the minds of federal courts, it was good law as late as 1979. That case is called Coe (phonetic) versus [p.92] City of Covington.

Q. Okay. Did you come across any historical documents or analysis that leads you to conclude that Congress embraced Chase's interpretation of —

A. I think so.

Q. — Section 3?

A. The question of whether various iterations of Section 3 would be self-enforcing or not came before Congress actually pretty early in the process of ratifying Section 3. That is, Stevens, who was kind of the leader in the House of the radical Republicans, said the version of Section 3 he preferred would need congressional implementation. And he reiterated that when leaving Congress in 1868. So there's that. But after Chase — now, to my knowledge, there's no mention explicitly of Griffin in Congress after it came down, but I think it's reasonably safe assume that Congress, after 1869, was aware of an opinion of the Chief Justice of the United States. Much more likely that they knew of In re — Griffin's case than Worthy's case. And after that, Congress decided, yes, we will enact implementing legislation that is — kind [p.93] of reinforces Chase's view. Because it provided in the Enforcement Act of 1870 a mechanism by which a federal district attorney could, in certain cases, bring Section 3 cases against — in court against certain government officials. They excepted senators and members of the House, but against another class of officials, the federal district attorney was authorized by this federal statute to bring enforcement actions in federal courts, federal courts alone. So that was how, as I see it, Congress responded to Chase, even though, to my knowledge, it

didn't explicitly — nobody in the debates that I've seen explicitly refer to Griffin.

Q. So your view is that congressional enactment — the Congress enacted — implemented legislation for Section 3?

A. Pretty soon after, yeah.

Q. And so sort of based on your approach to this historical analysis, your view is that they knew about the Griffin's case or were likely to have known about it?

A. Yes.

Q. And why is that?

A. Well, it's an opinion by the Chief [p.94] Justice.

Q. Okay.

THE COURT: So under this theory, essentially, wouldn't it put the question of whether Fourteenth — whether this provision of the Fourteenth Amendment is even — exists, right? I mean, on Congress — so, I mean, it's essentially giving Congress the power to decide what amendments to apply or not apply?

THE WITNESS: Well, if they're going to be applied —

MR. GESSLER: Could you please move —

THE WITNESS: Sorry. I'm so sorry. If they're going to apply the sword to seek affirmative relief. I think this action — it doesn't originate with — this congressional interest — doesn't originate with Griffin's case, but it maybe is prompted by Griffin's case. And it, I think, corroborates or reinforces Chase's conclusion that Section 3 is not self-executing in that way.

THE COURT: My question was just a little bit different —

THE WITNESS: Okay.

THE COURT: — which is, if the only way to enforce a constitutional provision such as this is [p.95] through

legislation, then essentially it's leaving — isn't it leaving to Congress to decide whether or not the prohibition exists at all?

THE WITNESS: Yes. I mean, unless you try to implement it in the way North Carolina did, through a state statute that incorporates Section 3 by reference. But direct — because I want to — I really want to be responsive to your question, but —

THE COURT: No, that was —

THE WITNESS: Yes. And, in fact, I think Stevens, at the time, basically was saying — I mean, even earlier than Chase — Stevens, Thaddeus Stevens, was saying, "Hey, Section 3 is a dead letter." It's a dead letter unless we provide some enforcement mechanism. And, you know, generally speaking, Congress at the time wanted to take charge of the Reconstruction program, and so I think people like Stevens were saying we want to decide how and when and whether — and whether to enforce Section 3 or leave it to be a dead letter. Obviously, Stevens thought that that was a very poor idea, but that's what he was saying. He was warning his colleagues, "We can't let this stay a dead letter." And so in the Enforcement Act of 1870, [p.96] they basically said, "We're going to leave it a dead letter, at least for now, as applying to people like us, members of Congress. But we're going to make it a live letter when applied to another group of people who aren't in Congress." There was that threat, that it would be a dead letter and —

THE COURT: And your —

THE WITNESS: — not judicially enforceable.

THE COURT: And your opinion is today it's a dead letter? It's essentially —

THE WITNESS: No, no, no, no, no. My opinion is that it is not judicially enforceable absent either in cooperation

as applied to state officials, which was what North Carolina did, or it's not — it's not enforceable offensively without an act of Congress —

THE COURT: So —

THE WITNESS: — without implementing legislation.

THE COURT: So if Colorado had a statute that adopted Section 3 of the Fourteenth Amendment, is your opinion that then it would be enforceable?

THE WITNESS: It would be enforceable in [p.97] Colorado as applied to state officials, candidates, state offices. Outside of that, I think it's not applicable by state of — by Colorado.

THE COURT: So at the federal level, your opinion is that Section 3 of the Fourteenth Amendment is a dead letter, essentially a nonexistent constitutional provision, because there's no way to enforce it?

THE WITNESS: Well, no, I don't think it's a total dead letter. We don't know whether it could have been used defensively, as Jefferson Davis tried to do, or not. But it — like most of — like much of the Fourteenth Amendment, it requires congressional action to provide the course of action in a — in a court. It's just —

THE COURT: And —

THE WITNESS: I —

THE COURT: Go ahead.

THE WITNESS: So —

THE COURT: I'm just making sure I understand the testimony.

MR. GESSLER: Professor Delahunty, I'm going to ask you to wait until the sirens go by.

THE WITNESS: Oh, okay.

[p.98]

MR. GESSLER: That's one of the unique characteristics of this courtroom.

THE WITNESS: May I proceed?

THE COURT: Yes.

THE WITNESS: So the baseline for understanding the Constitution globally is set by the Supreme Court in these Supremacy Clause cases that I mentioned earlier. That's the default position. The Constitution generally, globally, whether it's Section 3 or the Supremacy Clause, the Constitution is not self-enforcing in the relevant sense. And the Court, in the latter of these two cases, the Armstrong case, explains why the Constitution is not automatically self-enforcing, why it needs guidance. And that is because Congress has to set the policy of the United States. And it can decide whether and how far to enforce constitutional provisions and whether or not — not to. That's the general assumption. The Constitution, as a general matter, is not self-enforcing. So that's the Armstrong case.

THE COURT: Okay.

MR. GESSLER: Your Honor, may I continue, or do you have —

[p.99]

THE COURT: No, of course. I'm sorry to interrupt.

Q. (By Mr. Gessler) So let me — let me ask you about historical examples of Congress refusing to seat members for, you know, what they view as treasonous or rebellious or types of behavior that would fall under the ambit of Section 3. Are those examples of congressional enforcement of Section 3?

A. Well, I don't think they are, because, if I recollect that part of Professor Magliocca's report, these two exclusions occurred before Section 3 was ratified. So in that way, they're not. Now, Congress — well, Congress

has the power to exclude members-elect, and that power is a limited one under Powell versus McCormack. But maybe in this relevant period, close to ratification of Section 3, Congress took a broad view of its powers to exclude members-elect and acted under the provisions in Article 1 rather than the Fourteenth Amendment, enabling it to exclude members-elect —

Q. Okay.

A. — for a good cause. Now, that's been tightened, the exclusionary powers of Congress. We don't know — the [p.100] Supreme Court in Powell versus McCormack specifically withheld opining on the question of whether Section 3 is a disqualification and a basis for congressional exclusion. They withheld that judgment.

Q. Okay. Let me —

MR. GESSLER: Excuse me. One moment, Your Honor. I just need to look at something.

Q. (By Mr. Gessler) Let me move on to a — I'm just checking — double-checking my notes here. Were you able to identify any instances in the historical record of your view where Section 3 was enforced by state officials and state courts, not a — not a state incorporation in a state statute of Section 3 standards, but Section 3 itself directly enforced by state courts?

A. No.

Q. Okay. Let's move on to the third item that you had discussed in your testimony — in your report, in your opinion, with respect to an officer of the United States. Although, before we move there, is there anything else that serves as the basis for your opinion that Section 3 is not self-executing?

A. Well, I've given the basic reasons, including the Fourth Circuit's reference to reliance [p.101] on Chase and application of less — the framework of Chase to the

case before it, which was wrongful discharge acts based on an assumed cause of action directly under the Fourteenth Amendment.

Q. Okay. Let's talk about the phrase "officer of the United States."

A. Well — I'm sorry.

Q. Let me ask a question —

A. Yes.

Q. and then we'll head there. So what — what's your response or your opinion on Professor Magliocca's conclusions that an officer — the phrase "officer of the United States," as used in Section 3, includes the President and Vice President of the United States?

A. Well, I disagree with that conclusion. And the more I looked into that question, the more I was persuaded that he is really wrong. I think that that term is, in essence, a term of art and has a specialized meaning. And this brings me back to the question on whether I had consulted legal dictionaries, like — dictionaries, dictionaries like Noah Webster, on the meaning of "insurrection." There is a legal concordance. Now, is [p.102] that a dictionary? It operates — it looks like a dictionary. It's from 1883, I think by John Lawler [sic]. And it offers legal — legal definitions of various terms, including the term "officer." And it cites supporting case law for its definition. That definition of "officer" has a separate, compartmentalized understanding, definition, of "officer of the United States," okay? Now, this is 1883. It's later than the ratification of Section 3. But it's not too long after the conclusion of the Reconstruction period which is commonly dated to 1876, the election of President Hayes. And so I think it's fair to say that "officer of the United States" was understood by the legal community, the kind of people who would have read this concordance, looked

up the definitions it offers. I think it's fair to say that "officer of the United States" was understood to be a special term needing separate definition from "officer" generally.

Q. And so what — what sources — other sources did you look to define what "officer of the United States: means?

A. Well, there is the language, the text of the Constitution itself. And then there are a long [p.103] variety of Supreme Court opinions, going up to a fairly recent one by Chief Justice John Roberts, defining what "officer of the United States" means for purposes of the Appointments Clause in Section 2. Some of these Appointments Clause cases are roughly around the time of the ratification of Section 3, and they include Supreme Court — sorry — lower court federal cases about the definition of the term "officer of the United States." And, of course, it — or close — very close cognates to it appear in the Constitution — in the text of the Constitution itself. And so far as possible, it wants to construe these constitutional uses of the term "officer of the United States" to be consistent, to be the same. So the text of the Constitution uses the term in several contexts. And the meaning should, by ordinary rules of construction, be consistent from one such provision to the next. So I think both the text of the Constitution — especially if you assume this rule of consistent meaning and different uses, the text of the Constitution and the Supreme Court case law support the view — strongly support the view that, you know, the term "officer of the United States" means the same [p.104] thing in Section 3 as it means under the Appointments Clause. That — the Appointments Clause is kind of the anchorage, if I may speak that way, of interpreting the meaning of this phrase, "officer of the

United States," elsewhere in the Constitution, outside the Appointments Clause, including Section 3.

Q. And why is it considered the anchorage?

A. Well, because of the principle — because the case law, Supreme Court cases. Some of it very recent. But also because if the term is to be used in a consistent way through the text of the Constitution, then it's got to mean elsewhere what it means under the Appointments Clause.

Q. Now, did you also look at the Impeachment Clause and the drafting documents involving the drafting of the Impeachment Clause as part of your opinion?

A. I don't know that I looked directly — mean, I didn't look closely anyway at the — the document. I — other than it's cited in court opinions, I don't think I looked at the original pre-17 — pre-1788 documents, no. Did I look at the case law? Yes. And the case law — sorry — well, on the — I did consult [p.105] secondary sources about the process of drafting the impeachment clauses. And the secondary sources show, I think, that, as used in those clauses, the office — "officer of the United States" had a meaning that was designed to exclude the President. The President — there's separate rules about presidential impeachments from impeachments of lower, executive-level officials and federal judicial officials. There's a separate treatment of those officials in the impeachment clause — clauses.

Q. Okay. Let me — you also talked a bit about the — with respect to the jurisdictional language of Section 3 involving the Oath Clause — I'm sorry. We've talked about that in Article 6. Are there any other documents or bases of your opinion that "officer of the United States" includes — or I'm sorry – excludes the President and Vice President?

A. Well, I think the language of — that the Constitution uses for prescribing an Article 6 oath is strikingly different from the language the Constitution uses in prescribing a quite separate presidential oath in Section — in Article 2 of the Constitution. There are two oath clauses, an Article 6 [p.106] one and an Article 2, okay? And the Section 3 of the Fourteenth Amendment echos the oath language of Article 6, where those who are subject to it would have to take an oath to support — support — the Constitution. If you go back to Section 3 from the Oath Clause in Section 6, it appears quite obvious to me that they were talking about the class of people who was — who had to take the Article 6 oath, not the people who were talking — that they didn't mean to include the Article 2 Oath Clause. I think that's — now, is there — as Professor Magliocca says, that —and he cites a grand jury charge from the 19th century that allows for some play in the joints as to what the — what it means to take an oath to support the Constitution. There can be — there is, historical sources say, some play in the joints, some elasticity. But so what? That doesn't assimilate the Article 6 language where the President has to swear to preserve, protect, and whatever else it says, the Constitution. You can't just assimilate the language of the Article 2 Oath Clause into the language of the Article 6 Oath Clause. That's beyond play in the [p.107] joints. It's a separate language about how the President — what the President's constitutional responsibilities are.

Q. Now, how do you respond — and I believe Professor Magliocca said, Look, an oath to protect and defend is essentially an oath to support, so they're effectively the same thing.

A. No, I think that's stretching the language much too far. I mean, people who draft constitutional language have

to be very, very careful about the terms they use, especially if those terms are used elsewhere in the text of the Constitution. So I think he's going way too far. I once, at OLC, was asked to draft an amendment to the Constitution, and we gave up in the end, it was so hard.

Q. And what's the basis for your opinion that people who draft the — draft constitutional provisions are very careful about the language they use?

A. What's the basis for my opinion?

Q. Yes. And if you could —

A. Oh, sorry.

Q. — explain to me the basis in the microphone, that would be great.

[p.108]

A. Yes. Well, look, there's a principle that Professor Akhil Amar expresses at length in the article called, I think, “Intertextuality” or “Intratextuality,” where he shows that you should, if you are asked to interpret the same term in different occurrences in the Constitution in the same consistent way.

MR. MURRAY: and, Your Honor, I'm just going to object to the extent we're talking about canons of construction among modern scholars as opposed to historical sources.

THE COURT: Sustained.

MR. GESSLER: Okay.

Q. (By Mr. Gessler) So let me ask you did — as a matter of historical analysis and knowledge, did the people who drafted Amendment did they take care about the language they used and understand when they used language that mimics other language or was different than other language?

A. Well —

Q. Let me try rephrasing.

A. — the drafting of Section —

THE COURT: Why don't you re-ask it.

MR. GESSLER: That was a terrible question, I was about to say. [p.109]

THE COURT: I'm going to sustain your own objection to your question.

MR. GESSLER: No, I'm not objecting to my question. I'm simply withdrawing it.

Q. (By Mr. Gessler) So in using the term "officer of the United States" or using an oath to support, versus a different type of oath, the care and usage of language, did the framers of the Fourteenth Amendment pay conscious attention to the very specific words they were using and how that did or did not reflect other usage in other parts of the Constitution?

A. Well, the initiative to draft a new amendment to the Constitution came very early after the Civil War, because it was considered generally, widely that there was need to bring the Constitution up to date. And in particular, a need to get rid of Dred Scott and its holding on citizenship. So the Congress very, very early in its term set out a 15-member joint committee, including members of the House and Senate, to do exactly that. They included some very fine lawyers and very thoughtful people, and the committee considered several draft versions of what later matures into the Fourteenth Amendment, including Section 3. And those [p.110] proposals, which ripened over months by many members of both houses, was sent to the House and Senate for consideration, again by very able lawyers. And do I have proof that somebody sat down one day in the course of these deliberations and said, "We've got to make sure that everything clicks into place"? No? Do I make the assumption based on the care and length of the deliberations that the special — the Select

Committee and houses gave, and the attention that was given to it to determine exactly who was covered, whose jurisdictions were subject? Do I make the assumption that that was given careful consideration to bring that into line with the rest of the Constitution or else depart from the standard meaning? Yes. That is an assumption I would make.

MR. GESSLER: I have no further questions.

Your Honor, if you have any further questions, we'd certainly appreciate the discourse that you may have.

THE COURT: I was just wondering. Professor Magliocca, he showed us some discussion about the enactment of Section 3 of the Fourteenth [p.111] Amendment in which one of the senators stated, you know, "Don't we want to make sure that this applies to the President?" And then somebody responded and said, "Well, it applies in the kind of catchall phrase." And then the gentleman says, "Oh, yeah, I see you're right." So what do you — how do you — how do you — how does that discourse which —

THE WITNESS: That —

THE COURT: — impact your opinion in this?

THE WITNESS: That's Senate colloquy between Senator Reverdy Johnson of Maryland and Senator —I can never remember whether it's Morrill Lot or Lot Morrill — I think it's Morrill Lot of Maine. That colloquy concerns the disqualification clause of Section 3, not the jurisdictional clause. So it is relevant to interpreting from what offices a covered person who has committed the relevant offense will be excluded. That's the start of the language in Section 3. But it doesn't go to the coverage of — the jurisdictional coverage of Section 3. You can't just map on Section — the leading language of [p.112] Section

3 about from what offices shall this person be excluded onto who is covered by Section 3.

THE COURT: Okay.

THE WITNESS: It goes more to the — whether the President, the presidency as an office, is included in Section 3 than it goes to the question whether the President is or is not an officer of the United States. So I don't think it's relevant, frankly —

THE COURT: Okay.

THE WITNESS: — to the interpretation of the judicial — the jurisdictional aspect of Section 3.

THE COURT: Thank you. I appreciate that.

MR. GESSLER: Your Honor, we have no further questions. And with that, we will release the witness to opposing counsel for cross. Although I note it's about 11:30.

THE COURT: Yeah. So let's talk for a second about timing. I know we were planning on having Mr. Heaphy at 1:00. Is that a hard time, or does Mr. Heaphy have some flexibility in his schedule?

MR. MURRAY: Well, Mr. Grimsley can talk [p.113] about Mr. Heaphy's schedule.

MR. GRIMSLEY: Your Honor, that's a pretty hard time for him. He teaches class in the evening. And he's on the East Coast, so that's 3:00 his time. So I think it would be fine with us to take him out of order. And as much as I don't want to interrupt the cross-examination, I think it would make sense to do so.

THE COURT: And I guess the question for you, Professor Delahunty, is: Are you available to finish your cross-examination after we take this other witness? Are you available today?

THE WITNESS: Today, yes.

THE COURT: Okay. It would be today. It just — we may go till noon and then break for lunch, do Mr. Heaphy, and come back to you sometime later in the afternoon. Is that okay with you?

THE WITNESS: Yes.

THE COURT: Okay. So let's do about a half hour of cross-examination. And if you aren't finished, we'll finish it after Mr. Heaphy.

MR. MURRAY: Yes, Your Honor. Thank you. Let me just make sure we've got — we have the screens here. [p.114] It looks like we're on this one, but not this one.

THE COURT: You may proceed.

CROSS-EXAMINATION

BY MR. MURRAY:

Q. Good morning, Mr. Delahunty. You're not claiming to be an expert in the history of Section 3 of the Fourteenth Amendment —

A. No.

Q. — are you? And certainly Section 3 of the Fourteenth Amendment is not the main focus of your scholarly work, correct?

A. That's true. It has been for very few academics, until recently.

Q. I want to look briefly at some of the things that you have published academic literature on. This is Petitioners' Exhibit 315. Is this your latest CV?

A. Yes. I think it is. I did ask counsel to submit a slightly updated CV.

Q. Yes. And this is the one we received —

A. Yes.

Q. — I think on Wednesday of this week.

[p.115]

A. Okay.

Q. On page 3 of your CV, we have some articles and book chapters here, and one of those is a book chapter "Deconstructing the Deep State" —

A. Yes.

Q. — in the book "Up From Conservatism."

A. Yes.

Q. Do you see that?

A. That's the title. Yes.

Q. And you've also written, for example, "The Major questions Doctrine and the Administrative State"?

A. Yes.

Q. You mentioned some publications on Shakespeare. Is this one of them here?

A. Yes.

Q. And at the bottom, there's another one about Shakespeare's "King Henry" and Just War; is that right?

A. Yes.

Q. You have a lot of publications on foreign affairs and international law, such as "Toward a Concert of Asia?" and "The Crimean Crisis," and "The Use of Weaponized Drones"; is that right?

[p.116]

A. Well, the first one was accepted for publication, and then I think this publication by the University — by a journal at the University of Pennsylvania was never actually published. It wasn't rejected; I think they just closed down. But, yes, in the — in that sense, it was —

Q. But —

A. rejected for publication, yes.

Q. But — and those were things you wrote?

A. Well, it never got published. I don't know exactly what you mean by it's a big zero, but . . .

Q. Do you mind just speaking a little bit closer —

A. Oh, yes.

Q. — to the microphone? Thank you.

A. I mean, I think I gave full disclosure. It was accepted for publication but was not published.

Q. And nothing —

A. Does that make it a big zero? I don't understand.

Q. No. I'm sorry. I may have misspoke. But let me ask you another question. Nothing on this page of your CV relates [p.117] at all to Section 3 of the Fourteenth Amendment —

A. No.

Q. — is that right?

A. That's certainly true.

Q. And I'm not going to go through every item in your CV, but just on the next page we do have some additional articles on things like international law, the laws of war, The Bush Doctrine, Latin America, things like that, correct?

A. Yes.

Q. And, again, there's nothing on this page, no publications, that relate to Section 3 of the Fourteenth Amendment?

A. No. No.

Q. On the next page of your CV, once again there's articles on international relations, on "The Kosovo Crisis," on "Why American and European Attitudes Towards International Law Differ," on "Against Foreign Law," and things like that, correct?

A. Yes.

Q. And, again, on —

A. Well, if I may say, the piece about "Against Foreign Law" is about constitutional adjudication and whether foreign law should be imported into the interpretation of constitutional [p.118] clauses.

Q. Understood. And in your article "Against Foreign Law," you weren't discussing Section 3 of the —

A. No, no, no.

THE STENOGRAPHER: If you can please wait until the end of the question for me.

THE COURT: Yeah. So the whole nature cross-examination is that they're usually yes-or-no answers.

THE WITNESS: Okay.

THE COURT: And you kind of know where he's going —

THE WITNESS: Okay. Yes.

THE COURT: — you're tempted to answer before he finishes. But you've got to wait, just for the court record, okay?

THE WITNESS: Okay.

Q. (By Mr. Murray) And if we go to the next page of your CV, we have a few more articles on things like the Geneva Convention and the President's constitutional authority to conduct military operations and foreign affairs matters; is that correct?

A. Yes.

[p.119]

Q. You've also written on philosophy. For example, you have an article about Descartes, correct?

A. Yes.

Q. And you've written a book on the philosopher Baruch Spinoza?

A. Yes.

Q. But you've never written a book with a central focus on the history of the Fourteenth Amendment —

A. No.

Q. — have you?

A. No.

Q. These days you write a lot of political commentary; is that right?

A. Yes.

Q. For example, you write articles and op-eds in Fox News and the National Review and The Federalist?

A. Yes.

Q. For example, you wrote an article with John Yoo entitled "Pushing Back on Cancel Culture." Do you see that?

A. Yes.

Q. And then on the next page, you have a [p.120] number of articles about China and COVID, such as "How to Make China Pay for COVID-19" correct?

A. Yes.

Q. And if we go a few pages down the line, there's articles about things like the South Korean election, the Persian Gambit, and Brexit, correct?

A. Yes.

Q. Do you remember writing an article in The Federalist this summer about why, in your view, Democrats can't ditch Biden?

A. Yes.

Q. In that article, you claimed that Biden was suffering from what you called embarrassingly obvious cognitive decline; is that right?

A. Yes.

Q. In that article, you said that President Biden is "surrounded by the stench of corruption" and you cited evidence from "The Hunter Biden laptop." Do you remember that?

A. Yes.

Q. In that article you also discuss "the pouch of cocaine found in Biden's White House." Do you remember that?

A. Yes.

Q. And in that article you referred to the [p.121] Democrats and their deep-state enforcers in the FBI and CIA. Do you recall that —

A. Yes.

Q. — as well? You've never written a peer-reviewed article with a primary focus on the history of the Fourteenth Amendment; is that right?

A. That's correct.

Q. You've never published a peer-reviewed article about Section 3 of the Fourteenth Amendment, correct?

A. No, I have not.

Q. Now, you have published one article talking about Section 3; is that right?

A. Yes. An op-ed.

Q. That was an op-ed in The Federalist in August of this year?

A. That's right.

Q. You'll agree with me that your op-ed in. The Federalist was not a work of historical scholarship, right?

A. That's right.

Q. It doesn't cite very many historical primary sources?

[p.122]

A. No.

Q. You've never given expert testimony before, correct?

A. Correct.

Q. I want to ask you a few questions about historical methodology. When you're doing historical work, I think you said on direct that you look at primary sources, correct?

A. Yes.

Q. And it's always better to go back and look at the original primary sources than it is to take some secondary source's word for what those primary sources say?

A. That's correct.

Q. Were any of the sources that you discussed on direct examination sources that were uncovered through your own original archival research?

A. No.

Q. In your report, you said that you gave a draft of your report to Professors Blackman and Tillman. Do you recall that?

A. That's right.

Q. And you said that you gave Professors [p.123] Blackman and Tillman a draft of your report because they have "written extensively on the subjects discussed in my report," right?

A. Yes.

Q. Unlike you, Blackman and Tillman have written extensively on the subject of whether the President is an officer on the United States under Section 3 of the Fourteenth Amendment?

A. That is correct.

Q. But you know that not all scholars agree with that view, right?

A. I do.

Q. You know that Professors William Baude and Michael Paulsen disagree with that view?

A. I certainly do.

Q. Did you ever ask Professors Baude or Paulsen to comment on your draft report?

A. No.

Q. You know that Mark Graber disagrees with the Blackman and Tillman view with the presidency — that the President is not an officer of the United States, right?

A. Well, I haven't read the Graber piece, but I assume that he is in agreement – or disagreement, rather, with Tillman and Blackman.

[p.124]

Q. You haven't read Mark Graber's piece discussing the history of Section 3 of the Fourteenth Amendment?

A. No.

Q. And so you never asked Mark Graber to comment on your draft report either?

A. No.

Q. But did you ever give a draft of your report to John Vlahoplus?

A. No.

Q. Do you know who that is?

A. Yes. I've seen references to his recent work.

Q. He also wrote an entire article responding to the Blackman and Tillman position that the President is not an officer under Section 3, right?

A. I didn't know that, but yes.

Q. You didn't know about that article and you didn't read —

A. No.

Q.— the article where John Vlahoplus responds directly to the Blackman and Tillman position —

A. No.

[p.125]

Q. — in the context of Section 3?

A. No.

Q. You didn't solicit comments from any scholars who disagree with your opinion on whether the President is an officer of the United States?

A. No.

Q. I want to ask you about some of the sources you do rely on. I want to pull up your report, Petitioners' Exhibit

227. And does this appear to be the expert report that you served in this case?
A. Yes.

Q. Do you recall that in your expert report, you have, starting on page 5, a background to Section 3 of the Fourteenth Amendment?

A. Yes.

Q. And if we scroll through just that, that section is about seven pages long, and it goes until page 12 of your report?

A. Uh-huh. Yes.

Q. In that entire section, you don't cite a single primary source, do you, sir?

A. I don't think so, no.

Q. You do cite to Professor Kurt Lash's recent article on Section 3, though, right?
[p.126]

A. Yes. Yes.

Q. And certainly, you don't cite any original historical research that you've —

A. No. Not on the background. No.

Q. And in this article by Kurt Lash, that's your only citation in your "Background" section, that's a draft paper that hadn't been published yet, right?

A. That's right.

Q. That was actually posted on SSRN just a few weeks ago?

A. That's right.

Q. I want to look briefly at Professor Lash's draft paper, Petitioners' Exhibit 289. Does this appear to be the article from Professor Lash that you relied on?

A. It does.

Q. If we go to page 3 of Professor Lash's article, there's a footnote here, Footnote 5. And it says "A robust

scholarly debate has emerged regarding the proper reading of Section 3 terms such as 'office' and 'officer' and those who have previously taken an oath as an officer of the United States." Do you see that?

A. Yes.

[p.127]

Q. And then he cites a number of scholars, right?

A. Yes.

Q. And one — some of the scholars he cites are Josh Blackman and Seth Barrett Tillman who you said you sent your draft report to, right?

A. Yes.

Q. He also cites William Baude and Michael Paulsen, right?

A. Yes.

Q. And he also cites Mark Graber whose paper you said you never read, correct?

A. You mean that particular citation? I have not read his piece on lawfare, no.

Q. And he also cites as a contributor to this robust scholarly debate Gerard Magliocca, who you understand is petitioners' expert in this case who testified earlier this week, correct?

A. Yes. Yes.

Q. Professor Lash does not list you as having made any contributions to the robust scholarly debate about the proper meaning of "office" and "officer" under Section 3; is that right?

A. That's right.

Q. If we go to page 48 there's another p.128] footnote, and it's a long footnote. I'm not going to ask about the substance of what the sources are talking about. But I just want to ask you, do you see in Footnote 218 Professor Lash cites an opinion reported in The Times-Picayune —

A. Yes.

Q. – and a jury charge —

A. Yes.

Q. — reported in The Tennessean?

A. Yes.

Q. And at the end of that footnote, Professor Lash says, "My thanks to Gerard Magliocca for the pointer to these opinions," correct?

A. Yes.

Q. Nowhere in Professor Lash's article is there an acknowledgment given to you for any contribution that you've made to the historical record on Section 3, correct?

A. That is correct.

Q. And, in fact, Professor Lash's article doesn't cite you anywhere in his draft article —

A. No.

Q.— is that right?

A. He does not.

[p.129]

MR. MURRAY: Your Honor, at this point we would renew our motion to exclude the testimony under Section 702.

THE COURT: I'm going to deny the motion. As I said, Professor Delahunty has expertise in reviewing historical documents and applying them to constitutional provisions. And his lack of a scholarly contribution to Section 3 in particular I don't think excludes him from testifying on opinions that he's testified to today.

MR. MURRAY: Thank you, Your Honor. At this point I'm going to move on to the substance of his opinions, but I know we only have a few minutes left. So I wanted to see if you wanted me to start with that or if you want to just break for lunch now.

THE COURT: Why don't you start since we're running a little behind today. We'll go for about 10, 15 minutes and maybe take a little bit shorter lunch.

MR. MURRAY: Sure.

Q. (By Mr. Murray) Mr. Delahunty, I believe you said on direct that the Fourteenth Amendment was — that you begin your constitutional [p.130] law classes with the Fourteenth Amendment; is that right?

A. Yes.

Q. And you called —

A. Actually, I — that's probably what I said. I began it with Dred Scott typically.

Q. Dred Scott and then a discussion —

A. Correct.

Q. — of the Fourteenth Amendment?

A. Yes.

Q. And you referred to the Fourteenth Amendment as a second founding —

A. Yes.

Q.— of our Constitution; is that right?

A. Yes.

Q. The Fourteenth Amendment is not some kind of second-class constitutional amendment. You'd agree with that, right?

A. I do. Well, I wouldn't. See, you can make — what is — may I ask for clarification on the question?

THE COURT: You can ask him to repeat the question, but I'm just going to admonish you again to let him finish his questions before you start to answer.

[p.131]

A. Okay. I don't understand the distinction you're trying to draw, Counsel, between first-class and second-class amendments.

Q. (By Mr. Murray) Well, I'm not sure I do either. I'm just trying to make the point that there's — there's nothing that says the Fourteenth Amendment is somehow lesser than any other constitutional amendment, right?

A. That's right. They stand on an equal plane.

Q. So I want to start by talking about your opinion that Section 3 is ambiguous and that, therefore, it needs congressional enforcement legislation. You'd agree with me that courts interpret ambiguous text all the time, right?

A. Indeed.

Q. Courts interpret unreasonable searches and seizures in the Fourth Amendment, for example.

A. That's right.

Q. And even in the Fourteenth Amendment, they interpret terms like "due process" and "equal Protection" right?

A. Yes.

Q. Are you aware of judicial decisions [p.132] saying that we can't tell what an unreasonable search and seizure is, or due process of law is, unless Congress tells us?

A. No, I'm not aware of any such decisions.

Q. When you teach constitutional law, do you teach Marbury v. Madison?

A. Yes.

Q. And that's a case where the Supreme Court, Chief Justice John Marshall says emphatically the province of the judicial branch is to say what the law is, right?

A. It is, yes.

Q. You know that courts interpreted and applied Section 3 pursuant to state law, even before Congress enacted implementing legislation, right?

A. That's true.

Q. Your opinion — one of your opinions is that it's difficult to understand how the phrase "insurrection" was defined during Reconstruction, correct?

A. Well, I don't know that it was defined at all, but it is difficult to interpret the term.

Q. But you agree with petitioners that Section 3 remains in force even outside the context of the Civil War? [p.133]

A. I do agree with that. And so state in the report.

Q. And you agree that Section 3 has continuing relevance to any future insurrection —

A. I do.

Q.— or rebellion?

A.— agree with that, yes.

Q. You also agree that insurrection need not rise to the level of an organized rebellion?

A. That is what the Supreme Court says in the prize cases, and I agree with it.

Q. And the prize cases were cases that came up during the Civil War where the Supreme Court said just that, right?

A. Say again?

Q. Where the Supreme Court —

A. Yes.

Q.— said that an insurrection need not rise to the level of a rebellion?

A. Yes.

Q. An insurrection also need not rise to the level of a civil war; is that right?

A. Yes.

Q. You're not saying that a criminal conviction or a guilty plea on a charge of [p.134] insurrection is a necessary condition for a Section 3 disqualification?

A. No.

Q. On direct examination when you were talking about the President's oath versus an oath to support the Constitution, you said that the drafters of the Constitution were very careful with their words; is that right?

A. Yes.

Q. Is it your testimony that they were so careful with their words that they used a term "insurrection" that just had no clear meaning?

A. I — can I — I don't understand. Could you repeat it?

Q. Well, you testified that the framers were careful with their words —

A. Yes.

Q.— but you've also testified that "insurrection" is a sufficiently unclear term that we need Congress to tell us what it means; is that right?

A. Did I testify to that? I don't remember, but I think I probably did, yes. Certainly, that congressional guidance would be helpful, instructive to the courts. Because the term is pretty broad-gauged. There's also the question of whether [p.135] the courts can enforce at all that Section 5, but that's separate from what you asked me.

Q. Can I just ask you to speak into the mic?

A. Yes. The question is a bit complicated because it implicates Section 5 of the Fourteenth Amendment as well as Section 3.

Q. And other provisions of the Fourteenth Amendment, like Section 1, also implicate Section 5, right?

A. Yes.

Q. Now, if I have trouble knowing what a word means, sometimes I go to a dictionary. So let's look at some

dictionaries. And this is Petitioners' Exhibit 144, the appendix and materials that we looked at with Professor Magliocca. Page 785, I believe you testified about Webster's on direct but we didn't look at it. Webster's in the antebellum period defined "insurrection" as a "rising against civil or political authority, the open and active opposition of a number of persons to the execution of law in a city or state," correct?

A. Yes.

Q. Webster's was not the only dictionary in [p.136] the antebellum period that defined "insurrection" in just this way, was it?

A. I think that Webster — Webster's definition is the essence of it. Maybe not word for word. Particularly, "the execution of law in a city or state" was widely accepted, maybe even followed.

Q. You cite some cases in your report as well, and I just want to pull that discussion up. Plaintiffs' Exhibit 227 is your report. And if we go to page 71, there's a discussion of a Georgia Supreme Court case in 1868 called Chancely versus Bailey. Do you see that?

A. Yes.

Q. And in Chancely versus Bailey, the year that the Fourteenth Amendment was ratified, the Georgia Supreme Court said: "If the late war had been marked merely by armed resistance of some of the citizens of the state to its laws or to the laws of the federal government, as in the case of Massachusetts in 1789 and in Pennsylvania in 1793, it would very properly have been called an insurrection, and the acts of such insurgents would have been held as illegal." Correct?

[p.137]

A. Yes.

Q. You also testified on direct about the instructions by Justice Catron that we looked at in Professor Magliocca's testimony. And you called those grand jury instructions helpful in understanding insurrection —

A. Yes.

Q.— is that right?

A. Yes.

Q. And just to make sure we're all looking at the same thing, if we go a few pages in, to 752 of Professor Magliocca's appendix, Justice Catron instructed the jury that "The conspiracy and the insurrection connected with it must be to the effect" — "to effect something of a public nature concerning the United States, to overthrow the government or some department thereof, or to nullify and totally hinder the execution of the United States law or Constitution or some part thereof or to compel its abrogation, repeal, modification, or change by a resort to violence." That was the instruction that you found helpful, correct?

