

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

Case Number 2023CV032577, Division/Courtroom 209

CERTIFIED STENOGRAPHER'S TRIAL TRANSCRIPT
TRIAL DAY 5: November 3, 2023

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAHER,
KATHI WRIGHT, and CHRISTOPHER
CASTILIAN,

Petitioners,

v.

JENA GRISWOLD, in her official capacity as
Colorado Secretary of State, and
DONALD J. TRUMP,

Respondents,

and

COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE, and DONALD J. TRUMP,

Intervenors.

The trial in the above-entitled matter
commenced on Friday, November 3, 2023, at 8:31 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:
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1 P R O C E E D I N G S

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

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

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

11 MR. GESSLER: I believe they do not.

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

15 THE COURT: Sure. Sure.

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

23 And we were wondering if we could just
24 get a standing objection on those questions during
25 direct examination and then renew those objections and

1 request a ruling after that portion of
2 cross-examination.

3 THE COURT: Yeah. And I would -- most
4 likely what I'll do is defer any 702 ruling until the
5 findings of facts and conclusions of law that I'm
6 going to be issuing.

7 But I certainly want to allow you to
8 make your record, but I am -- it's my intention to let
9 Professor Delahunty testify.

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

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

19 MR. GRIMSLEY: Understood, Your Honor.

20 And if I may, for petitioners today,
21 Jason Murray, Eric Olson, Martha Tierney, Nikhel Sus,
22 Mario Nikolais, and Sean Grimsley.

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

1 MS. RASKIN: Good morning, Your Honor.
2 Jane Raskin on behalf of the Republican State Central
3 Committee. With me are Michael Melito, Nathan
4 Moelker, Bob Kitsmiller.

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

9 MR. KOTLARCZYK: Good morning, Your
10 Honor.

11 Michael Kotlarczyk from the Attorney
12 General's Office on behalf of the respondent, Jena
13 Griswold, Secretary of State, in her official
14 capacity. With me at counsel table is Jennifer
15 Sullivan from the Attorney General's Office and Deputy
16 Secretary of State Christopher Beall.

17 THE COURT: Great. Thank you.

18 MR. KOTLARCZYK: Thank you.

19 THE COURT: Mr. Gessler.

20 MR. GESSLER: Good morning, Your Honor.

21 Scott Gessler on behalf of President
22 Trump. With me is Mr. Chris Halbohn. I don't know if
23 his pro hac vice has been finished.

24 THE COURT: It has been.

25 MR. GESSLER: It has been. So I don't

1 expect him to talk, but he may. Mr. Geoff Blue as
2 well, Mr. Jacob Roth, and Mr. Justin North.

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

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

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

13 THE COURT: Okay.

14 Oh, okay. We need to take a pause while
15 the court reporter deals with some technical issues.

16 (Recess from 8:34 a.m. to 8:44 a.m.)

17 THE COURT: Let's proceed.

18 MR. GESSLER: Thank you, Your Honor.

19 For our next witness, we will call
20 Mr. Robert Delahunty.

21 THE COURT: Will you raise your hand.

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

25 THE COURT: Great. Have a seat and just

1 make sure to speak into the microphone.

2 THE WITNESS: Thank you.

3 DIRECT EXAMINATION

4 BY MR. GESSLER:

5 Q. Good morning, Mr. Delahunty.

6 So I'm going to be asking you some
7 questions today. And you're here -- we've called you
8 as an expert.

9 Let me ask you, have you ever
10 testified -- let me start with this.

11 Could you please state and spell your
12 name.

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

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

17 A. No.

18 Q. Okay. So this is your first time?

19 A. It is.

20 Q. So let me -- let me start with asking
21 you a little bit about your professional background.

22 What's your -- what's your current
23 position, if any?

24 A. I am retired.

25 Q. Okay. As someone who is retired, are

1 you -- are you involved in any law-related activities?

2 A. Well, I write articles or other shorter
3 pieces on law --

4 Q. Okay.

5 A. -- and public policy.

6 Q. Okay.

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

12 Q. Okay.

13 A. -- quite recently.

14 THE COURT: Professor, you're leaning
15 back.

16 THE WITNESS: Oh, I'm sorry.

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

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

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

22 THE WITNESS: Can you hear now?

23 Q. (By Mr. Gessler) Yeah. Professor,
24 sometimes it's a challenge whether you're supposed to
25 answer me or the Court when you're speaking, but since

1 we -- since there's a fair amount of media coverage,
2 just try and stay close to that microphone.

3 A. I will.

4 Q. Let me ask you to start with your legal
5 background in chronological order.

6 What -- what's your education?

7 A. Well, I graduated in 1968 from Columbia
8 University and had a summa cum laude degree there. I
9 then won a Kellett Fellowship from Columbia to study
10 at Oxford University, England. I studied a subject
11 called Greats, which consisted of two parts, classical
12 history and classical and modern philosophy. And I
13 got first class honors in Greats.

14 I then did a second degree at Oxford
15 University, a bachelor's of philosophy. I wrote a
16 thesis on Aristotle. I then had a career in Britain,
17 both at Oxford and Durham University teaching
18 philosophy. I was tenured at Durham University as
19 what they call a lecturer on the philosophy faculty.
20 That was the equivalent, really, of associate
21 professor in the United States.

22 At that point, about 1980, I decided to
23 return to this country and -- to study the law. And I
24 studied the law at Harvard Law School and graduated
25 cum laude from there. And then -- this is not

1 educational background, but it's the past. I spent
2 three years on Wall Street at a law firm called
3 Sullivan & Cromwell.

4 And then I joined the Department of
5 Justice, the appellate section on Civil Rights
6 Division, in 1986. And then at the start of 1989, the
7 start of the first George H.W. Bush administration,
8 William Barr, later twice Attorney General, invited me
9 to become a staff attorney at the Office of Legal
10 Counsel in the Department of Justice. And so I began
11 working there in early 1989.

12 I don't remember the year, but I was
13 eventually promoted to the Senior Executive Service in
14 the Department of Justice. And from 1989 until 2004,
15 I served primarily in the Office of Legal Counsel,
16 although for about a year, I was the special counsel
17 to the Solicitor of the Department of Labor, the U.S.
18 Department of Labor. He had been a college friend of
19 mine in England.

20 And then I served -- I was on unpaid
21 leave of absence but still employed by OLC for a year
22 to be a visiting professor at the Columbus School of
23 Law in Washington, D.C., which was part of the
24 Catholic University of America.

25 And while at St. Thomas -- I was there

1 from 2004 until the end of 2020. At the end of 2020,
2 I retired, and now I am a fellow for the Claremont
3 Institute Center for the American Way of Life in
4 Washington, D.C., and do -- give them legal advice
5 from time to time.

6 And I published an article and a book, a
7 collection of essays I put together. That also came
8 out --

9 Q. Okay.

10 A. -- in June.

11 Q. Let me interrupt you for just a moment.

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

15 THE WITNESS: Sorry.

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

19 THE WITNESS: Fine.

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

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

25 A. Yes.

1 Q. -- from 2004 to 2020.

2 What did you do there?

3 A. I taught constitutional law. And every
4 year I was there -- I'm not absolutely certain that I
5 did or did not teach it in the year I was on -- half
6 year I was on sabbatical. But constitutional law,
7 including, of course, the Fourteenth Amendment. That,
8 in fact, was the centerpiece of my teaching.

9 And I taught public international law.
10 And one term I gave a seminar on the law of genocide,
11 which is international law.

12 Q. Okay. During your time in any of these
13 positions -- and it looks as though you spent most of
14 your -- or a large portion of your career, large
15 chunks, at both the Office of Legal Counsel at the
16 Department of Justice as well as St. Thomas School of
17 Law.

18 Did you have an opportunity to work with
19 historical documents?

20 A. Oh, yes. Indeed.

21 Q. Can you describe some of that?

22 A. Well, I could go on. I hope not too
23 much.

24 But let me give you maybe three
25 examples. One of the first assignments I had in the

1 Appellate section of the Civil Rights Division of
2 Justice, which would have been in 1986, was to do
3 research into the Civil Rights Act of 1866, which is
4 now codified as section -- it's --

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

7 A. Section 1981 of Title 42 of the U.S.
8 Code.

9 And that involved research including
10 looking at dictionary definitions from the 19th
11 century of the meaning of the term "race." But that
12 was in connection with an amicus brief that the
13 government eventually did not file in a case called
14 Shaare Tefila versus Cobb.

15 So my whole research led me to draft an
16 amicus brief for the government. That was never
17 filed, but it did, right at the start of my career in
18 the Justice Department, entail research into private
19 documents and into the background of the Civil Rights
20 Act of 1866.

21 Q. (By Mr. Gessler) Okay.

22 A. More recently --

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

25 A. Yeah. This was a Law Review article I

1 published three or four years ago, maybe four or five
2 years ago. I'm interested in the law and Shakespeare,
3 and so I wrote a lengthy article about the law in his
4 play "King John." This entailed the research into the
5 English law of intestacy and bastardy in Shakespeare's
6 period, the Tudor period and the Stuart period.

7 And I made quite extensive use of a
8 database compiled by the University of Michigan, which
9 is called Early English Books Online. It is a
10 collection of thousands of legal and other documents,
11 proclamations, sermons, books of the Tudor and Stuart
12 periods.

13 And so I did that kind of research into
14 English legal history of the early modern period and,
15 indeed, the Middle Ages, because the play is set in
16 the Middle Ages, on the law of intestacy and the law
17 of illegitimacy using those historical materials which
18 were archived at the University of Michigan.

19 And if I am permitted to give another
20 example?

21 Q. Yeah. Let's do one more example --

22 A. Yes.

23 Q. -- and then we'll move on.

24 A. Some years ago in the Cornell Law
25 Quarterly, a law journal, I published an article on

1 the Declaration of War clause of the -- of Article 1
2 of the Constitution. And I did the primary research
3 or research into other primary materials from English
4 law, English legal cases -- I think it was prize
5 law -- from the middle of the 18th century, consulting
6 the original case materials.

7 Q. Okay. Have you written any pieces or
8 articles involving the electoral -- the Vice President
9 and the electoral count?

10 A. Yes. In 2022, along with my
11 often-coauthor, John Yoo, who is a professor --
12 chaired professor of law at the University of
13 California at Berkeley, we published an article on the
14 Twelfth Amendment and the -- as we understand it, the
15 constitutional authority of Congress to regulate the
16 vote count process in presidential elections, and the
17 constitutional role of the Vice President in the vote
18 count, the count of the electors, presidential
19 electors' votes.

20 Incidentally, that also involved
21 research into materials from the early republic.

22 MR. GESSLER: Okay. Your Honor, I -- to
23 be frank here, we had prepared to provide extensive
24 testimony on Mr. Delahunty's background, but in light
25 of your earlier ruling to keep the proceedings moving,

1 at this point I would proffer Mr. Delahunty as an
2 expert in the use of historical documents, legal
3 historical documents, and interpretation of legal
4 statutes arising from that historical analysis on
5 constitutional issues.

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

9 THE COURT: I'm going to -- I'm going to
10 accept Professor Delahunty on what sounds to me as a
11 very specific subject, which is the use of historical
12 documents and interpretation of legal statutes arising
13 from historical analysis on constitutional issues. He
14 was a law professor for 16 years and had a lengthy
15 career before then.

16 And obviously, you can cross-examine
17 him, and I will consider that in the weight of his
18 testimony.

19 MR. MURRAY: Understood.

20 THE COURT: But at the same time,
21 Mr. Gessler, I don't want to short-circuit your
22 examination in any way, so you should feel free to ask
23 him whatever you want to ask him for the record.

24 MR. GESSLER: Thank you, Your Honor.
25 Your Honor, I would like to clarify legal

1 interpretation of statutes as well as constitutional
2 provisions.

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

5 MR. GESSLER: That's why I clarified. I
6 am --

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

9 MR. GESSLER: I'm accepting
10 responsibility for lack of clarity.

11 And, Your Honor, I would also note that
12 we specifically proffered Mr. Delahunty as a rebuttal
13 expert to Professor Magliocca as well. So he'll
14 directly address the items raised in Professor
15 Magliocca's testimony.

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

22 MR. GESSLER: Okay. Your Honor, we
23 would then seek to proffer him as an expert on the
24 Fourteenth Amendment, as he taught constitutional law
25 for 16 years on the Fourteenth -- taught

1 constitutional law for 16 years, with a specific focus
2 on the Fourteenth Amendment.

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

10 MR. GESSLER: Okay. And, Your Honor, I
11 would also note that we -- I mean, to be
12 straightforward with the Court, we obviously raised a
13 702 objection to Professor Magliocca.

14 And our view is that all of this,
15 Professor Magliocca's testimony and Professor
16 Delahunty's, is akin to legal analysis and
17 interpretation, which normally tends to be excluded by
18 courts.

19 And we understand that it's here to help
20 you. And we understand also that you recognize there
21 are other published professors in the field that you
22 will look to as well, so . . .

23 THE COURT: And just on that, I -- and
24 maybe this will help with your focus on Professor
25 Delahunty's testimony.

1 Professor Magliocca largely talked about
2 historical interpretation and did not -- I do not
3 think, in large part, if -- and, maybe not if all, he
4 testified as to the law. He testified as to the
5 original documents that he had uncovered in looking at
6 the formation and the purpose of the amendment in the
7 first place.

8 And that was what I found to be helpful.

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

12 THE COURT: Great. Thank you.

13 MR. GESSLER: Okay.

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

19 Q. (By Mr. Gessler) Okay. Professor
20 Delahunty, you said you taught law school for, I
21 believe, 16 years at St. Thomas, and that a
22 substantial focus of your teachings was on the
23 Fourteenth Amendment.

24 Could you provide some more detail on
25 that?

1 A. Yes, indeed. I would think about half
2 of the course consisted of the study of the Fourteenth
3 Amendment. I was, I think, quite unusual among
4 American law professors in starting the course with
5 the Fourteenth Amendment, and that took over half of
6 the term. Then I gave attention primarily to
7 separation of powers in the final, let's say,
8 40 percent of the course.

9 And I focused on the Fourteenth
10 Amendment because I agree with the view that it was a
11 second founding, constitutionally speaking. And it
12 was also the focus of a lot of contemporary discussion
13 and litigation, and I wanted to make sure my students
14 were quite well aware of what it meant, what its
15 origins were.

16 I was, I think again, pretty unusual
17 among American constitutional law teachers in
18 discussing in some depth, actually, the Dred Scott
19 case as a background to the ratification of the
20 Fourteenth Amendment, and how parts of Section 1 of
21 that amendment were framed against the backdrop and in
22 connection to the Dred Scott decision.

23 Most constitutional law professors, I
24 think, don't discuss the Dred Scott case, and I did.

25 Q. And why did you -- why did you focus --

1 well, what is the Dred Scott case, and why did you
2 focus on that?

3 A. Well, the relevant part of that -- of
4 the opinion of Chief Justice Taney in that case was
5 that African-Americans, even those not held to bondage
6 and slavery, were not and never could be, citizens of
7 the United States. And the naturalization provision
8 of -- the citizenship provision, rather, of Section 1
9 ensures that they all were citizens of the United
10 States, entitled to privileges and immunities of
11 citizens of the United States.

12 So it helps to explicate the meaning of
13 those parts actually of Section 1.

14 I taught the Slaughter-House case every
15 year. And so I am not just focusing on the history of
16 the framing and ratification of the Fourteenth
17 Amendment, but both the case law -- Supreme Court case
18 law before it and after.

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

22 A. Well, the Slaughter-House case is itself
23 a historical document, as is the Dred Scott case, so
24 yes. In that sense, yes.

25 But this was a -- this was not a course

1 in legal history. It was a course in constitutional
2 law. It wasn't a course in historical scholarship
3 generally or even in legal historical scholarship. It
4 was a course largely, mainly dedicated to extricating
5 the meaning of the Fourteenth Amendment.

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

10 A. Not that I recall, no.

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

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

17 Q. Okay.

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

21 Q. Okay.

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

24 Q. I'm sorry. What was that?

25 A. This was a course for first-year law

1 students, and I did not go into -- I mean, I discussed
2 the Civil Rights Act of 1866. I don't know if that
3 would kind of answer you or not. But yes --

4 Q. Okay.

5 A. -- things like that.

6 Q. Okay.

7 MR. GESSLER: Your Honor, I would renew
8 my proffer.

9 Does that answer your questions?

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

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

18 THE COURT: Yeah.

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

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

24 Do you remember that article?

25 A. Can you tell me where it appeared and

1 when?

2 Q. It was Cardozo Law School online
3 publication --

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

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

7 A. Well --

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

9 A. That particular article. It involved
10 going to the meaning of what counted as an elector
11 in -- at the -- in the framing of the original
12 Constitution, and whether electors, as understood at
13 that period in 1787, were considered to be people who
14 had essentially unfettered freedom to decide whom to
15 vote for in -- as the leading figure in the state.

16 So, for example, I found that the King
17 of England was an elector for the emperor of the Holy
18 Roman Empire. And the framers, as subjects of the
19 King of England before the American Revolution, were
20 probably aware of the King's role as an elector. He
21 was not just the King of England. He was the King of
22 Hanover in Germany. And as such, he counted as an
23 elector for the Empire.

24 And my conclusion, broadly, was that
25 electors in -- presidential electors in this country

1 had the freedom to vote for a candidate who they were
2 not -- who they were not pledged to support. In other
3 words, that they were not bound by state restrictions
4 on their ability as presidential electors to select
5 the candidate who best suited -- in their judgment was
6 best suited to be President.

7 That view, which was based on original
8 material, was rejected by the U.S. Supreme Court in
9 the Chiafalo case, which upheld the binding quality of
10 the pledges electors made to vote in a certain way.
11 But it was an attempt to clarify, using contemporary
12 dictionaries and so forth, the meaning of what an
13 elector was in the electoral colleges.

14 Q. Okay. I saw that you also wrote an
15 article on "Who Counts?: The Twelfth Amendment, the
16 Vice President, and the Electoral Count." I think
17 we've spoken a little bit about that.

18 Can you tell me what that was about and
19 your use, if any, of historical documents and
20 scholarship?

21 A. Well, there was extensive use of
22 historical materials, both from the framing period,
23 1787, and much later. And it wasn't just documents.
24 It was historical practice, such as the role the Vice
25 President had played in the electoral vote count when

1 John Adams was in the chair and had -- and then George
2 Washington -- was George Washington's Vice President.
3 And then Thomas Jefferson as Vice President also
4 oversaw the electoral vote count.

5 They both assumed they had authority to
6 admit or reject --

7 Q. Okay.

8 A. -- contended votes.

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

12 A. Uh-huh.

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

14 A. Honestly, I don't remember that one. It
15 was, as is the tradition, I think, at OLC -- I was
16 certainly steeped in that culture -- a defense of
17 presidential power, executive power in wartime. I
18 don't -- it's been a long while since I looked at or
19 thought about that.

20 I think, however, it made reference to
21 the prize cases, which is one of the cases that is
22 helpful in construing Section 3 of the Fourteenth
23 Amendment.

24 Q. Okay. Let me ask you this: In your
25 work, have you -- well, let me -- let me -- before I

1 go there.

2 You said you spent time in the Office of
3 Legal Counsel --

4 A. Yes.

5 Q. -- correct?

6 A. Yes.

7 Q. What were your duties or activities
8 there?

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

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

16 A. Yes. Yes.

17 Q. Describe what that -- an example or what
18 that process might look like.

19 A. Well, I remember one frantic weekend
20 when I had to write an opinion on the constitutional
21 validity of President Clinton's appointment of a
22 member of Congress to be our first ambassador to
23 Vietnam since the war in Vietnam ended. And that
24 involved looking at historical practice and opinions
25 going back, as I recollect, at least as far as James

1 Madison.

2 Q. Okay.

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

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

9 A. Yes.

10 Q. Okay. So are you familiar with the
11 congressional reporters --

12 A. Yes.

13 Q. -- as they were developed then?

14 A. Yes.

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

18 A. Oh, yes.

19 Q. Have you spent time working with sort of
20 congressional debate issues and historical legal
21 cases --

22 A. Yes.

23 Q. -- from the 19th century?

24 A. Yes.

25 Q. Can you speak on it?

1 A. Yes, yes.

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

6 A. Yes.

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

11 A. Oh, yes. Yes.

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

15 A. Yes.

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

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

23 Q. That was a very long question.

24 A. Yes.

25 Q. In preparing and rendering your opinion

1 today, did you rely on congressional -- records of
2 congressional debates?

3 A. Yes.

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

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

14 Q. They're all -- they're both -- they were
15 written in the English language as --

16 A. Yes --

17 (Simultaneous speaking.)

18 THE STENOGRAPHER: One at a time,
19 please.

20 THE COURT: You need to wait for
21 Mr. Gessler to finish his question before you start
22 answering --

23 THE WITNESS: I'm sorry.

24 THE COURT: -- because the court
25 reporter can't --

1 THE WITNESS: Oh, I'm sorry.

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

5 THE WITNESS: That's fine. I apologize.

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

9 A. Yes.

10 MR. MURRAY: Objection. Leading.

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

13 MR. GESSLER: Thank you.

14 Q. (By Mr. Gessler) And you've discussed
15 your --

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

18 Q. (By Mr. Gessler) You've discussed your
19 research of legal cases, historical legal cases.

20 How do those compare with the legal
21 cases that you reviewed and analyzed in preparation of
22 your opinion here today on the Fourteenth Amendment?

23 A. In no way.

24 Q. I'm sorry. You say "no way."

25 How do they differ, if at all?

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

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

7 A. Yes.

8 Q. -- is that correct?

9 A. Yes.

10 Q. And do the four -- do the historical
11 cases that you reviewed for the Fourteenth Amendment,
12 in your opinion, do they differ or how do they differ
13 as far as their -- in any characteristics?

14 Is their writing, their modes of
15 analysis, do they differ -- and if so, how -- from the
16 types of cases that you've analyzed in the past from
17 the 19th century?

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

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

21 A. Not that occur to me.

22 Q. Okay. In looking at -- in looking at
23 reports involving sort of public reports or what we
24 would say are called media reports, newspaper reports
25 of congressional and public debates from the 19th

1 century, did those differ in any manner -- and if so,
2 describe it -- from the types of documents involving
3 public and congressional debates that you reviewed for
4 your opinion?

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

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

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

16 Q. So in --

17 A. But, I mean, I also looked at
18 18th-century dictionaries of the English language,
19 like Dr. Samuel Johnson's. I think I did that in
20 preparation for -- research I did for the piece on the
21 electoral college and the rights of electors to decide
22 independently.

23 So I think I used Samuel Johnson's
24 dictionary of the English language, which was in the
25 18th century, in connection with the research for that

1 article which -- in Cardozo.

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

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

8 A. There is a definite reference to --

9 THE COURT: Hold on.

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

11 THE COURT: Response?

12 MR. GESSLER: Your Honor, he was in
13 general viewed as a rebuttal expert to Mr. Magliocca.
14 And to the extent Professor Magliocca relied upon
15 those, we've had Professor Delahunty review
16 Magliocca's testimony, as he is allowed to do, and to
17 render an opinion on that.

18 We're not looking to go substantially
19 outside of Professor Magliocca's report, and nor are
20 we looking to go outside of Professor Delahunty's
21 report if there's an objection specifically to an
22 opinion. But I believe in his report he did mention
23 various definitions.

24 To the extent there is an objection
25 about a specific, we're certainly willing to take that

1 up. But as a general matter, the point is that
2 Professor Delahunty has reviewed dictionary
3 definitions, contemporaneous, similar to any ones in
4 this case.

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

8 MR. GESSLER: Okay.

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

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

15 THE COURT: So objection overruled.

16 THE WITNESS: May I ask you a question?

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

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

21 THE COURT: Oh. You can address this --

22 Q. (By Mr. Gessler) So Professor
23 Delahunty, why don't I ask you a few of those
24 questions. And feel free to ask me. We'll clear it
25 up.

1 So in rendering your opinion, you -- I
2 think both you and Professor Magliocca discussed an
3 executive order or executive statement, I should say,
4 from President Grant?

5 A. Yes.

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

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

12 A. No.

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

15 MR. MURRAY: We would renew our
16 objection.

17 THE COURT: Yeah. I'm not sure -- he's
18 already been endorsed as an expert in constitutional
19 law and the application of historical documents to
20 19th-century statute and constitutional provisions.
21 So I'm not sure he needs to be designated as an expert
22 on Section 3, because I'm going to let him testify on
23 what he did regarding Section 3.

24 I don't think that -- unlike Professor
25 Magliocca, who has clearly, you know, spent years

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

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

11 Q. (By Mr. Gessler) Okay. Let's talk
12 about the substance of your opinion, Professor.

13 Did you listen to or review Professor
14 Magliocca's expert testimony on Wednesday?

15 A. I did.

16 Q. Okay.

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

20 Q. Okay. And --

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

24 Q. Okay. And so are you prepared to
25 respond to --

1 A. I am.

2 Q. -- Professor Magliocca's analysis?

3 A. Yes.

4 Q. Okay. Let's start as a general matter.

5 He testified that Section 3 of the Fourteenth
6 Amendment is not limited to the events of the Civil
7 War.

8 What do you think of that statement?

9 A. I do agree with that. I think there are
10 scholars who might dispute that, but after -- and
11 frankly, it was -- when I was -- when this issue of
12 Section 3 began to come up, my attitude was, how can
13 that possibly be? It's clearly confined to the Civil
14 War.

15 But as I delved more closely into the
16 matter, it -- I think the better view on -- is that
17 it's not time-bound in that way. It's not restricted
18 to the events of the Civil War or to the people
19 involved in the Civil War. And I think there are
20 three reasons in support of that.

21 One is that the text itself of Section 3
22 does not, in express terms, limit its application to
23 the Civil War.

24 Second, there is some highly relevant
25 congressional testimony by the framers of Section 3

1 that it was meant to extend into the future.

2 And thirdly, practice, although limited,
3 has been to extend it, apply it to events involving
4 people who had no role whatever in the Civil War.

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

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

10 THE COURT: Less time.

11 (Pause in the proceedings.)