A. Yes.

Q. Did you also look at how Justice [p.138] Chase — not the Chief Justice, the other Justice Chase — defined "insurrection" in the case of Fries?

A. No.

Q. If we go to page 834 of Professor Magliocca's appendix, this is a case of Fries from the Circuit Court of the District of Pennsylvania in 1800. Do you see that?

A. Yes.

Q. And if we go to page 841, the Court says: "On this general position, the courts are of the opinion that any such insurrection or rising to resist or prevent by force or violence the execution of any statute of the United States for levying or collecting taxes, duties, imposts, or excises or for calling forth the militia to execute the laws of the

Union or for any other object of a general nature or national concern under any pretense as that the statute was unjust, burdensome, oppressive, or unconstitutional is a levying war against the United States within the contemplation a1 construction of the Constitution." Correct?

A. Yes.

Q. And that also uses this language we've [p.139] seen earlier about a rising up to resist by force or violence the execution of law, correct?

A. Yes.

Q. I just want to finish this line of questioning by asking about your example where you say that Professor Magliocca's definition of "insurrection against the Constitution" would essentially mean that Section 3 covers any effort to obstruct the mail. Do you remember that testimony?

A. Yes.

Q. Well, that's your interpretation; that's not something Professor Magliocca ever testified about, right?

A. That's right.

Q. Do you remember that when Professor Magliocca gave his definition of "insurrection," his definition was "a group of persons resisting execution of law by force or threat of force"?

A. Yes.

Q. And do you also recall that Professor Magliocca explained that Section 3 only applies to those who had previously sworn an oath in certain kinds of official capacities?

A. That was my recollection of his testimony, yes.
[p.140]

Q. If a person has never been in government and never taken an oath to the Constitution, does Section 3 have anything to do with them at all?

A. Well, that — that's a requirement under the offense element. Who, having taken an oath to support the Constitution, thereafter engaged in some kind of activities.

MR. MURRAY: All right. Your Honor, I think this would be a good time to break for lunch.

THE COURT: Agreed. We will — we will reconvene at 1:00 for Mr. Heaphy. And then we will finish your testimony, Professor Delahunty, after Mr. Heaphy is done, okay?

THE WITNESS: Yes. May I have lunch and speak with my counsel? Or counsel for —

THE COURT: You may absolutely have lunch.

THE WITNESS: But not discuss my testimony?

THE COURT: Under the rules, you're not supposed —

THE WITNESS: All right.

THE COURT: — to discuss your testimony with counsel.

THE WITNESS: Okay. Thank you, Your [p.141] Honor. Thank you.

THE COURT: But we do want you to eat.

THE WITNESS: Thank you.

THE COURT: Okay.

(Recess from 12:05 p.m. to 1:01 p.m.)

THE COURT: You may be seated.

MR. GRIMSLEY: And has Mr. Heaphy been admitted? Great. And there's just one preliminary issue, Your Honor, when you're set up.

THE COURT: Actually, let me start the video.

MR. GRIMSLEY: So one preliminary matter. Congressman Buck testified yesterday as their witness on the January 6 committee and the report. We would move to strike, then, Congressman Nehls' declaration from the record since we're not getting the opportunity to cross-examine him. They made the choice that they used Congressman Buck rather than Congressman Nehls. He had some things in his declaration that Mr. Buck — or Congressman Buck did not testify about. I don't plan on asking Mr. Heaphy to rebut what's in Mr. Nehls' declaration since it should [p.142] be struck from the record.

THE COURT: I already judicially admitted the testimony — or the January 6 — and considered Mr. Nehls' declaration. So I think to the extent Mr. Heaphy has things he wants to say about that, he should go ahead and say them.

MR. GRIMSLEY: Okay.

THE COURT: But given that I conditionally admitted, you may decide that it's not necessary.

MR. GRIMSLEY: Okay.

THE COURT: But I can't really remove — well, I can. I mean, that's what they say about bench trials — right? — that you can forget what you saw. But I think it would be my preference if you — if Mr. Heaphy has things to say about the Nehls declaration, he probably should.

MR. GESSLER: I'm sorry. Could you repeat that, Your Honor?

THE COURT: I think if Mr. Heaphy has things he wants to say about the — well, first of all, why don't you tell me. Would you like me to consider when I make my final determination on the January 6 report the Nehls declaration?

[p.143]

MR. GESSLER: Yes, Your Honor. And we believe it's proper. You know, the Court doesn't — isn't necessarily — the Court is not required to only confine itself to testimony when determining the admissibility of a report. Obviously, the Court's already made a consideration of it and viewed it, and, you know, so we think that you've already relied on it, obviously, and it should stay in. And I'm guessing you will put the same amount of weight on it that you have already, so . . .

THE COURT: Yes That would be my preference as well.

MR. GRIMSLEY: And I appreciate that, Your Honor. I'll just make the record that yesterday we were given the choice of door one or door two, Nehls' declaration or Congressman Buck.

THE COURT: Yeah. And I made you choose Buck.

MR. GRIMSLEY: And we had to choose Congressman Buck. And so I think, given that you've required us to make Mr. Heaphy available for cross-examination even though he had submitted declaration and we were willing to stand on that, and [p.144] that Mr. — or Congressman Buck has been made available for cross-examination; Congressman Nehls does not — has not suffered the same fate. And so we're happy if Your Honor wishes to consider it but would just urge you to consider it for the weight it deserves.

THE COURT: And I agree. But why don't you — if Mr. Heaphy is ready to respond, why don't you do that. And in my final findings of fact and conclusions of law, I will state one way or the other whether I considered Mr. Nehls' declaration.

MR. GRIMSLEY: Thank you, Your Honor. So would you like to swear Mr. Heaphy in?

THE COURT: Yeah. Can we make it so - change the view so we see — he's a little bit bigger? Mr. Heaphy, can you hear me?

MR. HEAPHY: Yes. I can hear you fine, Your Honor.

THE COURT: Okay. So I think you're going to have to do something to get closer to the microphone, because you're very faint.

MR. HEAPHY: Okay. Is this any better?

THE COURT: It's getting better.

MR. HEAPHY: Is that any better? Not really? [p.145]

MR. GRIMSLEY: No.

THE COURT: Not great.

MR. HEAPHY: Okay. I apologize for the technology issue.

MR. GRIMSLEY: You're not the first, Mr. Heaphy.

MR. HEAPHY: Yeah. I just don't know where the microphone is, so I'll have to speak up as long as you all can hear me this way.

THE COURT: Yep. That's — that works, but it's — okay. Yeah. That — that's fine. And we'll let you know if we're having trouble hearing you, okay?

MR. HEAPHY: Okay. I will speak up, Your Honor. I apologize for the faint audio.

THE COURT: Can you raise your right hand, please.

TIMOTHY HEAPHY, having been first duly sworn/affirmed, was examined and testified as follows:

THE COURT: Great. Thank you.

DIRECT EXAMINATION

BY MR. GRIMSLEY:

Q. Please introduce yourself to the Court.

A. My name is Tim Heaphy. It's spelled [p.146] H-e-a-p-h-y. And I'm a lawyer at Willkie Farr & Gallagher in Washington, D.C., and I previously served as the chief investigative counsel to the House of Representatives'

Select Committee to investigate the January 6 attack on the U.S. Capitol.

Q. So we'll get to the January 6 committee in a moment, but I just want to go over your background a little bit. Where did you go to college?

A. I went to the University of Virginia.

Q. What degree did you get?

A. I got a bachelor's degree. It was an English major. That was in 1986.

Q. Did you go to law school?

A. I did.

Q. Where did you go to law school?

A. I came back from two years off. I came back to UVA and graduated with a JD in 1991.

Q. What did you do after graduating from law school?

A. I was a law clerk to Judge John Terry on the District of Columbia Court of Appeals, and then I worked as an associate at Morrison & Foerster, a law firm in San Francisco.

Q. How long did you work at Morrison & Foerster?

A. For about two years until my wife graduated from graduate school, and we then moved back across the country to Washington, D.C.

Q. What did you do when you went to Washington, D.C.?

A. I was an assistant United States attorney in the District of Columbia. Eric Holder was the U.S. attorney at the time who hired me.

Q. What did you do while you were an assistant district attorney in the District of Columbia?

A. I was there for almost ten years, and I kind of moved through various sections in the office. Tried 65 jury trials. Ultimately, my last assignment was in a gang

prosecution unit. I had a 13-month-long racketeering trial, capital case, in federal court in Washington, D.C.

Q. What did you do after leaving the U.S. Attorney's Office in the District of Columbia?

A. I moved to Charlottesville, where I still live, to be an assistant U.S. Attorney in the Western District of Virginia. That was in 2003.

Q. And what did you do when you were an assistant U.S. attorney there? [p.148]

A. What I had done in D.C., investigated and prosecuted a wide array of federal crimes.

Q. After three years in the U.S. Attorney's Office in Virginia, where did you go?

A. I went into private practice. I went to the McGuireWoods law firm which had offices in Richmond and Charlottesville.

Q. What type of work —

A. White-collar defense, criminal defense practice. Sorry, Sean.

Q. No worries. Did you do investigations as well?

A. I did, yes.

Q. And how long were you at McGuireWoods?

A. I was there for a little over three years until I went back into government service in the Obama administration.

Q. What was the government service that you went back into?

A. President Obama appointed me to be United States Attorney for the Western District of Virginia where I had been an assistant, and I was confirmed by the U.S. Senate in October of 2009. And I served in that position as U.S. Attorney until the very end of 2014.
[p.149]

Q. What were your duties as U.S. Attorney?

A. I supervised the work of the office, all of the criminal prosecutions and civil cases tried by the 30-or-so lawyers who represented the western part of Virginia.

Q. You said you finished there in 2014?

A Yes.

Q. What did you do after that?

A. Went back to private practice to another Virginia-based firm, Hunton & Williams, where I was splitting time between Richmond and Washington, D.C. I was the chair of the white-collar defense investigations practice at Hunton & Williams.

Q. At some point did you do some work for the City of Charlottesville? Oh, we lost you.

A. Yes. Yes. I live in Charlottesville — lived there this whole time. And in August of 2017, there was a horrific public event at which there were protests and fatalities. And the City hired me and a team from Hunton & Williams to do an independent review of how my own client, the City, prepared for and managed that event, and there were a couple of previous events that summer of a similar nature. And I put together a comprehensive report about the [p.150] Charlottesville events.

Q. Was that event in August of 2017 the Unite the Right rally?

A. Yes, it was.

Q. When did you become involved with the January 6 committee?

A. Not until it was formed. I believe in June or July of 2021, the House passed House Resolution 503 creating the Select Committee. Soon thereafter, there was an effort to put a staff together, and I was one of the first half a dozen people hired to be involved in the leadership of the staff.

Q. What was your official position?

A. Chief investigative counsel.

Q. How did you get that position?

A. I spoke to the people that were tasked with putting the staff together. That was largely this — Speaker Pelosi's top aides as well as a couple of people that had already been hired, the staff director and chief counsel to the January 6 committee. I spoke with them and was hired, I believe, in the middle of August. I started, like, August 15 or 16 of 2021.

Q. What were your responsibilities as chief [p.151] investigative counsel?

A. And I should say — I should back up. Chairman Thompson, I spoke to him, and he ultimately made the hiring decision to hire me as chief investigative counsel. So my duties were essentially to run day-to-day investigation. First, hire a lot of people, lawyers and other professionals, to do the work, the fact-gathering of the investigation. And then over the course of the duration of the Select Committee, I supervised the work day to day.

Q. How many lawyers ultimately were there, roughly, on the investigative staff?

A. Yeah, it varied at times, but it was about 20 total lawyers and then a bunch of other professionals — some subject-matter experts, some paralegals, and other professionals that helped contributing to the investigative team.

Q. How did you choose who would be on the investigative staff?

A. Investigative experience. Candidly, I was looking for people that had been investigators, that had interviewed witnesses, that had reviewed large amounts of information to derive what was relevant, whose judgment and character I trusted, that [p.152] had a very strong interest in serving on the committee. So it was really, ultimately, a very talented group.

Q. What percentage were individuals from the U.S. Attorney's Office or DOJ, roughly, who had investigative experience?

A. I think out of the 20 lawyers, about three-quarters were former DOJ lawyers at some point in their careers. And that was not an intentional thing. It was more those were the lawyers in my experience who had really developed the skills that were most relevant to the work that we were doing. They could do lots of interviews, could review lots of information, and, again, who had the right ethical approach to the work.

Q. How, if you know, did the investigative staff for the January 6 Select Committee differ from typical investigative staffs?

A. Most of the people that we hired had never worked in Congress before, because, again, Congress really doesn't do these kinds of investigations very often. And therefore, a lot of the lawyers from other congressional committees didn't really have as much investigative experience. The work differed — my understanding — [p.153] Mr. Grimsley, I had never worked on a congressional investigation before, but my understanding was that the only thing different about our process was the involvement of our members. The members of the committee themselves were very involved in the day-to-day turning of the wheels of the investigation. They participated in the interviews. They had up-to-the-minute, sometimes daily, reports on what we were learning. And I think that's different from the normal congressional process where the staff does most of the work, the fact-gathering, and the members, you know, are sort of given that information before a public proceeding.

Q. But as you understand it, typically the investigative staff does not include seasoned investigators from the DOJ?

A. I don't believe that that is typical, that's right.

Q. Now, what party affiliation are you?

A. I'm a Democrat. I was appointed by President Obama, and, yes, on record as being a Democrat.

Q. Was there any political litmus test for determining who would be on the investigative staff [p.154] for the January 6 committee?

A. Absolutely not. I, frankly, don't know the political affiliation of most of the people on the staff, unless they said something or did something that would reflect that. That was not something that I ever asked about or was a criterion.

Q. Well, just focusing on people who you did know, were there Republicans on the staff?

A. Yeah. Yes, there were.

Q. Can you give me some examples?

A. Sure. John Wood, for example. John was a Bush-appointed U.S. Attorney. And he actually ran for Senate as a Republican, left the — our staff to do that in 2022, I believe. He came to us through Liz Cheney. Ms. Cheney had another counsel who reported to her directly. Kinzinger had a lawyer, I believe, who was also a Republican. So there were a handful that were. But, again, that was, to my view, sort of incidental to their work and not something that we asked about.

Q. When did your team begin the actual investigation?

A. Right away. You know, we knew all along that we were under a time crunch. We were going to expire at the end of Congress and had just a lot to [p.155] do. So almost immediately upon my arrival in August of '21, we were requesting documents, we are starting to talk to people. I

think some of the first transcribed interviews in which I participated were in September of 2021. So very soon after the committee was formed.

Q. What was the — or how long did the investigation last?

A. It lasted up until 11:59 p.m. on January 3 of this year. I mean, again, we used kind of every possible minute to get things done. So it was about 16 or 17 months altogether.

Q. Did you intentionally string out the investigation so that it corresponded with the midterm elections?

MR. GESSLER: Your Honor, I would just object to leading.

THE COURT: Overruled.

A. No, Mr. Grimsley, there was no stringing out. Quite the opposite. We were very focused; we moved as fast as we could. And, frankly, it could have gone on another 16 months and had additional potentially relevant information to try to find.

Q. (By Mr. Grimsley) What was the final [p.156] result of the investigation?

A. The resolution of the Select Committee required us to produce a report that made both factual findings about — the facts and circumstances that gave rise to the attack on the Capitol and make some recommendations to try to prevent similar events in the future. I believe the report — I don't remember the exact date, but sometime in mid- to late December was — it was issued. It's 845 pages. And that's kind of the official record of our — the committee's factual findings and recommendations.

Q. Have you submitted declarations in this matter?

A. I have, yes.

Q. Have you reviewed those two declarations, your opening declaration and your supplemental declaration?

A Yes. I did earlier today.

Q. Do those continue to be truthful and accurate, to the best of your knowledge?

A. Yes.

MR. GRIMSLEY: Your Honor, I'm not going to go over the declarations. You have them. I know the intent of this was for cross-examination. [p.157] But I do have some questions for Mr. Heaphy regarding rebuttal issues.

THE COURT: Okay. So you would like me to consider the declarations that he submitted?

MR. GRIMSLEY: Yes.

THE COURT: Okay.

MR. GRIMSLEY: Thank you, Your Honor. Just to short-circuit this rather than go into it at length, since you've seen them.

Q. (By Mr. Grimsley) Now there has been some suggestion by Congressman Nehls in his declaration — well, first of all, have you reviewed Congressman Nehls' declaration in this case?

A. Yes, I have.

Q. Now, he suggests that the January 6 report is somehow compromised by virtue of the fact that the committee presented doctored evidence at the hearings. Are you familiar with that allegation?

A. I am, from Congressman Nehls' deposition and some public reporting on that issue, yes.

Q. What is your response to the assertion that evidence was doctored?

A. I strongly disagree with that characterization. As I said in my declaration, there [p.158] was a text message that I believe a member of the committee used during one of our public proceedings which incorrectly indicated that a particular sentence from a text message ended as opposed to continued. A period was inserted instead of an

ellipsis. And when that was called to the committee's attention through our spokesperson, we acknowledged the mistake. It was a mistake, not an attempt to doctor evidence or mislead. I think there was also some allegation that there was video or audio that was doctored. Again, I strongly dispute that. There were some times where we used in public proceedings silent Capitol police surveillance footage and then dubbed over that contemporaneous police radio transmissions in time — in real time to correspond to the images in the surveillance footage. And I don't consider that to be doctoring them. It's simply putting two pieces of evidence taken contemporaneously together. So that — unless I'm forgetting something from Congressman Nehls' declaration, I believe those were the two allegations that I would dispute.

Q. Those are the only two. [p.159] Did you ever hear any allegation that other evidence was doctored somehow?

A. No. I don't think so. I mean, those specifics, I recall. No, I'm not remembering any other specific accusation of doctoring.

Q. How many pieces of evidence were actually presented — and I don't need an exact number, but just ballpark — during the public – ten public hearings?

A. Pieces of evidence, broad term. You know, we played clips of depositions, we showed documents or images that had been obtained. Hundreds or even thousands over the course of the hearings. And then the hearings were a subset of what we actually presented in the actual report. So I think the report indicates exactly with more specificity than I can recall how many documents were able to obtain, how many witnesses we

interviewed. All of that is detailed with more specificity in the report.

Q. Now, there was a question raised yesterday about whether or not the January 6 committee had interviewed leadership from the Capitol Police. Did the January 6 committee interview leadership from the Capitol Police, including Chief [p.160] Sund?

A. Yes, we interviewed six or eight or ten even senior officials with the Capitol Police, including Chief Sund.

Q. Were there any interviews or depositions that were kept confidential and not released to the public?

A. Yeah. There were a handful of national security-related witnesses, primarily people that worked in some — and continue to work in sensitive positions inside the White House that we agreed that we would not release the identity of those witnesses or the transcript because public release would be debilitating to them individually and to the safety and security of the White House complex. So there were a handful, three to four, I think, of those transcripts that we did not release for that reason.

Q. Other than that small number of transcripts you did not release for national security purposes, were there any other interview transcripts or deposition transcripts that were not ultimately made public?

A. I don't believe so, no.

Q. Now, do you recall that the committee [p.161] took a deposition of a person named Kash Patel, former chief of staff to Acting Secretary of Defense Christopher Miller?

A. Yes. I was personally present for that and participated in the questioning of Mr. Patel.

Q. Was his deposition transcript kept confidential somehow?

A. No. I believe it was released and made public along with all the others at the end of our investigation.

Q. Was there any effort to keep his deposition transcript secret for a longer period of time?

A. No. Absolutely not.

Q. Was it the very last one released?

A. No, not that — again, there was no rhyme or reason to the order in which they were released. We did them all at the end. And I don't remember even when his — we released them 10, 15, or 20 or 30 at a time over those last few days of the committee's existence. So I just don't know — but if your question was there an intentional effort to hold his to the end? Absolutely not.

Q. Did Mr. Patel ever reach out to ask to [p.162] provide testimony at a public hearing?

A. We never dealt with Mr. Patel directly. He was represented. I believe Gregg Sofer at Husch Blackwell was his lawyer. And I don't remember Mr. Sofer ever making a request for Mr. Patel to testify at a public hearing.

Q. Now, as an experienced investigator, why might an investigative team wait to release transcripts to the public until the end of an investigation?

A. Any kind of investigation is hampered if you're unable to discern what a witness is providing for personal knowledge versus things the witnesses may have heard from other sources. So it's very important to try to prevent the public release or the sharing in any way of information that you're learning during the investigation, because it makes it easier to sort of ensure that you're getting personal knowledge. So we didn't release either publicly or to witnesses what other witnesses said, even who other witnesses were, because we wanted to ensure that what we were getting from each witness was a

product of his or her memory, not something that they read in a transcript or saw in a news report. [p.163] And that's pretty standard. That was not a unique practice of the Select Committee. That's always — that's the way I've always done it.

Q. Now did the Department of Defense produce documents to the January 6 committee?

A. Yes. A lot of documents. A lot of agencies did, but Defense included.

Q. Did the Department of Defense refuse to produce or withhold documents, relevant documents, that had been requested by the committee?

A. No. They were completely cooperative.

Q. Would the request for documents that the January 6 committee sent to the Department of Defense have covered documents, if they existed, showing that President Trump had authorized 10- to 20,000 National Guard troops to be on the ready?

MR. GESSLER: Objection, Your Honor.

A. I'm not aware.

THE COURT: What's the objection?

MR. GESSLER: Your Honor, my understanding is that — well, first of all, this is calling for speculation. And secondly, it's beyond the scope of our understanding of what this witness is here for is to describe the processes of the January 6 commission, not to rebut the testimony of earlier [p.164] witnesses or earlier pieces of evidence. He is a — he was called by the Court essentially for the January 6 commission, not to be used as a witness on the petitioners' behalf. Had we — we probably would have prepared for a cross-examination if we had known that his testimony would be used in a substantive manner in this case.

THE COURT: Well, yesterday they advised the Court that they were going to call him as a rebuttal, specifically to the testimony of Mr. Patel and Ms. Pierson. And so his testimony certainly isn't a surprise to me. And I don't think that the question is speculative. Mr. Patel testified that there were documents showing this authorization and that they must not have been produced by the Department of Defense. And what I believe Mr. Grimsley is asking is, if those documents existed, you know, was there any understanding of these were withheld. So that's a long way of saying the objection is overruled.

MR. GESSLER: Thanks, Your Honor.

Q. (By Mr. Grimsley) So let me repeat the question. [p.165] Would the document requests that were sent to the Department of Defense have been broad enough to cover any documents that the Department of Defense had showing records of an authorization by the President for 10- to 20,000 National Guard troops to be on the ready?

A. Absolutely. And there was no such document produced.

Q. Now, did you attend Mr. Patel's deposition?

A. I did.

Q. Did you investigate the many assertions made by Mr. Patel in that deposition?

A. Both before and after. We asked him about conversations that other witnesses had relayed to us that they had with him. And then we continued to, as you do in every investigation, attempt to corroborate assertions. So, yes, we plugged in the questions and answers for Mr. Patel into the evolving body of work of the Select Committee.

Q. Were you able to observe Mr. Patel's demeanor during the deposition?

A. Yes.

Q. Based on your investigation, including [p.166] the deposition of Mr. Patel, do you have an opinion as to Mr. Patel's character for truthfulness or untruthfulness?

MR. GESSLER: Objection, Your Honor.

MR. GRIMSLEY: Rule 608(a) allows this.

MR. GESSLER: He's asking for opinion testimony. And I'm not sure Mr. Heaphy is an expert on judging character. He certain hasn't been qualified by the Court.

MR. GRIMSLEY: Your Honor, Colorado Rule of Evidence 608(a) allows for extrinsic testimony by individuals about a witness and specifically allows them to provide an opinion as to that witness's character for truthfulness or untruthfulness. Mr. Heaphy has a basis for doing so, and he is allowed to do so. I'm certainly willing to provide the Court with legal authority. If the Court would like briefing on this, I think that would be fine, and we can take the testimony and then just decide afterwards whether it be stricken. But this is squarely within the confines of Rule 608(a).

THE COURT: I'm going to — I'm going to sustain the objection. You may ask him what parts of his testimony they were contradicting by other [p.167] evidence. But I'm not going to let you have him opine on whether or not he thinks that Mr. Patel is a truthful person.

MR. GRIMSLEY: Okay.

Q. (By Mr. Grimsley) Mr. Heaphy, did your team investigate the claim that the President had authorized 10- to 20,000 National Guard troops to be on the ready?

A. Absolutely. Yes, we did. We elicited testimony about that from Mr. Patel's boss, the Acting Secretary of Defense, Chris Miller, who I believe testified on the record that there was no such order authorizing the deployment of 10,000 or any other number of National Guard troops.

Q. Did you see —

MR. GESSLER: Your Honor, we would object to that as hearsay and ask that it be stricken.

MR. GRIMSLEY: our Honor, this was part of the investigation. I was asking precisely what you had said I could ask him about.

MR. GESSLER: It — the report is hearsay. he comment —any information within the report about those statements is hearsay. The witness's statement is — you know, the testimony — the statement that the witness is testifying to is [p.168] hearsay. It's intended to prove the truth of the matter asserted, and it's an out-of-court statement. If we had subpoena power and adequate time, we would be able to talk to former Secretary of Defense Mark Meadows — or I'm sorry — Chief of Staff Mark Meadows. But — I'm sorry, Your Honor. It's —

THE COURT: Miller.

MR. GESSLER: I'll get the right name yet. Secretary of the Army Miller. But it is hearsay, Your Honor.

THE COURT: I've already accepted the finding that they could find no evidence, including for Mr. Miller, about the 10 to 20,000 — 10 to 20,000 troops. So I'm going to sustain the objection that the testimony is cumulative.

MR. GRIMSLEY: No further questions on direct, Your Honor.

MR. GESSLER: Just one moment.

THE COURT: You should go now, while we have pictures.

MR. GESSLER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GESSLER:

Q. Good afternoon, Mr. Heaphy. [p.169] Is it — and I apologize. Do you pronounce your name Heaphy or Heaphy? I've heard it both ways.

A. Yeah. It's Heaphy with a long A. Thank you for the clarification.

Q. Okay. Thank you very much. So let me ask you a little bit about your experience. So have you had experience running large investigations?

A. Yes. I was a U.S. Attorney — assistant U.S. Attorney where I ran large investigations and a U.S. Attorney where I supervised them. The Charlottesville investigation was substantial and actually similar. So, yes, before taking this position, I had supervised other investigations.

Q Okay. And were those investigations — would it be fair to say they were grand jury investigations —

A. Some were and —

Q. — mostly?

A. — some were not.

Q. Okay. Did you supervise large grand jury investigations? [p.170]

A. I did, yes, as a prosecutor, many.

Q. Okay. So I think in your — in your declaration you had talked a little bit about sort of the number of documents and number of witnesses that the Select Committee called. Do you — do you recall that?

A. Yes.

Q. Okay. And it talked about, you know, maybe 1,000-or-so witnesses and a million or-so documents, those types of numbers, correct?

A. Yes.

Q. And do you have experience, for example, in grand juries in investigations of that size?

A. I don't believe I've ever had a grand jury investigation that had quite that many witnesses or documents. No. This was probably a new peak in terms of volume of information.

Q. Would it be fair to say — did you work in grand jury investigations with over 100 witnesses?

A. Yes.

Q. Okay. And would it be fair to say that you worked in grand jury investigations of over 100,000 documents?

A. Definitely. Yes.

Q. Okay. And would you — you'd agree with [p.171] me that those are — I guess, would you agree that those are substantial numbers of documents and witnesses?

A. I mean, it's all relative, but yes.

Q. Okay.

A. You get into the hundreds of thousands, I would agree with you that that's substantial.

Q. Okay. And did any of those investigations result in indictments?

A. Yes.

Q. Okay. And after that indictment, you take that case to court, I assume, correct?

A. Someone does, yes.

Q. And when I say you, I speak in the collective, your office?

A. Yeah.

Q. Okay.

A. Yes, that's right. Yes.

Q. And did you ever go to the judge and say, Judge, we have a lot of witnesses, well over 100 witnesses, and we have over 100,000 documents, and so therefore, you should accept these as true for — and you need not accept any more for a conclusion of guilt?

A. No. The majority of — when you say [p.172] grand jury investigation, that is simply a first step in a criminal case. And a judge, himself or herself, cannot make a summary finding. It's a jury decision, and it has to be proven at a much different standard, beyond a reasonable

doubt. So the procedural posture of the criminal process would not allow for what you're suggesting.

Q. Right. And part of the reason for that is because that evidence would be subjected to the adversarial process. Would you agree with me on that?

A. Yes.

Q. Okay. So you don't just take the evidence, as hard as — the Court doesn't take the evidence, despite how hard a prosecution office may work at it, simply at face value, but requires it all to be subjected to the adversarial process, correct?

A. In a criminal case before a defendant can be convicted, that is a higher standard of proof than that which applies in a grand jury. Grand jury is probable cause. Guilt in a criminal case is guilt beyond a reasonable doubt, and that's a higher standard.

Q. But for a Court to make that [p.173] determination from a procedural standpoint, it has to subject that evidence to the adversarial process, correct?

A. It is — adversarial process, yes —

Q. Okay.

A. — is available in a criminal proceeding. Not in a grand jury proceeding.

Q. Now, you had talked a little bit about the House members — the members of the Select Committee, their involvement in the committee's activities, correct?

A Yes.

Q. Okay. And then how it differs from your understanding of the normal process, correct?

A. Yeah. Anecdotally, I think our members were more involved in the investigative process than they typically are in other congressional committees.

Q. Okay. And it sounds like — and I'm asking you to repeat some of your testimony, but I just want to make

sure I'm clear. So you talked, for example, about Mr. John Woods as a member of the investigatory staff, correct?

A. He was a co-leader of one of our five investigative teams —

[p.174]

Q. Okay.

A.-yes. He was more senior than other lawyers and very much involved.

Q. And you received his name through a — a reference from Representative Cheney. How did that work?

A. Yes. I believe Ms. Cheney introduced John to me as a potential staffer and asked me to speak with him. And when I did and got to see his qualifications, we hired him to co-lead the gold team. And he also had kind of collateral duty of being counsel to Ms. Cheney.

Q. And Representative Kinzinger also recommended an attorney, correct?

A. I think with Mr. Kinzinger his lawyer was already on the staff, and Kinzinger asked if he be sort of designated as — his collateral duty was to be counsel to Mr. Kinzinger. He was a lawyer who came to us from the Central Intelligence Agency named Steve Dubai (phonetic).

Q. And so did he represent Representative Kinzinger in the — did he have an attorney-client relationship with Representative Kinzinger at the same time he was a staff member on the committee?

A. He was staff member on the committee [p.175] exclusively, but part of his responsibility was to sort of be Mr. Kinzinger's counsel. So he had separate conversations with Mr. Kinzinger of which I was not part of.

Q. Okay. Now, you said normally — and I'm just trying to get a sense of the extent of your knowledge. You said normally congressional committees don't include sort of

seasoned investigators of the type that you appointed or hired on the committee; is that correct?

A. Perhaps a generalization, but my anecdotal impression is that the sort of professional background of the lawyers that we hired on the Select Committee is atypical for congressional staff. Congressional staff lawyers are generally, like, policy people and experts on policy, whereas I was looking more for investigative experience. And there are people in Congress with investigative experience, but not as much as in the Department of Justice.

Q. Okay. Now, I think your — in your declaration you talked a little about the members and the purpose of the committee. What was the purpose of the committee? [p.176]

A. To find the facts and circumstances that informed the insurrection, the attack on the Capitol, and to make recommendations to try to instill — motivate changes in law that would make similar attacks in the future less likely.

Q. And the members themselves, is it your belief that they went into the committee with an open mind as to the conclusions of the committee?

A. They were present for the event, so they certainly had some preconceived sense of what happened. But in terms of the overall findings for the committee, yes, I do believe that they were open-minded as to where the facts would lead as we conducted the investigation.

Q. Okay. And was one of the conclusions of the committee that President Trump engaged in an insurrection?

A. Yes.

Q. Okay. So was Representative Bennie Thompson, he was — was he the chair, am I correct, of the committee, or a co-chair?

A. Yes.

Q. Okay.

A. He was the chairman, yes.

Q. Okay. I'd like to show you what's [p.177] Exhibit 1084.

MR. GRIMSLEY: And, Your Honor, I believe these are going to be tweets that were sent by members of the committee at some point after January 6. We would object. The — Mr. Heaphy does not have personal knowledge of these. They have not been authenticated. But in any event, if the insinuation is that somehow only the members of the committee had a preconceived notion as to Mr. Trump's involvement, we would like the opportunity on redirect to show the many members of the Republican caucus who also had a similar view after January 6.

THE COURT: I'm going to allow you to show the tweets, so the objection is overruled to the extent it's objecting to the tweets.

MR. GESSLER: Okay. Thank you, Your Honor. Could you show Exhibit 1084, please. Oh, boy. I can't even read that myself. May I use your computer here?

MR. GRIMSLEY: Yes.

MR. GESSLER: Okay.

MR. GRIMSLEY: You can come stand over here.

[p.178]

MR. GESSLER: We're just having some technological fumbling on my part, Mr. Heaphy. apologize.

Q. (By Mr. Gessler) So, Mr. Heaphy, do you see this — do you see this exhibit?

A. Yes.

Q. Okay. And do you see that that was sent by Representative Bennie Thompson?

A. I see some tweets that he issued, it looks like, on January 6, the day itself, yes.

Q. Okay. And do you see where he tweeted "Trump fed this vile monster" — I'm sorry. Said, "Fed this monster with his vile and dangerous talk." Do you see that?

A. I do.

Q. Okay. Is it your view that that statement is consistent with going into the January 6 committee with a fair and open mind?

A. I think there were things that were obvious on January 6, like what Congressman Thompson said. But the facts and circumstances that gave rise to those events was uncertain, and that was the task of the committee. So, yes, I don't consider that statement to be one that's closed-minded at all.

[p.179]

Q. And if I remember correctly, the committee — one of the things that the committee concluded was that President Trump, himself, was responsible for events — for the violence tha occurred on January 6; is that correct?

A. President Trump and others, the conspirators, yes.

Q. Okay. And so I'd like to — we scrolled down a little bit. I'd like you to look at that second tweet where it says "The events of today" — referring to January 6 — "are the inevitable result of the tyrannical and idiotic leadership of Donald Trump." In your view, would you view those as consistent with someone entering into these — an investigation with a fair and open mind?

A. Yes. Again, it depends on what you mean by fair and open mind. There were some things that were obvious on January 6. But the overall view of what facts and circumstances informed those events was very much an

open question and was the primary task of the committee. So, yes, I would consider Chairman Thompson to be open-minded throughout the course of the investigation.
[p.180]

Q. Okay.

MR. GESSLER: Could we go to Exhibit 1085, please?

Q. (By Mr. Gessler) And do you see that first tweet where it says "Former President Trump has to be held accountable for his actions that precipitated the riot at the U.S. Capitol on January 6"? Do you see that?

A. I do.

Q. And is, in your view, that statement consistent with someone going into this investigation with an open mind?

A. Same response. Yes.

Q. Okay. And you see where he wrote on January 29, it says "Donald Trump threatened our entire democracy by instigating this attack on our nation's Capitol." Do you see that?

A. I do, yes.

Q. And you say that when Representative Thompson said that President Trump threatened our democracy by instigating — he instigated the attack, that he's entering into the investigation and deliberations with an open mind?

A. I don't think he's open-minded about [p.181] that fact, but he's certainly open-minded about the scope of the investigation. I think that fact was obvious on January 6 –

Q. That Donald Trump —

A.— that it was plugged into —

Q. I'm sorry. I apologize.

A. Go ahead.

Q. Go ahead.

THE COURT: Please finish your answer.

A. So — yeah. You start any investigation with certain things you know and certain things you don't know. The fact that President Trump instigated the attack was obvious on January 6 just from his words on the — during his speech on the Ellipse. We were plugging those facts into what motivated them, how he reacted to them, the facts and circumstances and the response of law enforcement and otherwise. So just because certain facts are sort of obvious at the beginning of an investigation doesn't mean that the investigation has reached a conclusion or is closed-minded. So, again, to answer your question, I don't believe that that statement reflects that there was a — you know, that he was —I think your term was "closed-minded." While certain facts were, in his [p.182] view, established, we still needed to plug them into a much broader context.

Q. (By Mr. Gessler) Do you think from those statements that Representative Thompson could be fair and impartial in his investigative approach for January 6?