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

15 I want to talk about the definition of
16 "insurrection." And Professor Magliocca provided a
17 very specific definition of "insurrection" and looked
18 at historical documents of insurrection examples or
19 events and judicial decisions and the treatment of the
20 law during the Civil War.

21 Can you -- what's your review of those
22 documents tell you about the definition of
23 insurrection?

24 A. Well, some of the materials that he
25 offered are offered overly -- quite broad definitions

1 of "insurrection." Some others are narrower ones. So
2 they differ.

3 And in particular, he cites the
4 definition of "insurrection" that is offered -- was
5 drafted by Professor Francis Lieber, who was one of
6 President Abraham Lincoln's chief legal advisors
7 during the Civil War. And Lieber's definition of
8 insurrection appears in Lincoln's General Order
9 Number 100 to the Union Army.

10 And Professor Magliocca says that Lieber
11 was -- I don't have his transcript before me, but in
12 effect, the leading legal scholar of his period. And
13 Lieber actually taught at Columbia, which I'm proud
14 of.

15 And in General Order Number 1 [sic],
16 which I have studied and taught about for quite a
17 while, Lieber says -- again, I don't have the text
18 right in front of me, but he says in effect an
19 insurrection is a rising of the people in arms.

20 So if you accept Lieber's definition as
21 definitive, or at least very weighty evidence of the
22 meaning of "insurrection," an insurrection would have
23 to be in arms. Insurrectionists would have to use
24 arms.

25 And that's, I think, inconsistent with

1 many, if not all, but anyway many, of the other
2 definitions, including the case law that Professor
3 Magliocca cites.

4 So there's some -- "contradiction" is
5 perhaps too strong a word -- tension between the
6 accounts of insurrection that some of his sources
7 supply, which don't require that the insurrectionists
8 be armed and Lieber's definition.

9 Q. Okay. Professor Magliocca also cited to
10 a Webster dictionary definition of "insurrection" in
11 1828.

12 Do you remember that?

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

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

19 And then he also cited to a John Row
20 dictionary definition of "insurrection" as being
21 identical to the Webster definition.

22 What -- what do you make of that
23 interpretation? What's your interpretation?

24 A. Well, the Webster definition
25 specifically refers, as you quoted, to states and

1 counties. Obviously, it's highly relevant, competent
2 evidence about the meaning of "insurrection" in
3 Section 3. But it's by no means identical, because
4 "insurrection," as used in Section 3, must be against
5 the Constitution of the United States. The United
6 States is --

7 THE STENOGRAPHER: United States is
8 what?

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

11 Q. (By Mr. Gessler) And what's the -- when
12 you say "insurrection against the Constitution of the
13 United States," what's the -- what's the importance of
14 that distinction?

15 A. I think that is really crucial because
16 while it is certainly very helpful to know what
17 "insurrection" was understood to mean or likely
18 understood to mean in 18 -- from 1866 to 1868, while
19 that's certainly very useful, Professor Magliocca
20 himself emphasizes that there is this important
21 limiting principle which is found in the text of
22 Section 3.

23 It's not just any plain-vanilla
24 insurrection. It's an insurrection against the
25 Constitution of the United States.

1 And that's in the text, and it is a
2 critical element of the offense at issue, that the
3 insurrection be an insurrection against the
4 Constitution of the United States.

5 In other words, "insurrection" is not a
6 freestanding term in Section 3. It's coupled with --
7 by Professor Magliocca's own insistence really, it's
8 coupled with that other phrase, "insurrection against
9 the Constitution."

10 So what really needs to be explicated
11 and decided is not the sort of plain vanilla, as I
12 called it, meaning of "insurrection," but the whole
13 phrase, "insurrection against the Constitution of the
14 United States." And there's no, to my knowledge, any
15 dictionary definition or definition in a legal
16 dictionary of that phrase.

17 Q. Okay. Professor Magliocca also
18 testified that before 1862 there was no federal crime
19 of insurrection, and that the cases that discussed
20 insurrection were really treason cases.

21 And so, for example, he cited a grand
22 jury charge from the U.S. Circuit Court in Missouri
23 from 1861, which specifically said that "conspiracy
24 and insurrection connected with it must be to effect
25 something of a public nature concerning the U.S.," and

1 that included, quote, "overthrowing the government" or
2 "to nullify and totally hinder the execution of some
3 U.S. law or the U.S. Constitution or some part
4 thereof; or to compel its abrogation, repeal,
5 modification or change, by a resort to violence."

6 What's your view on the use of that
7 grand jury charge and the importance of that, or lack
8 of importance --

9 MR. MURRAY: Your Honor --

10 Q. (By Mr. Gessler) -- with respect to
11 defining insurrection?

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

17 THE COURT: I'm going to overrule the
18 objection.

19 I am, though, going to ask, Mr. Gessler,
20 when you read from the --

21 MR. GESSLER: Be slower?

22 THE COURT: -- be slower for the court
23 reporter.

24 MR. GESSLER: I just got that. I'm
25 sorry, Your Honor. I'll calm down and work on being

1 slow. My apologies.

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

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

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

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

12 A. Yes.

13 Q. -- from a grand jury charge --

14 A. Yes.

15 Q. -- from Missouri.

16 A. Yes.

17 Q. Do you need me to repeat that or are you
18 able to --

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

23 Q. So it says the "conspiracy and the
24 insurrection connected with it must be to effect
25 something of a public nature." And it included

1 "overthrowing the government to nullify and totally
2 hinder the execution of a law, Constitution, some part
3 of it, or to compel its abrogation, repeal,
4 modification, or change by a resort to violence."

5 What do you think of that use of that
6 sort of historical document?

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

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

17 A. Well, I can't remember in detail the
18 other definitions, the framing -- the phrasing. I
19 just -- it's -- he says that it's relevant to
20 understanding Section 3, and it is.

21 And is it consistent with other
22 definitions from roughly the middle of to late 19th
23 century? I think it's certainly not in contradiction.
24 But then he said Lieber -- no, it's not even in
25 contradiction with Lieber because I think at the very

1 end he talks about violence.

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

4 A. Probably.

5 Q. Okay.

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

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

10 A. Yeah.

11 Q. -- as insurrections.

12 How do they relate, in your view, to the
13 interpretation of the meaning "insurrection against
14 the Constitution"?

15 A. Well, Professor Magliocca says that they
16 are not the kind of insurrection that is covered by
17 Section 3. And whether that's true or not depends on
18 how you interpret "against the Constitution" in
19 Section 3.

20 He offers his own interpretation. It's
21 not a dictionary definition. It's his interpretation
22 of what "insurrection against the Constitution" means.
23 And he says, under his interpretation of that
24 constitutional clause, the Whiskey and Fries
25 rebellions are not insurrections against the

1 Constitution of the United States.

2 I think that depends on the meaning of
3 "insurrection against the United States." And there
4 could be a broad or narrow reading of that
5 constitutional language under which both insurrections
6 were against the Constitution of the United States.

7 Q. And what would that reading be?

8 A. So Professor Magliocca offers this
9 interpretation, that an insurrection against the
10 Constitution of the United States is an insurrection
11 that interferes with the execution of the
12 Constitution.

13 And the question becomes, well, what is
14 the execution of the Constitution? And in substance,
15 as I understand it. He's saying the execution of the
16 Constitution is interference with the federal
17 government's political branches' and judicial branch's
18 performance of their constitutionally appointed
19 functions, if it interferes with the discharge of
20 their constitutional responsibilities.

21 And he argues that certainly the events
22 of January 6 are interference with the congressional
23 duties assigned by the Twelfth Amendment to, at least
24 minimally, to observe a vote count.

25 Now, on that definition of interfering

1 with the execution of the Constitution, it seems to me
2 that there could be many other events that were
3 similarly insurrections against the Constitution, even
4 in the sense of executing the Constitution.

5 For example, if there is an interference
6 with the execution of the judicial -- sorry --
7 judicial function of adjudicating cases, clearly a
8 responsibility of the federal judiciary under
9 Article 3, if you interfere with the execution of
10 their constitutionally appointed judicial
11 responsibilities, that would also -- by burning down a
12 courthouse or disrupting judicial proceedings, that
13 would also, I guess, under that understanding of
14 "against the Constitution," be an insurrection against
15 the Constitution or against the execution of the
16 Constitution.

17 Or take another case. The Constitution
18 assigns to the Senate the lead role of debating and
19 deciding on presidential nominations to principal
20 offices of the United States. So it's appointments to
21 the federal judiciary. If you have a crowd disrupting
22 the Senate's vote on a presidential nomination, that
23 would seem to be an interference with the execution of
24 the Constitution.

25 In fact, you could -- I think, myself,

1 under that definition of "interfering with the
2 execution of the Constitution," that even disrupting
3 the delivery of the mail, which was the issue in the
4 Supreme Court's decision in the Debs case, would count
5 as interference with the execution of the Constitution
6 because the President has the constitutional duty to
7 ensure that federal law is faithfully executed.

8 So you're interfering with the
9 President's execution of his constitutional duty to
10 execute the postal law.

11 Q. And why do you say the postal service?

12 A. Well, because Article 1 mentions the
13 postal service. And it's apparently, as Debs
14 understands it, a duty of Congress to execute that
15 power and to create and instruct the President how to
16 administer the statute regarding the post office.

17 So what I'm -- to cut it to the chase
18 basically, I think that under even Professor
19 Magliocca's interpretation of "against the
20 Constitution," disrupting the delivery of the mail is
21 interference with the execution of the Constitution.

22 And you could go on and on with examples
23 of interference with the execution of their
24 responsibilities by the President, by the Senate, by
25 the House, by the courts that would count as against

1 the Constitution, as he understands that.

2 So what is meant to be a limiting
3 principle is, I think, a very expansive one, unless
4 you attach a more limited scope to the meaning of --
5 the meaning of "against the Constitution." On what I
6 think is his understanding, it could -- it does cover
7 whether he denounces the Whiskey insurrection and the
8 Fries insurrection.

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

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

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

17 THE COURT: I'm just going to ask you a
18 question.

19 So as I understand it, what you're
20 saying is, is that if you take Professor Magliocca's
21 interpretation of what insurrection is, it's simply
22 that it could just apply to a litany of different --

23 THE WITNESS: Correct.

24 THE COURT: -- things?

25 THE WITNESS: Yes. Many. Almost all,

1 if not all, interferences with the execution of the
2 duties of the President, the Senate, the House, and
3 the federal judiciary.

4 THE COURT: Okay.

5 THE WITNESS: It is a --

6 THE COURT: I assume we'll get to what
7 he thinks the definition -- what he thinks it should
8 be.

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

11 Q. (By Mr. Gessler) Let me ask you this:
12 Professor Magliocca also testified that the "shall
13 have engaged in insurrection or rebellion" language
14 means any voluntary act in furtherance of an
15 insurrection against the Constitution, including words
16 of incitement. And he based this on judicial
17 decisions and a U.S. Attorney General opinion of
18 Attorney General Stanbery.

19 What's your opinion on the use of
20 Stanbery's opinion on defining what insurrection is?

21 A. Well, I would have three thoughts, I
22 guess, about that part of Professor Magliocca's
23 testimony and report.

24 First of all, I would say it's a
25 linguistic point. I think "engage in insurrection"

1 has a more restricted meaning than he supposes.

2 Let me give you -- this is sort of --
3 speakers of the English language, I think, would think
4 this.

5 If we use a case like engage in
6 hostilities, we probably have in mind combat, not the
7 preparatory actions that would go with engaging in
8 hostilities.

9 I think, to a degree, we would
10 distinguish engaging in hostilities from engaging in
11 incitement, let's say, to hostilities. So that's just
12 a linguistic point.

13 But the backdrop to the
14 Constitution's Section 3's use of "engaging in
15 insurrection," part of it is the Second Confiscation
16 Act, which I think Professor Magliocca cites, which
17 itself distinguishes between various preparatory or
18 accompaniments of engaging in insurrection or
19 rebellion and engaging itself. That's the language of
20 the Second Confiscation Act.

21 So it -- the Act distinguishes between,
22 let's say, inciting an insurrection or rebellion
23 versus engaging in it.

24 Congress had that template before it --
25 and cut it out or at least didn't include all this

1 other language. And in Section 3, it narrows it to
2 engagement in insurrection or rebellion, which I think
3 very strongly suggests that it was not covering the
4 same class of activities as the Second Confiscation
5 Act did.

6 So engaging in insurrection in Section 3
7 has a narrower meaning than the comprehensive,
8 sweeping account of what -- of the activities
9 associated with insurrection or rebellion that you can
10 see listed, enumerated, in the Second Confiscation
11 Act.

12 I agree with Professor Magliocca that
13 Attorney General Stanbery's two interpretations of
14 statutes, the -- in the Military Reconstruction Acts
15 of 1867, I agree with him that the Attorney General's
16 opinions are certainly good evidence as to the meaning
17 of "engaging in insurrection" in Section 3.

18 They were opinions that were written
19 while Section 3 was being debated and in the process
20 of ratification, and he actually -- Stanbery actually
21 kind of has a section in the first of his opinions
22 dealing with the statutory language of what it means
23 to engage in insurrection. So it's contemporaneous.
24 It's from a high officer of the executive branch. It
25 is about a statute, but it sheds light on what

1 "engaging in insurrection" means for Section 3
2 purposes.

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

7 A. So I think that Professor Magliocca
8 under-describes what Attorney General Stanbery is
9 writing about when -- in the first of these two
10 opinions of the Military Reconstruction Acts.

11 In the first of them, Stanbery has a
12 section called something like "Engaging in
13 insurrection and rebellion." But I think it's
14 actually called "Engaging in rebellion and
15 insurrection."

16 So Stanbery says, okay, this is what
17 he's going to explicate, this language in the statute.
18 And he starts by saying that -- engaging in there
19 has -- you have to distinguish between active and
20 passive engagement, participation in rebellion.
21 Stanbery, here, is primarily addressing what it means
22 to engage in rebellion, not insurrection.

23 So you have to start, Stanbery says, by
24 distinguishing between active and passive
25 participation. And passive participation in rebellion

1 doesn't count under the statute. So that's his first
2 sort of distinction.

3 Then he says there's a distinction to be
4 drawn between voluntary and compulsory or involuntary
5 participation in the rebellion. So not only does the
6 participation have to be active, but it has to be
7 voluntary. If you are coerced to assist the
8 rebellion, that doesn't bring you within the meaning
9 of the statute.

10 So one distinction, active/passive; two,
11 voluntary or compelled.

12 And then he has a third distinction
13 between participation in an official capacity and
14 participation in the purely individual capacity. And
15 he has a pretty extensive discussion, Stanbery does,
16 of what official, voluntary, active participation in
17 the rebellion would be. That would include things
18 like being the so-called Confederate states'
19 ambassador to France, okay? That clearly is not being
20 combative, right?

21 But then there's also a discussion of
22 what it means to participate in the rebellion in an
23 individual capacity.

24 And so the statute has to be understood
25 in one way if the charge of engaging in insurrection

1 is going to be charged against someone acting in an
2 official capacity and then against someone who is
3 charged with acting in an individual capacity.

4 So to bring you under the statute,
5 you -- if you are acting in an individual capacity, it
6 would seem to require different tests from acting in
7 an official capacity.

8 And okay. Let's talk about Professor --
9 President Trump. One thing -- if you just map on the
10 interpretations Stanbery offers on --

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

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

17 MR. GESSLER: Okay.

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

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

22 MR. GESSLER: Sure.

23 THE COURT: So you kept referring to the
24 statute. What was --

25 THE WITNESS: It's the Military

1 Reconstruction Act.

2 THE COURT: Okay. And that's what
3 Stanbery --

4 THE WITNESS: Yes.

5 THE COURT. -- was opining on?

6 THE WITNESS: Yes. Sometimes called the
7 Reconstruction Act. I think that's probably the more
8 common.

9 THE COURT: Okay.

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

12 A. Primarily, yes.

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

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

20 Q. And why does that matter?

21 A. Well, it's not directly on point as to
22 what engaging in insurrection means under the statute.
23 It certainly sheds light. I am not disputing that.
24 I'm just saying it's not directly about engaging in
25 insurrection under the statute.

1 So it's certainly helpful, but to cut to
2 the chase, I'm not sure that everything that Stanbery
3 says in connection with engaging in rebellion carries
4 over automatically to engaging in insurrection. The
5 statute which carries over automatically into the
6 meaning of engaging in insurrection is Section 3.
7 These are all steps in the process.

8 And then if someone is charged with
9 engaging in insurrection, it would have to be
10 determined whether that engagement was in an official
11 capacity or an individual capacity. So if it was
12 applied to someone, you would have to ask whether that
13 engagement on his or her part was in an official
14 capacity or an individual capacity, which could be
15 quite problematic to decide legally.

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

20 A. Well, this is all kind of uncharted
21 territory. But not everything that Professor
22 Magliocca says about Stanbery's opinion -- he quotes
23 from it quite at length. But not everything he says
24 immediately translates into every single case.

25 You have to decide whether the language

1 he quotes about engaging in rebellion in an official
2 capacity also carries over to whether that is true of
3 someone who engages in insurrection in an individual
4 capacity.

5 So you -- before applying his account,
6 Stanbery's account, you have to decide is this person
7 acting in an individual capacity or not? Is he or she
8 acting individually? And does that matter? Does
9 everything Stanbery says about engaging in rebellion
10 in an official capacity immediately carry over into
11 such an engagement in an individual capacity?

12 So construing Stanbery is quite
13 difficult in itself, let alone bringing whatever he
14 says into -- about the statute into Section 3.

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

19 A. No. I don't think he talks about -- at
20 least not in the part headed "Engagement in," I don't
21 think he talks about the liability to which one is
22 exposed, no.

23 He offers examples more than standards
24 about how to apply the statutory term, but he doesn't
25 discuss the liability to which you're -- not on that

1 part -- doesn't discuss the liability to which someone
2 who is found to have engaged in insurrection is
3 exposed.

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

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

15 Q. Okay. Now, he also -- Professor
16 Magliocca also compared the Stanbery opinions to the
17 Worthy cases from -- the Worthy case from North
18 Carolina.

19 A. Right.

20 Q. And he said that they were -- that they
21 were -- the definition for engaging in insurrection
22 was the same in the Stanbery opinions and the Worthy
23 case from North Carolina.

24 What's your opinion on that?

25 A. Well, Stanbery is talking about a

1 statutory term, and the North Carolina opinion, the
2 Worthy case, is talking about Section 3.

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

6 A. Right.

7 Q. -- correct?

8 A. Yes. And it's decided under a state
9 statute that incorporates Section 3 by reference and
10 applies it -- North Carolina had operationalized the
11 enforcement of Section 3, at least as to state
12 officials, state offices. Not to federal offices or
13 federal -- federal officers or offices.

14 So it's relevant to understand -- I
15 don't think it's relevant to understand what engaging
16 in rebellion or insurrection means in the
17 Constitution, Section 3. It's more --

18 Q. And why is that? Why --

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

25 Q. Okay. We'll get to the holding in just

1 a minute.

2 But is it your opinion that the -- that
3 the definitions with respect to engaging in rebellion
4 differ between the Stanbery opinion and the Worthy
5 case?

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

7 Q. Okay.

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

10 MR. GESSLER: Go ahead.

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

14 A. Yes.

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

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

23 Q. And so you -- you've looked at Professor
24 Magliocca's sort of approach to limiting the
25 Constitution.

1 Are you able to create a definition of
2 "insurrection against the Constitution" based on the
3 historical documents?

4 A. Well, I would say this: I would look to
5 guidance more to the remarks that Senator Jacob Howard
6 makes in introducing the Fourteenth Amendment to the
7 Senate, which are -- those remarks of Senator Howard
8 are cited, I think, twice in Magliocca's report.

9 And I don't have Senator Howard's exact
10 language, though it appears both in Magliocca's report
11 and mine. But Howard says something to the effect
12 that this section of the Constitution is meant to
13 cover actions -- to sanction actions that -- acts that
14 are -- that pose -- I just don't have the exact
15 language, but essentially grave -- to the -- threaten
16 to -- I don't -- it would help me if I could have --

17 Q. Let's bookmark that.

18 A. Okay.

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

21 A. Essentially -- that would destroy.
22 "Destroy" was the term Howard used. It would destroy
23 the Constitution.

24 So given Howard's role in the
25 enactment -- the ratification, rather, of the

1 Fourteenth Amendment, it would seem to me -- I would
2 start by looking at Howard's remarks and explicating
3 the phrase, for better words, "insurrection against
4 the Constitution." And there would be acts that
5 threaten -- that destroy the Constitution.

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

11 MR. GESSLER: Your Honor, I don't think
12 he said that Article -- I'm sorry, I keep saying
13 "Article" -- Amendment 14, Section 3, has to be
14 defined that way.

15 So the starting point is to look at
16 Senator Howard's viewpoint as an analogy or basis. I
17 don't think he said he has to -- that has to be the
18 definition.

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

21 MR. MURRAY: No, Your Honor.

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

25 THE COURT: Can we come back to it?

1 MR. GESSLER: Sure, Your Honor.

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

4 MR. GESSLER: Okay.

5 Q. (By Mr. Gessler) Professor Delahunty,
6 why -- without -- we won't discuss Senator Howard's
7 remarks at the moment.

8 But why would you start from that as a
9 foundation, looking at the remarks of a congressional
10 debate?

11 MR. MURRAY: Same objection.

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

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

19 THE COURT: Okay.

20 MR. GESSLER: We may even have them.

21 Your Honor, we're going to need to just
22 spend a few minutes on this. If we could come back to
23 it a little bit later.

24 THE COURT: Okay. I mean, in general,
25 it's been a little difficult to follow what he's

1 talking about because he's talking about kind of
2 things that we can't see. So to the extent that we
3 can see the remarks that he's talking about,
4 et cetera, definitely would be helpful to the Court.

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

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

10 MR. GESSLER: Okay.

11 THE COURT: -- and come back to it.

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

13 THE COURT: You may be seated.

14 You're back on, Mr. Gessler.

15 MR. GESSLER: Thank you, Your Honor.

16 Q. (Mr. Gessler) Professor Delahunty, I've
17 been asking you a little bit about -- talking about
18 certain case law to arrive at a definition of
19 "insurrection."

20 But in your report -- and I may have
21 been going about it the wrong way in questioning you.
22 In your report, you talk about difficulties of
23 interpreting Section 3's offense element in defining
24 what it means to have engaged in an insurrection.

25 Do you remember that?

1 A. Yes.

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

5 A. Well, Section 3 has essentially four
6 elements. One of them -- it's the language towards
7 the end of Section 3 -- identifies the class of people
8 who are subject to potential sanctions under
9 Section 3. That, in my report, I called the
10 jurisdictional element.

11 Then there's what I've called the
12 offense element. And here I'm following, by the way,
13 Professors Tillman and Blackman.

14 The offense element defines what kind of
15 conduct by the persons whose -- who is subject to
16 Section 3 have engaged in that would trigger
17 liability. And the offense element is the language to
18 which you referred, having engaged in rebellion or
19 insurrection against the Constitution.

20 Then the third element is the
21 disqualification element, which says from what offices
22 the persons who were subject to the section and had
23 committed the offense in question would be thereafter
24 excluded.

25 And then the fourth section is the

1 amnesty provision, which empowers Congress to extend
2 amnesty either individually or collectively to those
3 who are jurisdictionally subject to Section 3 and have
4 been found to commit the offense element and would
5 have been excluded from the relevant offices but for
6 the amnesty, if Congress chose to give them one.

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

10 A. Uh-huh.

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

14 A. Yeah.

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

18 A. Yes.

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

23 A. Well, it's really this, that I'm not
24 aware of any direct definition of what it means to
25 engage in insurrection against the Constitution. I

1 don't believe there's any case law on that.

2 Professor Magliocca proffers his
3 interpretation of what that phrase means. And that,
4 as I have said and testified, it is essentially to
5 engage in interference with the -- to commit
6 insurrection against the execution of the
7 Constitution. And that, in turn, is a phrase that is
8 opaque, I would say.

9 And really, all of the -- I don't offer
10 my own definition of what it means to engage in
11 insurrection against the Constitution of the United
12 States because -- other than to gesture towards
13 Senator Howard's remarks because I don't know of any
14 really good source to interpret that.

15 Which, I mean, is -- now, my point is to
16 underscore the difficulties a Court would have, or
17 really anybody would have, in interpreting that
18 phrase, which is the crucial phrase, without such
19 guidance, especially from Congress, which could define
20 under Section 5 powers what it means to engage in the
21 insurrection against the Constitution of the United
22 States.

23 Congress hasn't enacted a statute that
24 purports to provide us with that definition. That
25 leads me to the conclusion that the Courts, as a

1 matter of Constitutional policy, should defer to
2 Congress and not decide a case on the merits of
3 whether or not someone had engaged in insurrection
4 against the Constitution. There's just inadequate
5 guidance, so far as I can tell, from relevant sources,
6 authorities.

7 So this is really -- goes -- the
8 difficulty I experience in offering a definition --
9 although Professor Magliocca seems more confident
10 about it. The difficulty I experience I think
11 should -- if only for reasons of prudence, but really
12 sort of Constitutionally inflected reasons, lead a
13 Court to abstain from deciding what that phrase means
14 and toss the ball over to Congress to act under
15 Section 5.

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

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

21 THE COURT: I'm just trying -- do you
22 have examples of situations in which a Court has
23 basically said, "The Constitution's too hard for me to
24 interpret; therefore, I'm going to let Congress tell
25 me what it means"?

1 I'm just -- I mean, in general, I think
2 that's exactly the job of the Court, is to interpret
3 the Constitution. And so I'd love to hear from you as
4 to why you think in this instance that what I need to
5 do is say, "It's too hard. Congress, tell me what it
6 means."

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

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

15 THE WITNESS: Correct.

16 THE COURT: -- question?

17 THE WITNESS: Yes.

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

23 A. Uh-huh.

24 Q. -- correct?

25 And you looked at the prize cases.

1 Do you remember that?

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

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

7 A. Well, they -- they -- first of all, the
8 prize cases -- which is probably the most important
9 Supreme Court case during the Civil War. The prize
10 cases do help with distinguishing between organized
11 rebellion, rebellion, and insurrection.