A. Absolutely. And he was throughout, throughout the entire investigation.

Q. Okay. You see where Representative Thompson in his tweet included this sort of block statement that says "He summoned the mob, assembled the mob, and he lit the flame of the attack." Do you see that?

A. I do.

Q. Okay. And it's your view, I'm assuming, that that is fully consistent with him being fair and impartial with respect to investigating President Trump's culpability or non-culpability for the events of January 6?

A. We were not investigating the culpability or non-culpability of any one person. We were investigating the facts and circumstances that informed the attack on the Capitol. Certain things were obvious at the beginning;

other things were not. So in terms of his overall approach to [p.183] the investigation to fill out all of the relevant facts and circumstances, I don't believe he was in any way biased or had a preconceived notion.

Q. So you said there were certain facts that were obvious at the start of the investigation. And I believe — and I just want to make sure I'm correct — that one of the facts that was obvious at the start of the investigation was that Donald Trump instigated the violence. Is that correct?

A. Donald Trump talked about violence directly, yes, during his speech on the Ellipse.

Q. So is that a yes to my question?

A. I'm sorry. Repeat the question.

MR. GESSLER: Could the court reporter please repeat the question?

THE COURT: Yeah.

(Previous question was read back.)

THE WITNESS: I'm sorry. I could barely hear. What was it again?

THE COURT: Yeah. I can read it. I'm going to read it because you can't hear the court reporter because she doesn't have a microphone. So the question was "So you said there were certain facts that were obvious at the start of [p.184] the investigation, and I believe — and I just want to make sure I'm correct — that one of the facts that was obvious at the start of the investigation was that Donald Trump instigated the violence; is that correct?"

A. Yes. Donald Trump said, "You have to fight like hell or you won't have a country anymore." That was something that was stated at the Ellipse, which did, in fact, instigate violence. So, yes, the answer to that question would be yes.

Q. (By Mr. Gessler) Okay. Let's go to Exhibit 1086. Was Representative Lofgren a member of the commission?

A. She was a member of the Select Committee, yes.

Q. I'm sorry. The committee. My apologies. So I'm going to show you what's designated as Exhibit 1086. And in that — are you able to see that?

A. Yes.

Q. Okay. And I ask you that because at the moment I can't see you. But we'll continue from the [p.185] video. I can certainly hear you. And she says in the last sentence of that tweet, "Trump incited this, and he's a threat to the security of our country." Is it your testimony that that statement is consistent with being fair and impartial in the investigation?

A. Yes.

Q. Okay.

MR. GESSLER: Let's go to Exhibit 1087.

Q. (By Mr. Gessler) And this, it looks like at the top, is an official press statement from Ms. Lofgren. And in it she says that —

MR. GESSLER: Can you scroll down just a little bit? Excuse me one moment, Mr. Heaphy.

Q. (By Mr. Gessler) She says — if you see that paragraph that begins in italicized font towards the bottom — towards the bottom of it: "Today we don't need a long investigation to know the President incited right-wing terrorists to attack Congress" — "the Congress to try to overturn constitutional government." And it's your view that that statement is consistent with Ms. Lofgren being fair and [p.186] impartial on the committee; is that correct?

A. Yeah. Like — I would characterize that and every — and all of these tweets as essentially sort of hypothesis

based on observations at that point that certainly informed the investigation. But I don't consider them to represent a closed mind about those facts and circumstances. Same answer as I had with Chairman Thompson's tweets.

Q. Okay.

A. Yes, they certainly had opinions at the beginning based on observations that I would call hypotheses that were a starting point. But we were comparing everything we learned to those hypotheses. That's what happens in an investigation.

Q. Okay. I'm going to go through a number of additional exhibits. We'll go through them quickly. I'll ask you the same questions. I assume you'll give me the same answers. And we'll—

A. Yeah.

Q. — try to —

A. Yeah. You provided these to me earlier today, and I've seen them all. And, yes, I will have the same answer to all of the member tweets reflecting this perspective.
[p.187]

Q. Okay. So let's do this since we personally, on our side, didn't provide them. I'm just going to go through the exhibits, and I'm going to say "Is that one of the exhibits you saw to which you would provide the same answer if I read you parts of the exhibit?" Can we do that?

THE COURT: So I'm not going to put this into evidence. It's being used for impeachment. So if you want me to hear the impeachment, you're unfortunately going to have to walk through it.

MR. GESSLER: Let's walk right through it then. Let's go to Exhibit 1088, please.

MR. GRIMSLEY: And, Your Honor, I would object to this being impeachment because it's not impeaching the witness's testimony at all.

THE COURT: Well, yes, it is. It's impeaching his — he says that everybody was fair and open to any possibilities of where the investigation could lead. And Mr. Gessler is saying, no, they weren't. I think that's proper impeachment.

MR. GESSLER: Thank you, Your Honor.

Q. (By Mr. Gessler) So do you see this [p.188] exhibit here?

A. I do, yes.

Q. So it says "While we were performing our duties, the President of the United States in an unconscionable act of sedition and insurrection incited a violent mob to attack the Capitol." Do you see that?

A. I do.

Q. And in your view is that consistent with someone being fair and impartial in an investigation?

A. I think that was Mr. Schiff's hypothesis informed by events that he observed, but does not reflect him or others to have a closed mind.

MR. GESSLER: Okay. Let's go to Exhibit 1095, please.

Q. (By Mr. Gessler) One moment, Mr. Heaphy. And it says — towards the end of the first paragraph, it says "Aguilar spoke on the House floor to call on his Republican colleagues to uphold their oaths of office by holding the President accountable and supporting impeachment." So here is where Representative Aguilar is asking others to hold the President accountable and support impeachment. [p.189] And then later in the next paragraph, it says "When the President sent a mob to the Capitol radicalized by his lies about the assault on free

and fair elections to stop the counting of the electoral votes, he made it clear that he poses a grave threat to our democracy." In your view, that statement is also consistent with Representative Aguilar being fair and impartial in the investigation into January 6?

A. Yeah. The reference of impeachment is instructive because there was a proceeding in Congress seeking to impeach the President based on the same — some of the same facts that were at issue in our investigation. And I think all nine members had already voted that he should be impeached when that proceeding took place before the committee even started. So, yes, they had made some preliminary determinations, hypotheses, based on what they saw; but, again, wanted us to plug that into and test against all of the evidence that we were finding. So I don't believe Mr. Aguilar or any of the others had made any conclusion other than that preliminary one informing that impeachment veto.

Q. Okay. Do you see where it says [p.190] Representative Stephanie Murphy — I'm showing you 2 tweets from her. Was she a member of the Select Committee?

A. Yes, she was.

Q. Okay. And here she says "the President incited a violent insurrection against our democracy, proof he's unable to uphold the Constitution." Is that statement consistent with her being fair and impartial in this investigation?

A. Yes. I believe so.

MR. GESSLER: Okay. Let's go to Exhibit 1099, please. And scroll down, please.

Q. (By Mr. Gessler) Okay. So this says that "The nine impeachment managers will present" — this is the second-to-the-last paragraph. "The nine impeachment

managers appointed by the House of Representatives will present overwhelming evidence of the facts of former President Trump's incitement of the violent insurrection that took place in and around the Capitol on January 6, 22, 2021."

Is that statement consistent with Representative Raskin's ability to be fair and impartial as a member of the committee?

[p.191]

A. Yes. Same response. Mr. Raskin led the impeachment proceeding as the chief prosecutor, if you will. But I don't believe that made him closed-minded about the overall facts and circumstances that gave rise to those actions.

Q. Okay. So even though he said there was overwhelming evidence," and even though he said there was overwhelming evidence that President Trump had incited a violent insurrection, and even though he actually led the prosecution of President Trump, you're saying that he was — he remained fair and impartial in determining the conclusion in investigating and coming up with conclusions on the January 6 Select Committee; is that correct?

A. Yes, because the goal of the January 6 committee was not about the culpability of any one person. It was about the overall facts and circumstances that informed the attack. All of the various components of it. The President's incitement of a violent insurrection was one among hundreds of facts and circumstances that were considered. And even that, if there had been contrary evidence, we would have presented that. So I don't believe any of these [p.192] statements about this one fact among many represent that any of our members were, to use

your term, "closed-minded" in the approach to the investigation.

Q. I'll represent to you that I have not used "closed-minded," but I'm not going to object to your characterization. Let's go to the next —

A. Oh, I apologize.

MR. GESSLER: Let's go to the next exhibit, 1101, please.

Q. (By Mr. Gessler) So here it says — and this is a remark from — I'll represent to you that this is a remark from Representative Luria. Did Representative Luria serve on the commission — I'm sorry, on the committee?

A. Yes, on the committee, she did.

Q. Okay. And here it says that — "encouraged and emboldened by President Trump." Do you agree with me that that statement indicates that President Trump encouraged and emboldened people, that that's the meaning of that phrase?

A. I believe that's what Ms. Luria intended, yes.

Q. Okay. And it's your belief that that [p.193] statement is consistent with the investigation – with the fair and impartial investigation by the January 6 committee; is that correct?

A. Yes.

Q. Okay.

MR. GESSLER: Let's go to Exhibit 1105, please.

Q. (By Mr. Gessler) And this looks like an official statement from Representative Cheney; is that correct?

A. I think so, yes.

Q. Okay. And did Representative Cheney serve on the Select Committee?

A. She was the vice chairwoman of the Select Committee.

Q. Okay.

MR. GESSLER: And scroll up just a little bit. I'm sorry, scroll down.

Q. (By Mr. Gessler) And so do you see where it says "The President of the United States summoned this mob, assembled the mob, and lit the flame of this attack. Everything that followed was his doing. None of this would have happened without the President"? Do you see where it says that?

A. I do, yes. [p.194]

Q. And is that statement consistent with Representative Cheney approaching the — approaching the workings of the Select Committee in a fair and impartial manner?

A. I believe Ms. Cheney was always fair and impartial, yes. And I apologize for using the wrong term before, "closed-minded." All of the members were fair and impartial throughout the process.

Q. Okay. There is no apology needed, although I appreciate that.

MR. GESSLER: Let's look at Exhibit 1106, please.

Q. (By Mr. Gessler) And this looks like a official statement from Representative Kinzinger; is that correct?

A. I think so, yes.

Q. Okay. And if you look at sort of the second — I'm sorry — the third paragraph, the final paragraph I'll say, where it says "There is no doubt in my mind that the President of the United States broke his oath of office and incited this insurrection." Do you see where it says that?

A. Yes.

[p.195]

Q. Okay. And is that statement consistent with approaching the workings of the commission in a fair and impartial manner?

A. I believe so, yes. And this also re-reminds me that all — I think all of these statements that you're showing me were put forth at the time of the impeachment proceeding. And they were declaring their position on impeachment. "I will vote" — I believe he says in this very statement, "I will vote for impeachment." So they had made it —he had made a personal decision that with what he had seen and had been presented was sufficient to vote in favor of impeachment. Our lens was much broader —

Q. Okay.

A.— in terms of — and had a very different standard. So I don't believe that it — Mr. Kinzinger or any others were anything other than fair and impartial —

Q. So let's talk about —

A.— in that.

Q.— let's talk about that impeachment proceeding for a second. So the impeachment proceeding, is it [p.196] your understanding that the Articles of Impeachment were whether or not President Trump had engaged in an — in an insurrection; is that correct?

A. Yeah. I was not involved in that, and don't remember the specific allegations in the Articles. Generally, my belief is they believed he was unfit to continue service, but I just don't recall the specific Articles of Impeachment.

Q. Okay.

A. I think they did involve insurrection, but I just don't recall.

Q. Okay. I'm going to represent to you for purposes of my question, in fact it did include a vote on whether or not President Trump incited an insurrection. And you said that all members of the commission had voted yes on the impeachment question; is that correct?

A. I believe that's right, yes.

Q. Okay. Do you know how many — do you know, roughly, what the vote was overall?

A. I don't —

Q. Okay.

A. — recall. I — I'm sorry. I don't recall. I think all Democrats and some Republicans [p.197] voted for impeachment.

Q. Okay. I'm going to represent to you that there were 232 votes in favor of impeachment, which constituted 54 percent of the voting members. And I'm going to represent to you that 197 members voted no, which constituted 46 percent. What percentage — just to be sure again, what percentage of the members of the Select Commission voted no on the impeachment?

A. I don't believe any of our members had previously voted no. I believe all of them are in that 54 percent majority that voted yes.

Q. Okay. So would you agree with me, then, that with respect to the perspective that President Trump incited an insurrection, that 46 percent of the members of Congress, their points of view were not represented on the committee?

A. That assumes that everyone who voted no voted true to their conscience and their personal belief. And I'm not certain I can say that that was accurate. I think a lot of people voted no when they actually thought he should have been. That's my personal opinion.

Q. Okay. Now, did the committee have any minority — any staff that was controlled by a [p.198] minority opinion? Let me back up a little bit. Is it your understanding that congressional committees normally have a majority staff and a minority staff?

A. Yes.

Q. Okay. And your commission did — and your procedures for the Select Committee did not have a separate minority staff; is that correct?

A. We had one staff, that's right. There was not a majority and a minority.

Q. Okay. Were there any — do you know of any other commission in — or I'm sorry — committee — and I understand the limitations of your testimony earlier. But are you aware of any other committee in congressional history or modern congressional history that lacked a second minority staff?

A. I just don't know. There may be, but I just — I don't have any personal knowledge of a point of comparison.

Q. Okay. Let's —

MR. GESSLER. One moment, please. Excuse me just one moment, please, Your Honor. I'm going to pull up what's been marked as Exhibit 1108.

Q. (By Mr. Gessler) Do you see that?

[p.199]

A. I do.

Q. Okay. Let's go to the third page of that, the top of the third page. Do you see the paragraph that begins with "There was a lot of advance intelligence about law enforcement"? Do you see that?

A. I do. Yes.

Q. And that's a quote. And I believe the article quotes you. Did you make that statement?

A. I did.

Q. Okay. And you said there was a lot of intel in advance that was pretty specific, and "it was enough, in our view, for law enforcement to have done a better job," correct?

A. Have done a better job, yes.

Q. Okay.

A. I still believe that to be accurate.

Q. Okay. And that advance intelligence was about the potential for violence at the Capitol, correct?

A. Yes.

Q. Okay. Now, when you say "advance intelligence," did you mean intelligence reports [p.200] appearing before January 6?

A. Yes.

Q. Okay. Do you remember how far in advance, by any chance? I mean, the spectrum of advance knowledge, do you have any memory? I'm trying to get a sense.

Was it, you know, one hour before the start of January 6? Was it two years before the start of January 6?

Can you provide a time frame there?

A. Yeah. I can try — I can tie it very specifically to a tweet from President Trump on December the 19th where he made a very first reference to January 6 and encouraged people to come to the Capitol and said "Big protest in D.C. Be there. Will be wild."

It was immediately thereafter that the intelligence started showing people's intent to come and the potential for violence. That was the spark really that ultimately erupted in violence on January 6.

Q. Okay. And so you started receiving lots of intel after that tweet, correct?

A. I —

Q. Or various law enforcement agencies [p.201] received that intel after — after that tweet?

A. Yes.

Q. Okay. Okay. And let's go to the ninth page.

Okay. Now, you see — okay. Do you see where it says "One of the tips entered in Guardian on December 27 came from a person who was reading traffic on a website called the TheDonald.win, a hive of January 6 rhetoric."

Do you see that?

A. I do.

Q. Okay. What was Guardian?

A. Guardian was an FBI system in which field agents submit information into a central database. And they're called guardians. The tips themselves are called guardians.

And the FBI, I believe, received 50, 55 guardians that were all placed under that CERTUNREST umbrella. And I believe that this piece from TheDonald.win was one such guardian.

Q. Okay. And it says:

"'They think they will have a large enough group to march into D.C. armed and will outnumber the police so can't be stopped,' the tipster wrote. 'They believe that since the election was [p.202] stolen that it's their constitutional right to overtake the government, and during this coup no laws apply . . . Their plan is to kill people. Please take this tip seriously and investigate further.'"

Was that one of the pieces of evidence or one of the — was that the tip that was entered into Guardian on December 27?

A. That was one of many tips that were entered into the Guardian system. I don't recall this one specifically, but I — I know that was December 27. But that sounds consistent with the kind of information that was starting to emerge in — in between December 19 and between — and the attack on the Capitol.

Q. Okay. Now, did you or the committee form an opinion that there was a — that there were plans for violence that were made in advance of January 6?

A. Yes. I believe the Proud Boys, the Oath Keepers, there were multiple people in the crowd that did have very

specific plans to commit acts of violence at the Capitol on January 6.

Q. Okay.

A. And I'm sorry. I believe there have been criminal convictions to that effect, seditious [p.203] conspiracy, which requires a use of force, in criminal courts, separate and apart from this committee process.

Q. Okay. Now, let me ask you this: This article also says — this article also says — and I'm looking for the quote, but I'll simply ask you — that the final commission reports downplay the failures of other — of law enforcement agencies to fully prepare for January 6.

Do you agree with that conclusion in the article?

A. No. No. We published every interview that we did with law enforcement and otherwise. There were several appendices to the report as well that detailed law enforcement failures. So I don't believe anything was downplayed in the report.

Q. Okay.

A. I'll say that the report puts together the whole facts and circumstances. Failures of law enforcement was a context, but it took nothing away in our view from the proximate cause of the event, which was President Trump inciting the mob.

That law enforcement failures made violence, unfortunately, more prevalent, but it did not detract from the overall conclusion that the [p.204] causation of the attack was the President's statements and the whole conspiracy to disrupt the transfer of power in the joint session.

Q. Okay. And that causation was one of the obvious facts that members of the commission and yourself concluded had occurred even before the January 6 Select Committee began its investigations, correct?

A. I guess I would call it more of a — an hypothesis with which we started. It was what they already decided at least preliminarily through the impeachment process. But we were continually testing our evidence against that hypothesis. It did not change. It ultimately reinforced our conclusions —

Q. So —

A. — over the course of our investigation.

Q. So let me ask you this. And we —obviously, this transcript will be used as part of the proposed findings of fact and conclusions of law and used by the judge.

But I'll represent to you that earlier in your testimony you stated that the fact that President Trump instigated was viewed as a fact as —that was obvious on January 6; is that correct?

A. At the beginning, yes, it was obvious. [p.205] But I would classify it as an obvious fact which gave rise to an operating hypothesis that informed the approach to the investigation. Continually tested by evidence.

Q. So you're saying that it began as an obvious fact, it then became a hypothesis, and then it resulted in the same conclusion at the end of the committee's work; is that correct?

A. No. It never changed. It was — it's something that was obvious from the events of the day, from people that were there. It was the hypothesis that began the investigation. It informed the impeachment proceeding.

But I'm saying we tested it, as you always do in an investigation, against other facts as they emerge. And it never changed. The hypothesis was not rebutted or disputed, so there's no evolution.

But it was, to be clear, tested and plugged into a much more fulsome body of work beyond what had been obvious

at the time of those tweets and the impeachment proceeding.

Q. Okay. So, Mr. Heaphy, you were — you were appointed by President Obama as a U.S. Attorney, correct?

25 A. Yes.

[p.206]

Q. And President Obama was and, I believe, still is a Democrat, correct?

A. Yes, he is.

Q. Okay. And you were appointed to the January 6 committee as an investigator by Representative Pelosi; is that correct?

A. Well, Chairman Thompson made the decision, but, yes, the Speaker was involved in the hiring of the senior staff.

Q. Okay. And both former—Speaker Pelosi and Representative Thompson, they were both Democrats, correct?

A. Yes, that's correct.

Q. Okay. Have you ever been appointed to a position by a Republican?

A. I don't think so. No.

Q. Okay.

A. No. I've only been appointed —

Q. In fact, you were fired — I'm sorry. Did I cut you off? Please complete your question [sic]. I apologize.

A. No. If you want to talk about the firing, I'm happy to.

I was removed in my position as University counsel by a Republican attorney general [p.207] who defeated an incumbent Democrat. I was an assistant attorney general of Virginia as University counsel. And without explanation, without — over the objection of my client, the

University — the new Republican attorney general terminated my leave of absence while I was working on the Select Committee.

Q. Thank you, Mr. Heaphy. You just saved me a few questions, so I appreciate that openness.

Now, Mr. Heaphy, you've made a number of political contributions over the years, correct?

A. Yes.

Q. Okay. I'll see if we can short—circuit a number of questions.

But have you ever — have you ever made contributions — have you made any contributions to Democrats?

A. Yes.

Q. In fact, almost, if not all, of your contributions have been to Democrats, correct?

A. I think so. I don't know for sure, but I — I don't recall right now making a contribution to a Republican.

Q. I'm sorry. Did you say you don't recall making a contribution to a Republican?

A. I do not.

[p.208]

Q. Okay.

A. I was talking about Mr. John Woods when he ran for Senate. I just don't think I — I don't believe I did.

THE STENOGRAPHER: Can he repeat that name?

THE COURT: Can you repeat? What was the name of the person that you considered making a contribution to?

A. John was a staffer on — of the January 6 committee, and he left to run for the Senate in Missouri. I may — I just don't know if I gave him money or not. I took a huge pay cut to be on the Select Committee, so I may not.

But — yeah. To back up — so to be clear, I'm a Democrat. I've given money to Democrats my whole life. That's right.

Q. (By Mr. Gessler) Okay. Are you currently investigating or seeking the possibility of being appointed as a federal judge?

A. No.

Q. Okay. Have you had any conversations with anyone about seeking a federal judicial appointment?

MR. GRIMSLEY: Objection.

[p.209]

A. I have had conversations with so many people. I'm not interested in being a federal judge. With all due respect to judges, no, I —

Q. (By Mr. Gessler) I am not insulted by that answer. It's a difficult job.

MR. GESSLER: One moment, please.

Mr. Heaphy, thank you very much for your time today. I have no further questions —

THE WITNESS: Thank you.

MR. GESSLER: — right now.

THE WITNESS: Thank you.

THE COURT: All right. Any redirect?

MR. GRIMSLEY: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. GRIMSLEY:

Q. Mr. Heaphy, I think you may have answered this question.

But you had answered in response to many questions about statements and tweets that had been issued in kind of the January 2021 time frame that they were hypotheses that were tested.

How were those hypotheses tested by the investigative staff on the January 6 committee?

A. We compared them to what we were hearing from other witnesses, what we were seeing in [p.210] documents, from what we were learning from our review of open—source material. Every investigation starts with a hypothesis. It's just the nature of it. It's the suspect in a criminal investigation. Sometimes that's reinforced; sometimes that's rebutted.

So it's hard to answer that question, Mr. Grimsley, because literally everything we did was always plugging in, continuing to synthesize, and comparing it to our understanding of facts and circumstances.

Q. And if you had found evidence that contradicted that hypothesis, what would you have done?

A. Absolutely, we would have found it as such. We would have made that clear. When I was hired by the chairman, he gave me an instruction that was reinforced throughout, which is follow the facts and circumstances, wherever they lead. And that's what we tried to do. We followed them.

They ended up affirming the hypothesis, but that was a constant reassessment in the course of our work.

Q. And after over a year of investigation and discussions with the numerous witnesses that you all had and the review of documents and video, what [p.211] was the — in testing that hypothesis, what was the conclusion of the January 6 committee with regard to President Trump's culpability in the January 6 attack?

A. Well, over the course of our hearings in the report, the conclusion we found as fact was that there was an intentional, multipart plan led by the President and facilitated by him and others to disrupt the joint session and prevent the transfer of power.

It's palpable throughout our hearings, and it's explicitly stated in our report.

Q. And what were your conclusions about whether . . .

THE COURT: I'll ask you to start over.

Q. (By Mr. Grimsley) What were your conclusions about whether President Trump incited a violent insurrection on January 6?

A. His incitement of violence was the final step of that multipart prong to try to disrupt the transfer of power. We reinforced the hypothesis of his incitement. It broadened from just his words at the Ellipse, "Fight like hell or not have a country anymore," to a much broader pattern, which inciting the mob was just one final desperate step.

Q. Now there has been some suggestion that the January 6 committee was populated by Democrats and [p.212] RINOs who had already prejudged President Trump's guilt.

Are you familiar with other members of Congress who had also made statements in the weeks and months after the attack on January 6 regarding President Trump's culpability, including Republicans?

A. Yeah. I believe our hearings featured some statements by Leader McCarthy and Senator Minority Leader McConnell and other Republicans essentially agreeing that the President bore every responsibility and incited the violence. Those things came up soon after the events in the course of the impeachment proceedings.

MR. GRIMSLEY: Are you just waiting?

MR. GESSLER: (Nodding head.)

Q. (By Mr. Grimsley) You had mentioned that Speaker McCarthy said that President Trump, in the days after the attack, bore responsibility, correct?

MR. GESSLER: Your Honor, I am going to object —

A. Yes.

MR. GESSLER: — to this line of

questioning. I asked him his understanding with respect to actual members of the committee, because [p.213] we're talking about the processes of the committee, not processes or political opinions people may have had outside of the committee. Those are not relevant nor part of my questioning, nor do we think appropriate for part of the direct exam.

MR. GRIMSLEY: Well, there was a suggestion, Your Honor, that if one held a certain opinion shortly after January 6, they were closed—minded and wouldn't change it. But I think Speaker McCarthy — or former— Speaker McCarthy is a pretty good example of somebody whose opinion may have changed over time.

THE COURT: I think that you can bring in hearsay to impeach, but I'm not sure that you can bring in hearsay to rehabilitate the impeachment. Plus, I really don't — so I'm going to sustain the objection.

MR. GRIMSLEY: That's fine, Your Honor. I'll move on. I think the point is made.

Q. (By Mr. Grimsley) You were asked some questions about Exhibit 1108, which was an article, I think published earlier this year, in which you gave some quotes or at least there were some things you said were quoted in.

Do you recall that?

[p.214]

A. I do.

Q. And do you recall there being some effort to use the quotes from that article to suggest that the January 6 committee had somehow omitted key evidence?

A. Yes. I think Congresswoman Greene used a clip — a link to that interview and suggested that the January 6 committee found that the law enforcement was at fault. And I rebutted that in my first and only series of tweets.

The only time I've ever actually tweeted something was a direct response to her in the wake of that NBC report.

MR. GRIMSLEY: Can we put up Plaintiffs' Exhibit 320, please.

MR. GESSLER: Your Honor, I guess I would object to this. The question was did he agree with the statement in that article. He said no, did not authenticate it, did not endorse it, and that was sort of the end of it.

MR. GRIMSLEY: I think the article was brought up to suggest that there were other — yes, exactly.

THE COURT: Dissent among the ranks.

Q. (By Mr. Grimsley) Do you see Plaintiffs' Exhibit 320?

[p.215]

A. I do.

Q. Was that one of the tweets, your 15 minutes of fame on Twitter, where you sent out a tweet following the publication of the article?

A. Yeah. I think I actually opened my account that day for this purpose. And there were maybe three or four successive statements that directly addressed my statements in that article.

And, yes, this looks like the first or one of the series of tweets that — it looks like February 5, I see was the date.

Q. Could you read this tweet, please?

A. "President Trump and his co—conspirators devised and pursued a multipart plan and prevent the transfer of power" — that should be "to prevent the transfer of power."

"He incited the crowd on January 6 and failed to act during the riot despite being able to do so. He and his enablers bear primary responsibility for the attack."

Q. And I'll ask you to read just a little more slowly, because I'm going to ask you to read a second one too.

A. Okay. I'm sorry.

MR. GRIMSLEY: Can you put up exhibit — [p.216] Plaintiffs' Exhibit 321.

A. It says:

"I recently spoke to NBC news about law enforcement planning for January 6. Since that interview, some have used my comments to suggest that law enforcement could have prevented the riot. That is false. The proximate cause of the attack on the Capitol was President Trump."

Q. (By Mr. Grimsley) And finally, I want to ask you some questions about intelligence that was gathered prior to January 6, following December 19, and specifically the Guardian platform that you had talked about during cross—examination, okay?

A. Sure.

Q. Was the committee ever able to discover or find out what specific intelligence was communicated to the President that the FBI had gathered?

A. No. Unfortunately, I can't say how much, if any, of those guardians or other intelligence was briefed to the President. We did have testimony that on the morning of January 6, the President was directly informed about the presence of weapons in the crowd. We had evidence that the night before he commented to a group of White House staffers, "They're [p.217] very depressed. They're angry."

So there's some evidence of his awareness of danger or the potential for violence before his speech on the Ellipse. But I can't say, Mr. Grimsley, that we were able to determine that he was directly briefed about any of that intelligence. That was one of the many things that we just could never get to the bottom of.

Q. Was there some evidence about what Mr. Trump was told at the Ellipse about individuals having weaponry?

A. Yes. We had testimony that he was told about weaponry, that he actually asked that the magnetometers be moved, and saying "These people aren't here to hurt me." That he was very specifically made aware by staff of the presence of weapons in the crowd and proposed, actually, that people bring weapons into the event.

Q. So I want to look very quickly at one of the pages you were shown from Exhibit 1108.

MR. GRIMSLEY: And if we could go to page 9, please.

Q. (By Mr. Grimsley) And this will be the same, I think, quote from the Guardian, from the tipster that you were asked about.

[p.218]

MR. GRIMSLEY: If you could blow up the second—to—last paragraph, please.

Q. (By Mr. Grimsley) And do you recall being asked a question about this very specific — or this very piece of evidence?

A. Yes.

Q. And the tipster says "They think they will have a large enough group to march into D.C. armed and will outnumber the police so they can't be stopped."

The quote goes on: "They believe that since the election was stolen, that it's their constitutional right to overtake the government, and during this coup, no U.S. laws apply. Their plan is to literally kill. Please, please take this tip seriously and investigate further."

Do you see that?

A. I do.

Q. And did you review the President's speech at the Ellipse on January 6 as part of the investigation?

A. Yes. Absolutely. Consistent message: The election was stolen, constitutional right to overtake the government, different rules apply, different laws apply. [p.219]

I may be confusing that speech with other speeches, but the "no rules apply, different rules apply" is consistent with the President's rhetoric.

Q. Let me put up the speech.

MR. GRIMSLEY: So Plaintiffs' Exhibit 1029, page 14. Blow up the top, please.

Q. (By Mr. Grimsley) And this is from — this is a transcript of the Ellipse speech. And President Trump says:

"The Republicans have to get tougher. You're not going to have a Republican party if you don't get tougher. They want to play so straight. They want to play so 'Sir, yes, the United States, the Constitution doesn't allow me to send them back to the states.' Well, I say 'Yes, it does, because the Constitution says you have to protect our country and you have to protect our Constitution, and you can't vote on fraud, and fraud breaks up everything, doesn't it?' When you catch somebody in a fraud, you're allowed to go by very different rules."

How does that compare to that piece of intelligence taken from the Guardian inside of Exhibit 1108?

A. Very, very close. The President [p.220] repeatedly talked about the election being stolen, about actual support, and did confirm to them that, in fact, different rules apply. Saying that to an angry mob of people on the Ellipse incited violence.

MR. GRIMSLEY: No further questions.

THE COURT: Okay. Let's recess until — let's make it 3:05, so 20 minutes, and we'll finish up with —

MR. GRIMSLEY: Just for the record —

THE COURT: Oh, sorry.

MR. KOTLARCZYK: No questions for this witness, Your Honor.

MS. RASKIN: No questions.

THE COURT: Thank you, Mr. Grimsley.

MR. GRIMSLEY: Yes.

THE COURT: Now that Mr. Kotlarczyk is sitting all alone, it's really easy to forget you. It's like you're at the kids' table.

MR. KOTLARCZYK: This is the appropriately sized table for these chairs, Your Honor. The others have the, you know, much higher tables.

THE COURT: Okay. So we'll go back on the record at 3:05 to finish up with Professor Delahunty.

[p.221]

MR. GRIMSLEY: Can we excuse Mr. Heaphy? I apologize.

THE COURT: Thank you, Mr. Heaphy. Well, first of all, Mr. Heaphy, I've been mispronouncing your name all week, so I apologize for that.

THE WITNESS: Honest mistake, Your Honor. It's okay.

THE COURT: You are released.

THE WITNESS: Thank you.

(Recess from 2:43 p.m. to 3:07 p.m.)

THE COURT: You may be seated. Professor Delahunty, you're still under oath.

THE WITNESS: Sorry, Judge?

THE COURT: You're still under oath.

THE WITNESS: Yes, yes. I know. Thank you.

MR. MURRAY: And, Your Honor, I just wanted to flag for the Court that after Mr. Delahunty's testimony we'll have just five to ten minutes of sort of evidentiary housekeeping matters if that's all right.

THE COURT: Yeah. We — I'll want to talk about a few things about the proposed findings of [p.222] facts and conclusions of law, so . . .

MR. MURRAY: Thank you.

CONTINUED CROSS—EXAMINATION

BY MR. MURRAY:

Q. Mr. Delahunty, did you speak with anybody about your testimony since you were last on the stand?

A. No.

Q. When we talked before lunch, we had just been discussing your testimony that Section 3 is ambiguous. And we finished talking about the meaning of the phrase "insurrection." So now I want to turn our attention to your opinion about the meaning of the phrase "engaged in" —

A. Yes.

Q. — "insurrection."

Now, do you recall talking about opinions by Attorney General Stanbery?

A. Yes.

Q. And I believe you called Attorney General Stanbery's opinions good evidence about the meaning of Section 3?

A. Yes.

Q. Now, at the time that Attorney General Stanbery issued these opinions, that was in 1867, [p.223] right?

A. Yes. This was before the ratification of Section 3.

Q. 1868 was before the states ratified Section 3 but after Congress had enacted legislation proposing Section 3 to the states, right?

A. Yes.

Q. Let's pull up Attorney General Stanbery's first opinion. This is on page 788 of Professor Magliocca's appendix.

You talked about how the Reconstruction Acts were a statute.

A. Yes.

Q. So I just want to look briefly at this. The sixth section of the Reconstruction Acts provides, among other things, "No person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the third article of said constitutional amendment" —

A. Yes.

Q. — correct?

A. Yes. That's what it says.

Q. So the Reconstruction Acts incorporated fully Section 3 of the Fourteenth Amendment? The [p.224] language was — the applicable language was identical, correct?

A. I think — I think in reading this,
that's what it says. It says "No person shall be eligible to the office under any such provisional governments" —

THE STENOGRAPHER: Would you please use the microphone?

THE WITNESS: Yes. I'm sorry.

A. "No person shall be eligible to any office under any such provisional governments."

Well, that's not the language of Section 3. It's talking there about offices — state offices under former Confederate, now provisional, governments. So there's that difference.

Q. (By Mr. Murray) Well, to be clear, though, this is saying that people would be disqualified from holding office under Section 3.

A. Yes.

Q. And so when we're talking about engaged in insurrection or rebellion, that phrase was the phrase he was interpreting among others here —

A. Yes.

Q. — correct?

A. I think it's fair to say that — well, [p.225] the text of the statute itself incorporates the well, the jurisdictional provision of Section 3.

Q. Do you recall testifying in your direct examination about official versus individual capacity?

A. Yes.

Q. And I think the point you were trying to make was that it wasn't totally clear what kinds of conduct were disqualifying in an official capacity versus in an individual capacity?

A. That seems to be Stanbery's opinion, yes.

Q. I want to look at that discussion in Stanbery's opinion.

A. Okay.

Q. If we go to page 799 of the appendix, there's a discussion here at the top.

"All those who in legislative or other official capacity were engaged in the furtherance of the common unlawful purpose or persons who, in their individual capacity, have done any overt act for the purpose of promoting the rebellion may well be said in the meaning of this law to have engaged in rebellion."

Do you see that?

A. Yes.

Q. And then the paragraph after that gives [p.226]

some examples of what might be considered engaging in rebellion in an official capacity.

A. Yes.

Q. And then later on in that page in the —at the bottom, Stanbery says "So much for official participation. I now recur to what amounts to individual participation in the rebellion."

Do you see that?

A. I do.

Q. And that's at the bottom of page 799.

If we go to the top of page 799 — and really that whole page is about individual participation in rebellion, correct?

A. I'm not sure —

THE STENOGRAPHER: I can't hear you. I'm sorry.

A. What page did you say the previous one was?

Q. (By Mr. Murray) Well, we just looked at the bottom of page —

A. 7 —

Q. — 799.

A. And then —

THE STENOGRAPHER: I can't hear you.

A. And then what follows.

[p.227]

MR. GESSLER: Your Honor, may I approach the witness just to readjust the screen and the microphone to help out a little bit?

THE COURT: Yeah. Of course.