12 So, of course, they're relevant in that
13 connection, in defining what "insurrection" means.
14 It's certainly something, to a degree, less than
15 rebellion. They're helpful in that way. But only
16 so -- only so far. I mean, it's not -- it doesn't
17 explicate because it wasn't in the Constitution at the
18 time.

19 THE STENOGRAPHER: What wasn't in the
20 Constitution?

21 A. The prize cases do not explicate what it
22 means to engage in insurrection against the
23 Constitution, because the Fourteenth Amendment hadn't
24 been ratified. Not until July of 1868.

25 So they're not helpful. They are

1 helpful in a general way in suggesting -- saying that
2 insurrection is different from a rebellion and
3 something sort of more high grade than a riot, but
4 something lower than a rebellion.

5 An insurrection -- I think the Court
6 there says something like insurrections tend, in many,
7 many circumstances, to lead to rebellion, but they
8 don't have to amount to rebellion.

9 So it helps in that way, sort of
10 suggesting a gradient between rebellion, insurrection,
11 and other kinds of disorderly conduct.

12 Q. (By Mr. Gessler) I'm going to ask you
13 to stay a little bit closer to the microphone when you
14 speak, Professor. I suffer from the same challenge
15 here.

16 And then you also looked at the
17 charges -- In re Grand -- In re Charge to the Grand
18 Jury, correct? There was a particular case from 1894
19 from the Northern District of Illinois.

20 Do you remember that?

21 A. Yeah. I think I do, yes.

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

25 A. Well, I think that -- no, not as to the

1 meaning of that precise phrase, no. It does help to
2 understand what "insurrection" meant, at least later
3 in the 19th century.

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

9 Do you remember that?

10 A. I don't have it before me.

11 Q. As a general matter?

12 A. Yes.

13 Q. And my question really goes to all of
14 these cases that you identify.

15 Do they give you a sense of confidence
16 in creating a definition of what "engaging in
17 insurrection against the Constitution" is?

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

22 Q. And even from the prize cases, the most
23 you were able to glean is that insurrection is
24 something more than a riot and something less than a
25 rebellion?

1 A. Yeah. That's -- yes, that's right.

2 Q. Okay. In your view, looking at the
3 sources and Article -- or Section 3 of the Fourteenth
4 Amendment -- and I think you've talked about this.

5 But how does -- does insurrection equate
6 to insurrection against the Constitution?

7 A. No.

8 Q. And why is that?

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

13 THE COURT: So when you -- I understood
14 your testimony before to be that the problem you have
15 with Professor Magliocca's opinion is that he's saying
16 insurrection against the Constitution is essentially
17 an insurrection against a constitutional proceeding.

18 THE WITNESS: Against the execution of
19 the Constitution --

20 THE COURT: The execution of the
21 Constitution. And that those words --

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

25 THE COURT: Right. The words "execution

1 of Constitution" aren't in there. And I guess that I
2 understand what you're saying is that you don't know
3 what execution -- what "insurrection against the
4 Constitution" means without adding those extra words,
5 and that's why you think that Congress needs to
6 decide?

7 THE WITNESS: Yes.

8 THE COURT: Okay.

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

11 A. Okay.

12 Q. And I'd like to talk a little bit about
13 the doctrine of -- or the application of preemption in
14 the enforcement of Section 3 by a state court.

15 And do you remember opining about that
16 in your expert report?

17 A. Yes. I certainly do remember. This is
18 one of the really crucial issues in this case, and
19 other cases. I opined my -- in my report, opined that
20 the meaning of "officer of the United States" as used
21 in Section 3, opined about whether Section 3 is
22 judicially enforceable, whether by state or federal
23 courts, without some enforcement-implementing
24 legislation from Congress.

25 And it opined about what it means, in

1 the Constitutional sense, to have engaged in
2 insurrection against the United States --

3 Q. Okay.

4 A. -- and what difficulties there would
5 be --

6 Q. So --

7 A. -- without congressional guidance in
8 defining that term.

9 Q. Okay. So we've covered the difficulties
10 of defining "insurrection." Let's talk about -- let
11 me ask you -- we've got two more subjects I'd like to
12 talk about. One is to whom Section 3 applies and
13 whether it's enforceable in state or federal judicial
14 courts.

15 Let's talk about the enforcement
16 provision, if we may, okay? And there were several
17 instances of -- several actions that Professor
18 Magliocca believed constituted enforcement. Obviously
19 you have a different viewpoint.

20 Why do you believe that --

21 THE COURT: Can we start just with what
22 exactly -- what provision -- what clause in the -- in
23 that -- in the article he is referring to as the
24 enforcement.

25 MR. GESSLER: Okay.

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

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

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

12 A. The question is how is Section 3 to be
13 enforced. Can it be enforced by a Court, state or
14 federal, independent of any action by Congress or not
15 by some enforcement mechanism that Congress provides
16 necessary for the enforcement of Section 3?

17 Put it in -- simply: Can I just show up
18 at a courthouse one day and ask for Section 3 to be
19 enforced, or does it have to be some implementing
20 mechanism to enforce Section 3 that Congress has
21 provided?

22 Q. And what's the basis for your opinion
23 that -- that as currently, based on the historical
24 documents, that the Section 3 -- I'm sorry --
25 Section 3 is not enforceable absent action from

1 Congress?

2 A. Well, my reasoning is this: First of
3 all, as a general matter, the Constitution should not
4 be understood to provide enforcement actions for its
5 provisions directly, sort of taking the naked
6 Section 3 or a case -- there's two cases from the
7 Supreme Court. The Supremacy Clause, which declares
8 that federal law is -- the Constitution, statutes,
9 acts of Congress, and treaties -- are supreme law.

10 So in these two Supreme Court cases, the
11 latter of which was from 2015, the Court ruled that
12 the Supremacy Clause was not directly enforceable.

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

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

22 THE COURT: Okay. Because I tend to
23 agree with Mr. Murray.

24 So I'm going to sustain that objection.

25 MR. GESSLER: Okay.

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

5 A. Yeah.

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

9 A. Of Section 3?

10 Well, the Griffin's case is decided not
11 so long after the Fourteenth Amendment, including
12 Section 3, is ratified. And I think it helps us to
13 understand what, in the mind of the framers and
14 ratifiers and voters, generally Section 3 was
15 understood to mean.

16 And it's an opinion by the Chief Justice
17 of the United States, Samuel [sic] Chase, that
18 addresses the question of whether Section 3 can be
19 directly enforceable without implementing legislation
20 or whether implementing legislation is required.
21 That's one of the three bases of Chase's opinion.

22 And Chase was not only the Chief -- it's
23 not an opinion of the Supreme Court. It's an opinion
24 by Justice -- Chief Justice Chase writing cert. But
25 it's soon after the Section 3 is ratified and put into

1 the Constitution. And it's by someone who was not
2 only Chief Justice but a very fine lawyer and a
3 politician and potential candidate for the presidency
4 at the time. And it's soon -- it's soon after the
5 ratification of Section 3.

6 So I think it's weighty authority as to
7 what Section 3 does and does not do in the absence of
8 action by Congress under Section 5, the enforcement
9 provision of the Fourteenth Amendment.

10 And Chase holds that -- it's one of his
11 three holdings -- that Section 3 is not directly
12 judicially enforceable. And that strikes me as very
13 powerful evidence. I'm not saying it's a binding
14 precedent. For one thing, it's by a Justice of the
15 Supreme Court alone. It's not -- it's not a decision
16 of the Supreme Court.

17 But it strikes me as very powerful
18 evidence as to the original public understanding of
19 what Section 3 did. And there was consideration given
20 in Congress. Even before Chase's opinion in Griffin's
21 case, there was consideration about the need to
22 enforce Section 3 by acting under Section 5. And that
23 ripened into the enactment in 1870, after Chase's
24 opinion, the enactment of the Enforcement Act of 1870.

25 So Congress sent the signal from Chase

1 that Section 3 needed enforcement. There were other
2 reasons even before Chase to think that it needed
3 enforcement. And that is Stevens, who was the
4 departing Speaker of the House, told the House it
5 needed to step up to the plate and enforce -- provide
6 legislative mechanisms to enforce Section 3.

7 But it is relevant to the question
8 before the Court here about whether it can, without
9 congressional action, decide whether to reach the
10 merits or whether it needs some congressional action
11 or does it. This applies to both state and federal
12 courts.

13 Now, the Worthy case, I think you
14 mentioned that, and it's certainly pretty prominent in
15 Professor Magliocca's testimony. The Worthy case is a
16 North Carolina case which is decided before Griffin's
17 case. It doesn't take account of it. Certainly,
18 doesn't undercut Chase's opinion, because it's -- the
19 Worthy case is decided in January of 1869. Chase's
20 opinion comes down in late July of 1869.

21 If I were a judge in North Carolina and
22 knew of it and studied Chase's opinion in Griffin's
23 case, I would have discussed it in my opinion in
24 Worthy. Worthy came six months after Griffin's case.
25 I would have certainly taken account, positively or

1 negatively, but I would have taken account of what the
2 Chief Justice of the United States had to say in
3 Griffin.

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

7 A. Well, as I read it, the court -- the
8 North Carolina court is acting under a North Carolina
9 statute that incorporates and makes state law
10 qualifications based on Section 3.

11 It's not direct enforcement of
12 Section 3, per se. It's enforcement of a state
13 statute that takes Section 3, incorporates it, and
14 applies it to state officials and state offices.
15 Which, of course, a state can do. A state can rule on
16 the qualifications or disabilities or whatever of its
17 own state government officials. That, it can do. And
18 I think that's what North Carolina did, or was
19 attempting to do.

20 So as to whether globally Section 3,
21 per se, is self-enforcing, I don't think Worthy has
22 much -- or has any real relevance.

23 Q. Okay.

24 A. If you parse out that case closely, I
25 think you see it's acting under North Carolina

1 statute.

2 Q. Now, shortly after Chief Justice Chase
3 issued a decision in the Griffin's case with respect
4 to the self-executing nature, he also ruled in another
5 case, a second Griffin's case that was -- I believe
6 Professor Magliocca and others have stated that it
7 contradicts his earlier viewpoint on -- or his earlier
8 ruling on self-execution.

9 Can you address that, please?

10 A. Yeah. The argument that Professor
11 Magliocca and others make is that Chase took
12 inconsistent positions on the enforceability of
13 Section 3 in the Jefferson Davis case from what he
14 said in Griffin's case.

15 First of all, I would say it's not
16 absolutely clear what Chase said, or wrote, in the
17 Jefferson Davis case. That's a dispute among
18 scholars. But I'm going to assume that he was of the
19 view and -- that in the Jefferson Davis case,
20 Section 3 was not self-executing.

21 So let's posit that there was a
22 contradiction between Chase in Jefferson Davis and
23 Chase in Griffin. Let's posit that. I don't think
24 that matters, because judges, professors can change
25 their minds, and maybe he did.

1 But the real thing to look at is the
2 quality of his judicial reasoning in Griffin's case.
3 We don't really have an account of any judicial
4 reasoning he may or may not have had in Jefferson
5 Davis' case. So we do have this leading authority in
6 Griffin's case by a Chief Justice. If he's trapped in
7 some kind of contradiction, does that really matter?
8 Look at the quality of the reasoning in Griffin's
9 case.

10 But in any event, even if we do catch
11 Chase in some kind of opposition, contradiction, I
12 think -- even if we think we have, I would say that
13 the two cases are reconcilable because Jefferson
14 Davis' legal counsel appeared to have been threatening
15 to use Section 3 as a defense in Jefferson Davis's --
16 it never happened, but in his forthcoming trial on
17 violating the federal treason statute.

18 So that would have been a defensive use
19 of Section 3. And maybe Section 3 can be used
20 defensively against a charge of criminal treason. I'm
21 kind of -- I'm just not sure about that. We don't
22 have any ruling because what happened with Jefferson
23 Davis was that President Johnson pardoned him, and
24 that short-circuited any trial. It just didn't occur.
25 It never happened. Pardoned him from the charge of

1 having committed the federal crime of treason.

2 So Jefferson Davis's lawyers were --
3 said that they were planning to use Section 3 as a
4 shield, defensively, to -- they sort of thought that
5 Section 3 had displaced or overcome the treason
6 statute, in his respect.

7 Whereas in Griffin, Chase was really
8 saying that Section 3 could not independently,
9 directly, be used as a sword to -- on which to base a
10 claim to affirmative relief. And the plaintiff, who
11 was a -- he was a prisoner -- was seeking federal
12 habeas relief, so affirmative relief, based on
13 Section 3. That would be using Section 3 as a sword.

14 And Chase reasoned it's not
15 self-executing in that sense. And that opinion,
16 Chase's opinion in Griffin's case, was cited
17 affirmatively. And even the sword/shield distinction
18 in it was approved of in a 1979 Fourth Circuit
19 opinion.