A. Okay. So this —

THE STENOGRAPHER: One moment.

THE COURT: Okay. When you lean in, it's getting all that feedback. So let's try to . . .

Does that help, Professor?

THE WITNESS: I hope it helps everybody else. It helps me, yes. Thank you, all.

MR. BLUE: Remember to speak into the microphone.

THE WITNESS: Oh, thank you, all.

A. I'm sorry?

Q. (By Mr. Murray) So at the bottom of page 799 —

A. Yep.

Q. — Attorney General Stanbery transitions from the subject of official participation —

A. Yes.

Q. — to individual participation —

A. Yes.

Q. — is that correct?

A. Yes.

[p.228]

Q. And then the following page, page 800 —

A. Yes.

Q. — there is a discussion of what it means to have engaged in individual participation —

A. Yes.

Q. — and rebellion?

A. Yes.

Q. And on page 799, Stanbery says "It requires some direct overt act done with the intent to further the rebellion. "

Do you see that?

A. He says that's a necessary condition of bringing the party within the purview and meaning of this law. Not sufficient. He says it's a necessary condition.

Q. Well, sir, later in that same passage —

A. Yeah.

Q. — he says "But wherever an act is done voluntarily and in aid of the rebel cause, it would involve the person and it must work disqualification under this law."

That was Attorney General Stanbery's interpretation, correct?

A. Yes.

Q. I want to turn to page 804 of Professor [p.229] Magliocca's appendix. And just highlighting that now we're talking about Attorney General Stanbery's second opinion.

Do you see that?

A. Yes.

Q. And if we look at page 815 of that opinion — I just wanted to direct your attention to the second—from—the—bottom paragraph there where Attorney General says that "While forced contributions are not disqualifying, voluntary contributions to the rebel cause, even such indirect contributions as arise from the voluntary loan of money to rebel authorities or purchase of bonds or securities would work disqualification," correct?

A. Are we talking about the second highlighted —

Q. Yes.

A. — language? That's what he says, yes.

Q. And then later on that page, he specifically says "When a person has, by speech or writing, incited others to engage in rebellion, he must come under disqualification," correct?

A. Yes. But here he is talking about those who are subject to disqualification as — because of their actions in an official — in official [p.230] capacities. "Discharge" — "Officers who, during rebellion, discharge official duties not incident to" — or like being an ambassador, a purported ambassador, to the Confederacy, to France — those people are not, in his judgment, subject to disqualification in light of actions such as speech or writing that incited others to engage in rebellion.

So here he is talking about action in an official capacity. I don't know if that, in his view, translates into a disqualification for actions done in an individual capacity.

Q. Well, sir, the first sentence of this says that "Officers during the rebellion discharged official duties not incident to war but only such duties as belonged to a state of peace and were necessary to the preservation of order and the administration of law are not to be considered as thereby engaging in rebellion or disqualified," correct?

A. I think what he has in mind there is that the use of law enforcement officials on the level of constable, let's say, who are keeping the peace in some county in the Confederacy. And in doing — in keeping the peace locally, they're engaging in official duties but not official duties incident to [p.231] war. So that's the class of the person there.

Q. Correct. In the first sentence he's saying this is the class of persons that are not disqualified, and in the second sentence he says "When a person has, by speech or writing, incited others to engage in rebellion, he must come under disqualification," correct?

A. Well, I take that to refer to incitement by speech or writing in the discharge of official duties.

Q. But nowhere in that sentence does it say "in the discharge of official duties" —

A. Well, if —

Q. — correct, sir?

A. — you read it in the context with the immediately preceding sentence, that strikes me as the clear implication.

Q. That's your interpretation —

A. Yes —

Q. — correct?

A. — it is.

Q. In your report, you didn't discuss any of the pre—Civil War treason cases about incitement, did you?

A. No.

[p.232]

Q. This is page 44 of Professor Magliocca's appendix. And here we're looking at "Charge to the grand jury treason from the Circuit Court in the Eastern District of Pennsylvania in 1851."

Do you see that, sir?

A. I do.

Q. If we look at page 46 — and by the way, this is from Judge Kane charging the grand jury.

Judge Kane says "There has been, I fear, an erroneous impression on this subject among a portion of our people if it has been thought safe to counsel and instigate others to acts of forcible oppugnation to the provisions of a statute to inflame the minds of the ignorant by appeals to passion and denunciations of the law as oppressive, unjust, revolting to the conscience, and not binding on the actions of men. To represent the Constitution of the land as a compact of iniquity, which it were meritorious to violate or subvert, the mistake has been a grievous one. "

Do you see that?

A. Yeah.

Q. And do you see at the end of that paragraph Judge Kane instructs the grand jury that "Successfully to instigate treason is to commit it"?

[p.233]

A. Yes.

Q. But you didn't consider that in your report in this case —

A. No —

Q. — correct?

A. — because it's about treason and, in particular, about levying war. So if this case is relevant, I think it's relevant to a part of Section 3 that does not appear to be at issue, and that is the part that refers to aid or comfort to the enemy.

So that doesn't really speak to the meaning of insurrection or insurrection against the Constitution.

Q. Your opinion —

A. He refers to —

Q. Sorry. Go ahead.

A. Well, show me where it talks about insurrection other than in the context of treason. Can we go back to the first page?

Q. Let me just ask you a question. Is it your opinion that incitement was enough to have levied war against the United States for purposes of the Treason Clause — let me finish —but was not enough to have engaged in insurrection under Section 3? Is that your opinion?

[p.234]

A. I don't know the answer to your question.

Q. I want to move to the subject of self—execution —

A. Yeah.

Q. — that you testified about on direct examination.

You know that states can enforce federal constitutional provisions through their own procedural rules —

A. Yes.

Q. — correct?

A. Yes.

Q. That would include, for example, Section 1 of the Fourteenth Amendment, right?

A. In — as a shield.

Q. Well, certainly, a state could pass legislation providing remedies for violations of due process or equal

protection, correct? There's nothing unconstitutional about that?

A. Not that I can see, no.

Q. You're not an expert in Colorado election law, fair to say?

A. No. That's very fair to say.

Q. And you're not here to offer an opinion [p.235] as to whether Colorado law grants a right of action to enforce federal constitutional qualifications in presidential primaries?

A. I have not read any Colorado law, statutory law.

Q. Let's just briefly discuss Griffin's case.

A. Yes.

Q. So Griffin was convicted of a crime in Virginia; is that right?

A. Yes.

Q. And he was convicted of a crime by a state court judge who presumably was disqualified under Section 3?

A. Very likely — yes.

Q. And so then Griffin brought a federal habeas petition in federal court, arguing that his conviction should be overturned because the judge was disqualified under Section 3?

A. Yes.

Q. And on direct examination, you said that Griffin's case had kind of three separate holdings.

Do you recall that?

A. Yes. Alternative holdings, yes.

Q. One of the holdings denied habeas relief [p.236] to Griffin on the basis of the de facto officer doctrine.

Do you recall that?

A. Yes.

Q. And as I understand it, the de facto officer doctrine essentially said this judge was, in fact, in that office at the

time, even if perhaps not lawfully so, and we're not going to allow a collateral attack on the conviction of someone who was convicted by a de facto judicial officer.

A. Yes.

Q. Was that the reasoning?

A. Essentially, yes.

Q. And the Court also denied relief based upon the scope of habeas relief available under federal law, right?

A. Yes.

Q. So just so we're all clear, Griffin's case did not involve a party invoking state procedural rules to enforce federal qualifications, correct?

A. Right.

Q. Do you know what year Griffin's case was decided?

A. I think it was decided in late July 1869.

[p.237]

Q. What was the status of Virginia in 1869?

A. Well, there is another attorney general opinion — I think it is the second opinion of Stanbery, but I'd have to confirm that — that discusses the powers of states not yet admitted —readmitted to the Union.

And the tenor of that, maybe, the clear language, is to the effect that the powers of the Union Army, Union military are very circumscribed, but they are part and parcel of the provisional government of the state. And the provisional government has, basically, all powers that an unreconstructed state would have, barring those that are expressly conferred upon the military.

Q. But Virginia was under federal military occupation in 1869, right?

A. I don't know, but — I don't know. I think so, but I — I have not confirmed that.

Q. And, in fact, Virginia didn't get readmitted to the Union until 1870? Do you know that?

A. No, but I will take that representation as correct.

Q. I want to turn to your opinion that Section 3 does not cover the President.

A. Well — sorry.

[p.238]

Q. Oh, well, that the President is not an officer of the United States.

That's your opinion, correct?

A. Yes.

Q. Before this case, before you became an expert in this case, you had previously suggested that Section 3 does cover the presidency.

Do you remember that?

A. Well, I — what I said and what I think you're referring to was that there is support for the view that it does not — the jurisdictional language. I didn't use that term, but that Section 3 does not include the President as the subject — as subject to the section.

THE COURT: Can you — can you move the microphone back next to you?

THE WITNESS: Like that?

THE COURT: Yeah. Thank you.

Q. (By Mr. Murray) You addressed this issue in your article — your op—ed in The Federalist in August of this year —

A. That's right.

Q. — correct? And in that op—ed, you said —

A. May I qualify what I just said?

[p.239]

I addressed this issue in a sentence in passing, basically to take it off the table by saying I did not really want to discuss the issue any further.

Q. Understood. And in that portion of your article, you said that "Although Section 3 does not explicitly refer to

Presidents or presidential candidates, comparison with other constitutional texts referring to officers supports the interpretation that it applies to the presidency too."

Were those your words —

A. Yes.

Q. — back in August?

A. Yes.

Q. Your article from The Federalist in August of this year certainly didn't argue that the President was not covered by Section 3, right?

A. That is correct.

Q. You wrote that article in August of this year, before you were hired by Donald Trump as a paid expert in this case, right?

A. Yes.

Q. Since the time you wrote that article in The Federalist, you've been paid about $60,000 —

A. Yes.

[p.240]

Q. — by Donald Trump for your work —

A. Yes.

Q. — in this case?

I want to pull up the language of Section 3 just so we're all clear on offices and officers. And let's start with offices.

So no person shall hold any office, civil or military, under the United States if they are disqualified and have not received amnesty —

A. Yes.

Q. — correct?

A. Uh—huh.

Q. You agree that the presidency is an office under the United States, don't you?

A. I take no position on that. That is disputed among scholars. I think Professor Lash does not believe that that

language applies to the presidency as an office. Other scholars, maybe the preponderance, think it does. It is the subject — that language of the colloquy that I think the judge questioned me about earlier, the colloquy between Senator Reverdy Johnson and Senator Morrill Lot.

So I don't take a position on the —that, whether the presidency as an office is covered or not. I haven't — [p.241]

Q. So you're not going to tell us today whether the presidency is an office under the United States?

A. That's right. I haven't formed a scholarly opinion about that.

Q. Well, sir, you know that the Constitution repeatedly refers to the office of the presidency, don't you?

A. That's one of the reasons I would be inclined to think that that language does apply to the office of the presidency.

Q. You would be inclined to that view, or you don't know?

A. Well, they're consistent statements.

Q. Let's look at Petitioners' Exhibit 235. This is just the U. S. Constitution.

And Article 2 is the portion of the Constitution that defines the powers of the presidency, right? Or at least one of them? And the executive branch?

A. Well, if that's the President of the United States with the executive power. I mean, does the President have powers outside of Article 2? That —

Q. No, no. I think we're — I'm just [p.242] saying that Article 2, at least in part, sets out the powers of the executive branch, correct?

A. Yes. I'm trying to think whether Article 7 refers to the President, to — the powers of the President, to respond fully to your question.

Q. Understood. But I just want to highlight a little bit of language here in Article 2.

In Section 1 it says that the President shall hold his office during the term of four years, right?

A. Yes.

Q. And it refers to eligibility for the office of President?

A. Yes.

Q. And being eligible to that office?

A. Yes.

Q. And it talks about the removal of the President from office and the duties of that said office?

A. Yes.

21 Q. And the President, in fact, before he takes — enters on the execution of his office, he has to take his oath, right?

A. That's right.

Q. You know that the Twelfth Amendment also [p.243] refers to the presidency as an office?

A. Yes.

Q. And despite all that, you're not going to offer an opinion that the presidency is an office under the United States?

A. No, I am not.

Q. Well, let me ask you this: You agree it was well understood that Section 3 would not allow Jefferson Davis to become the President of the Union after the Civil War unless he got amnesty, right?

A. Well, if the language that we're discussing in Section 3, the disqualification or liability language, includes the office of the presidency, then Jefferson Davis would clearly have been disqualified from holding that office because, as a senator from Mississippi and perhaps

in other connections, he had taken the Article 6 oath to support the Constitution.

Q. Correct. And you understand that after the Civil War it was incredibly well understood that Jefferson Davis could not be the President of the Union unless he received amnesty, right? You recall seeing some of that evidence?

A. It was well — may well have been well understood, but there was a — okay. Yes. Certainly, [p.244] it was what he desired. There's no question of that. And this was the worry that Senator Johnson raised and Senator Lot sought to allay by pointing to the liability or disqualification clause.

Q. And that colloquy that you're referring to —

A. Yes.

Q. If we go to page 477 of Petitioners' Exhibit 144, this colloquy between Mr. Johnson and Mr. Morrill is what you're referring to?

A. Yes.

Q. And you, in your report, said that this colloquy may tend to show that the presidency is an office covered by Section 3, right?

A. An office covered by the disqualification liability language of Section 3.

Q. And you would agree that in the debates about amnesty after the Civil War, one of the main arguments against blanket amnesty was that it would be absurd to allow Jefferson Davis to be the President of the United States, and if you granted amnesty for everybody under Section 3, then Jefferson Davis would become eligible to become president.

Have you seen all that historical evidence?
[p.245]

A. Well, there may have been people who thought that, but they would have been wrong if an office — the office of the presidency is covered by the language that Senator Morrill posed. Whatever they thought, he would have been disqualified —

Q. Yes, and —

A. — because he falls within the jurisdictional element of Section 3, which is having taken an oath to support the Constitution.

Q. So even though everybody at the time knew that Section 3 disqualified Jefferson Davis to be President, you don't think that's good enough evidence to take a position as to whether or not the presidency is an office that is covered by Section 3's —

A. No, because this is a matter of active scholarly dispute. Kurt Lash, Professor Lash, and Professors Blackman and Tillman do not think that the language which the two senators here are discussing comprehends the office of the presidency.

Q. And they also don't think it's enough that the presidency is referred to as an office about a dozen times in the Constitution?

A. Apparently not.

Q. Let's talk about oaths.

I believe you testified on direct that [p.246] you thought there's a difference between an oath to support the Constitution of the United States and the President's oath.

Do you recall that testimony?

A. Yes.

Q. And I believe you said that the President's oath to preserve, protect, and whatever else it says, isn't an oath to support the Constitution, right?

A. It obviously was, contextually, a different oath. And it's in a different article of the Constitution as well.

Q. Okay. It's preserve, protect, and defend the Constitution, right? That's what the President has to do?

A. That is — he is required to take that oath and, having taken it, to carry it out.

Q. And they use different words, but you would certainly agree with me that preserving, protecting, or defending the Constitution of the United States, as a practical matter, includes an obligation to support it, right?

A. I don't think it is relevant whether, as a practical matter, it requires to support the Constitution. As a practical matter, sure.

[p.247]

But we're not talking about practical matters. We're talking about the actual language of the Constitution. The actual language of Article 6 is palpably different from the Oath Clause in Article 2. Palpably different.

Q. And, sir, are you going to take the position — well, strike that.

Preserving, protecting, and defending the Constitution of the United States may not be limited to supporting it but certainly includes supporting the Constitution, right?

A. As a practical matter, yes. But, again, I don't see the real relevance of that because constitutional language is crafted carefully and precisely so as to achieve the intended objects. And I do not believe that the framers of Section 3 were careless in their draftsmanship.

It may be that there are some formulations of the Article 6 oath or its equivalent that vary linguistically slightly, but there's a palpable difference between the language of the Article 2 oath and the language of the

Article 6 oath. I think that linguistic difference, which is a substantial one, supports the view that the President is not comprehended under the disqualification [p.248] language of Section 3 because he does not take an oath which members of Congress do to support the Constitution. He takes a different oath and has ever since George Washington was inaugurated in 1788. And I think the framers of the Section 3 understood that perfectly well.

Q. Sir, we talked about dictionaries earlier. And you testified on direct that in some of the historical research you've done in the past, you've looked at a dictionary by Samuel Johnson.

Do you remember that?

A. To the best of my recollection, I did, yes.

Q. Yeah. And you cited Samuel Johnson because that dictionary in the late 1700s was considered kind of one of the gold standards for lexicography and definition, right?

A. Yes, if maybe not the unique dictionary of the English language.

Q. All right. So let's pull up Petitioners' Exhibit 280. This is Samuel Johnson's fifth edition, which I will represent to you is from 1773.

And I want to look at how Samuel Johnson defined "defend," that word that appears in the [p.249] Article 2 oath, okay?

A. Yes.

Q. "Defend: To stand in defense of. To protect. To support."

A. Right.

Q. Do you see that, sir?

A. Yes.

Q. I want to go back to our Section 3.

Your position is that you're not going tell us whether the presidency is an office under the United States, but you know that the President is not an officer of the United States —

A. I am —

Q. — is that your testimony?

A. I am very confident that the President, for this purpose, is not an officer of the United States. And I rest that position on the occurrence of that term, that specific term, that exact language, in other parts of the Constitution and judicial interpretation of that language in other parts of the Constitution from — up to the time of Chief Justice John Roberts' opinion in the Free Enterprise case.

There's a consistent body of judicial opinion from the Supreme Court and other lower courts concerning the meaning of "officer of the United [p.250] States" elsewhere in the Constitution. And some of that case law is around the time of the ratification — discussion and ratification of Section 3.

Q. Okay, sir. And you talked about some case law on direct examination as well. And I believe that you said that some of those cases were about the Appointments Clause, which you said was the anchorage of the meaning of the phrase "officer," right?

A. Yes.

Q. Let's look at the Appointments Clause. Our Constitution, again, on page 7.

The Appointment Clause says that "The President shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers, and consoles, judges of the Supreme Court, and all other officers of the United States" —

A. Yes.

Q. — correct?

A. Yes.

Q. And the President can't appoint himself, right?

A. No. That's because he's not an officer of the United States.

[p.251]

Q. Well, he's certainly not an "other" officer of the United States, right?

A. Well, not being an officer of the United States, he can't be an "other" officer of the United States.

Q. Right. But if we're talking about the Appointments Clause, and the Appointments Clause is talking about "other officers of the United States," clearly the Appointment Clause couldn't cover the President even if he was an officer, right?

A. Well, let me refer again to Chief Justice Roberts' opinion in the Free Enterprise case where he explains the language that's at issue right now in the Appointments Clause as indicating this, that the Constitution establishes quite clearly a distinction — it's a fundamental distinction in the Constitution — between those who are elected to their offices like the President and those who are appointed to the offices, like the Secretary of State or the Chief Justice or other officers of the United States.

And that's why — and that fundamental Constitution distinction, which is reflected here between elected and appointed, is — that's recognized and established in the case law.

Q. All right. So let's look at that. I [p.252] want to look — let me ask you this first.

You know that President Trump has previously argued that he is an officer of the United States, correct?

A. I do not know that. But if I wanted a constitutional interpretation of that language, he would not be the first person to whom I would look.

Q. Fair enough. But let's look at it anyways. Petitioners' Exhibit 287.

I'm showing you "President Donald J. Trump's Memorandum of Law in Opposition to the People of the State of New York's Motion for Remand."

Do you see that on your screen?

A. I do.

Q. Okay. And the way this case came up is that there was a criminal prosecution of President Trump that then got removed to federal court. President Trump tried to remove it to federal court.

A. Yes.

Q. And then the district attorney of New York tried to remand it back to state court, right?

A. I'll take your word for it.

Q. Okay. If we go to page 8, legal argument, point one: "The President is an officer of [p.253] the United States who can remove cases to federal court."

Do you see that?

A. I do.

Q. Later on — and this is page 2 of the motion itself, numbered page 2 — there's a citation to Josh Blackman and Seth Barrett Tillman.

And do you imagine that those are the same scholars that you had cited in your direct testimony?

A. Yes. They're the same. I'm confident.

Q. And President Trump says, "Well, this argument that elected officials, including the President, are not officers of the United States has been advocated by these professors for some time. To our knowledge, it has never been accepted by any Court."

Do you see that?

A. Yes.

Q. And if we go to the next page — well, actually, at the bottom of this page there's a Footnote 1. And they're citing some articles, and then the footnote continues on page 2.

And President Trump says, "To be clear, we mean no disrespect to either of these fine [p.254] academics, but their views on this matter are idiosyncratic. See, e. g. , Our Next President at 5 through 6 (collecting the contrary views of numerous scholars) and of limited use to this Court."

Do you see that?

A. Yeah.

Q. Did you know that this brief also specifically addresses the Free Enterprise case that you were just talking about?

A. No, I didn't know that. I have not read the New York lawyer's brief.

Q. Well, on the next page, page 4, there's a citation to Free Enterprise Fund, and that's the case you were just referring to, right?

A. Yes.

Q. And it says that case addresses the President's removal power under the Article 2 Appointments Clause?

A. Yes.

Q. And then it says later "It is clear that the Supreme Court was not deciding the meaning of 'officer of the United States' as used in every clause of the Constitution, let alone in every statute of the United States code. Rather, the Court was simply describing the meaning of 'other officers of the [p.255] United States' as used in U. S. Constitution, Article 2, Section 2, Clause 2."

Do you see that?

A. Yes.

Q. And then that paragraph goes on to say obviously the President cannot appoint himself, and so other officers of the United States, as used in Article 2, Section 2, Clause 2 must be a reference to nonelected officials, right?

A. Uh—huh.

Q. And then President Trump says, "This stray line in Free Enterprise Fund says nothing about the meaning of 'officer of the United States' in other contexts such as the relevant context the Court must consider here," correct?

A. Yes.

Q. I want to take us back to the 19th century now.

A. Uh—huh. Did you want me to speak to this or no?

Q. No. Your counsel can ask you questions about that if they'd like.

A. Okay.

Q. Let's go back to the 19th century. Petitioners' Exhibit 144 again, Magliocca's materials.

[p.256]

And we're going to go back to Attorney General Stanbery's first opinion.

A. Yes.

Q. You're aware that he also addresses officers of the United States, correct?

A. In the statutory context.

Q. Yeah. In the context of the Reconstruction Acts applying Section 3, disqualification?

A. Yeah.

Q. And Attorney General Stanbery says, "This brings me to the question who is to be considered an officer of the United States within the meaning of the clause under consideration? Here the term 'officer' is used in its most general sense and without any qualification as legislative

or executive or judicial. And I think as here used, it was intended to comprehend military as well as civil officers of the United States who had taken the prescribed oath," correct?

A. Yes.

Q. And did you know that Attorney General Stanbery also addressed the meaning of "officers" in his second opinion?

A. Yes.

[p.257]

Q. Page 811. Excuse me. Page 814. "Officers of the United States. As to these, the language is without limitation. The person who has at any time prior to the rebellion held any office, civil or military, under the United States and has taken an official oath to support the Constitution of the United States is subject to disqualification."

Do you see that?

A. I do.

Q. So here, Stanbery isn't drawing a distinction between office, officers, and those who hold offices, correct?

A. Not that I can see.

Q. Did you know that Attorney General Stanbery also referred to the President as an officer?

A. I don't — I think he said that, though he wasn't there purporting to interpret the language of Section 3. My recollection is that he said that a military governor of a not—yet—readmitted state, if he usurped powers that were not his, would be placed himself on a higher footing than the President, who is, if I remember the language, not to be considered — who is merely an executive officer of the United States. I think that's what it says. It doesn't appear on the screen, but I think you have to [p.258] read

what Stanbery is talking about here in construing the statute in light of what he says elsewhere.

Q. Yeah. And your opinion or what you just said — you actually — you quoted it spot—on. And that was from the same second opinion —

A. Yeah.

Q. — of the — on the Reconstruction Acts, correct?

A. Yes.

Q. Andrew Johnson was president when the Fourteenth Amendment was ratified, right?

A. Yes. He issued the proclamation that it had been ratified.

Q. And he also issued other presidential proclamations, correct?

A. He did.

Q. And in some of those proclamations, Andrew Johnson referred to himself as the chief executive officer of the United States?

A. He did. He referred to himself as the
chief executive officer of the United States.

Q. Do you know whether other presidents during the 19th century were referred to as the chief executive officer —

A. I think —
[p.259]

Q. — of the United States?

A. — it probably was a common way of referring to the President and may still be now.

Q. In the 19th century, it was a common way to refer to the President — to refer to him as the chief executive officer of the United States.

You would agree with that?

A. A common way. Not common in connection with the interpretation of the Appointments Clause, however. And,

indeed, the "chief executive officer of the United States" is a different term colloquially from the term "officer of the United States" as used in various places in the Constitution, principally Article 2's Appointments Clause.

So I don't consider that evidence of not — it's not really terribly relevant, if it's relevant at all, which I doubt, to the interpretation of the Constitution in any of its parts that uses the term "officer of the United States."

Q. So you —

A. I think that the focus needs to be not on how "officer" or "officer of the United States" even is understood in statutory context, in official proclamations, in colloquial usage. The question before the Court is how is it understood for purposes [p.260] of the framing ratification and later understanding of Section 3. Legal terms and ordinary uses of language cannot simply be mapped on to the constitutional language.

Q. You don't think it was relevant in interpreting the phrase "officer of the United States" as used in Section 3 in the 1860s to look at what people in the 1860s thought "officer of the United States" meant?

A. Not given the language of the original Constitution of 1788, no, I do not think it is particularly relevant at all. It's a legal term, constitutional term of art.

Let me give you —

Q. And —

A. — an example of what I mean.

Q. Well, let me ask you a question, sir, and then you can answer my question.

So you wouldn't think it was relevant that Presidents Jefferson, Jackson, Van Buren, Harrison, Polk, Taylor, Fillmore, Buchanan, Lincoln, Grant, and Garfield were all also referred to as the chief executive officer of the United States?

A. No, I don't. And let me give you an example.
[p.261]

Q. I'm just going to — that was just ayes—or—no question. If you want to —

A. Okay.

Q. — expound, I'm sure —

A. I just said —

Q. — your counsel can follow up on it.

A. — I don't think that it's particularly relevant.

Q. And therefore, you didn't look at any of that historical evidence in your report, correct?

A. The Constitution says what it says. And you interpret one clause of the Constitution in connection with other terms that use the same language or extremely close language.

Q. Okay. But you would agree with me that the original Constitution was ratified roughly 80 years before Section 3 of the Fourteenth Amendment —

A. Yes.

Q. — right?

A. Yeah.

Q. Okay. Right now we're in the 117th Congress.

Do you know which Congress was the Congress that enacted legislation proposing [p.262] ratification of Section 3?

A. It was proposed in 1866.

Q. And what number Congress was that?

A. I don't remember that.

Q. So you're not aware that it was the 39th Congress —

A. I —

Q. — one of the most famous Congresses in American history, that proposed Section 3?

A. Well, I'm grateful to be reminded.

Q. And so you also didn't think it was relevant that the 39th Congress repeatedly referred to the President as the chief executive officer of the United States?

A. Again, unless — no. I don't think it's particularly relevant. I mean, may I finally give the example that I need to underscore my claim that it's not relevant?

Q. Sure.

A. Article 2 says that the Senate shall advise and consent to presidential nominations to certain offices, and the Senate shall advise and consent to treaties.

Well, if you took those words, "advise and consent," in their ordinary meaning outside the [p.263] context of the Constitution, then the Senate would have to consent to every treaty and consent to every presidential nomination.

The Senate doesn't always consent to treaties or nominations, right? So I deduced from that that the term "advise and consent" was a term of art as used in the Constitution.

My recollection — I never studied this deeply — but my recollection is that the term "advise and consent" was used as a term of art in English law and then entered our Constitution in 1788 with the understanding that that was the legal meaning of advise and consent, not — clearly not the only — not at — not understanding of the term "advise and content" that those words had in common acceptation.

Q. And because of your view about constitutional interpretation and methodology, you didn't think it was relevant to see how the 39th Congress that enacted the Fourteenth Amendment used the phrase "officers of the United States," correct?

A. Not particularly relevant, no.

Q. And so if I were to show you ten pages from the congressional Globe of the 39th Congress that repeatedly referred to the President as an officer of the United States again and again and again, and these [p.264] were the very same people who enacted Section 3 of the Fourteenth Amendment, you wouldn't think any of that was relevant, would you, sir?

A. They're proposing the language of Section 3 against the backdrop of the Constitution that had been in existence for — what? — 80 years and as that constitutional language would have been understood even before 1868. Well before 1868.

Q. So there's some sort of technical term—of—art meaning in the phrase "officers of the United States" that was different from the way that everybody was actually using those phrases in public during the ratification or during reconstruction? That's your testimony?

A. No. I don't want to characterize it that way.

MR. MURRAY: All right. I have no further questions. Thank you.

THE COURT: The court reporter would like a five—minute break, so . . .

MR. GESSLER: My questions are going to be less than that, Your Honor.

THE COURT: I know, but I think she needs —

THE STENOGRAPHER: My computer froze.

[p.265]

MR. GESSLER: That's a non—negotiable five minutes. I understand, Your Honor.

(Recess from 4:00 p. m. to 4:06 p. m.)

THE COURT: You may be seated.

Mr. Gessler, the floor is yours.

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

REDIRECT EXAMINATION

BY MR. GESSLER:

Q. Professor Delahunty, I'm going to ask you to grab that microphone and get it close to you there.

So you were asked some questions about your opinion with respect to the payments you were receiving in this case, correct?

A. Yes.

Q. Okay. Do you remember having a conversation with me about a version of the Fourteenth Amendment that was introduced into the House of Representatives by Representative McKee?

A. Yes.

Q. Okay. And you remember I said — and that particular version said — specifically spoke to the portion of the Fourteenth Amendment involving the — the first phrase, the one involving "under [p.266] the" — "office under the United States."

And that first version introduced by Professor McKee — I'm sorry — Representative McKee — specifically said not — specifically included the President and Vice President of the United States. Do you remember that?

A. Yes.

Q. And you remember I was pretty enthusiastic about that provision and thought that that should be included in your expert report? Do you remember that?

A. You were.

Q. I was very enthusiastic.

A. Yes.

Q. And did you include it in your expert report?

A. No.

Q. Why not?

A. Because I thought it was irrelevant to the use of the term "officer of the United States" in the disqualification language. I thought it just wasn't really —

Q. And —

A. — relevant evidence.

[p.267]

Q. And at the time —

A. Not relevant at all.

Q. I'm sorry. And at the time you refused to include it, did you know that you were receiving compensation for putting together this report?

A. I'm not sure that I — I don't know the answer. I think — I don't know the answer.

Q. Okay. Did you understand that you were getting paid for —

A. Yes.

Q. — your work —

A. Yes.

Q. — by the — by President Trump?

A. Yes.

Q. Okay. Now, do you earn your living as a testifying expert witness?

A. No.

Q. Do you —

A. Not at all.

Q. Do you have plans to market yourself as a testifying —

A. Absolutely not. No.

MR. GESSLER: No further questions, Your Honor.

THE COURT: Mr. Delahunty, you are [p.268] released. Thank you so much.

THE WITNESS: Thank you, Your Honor.

THE COURT: So I think that there was some additional evidence that the petitioners wanted to offer; is that correct?

MR. OLSON: Yes, Your Honor. We've, I think, reached agreement on — each side has a few more things we would like to put in —

THE COURT: Okay.

MR. OLSON: — to make sure we can complete the record. And I think they have three things. We have three documents and a handful of videos, total running time of less than ten minutes.

THE COURT: Okay.

MR. OLSON: Would you like to do that now?

THE COURT: Yeah. Let's —

MR. OLSON: Okay.

THE COURT: — let's take care of everything.

MR. OLSON: Great. And first — and then a couple other just quick notes.

Exhibit 78 is the findings of the final report of the January 6 Select Committee that we would like to submit. We mentioned we were going to reduce [p.269] the size of those findings, even ones you deemed admissible, because the evidence came in through other ways.

Our plan, if it's okay with Your Honor, is to use the weekend to look at the transcripts and then submit, when we submit the final exhibits to you, the shortened version of that Exhibit 78, if that's okay with Your Honor.

THE COURT: Yeah. That's fine. When you do so, will you just make sure that you make a notation as to whether the intervenors agree that — I know that they object to them all, but that they agree that those are ones that I've otherwise held —

MR. OLSON: Yeah.

THE COURT: — admissible, et cetera.

MR. OLSON: Yeah. Great. We will do that.

THE COURT: Without waiver, Mr. Gessler, all the arguments you've made about January 6.

MR. GESSLER: Thank you, Your Honor.

MR. OLSON: Secondly, just a clean—up on the transcript. When we qualified Dr. Simi as an expert, I think the transcript reflects his testimony — he was admitted as an expert on political extremism "excluding" a bunch of specific things, and [p.270] I think it should say "including."

I offered him as an expert on political extremism, including how extremists communicate, his interpretation of January 6 vis—à—vis his expertise in extremism, and extremism communication. We just want to be clear that that second phrase is part of what he was qualified as an expert on.

THE COURT: So would you say the transcript — you mean do you think it was just mistranscribed or did you misspeak or . . .

MR. OLSON: I think you misspoke, Your Honor.

THE COURT: Oh, I misspoke. Okay. I'm sure I meant to say "including" —

MR. OLSON: Okay. Great.

THE COURT: — because I wouldn't exclude the very things he was going to testify about.

MR. OLSON: Yeah. That — we just wanted to clarify.

And then there are a few portions of admitted documents that Your Honor hasn't seen. Our proposal would be just to call those out in the proposed findings rather than show them to you right now. But we're happy to show them to you right now if you want to see them before we submit the proposed [p.271] findings, but really welcome guidance from Your Honor.

THE COURT: I didn't really follow. So there's . . .

MR. OLSON: A few portions of some admitted documentary evidence —

THE COURT: Okay.

MR. OLSON: — that we have not shown on the screen.

THE COURT: Okay.

MR. OLSON: We would like to reference those portions in the proposed findings of fact. But because it's admitted evidence, our proposal would be just to reference it in the findings of fact rather than show you the documents now, but if you'd like, we can have a slideshow and look at the documents.

THE COURT: No. If the — if what you want to cite in the proposed findings of fact and conclusions of law is from an admitted exhibit —

MR. OLSON: Yeah.

THE COURT: — that we just haven't talked about, I consider that to be evidence —

MR. OLSON: Okay.

THE COURT: — that's been admitted.

MR. OLSON: Great. Thank you. That was our understanding too. Thank you, Your Honor, for the [p.272] clarification.

So now, let me turn to the, I guess, just two documents that we would like to move for admission. Again, these are not objected to.

And just to make it move and be a little more interesting, I'll put the first page of the document on the screen. But I'm not going to walk through the whole document.

The first is Exhibit 30.

THE COURT: Okay.

MR. OLSON: Give me one second, Your Honor.

You would think by Friday we'd have this figured out, so my apologies.

All right. Here we go.

The first, Your Honor, is a — in fact, we move for the admission of the artisanal flowers.

I'm just glad it made it this long.

Thank you very much.

First is Exhibit 30. It's a Government Accountability Office report on the Capitol attack. And we're mainly — exhibit — offering it for —there's a table on page 24 that we'll reference in our findings of fact.

The next is Exhibit 157, which is the [p.273] readout from the teleprompter that Donald Trump saw during the Eclipse [sic] speech. And so this differs from the actual speech in ways that we'll discuss, but this is what was on the prepared remarks for Donald Trump. And if you see at the bottom, it's an official government record from the General Accounting [sic] Office that you'll see along the bottom left.

Turning to the — so we move for the admission of Exhibits 30 and 157.

THE COURT: Okay. So 30 I know has been stipulated to.

Do the — does President Trump object to 157?

MR. GESSLER: Your Honor, we don't. We're going to argue its lack of relevance with respect to weight, but I guess we're — both counsel are following the rule of the big bucket of evidence. And so under that, you know, we'll — we'll argue it has little if any bearing, but as far as its authenticity and to the extent the Court wants to accept its relevance, we don't object.

THE COURT: Okay. So how about the Colorado Republican Party? Any objection to those two exhibits?

MS. RASKIN: No objection.

[p.274]

MR. KOTLARCZYK: No objection, Your Honor.

THE COURT: Okay. So 30 and 157 are admitted.

(Exhibits 30 and 157 admitted into evidence.)

MR. OLSON: Thank you. Now turning to the videos, Your Honor. The first is Exhibit 58.

(Video was played.)

MR. OLSON: And I'll just go through all of the video exhibits and move for the admission at the end, Your Honor, if that's okay.

THE COURT: Okay.

MR. OLSON: The next is Exhibit P—62 —or Exhibit 62, Plaintiffs' Exhibit 62.

(Video was played.)

MR. OLSON: And, Your Honor, this was on August 24, 2020, and you can see at the bottom, a speech at the Republican National Convention.

The next video —

MR. GESSLER: Eric, can I just make a comment on that one?

MR. OLSON: Yeah.

MR. GESSLER: Your Honor, we do not object to this as statements from President Trump. [p.275] What I would ask — and I'll just go through these one—by—one — is that we nonetheless have a right to introduce the entire speech if necessary, because there's a few editing — there may have been a former Colorado Secretary of State wildly applausing — wild applause of his in the background during that convention.

THE COURT: And you want to make sure that that's part of the record?

MR. GESSLER: Exactly, Your Honor. So — but, yeah, we may want to include the entire — or additional portions.

MR. OLSON: Yeah. And we, of course, have no objection.

THE COURT: That's fine.

MR. OLSON: Yeah. And the first one we watched was May 8 — P—58 was a May 8, 2019, speech in Florida, in the Florida Panhandle.

The next is P—64 — Plaintiffs' — or Petitioners' Exhibit 64.

(Video was played.)

MR. OLSON: And this was — P—64 was on 23
September 23, 2020.

Our next video is P—67 from November 1, 2020, in Michigan. And this speech is referring to [p.276] the Trump train with a bus. I can show the setup video that Trump had retweeted if you'd like, Your Honor. This was — the truck surrounded the Biden bus on the Texas interstate, then Trump retweeted the video.

THE COURT: Have I seen that?

MR. OLSON: Yes, but let me show it. It's P—71. I'll start with that. So this is a tweet — this is a video that Trump retweeted.

(Video was played.)

THE COURT: Well, I had missed what was actually happening, so thank you.

MR. OLSON: You're welcome. And so, if
you recall, he retweeted that video saying — "I love Texas" was on top.

And then this is a video in Michigan shortly after this event where he talks about this event. It's Exhibit P—67.

(Video was played.)

MR. OLSON: The next video is from Miami, Florida, October 23, 2015, Petitioners' Exhibit 127.

(Video was played.)

MR. OLSON: The next video is Exhibit —Petitioner Exhibit 134 from a CNN town hall. We'll [p.277] provide the date shortly. I don't have that on my notes.

(Video was played.)

MR. OLSON: And, Your Honor, Mr. Murray informs me this is from May 10, 2023.

And our last video is from an August 9, 2016, speech in Wilmington, North Carolina.

THE COURT: Okay. What number?

MR. OLSON: 159.

(Video was played.)

MR. OLSON: And, Your Honor, this — it goes on, but the portion that we wanted to introduce was the portion on the Second Amendment piece.

So those are the videos that we'd like to move into evidence: Petitioners' Exhibits 58, 62, 64, 67, 127, 134, and 159.

THE COURT: Any objection, Mr. Gessler?

MR. GESSLER: Your Honor, for the record, you know, we always have objections on relevance, but for the standards before this Court, we recognize any of those objections go to the weight. We're not going to dispute the authenticity or, you know, the admissibility in that sense, Your Honor.

THE COURT: Okay. The Republican Party?

MS. RASKIN: No objections.

[p.278]

MR. KOTLARCZYK: No objection, Your Honor.

THE COURT: Great. So 58, 62, 64, 67, 127, 134, and 159 are admitted.

(Exhibits 58, 62, 64, 67, 127, 134, and 159 admitted into evidence.)

THE COURT: And had 71 already been admitted, the Biden bus one?

MR. OLSON: Yes. It had already been admitted.

THE COURT: Okay.

MR. OLSON: And with that, subject to submitting the revised Exhibit 78, which is the findings from the January

6 committee, I think that's the evidence that we plan to present in this hearing. Thank you very much, Your Honor.

THE COURT: Okay.

MR. GESSLER: Thank you, Your Honor. We have three additional exhibits that I believe petitioners have agreed to — or agree to the admissibility of as well.

First is the full video exchange for the presidential debate involving Proud Boys. So we'll play that very briefly.

THE COURT: Okay.

[p.279]

MR. GESSLER: 1083, please.

THE COURT: And do we have an exhibit number for this?

MR. GESSLER: That's 1083, Your Honor.

THE COURT: Okay.

(Video was played.)

MR. GESSLER: Your Honor, I don't mean to interrupt this argument, but we're seeking — we don't need to listen to any more. It's for that relevant part that we had there, but it will be the entire — that portion of the video.

Next is a transcript from this same debate. This is the full transcript. We're only seeking to introduce it for purposes of the portion of that Proud Boys — I'll call it the Proud Boys exchange that you just saw.

THE COURT: And that is what number?

MR. GESSLER: And that's Exhibit 1080.

THE COURT: Okay.

MR. GESSLER: And then lastly, there's a transcript of President Trump's remarks the day after — and that's Exhibit 1081 — before a Marine One departure. We're not able to locate a video. We're not really sure it exists.

THE COURT: The day after what?

[p.280]

MR. GESSLER: The day after the Proud Boy debate exchange.

And if you could scroll down a little bit, please.

Okay. And the question is "Mr. President, can you explain what you meant last night when you said that the Proud Boys should, quote, stand back and stand by?

"The President: I don't know who the Proud Boys are. I mean, you'll have to give me a definition because I really don't know who they are. I can only say they have to stand down, let law enforcement do their work. Law enforcement will do the work more and more. As people see how bad this radical liberal Democratic movement is and how weak —the law enforcement is going to come back stronger and stronger.

"But again, I don't know who Proud Boys are. But whoever they are, they have to stand down. Let law enforcement do their work."

And then it goes on a little bit. But

that's what we'll be seeking to introduce our — we seek to introduce as well. And that's Exhibit 1081.

THE COURT: Okay.

MR. GESSLER: And with that, Your Honor, [p.281] we rest with respect to our evidence as well.

While I have the podium, I know that there's a standing order or request from the Court within two days of the close of evidence to provide arguments to whether 113 has to be decided within two days. I believe we've discussed that but I just, from a housekeeping standpoint, want to do — to point that out. And I think that was your order of October 2, which was about a lifetime ago.

I assume we have resolved that, but I at least wanted to draw it to your attention from a formal standpoint.

THE COURT: Okay. So 1080 — well, first of all, do the petitioners object to 1080, 1081, and 1083?

MR. OLSON: No, Your Honor.

THE COURT: Republican Party?

MS. RASKIN: We do not object.

THE COURT: Secretary of State?

MR. KOTLARCZYK: No objection.

THE COURT: Okay. So 1080, 1081, and 1083 are admitted.

(Exhibits 1080, 1081, and 1083 admitted into evidence.)

THE COURT: On the issue of [p.282] Section 1—1—113, the hearing is now concluded. It will be continued until oral arguments on November 15. I think it was at 3:00, from 3:00 to 5:00 — for closing arguments from 3:00 to 5:00?

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

THE COURT: And everybody believes that that's enough time to conclude the closing arguments?

MR. GESSLER: I don't know if there's ever enough time, Your Honor. But, I mean, I think both counsel are prepared to make their case with an hour of time allotted to them. At least we are. I assume the sage and concise counsel on the other side are as well, Your Honor.

MR. GRIMSLEY: We will be.

THE COURT: Okay. So on the proposed findings of fact, which are due on November 8, just a few comments.

All the proposed — all the propose findings should have cites either to the record or to the law. If possible, the Court would appreciate receiving just full transcripts for the days versus clips of what's being cited. So if that can be

24 arranged, that would be helpful.

This is specifically to you, [p.283] Mr. Gessler. Can you please put your citations in the text and not in footnotes?

MR. GESSLER: Yes, Your Honor. We'll abide by that guidance.

THE COURT: Well, the hope is is that I'm going to cut and paste them, and it's hard to do with the footnotes.

MR. GESSLER: I understand. No problem, Your Honor.

THE COURT: So it's to your benefit. To that end — to that end, if the parties could please try to avoid rhetoric in the proposed findings of fact and conclusions of law. The idea and hope is that I'm going to use them, and if they're very argumentative, that's difficult to do.

So if you can just lay out the case —the facts that you think have been established and the law that you think you have applied in a manner in which a Court might rule, that would be the most helpful to me, especially given the limited time that I'm going to have between submission and November 17, which is when the time will talk — the time will —when my rulings are going to be required to be submitted under the 1—1—113.

And if you can — I'm not going to make page limitations, but I just request that people be judicious with length so that I have time to actually process them, read any cases I haven't already read, et cetera, in the limited time between November 8 and November 17.

And then I just want to make sure. So first of all, Mr. Kotlarczyk, do you anticipate that the Secretary of State will be making any proposed findings?

MR. KOTLARCZYK: I do, Your Honor.

THE COURT: Okay. And will they just be on very discrete issues?

MR. KOTLARCZYK: Your Honor, we haven't had a chance to fully confer with my client since we're concluding the hearing now, but I would anticipate proposed findings specifically around Ms. Rudy's

testimony, documentation practices at the Secretary of State's office, and some of the legal issues that I think we've briefed previously.

THE COURT: Okay. So if you could just try to — that's fine. I'm — I just don't — I just don't want a lot of duplication. But I understand that you're kind of a lone wolf in this process. And so if you can just do as everybody else is and try not to make them too long, that would be great.

[p.285]

MR. KOTLARCZYK: I would wager, Your Honor, than mine will be substantially shorter than other parties in the case, but there are some important institutional interests that the Secretary of State wants to vindicate through this process.

THE COURT: Well, and I'm absolutely not — she's the respondent in the case. She obviously has the right to submit proposed findings of facts and conclusions of law, so . . .

MR. KOTLARCZYK: Thank you.

THE COURT: Okay. And can the Republican Party and President Trump coordinate and submit one set?

MR. GESSLER: I think this would be the first time in history that President Trump and the Republican Party have stated in court that they will cooperate. But we will do that, Your Honor. Of course.

MS. RASKIN: Yes. We can do that.

THE COURT: Okay. Great. So I will expect to see three submissions. No page limits, but just please don't go overboard.

MR. GESSLER: Your Honor, would you like us to coordinate so that we have a unified submission on behalf of President Trump and the Colorado [p.286] Republican Party?

THE COURT: Yeah. That's what I — I'd like —

MR. GESSLER: Okay.

THE COURT: — one submission —

MR. GESSLER: Okay.

THE COURT: — if possible.

And then on the exhibits, you need to —you're going to have to submit all the exhibits that have been offered and not admitted — I'm not sure if there are any. But if you've offered them and I excluded them, they need to be submitted as that with a cover pleading.

And then if they've been offered and admitted, they need to be under a separate pleading, and they need to be submitted. And this is online.

Understanding that the videos are going to probably have to be, you know, like, a page, like, video, submit it to the clerk's office separately or something like that. But in order to have a clear record, you're going to have to do that on the judicial electronic filing system.

And then I think the best thing to do is for the videos if each side can submit the videos that were both admitted and offered and not admitted on, [p.287] like, flash drives so that the clerks — and the clerk's office, I believe, will accept that that way. But showing them to me or handing them to me doesn't cut it and won't make it to the Supreme Court if and when this gets appealed.

MR. OLSON: Just one question on that, Your Honor.

Is it your — it's a little complicated here because we have the anti—SLAPP motion. We filed a bunch. The was a motion practice for the admission of evidence before it was officially offered in court.

So for the exhibits offered but not admitted, just confirming for us, that includes information that we tried to use on the anti—SLAPP motion that you then

said you would not admit into evidence? Or is it just what happened this week in terms —

THE COURT: So, I mean, did the anti—SLAPP motion include videos and stuff?

MR. OLSON: The anti—SLAPP motion, I don't — it referenced videos. I don't know that we included videos.

MR. GRIMSLEY: I think we did.

MR. OLSON: Oh, we did. Okay. Yes, it did include videos.

[p.288]

THE COURT: Okay. So the extent that the — those exhibits — the ones that you filed, that's fine. If you — if you were — if part of the support for the anti—SLAPP motion was videos, then those should probably be submitted to the clerk's office as the videos in support of the anti—SLAPP motion.

MR. OLSON: All right.

THE COURT: And then, in my view, this is totally different. And so any videos — any exhibits or videos that were presented and admitted in this hearing need to be separately submitted.

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

And then just on the transcripts, would you like the transcripts with the filings on Wednesday? I think we're going to receive the final ones on Monday. Would you like them on Monday or do you want to wait with the — when we submit our proposed findings of fact and conclusions of law on Wednesday? And do you have a particular format that you prefer them in?

THE COURT: No.

MR. OLSON: Okay.

THE COURT: Not for format. And I plan [p.289] on spending Monday, Tuesday, and Wednesday catching up on my other —

MR. OLSON: Okay.

THE COURT: — 199 cases and probably reading some of the case law and things that have been talked about during the course of the trial. So we'll have plenty to do.

MR. OLSON: Great. Thank you, Your Honor.

THE COURT: Anything from you, Mr. Gessler?

MR. GESSLER: No, Your Honor.

MR. GRIMSLEY: Sorry. One last thing, Your Honor. And I think we forgot sometimes that the Secretary of State and the Republican Party are parties here. So in the closing arguments, I still assume two hours will be fine, but if we find out they have robust closing arguments they'd also like to present, we may get back to you.

MR. KOTLARCZYK: I don't anticipate robust closing arguments, Your Honor. If they're mindful of the Court's advisement that we are on the same clock, in advance of the 15th, we will huddle internally and I'll confer with the petitioners if we want to take any of their time.

[p.290]

THE COURT: Okay. And why don't you —you know, if you huddle and they say, "We really need the full hour," and you need 20 minutes of your own —and that goes the same for the Colorado Republican Party. If you feel like you've got something that you need to say outside of what President Trump is saying and you need a little bit of extra time, just get in touch with us so that we can — you know, we can start a half hour earlier if we need to.

MR. KOTLARCZYK: Understood.

THE COURT: I don't want to deprive you of making your arguments.

MR. KOTLARCZYK: Thank you, Your Honor.

THE COURT: Anything else that we need to address?

MS. RASKIN: Not from us, Your Honor.

THE COURT: Well, I want to thank everyone. It's been super helpful. And I really want to — I thank everybody, that I appreciate the decorum that the parties have had throughout these entire proceedings.

I know that this case, like all cases, but maybe particularly, is very deeply felt on both sides. And despite those deep feelings, I feel like the counsel for the parties has been very, very [p.291] professional and has put on a really outstanding presentation of the evidence and the arguments.

So we will continue this hearing until either 2:30 or 3:00 on November 15.

WHEREUPON, the foregoing deposition was concluded at the hour of 4:46 p. m. on November 3, 2023.

DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO
1437 Bannock Street
Denver, Colorado 80203

Case Number 2023CV032577, Division/Courtroom 209

CERTIFIED STENOGRAPHER'S TRIAL TRANSCRIPT
TRIAL DAY 6: November 15, 2023
NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN,
Petitioners,
v.
JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and
DONALD J. TRUMP,
Respondents,
and
COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, and DONALD J. TRUMP,
Intervenors.

The trial in the above—entitled matter commenced on Thursday, November 15, 2023, at 3:05 p.m., before the HONORABLE SARAH B. WALLACE, Judge of
the District Court.

This transcript is a complete transcription of

the proceedings that were had in the
above—entitled matter on the aforesaid date.
Stenographically reported by:
Reported by K. Michelle Dittmer, RPR
[p.2]
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[p.3]
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[p.6]
PROCEEDINGS

WHEREUPON, the Court convened at 3:05 p.m., and the following proceedings were held:

THE COURT: Good afternoon. Welcome back.

We are here for the continued Colorado Revised Statute 1—1—113 hearing in the matter of Anderson vs. Griswold, with the intervenors, the Colorado Republican State Central Committee and Donald J. Trump, Case Number 2023—CV—32577.

May I have entries of appearances, starting with the petitioners?

MR. GRIMSLEY: Your Honor, Sean Grimsley, with Eric Olson, Jason Murray, Martha Tierney and Mario Nicolais for petitioners.

THE COURT: Great.

MR. GESSLER: Afternoon, Your Honor. On behalf of President Trump, Scott Gessler. With me is Mr. Geoff Blue and Mr. Justin North.

MR. SISNEY: Good afternoon, Your Honor. I'm Ben Sisney. I'm here with Nathan Moelker in person. Jane Raskin, also with the American Center for Law and Justice, is here remotely. Also here with Michael Melito, Melito Law, and Bob Kitsmiller of Podoll & Podoll.

THE COURT: Great. Thank you.

[p.7]

MR. KOTLARCZYK: Good afternoon, Your Honor. Michael Kotlarczyk from the Attorney General's Office here on behalf of respondent, Jena Griswold. With me today is Secretary of State Jena Griswold and Deputy Secretary of State Christopher Beall.

THE COURT: Great.

Have we, among counsel, talked about the order? I'm assuming we're starting with the petitioners, and then what's next?

MR. GRIMSLEY: I would assume that the Secretary of State would go next because I would imagine that the intervenors would probably want to respond.

THE COURT: Okay. Does that work for you, Mr. Gessler?

MR. GESSLER: That works fine, Your Honor.

And then we just had one question for the — for the time allotment. Do the — does President Trump and the Colorado Republican Party, do they split it or does the Colorado Republican Party get — I think they have maybe 10 minutes of additional time.

THE COURT: I'm not going to cut anybody off, so let's just proceed.

MR. GESSLER: Okay. Well, then, with [p.8] that, we'll probably ask the Colorado Republican Party to go first because they have some airline transportation issues.

THE COURT: Oh.

MR. GESSLER: And then — and then we'll bat cleanup.

THE COURT: Nothing for me to decide on the airline transportation issues, I hope?

MR. GESSLER: We could have that jurisdictional discussion, but I'm not sure that would work. But yeah, they have a flight to catch.

THE COURT: Okay.

MR. GRIMSLEY: And, Your Honor, may I reserve time for rebuttal given that this is a closing argument?

THE COURT: Sure. So why don't we do it this way. Mr. Kotlarczyk already asked for ten minutes, and we'll give approximately ten minutes to the Republican Party, and then up to an hour each for Intervenor Trump and

the petitioners. And if you want to reserve time, that's fine.

MR. GRIMSLEY: We'll see. We'll see where I'm at at the end of the opening of the closing argument.

THE COURT: Do you need us to keep time or —
[p.9]

MR. GRIMSLEY: I can keep it.

THE COURT: Okay.

MR. GRIMSLEY: Good afternoon, Your Honor. I'm sure I speak for everybody here, but on behalf of petitioners, I wanted to thank the Court and the court staff for all of the time and attention that you have put in on this matter, the speed and thoughtfulness with which you have issued your rulings, all while under the brightest of spotlights. We really thank you.

I wish we didn't have to be here. We're here because for the first time in our nation's history, a President of the United States has engaged in insurrection against the Constitution. He spearheaded a multifaceted scheme to stay in power by any means necessary, the scheme culminating in a violent attack on the Capitol on January 6, during the constitutionally mandated counting of electoral votes, and now he wants to be President again.

The Constitution does not allow that.

It's easy to forget that we are governed by a document. There is real fragility to that. The document has no weapons. It commands no armies. Section 3 of the Fourteenth Amendment is one of the few self—defense mechanisms that that document has.

And it stands for the unremarkable [p.10] proposition that a person who takes an oath to support the Constitution and then turns around and attacks it cannot be allowed to take the oath a second time.

Such a person has proven themselves untrustworthy and incapable of ensuring that we remain a country ruled by law and not by men. Through his actions, and his actions alone, Donald Trump has disqualified himself from ever holding office again.

I've got some slides here. I also have a board over here, Your Honor. I'm sorry I had to put it way over there. I didn't want to block anybody.

This is a slide that we used in opening. I've tweaked it a little bit. These are the four elements that we said that we would prove and that we have proven. I'm going to talk about the first three today. I understand the Secretary of State is going to talk about the fourth one. And over here, again, we have a board, and I'll be referencing that.

The first element, that President Trump took an oath as an officer of the United States to support the Constitution. There is no dispute that President Trump took an oath. There's a stipulation to that. We all know that.

Now, President Trump, I expect, is going to argue that he was not, as President, an officer of the [p.11] United States or that his presidential oath was not one to support the Constitution. I'll address those incorrect arguments later.

Element 2. January 6 was an insurrection against the Constitution. And there really isn't that much in the way of dispute here, either. That's likely why President Trump waited until the very end of a 177—page findings of fact and conclusions of law to make the argument.

And like I said, we have a board, Your Honor. Over on this board is the standard — and I'll — for both insurrection against the Constitution and engaging in

that insurrection. These are the standards that were put forth by our expert, Gerard Magliocca.

So for insurrection against the Constitution, that is any public use of force or threat of force by a group of people to hinder or prevent the execution of the Constitution.

Now, Trump's expert, Delahunty, offers no alternative definition. He instead argues that insurrection against the Constitution is somehow so ambiguous that this Court needs to defer to Congress.

Delahunty is wrong. He is wrong that ambiguity, even if it existed, would require this Court [p.12] to throw its hands up. It is the Court's fundamental duty to interpret the Constitution and say what the law is. But there is no ambiguity. The historical evidence on this is clear.

Now, before we get to the battle of the experts and what they said on the historical evidence, I want to look at their qualifications because this probably says all you need to know.

On the left we have Gerard Magliocca, who was a fan of the Fourteenth Amendment Section 3 before it was cool to be, and then we have Delahunty on the right.

On the left, we have a professor who has not only been a constitutional scholar for over 22 years, written books and law review articles, but he has two peer—reviewed articles on Section 3 and a book on the Fourteenth Amendment.

He has Section 3 literature that's been cited by two Federal Courts, the Congressional Research Service, and he has testified and been found to be an expert before this case in court on Section 3 of the Fourteenth Amendment.

Delahunty, by contrast, one of the first answers on cross—examination was that he was not claiming to be an expert in the history of Section 3 of the Fourteenth Amendment.
[p.13]

Now, the historical evidence in support of Professor Magliocca's definition is just as clear as the qualifications when you look at the balance.

So Professor Magliocca points to a number of historical sources, the Whiskey and Fries Insurrection, which would have been well—known at the time of the framing, dictionary definitions of insurrection, jury and grand jury charges, and the code of war that was used by the Union Army during the Civil War.

And again, on the right—hand side, what do we have? Delahunty asking this Court to throw its arms up because insurrection is somehow too ambiguous.

Magliocca is correct.

The January 6 events easily meet the definition of insurrection against the Constitution. There was a large group of people that attacked the Capitol on January 6.

This is from Officer Danny Hodges: "There were thousands, I would say." "The size of the mob was the greatest weapon," and that's, on the right, a photo still from the video — from the camera atop the Capitol that day.

Here's testimony from Officer Pingeon: "There were thousands of people coming towards the [p.14] Capitol along Pennsylvania Avenue." So it wasn't just the folks who were at the Capitol to begin with. There were thousands coming up from the Ellipse at the behest of President Trump. The mob used violence and threats of violence. This is from Officer Danny Hodges: "The crowd

attacked me in a variety of ways, punching, kicking, pushing, chemical irritants, beaten in the head. I was pinned and crushed with a police shield." And we know what that video was.

(Video playing.)

MR. GRIMSLEY: This is from Officer Hodges' body cam outside the Capitol, and this, even worse, somebody's phone inside.

(Video playing.)

MR. GRIMSLEY: And this from Officer Pingeon:

"How long were you engaged in hand—to—hand combat?"

"For probably two to three hours."

"Did you think your life was in imminent danger?"

"Yes, I did."

And it wasn't just violence against the [p.15] police officers. It was the threat of violence against members of Congress and Vice President Pence.

Here is testimony from Representative Swalwell:

"How concerned were you for your personal safety at that moment?"

"It was escalating as we went from gas masks to a pen in my hand to a prayer from the chaplain, and it was when the chaplain read that prayer that I finally texted my wife something I did not want to text her."

And we know what the mob was doing inside the Capitol. This is the mob —

(Video playing.)

MR. GRIMSLEY: — chanting "Nancy," looking for Nancy Pelosi. That is violence and the threat of violence.

Finally, it's clear that the mob's goal and what it did, in fact, do was to disturb a constitutionally mandated proceeding; namely, the counting of electoral votes.

This is testimony from Representative Ken Buck, who was President Trump's witness:

"The mob meant to disturb a proceeding?"

"Yes, the electoral vote count on the [p.16] House."

And the mob did, in fact, disturb that proceeding.

Now, Delahunty suggests that one of the reasons insurrection against the Constitution is ambiguous is because "against the Constitution" is somehow ambiguous. There's a slippery slope here. How do we know at the end of the day what "against the Constitution means."

But this Court doesn't have to engage in fine—line—drawing exercises. There is no doubt that the counting of electoral votes to ensure the peaceful transfer of power under the Constitution is interfering with, hindering, and preventing the execution of the Constitution.

Now, President Trump makes a few arguments about why this is not an insurrection. First, the mob was not organized. Somehow that makes it not an insurrection.

The mob was not armed with guns.

And, most curiously, the people at the Ellipse were happy and milling around, so too at the Capitol.

These are not credible arguments. First, there is no organizational requirement in that definition [p.17] over there, but the mob was organized. Let's look again at some testimony.

This from Officer Pingeon: The equipment that people had on: helmets, goggles, body armor, paramilitary—style gear and equipment.

And on the right you have photos, one from Nate Gowdy and the other a still from the body camera of Officer Hodges.

Then we have video.

(Video playing.)

MR. GRIMSLEY: Coordinated attack on the Capitol working together to try and get in to the portico on the right side where all of those officers are.

"Fight for Trump. Hand up the flag, use it as a battering ram."

And you remember when Officer Hodges was testifying about fighting with the crowd and how a person came up to him and said, "You need to watch out, people are coming up from the back"?

Here's what Officer Hodges had to say: "This indicated to me that there was preplanning, coordination, and that they were intentionally encircling the U.S. Capitol."

And then finally, the January 6 Report, this is Finding 367. And there are many findings like [p.18] this in the report, that this was an organized attack. "While the Proud Boys and other extremists were overwhelming law enforcement at the West Plaza, another group led the attack on security barriers on the East Plaza. A military—style stack of Oath Keepers entered through the Columbus doors as well. This was a coordinated attack."

Now, as to the assertion that there were no arms so this shouldn't be an insurrection, again, there's no requirement for there to be arms to be an insurrection. But there were arms.

As we point out in our Proposed Findings of Fact 119, the mob brought guns, knives, Tasers, sharpened flagpoles, scissors, hockey sticks, pitchforks, bear spray, pepper spray, chemical irritants.

They stole items from the Capitol to use as weapons: Police barricades, scaffolding, construction equipment, trash cans.

They took items off of police officers: Batons and riot shields.

They were armed.

And third, as I said most curiously, the idea that people were happy and milling around. You know, there may have been some Tom Bjorklunds, or Steves, at the event does not change the fact that a large group [p.19] of people attacked the Capitol that day.

The fact that Amy Kramer believed that many of the people at the Ellipse were happy and festive does not change the fact that, A, she didn't even go to the Capitol; she went back to the Willard.

But even when she was at the Ellipse, she could not see out beyond the magnetometers where the people were not so happy.

(Video playing.)

MR. GRIMSLEY: That is almost certainly why what I've just gone through, in the immediate aftermath of January 6, there was bipartisan agreement in both the House and the Senate that the January 6 attack was a violence insurrection.

Indeed, President Trump's own lawyer said as much at the impeachment proceeding.

Element 3. Trump engaged in the insurrection.

Now, I point back to the board again, and we have on it Professor Magliocca's proposed definition of what constitutes engaging in an insurrection against the Constitution: Any overt and voluntary act in furtherance of an insurrection against the Constitution, including

words of incitement, done with the intent of aiding and furthering the common unlawful purpose.
[p.20]

Now, here the dispute between Magliocca and Delahunty is — really comes down to one thing, and that's what Delahunty says: In order to engage, you have to have actually taken up arms, that incitement is not enough.

But Magliocca again has the better of the argument. Here we have the comparison, again on the left, Magliocca. He's got the first and second Attorney General opinions. Now, those are significant because A.G. Stanbery was the person interpreting and guiding the Union Army in the south on what the — conduct would satisfy the disqualification provisions of Section 3.

There were early Section 3 cases in which this was the definition of insurrection, that it did not require actually taking up arms.

There were the pre—Civil War cases, and these are particularly instructive because there, treason was at issue, levying war. In those cases, incitement was sufficient.

And then there were the congressional cases, you'll remember, where the House refused to sit certain members. One of them was the man John Brown — Young Brown from Kentucky who wrote an op—ed.

The other was, I think, Philip Thomas from Maryland, who gave $100 to his son, who was going off to [p.21] join the Confederate Army. There is no requirement that one actually take up arms.

The only thing Delahunty has on his side is the Confiscation Acts, which were a criminal statute at the time that made it illegal to engage in or incite an

insurrection. He says because incite was used there, wasn't used in Section 3, that it must not be part of Section 3.

But he ignores that that's a criminal statute. Those are often far more specific than the Constitution, as Magliocca testified. Otherwise, we'd have a 100—page—long Constitution.

But more than that, he provides absolutely no evidence, contrary to what you see on the left, that anybody who is drafting Section 3 believed that incitement was somehow insufficient.

He's pointed to no evidence suggesting that anyone drafting Section 3 was relying on the Confiscation Acts.

And he never explains why it would make sense, given the goal of Section 3, to require taking up arms. The people that the framers of Section 3 were most concerned with were the leaders of the Civil War, of the Confederacy, Jefferson Davis, people who never took up 25 arms.

[p.22]

That's why even in 1872, when Congress gave blanket amnesty from Section 3 to most Confederate soldiers, it withheld that amnesty from the leaders of the Confederacy, including Jefferson Davis. There's no requirement that somebody actually take up arms. Incitement is more than sufficient.

Trump's actions constitute engaging in an insurrection again the Constitution. Now, there is no question at all that he took many overt and voluntary acts that furthered the insurrection. He summoned the mob to DC.

This is a slide we used in opening, and it shows all of the tweets that he sent out between December 19, "Will be wild," and his Fight for Trump video and January 6.

But he also gave them their common purpose, and this is a slide we have not shown. And believe it or not, this is not all the tweets that he sent out dealing with election fraud.

But from November 4 to January 6, he sent out all these tweets, he made numerous speeches where he claimed there was election fraud, repeated assertions of a stolen election.

Now, beyond that, he focused his supporters and the mob's attention on Vice [p.23] President Pence. Here's just one example of a tweet. This is from the morning of January 6: "States want to correct their votes which they now know were based on irregularities and fraud. All Mike Pence has to do is send them back to the States and we win. Do it, Mike. This is a time for extreme courage."

And we know that after that tweet, President Trump spent 90 minutes on the Ellipse inflaming his supporters, telling them that they needed to fight or they would not have a country anymore. Telling them to march down to the Capitol, where he would be there with him — with them.

I'm not going to play the speech. We played the speech a bunch of times, but I'm just putting up here some of the things that were contained in that speech:

"You don't concede when there's theft involved. Our country has had enough. We will not take it anymore. Because if Mike does the right thing, we win the election. If this happened to the Democrats, there'd be hell all over the country going on. And we fight, we fight like

hell, and if you don't fight like hell, you're not going to have a country anymore."

And most chilling of all: "And fraud breaks up everything, doesn't it? When you catch [p.24] somebody in a fraud, you're allowed to go by very different rules, so I hope Mike has the courage to do what he has to do, and I hope he doesn't listen to the RINOs and the stupid people that he's listening to."

What could that mean, other than a call to lawlessness or violence. You go by very different rules.

Now, you don't need to take my word that this was a call for violence or lawlessness. Professor Simi came in and testified. He was an expert and is an expert on political extremism, including how extremists communicate. And, in fact, this Court qualified him as an expert to testify on his interpretation of January 6 vis—a—vis his expertise in extremism and extremist communications. Here's what he had to say about the Ellipse speech: "It was a call to violence."

Now, Trump asserts his language was not a call to violence. He was just using strong political rhetoric. The word "fight," even though he used it 20 times, was just metaphorical. He said peacefully and patriotically once, so how on earth could he possibly have been encouraging violence or lawlessness.

Well, Professor Simi explained why. Trump did not conjure his rhetoric out of nowhere. He did not just happen to choose language that would resonate with [p.25] his far—right extremist supporters. He knew precisely what he was saying based on a five—year history of call and response, where he would either call for violence and then not condemn it, or there would be violence and he would actually praise it.

Now, you recall that my colleague, Eric Olson, during the redirect had the flip chart, and he wrote up some of the episodes of the call and response, and there were about five there. There are a lot more than that, and we put that in our proposed findings of fact. But I want to go over it quickly just so Your Honor can see.

So 2015, October, he starts saying —these are protesters — first group, he's going to be kind of nice to; second group, eh, not so nice; third group, I'll be a little more violent; fourth group, "Get the hell out of here."

November of 2015. "Get the hell out of here." And that's a protester who actually then got beat up, assaulted, and President Trump goes on the news, I think it was the next day, and saying maybe he deserved to be roughed up.

February 1, 2016: Somebody throws tomatoes, "Knock the crap out of him. I'll pay for your legal bills." [p.26]

February 22, 2016: "Punch him in the face."

March 11, 2016, in response to violence that his supporters had committed in his name: "Violence sometimes is very, very appropriate," what he said, and he said, "We need a little bit more of it."

On August 9, 2016, he's complaining at a rally about how Hillary Clinton will appoint judges who will take Second Amendment rights away, telling the crowd that if she does that, there's nothing that can be done, except maybe the Second Amendment people can do some thing about it.

And then August 15, 2017, this is the "very fine people on both sides," the press conference after the Unite the Right rally, where somebody was killed by a far—right—wing extremist.

I want to stop here for a minute because President Trump, I suspect, and has already, is going to say that we're cherry—picking here, that we're just looking at what he said at the press conference and we're not pointing out what he said the day before at the White House condemning these people.

But I want to show you what couldn't be a clearer example of what Professor Simi called front—stage and back—stage behavior. Front stage, you tell people [p.27] what you know you're supposed to say, you don't really believe it. Back stage, you're telling people what you really think. So let's look at these two statements.

(Video playing.)

MR. GRIMSLEY: And here's the next day.

(Video playing.)

MR. GRIMSLEY: You have what Trump really believes clearly on the right and teleprompter Trump on the left.

It's not surprising then that after the press conference, leading lights in the white supremacy movement actually publicly thanked Donald Trump for his statements. David Duke; longtime neo—Nazi Klansman Richard Spencer; Andrew Anglin, the founder of The Daily Stormer, which is some horrific media board that deals in anti—Semitic and other xenophobic tropes.

So back to the call and response. He praises, in October of 2018, a politician who body—slammed somebody, a reporter, I think.

Somebody at a rally in May of 2019 says to shoot migrants. Makes a joke, says, "You can only get away with that in the Florida Panhandle."

Michigan, some far—right extremist supporters stormed the Michigan Capitol and I think were squatting there. And rather than condemn them, he writes [p.28] a tweet: "The governor of Michigan should give a little and put out the fire. These are very good people. See them, talk to them, make a deal."

Then there were the protests in Minneapolis after the George Floyd murder. And President Trump says, "When the looting starts, the shooting starts."

On September 29, 2020, "Stand back and stand by," to the Proud Boys.

October 30, there's the Trump Train that surrounds the Biden—Harris bus in Texas, slowing it down, pushing it off the road, injuring people. And rather than condemn it, President Trump says, "I love Texas" and jokes that they were just protecting Biden's bus because they're so nice.

And then we have, as we all remember, after the election, December 1, 2020, election official Gabriel Sterling making a public statement, calling on President Trump to condemn his supporters who are threatening election workers in Georgia.

He says that: "Somebody's going to get hurt, somebody's going to get killed. President Trump, please do something."

Now, did President Trump condemn them? No. Did he do nothing? No. He retweets it and doubles [p.29] down on his claims of election fraud. He is, I wouldn't even call it tacitly, approving of what his supporters are doing and what prompted Gabriel Sterling to give his message.

The Ellipse speech fits this pattern to a T. As Professor Simi explained, "Trump used so many right—

wing extremist tropes that it's simply not credible for him to assert that his words were not a call for violence or lawlessness, or that Trump didn't know what he was saying, or that people in the crowd didn't know what he was saying."