20 So Chase's view that the way in which
21 Section 3 was non-self-executing, Chase's view was
22 considered good law until -- at least until 1979. I
23 think it's good law, but so what? But certainly in
24 the minds of federal courts, it was good law as late
25 as 1979. That case is called Coe (phonetic) versus

1 City of Covington.

2 Q. Okay. Did you come across any
3 historical documents or analysis that leads you to
4 conclude that Congress embraced Chase's interpretation
5 of --

6 A. I think so.

7 Q. -- Section 3?

8 A. The question of whether various
9 iterations of Section 3 would be self-enforcing or not
10 came before Congress actually pretty early in the
11 process of ratifying Section 3. That is, Stevens, who
12 was kind of the leader in the House of the radical
13 Republicans, said the version of Section 3 he
14 preferred would need congressional implementation.
15 And he reiterated that when leaving Congress in 1868.
16 So there's that.

17 But after Chase -- now, to my knowledge,
18 there's no mention explicitly of Griffin in Congress
19 after it came down, but I think it's reasonably safe
20 to assume that Congress, after 1869, was aware of an
21 opinion of the Chief Justice of the United States.
22 Much more likely that they knew of In re -- Griffin's
23 case than Worthy's case.

24 And after that, Congress decided, yes,
25 we will enact implementing legislation that is -- kind

1 of reinforces Chase's view. Because it provided in
2 the Enforcement Act of 1870 a mechanism by which a
3 federal district attorney could, in certain cases,
4 bring Section 3 cases against -- in court against
5 certain government officials. They excepted senators
6 and members of the House, but against another class of
7 officials, the federal district attorney was
8 authorized by this federal statute to bring
9 enforcement actions in federal courts, federal courts
10 alone.

11 So that was how, as I see it, Congress
12 responded to Chase, even though, to my knowledge, it
13 didn't explicitly -- nobody in the debates that I've
14 seen explicitly refer to Griffin.

15 Q. So your view is that congressional
16 enactment -- the Congress enacted -- implemented
17 legislation for Section 3?

18 A. Pretty soon after, yeah.

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

23 A. Yes.

24 Q. And why is that?

25 A. Well, it's an opinion by the Chief

1 Justice.

2 Q. Okay.

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

10 THE WITNESS: Well, if they're going to
11 be applied --

12 MR. GESSLER: Could you please move --

13 THE WITNESS: Sorry. I'm so sorry.

14 If they're going to apply the sword to
15 seek affirmative relief. I think this action -- it
16 doesn't originate with -- this congressional interest
17 doesn't originate with Griffin's case, but it maybe is
18 prompted by Griffin's case. And it, I think,
19 corroborates or reinforces Chase's conclusion that
20 Section 3 is not self-executing in that way.

21 THE COURT: My question was just a
22 little bit different --

23 THE WITNESS: Okay.

24 THE COURT: -- which is, if the only way
25 to enforce a constitutional provision such as this is

1 through legislation, then essentially it's leaving --
2 isn't it leaving to Congress to decide whether or not
3 the prohibition exists at all?

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

9 THE COURT: No, that was --

10 THE WITNESS: Yes. And, in fact, I
11 think Stevens, at the time, basically was saying -- I
12 mean, even earlier than Chase -- Stevens, Thaddeus
13 Stevens, was saying, "Hey, Section 3 is a dead
14 letter." It's a dead letter unless we provide some
15 enforcement mechanism.

16 And, you know, generally speaking,
17 Congress at the time wanted to take charge of the
18 Reconstruction program, and so I think people like
19 Stevens were saying we want to decide how and when and
20 whether -- and whether to enforce Section 3 or leave
21 it to be a dead letter.

22 Obviously, Stevens thought that that was
23 a very poor idea, but that's what he was saying. He
24 was warning his colleagues, "We can't let this stay a
25 dead letter." And so in the Enforcement Act of 1870,

1 they basically said, "We're going to leave it a dead
2 letter, at least for now, as applying to people like
3 us, members of Congress. But we're going to make it a
4 live letter when applied to another group of people
5 who aren't in Congress."

6 There was that threat, that it would be
7 a dead letter and --

8 THE COURT: And your --

9 THE WITNESS: -- not judicially
10 enforceable.

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

13 THE WITNESS: No, no, no, no, no. My
14 opinion is that it is not judicially enforceable
15 absent either in cooperation as applied to state
16 officials, which was what North Carolina did, or it's
17 not -- it's not enforceable offensively without an act
18 of Congress --

19 THE COURT: So --

20 THE WITNESS: -- without implementing
21 legislation.

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

25 THE WITNESS: It would be enforceable in

1 Colorado as applied to state officials, candidates,
2 state offices.

3 Outside of that, I think it's not
4 applicable by state of -- by Colorado.

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

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

17 THE COURT: And --

18 THE WITNESS: I --

19 THE COURT: Go ahead.

20 THE WITNESS: So --

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

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

25 THE WITNESS: Oh, okay.

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

3 THE WITNESS: May I proceed?

4 THE COURT: Yes.

5 THE WITNESS: So the baseline for
6 understanding the Constitution globally is set by the
7 Supreme Court in these Supremacy Clause cases that I
8 mentioned earlier. That's the default position.

9 The Constitution generally, globally,
10 whether it's Section 3 or the Supremacy Clause, the
11 Constitution is not self-enforcing in the relevant
12 sense. And the Court, in the latter of these two
13 cases, the Armstrong case, explains why the
14 Constitution is not automatically self-enforcing, why
15 it needs guidance.

16 And that is because Congress has to set
17 the policy of the United States. And it can decide
18 whether and how far to enforce constitutional
19 provisions and whether or not -- not to. That's the
20 general assumption. The Constitution, as a general
21 matter, is not self-enforcing. So that's the
22 Armstrong case.

23 THE COURT: Okay.

24 MR. GESSLER: Your Honor, may I
25 continue, or do you have --

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

3 Q. (By Mr. Gessler) So let me -- let me
4 ask you about historical examples of Congress refusing
5 to seat members for, you know, what they view as
6 treasonous or rebellious or types of behavior that
7 would fall under the ambit of Section 3.

8 Are those examples of congressional
9 enforcement of Section 3?

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

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

22 Q. Okay.

23 A. -- for a good cause.

24 Now, that's been tightened, the
25 exclusionary powers of Congress. We don't know -- the

1 Supreme Court in Powell versus McCormack specifically
2 withheld opining on the question of whether Section 3
3 is a disqualification and a basis for congressional
4 exclusion. They withheld that judgment.

5 Q. Okay. Let me --

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

8 Q. (By Mr. Gessler) Let me move on to a --
9 I'm just checking -- double-checking my notes here.

10 Were you able to identify any instances
11 in the historical record of your view where Section 3
12 was enforced by state officials and state courts, not
13 a -- not a state incorporation in a state statute of
14 Section 3 standards, but Section 3 itself directly
15 enforced by state courts?

16 A. No.

17 Q. Okay. Let's move on to the third item
18 that you had discussed in your testimony -- in your
19 report, in your opinion, with respect to an officer of
20 the United States.

21 Although, before we move there, is there
22 anything else that serves as the basis for your
23 opinion that Section 3 is not self-executing?

24 A. Well, I've given the basic reasons,
25 including the Fourth Circuit's reference to reliance

1 on Chase and application of less -- the framework of
2 Chase to the case before it, which was wrongful
3 discharge acts based on an assumed cause of action
4 directly under the Fourteenth Amendment.

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

7 A. Well -- I'm sorry.

8 Q. Let me ask a question --

9 A. Yes.

10 Q. -- and then we'll head there.

11 So what -- what's your response or your
12 opinion on Professor Magliocca's conclusions that an
13 officer -- the phrase "officer of the United States,"
14 as used in Section 3, includes the President and Vice
15 President of the United States?

16 A. Well, I disagree with that conclusion.
17 And the more I looked into that question, the more I
18 was persuaded that he is really wrong.

19 I think that that term is, in essence, a
20 term of art and has a specialized meaning. And this
21 brings me back to the question on whether I had
22 consulted legal dictionaries, like -- dictionaries,
23 dictionaries like Noah Webster, on the meaning of
24 "insurrection."

25 There is a legal concordance. Now, is

1 that a dictionary? It operates -- it looks like a
2 dictionary. It's from 1883, I think by John
3 Lawler [sic]. And it offers legal -- legal
4 definitions of various terms, including the term
5 "officer." And it cites supporting case law for its
6 definition.

7 That definition of "officer" has a
8 separate, compartmentalized understanding, definition,
9 of "officer of the United States," okay? Now, this is
10 1883. It's later than the ratification of Section 3.
11 But it's not too long after the conclusion of the
12 Reconstruction period which is commonly dated to 1876,
13 the election of President Hayes.

14 And so I think it's fair to say that
15 "officer of the United States" was understood by the
16 legal community, the kind of people who would have
17 read this concordance, looked up the definitions it
18 offers. I think it's fair to say that "officer of the
19 United States" was understood to be a special term
20 needing separate definition from "officer" generally.

21 Q. And so what -- what sources -- other
22 sources did you look to to define what "officer of the
23 United States" means?

24 A. Well, there is the language, the text of
25 the Constitution itself. And then there are a long

1 variety of Supreme Court opinions, going up to a
2 fairly recent one by Chief Justice John Roberts,
3 defining what "officer of the United States" means for
4 purposes of the Appointments Clause in Section 2.

5 Some of these Appointments Clause cases
6 are roughly around the time of the ratification of
7 Section 3, and they include Supreme Court -- sorry --
8 lower court federal cases about the definition of the
9 term "officer of the United States."

10 And, of course, it -- or close -- very
11 close cognates to it appear in the Constitution -- in
12 the text of the Constitution itself. And so far as
13 possible, it wants to construe these constitutional
14 uses of the term "officer of the United States" to be
15 consistent, to be the same.

16 So the text of the Constitution uses the
17 term in several contexts. And the meaning should, by
18 ordinary rules of construction, be consistent from one
19 such provision to the next.

20 So I think both the text of the
21 Constitution -- especially if you assume this rule of
22 consistent meaning and different uses, the text of the
23 Constitution and the Supreme Court case law support
24 the view -- strongly support the view that, you know,
25 the term "officer of the United States" means the same

1 thing in Section 3 as it means under the Appointments
2 Clause.

3 That -- the Appointments Clause is kind
4 of the anchorage, if I may speak that way, of
5 interpreting the meaning of this phrase, "officer of
6 the United States," elsewhere in the Constitution,
7 outside the Appointments Clause, including Section 3.

8 Q. And why is it considered the anchorage?

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

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

19 A. I don't know that I looked directly -- I
20 mean, I didn't look closely anyway at the -- the
21 document. I -- other than it's cited in court
22 opinions, I don't think I looked at the original
23 pre-17 -- pre-1788 documents, no.

24 Did I look at the case law? Yes. And
25 the case law -- sorry -- well, on the -- I did consult

1 secondary sources about the process of drafting the
2 impeachment clauses. And the secondary sources show,
3 I think, that, as used in those clauses, the office --
4 "officer of the United States" had a meaning that was
5 designed to exclude the President. The President --
6 there's separate rules about presidential impeachments
7 from impeachments of lower, executive-level officials
8 and federal judicial officials. There's a separate
9 treatment of those officials in the impeachment
10 clause -- clauses.

11 Q. Okay. Let me -- you also talked a bit
12 about the -- with respect to the jurisdictional
13 language of Section 3 involving the Oath Clause -- I'm
14 sorry. We've talked about that in Article 6.

15 Are there any other documents or bases
16 of your opinion that "officer of the United States"
17 includes -- or I'm sorry -- excludes the President and
18 Vice President?

19 A. Well, I think the language of --
20 that the Constitution uses for prescribing an
21 Article 6 oath is strikingly different from the
22 language the Constitution uses in prescribing a quite
23 separate presidential oath in Section -- in Article 2
24 of the Constitution.

25 There are two oath clauses, an Article 6

1 one and an Article 2, okay? And the Section 3 of the
2 Fourteenth Amendment echos the oath language of
3 Article 6, where those who are subject to it would
4 have to take an oath to support -- support -- the
5 Constitution.

6 If you go back to Section 3 from the
7 Oath Clause in Section 6, it appears quite obvious to
8 me that they were talking about the class of people
9 who was -- who had to take the Article 6 oath, not the
10 people who were talking -- that they didn't mean to
11 include the Article 2 Oath Clause.

12 I think that's -- now, is there -- as
13 Professor Magliocca says, that -- and he cites a grand
14 jury charge from the 19th century that allows for some
15 play in the joints as to what the -- what it means to
16 take an oath to support the Constitution. There can
17 be -- there is, historical sources say, some play in
18 the joints, some elasticity.

19 But so what? That doesn't assimilate
20 the Article 6 language where the President has to
21 swear to preserve, protect, and whatever else it says,
22 the Constitution.

23 You can't just assimilate the language
24 of the Article 2 Oath Clause into the language of the
25 Article 6 Oath Clause. That's beyond play in the

1 joints. It's a separate language about how the
2 President -- what the President's constitutional
3 responsibilities are.

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

8 A. No, I think that's stretching the
9 language much too far. I mean, people who draft
10 constitutional language have to be very, very careful
11 about the terms they use, especially if those terms
12 are used elsewhere in the text of the Constitution.
13 So I think he's going way too far.