And if there's any doubt about what Trump was saying that day, his former campaign manager, Brad Parscale, put it to rest. This is a text exchange between Katrina Pierson, one of Trump's witnesses here, and Brad Parscale, on January 6:

Parscale: "A sitting President asking for a Civil War."

That's how people that knew Trump took what he said that day.

Now, Trump's speech did not end his involvement in the insurrection. By 1:21 p.m., he knew that there was an attack on the Capitol. Rather than do anything, he chose to let that attack go unimpeded.

Now, you heard from Professor Banks, who [p.30] told you all of the different things that somebody as Commander in Chief could have done that day to put down the attack. Trump did none of those things.

Instead, an hour later, he sent out this tweet, 2:24: "Mike Pence didn't have the courage to do what should have been done to protect our country and our Constitution, giving the states a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth."

Now, remarkably, nowhere in his 177—page findings of fact and conclusions of law does President Trump mention this tweet. Certainly doesn't give an innocent explanation for it. Because there is none.

But simply ignoring the evidence won't make it go away. The tweet had its predictable effect. It caused the crowd to surge. This is Finding 150 from the January 6 Report, and immediately after President Trump sent his tweet, the violence escalated.

And on the right we have a time—lapse photo or video from the top of the Capitol. This is 2:24, 2:34, ten minutes later, 2:44, 2:45. And then I think that's 2:57.

Given all of this, there's no question [p.31] that Trump committed overt acts in furtherance of the insurrection.

Oh, these are the two tweets that he does cite in his findings of fact and conclusions of law. This is the 3:38 — or the 2:38 tweet and the 3:13 tweet, which he says somehow absolve him of his conduct that day because he says, "Stay peaceful, remain peaceful."

There are a lot of problems with that argument. First, it doesn't change the 2:24 tweet.

Second, there's nothing in either of those tweets telling his supporters to actually go home, and while he does say "Support law enforcement," he doesn't say support the people that he had sicced the mob on, namely, the Vice President or Congress.

And not surprisingly, those two tweets had absolutely no effect on the mob. Finding 134 from the January 6 Report: "Neither of these tweets had any appreciable impact on the violent rioters."

Given all of this, there is no question that Trump engaged in overt and voluntary acts in furtherance of the insurrection. As Professor Simi testified:

"How confident are you in the conclusion that Donald Trump played a central role leading these events?"
[p.32]

"Very confident."

The only dispute that really may exist on this is whether Trump acted with the requisite intent that day.

Now, the parties disagree about what the intent requirement is for engaging in insurrection and whether — what — to what extent Brandenburg applies coming in from the First Amendment. We addressed those in our briefing, so I'm not going to talk about that today.

I'm just going to assume, for purposes of today's argument, that President Trump's intent standard applies, that the Brandenburg incitement intent standard applies, and the reason I'm comfortable doing that is because the evidence of intent is so overwhelming here.

Trump did not give his Ellipse speech that day in a vacuum. It was the last step in a multipronged attempt to stay in power by any means necessary.

It started back in August of 2020 when the polls didn't look like they were going his way. He starts saying, "The only way we're going to lose is if the election is rigged."

Election night, after Fox News calls Arizona for President Biden, President Trump, rather than go out and concede gracefully, tells America that the [p.33] election is being stolen.

He then turns to the courts, where he files bogus lawsuit after bogus lawsuit, using lawyers like Rudy Giuliani and Sidney Powell to lead the charge. He lost 61 out of 62 lawsuits. The only one that he won in Pennsylvania had no appreciable effect on the outcome of the election.

And he did it all while knowing from his top advisors — this is Finding 36 — that the election fraud allegations were nonsense.

Now, when he summoned the mob on December 19, with his "Will be wild" tweet, he had run out of court challenges. His only hope was this fake elector scheme and stopping the certification of electoral votes.

He hoped Pence would go long. He needed him to go along — that's the only way the scheme works — on January 6, but he needed the mob in DC on January 6 in case Pence was not willing to play ball, in case, to quote Trump from the Ellipse, he needed some courage. Better to have a mob and not need one than to need a mob and not have one.

By late morning January 6 when Trump stepped onto the stage to give his speech, he knew that Vice President Pence was not going to go along. This is [p.34] Finding 321. There was a call in the morning between Vice President Pence and President Trump where Pence told him, "I'm not going along."

Now, given that call, you'd think that maybe President Trump would have revised his speech to focus on the accomplishments of his administration, because at that point, the gig is up, Vice President Pence isn't going to do what he needs to do.

Trump did just the opposite. He amped up his speech. He added stuff to it to inflame the crowd. He added stuff to it to inflame the crowd against Mike Pence.

We've submitted the teleprompter version of the speech, and you can compare it to what he actually said that day. It is a remarkable difference.

This is some of the stuff that President Trump added after speaking with Pence. And most chillingly, again, the last one. "And fraud breaks up everything, doesn't it? When you catch somebody in a fraud, you're allowed to go by very different rules."

At this point, Trump's only hope of remaining in office was violence and intimidation. That was the only thing that was going to stop certification of the electoral votes that day.

Making matters worse, Trump knew that many [p.35] in the crowd were armed. This is Finding 105. President Trump was briefed on the risk of violence that morning. And this is testimony below from Tim Heaphy that came in unobjected to.

"We had testimony that he was told about weaponry, that he actually asked that the magnetometers be moved and saying, 'These people aren't here to hurt me,' " that he waited — "aren't here to hurt me."

He also knew at the time that his supporters would listen to him. This wasn't a lark. He admitted just earlier this year on CNN how his supporters listen.

(Video playing.)

MR. GRIMSLEY: If there was any, again, doubt about his intent that day, you need look no further than what he did after the speech. On the left we have things that Professor Banks say Trump could have done as Commander in Chief to deal with the riot or the attack that day. He did none of them. That was intentional. That was deliberate inaction.

How do we know it was deliberate inaction? This is a tweet he sent out just the day before, January 5, warning Antifa to stay out of Washington: "Law enforcement is watching you very closely." And then he tags the

Department of Defense and all of those [p.36] federal law enforcement authorities.

The fact that he did not mobilize those same authorities when it was his supporters attacking the Capitol makes clear that he supported them and intended for what they were doing — intended for them to do what they were doing.

Now, there was the 2:24 tweet. We've already talked about that. And I want to repeat again, on the 2:24 tweet, there is no innocent explanation for that tweet. Why, when the Capitol is under attack, Congress and Vice President Pence are in that Capitol under duress, you send out that tweet?

He waited another two hours almost before he sent anything telling his supporters to go home, and that was a statement at 4:17 p.m.

Did he condemn — oh, and by the way, it was not until it was obvious to him that the attack would actually fail that he put out this statement. He waited three hours to tell people to go home, and this is a finding from the January 6 Report, Finding 331: "It was not until it was obvious that the riot would fail that he told people to go home."

The fact that he waited until it was obvious that his plan would not succeed tells you everything you need to know about his intent. And when [p.37] he finally did, he didn't condemn the attackers; he praised them.

(Video playing.)

MR. GRIMSLEY: This fits the five—year call—and—response pattern that Professor Simi talked about to a T. Two hours, almost, later, he sends out a tweet — again, not condemning — saying, "Go home with love and in peace, remember this day forever." That's intent.

And I forgot to add earlier that Trump also, while all of this was going on, the attack, rather than do anything to call it off or stop it, he was calling members of Congress to lobby for them to object to the certification of the election. He was taking advantage of the duress he had created by summoning that mob on the Capitol. This is intent.

And if that all were not enough, look no further than what he was telling people while he was at the Capitol that day. This is Finding 150 from the J6 Report:

"Chief of Staff, Mark Meadows, told White House Counsel, Pat Cipollone, that the President doesn't want to do anything to stop the violence. Evidence developed in the Committee's investigation showed that the President, when told the crowd was chanting, 'Hang [p.38] Mike Pence,' responded that 'Perhaps the Vice President deserved to be hanged.'"

And President Trump rebuffed pleas from Leader McCarthy to ask that his supporters leave the Capitol, stating, "Well, Kevin, I guess these people are more upset about the election than you are."

The only reasonable inference from all of this is that Trump intended to incite the attack on the Capitol on January 6 as the final desperate attempt to hold on to power in violation of the Constitution.

Do we really think that somebody who had engaged in that four—month—long scheme, unlawful scheme to prevent the peaceful transfer of power, suddenly found religion that day, that he would somehow stop short of lawlessness and violence?

He had already decided the Constitution was not an obstacle, telling his supporters they could go by very different rules.

And even years later, Trump continues to express his disdain for the Constitution when it stands in the way of his exerting political power.

This is a Truth Social post from December of 2022, where he's still complaining about the fraud. "Massive fraud of this type and magnitude allows for the termination of all rules, regulations, and articles, even [p.39] those found in the Constitution."

This tweet is exactly why we have Section 3 of the Fourteenth Amendment. People who have violated their oath by engaging in insurrection have shown themselves to be untrustworthy and unworthy of taking the oath again. This right here is what four more years of Trump will look like.

Now, I want to turn briefly to Trump's remaining defenses, and I say "remaining defenses" because Trump argues a lot of the — reargues a lot of the issues that Your Honor has already decided. I'm certainly not going to address those today, and I'm not going to address all these either.

I'm not going to address whether the January 6 Report is admissible. You've gotten a lot of briefing on that. You conditionally admitted it. The testimony during the hearing did not change the predicate requirements for admissibility.

I'm also not going to talk about Trump's inaction, whether it could constitute engagement, but to say we agree that Courts generally should not be second—guessing the Chief Executive and whether he or she uses force.

But this was no normal situation. President Trump lit the fire that was the attack on the [p.40] Capitol. He alone had the powers and authorities to put that attack

down. He violated his duty, which Professor Banks pointed out, to protect this country's national security.

But even if inaction could not constitute, itself, engagement — we've got many other acts on his part — it certainly bears directly on President Trump's intent that day.

So I want to start with the argument that Section 3 somehow does not apply to the President because he's not an officer or because the oath is not one to support the Constitution.

First, Delahunty never explains why it would make sense to exempt the most powerful and, hence, most dangerous of all elected officials from Section 3's reach.

And that's because it doesn't make sense. And the historical evidence, again, is clear: Section 3 was meant to apply to a President.

And this, again, is Professor Magliocca versus Professor Delahunty.

We have the Attorney General opinions, early Section 3 cases, 19th century proclamations, congressional debates, grand jury charges, dictionary definitions; and Delahunty relies instead on a technical [p.41] understanding of what President of the United States or officer of the United States may have meant in the original Constitution, pointing almost exclusively to the appointments clause, which really doesn't apply because that clause talks about other officers of the United States.

And I want again to look at what Attorney General Stanbery said because this bears directly on the question. He said, "An officer of the United States is used in its most general sense and without any qualification."

In his second opinion: "The language is without limitation. The person who has held any office, civil or military, under the United States and has taken an official oath is subject to disqualification."

Now, the thing is there's really no dispute about all of the historical evidence that Professor Magliocca relies on. There's no dispute that at the time of the framing of Section 3, the President was considered to be an officer, no dispute that the 39th Congress regularly referred to the President as an officer, no dispute that the Courts and contemporary jury charges did the same.

No dispute that Attorney General Stanbery thought so. No dispute that the common understanding of [p.42] the word "defend" in the oath to protect — "preserve, protect, and defend" meant support. There's no dispute that the presidential oath itself in the Constitution requires swearing to faithfully execute the office of the President of the United States.

And there's also no dispute that when Trump's not in this courtroom but a different courtroom in New York where it suits his interest there, he argues that the President is an officer of the United States.

This is from the briefing that President Trump submitted in the New York case regarding an issue of removal.

It says: "The President is an officer of the United States, but while this argument that elected officials, including the President, are not officers of the United States has been advocated by these professors," and he cites Tillman and Blackman, the very ones that now Delahunty cites, "to our knowledge, it has never been accepted by any Court."

And as to this argument about the appointments clause cases somehow suggesting that the President is not an officer of the United States, here's what Trump argued in a different courtroom:

"The Supreme Court was not deciding the meaning of officer of the United States as used in every [p.43] clause in the Constitution, let alone every statute in the U.S. Code. Obviously the President cannot appoint himself, so other officers of the United States must be a reference to nonelected officials. This stray line in Free Enterprise Fund" — the recent Justice Roberts case — "says nothing about the meaning of officer of the United States in other contexts."

And finally, before he was a paid expert for Trump in this case, in August, Delahunty wrote an op—ed, and he says:

"Although Section 3 does not explicitly refer to Presidents or Presidential candidates, comparison with other constitutional texts referring to officers supports the interpretation that it applies to the Presidency, too."

The next defense is a First Amendment defense. And I'm not going to spend a lot of time on that. The only reason I'm addressing it at all is that President Trump seems to think that that is a Get Out of Jail Free card.

And like I said, we have a lot of arguments about why the First Amendment doesn't apply in the way that Trump says it does here. The Fourteenth Amendment is a coequal amendment to the Constitution. If you engage in insurrection, that's [p.44] sufficient. The First Amendment has nothing to say about it.

There are other First Amendment exceptions that apply here. The employment exception, which, oh, by the way, is the one that allows you to require people to take

oaths. The speech in furtherance of a crime exception, that would apply here.

But as I said, we'll just assume that Brandenburg applies. And there are three requirements for Brandenburg: Speech explicitly or implicitly encourage violence or lawless action. It doesn't have to be violence, lawless action. We've already shown that, I've talked about it.

Speaker intends speech will result in violence or lawless action. We've already talked about that.

The only one left is that imminent use of violence or lawless action is the likely result of the speech. Of course it was. Not only is that what actually happened, but he was giving the speech as Congress was beginning to count the electors. He sent people at the speech down to the Capitol to give congresspeople some courage.

And finally, I want to address the argument that it's not for Courts to decide [p.45] disqualification; it's for Congress to decide only after an election.

Now, this argument takes a number of forms that — and, sorry, I turned that off because I'm going to get to that.

The argument takes a number of forms; that Section 3 is about holding office, not running for office; that the Twentieth Amendment somehow comes in and says this is for Congress alone; that Congress has the power under Section 3 to remove a disability, and if you disqualify somebody now, that disables Congress from being able to do that.

These arguments are all wrong.

First, it would make no sense to require waiting until millions of Americans had cast their votes and elected an unqualified candidate to say, "Oops, we need a do—over

here." Applying the "framers aren't stupid" canon of construction disposes, I think, of this argument.

Second, the fact that Section 3 requires a two—thirds supermajority of Congress to remove the disability is a textual commitment taking away from Congress the ability to impose the disqualification. How could it be that Congress, by a simple majority, decides whether the qualification or disqualification exists in [p.46] the first place, but it has to vote by two—thirds supermajority in order to remove it?

The disqualification exists at the time Section 3 was ratified without any action from Congress. It exists at the time somebody engages in an insurrection, and Congress has to remove it by a two—thirds supermajority vote.

Trump's argument also ignores that in the context of presidential elections, states' powers are at their apex. States' powers to appoint electors, select the time, manner, and place of electors appointed is left to the discretion of the states.

This is from a recent case, Chiafalo v. Washington. It was the faithless elector case. "Article 2, Section 1's appointment powers give the states far—reaching authority over presidential electors. The Court has described that clause as conveying the broadest power of determination over who becomes an elector. Given the textual commitment of choosing electors to states, states are well within their rights to protect against wasting their electoral votes by keeping a disqualified candidate on the ballot."

And then now Justice Neil Gorsuch said as much in Hassan. He said, "A state's legitimate interest in protecting the integrity and practical functioning of

[p.47] the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office."

Fourth, the historical evidence is not with Trump. As I said, the disability existed at the instant Section 3 was ratified. That's why people began applying for amnesty right away. That's why courts began right away enforcing it.

And Trump's argument again would prove too much. Courts in Colorado, California, other states, have long ruled that presidential and other candidates are ineligible because of federal constitutional requirements such as being too young, not being a natural—born citizen.

And then finally, the Twentieth Amendment — the Twentieth Amendment is not about this. The Twentieth Amendment is about a very peculiar situation that there was no remedy for before, and that is if a disqualification came to be after the President was elected or was only discovered afterwards.

That was what the Twentieth Amendment was about, and that's why the only Court to have addressed this issue rejected the very argument that Trump makes here. Nothing in its text or history suggests that it precludes state authorities from excluding a candidate [p.48] with a known ineligibility from the presidential ballot.

And finally, if Congress wants to remove the disqualification, they are free to do that at any time for President Trump. Colorado is not required to put a disqualified candidate on the ballot and risk disenfranchising millions of its voters on the off chance that supermajorities of both Houses of Congress might

remove that disability in the future. And let's be honest. It's not going to happen.

I'll reserve the remainder of my time.

MR. KOTLARCZYK: Good afternoon, Your Honor. May it please the Court. Michael Kotlarczyk on behalf of Colorado Secretary of State Jena Griswold.

I want to start in a similar place to where Mr. Grimsley started, which is thanking the Court on behalf of the Secretary for the Court's tremendous and the court staff's tremendous investment of time and resources in deciding this matter.

As the Court is well aware, the Election Code requires the Secretary to certify the primary presidential candidates on January 5, 2024, and I'm pretty confident, like everyone else in this courtroom, we fully expect that some appellate process is going to play forward from whatever this Court decides. So in light of that, the urgency with which the Court has [p.49] treated this matter is deeply appreciated.

Fundamentally, Your Honor, this case poses two questions:

Number one, did former President Trump incite an insurrection on January 6, 2021, within the meaning of the Fourteenth Amendment such that he is disqualified from holding that same office again.

And, number two, if so, does the Colorado Election Code permit him to appear on the presidential primary ballot.

As we have stated throughout these proceedings, the Secretary has presented no evidence or argument concerning the first question as to whether President Trump incited an insurrection on January 6. The Secretary has deferred to the other parties to present

their evidence on that issue and leaves that matter in the Court's capable hands to resolve.

Instead, as Colorado's chief election official, the Secretary, in this proceeding, has focused on the second question and sought to provide the Court with guidance as to the meaning of the Colorado Election Code in this unprecedented situation. And it is to that matter that I'll direct my brief remarks today.

In his proposed findings, former President Trump argues that neither the Secretary nor the [p.50] Court have the authority to keep disqualified candidates off the ballot. We disagree.

And to understand why he is wrong, Your Honor, we need to start with the ballot itself. The purpose of a ballot is to elect candidates to office, as the Supreme Court held in the Timmons case that we cited in our papers. And this is true for presidential primaries as well.

In the case of a presidential primary, ballots serve to allocate delegates for a party nominating convention, but in either case, ballots are what voters use to select their candidate. Having candidates who are ineligible to serve in the office they seek frustrates that purpose.

As the Supreme Court stated in Anderson v. Celebrezze at 460 U.S. 780, "As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."

The voters of Colorado recognized these principles when they adopted Proposition 107, creating the statewide presidential primary in 2016. Section 1—4—1201 of — which was enacted in Proposition 107, states that the presidential primary process should, quote,

conform to the requirements of [p.51] federal law. This, of course, includes all of the requirements of the United States Constitution.

And Section 1—4—1203(2)(a) states that, quote, Each political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election.

So to conform Colorado's presidential primary process to federal constitutional requirements, if the Court concludes that former President Trump is disqualified from holding the office of President under the Fourteenth Amendment, the Court should order him to be excluded from the ballot.

The contrary view expressed by former President Trump would produce an unreasonable outcome and would disenfranchise Colorado's voters, both of which outcomes are disfavored by Colorado law. According to his view, neither the Secretary nor the Court could exclude, for example, an 18—year—old who submits the necessary paperwork to be President or someone who is not a native—born citizen. But such candidates could never serve as President, so no valid purpose is furthered by including them on a ballot.

As then Judge Gorsuch stated in the Hassan [p.52] case, "Colorado has a legitimate interest in ensuring that only qualified candidates are certified to that ballot" — "to the ballot," and it's the legitimate interest that we seek resolution of in this matter, Your Honor.

So from the perspective of the Election Code, and specifically Section 1—1—113, the question is whether it would be a breach or neglect of duty or other wrongful act if the Secretary certifies a disqualified candidate to

the ballot and whether the Court can enter an order directing the exclusion of such a candidate.

Under 1—4—1204(1), the Secretary is responsible for certifying names to the presidential primary ballot, and the code clearly imposes a duty on the Secretary to exclude certain candidates from the presidential primary ballot. And I'm citing here, Your Honor, to Section 1—4—501, which is made applicable to the presidential primary process through 1203.

The Secretary has to exclude any candidate from the ballot who fails to swear or affirm under oath that he or she will fully meet the qualifications of the office if elected. A candidate who is unable to provide proof that he or she meets any of the requirements of the office related to residency, or who the Secretary herself determines is not qualified to hold the office based on [p.53] residency requirements.

Importantly, a presidential primary candidate who is disqualified under Section 3 of the Fourteenth Amendment is no more entitled to appear on the ballot than one who fails to meet any affirmative qualification for the office of President.

To hold otherwise would be contrary to the electorates' and the General Assemblies' express intent that only qualified candidates may participate in Colorado's presidential primary, and that the Secretary of State's certification of such candidates must conform to the requirements of federal law.

To effectuate that intent, the Election Code creates an express cause of action under 1—4—1204(4) for any challenge to the listing of any candidate on the primary election ballot under Section 1—1—113.

And that's the provision, of course, that the petitioners here have invoked.

When these provisions of Colorado law are read together and harmonized, as they must be, they authorize this Court to act if an election official breaches or neglects a duty or commits or is about to commit another wrongful act.

Now, as the Colorado Supreme Court has recognized, "other wrongful act" is broader than just [p.54] those acts that are breaches of duty.

Former President Trump is thus wrong when he says, on page 37 of his proposed findings, that the Court only has jurisdiction under 113 if the Secretary has a mandatory duty to act in a particular way under the Election Code.

"Other wrongful act" is broader than a mandatory duty to act in a particular way. And in light of the need for the presidential primary process to conform to federal law and for only qualified candidates to participate in the primary, it would be a wrongful act, within the meaning of 113, for the Secretary of State to certify a candidate to the ballot who is disqualified under Section 3 of the Fourteenth Amendment.

In his proposed findings, the former President also makes much of the lack of historical precedent for the Secretary to exclude a candidate from the ballot for failing to meet constitutional requirements.

Your Honor, the Secretary readily concedes that this is an unprecedented situation. But the absence of evidence on this point is by no means evidence of absence. The Secretary frequently must confront unprecedented situations when administering Colorado's elections.

[p.55]

Before the 2016 presidential election, the Secretary of State had never been confronted with rogue presidential electors in the Electoral College, but when the former Secretary was, a division of this Court decided that the provisions of the Election Code that binds the votes of such electors was valid and enforceable.

Before the 2020 presidential election, election officials in Colorado and across our nation had never before confronted widespread, baseless claims of a stolen election. But when they were, those claims were heard and disposed of by numerous state and federal courts.

To be sure, Your Honor, we live in unprecedented times, but the rule of law still controls. And that rule gives courts of general jurisdiction, like this one, empowered by the Colorado Election Code, the full power and authority to consider and decide legal disputes like the one presented here.

For these reasons, Your Honor, the Secretary of State respectfully requests that the Court decide the merits of petitioners' claim under the Election Code.

Thank you.

MR. SISNEY: Good afternoon, Your Honor.

[p.56]

This Court's heard a lot. This Court's been through a lot. So has the court staff. We also appreciate that.

The petitioners, and even the Secretary, with due respect, have complicated things. I would like to bring the Court back to the basics.

More than anything else, this is a case about the law. This is a Section 113 proceeding, intentionally and expressly limited in scope by the Colorado legislature.

The only relief available is for this Court to order the Secretary to comply with the Election Code, or substantially comply.

This is also about Section 1204. We've heard some of that this afternoon. That contains a finite and enumerated list of shalls, ministerial duties with which the Secretary must comply. She has no discretion with that list.

The Colorado Election Code does not contemplate — actually, it does not even allow a discretionary role for the Secretary in determining extra—statutory qualifications in usurpation of the major political party's will.

It includes no vesting of such authority. It gives her no budget for such a pursuit. It sets no guardrails. Her duty is the shalls.

[p.57]

Here's some more of what the law says. According to Section 1203(2)(a), and I quote: Each political party that has a qualified candidate entitled to participate in a presidential primary election — I'd like to emphasize — pursuant to this section is entitled to participate in the Colorado presidential primary election.

In other words, Your Honor, qualifications are still based on what the party, the political party determines.

Section 1201 provides that a legislative intent, the intent behind the provision — the provisions of this Part 12 conform to the requirements of federal law. We just heard that. What I think was omitted —well, it was omitted: "and national political party rules governing presidential primary elections."

Those are in the record, Your Honor.

But conforming to federal law does not give rise to an independent right, let alone a duty on the part of a state official, to enforce Section 3 of the Fourteenth Amendment. This is distinct from some of the residential requirements we heard about that apply to state candidates.

In fact, the Secretary's representative, Ms. Rudy, acknowledged that the Secretary's role in the [p.58] ballot qualification process has been, as a practical matter, ministerial. Lawyers know what ministerial means as opposed to discretionary for state officials.

Her responsibility under the Election Code is to either confirm that a candidate is affiliated with a major political party according to the statute and is a bona fide candidate, pursuant to that party's rules; or, alternatively, to confirm that the candidate submitted a properly notarized candidate statement of intent. Ministerial. Nothing else. Just that.

That's uncontroverted evidence from the Secretary's representative. It is the political party that is vested with the power to determine its bona fide candidate, not the Secretary.

I run the risk of belaboring that point, Your Honor, but that's a very important point in this case.

I'd like to direct the Court — I won't read it all for the sake of time — Day 3, direct examination of Hilary Rudy, page 116, lines 3 through 7 [sic]. This one I'd like to read:

"Question: What does it mean to be a bona fide candidate?"

"Answer: I don't know what that means to the party." [p.59]

"From our perspective, it means that the

party approves that that candidate represents the party."

Day 3, direct examination of Hilary Rudy, page 97, lines 17 through 21 [sic], quote:

"Our office looks at the information provided in the affidavit itself. And if the affidavit is complete and we have no affirmative knowledge that any of the information is incorrect, then we would qualify that candidate to the ballot."

Later Ms. Rudy confirms, "The ballot access team doesn't do" — that's does not do — "any investigation beyond the review of the paperwork to ensure it's accurate and complete, and to review the party's paperwork to ensure that the 'Approved' box, as opposed to the 'Disapprove' box, is checked."

That's Day 3, page 108, lines 10 through 13 [sic].

There's a few more that the Court heard that I'll move past for now.

The Secretary's representative conceded the role for the office is ensuring that the required paperwork is completed, not determining whether substantive affirmations of constitutional qualifications are accurate.

Again, nothing in the statute gives her [p.60] that authority. Such a pursuit certainly requires guardrails, standards, a budget, restraints, due process protections. It's not in the code. It's not in the code that 113 authorizes this Court to order that the Secretary can substantially comply with the code. That's it.

Obviously the question this Court is grappling with today are at issue in other states around the country. It's not a secret. While, of course, not binding on this Court, Your Honor, both Minnesota and Michigan courts have recognized the same principles. We're submitting to you

here today the limitations of Election Code, state Election Code.

Growe v. Simon, this is the Minnesota Supreme Court, issued an order last week rejecting efforts to keep former President Trump off the ballot in that state, and I'd like to quote.

"Although the Secretary of State and other election officials administer the mechanics of the election, this is an internal party election to serve internal party purposes."

That opinion has been filed of record as a notice of supplemental authority. That — that code, the Election Code of Minnesota, is substantially the same as the code that we're dealing with here.

[p.61]

To the argument that the Secretary's oath — this is an argument we've heard — that the Secretary's oath to defend the Constitution vests her with the power to enforce by barring candidates from ballots to enforce Section 3 of the Fourteenth Amendment.

According to Wayne County, Michigan, Monday night, just dismissed a similar case explaining, and I quote: "There is no support for the Plaintiff's position that an oath to support the Constitution of the United States incorporates a duty to enforce a provision such as Section 3 of the Fourteenth Amendment."

I submit to the Court respectfully, nothing in the Election Code of Colorado does, either.

That Court also held that imposing legal duties on the State Election Commission, the relevant office in Michigan, that are, quote, beyond the scope of the plain language of the statute, close quote, failed to state a claim upon which relief could be granted.

They were asking the Court to infer something into the Election Code so that the state official could enforce it.

This Court has heard the same argument here. I just would like to emphasize, Your Honor, beyond the scope of the plain language of the statute.

I recall in the Secretary's brief, the [p.62] omnibus brief, the Secretary admitted that the statute does not explicitly vest her with the independent authority, I believe, is the — is how it went, but instead, they're asking the Court to infer it into the code.

Then, even more recently, the Michigan Court of Claims — this opinion, I think, was also filed, just dismissed similar cases last night. That court noted that the Michigan Election Code was such that —and I'd like to quote — "such that the Secretary has neither the affirmative duty nor the authority to separately" — I'm going to back up — the authority —"the affirmative duty nor the authority to separately decide whether Donald J. Trump will be placed on the Michigan presidential primary ballot on the ground that he's disqualified under Section 3."

I submit to the Court that that Election Code provision that's at issue — was at issue in that case before it was dismissed was substantially similar to the code before this Court today.

That Court declined to read something into the statute, something very monumental, borrowing — barring a candidate that a major state political party has decided to place on its primary ballot.

Now, even if this Court were to find a way [p.63] past the limitations of Section 113, 1204 — neither the Minnesota nor Michigan Courts did when they faced an

analogous state law framework — this Court will still be faced with the issue of interpreting the Fourteenth Amendment.

As we briefed extensively — I won't repeat it all here certainly — it is black letter law that constitutional provisions can be self—executing as a defense, not as a cause of action. Very different.

To start, the Fourteenth Amendment as a whole does not create a cause of action. I'd like to refer the Court to the United States Supreme Court opinions cited on pages 68 and 69 of our proposed findings and conclusions. There's one I'd like to read, for example.

Ownbey v. Morgan, 256 U.S. 94 at 112, ". . . it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self—executing remedy."

Section 5 of the Fourteenth Amendment confers the enforcement power on Congress to determine, and I quote, "whether and what legislation is needed to," close quote, enforce the Fourteenth Amendment. That's Katzenbach v. Morgan, 384 U.S. 641 at 651.

There's a series of circuit cases we [p.64] cited —

THE COURT: Mr. Sisney, I specifically said at the end of — at the end of the last hearing that if the — if the State party wanted to have time at the oral arguments, to ask for it.

Secretary of State's asked for it. The Colorado Republican Party didn't. Then at the beginning of this hearing, you did, and I said you could speak, and I said it would be limited to ten minutes, which is what the Secretary of State did.

You're now at 13, and I — it's just getting late, and I think Mr. Gessler has a lot of time, and all of this has

been briefed. And so if you wouldn't just mind wrapping up, I really appreciate it.

MR. SISNEY: Yes, Your Honor, I apologize. Thank you. Certainly.

In Bush v. Gore, the United States Supreme Court held that a state court's order to determine the intent of a voter violated the Equal Protection Clause, in part because, I quote: the absence of specific standard to ensure its equal application.

That absence rings loudly here. What standards will guide the Secretary's pursuit that they are asking this Court to order her to do.

Republican Party of Colorado respectfully [p.65] urges this Court to deny all the relief sought by the petitioners, to dismiss their petition, and enter an order declaring that the Secretary must comply with the code as written, not as certain people wish it to be. This is the law.

Thank you, Your Honor.

THE COURT: Thank you. I appreciate it.

Mr. Gessler, we're just going to — let's start up at 35 after since we've already been going for almost an hour and a half. Let's just take a quick bathroom break, okay?

We'll start with you at 4:35, and you'll get your full amount of time.

MR. GESSLER: Thank you, Your Honor.

(Recess taken from 4:27 p.m. until 4:35 p.m.)

THE COURT: You may be seated.

Go ahead.

MR. GESSLER: If I may stay standing, Your Honor.

So, Your Honor, thank you very much for the ample time here, and we certainly respect all of the hard work that's gone into this.

I don't think I've ever filed such a long brief in my life, 120 pages — or 170—plus pages.
[p.66]

THE COURT: 177, to be precise.

MR. GESSLER: 177. Well, and I felt like, my gosh, we did 177 and they only did 75, but then theirs is single—spaced —

THE COURT: Yeah.

MR. GESSLER: — so it's equivalent.

So let me talk a little bit about the case here. What this case — after we've looked at the evidence, after we've completed this five—day hearing, I think what this case comes down to is whether or not the Court is going to follow the January 6 Report.

This case is about the January 6 Report, to be frank, and what the petitioners have done is they have taken the January 6 Report and tried to get this Court to accept it as evidence, to accept its conclusions, to accept its logic into this case.

Basically, they took the January 6 Report, they pulled a handful of witnesses from the January 6 Report to testify. They pulled curated and, frankly in some instances, edited videos from the January 6 Report. They had Professor Simi rely on the January 6 Report. They had Professor Magliocca rely on the January 6 Report in some of his application.

They cited the January 6 Report, they've relied on it 67 times in their findings of fact, and then [p.67] they refer to it another 4 times. And they've asked this Court to endorse 96 findings.

"Findings," I would almost say, is a somewhat, shall we say, charitable — a charitable characterization. It's

96 conclusions, it's 96 opinions, it's 96 pieces of reasoning that the January 6 presented.

And so what I would say is that the petitioners' case, the foundation of it is — it is rotted, it is a rotten foundation.

The January 6 Report was originally used for political purposes to — as, you know, sort of an election issue, and that has failed. I mean, like it or not, for the authors, President Trump remains a viable and, in many instances, considered leading candidate for the presidency.

They — the authors of the January 6 Report attempted to use it to get criminal charges, certain criminal charges filed against President Trump. That failed. Those criminal charges, for example, incitement of an insurrection, those were never filed, and now the petitioners are trying to use the January 6 Report to get it into evidence.

Excuse me one moment, Your Honor. I need to turn on my timer, of all things. I'll subtract a few minutes, don't worry.

[p.68]

MR. GRIMSLEY: No, 35, so it's right there.

MR. GESSLER: Okay.

And, really, at the end of the day, it is a rotted foundation, and it is another attempt at the January 6 — using the January 6 Report to limit people's ability to vote.

The other technique that they've used, of course, is talking about violence. Anything that smells of violence, that smacks of violence, is all sort of in cahoots with one another, it's violence. Violence is insurrection, that's bad, and so President Trump is responsible for all of it.

The third tool they use is relying on Professor Simi at length, and I'll discuss that. You know, he studied far right—wing extremists, and the goal is to take that — that small group of people and apply to everyone and infer intent to President Trump, frankly without evidence, especially when Professor Simi specifically disavowed that he addressed President Trump's intent. But they want to rely on that anyway.

So I'm going to talk a bit about the January 6 Report. Petitioners didn't, but I think it's pretty important, and we will talk about that, because [p.69] this Court has conditionally admitted it. And so although the decision of admission has already taken place, this Court should not place weight upon these findings absent, absent evidence at this hearing to support those findings.

And there's a lot of those problems where there's these sort of "findings," as I put in scare quotes, without evidence to support it.

I'm going to talk a little bit about the legal standards, and I will lightly revisit the jurisdictional arguments. We briefed those, obviously, 12 pretty thorough. I'll try and be brief on those, but I will say this.

The petitioners are asking this Court to do something that has never been done in the history of the United States. It has not been done when Horace Greeley ran for President, it's not been done when Eugene Debs ran for President. It's not been done for any presidential candidate in the history of our Republic, and the evidence doesn't come close to allowing the Court to do it this time as well.

And with respect to this Court's jurisdiction, I would note that since this case has been filed, there have been three directly on point cases, one from New Hampshire,

the Supreme Court, one from [p.70] Minnesota's Supreme Court, and one from a court in Michigan. This is in addition to all of the other courts that have dismissed this, and those cases have directly addressed or refuted — or I should say ruled directly against — several of the petitioner's jurisdictional arguments.

So I think the Court should look at that reasoning and consider what perhaps I think was fairly characterized as an emerging consensus here within the judiciary across the United States.

And then finally I would ask this Court to step back. At the end of the day, there are serious questions about this Court's jurisdiction. We've raised those and briefed those, okay, but we also — I would also submit that we're talking about whether a presidential candidate of the United States committed an insurrection, engaged in an insurrection. And we're going to try and decide this issue based on a five—day hearing, and you've heard our concerns about the procedures of this hearing.

But at the end of the day, it's a five—day hearing with 17 1/2 hours or so per side, which is basically papered over or underpinned, as one may describe it, with the January 6 Report to determine constitutional rights, issues of first impression in the [p.71] history of the United States with consequences.

I submit that this Court, as the Michigan court said, no matter — you know, no matter how well meaning, no matter how fair, no matter how thoughtful and well intentioned, evenhanded, fair and learned, a court cannot in any manner or form possibly embody the represented quality — concerns and qualities of every citizen in the nation as in this case the Michigan court referred to the

House of Representatives or the Senate. And also noted that judicial officers in states are not empowered.

So we would submit that this Court should — should look at that with a different set of eyes than it has to date.

Let's talk about the January 6 Commission. So we've cited the standards, the legal standards for when a court should consider or admit congressional reports. And among those considerations are whether there is a hearing along the lines of an adversarial hearing and motivational problems that a congressional committee may have.

And the courts have specifically highlighted the fact that for congressional commissions and committees and committee reports, there are partisan considerations. They have said election officials have a [p.72] tendency to grandstand — I don't know where they got that from — a big issue is whether or not the minority joins in the majority, and the court's pointed out that when there are bitter divisions arising from that, that's evidence that it's less — that it's more politics versus policy or truth—seeking, that truly reliable — that a report that's truly reliable on methodological and on procedural levels are unlikely to create these bitter divisions.

So that's all things that this Court should look at.

The January 6 Committee was biased from the start, heavily biased, in fact, overwhelmingly biased. And I know this Court and the petitioners have pointed out there were two Republicans on the Committee.

But that's not the standard. This is not a Republican/Democrat issue that we are looking at here today. The issue we're looking at is whether President Trump engaged in an insurrection. That's the issue.

That was the issue that the January 6 Committee investigated as well. The two Republicans on that committee, along with all of the Democrats on the Committee, were unified in their belief, in their vote, every member had voted that President Trump had incited [p.73] an insurrection. Every one of them voted on that, every one of them said that, every one of them believed it.

And Mr. Heaphy, he testified that for them it was an obvious fact, an obvious fact is what he said.
Every member voted on that obvious fact.

Now, if you look at the — and I've — the petitioners will repeatedly cite that, "Well, it was a bipartisan vote on the impeachment."

Well, if you look at the impeachment vote in the House of Representatives, it was a 54 to 46 percent split. And the 46 percent did not — they voted against incitement, that President Trump incited an insurrection. And the number of people that were on the Committee representing 46 percent of the House of Representatives, that viewpoint was zero, none. It was stacked. Lots versus zero was — was the lineup.

Everyone on that committee started from the proposition that it was an obvious fact that President Trump incited an insurrection. They then spent a year and a half looking at it, and lo and behold they came up with a conclusion that he incited an insurrection. No surprise there.

Let us look at the witnesses that talked about the January 6 Committee. So we presented Congressman Buck. I jokingly say Congressman Buck was, [p.74] for us, a witness out of Central Casting. He was a credible witness. He was not and is not and you heard nothing

about him being a fan of President Trump. He's not a President Trump lover, so he wasn't here to cast love upon President Trump.

He is on good terms with Representatives Cheney and Kinzinger. He had worked for Representative Cheney's father and knew the family and knew her. So he didn't consider himself a close friend, but he was not someone who demonized those two Republicans.

He had announced the day before his testimony that he would not seek reelection, so he was a man liberated from political concerns. And, in fact, in many ways, he testified to certain facts the same as Representative Swalwell. He wasn't trying to spin things.

Other things that Representative Buck brought to the table was, he's a member of Congress, obviously, but just as importantly, he is a former staffer of the Iran—Contra commission that investigated the Iran—Contra controversies, and so he knows what a proper investigation looks like.

And if you remember — I was a young adult when this happened, very young adult — but the Iran—Contra was when President Reagan was accused of [p.75] selling arms to Iran so that he could have money to, like, give arms to the Sandinista — to the people fighting the Sandinistas in Nicaragua, so that was the Iran—Contra controversy.

And there were claims and beliefs that President Reagan should be impeached, very — great controversy. Just as much of a hothouse controversy as what the — what Congress faced in early 2021.

And Representative Buck said: Look, we had a majority and we had a minority, and witnesses were fully examined. And more importantly, the minority was able

to call witnesses to — whether bring in new evidence or rebut or to point out the irrelevancy, or whatever those arguments may be, of the majority's witnesses. And not only witnesses, but to obtain facts and documents that — and develop facts and obtain documents that contradicted the majority narrative.

On top of that, Representative Buck was a former prosecutor for about 20 — more than 20 years, and so he knows what an investigation looks like. And he likened the January 6 as him taking witnesses and whatnot and going into court without the defense present, without the defendant and without defense counsel even present. That's how one—sided he viewed it.

He also testified that Congress's goal is [p.76] political, it is political.

And now look, we have this Madisonian government of checks and balances, and that's designed so that, as Madison said in Federalist Number 10, that certain factions and balances will cancel one another out.

And so you even have those checks and balances built into congressional investigations. In other words, you have a majority and you have a minority. And they each bring in their evidence, and then they present their own reports.

Sometimes they agree and when they agree, the courts have said, Well, we're going to give that more credence, far more credence, and we're probably not going to give any credence when they don't agree because then — particularly when there's bitter and sharp divisions, as there have been here.

So there were no checks and balances in that process.

The adversarial process. How do we — how do we have checks and balances in the court procedures? Through an adversarial process. That did not exist in the January 6 Report.

So when you receive a conclusion that the January 6 Report said this happened, that's not part of [p.77] a — that's not part of an adversarial process. In fact, the, quote, judges in that instance, there's the people who decided that, were all very biased from the start.

And, of course, you have the checks and balances of the judicial versus the political process. This is a judicial process. The reason people have faith in courts, the reason we do, the reason we devote our lives to this, is because we have an adversarial process and we believe that with the adversarial process is the best opportunity to determine what the truth of the matter is.

What the petitioners are asking you is to import into this judicial proceeding something that was the antithesis of the adversarial process, was the antithesis of a fair and balanced approach. It was the antithesis of having decision—makers look at this with an open set of eyes. It was the antithesis of that.

And they're asking to import that into what should not ever be a process that has those types of infirmities.

Second, you have Mr. Heaphy. He confirmed, frankly, very critical facts. He confirmed that there was no minority staff. He confirmed that there was no minority report. He confirmed that everyone on the Committee had voted on impeachment to — that [p.78] President Trump incited an insurrection.

He admitted that the Committee was very unusual, and it was basically stacked with prosecutors. He admitted that it was very unusual, the process, because

the members themselves — remember, the members who had already decided what had happened, who already viewed as an operative fact incitement to insurrection —that those members took a leading role and were heavily involved in the processes.

So this was not an instance where a professional staff was allowed to go forward. This was an instance in which they were heavily directed by the members. In fact, not only were they so heavily directed, but one of the staff members represented, as an attorney — and I just don't know how this happens — but as an attorney, he represented Representative Kinzinger as his attorney while also serving as an investigator on the Committee.

So his loyalty was directly to make sure that that Congressman's will was taken care of. If you're an attorney, you've got that duty to your client. And yet he had two duties, which he viewed apparently as didn't — not conflicting as one duty.

Mr. Heaphy also admitted that the volume, the number of documents or the number of witnesses, does [p.79] not equal fairness because he pointed out how, you know, he's done grand jury investigations with lots of documents, but in order — but those still have to be subject to the adversarial process, which, of course, they weren't in the January 6.

And he himself readily admitted he was a Democrat, he's been fired by a Republican, and that he's viewed himself as a partisan and was a political appointee.

We walked through, or I walked through during that cross—examination the — not only the impeachment vote, but the fact that the Committee members had made up their minds. And I certainly respect Mr. Heaphy for working to defend his — the process there,

but he used — he — when I confronted him with those comments, the public comments, he sort of said a few things.

One, he said, Well, it was an operative fact that — or an obvious fact was his — was his testimony, that the — that every one of the Committee members started out with.

Second, he said, Well, it was really sort of a hypothesis, and they really had an open mind. I just don't think that's credible or believable.

And then thirdly, he said, you know, they [p.80] had made some preliminary determinations, hypotheses based on what they saw, but again wanted us to plug into and test that against the evidence we were finding. And then he says, "So I don't believe Mr. Aguilar" — he was referring to Mr. Aguilar, one of the Committee members —"or any of the others made any conclusion other than that preliminary one informing that impeachment veto."

In other words, he viewed the vote that they made as a preliminary conclusion. Well, I disagree with that as well, and here's why. I would submit to the Court that congressmen and congresswomen spend a lot of effort, blood, sweat — maybe not blood — but sweat and tears getting into Congress. It's a big deal. It's hard work. You sacrifice a lot.

And then they get to Congress, and their main job is to vote on things, and this was a seminal vote everyone is looking at. This isn't some preliminary. This is one of the most important votes they took in Congress during that time. In fact, two, Ms. Cheney and Mr. Kinzinger, are no longer in Congress primarily because of these votes they took, I would submit.

So this wasn't some light, preliminary vote that they took. This was something they were committed to, that they were representing their [p.81] constituents on, and that they believed in, and that's why they took that vote.

They took the vote, they control the investigation, and they came up with a conclusion that matches exactly how they voted.

And then, of course, you have Congressman Nehls' affidavit. He basically testified to, I think, some procedural, relatively obvious things.

But at the end of the day, you have bias, you have a committee full of prosecutors, no minority staff, no minority report, no witnesses or evidence that were introduced by anyone who disagreed with the obvious facts that the — that the members — and you have members that were highly involved.

And you had political grandstanding. Much of the video was edited, and Mr. Heaphy admitted that. Much of it was produced for TV production. The timing was suspect. And this report in general was highly controversial, very controversial.

And I'll submit, you know, I mean, I had never read it before. I was shocked at just how bad it was, how shallow it was. I mean, there's lots of conclusory statements there, not a lot of evidence backing them up.

And let's look at a few other things. [p.82] There are factual findings, the evidence in this hearing showed factual findings are suspect based on the evidence in this hearing, based on evidence in this Court.

So stuff that didn't make it in. Mr. Kash Patel, he testified that President Trump authorized, not ordered, but authorized 10— to 20,000 National Guard troops. And not only — and he didn't say, Oh, that's just

something I overheard, you know, once. He talked to Secretary of the Army with it, he followed up, he made sure that there were conversations with the mayor. That was his job, and he testified about that process at length.

Ms. Pierson, she also testified that President Trump talked to about 10— to — wanted 10— to 20,000 National Guard troops to prevent violence. And she said that he — President Trump specifically struck names as far as the speakers.

This is all stuff that didn't make it into the report at all. And that — and that she had security concerns, and much of her interview — and Mr. Patel talked about this as well — never made it in to the January 6 Report.

I think on the National Guard issue, what's really interesting is the — oh, and also Representative Buck testified that Congressman Jordan had [p.83] a much different story that he had presented about whether — his willingness to testify than what showed up in the report.

And this wasn't something that Congressman Buck sort of remembered offhand in the missives of time. He specifically asked Representative Jordan because, you know, Representative Buck was concerned about the election issue. He disagrees with President Trump on that, showing again, his credibility.

And it was just the last week or so before his testimony because he was talking to Representative Jordan about the controversy as — and whether or not Buck could vote for Jordan for Speaker of the House. That was a pretty important conversation and fresh in his mind, and he specifically drilled in to whether or not that happened on the January 6 Report and there was that conflict there.

None of that stuff made it into the January 6 Report.

Then you have a couple others. For example, in the — that was actually refuted, some of the conclusions that were refuted by evidence at the hearing.

So, for example, one of the proposed findings of facts from the petitioners is that Trump also regularly endorsed incendiary figures connected with [p.84] far—right extremists like Alex Jones, Ali Alexander, Steve Bannon, Roger Stone. That's what the finding says.

Well, Professor Simi admitted, recognized, endorsed the fact that President Trump had fired Mr. Bannon. And Ms. Pierson testified that President Trump, when he was striking names off of the list of people to speak, didn't even know who Ali Alexander was and that President Trump specifically struck Roger Stone off the speaker list as well, as well as Mr. — as well as Mr. Giuliani.

So — so the findings of fact are used to sort of create this close collaboration, when the actual evidence in this hearing refuted that, refuted that finding very directly.

Then we have a finding where the Committee says that, you know, Trump knew his claims of election fraud were false. You've heard that argument.

Well, the petitioners' witness, Mr. Swalwell, okay, Mr. Swalwell said, testified that —and I quote him, he said, "It was well—known among myself and my colleagues and the public that President Trump believed that Pence had — that Vice President Pence had the ability to essentially reject the electoral ballots that were sent from the states." That's what Mr. —Representative Swalwell said.

[p.85]

And then another thing about — the Commission says about 25,000 additional attendees purposely remained outside the Secret Service perimeter at the Ellipse — this is on January 6 — and avoided the magnetometers, okay, and that Trump knew that they were armed.

There is no evidence of that. And, in fact, the evidence that you did hear was — and I admit it's one person, because that's all I had time to find —but it was one person, Mr. Bjorklund, who said, "I don't like being in the middle of crowds. I didn't want to go through the magnetometers and I stayed back." That's what he specifically said.

And, you know — and that's also suspect. I mean, you have Amy Kremer saying — I mean, she couldn't tell whether people were armed or not. She had no idea. And yet somehow they're inferring that President Trump was all—knowing and all—seeing and knew all of this, apparently, which no one else did.

Talking about the videos very quickly. They are curated and highly edited videos. Curated means, in the scientific speech, they suffer from selection bias. Cherry—picked. You pick and choose what supports your case.

And they had a TV producer behind it and [p.86] that, in fact, this Court saw there's a recent lawsuit —and I'm not saying that lawsuit's absolutely correct, okay — but the person who sought to intervene said, "Look, I'm suing the petitioners' attorneys" — good luck with that, folks — "I'm suing them because they produced this edited document that had me — that they said I made this speech earlier and it took it out of context and" — yada, yada, yada, they said all that.

So at least we have some evidence about the curation process. It's evidence, of course, we weren't able to explore fully because of the compressed timelines, but that should at least give the Court pause that maybe not all this stuff should be taken at face value.

And, in fact, we're talking taking things at face value. I'll use the example of Professor Simi.

So Professor Simi had that photo of Charlottesville and he said, "Well, that shows right—wing violence."

And I questioned him about it. And I said, "Well, it looks as though there's two people who have — one's sort of got this garb and the other's got a gas mask. Can you tell which one is the far right—wing extremist?" And he couldn't, he couldn't.

I asked him if he could tell who was attacking whom, and — and he couldn't. I asked him, [p.87] "Well, is one, like, stabbing the other or is one grabbing that flagpole from the other or does one hit the other in — in the process of doing" — and he didn't know. He didn't know who was committing violence. He didn't know who was on which side.

And I think that's an example of curated videos, curated photos, absent personal testimony saying, "Yeah, that was me," or "That's something I took."

So when Hodges says, "That's — that's a video that I took," that deserves credibility. I'll give him that. But when you have a video that just says, "This is what it is and this is what happened and this represents what was going on that day," without the opportunity to cross—exam, without the ability to identify the context of it, without the time to look at other — other explanations, that is suspect, and this Court should not place much weight on that.

At the end of the day, we have tests for congressional reports for a reason. Sometimes congressional reports pass those tests and they should be admitted by the Court, and sometimes they fail those tests.

I submit to you that if this one doesn't fail that test for — well, we've already ruled on admissibility. But if the Court places great weight on [p.88] this, then there's no congressional report that ever should be kept out or reduced because — or with little reliance placed on it because this is about as biased and unprecedented and controversial of a process as you can possibly have, and yet that's what the petitioners are relying on.

The second pillar of their case is basically Professor Simi's testimony. And he talked about far—right extremists, and what he did is he described the Proud Boys and the Oath Keepers and the Three Percenters. And I learned a lot, I learned a lot. I will submit that I've spent a lot of time probably talking to groups that may have included those people.

I had heard of the Proud Boys once before or a few times. I knew they were sort of hard core, but I didn't know much. Oath Keepers, I sort of thought they were a vaguely religious group. And I had never heard of the Three Percenters.

Now, my experience is not evidence before this Court, but what I am — the reason I'm saying it is because I was very keenly interested, very keenly interested in how Professor Simi was going to link President Trump to these far right—wing groups because I've — I will submit for the record I've run for a number of public offices and held office, I didn't really [p.89] know about these groups at all. And so I wanted to know how this President all of a sudden knew about

everyone, maybe not all of a sudden. And so I was very keenly focused on that.

And Professor Simi certainly implied, and in some instances almost said that, you know, President Trump was sort of in cahoots with these groups.

But there was no evidence, and I was —there is no evidence, there's no evidence that he intended to speak to them. There's no evidence that he knew how widespread they were. There's no evidence that he didn't even know who they were. There's no evidence to even make those inferences.

And so you look through this and, sure, people can say things, but there's got to be evidence. In fact, the evidence introduced at this hearing is that President Trump did not know of them.

So let's take that debate exchange where President Trump said, "Proud Boys, stand back and stand by." Remember that. And, in fact, the petitioners were questioning Professor Simi about it, and they showed the exchange. And — and I will tease them a little bit.

At one point the question was to Professor Simi, "Proud Boys" — and this is the question — "was he" — referring to President Trump — [p.90] "was he asked a question about the Proud Boys, or did he pick that out of his own brain?"

That was a question to Professor Simi. And that was a false choice. He wasn't asked the question, and he didn't pick it out of his own brain. And to his credit, Professor Simi didn't take the bait on that. He said, "Well, there was some cross—talk and then he used the word 'Proud Boys.'"

Well, what was that crosstalk? The moderator said, "Will you tell these white supremacists and these people to stand down?"

So it was the moderator who used that formulation, "stand down." And I know President Trump used "stand back," but pretty similar, the "stand" formulation. And President says, "Well, it's Antifa's fault," and there's all this back—and—forth, and it's Joe Biden who suggests Proud Boys are the people. That's why we included the transcript, and you're welcome to listen to the video. It's Joe Biden who uses the word "Proud Boys."

And so Trump — President Trump says: Well, Wallace, thinks Wallace says stand down, so I say stand by. And then former Vice President, President Joe Biden says "Proud Boys," so he does what the two of them ask him to do. That's how he came up with Proud Boys.

[p.91]

And the next day — and we include the transcript of that press conference at Marine One, you know, at the helicopter there, he says, "Look, these white supremacists, I condemn them completely. I don't even know who the Proud Boys are, but there has to be peace and" — along those lines. So he specifically disavows knowledge of Proud Boys at that time.

Now, the other thing that Professor Simi relies upon, he says, "You know, look, I mean, I observed" — well, let me back up.

Professor Simi is very clear. He says, "My report did not address President Trump's intent. I'm not in President Trump's head." He said that a couple times.

What he did say is, he says, "Well, what President Trump did was characteristic of sort of the speech

patterns and methods of speaking that — that are part of far right—wing extreme conversations and speech."

And we talked at length about, you know, the use of the 1776, and I asked him these hypotheticals, which, frankly, were a little personal because I've used that phrase, and I didn't know I was talking of Proud Boys or Three Percenters or whoever the heck they were.

And so Professor Simi talked about how —these sort of methods of speech and — and on cross—exam, [p.92]

he admitted very readily, he's not hiding anything, he said, "Look, these characteristics, whether it's front stage/back stage, or doublespeak," he says, "we all do it."

And, in fact, politically, people do it regularly all the time. And conspiracy theorists, he agreed with me, sort of the — you know, Hofstadter, the paranoid — the Paranoid Style in American Politics, there have been conspiracy theorists and — floating around political discourse for a very long time in U.S. politics.

And he said: So all these methods, all these appearance are common to political discourse. So if you're looking at a politician who uses common political discourse and that common political discourse is similar to what far right—wing extremists use for their political discourse, it's not a difficult logical leap.

But it's also a false one. There's no causality. President Trump is not using these types of speeches that Simi identify, these methods, to communicate with Proud Boys, or whoever. He's using them because everyone else does, and that's how people talk. And that's why we included the video where we have lots of folks, President Biden, Senator Warren, [p.93]

representatives, all using the word "fight," "fight like hell," "take it to the streets," all of that stuff.

So that's one example of, frankly, what could be many.

Now, Professor Simi, from that, says: Well, President Trump and far—right extremists had a relationship. And my effort to cross—examine him on the Dumb and Dumber movie didn't work out too well, but you still get to hear that on cross — on closing argument now.

So there's this scene in this movie played by Jim Carrey, sort of one of the — the protagonists, and he has a crush on a woman. And he travels to meet her and he says to her — and I'm quoting, so pardon the language. He says, "What do you think the chances are of a girl like you and a guy like me, I traveled a long way, at least you can level with me." He says that to her. He says, "What are my chances?"

She looks at him and she says, "Not good."

And then he says, "You mean not good as in 1 out of 100?"

And then she looks at him with sort of a mixture of pity and sorrow and perhaps disgust and says, "I'd say more like 1 out of a million."

And then the character — and a long [p.94] pause, and he smiles and he's very happy and he says, "So you're telling me there's a chance."

That's what he says. And he just gives out this big whoop, and she's just astonished. That's sort of the scene.

And so to say that President Trump had a relationship with the far right—wing extremists would be analogous to saying that this character had a relationship with this woman or vice versa. There was no

relationship except in one person's head, and that was the character played by Jim Carrey.

A more sinister analogy, more sinister, that's not humorous would sort of be John Hinkley and Jodie Foster. If you remember, John Hinkley was the person who tried to assassinate President Reagan, and the reason he did that is because he had this obsession, this crush on Jodie Foster and wanted to sort of prove himself and do something great.

It would be like saying that they had a relationship. No, there was no relationship there. It was John Hinkley's obsession and Jodie Foster had no relationship with him.

So when Professor Simi says there is a relationship there or there's involvement there with President Trump, no, that's at best unrequited love on [p.95] behalf of the far right—wing extremists who may like President Trump, may be inspired by President Trump, but there's no evidence that it ever went the other way. And to call that a relationship is like calling a stalker and their victim having a relationship. It is just wrong.

Now, let me talk about some of the legal standards and whatnot. Let me start with engage. So engage does not equal incite. They — and we've not —I'm going to phrase this a little bit different. I'm going to try and be a little bit different than our briefings because you've read all that stuff, all right? So — so please pay attention. I'm not just going to repeat myself, I hope.

Engage and incite are two fundamentally different activities. Engage means to participate in an activity, to be involved in it. Incite means to provoke and urge on, to move others to action. They are different activities.

So when you say engage includes incite, you're actually saying that engage includes a fundamentally different activity than the normal meaning of incite, the normal meaning today and, frankly, the normal meaning back then.

And when I say "back then," during the —during that, I mean, there wasn't an issue about [p.96] launching an insurrection when the Fourteenth Amendment came about. The insurrection had occurred, the rebellion, the enemies, the war between the states.

And so Congress, I submit, was looking at engage. And the reason why Professor Delahunty talked about the Confiscation Act of 1862 is because Congress specifically used the word "incite," as well as "engage," and then used a much different formulation for Section 3.

Oh, by the way, the experts. Okay. They are testifying to law, and I'm hopeful that they were helpful for this Court. And they're testifying to the history, and that's what judges do.

And so for them to say: Well, our experts got a bigger resume than your expert, and our experts are really smart and yours isn't, whatever. Okay? We need to look at the actual sources and the reasoning behind it. Okay?

And I like Professor Magliocca. I'm teasing a little bit there.

But when Magliocca testified about what incite — why incite means engage, let's actually — I'm going to zero in on this a little bit. He said, The Reconstruction Acts were — the language was identical to Section 3. And then he looked at Stanbery's opinion, and he — and in that opinion, that AG opinion, he said, [p.97] Stanbery said, "Disloyal sentiments, opinions, or sympathies would not disqualify. But when a person has, by speech

or writing, incited others to engage in rebellion, he must come under the disqualification." So that's what he said.

Let's break that down and put it in context. First he said "incite others to engage." That's a little bit different than inciting an insurrection. He's motivating others to engage in what is already an ongoing insurrection, not to start some one. Well, why would he have that strange formulation?

Here's why. That shows up in paragraph 16 of the Stanbery report of his advisory opinion, okay? And in that advisory opinion, it's 12 Attorney General Opinions, 460, I think it's page 41 and it's paragraph 16.

And in paragraph 16, he is talking about two types of officials that come under the disqualification. He says — because remember when Delahunty was talking about official, people in their official capacity and individual capacity, and Magliocca was talking about that a little bit, and everybody's eyes were glazing over?

This is why it's important, because in the advisory opinion, what happened is, Stanbery is talking [p.98] about two types of officials. He says one type of official is an official whose duties are — duties of the office necessarily had relation to the support of the rebellion.

So what's that? A naval officer or military officer or a state senator who voted for this or an executive branch. I mean, someone whose job was to further the rebellion.

And then he said there's a second type of official. And that type of official is someone who discharges their official duties not incident to war, only such duties as belong to a state of peace and were necessary to preservation of order in the administration of law.

So that could be a sheriff or a police officer or a Secretary of State, someone who does their thing whether there is a war or not.

And in the second category is where he makes the statement because there's a lot of other advisory opinions that Stanbery talks about insurrection and what engage is, and this is the only time he uses that formulation.

And the reason he uses that formulation is because then he makes an exception to the second category. He says if you're a Secretary of State — I'm [p.99] teasing — or a sheriff, all right, or a constable and you're using your office as part of your duties, you're inciting others to engage in the rebellion.

In other words, what you're doing is using your official position to urge them to go forth and do things. Then you no longer fall under that category of duties that are not incident to war but, rather, you're disqualified.

That's the context he uses that in. And that's why this whole official and not official and types of official is important.

The next way, this second piece of evidence, the second reason that Magliocca relied upon is he said, Look, there were these examples, John Young Brown, which petitioners mentioned, and Philip Thomas. And what they did is, you know, John Young Brown, he —or one of them, wrote a letter, wrote a letter to the editor, remember that?

In fact, you used that to deny our motion to — our half—time motion. I'm teasing obviously.

But what happened there is he wrote that letter. And Magliocca's testimony shifts. He shifts. And two things

are important to know. One is, the House of Representatives is what disqualified. The House of Representatives said, No, we're not going to seat you, [p.100] using their authority.

But the second thing is that what Magliocca said, and his shift is, they did it because he had provided aid to the Confederacy. A much different standard than incite. The Confederacy is already — the war between the states is ongoing and this is aid.

And that's why — I think it was Philip Thomas who wrote the $100 check to his son who marched off to Shenandoah Valley or whatever. That was aid.

So it's a different prong, and so now we're shifting these prongs. That's the sum total of Professor Magliocca's testimony.

And compared to that, you have sort of the ordinary meanings, the difference of types of behavior, and you have the Confiscation Act of 1862 where Congress specifically used incite but didn't use engage.

There is no case law supporting Professor Magliocca's interpretation. There's not a lot of case law supporting any of this, to be honest with you.

But — but if you look at some of these recent decisions on justiciability and sort of what's going on there, there's a skepticism of the application, and rightfully so. I mean, towards the end, the petitioners said: Well, you know, the Secretary has all [p.101] of these — this authority and states have all of these authorities based on the Fourteenth Amendment.

The Fourteenth Amendment was passed to limit state authority, not to increase state authority. It was passed to limit, and that's the framework.

Now, for incite, now we'll step back. Engage doesn't equal incite. Let us assume for purposes of argument only and all of these, you know, statements I'll make to say no, we're not bound by that. Let's assume incite is the standard, okay?

What we've — what I want to point out is there is no case law on — or very little on insurrection, pretty much none since — since it was passed. I mean, there's definitions, there's a grand jury charge over there, but, I mean, are there rulings on this? No.

And same with engage. This Court is wading into a brave new world, but the Court is not wading into a brave new world when it comes to standards for incite. Under the Brandenburg standards, there's lots of that.

And we're not saying that the First Amendment, pardon my pun, trumps the Fourteenth Amendment or vice versa. What we are saying, and this we've talked in our brief, the Court is required to harmonize the two, [p.102] when possible, to find a construction that harmonizes the two.

And the Brandenburg standards are what harmonizes it. And Brandenburg standards say: This is when incitement to violence takes place, and this is when incitement doesn't take place. That's what the Brandenburg standards talk about.

And so there's a couple important things. I mean, the Brandenburg standard, the Sixth Circuit has specifically rejected, it's not how a speaker interprets the speech.

All of Simi's approach doesn't find any solace — it's another way of saying it's been rejected — by case law. It's not that the Proud Boys said, "Oh, my gosh, he's speaking to me, so you're telling me there's a chance." That's not the standard. The standard is the intent and

the objective words that are used. It's a plain word meaning.

Now, look, I get it. You know, there could be a code that if there was evidence that President Trump sat down with the Proud Boys and said, "Look, I'm going to give this speech. And when I say the Eagle has landed, go launch your attack." Okay? I mean, there could be a prearranged code. But absent that, which doesn't exist here, it's the plain objective words, [p.103] the objective meaning of the speech.

Let me talk a little bit about causality as well. Unengaged, it has to be — or incite, has to be causality. Look, even the January 6 Report says this, that the violence began well before President Trump finished his speech. So it's difficult to see how the January 6 speech caused this.

Now, I know they've argued, well, then it increased, that 2:24 tweet, and I'll get to that in a second. But the speech itself, there was not causality.

And all of the stuff pre—6, it fails the imminence test, the objective words. And you can say "will be wild" means this, that, or the other. It doesn't mean violence. The objective words do not
incite. They simply don't.

Let's talk a little bit about specific intent. There was no intent on President Trump's behalf whatsoever, general or specific. The most one can discern is that he pressured and he wanted other people to pressure Vice President Pence to send the electoral count back to states for ten days.

That's what he said, and you heard him in the January 6 speech: Send it back for ten days. I'm sure it

will change. You know, let's do the right thing. That's what he wanted to do.
[p.104]

I want to talk about the National Guard when it comes to specific intent. Now, the National Guard is important for a couple of reasons because it, frankly, I think destroys their argument that President Trump did a failure to act.

But let's talk about intent. The evidence on National Guard is, frankly, overwhelming. We have two witnesses, Kash Patel, we have Katrina Pierson. And it's corroborated — and this is important — it's corroborated by the text from Max Miller, the petitioners introduced, in which Max Miller says, "Boy" — he says to Katrina Pierson — "it's a good thing we killed that National Guard thing."

Well, why would he say "we killed that National Guard thing"? Well, because it came up in the conversation because President Trump wanted and my — I'm inferring that it freaked everyone out because no one wanted President Trump to mobilize the National Guard because he would be accused of being a dictator and all of this other stuff.

But he certainly authorized it. How can a President who authorizes the National Guard to be used, not on one occasion but on two in front of two audiences, enough to give his staff concern that he's actually going to, you know, push it really hard, he authorizes it and [p.105] Kash Patel follows up on it to prevent violence, how is that an intent to incite?

It is the antithesis. In fact, you know, the mayor of DC put out this letter saying, Don't give me any more National Guard. Well, why would she do that? Well, the

reason she would do that is because the Secretary of the Army talked to her and she was like, No, I don't want this.

In fact, the Capitol Police didn't want it. I think the evidence shows that President Trump was the only political leader in DC that wanted substantial protections to prevent the type of violence that happened on January 6. He's the only one who wanted to sort of flood the zone with troops to make sure that there wouldn't be any violence. Everyone else resisted, everyone else resisted until it started.

And then, of course, the National Guard was mobilized and — because they already had President Trump's authorization. In fact, the National Guard was already — according to Kash Patel, was one of the fastest mobilizations. It happened within a couple of hours of the mayor asking for the National Guard.

I don't know if you know a lot about the National Guard. I used to serve in the Reserves. And mobilizing part—time soldiers, Marines — I'll be [p.106] respectful to Mr. North, who served there — is — is just a hot mess. It doesn't happen in two hours. Unless there has been substantial time pre—positioning people, getting them ready to go to staging points, making sure you have the transportation and equipment and logistics in place, so you can mobilize part—time solders from a disparate area in two hours.

That is pretty amazing. And it shows that there were actual steps taken by the military with President Trump's authorization to mobilize the National Guard.

So lots of evidence that he wanted to do that. Eyewitness evidence, confirmed by the tweet that the petitioners themselves brought in that shows President

Trump did not have an intent for violence, but had an intent to make sure there wasn't violence.

All right. I don't have a lot of time left.

Insurrection. I said earlier on that they're just picking something out of the hat for a definition of insurrection, and they point to this definition. If you look at that definition, it differs fundamentally from the definition they put in their Complaint. Paragraph 369, I believe it was.

That was an assembly of persons — and an [p.107] assembly means a group organized for a purpose — acting with a purpose to oppose the continuing authority of the United States Constitution — that's the continuing authority, not ten days — by force. Okay?

So that's a different definition than the one they proposed with Professor Magliocca. And I would urge the Court to follow what the — what the Michigan court just said recently. And the Michigan court — and we filed the supplementary authority just the other day — Michigan court said a lot of great things, rejected a lot of the petitioners' arguments, rejected the Secretary's arguments.

But one of the things that the Court said was: Look, you — we really don't know what insurrection is. There's lots of definitions. In fact, there's as many definitions — I'm trying to find it and I can't —but there are many definitions, as people who want to think deep thoughts about them.

Professor Magliocca is a smart guy, and I'm not saying that his definition is crazy, but it has no authority, it's him making it up, just like anyone else would make it up.

Yeah, the Court said: The short answer is there are as many answers and gradations of answers to each of these proffered examples — one of which was [p.108] insurrection — as there are people called upon to decide them.

The violence at the Capitol. No, the —wasn't armed, the mob wasn't armed. We have Professor Hodges — we had Mr. Hodges — Officer Hodges talking about how the gun unit was looking for firearms. There were no firearms. No one found them.

There's no evidence that Trump knew they were armed. There's no evidence beyond — so there were some — I admit, there are brass knuckles and some pepper spray. But deadly arms? People coming armed to actually cause an insurrection?

That's not a bunch of flagpoles. The way it was used and the way President Lincoln used it when he defined it as an armed insurrection is weapons of war to create force, not makeshift weapons.

And I understand violence is inexcusable. It's really hard to say, Well, you know, there's such violence, but there's not a lot. But that's what the job of the court is to do, to say, Look, this may constitute a riot, but it does not constitute an insurrection.

And that's why we said insurrection needs to be grounded in the context and the understanding at the day when it was drafted and when it was ratified, and that is in the context of a Civil War. You can't ignore [p.109] the fact that 620,000 people were killed, that there was a massive armed conflict, and say, Well, what they really meant by insurrection was intimidation to prevent a law.

No. They were looking at the Civil War, and it was a response to that.

All right. Real quick, Hilary Rudy. As the Colorado Republican Party correctly noted, the Secretary has never enforced anything like this. The Secretary has no administrative procedures in place to make these determinations. It is, in fact, a ministerial.

Look, referring to the form, the Major Party Candidate Statement of Intent for Presidential Primary, remember those three boxes. The title on the form says: Qualifications for office, and in parentheses, you must check each box to affirm that you meet all qualifications of the office, close paren. Okay?

I was surprised — and I'll admit I have a basis for being surprised — that apparently that's just advisory, that's just guidance. And when the Secretary says: All qualifications — and refers to these three boxes — it means something different than when the person signs it and says: I meet all qualifications as prescribed by law.
[p.110]

So apparently when a person signs that form, they mean all the Federal Constitution and that apparently gives the Secretary authority and apparently imports all of the constitutional requirements of the Colorado Election Code.

But when the Secretary said "all qualifications," it's really just advisory for those three boxes. There really could be more.

That does not bear credibility. And that's because the Fourteenth Amendment is a disqualification. It's not a qualification.

I don't have time to quote from the Michigan case. You're certainly capable of reading it. I'd urge you to

take a look at that because that is good persuasive authority on what's going on and how people are looking at this.

I would also urge you to take a look at the Minnesota court, which rejected the Secretary's authority. And I would urge you to take a look at the New Hampshire decision, which basically said this is a political question.

On the justiciability issue.

Self—executing. Look, there's some disagreement before, there's one exchange in the U.S. Senate about whether or not it was self—executing.

[p.111]

But when Supreme Court Chief Justice Chase in the Griffins case says, It is nonself—executing, and Congress immediately responds, there is no further debate in the historical record. Justice Chase's view is dispositive and it is viewed as dispositive.

Very quickly, we have not argued this at length. I think we referred to it slightly, the Amnesty Act of 1812 [sic], I want to at least preserve that argument. The fact of the matter is, Congress did, in fact, provide amnesty going forward, and that law has not been overruled.

Let me end with two last points. I would submit to this Court that the initial framework that the courts used has sort of led it astray on some of these procedural, these jurisdictional arguments.