14 I once, at OLC, was asked to draft an
15 amendment to the Constitution, and we gave up in the
16 end, it was so hard.

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

21 A. What's the basis for my opinion?

22 Q. Yes. And if you could --

23 A. Oh, sorry.

24 Q. -- explain to me the basis in the
25 microphone, that would be great.

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

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

12 THE COURT: Sustained.

13 MR. GESSLER: Okay.

14 Q. (By Mr. Gessler) So let me ask you
15 did -- as a matter of historical analysis and
16 knowledge, did the people who drafted Amendment 14,
17 did they take care about the language they used and
18 understand when they used language that mimics other
19 language or was different than other language?

20 A. Well --

21 Q. Let me try rephrasing.

22 A. -- the drafting of Section --

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

24 MR. GESSLER: That was a terrible
25 question, I was about to say.

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

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

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

13 A. Well, the initiative to draft a new
14 amendment to the Constitution came very early after
15 the Civil War, because it was considered generally,
16 widely that there was need to bring the Constitution
17 up to date. And in particular, a need to get rid of
18 Dred Scott and its holding on citizenship.

19 So the Congress very, very early in its
20 term set out a 15-member joint committee, including
21 members of the House and Senate, to do exactly that.
22 They included some very fine lawyers and very
23 thoughtful people, and the committee considered
24 several draft versions of what later matures into the
25 Fourteenth Amendment, including Section 3. And those

1 proposals, which ripened over months by many members
2 of both houses, was sent to the House and Senate for
3 consideration, again by very able lawyers.

4 And do I have proof that somebody sat
5 down one day in the course of these deliberations and
6 said, "We've got to make sure that everything clicks
7 into place"? No.

8 Do I make the assumption based on the
9 care and length of the deliberations that the
10 special -- the Select Committee and houses gave, and
11 the attention that was given to it to determine
12 exactly who was covered, whose jurisdictions were
13 subject? Do I make the assumption that that was given
14 careful consideration to bring that into line with the
15 rest of the Constitution or else depart from the
16 standard meaning? Yes. That is an assumption I would
17 make.

18 MR. GESSLER: I have no further
19 questions.

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

23 THE COURT: I was just wondering.
24 Professor Magliocca, he showed us some discussion
25 about the enactment of Section 3 of the Fourteenth

1 Amendment in which one of the senators stated, you
2 know, "Don't we want to make sure that this applies to
3 the President?"

4 And then somebody responded and said,
5 "Well, it applies in the kind of catchall phrase."

6 And then the gentleman says, "Oh, yeah,
7 I see you're right."

8 So what do you -- how do you -- how do
9 you -- how does that discourse which --

10 THE WITNESS: That --

11 THE COURT: -- impact your opinion in
12 this?

13 THE WITNESS: That's Senate colloquy
14 between Senator Reverdy Johnson of Maryland and
15 Senator -- I can never remember whether it's Morrill
16 Lot or Lot Morrill -- I think it's Morrill Lot of
17 Maine. That colloquy concerns the disqualification
18 clause of Section 3, not the jurisdictional clause.

19 So it is relevant to interpreting from
20 what offices a covered person who has committed the
21 relevant offense will be excluded. That's the start
22 of the language in Section 3.

23 But it doesn't go to the coverage of --
24 the jurisdictional coverage of Section 3. You can't
25 just map on Section -- the leading language of

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

3 THE COURT: Okay.

4 THE WITNESS: It goes more to the --
5 whether the President, the presidency as an office, is
6 included in Section 3 than it goes to the question
7 whether the President is or is not an officer of the
8 United States.

9 So I don't think it's relevant,
10 frankly --

11 THE COURT: Okay.

12 THE WITNESS: -- to the interpretation
13 of the judicial -- the jurisdictional aspect of
14 Section 3.

15 THE COURT: Thank you. I appreciate
16 that.

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

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

25 MR. MURRAY: Well, Mr. Grimsley can talk

1 about Mr. Heaphy's schedule.

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

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

13 THE WITNESS: Today, yes.

14 THE COURT: Okay. It would be today.
15 It just -- we may go till noon and then break for
16 lunch, do Mr. Heaphy, and come back to you sometime
17 later in the afternoon.

18 Is that okay with you?

19 THE WITNESS: Yes.

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

23 MR. MURRAY: Yes, Your Honor. Thank
24 you. Let me just make sure we've got -- we have the
25 screens here.

1 It looks like we're on this one, but not
2 this one.

3 THE COURT: You may proceed.

4 CROSS-EXAMINATION

5 BY MR. MURRAY:

6 Q. Good morning, Mr. Delahunty.

7 You're not claiming to be an expert in
8 the history of Section 3 of the Fourteenth
9 Amendment --

10 A. No.

11 Q. -- are you?

12 And certainly Section 3 of the
13 Fourteenth Amendment is not the main focus of your
14 scholarly work, correct?

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

17 Q. I want to look briefly at some of the
18 things that you have published academic literature on.

19 This is Petitioners' Exhibit 315.

20 Is this your latest CV?

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

23 Q. Yes. And this is the one we received --

24 A. Yes.

25 Q. -- I think on Wednesday of this week.

1 A. Okay.

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

5 A. Yes.

6 Q. -- in the book "Up From Conservatism."

7 A. Yes.

8 Q. Do you see that?

9 A. That's the title. Yes.

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

13 A. Yes.

14 Q. You mentioned some publications on
15 Shakespeare.

16 Is this one of them here?

17 A. Yes.

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

21 A. Yes.

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

1 A. Well, the first one was accepted for
2 publication, and then I think this publication by the
3 University -- by a journal at the University of
4 Pennsylvania was never actually published. It wasn't
5 rejected; I think they just closed down.

6 But, yes, in the -- in that sense, it
7 was --

8 Q. But --

9 A. -- rejected for publication, yes.

10 Q. But -- and those were things you wrote?

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

14 Q. Do you mind just speaking a little bit
15 closer --

16 A. Oh, yes.

17 Q. -- to the microphone? Thank you.

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

20 Q. And nothing --

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

23 Q. No. I'm sorry. I may have misspoke.
24 But let me ask you another question.

25 Nothing on this page of your CV relates

1 at all to Section 3 of the Fourteenth Amendment --

2 A. No.

3 Q. -- is that right?

4 A. That's certainly true.

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

10 A. Yes.

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

14 A. No. No.

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

20 A. Yes.

21 Q. And, again, on --

22 A. Well, if I may say, the piece about
23 "Against Foreign Law" is about constitutional
24 adjudication and whether foreign law should be
25 imported into the interpretation of constitutional

1 clauses.

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

5 A. No, no, no.

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

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

11 THE WITNESS: Okay.

12 THE COURT: And you kind of know where
13 he's going --

14 THE WITNESS: Okay. Yes.

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

18 THE WITNESS: Okay.

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

25 A. Yes.

1 Q. You've also written on philosophy.

2 For example, you have an article about
3 Descartes, correct?

4 A. Yes.

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

7 A. Yes.

8 Q. But you've never written a book with a
9 central focus on the history of the Fourteenth
10 Amendment --

11 A. No.

12 Q. -- have you?

13 A. No.

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

16 A. Yes.

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

20 A. Yes.

21 Q. For example, you wrote an article with
22 John Yoo entitled "Pushing Back on Cancel Culture."

23 Do you see that?

24 A. Yes.

25 Q. And then on the next page, you have a

1 number of articles about China and COVID, such as "How
2 to Make China Pay for COVID-19," correct?

3 A. Yes.

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

7 A. Yes.

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

11 A. Yes.

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

15 A. Yes.

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

19 Do you remember that?

20 A. Yes.

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

23 Do you remember that?

24 A. Yes.

25 Q. And in that article you referred to the

1 Democrats and their deep-state enforcers in the FBI
2 and CIA.

3 Do you recall that --

4 A. Yes.

5 Q. -- as well?

6 You've never written a peer-reviewed
7 article with a primary focus on the history of the
8 Fourteenth Amendment; is that right?

9 A. That's correct.

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

13 A. No, I have not.

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

16 A. Yes. An op-ed.

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

19 A. That's right.

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

23 A. That's right.

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

1 A. No.

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

4 A. Correct.

5 Q. I want to ask you a few questions about
6 historical methodology.

7 When you're doing historical work, I
8 think you said on direct that you look at primary
9 sources, correct?

10 A. Yes.

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

15 A. That's correct.

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

19 A. No.

20 Q. In your report, you said that you gave a
21 draft of your report to Professors Blackman and
22 Tillman.

23 Do you recall that?

24 A. That's right.

25 Q. And you said that you gave Professors

1 Blackman and Tillman a draft of your report because
2 they have "written extensively on the subjects
3 discussed in my report," right?

4 A. Yes.

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

9 A. That is correct.

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

12 A. I do.

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

15 A. I certainly do.

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

18 A. No.

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

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

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

4 A. No.

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

7 A. No.

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

10 A. No.

11 Q. Do you know who that is?

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

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

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

19 Q. You didn't know about that article and
20 you didn't read --

21 A. No.

22 Q. -- the article where John Vlahoplus
23 responds directly to the Blackman and Tillman
24 position --

25 A. No.

1 Q. -- in the context of Section 3?

2 A. No.

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

6 A. No.

7 Q. I want to ask you about some of the
8 sources you do rely on. I want to pull up your
9 report, Petitioners' Exhibit 227.

10 And does this appear to be the expert
11 report that you served in this case?

12 A. Yes.

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

16 A. Yes.

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

20 A. Uh-huh. Yes.

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

23 A. I don't think so, no.

24 Q. You do cite to Professor Kurt Lash's
25 recent article on Section 3, though, right?

1 A. Yes. Yes.

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

4 A. No. Not on the background. No.

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

9 A. That's right.

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

12 A. That's right.

13 Q. I want to look briefly at Professor
14 Lash's draft paper, Petitioners' Exhibit 289.

15 Does this appear to be the article from
16 Professor Lash that you relied on?

17 A. It does.

18 Q. If we go to page 3 of Professor Lash's
19 article, there's a footnote here, Footnote 5. And it
20 says "A robust scholarly debate has emerged regarding
21 the proper reading of Section 3 terms such as 'office'
22 and 'officer' and those who have previously taken an
23 oath as an officer of the United States."

24 Do you see that?

25 A. Yes.

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

3 A. Yes.

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

7 A. Yes.

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

10 A. Yes.

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

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

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

19 A. Yes. Yes.

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

24 A. That's right.

25 Q. If we go to page 48 there's another

1 footnote, and it's a long footnote. I'm not going to
2 ask about the substance of what the sources are
3 talking about.

4 But I just want to ask you, do you see
5 in Footnote 218 Professor Lash cites an opinion
6 reported in The Times-Picayune --

7 A. Yes.

8 Q. -- and a jury charge --

9 A. Yes.

10 Q. -- reported in The Tennessean?

11 A. Yes.

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

15 A. Yes.

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

20 A. That is correct.

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

23 A. No.

24 Q. -- is that right?

25 A. He does not.

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

4 THE COURT: I'm going to deny the
5 motion.

6 As I said, Professor Delahunty has
7 expertise in reviewing historical documents and
8 applying them to constitutional provisions. And his
9 lack of a scholarly contribution to Section 3 in
10 particular I don't think excludes him from testifying
11 on opinions that he's testified to today.

12 MR. MURRAY: Thank you, Your Honor.

13 At this point I'm going to move on to
14 the substance of his opinions, but I know we only have
15 a few minutes left. So I wanted to see if you wanted
16 me to start with that or if you want to just break for
17 lunch now.

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

22 MR. MURRAY: Sure.

23 Q. (By Mr. Murray) Mr. Delahunty, I
24 believe you said on direct that the Fourteenth
25 Amendment was -- that you begin your constitutional

1 law classes with the Fourteenth Amendment; is that
2 right?

3 A. Yes.

4 Q. And you called --

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

7 Q. Dred Scott and then a discussion --

8 A. Correct.

9 Q. -- of the Fourteenth Amendment?

10 A. Yes.

11 Q. And you referred to the Fourteenth
12 Amendment as a second founding --

13 A. Yes.

14 Q. -- of our Constitution; is that right?

15 A. Yes.

16 Q. The Fourteenth Amendment is not some
17 kind of second-class constitutional amendment.

18 You'd agree with that, right?

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

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

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

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

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

11 Q. So I want to start by talking about your
12 opinion that Section 3 is ambiguous and that,
13 therefore, it needs congressional enforcement
14 legislation.

15 You'd agree with me that courts
16 interpret ambiguous text all the time, right?

17 A. Indeed.

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

20 A. That's right.

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

24 A. Yes.

25 Q. Are you aware of judicial decisions

1 saying that we can't tell what an unreasonable search
2 and seizure is, or due process of law is, unless
3 Congress tells us?

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

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

7 A. Yes.

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

12 A. It is, yes.

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

16 A. That's true.

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

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

23 Q. But you agree with petitioners that
24 Section 3 remains in force even outside the context of
25 the Civil War?

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

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

5 A. I do.

6 Q. -- or rebellion?

7 A. -- agree with that, yes.

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

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

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

15 A. Say again?

16 Q. Where the Supreme Court --

17 A. Yes.

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

20 A. Yes.

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

23 A. Yes.

24 Q. You're not saying that a criminal
25 conviction or a guilty plea on a charge of

1 insurrection is a necessary condition for a Section 3
2 disqualification?