And the Court early on said that — that it was preparing this case for Supreme Court review, and I think that's laudable. But I think it created a bias to allowing — to reaching a factual hearing because you don't want to dismiss something on a jurisdictional and then it has to go — it comes back and then it has to go

back for a factual hearing, it bounces back and forth. You get everything at once.

And then also I think the Court's exchange with Professor Simi — I'm sorry, not — with [p.112] Professor Delahunty, when you were concerned that Professor Delahunty's interpretation would render the Fourteenth Amendment Section 3 a dead letter, and you talked about that a couple times.

It's not a dead letter if this Court doesn't make a decision. It's not appropriate for this Court's — for this Court to exercise jurisdiction. And stepping back, look, this was a five—day hearing, 17 1/2 hours, importing this whole January 6 stuff.

This is a big issue, and that's a small hearing, as much as I worked at it and the petitioners and yourself did. It does not create a good, thorough, factual record, an adversarial process, nor does it flesh out what these standards are to be able to apply to that. So I think there's some real concerns there.

At the end of the day — and remember I talked about the rule of democracy. I want to turn back to Attorney General Stanbery. And in his advisory opinions, Advisory 12 — Volume 12, 141, page 160 in 1867, the same language.

He said: Where from the generality of terms of description or for any other reason a reasonable doubt arises, that doubt is to be resolved against the operation of the law, against the operation of disqualification. That's what he said.

[p.113]

Two important things. His belief was that it has to be, the standard is beyond a reasonable doubt. So if there's a

reasonable doubt, you have to resolve it in favor of holding an election, the democracy canon.

And the second point was, any ambiguity get resolved that way, because that's, frankly, what we are as a country. We vote on these issues.

Just because, you know, I mean — I guess to put it more crudely, you know, look, when you have a hammer, when the Court system is the hammer, not every problem is a nail. The fact of the matter is that the people get to decide on this.

I would submit that the petitioners' evidence relies — it relies on the January 6 Report. It relies on inferences drawn from the January 6 Report. It relies on the conclusions and the characterizations from the January 6 Report. None of which meet the objective standards of certainly the Brandenburg line of cases as far as what incitement actually means.

None of that meets it unless you buy into the January 6 Report's conclusions. And that ain't evidence. It shouldn't be evidence before this Court.

I think I've come up with my full hour here. Thank God I was able to actually fill it and hopefully intelligently.

[p.114]

I want to thank the Court for its time. I want to thank the Court's staff for its time as well. I know it's been a lot of work. Obviously, as petitioners began, we will end, we're not happy to be here and we don't think we should be.

We would ask the Court to review and reconsider its jurisdictional arguments, but certainly recognize that the easiest way, the most straightforward way is looking at the well—developed Brandenburg standards and saying

that President Trump ca me nowhere near towards engaging in violence, insurrection, or anything approaching lawless activity.

Thank you very much, Your Honor.

THE COURT: So I'm going to give you a little bit of guidance.

I have no intention of revisiting my prior decisions. I'm — Mr. Gessler may be right and I may be wrong, but that's not what I plan on doing.

I plan on issuing a decision on what was in the hearing, and so to the — I only say that so that you don't spend time addressing some of these things that I've already decided.

MR. GRIMSLEY: And, Your Honor, I don't intend to. I guess one question is, with regard to the J6 Report and admissibility of that, is that one that's [p.115] off the table, or should I address it?

THE COURT: I consider that to be conditionally admitted. When I say conditionally, that meant and always meant that I may reverse myself on —after the hearing.

MR. GRIMSLEY: So I'll keep that brief, and I'll keep these remarks, I think, brief.

There's been consistent complaints about the January 6 Report and the methodology that went into coming up with the findings. The problem is, they haven't come in here and really challenged the veracity of actually many of those findings. They just complain about the process.

President Trump could have come in here and testified. There are other people who could have come in here and testified, but they don't really question, again, any of the findings that we're relying on.

Now, they tried to do it for a couple, I think, during the closing here, but we're not the ones who made up that President Trump knew Ali Alexander and Alex Jones. This is from Katrina Pierson:

"I want to talk with you about, you mentioned a couple of times Ali Alexander and Alex Jones. Do you refer to them as 'the crazies'?"

[p.116]

Yep.

"Okay. And you know that — or you said that Trump likes the crazies, right?"

"Yes, and I also define 'crazies' as being those who viciously defend him in public."

And Professor Simi testified that President Trump went on Alex Jones's show right after announcing his candidacy for President in 2015. We're not making this stuff up. So that finding is not impugned at all.

And then as far as 10— to 20,000 troops? That testimony was not credible. There was no documentation they could point to to support the idea that 10— to 20,000 troops had been authorized.

And you heard Professor Banks say, Yeah, that's a pretty big authorization of troops. You would think you might see some documentation.

And when confronted about it, Mr. Patel said: You know, it's kind of hiding back in the Department of Defense. I didn't have it with me. I couldn't bring it to the January 6 Committee.

It wasn't hiding back at the Department of Defense. The January 6 Committee asked for documents from the Department of Defense. Mr. Heaphy testified that the Department of Defense complied, that the request [p.117] would have covered any such document.

There were no such documents. Mr. Patel's testimony was not credible.

Now, as far as the criticisms of Professor Simi, yeah, he's not inside President Trump's mind. He admitted that. But when pressed repeatedly by my esteemed colleague here —

MR. GESSLER: Mr. Gessler.

MR. GRIMSLEY: — Mr. — I didn't — I was taught never to say opposing counsel's name on the record. I don't know if that's right or wrong.

But my esteemed colleague pressed him, and he said: Yeah, I'm not in his mind, but I have looked at these patterns of communication for my entire career, and these patterns of communication back and forth between President Trump and these right—wing extremists fits that to a T.

And it wasn't just on January 6. It was five years leading up to January 6. And he wouldn't have been allowed to testify on what Trump's intent was or meaning. That's for this Court to decide.

But it's certainly more than a reasonable inference, given the information and the patterns that Professor Simi identified for this Court, to infer that Trump knew exactly what he meant. He knew who he was [p.118] talking to, and he knew what the result of what he said that day was going to be.

And as far as Michigan goes, Your Honor has made your decision on this already. I addressed it without calling it the political question doctrine at the end of my earlier remarks.

I think Michigan just got it wrong. There are not committed textual reasons to think this was left to Congress. It's exactly the opposite. As I said before, it

cannot make any sense to say that Congress by a simple majority has to approve the disqualification, but it takes a two—thirds supermajority to disable it. It just does not make sense.

And finally, they just keep wanting to ignore the 2:24 tweet and what Trump did after the speech. Wasn't in the findings of fact and conclusions of law and despite the promise, they never came back to it in closing.

There is no innocent explanation for that tweet given what President Trump knew was going on.

So petitioners have proven their case on the facts and the law. And as I close, I want to address two rhetorical points that Trump continues to make.

First, Trump argues that petitioners' claims must be wrong because they're unprecedented. They [p.119] point out that no court in the history of the U.S. has disqualified a presidential candidate under Section 3 of the Fourteenth Amendment. They point out that no court in Colorado has disqualified any candidate under Section 3 of the Fourteenth Amendment.

There's a reason for that. Never before in the history of the United States has somebody who engaged in insurrection against the Constitution run for President after having taken an oath to protect that document. Never before in the history of the United States has a sitting President sicced a mob on the Capitol while they were counting electoral votes.

Section 3 of the Fourteenth Amendment was put in place precisely for this reason, that no President before Trump has tested it tells you all we need to know about Trump.

Second, Trump asserts that applying Section 3 is somehow antidemocratic, that it will deprive people the

ability to vote for the candidate of their choice, a candidate who they say is leading in the polls.

Now, qualifications by definition prevent people from voting for who they want. There are probably 30—year—olds out there, probably foreign citizens, maybe an Arnold Schwarzenegger, maybe a Barack Obama or a George W. Bush who's already been President two times, [p.120] but it doesn't matter.

And the argument that Section 3 should not apply because Trump is popular could not be more dangerous. Our founders have made clear time and again that a candidate's popularity does not supersede the Constitution. The rule of law must apply whether a candidate has no chance of winning election or is a potential front runner.

The application of Section 3 is at its most urgent when a person who has desecrated their oath to support the Constitution seeks the highest office in the land. That is when the protection is needed the most.

And enforcing the Constitution does not defy the will of the people. The Constitution itself enables, embodies the will of the people. It is the supreme law of the land and must be enforced even against popular political candidates.

Here's a news flash. President Trump lost the 2020 election. Rather than peacefully hand over power to his successor, as every single outgoing President in the history of our country has done, President Trump chose to do everything he could, say anything he could to hold onto that power unlawfully.

President Trump violated his oath to [p.121] preserve, protect, and defend the Constitution. President Trump engaged in insurrection against the Constitution.

The Constitution is clear. He cannot be President again.

THE COURT: I want to again thank everybody for their high quality presentations and for their professionalism, and I am now officially ending the Section 1—113 proceeding.

Everybody have a great night.

MR. GRIMSLEY: Thank you, Your Honor.

MR. GESSLER: Thank you.

(WHEREUPON, the within proceedings were adjourned at the approximate hour of 5:45 p.m. on the 15th day of November, 2023.)

Minute Orders

Case Number: 2023CV032577
Division: 209
Case Type: Injunctive Relief
Judicial Officer: Sarah Block Wallace
Case Caption: Anderson, Norma et al v. Jena Griswold in Her Official Capacity et al
Court Location: Denver County - District

Order Date: 09/18/2023

JUDGE SARAH B. WALLACE. CTRM 209. FTR 10:03. STAT. ATP ERIC OLSON, MARIO NICOLAIS, MARTHA TIERNEY, SEAN GRIMSLEY, AND JASON MURRAY ATD FOR TRUMP, SCOTT GESSLER AND JUSTIN NORTH; FOR GRISWOLD, MICHAEL KOTLARCZYK ATI ROBERT KITSMILLER AND MICHAEL MELITO COURT GRANTS THE MOTION TO INTERVENE. COURT HEARS ARGUMENT ON THE MOTION FOR AN EXPEDITED CASE MANAGEMENT CONFERENCE. COURT SETS 5-DAY HEARING TO BEGIN ON 10/30/2023. COURT ORDERS THAT INITIAL MOTIONS TO DISMISS ARE FILED BY 09/22/2023; RESPONSES DUE BY 09/29/2023; REPLIES DUE BY 10/06/2023. ALL OTHER MOTIONS TO DISMISS SHOULD BE FILED BY 09/29/2023; RESPONSES DUE BY 10/06/2023; REPLIES DUE BY 10/13/2023. PARTIES SHOULD COORDINATE THEIR ARGUMENTS TO REDUCE THE AMOUNT BEING FILED CONCERNING THESE MOTIONS. TO THE EXTENT THE COURT FEELS THE ARGUMENTS MADE IN THE

MOTIONS TO DISMISS WOULD BEST BE DECIDED AT THE HEARING, THE COURT WILL RESERVE ITS RULING UNTIL THAT TIME. PARTIES SHOULD WORK TOGETHER TO CREATE A PROPOSED SET OF DEADLINES THAT WILL GOVERN THE CASE. ANY DISAGREEMENTS WILL BE ADDRESSED AT THE STATUS CONFERENCE SET FOR 9:00 ON 09/22/2023. /CAS

Minute Orders

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Case Type: Injunctive Relief
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Order Date: 09/22/2023

JUDGE SARAH B. WALLACE. CTRM 209. FTR 9:00. STAT. ATP ERIC OLSON, MARTHA TIERNEY, MARIO NICOLAIS, AND SEAN GRIMSLEY ATD FOR GRISWOLD, MICHAEL KOTLARCZYK; FOR TRUMP, SCOTT GESSLER, GEOFFREY BLUE, AND JUSTIN NORTH; FOR CRSCC, ROBERT KITSMILLER AND MICHAEL MELITO COURT DISCUSSES EXPANDED MEDIA COVERAGE REQUESTS WITH THE PARTIES. COURT SETS ORAL ARGUMENT ON THE SLAPP MOTION FOR 1:30 ON 10/13/2023. COURT ORDERS THAT PTFS DISCLOSE THEIR WITNESS LIST ON 09/29/2023; DEFS SHOULD DISCLOSE THEIR WITNESS LIST ON 10/09/2023; PARTIES HAVE UNTIL 10/23/2023 TO SUPPLEMENT THEIR WITNESS LIST AND PROVIDE A JOINT ORDER OF PROOF. THE ORIGINAL WITNESS LISTS SHOULD PROVIDE ENOUGH DETAIL AS TO WHAT THE WITNESSES WILL TESTIFY TO SO THAT PARTIES CAN MAKE A REQUEST FOR DEPOSITIONS. COURT DENIES REQUEST FOR EXPERT DEPOSITIONS; REPORTS SHOULD BE FULSOME AS EXPERTS WILL NOT

BE ALLOWED TO TESTIFY TO ANYTHING OUTSIDE OF THE EXPERT REPORTS. PTFS WILL IDENTIFY EXPERTS AND SUBJECT MATTER BY 09/25/2023; DEFS SHALL IDENTIFY EXPERTS AND SUBJECT MATTER BY 10/13/2023. PTFS WILL PROVIDE EXPERT REPORTS BY 10/06/2023; DEFS SHALL PROVIDE EXPERT REPORTS BY 10/27/2023. PTFS WILL PROVIDE PRELIMINARY EXHIBITS ON 10/06/2023; DEFS WILL PROVIDE PRELIMINARY EXHIBIT LISTS ON 10/16/2023; PARTIES WILL EXCHANGE FINAL EXHIBIT LISTS ON 10/23/2023. PARTIES SHOULD PROVIDE A LIST OF STIPULATED AND A LIST OF NON-STIPULATED EXHIBITS PER PARTY BY 10/23/2023. MOVING PARTY SHOULD PROVIDE THE COURT WITH A COURTESY COPY OF THE MTDS WITH EXHIBITS WHEN THEY ARE FULLY BRIEFED. COURT ORDERS THAT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW BE FILED BY 11/08/2023. COURT ORDERS THAT A BRIEFING ON THE REMAINING EVIDENTIARY ISSUES BE PROVIDED BY EACH PARTY BY 10/20/2023; RESPONSES DUE BY 10/27/2023. COURT ORDERS THAT 702 MOTIONS BE FILED BY 10/16/2023; RESPONSES DUE BY 10/27/2023. PTFS WILL BE ALLOWED TO MAKE 702 OBJECTIONS AT THE HEARING. COURT DENIES REQUEST FOR AMICUS BRIEFS. COURT ENTERS THE PROTECTIVE ORDER SUBMITTED BY PTFS WITH MODIFICATIONS. /CAS

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO
1437 Bannock Street
Denver, CO 80202

Case No. 2023CV32577

Division: 209

Petitioners:
NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN

v.

Respondents:
JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and DONALD J. TRUMP

and

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

ORDER RE: DONALD J. TRUMP'S MOTION TO DISMISS FILED SEPTEMBER 29, 2023

This matter comes before the Court on Donald J. Trump's Motion to Dismiss, filed September 29, 2023. Having considered the parties' briefing, the relevant legal

authorities cited, and being otherwise familiar with the record in this case, the Court FINDS and ORDERS as follows:

I. LEGAL STANDARD

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

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

II. ANALYSIS

In his Motion to Dismiss, Intervenor Trump makes the following arguments: (1) the question before the Court is a non-justiciable political question; (2) Section 3 of the Fourteenth Amendment is not self-executing; (3) Congress has preempted states from judging presidential qualifications; (4) Section 3 of the Fourteenth Amendment does not apply to Intervenor Trump; (5) the Petition fails to state a claim that violence constituted an insurrection or President Trump engaged in an insurrection; and (6) the case should be moved to Washington, D.C. under Colorado's *forum non conveniens* statute.

a. Non-Justiciable Political Question

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

In this case, Intervenor Trump argues that the U.S. Constitution reserves exclusively to the U.S. Congress

the decision as to whether a candidate is unqualified under Section 3 of the Fourteenth Amendment.[1] He does not argue the second basis under the political question doctrine—that a Court is incapable of resolving the question—nor could he. Instead, Intervenor Trump argues the U.S. Constitution reserves exclusively for the United States Congress the power under Section 3 of the Fourteenth Amendment to determine whether a party may take office. In doing so, Intervenor Trump relies on cases that address the question of whether various Presidential candidates (Barack Obama, John McCain, and Ted Cruz) were natural born citizens. He does not cite a case holding that the question before this Court (whether a candidate is barred under Section 3 of the Fourteenth Amendment) is barred under the political question doctrine.

i. Intervenor Trump's Cases

Intervenor Trump cites the Third Circuit in *Berg v. Obama*, 586 F.3d 234, 238 (3d Cir. 2009) for the proposition that the question of whether Barack Obama was a natural born citizen was a non-justiciable political question outside the province of the judiciary. The Court in *Berg* makes no such holding. Instead, when describing the history of the case, the Third Circuit states, "[w]e also denied that motion, reiterating Berg's apparent lack of

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

standing and also stating that Berg's lawsuit seemed to present a non-justiciable political question." *Id.* This Court does not have this order in front of it, in which the Third Circuit apparently stated, "the lawsuit seemed to present a non-justiciable political question." *Id.* However, even if it did, it appears that whatever the Third Circuit did say regarding the political question doctrine was *dicta.*

In addition to *Berg*, Intervenor Trump cites a series of trial court opinions, and one California appellate opinion, some published, some unpublished, that largely hold or state in *dicta* that the plaintiffs' claims are likely also barred under the political question doctrine as a question committed to a coordinate political department. The Court addresses the cases Intervenor Trump cites below.

In *Robinson v. Bowen*, 567 F.Supp.2d 1144, 1145 (N.D. Cal. 2008), an elector pledged to a third-party candidate filed a motion for preliminary injunction seeking to remove John McCain from the ballot because he was allegedly not a natural born citizen. The Court denied the motion for preliminary injunction because the plaintiff was not likely to succeed on the merits. *Id.* at 1146. The Court then noted that Article II of the Constitution prescribes the number of presidential electors to which each state is entitled, and the Twelfth Amendment prescribes the manner in which the electors shall elect the President. *Id.* The Court examined 3 U.S.C. § 15 which directs that Congress "shall open, count, and record the electoral votes" and provides a mechanism for objections. *Id.* at 1147. Finally, it turned to the Twentieth Amendment which provides instructions on how to proceed if a president elect fails to qualify. *Id.* Having looked at these various constitutional provisions and statutes, the *Robinson* Court then concluded, without

invoking the political question doctrine, that "[j]udicial review—if any—should occur only after the electoral and Congressional processes have run their course." *Id.* The course it referred to was a 3 U.S.C. § 15 objection to a candidate and the Twentieth Amendment procedures addressing a failure to qualify. The idea, however, of Court intervention after "Congressional processes have run their course" is directly contrary to a holding that this is a political question—where there is no judicial review permitted.

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

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

Of the cases Intervenor Trump relies on, the Court in *Grinols v. Electoral Coll.*, No. 2:12-CV-02997-MCE-DAD, 2013 WL 2294885 (E.D. Cal. May 23, 2013) (unpublished), *aff'd*, 622 F.App'x 624 (9th Cir. 2015) had the most extensive analysis. First, it noted that the "natural born citizen" requirement does not designate which branch should address whether the candidate is qualified. *Id.* at *6. It further noted Article II, Section 1 of the Constitution establishes that the Electoral College elects the President. *Id.* It then pointed out that "[t]he Twelfth Amendment empowers the President of the Senate to preside over the meeting between the House of Representatives and the Senate in which the President of the Senate counts the electoral votes." *Id.* According to the Court, "[t]he Twentieth Amendment empowers Congress to create a procedure in the event that neither the President-elect nor Vice President-elect qualifies to serve as President of the Unites States [sic]." *Id.* Finally, the Court pointed out that "the Twenty-Fifth Amendment provides for removal of the President should he be unfit to serve." *Id.* Based on those provisions, the Court held "the Constitution make[s] clear that the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States." *Id.*

In *Strunk v. New York State Bd. of Elections*, No. 6500/11, 2012 WL 1205117, at *12 (N.Y. Sup. Ct. Apr. 11, 2012) (unreported disposition), *aff'd*, 5 N.Y.S.3d 483 (N.Y. App. Div. 2015) the Court held the framework for the Electoral College and its voting procedures for President and Vice President is found in Article II, Section 1 of the Constitution. More specifically, the Court noted that 3 U.S.C. § 15 dictates "the counting of electoral votes and the process for objecting" to votes. *Id.* According to the

Court, "[n]o objections were made by members of the Senate and House of Representatives, which would have resolved these objections if made." *Id.*

Finally, in *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *16 (S.D. Miss. Mar. 31, 2015) (unpublished), the Court, relying on *Keyes* and *Grinols, supra*, held "this court can find no authority in the Constitution which would permit it to determine that a sitting president is unqualified for office or a president-elect in unqualified to take office. These prerogatives are firmly committed to the legislative branch of our government."

ii. Petitioners' Cases

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

> 1. vested in the legislatures of the several states, not Congress, the power to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of

[2] The Pennsylvania Commonwealth Court is an appellate court that also has original jurisdiction to hear election cases.

> Senators and Representatives to which the State may be entitled."
> 2. commanded the electors, once selected, to meet in their respective states, and vote by ballot for two persons, and then to transmit their votes to the nation's seat of government.
> 3. commanded, upon receipt, the President of the Senate open the ballots and count the votes in the presence of the members of the Senate and the House of Representatives.
> 4. provide that only in the case of a tie, or the absence of a majority, does the Constitution allow Congress to choose the President and Vice President.

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

After reviewing the various constitutional provisions that supposedly support the Court dismissing the case due to the political question doctrine, the Court in *Elliot* concluded that the Constitution does not vest the Electoral College with the power to determine eligibility of a presidential candidate. *Id.* at 650–51. The Court similarly concluded that Congress has no control over the process other than deciding the day on which electors "'give their votes.'" *Id.* at 651 (quoting U.S. CONST. amend. XII). The Court then compared the provisions regarding Presidential eligibility with those regarding the eligibility of Congress where the U.S. Constitution clearly vests in Congress the power to determine the eligibility of its own members. *Id.* The Court concluded that because the Constitution does not vest any entity of the federal

government with the power to ensure that only persons who are constitutionally eligible become the President, that determination is reserved for the Courts. *Id.*

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

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

iii. Analysis

Intervenor Trump argues the weight of the law favors a holding that the political question doctrine precludes judicial review, and that Petitioner can only cite "two idiosyncratic state cases that never received appellate review."[3] The Petitioners, on the other hand, argue nothing in the Constitution commits to Congress and the Electoral College the exclusive power to determine presidential qualifications and that Intervenor Trump's

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

cases are distinguishable because in none of those cases did the plaintiffs bring pre-election suits in state court under a state law authorizing ballot access challenges.

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

ARTICLE II OF THE U.S. CONSTITUTION

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

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

This clause vests the States authority to appoint electors. The Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for President or a President-elect is constitutionally ineligible.

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

> The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in

> chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.

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

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

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

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

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

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

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

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

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

THE TWELFTH AMENDMENT

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;– The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;–The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of

those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.–The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. CONST. amend. XII.

The Twelfth Amendment modifies Article II, Section 1, Clause 3 and makes it clear that the President and Vice President are chosen separately but together. If there is no majority or a tie for President, the House of Representatives chooses the President. In the interim, the newly elected Vice President will serve as President. While the Twelfth Amendment references the "constitutional disability of the President" and that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President," the Court cannot find anything in this clause supporting a holding that the Constitution directs Congress to determine whether a candidate for president or a President-elect is constitutionally ineligible.

SECTION 3 OF THE TWENTIETH AMENDMENT

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

> accordingly until a President or Vice President shall have qualified.

U.S. CONST. amend. XX, § 3.

This provision addresses what happens if the President-elect dies or fails to qualify. It also allows Congress to make law to provide for the case when neither the President-elect nor the Vice President-elect qualify. *Robinson*, 567 F.Supp.2d at 1147; *Keyes*, 117 Cal.Rptr.3d at 216; and *Grinols*, 2013 WL 2294885 at *6 cite the Twentieth Amendment for the proposition that it empowers Congress to create a procedure if neither the President-elect nor Vice President-elect qualifies to serve as President of the United States. *See Peace & Freedom Party v. Bowen*, 912 F.Supp.2d 905, 911 (E.D. Cal. 2012), *aff'd sub nom. Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) ("Section 3 [of the Twentieth Amendment] was intended to provide for a then-unprovided for contingency: the selection and succession of the presidency in the event that the president elect, vice president elect, or both could not assume office" (citing 75 Cong. Rec. 3831 (1932) (statement of Rep. Cable))). And Congress did just that when it passed the Presidential Succession Act of 1947, 3 U.S.C. § 19. What Congress has not done is provide for any process to determine whether a President qualifies and what entity is supposed to make that determination. Further, nothing in the text of the Amendment commits to Congress the exclusive authority to render judgment on a presidential candidate's fitness to be placed on the ballot. *See Lindsay*, 750 F.3d at 1065 ("nothing in the Twentieth Amendment states or implies that Congress has the *exclusive* authority to pass on the eligibility of candidates for president" (emphasis in

original)). However, unlike the other Constitutional provisions relied on by the decisions Intervenor Trump relies on, section 3 of the Twentieth Amendment does include the word "qualify" and suggests that someone or something has decided whether a President qualifies to be President. It is for this reason that the Court has asked the Parties to provide the Court with testimony regarding the historical meaning and interpretation of this Amendment, if such evidence exists.

3 U.S.C. § 15

Finally, the decisions Intervenor Trump cites rely heavily on 3 U.S.C. § 15 for the proposition that there is an objection process when the electoral college votes are counted and that it is during this process that the objections to the qualifications of a President should be made. *Robinson*, 567 F.Supp.2d at 1147 ("It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify"); *Keyes*, 117 Cal.Rptr.3d at 216 (quoting *Robinson, supra*); *Strunk*, 2012 WL 1205117 at *12 ("the counting of electoral votes and the process for objecting for the 2009 Presidential election is found in 3 USC § 15. . . . This required the meeting of the joint session of Congress to count the 2008 electoral votes. . . . No objections were made by members of the Senate and House of Representatives, which would have resolved these objections if made. This is the exclusive means to resolve objections to the electors' selection of a President or a Vice President"); *Taitz*, 2015 WL 11017373 at *13 (noting

that the *Keyes* Court cited the Twelfth Amendment and 3 U.S.C. § 15 when it "stated that the Constitution and laws of the United States delegate to Congress the authority to raise and decide objections to a presidential nominee's candidacy"); *see also Oines v. Ritchie*, Dkt. No. A12-1765 (Minn. Oct. 18, 2012) (citing *Keyes* in support of the conclusion that 3 U.S.C. § 15 provides the avenue for challenging constitutional qualifications of presidential candidates).

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

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

SECTION 3 OF THE FOURTEENTH AMENDMENT

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the

> Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. CONST. amend. XIV, § 3.

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

The Court, having considered the above, declines to dismiss this case under the political question doctrine. A controversy involves a political question when, as is argued here, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. As the foregoing demonstrates, there is no textually demonstrable constitutional commitment of the issue to a

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

coordinate political department. The text is simply silent as to the specific issue, and arguments by inference, implication, or convention fail to demonstrate the kind of strong "textually demonstrable commitment" necessary for the Court to find the matter nonjusticiable. *See*, *e.g.*, U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members"); *Powell v. McCormack*, 395 U.S. 486, 548 (1969) (Art. I, § 5, cl. 1 is a "textually demonstrable commitment" to Congress to judge *only* the qualifications expressly set forth in art. I, § 2, cl. 2, and nothing more).

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

b. Whether the Fourteenth Amendment Is Self-Executing

Citing a law review article authored by Joshua Blackman and Seth Barrett Tillman, Intervenor Trump argues "Section Three of the Fourteenth Amendment is not self-executing and cannot be applied to support a cause of action seeking judicial relief absent Congressional enactment of a statute authorizing

Plaintiffs to bring such a claim in court." Intervenor Trump argues that the Blackman and Tillman law review article substantially refutes the law review article authored by William Baude and Michael Stokes Paulsen which the Petitioners cite in their Response causing the authors "to substantially modify their own analysis" and for a well-respected constitutional scholar, Steven Calabresi, to reverse his position on the matter. The Court has reviewed the modifications of the Baude and Paulsen law review article and the modifications do not in any way reverse their positions. Further, the retraction from Calabresi had nothing to do with whether Section Three was self-executing but was rather based on whether Section Three applies to Presidents. This leaves the Court with two law reviews that are over 100 pages each with contradictory conclusions.

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

The Petitioners, on the other hand, argue that whether Section 3 is self-executing is irrelevant because Petitioners are proceeding under Colorado's Election Code which provides it a cause of action. The Court agrees. To the extent that the Court ultimately holds that C.R.S. § 1-4-1204 allows the Court to order Secretary Griswold to exclude a candidate under the Fourteenth Amendment, the Court holds that states can, and have, applied Section 3 pursuant to state statutes without federal enforcement legislation. *See, e.g., State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *16 (N.M. Dist. Ct. Sept. 6, 2022) (adjudicating Section 3

challenge under state *quo warranto* law); *Worthy v. Barrett*, 63 N.C. 199, 200–01 (1869) (adjudicating Section 3 challenge as *mandamus* action), *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869*); In re Tate*, 63 N.C. 308, 309 (1869) (adjudicating Section 3 challenge as *mandamus* action); *State ex rel. Sandlin v. Watkins*, 21 La.Ann. 631, 632 (La. 1869) (adjudicating Section 3 challenge under state *quo warranto* law); *Rowan v. Greene*, Dkt. No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Off. Admin. Hr'gs May 6, 2022) (state administrative Section 3 challenge).[5]

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

c. Whether Federal Preemption Applies

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

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

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

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

Based on the discussion above regarding the political question doctrine, it is unclear to the Court that there is

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those of the act of Congress of twenty-fifth June, 1868 [re-admitting secessionist states to the Union, requiring compliance with Section 3 of the Fourteenth Amendment], the legal right to discharge the duties of the office of District Judge of the Eleventh Judicial District.").

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

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

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

e. Whether President Trump Engaged in an Insurrection

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

f. Forum Selection Clause

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

1. "The claimant or claimants are not residents of the state of Colorado." C.R.S. § 13-20-1004(1)(a). Here, all Petitioners are Colorado Residents.
2. "An alternative forum exists." C.R.S. § 13-20-1004(1)(b). Intervenor Trump has not identified a viable alternative forum. The three forums he suggests are: (1) Congress—but as discussed above, there is no

mechanism by which a Colorado elector can object to Intervenor Trump's qualification to Congress; (2) Criminal Prosecution—Intervenor Trump provides no explanation about how the Petitioners can seek criminal prosecution against Intervenor Trump in Washington, D.C.; and (3) Federal Court in Washington, D.C. But, as Intervenor Trump acknowledges, the Petitioners do not have standing in Federal Court. No adequate alternative forum, therefore, has been identified.

3. "The injury or damage alleged to have been suffered occurred outside of the state of Colorado." C.R.S. § 13-20-1004(1)(c). The alleged injury, in this case, is having an ineligible candidate on the ballot. That injury will occur in Colorado.

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

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

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

and C.R.S. § 1-4-1204. While Trump argues that they are nominal plaintiffs, he fails to explain who the actual plaintiffs are in this matter.

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

III. CONCLUSION

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

DATED: October 25, 2023.

BY THE COURT

Sarah B. Wallace
District Court Judge

JA1315

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

1437 Bannock Street
Denver, CO 80202

Case No. 2023CV32577

Division: 209

Petitioners:
NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN

v.

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

and

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

ORDER RE: DONALD J. TRUMP'S BRIEF REGARDING STANDARD OF PROOF IN THIS PROCEEDING

This matter comes before the Court on Donald J. Trump's Brief Regarding Standard of Proof in This Proceeding, filed on October 25, 2023. Petitioners' Response to the Brief was filed on October 27, 2023. The Court, having considered the matter, FINDS and ORDERS as follows:

Intervenor Trump argues in his Brief that even though C.R.S. § 1-4-1204(4) specifies that "[t]he party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence," as a matter of due process, this Court should apply the higher standard of clear and convincing evidence.

Intervenor Trump cites *Santosky v. Kramer,* 455 U.S. 745, 754 (1982) for the test to determine whether a standard of proof in a particular proceeding satisfies due process. The factors are: (1) "the private interests affected by the proceeding;" (2) "the risk of error created by the State's chosen procedure;" and (3) "the countervailing governmental interest supporting use of the challenged procedure." *Id.* The Colorado Supreme Court has also adopted this framework. *People in Interest of A.M.D.*, 648 P.2d 625, 636 (Colo. 1982).

Intervenor Trump argues that applying the *Santosky* test, this Court must apply a clear and convincing standard. First, he argues that the private interests at stake are significant because they implicate the "First and Fourteenth Amendment constitutional rights related to freedom of association." Intervenor Trump points out that the Colorado Supreme Court recognized in *Colorado Libertarian Party v. Sec'y of State of Colorado*, 817 P.2d 998, 1002 (Colo. 1991) that ballot access restrictions burden two fundamental rights: "'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political

persuasion, to cast their votes effectively.'"[1] (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

Petitioners respond citing the same cases and argue that under *Santosky,* the threshold inquiry is "the individual interests at stake" and that a heightened standard is only required when a "fundamental liberty interest" is implicated. 455 U.S. at 753–56. Petitioners then point out that many Courts, including Colorado, have held that "candidacy for a public office has not been recognized as a fundamental right." *Colorado Libertarian Party*, 817 P.2d at 1002; *see also Carver v. Dennis*, 104 F.3d 847, 850–51 (6th Cir. 1997); *Supreme v. Kansas State Elections Bd.*, No. 18-CV-1182-EFM, 2018 WL 3329864, *5–6, n. 27 (D. Kan. July 6, 2018).

Applying the government interest factor, Intervenor Trump argues the government's interest is served in using a higher standard of proof because the government has no interest in keeping qualified candidates off the ballot and a higher standard of proof would help ensure that does not happen. Petitioners respond that this argument puts the cart before the horse because it assumes that Intervenor Trump is qualified. The real governmental interest, according to Petitioners, is the right of the citizens of Colorado to cast a meaningful ballot—i.e., one for candidates who are constitutionally qualified. The Petitioners also urge the Court to discard Intervenor Trump's repeated references to his popularity because the fact that his supporters want to vote for him

[1] The right of qualified voters "to cast their votes effectively" cuts against a central theme of Intervenor Trump's position in this case which is that the Congress should decide whether he is qualified after the election has taken place and a hundred million voters have already cast their votes.

does not trump the public interest in only having qualified candidates on the ballot.

Finally, Intervenor Trump argues the risk of erroneous deprivation of his and Colorado voters' rights is heightened due to expedited procedures under C.R.S. § 1-1-113. This has been a repeated mantra of Intervenor Trump.[2] The Petitioners respond that this is not like the cases described in *Addington v. Texas*, 441 U.S. 418, 427 (1979) or *Santosky*, 455 U.S. at 753 where the risk of error is high because the Defendant was at risk of indefinite solitary confinement based on mental illness or parents were at risk of their parental rights being terminated. According to Petitioners, the injury to Intervenor Trump of not being on a ballot is no greater than that of the public's interest in ensuring that only constitutionally qualified candidates are on the ballot. Petitioners point out that the United States Supreme Court has held that when both parties have "an extremely important, but nevertheless relatively equal, interest in the outcome. . . . it is appropriate that each share roughly equally the risk of an inaccurate factual determination." *Rivera v. Minnich,* 483 U.S. 574, 581 (1987).

Considering all the above and the fact that Intervenor Trump does not point to a single case holding that a heightened standard of proof is required in a ballot access

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[2] The Court notes that at no point during these proceedings has Intervenor Trump articulated what discovery he would need to protect his interests further. Intervenor Trump ignores that while the Court declined to order expert depositions because it held that it would strictly construe C.R.C.P. 26(a)(2) and only allow opinions that were adequately disclosed, it never ruled that it would not consider fact depositions. To the contrary, the Court specifically advised the Parties that after witnesses were disclosed the Court would consider requests for fact depositions. *See* September 22, 2023 Minute Order.

challenge, the Court holds that under *Santosky,* the Court need not look beyond the fact that Intervenor Trump has failed to identify a fundamental liberty interest. While Intervenor Trump clearly has an interest in being on Colorado's ballot, that interest does not rise to the level of a fundamental liberty interest. *Colorado Libertarian Party*, 817 P.2d at 1002. As a result, the Court need not analyze the issue further.

The Court, therefore, will apply the burden of proof prescribed in C.R.S. § 1-4-1204(4).

DATED: October 28, 2023.

BY THE COURT:

Sarah B. Wallace
District Court Judge