3 A. No.

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

9 A. Yes.

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

13 A. I -- can I -- I don't understand. Could
14 you repeat it?

15 Q. Well, you testified that the framers
16 were careful with their words --

17 A. Yes.

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

21 A. Did I testify to that? I don't
22 remember, but I think I probably did, yes. Certainly,
23 that congressional guidance would be helpful,
24 instructive to the courts. Because the term is pretty
25 broad-gauged. There's also the question of whether

1 the courts can enforce at all that Section 5, but
2 that's separate from what you asked me.

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

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

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

11 A. Yes.

12 Q. Now, if I have trouble knowing what a
13 word means, sometimes I go to a dictionary. So let's
14 look at some dictionaries. And this is Petitioners'
15 Exhibit 144, the appendix and materials that we looked
16 at with Professor Magliocca.

17 Page 785, I believe you testified about
18 Webster's on direct but we didn't look at it.

19 Webster's in the antebellum period
20 defined "insurrection" as a "rising against civil or
21 political authority, the open and active opposition of
22 a number of persons to the execution of law in a city
23 or state," correct?

24 A. Yes.

25 Q. Webster's was not the only dictionary in

1 the antebellum period that defined "insurrection" in
2 just this way, was it?

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

7 Q. You cite some cases in your report as
8 well, and I just want to pull that discussion up.
9 Plaintiffs' Exhibit 227 is your report.

10 And if we go to page 71, there's a
11 discussion of a Georgia Supreme Court case in 1868
12 called Chancely versus Bailey.

13 Do you see that?

14 A. Yes.

15 Q. And in Chancely versus Bailey, the year
16 that the Fourteenth Amendment was ratified, the
17 Georgia Supreme Court said:

18 "If the late war had been marked merely
19 by armed resistance of some of the citizens of the
20 state to its laws or to the laws of the federal
21 government, as in the case of Massachusetts in 1789
22 and in Pennsylvania in 1793, it would very properly
23 have been called an insurrection, and the acts of such
24 insurgents would have been held as illegal."

25 Correct?

1 A. Yes.

2 Q. You also testified on direct about the
3 instructions by Justice Catron that we looked at in
4 Professor Magliocca's testimony.

5 And you called those grand jury
6 instructions helpful in understanding insurrection --

7 A. Yes.

8 Q. -- is that right?

9 A. Yes.

10 Q. And just to make sure we're all looking
11 at the same thing, if we go a few pages in, to 752 of
12 Professor Magliocca's appendix, Justice Catron
13 instructed the jury that "The conspiracy and the
14 insurrection connected with it must be to the
15 effect" -- "to effect something of a public nature
16 concerning the United States, to overthrow the
17 government or some department thereof, or to nullify
18 and totally hinder the execution of the United States
19 law or Constitution or some part thereof or to compel
20 its abrogation, repeal, modification, or change by a
21 resort to violence."

22 That was the instruction that you found
23 helpful, correct?

24 A. Yes.

25 Q. Did you also look at how Justice

1 Chase -- not the Chief Justice, the other Justice
2 Chase -- defined "insurrection" in the case of Fries?

3 A. No.

4 Q. If we go to page 834 of Professor
5 Magliocca's appendix, this is a case of Fries from the
6 Circuit Court of the District of Pennsylvania in 1800.

7 Do you see that?

8 A. Yes.

9 Q. And if we go to page 841, the Court
10 says:

11 "On this general position, the courts
12 are of the opinion that any such insurrection or
13 rising to resist or prevent by force or violence the
14 execution of any statute of the United States for
15 levying or collecting taxes, duties, imposts, or
16 excises or for calling forth the militia to execute
17 the laws of the Union or for any other object of a
18 general nature or national concern under any pretense
19 as that the statute was unjust, burdensome,
20 oppressive, or unconstitutional is a levying war
21 against the United States within the contemplation and
22 construction of the Constitution."

23 Correct?

24 A. Yes.

25 Q. And that also uses this language we've

1 seen earlier about a rising up to resist by force or
2 violence the execution of law, correct?

3 A. Yes.

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

9 Do you remember that testimony?

10 A. Yes.

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

14 A. That's right.

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

19 A. Yes.

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

24 A. That was my recollection of his
25 testimony, yes.

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

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

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

10 THE COURT: Agreed. We will -- we will
11 reconvene at 1:00 for Mr. Heaphy.

12 And then we will finish your testimony,
13 Professor Delahunty, after Mr. Heaphy is done, okay?

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

16 THE COURT: You may absolutely have
17 lunch.

18 THE WITNESS: But not discuss my
19 testimony?

20 THE COURT: Under the rules, you're not
21 supposed --

22 THE WITNESS: All right.

23 THE COURT: -- to discuss your testimony
24 with counsel.

25 THE WITNESS: Okay. Thank you, Your

1 Honor. Thank you.

2 THE COURT: But we do want you to eat.

3 THE WITNESS: Thank you.

4 THE COURT: Okay.

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

6 THE COURT: You may be seated.

7 MR. GRIMSLEY: And has Mr. Heaphy been
8 admitted?

9 Great. And there's just one preliminary
10 issue, Your Honor, when you're set up.

11 THE COURT: Actually, let me start the
12 video.

13 MR. GRIMSLEY: So one preliminary
14 matter.

15 Congressman Buck testified yesterday as
16 their witness on the January 6 committee and the
17 report. We would move to strike, then, Congressman
18 Nehls' declaration from the record since we're not
19 getting the opportunity to cross-examine him. They
20 made the choice that they used Congressman Buck rather
21 than Congressman Nehls. He had some things in his
22 declaration that Mr. Buck -- or Congressman Buck did
23 not testify about.

24 I don't plan on asking Mr. Heaphy to
25 rebut what's in Mr. Nehls' declaration since it should

1 be struck from the record.

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

7 MR. GRIMSLEY: Okay.

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

11 MR. GRIMSLEY: Okay.

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

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

20 THE COURT: I think if Mr. Heaphy has
21 things he wants to say about the -- well, first of
22 all, why don't you tell me.

23 Would you like me to consider when I
24 make my final determination on the January 6 report
25 the Nehls declaration?

1 MR. GESSLER: Yes, Your Honor. And we
2 believe it's proper. You know, the Court doesn't --
3 isn't necessarily -- the Court is not required to only
4 confine itself to testimony when determining the
5 admissibility of a report.

6 Obviously, the Court's already made a
7 consideration of it and viewed it, and, you know, so
8 we think that you've already relied on it, obviously,
9 and it should stay in. And I'm guessing you will put
10 the same amount of weight on it that you have already,
11 so . . .

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

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

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

20 MR. GRIMSLEY: And we had to choose
21 Congressman Buck.

22 And so I think, given that you've
23 required us to make Mr. Heaphy available for
24 cross-examination even though he had submitted a
25 declaration and we were willing to stand on that, and

1 that Mr. -- or Congressman Buck has been made
2 available for cross-examination; Congressman Nehls
3 does not -- has not suffered the same fate.

4 And so we're happy if Your Honor wishes
5 to consider it but would just urge you to consider it
6 for the weight it deserves.

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

12 MR. GRIMSLEY: Thank you, Your Honor.

13 So would you like to swear Mr. Heaphy in?

14 THE COURT: Yeah. Can we make it so --
15 change the view so we see -- he's a little bit bigger?

16 Mr. Heaphy, can you hear me?

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

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

22 MR. HEAPHY: Okay. Is this any better?

23 THE COURT: It's getting better.

24 MR. HEAPHY: Is that any better? Not
25 really?

1 MR. GRIMSLEY: No.

2 THE COURT: Not great.

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

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

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

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

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

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

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

21 THE COURT: Great. Thank you.

22 DIRECT EXAMINATION

23 BY MR. GRIMSLEY:

24 Q. Please introduce yourself to the Court.

25 A. My name is Tim Heaphy. It's spelled

1 H-e-a-p-h-y. And I'm a lawyer at Willkie Farr &
2 Gallagher in Washington, D.C., and I previously served
3 as the chief investigative counsel to the House of
4 Representatives' Select Committee to investigate the
5 January 6 attack on the U.S. Capitol.

6 Q. So we'll get to the January 6 committee
7 in a moment, but I just want to go over your
8 background a little bit.

9 Where did you go to college?

10 A. I went to the University of Virginia.

11 Q. What degree did you get?

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

14 Q. Did you go to law school?

15 A. I did.

16 Q. Where did you go to law school?

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

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

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

25 Q. How long did you work at Morrison &

1 Foerster?

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

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

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

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

13 A. I was there for almost ten years, and I
14 kind of moved through various sections in the office.
15 Tried 65 jury trials. Ultimately, my last assignment
16 was in a gang prosecution unit. I had a 13-month-long
17 racketeering trial, capital case, in federal court in
18 Washington, D.C.

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

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

24 Q. And what did you do when you were an
25 assistant U.S. attorney there?

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

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

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

8 Q. What type of work --

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

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

13 A. I did, yes.

14 Q. And how long were you at McGuireWoods?

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

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

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

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

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

6 Q. You said you finished there in 2014?

7 A. Yes.

8 Q. What did you do after that?

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

14 Q. At some point did you do some work for
15 the City of Charlottesville?

16 Oh, we lost you.

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

1 Charlottesville events.

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

4 A. Yes, it was.

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

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

14 Q. What was your official position?

15 A. Chief investigative counsel.

16 Q. How did you get that position?

17 A. I spoke to the people that were tasked
18 with putting the staff together. That was largely
19 this -- Speaker Pelosi's top aides as well as a couple
20 of people that had already been hired, the staff
21 director and chief counsel to the January 6 committee.
22 I spoke with them and was hired, I believe, in the
23 middle of August. I started, like, August 15 or 16 of
24 2021.

25 Q. What were your responsibilities as chief

1 investigative counsel?

2 A. And I should say -- I should back up.
3 Chairman Thompson, I spoke to him, and he ultimately
4 made the hiring decision to hire me as chief
5 investigative counsel.

6 So my duties were essentially to run
7 day-to-day investigation. First, hire a lot of
8 people, lawyers and other professionals, to do the
9 work, the fact-gathering of the investigation. And
10 then over the course of the duration of the Select
11 Committee, I supervised the work day to day.

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

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

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

21 A. Investigative experience. Candidly, I
22 was looking for people that had been investigators,
23 that had interviewed witnesses, that had reviewed
24 large amounts of information to derive what was
25 relevant, whose judgment and character I trusted, that

1 had a very strong interest in serving on the
2 committee. So it was really, ultimately, a very
3 talented group.

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

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

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

19 A. Most of the people that we hired had
20 never worked in Congress before, because, again,
21 Congress really doesn't do these kinds of
22 investigations very often. And therefore, a lot of
23 the lawyers from other congressional committees didn't
24 really have as much investigative experience.

25 The work differed -- my understanding --

1 Mr. Grimsley, I had never worked on a congressional
2 investigation before, but my understanding was that
3 the only thing different about our process was the
4 involvement of our members. The members of the
5 committee themselves were very involved in the
6 day-to-day turning of the wheels of the investigation.
7 They participated in the interviews. They had
8 up-to-the-minute, sometimes daily, reports on what we
9 were learning.

10 And I think that's different from the
11 normal congressional process where the staff does most
12 of the work, the fact-gathering, and the members, you
13 know, are sort of given that information before a
14 public proceeding.

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

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

20 Q. Now, what party affiliation are you?

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

24 Q. Was there any political litmus test for
25 determining who would be on the investigative staff

1 for the January 6 committee?

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

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

9 A. Yeah. Yes, there were.

10 Q. Can you give me some examples?

11 A. Sure. John Wood, for example. John was
12 a Bush-appointed U.S. Attorney. And he actually ran
13 for Senate as a Republican, left the -- our staff to
14 do that in 2022, I believe. He came to us through Liz
15 Cheney. Ms. Cheney had another counsel who reported
16 to her directly. Kinzinger had a lawyer, I believe,
17 who was also a Republican.

18 So there were a handful that were. But,
19 again, that was, to my view, sort of incidental to
20 their work and not something that we asked about.

21 Q. When did your team begin the actual
22 investigation?

23 A. Right away. You know, we knew all along
24 that we were under a time crunch. We were going to
25 expire at the end of Congress and had just a lot to

1 do.

2 So almost immediately upon my arrival in
3 August of '21, we were requesting documents, we are
4 starting to talk to people. I think some of the first
5 transcribed interviews in which I participated were in
6 September of 2021. So very soon after the committee
7 was formed.

8 Q. What was the -- or how long did the
9 investigation last?

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

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

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

19 THE COURT: Overruled.

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

25 Q. (By Mr. Grimsley) What was the final

1 result of the investigation?

2 A. The resolution of the Select Committee
3 required us to produce a report that made both factual
4 findings about -- the facts and circumstances that
5 gave rise to the attack on the Capitol and make some
6 recommendations to try to prevent similar events in
7 the future.

8 I believe the report -- I don't remember
9 the exact date, but sometime in mid- to late December
10 was -- it was issued. It's 845 pages. And that's
11 kind of the official record of our -- the committee's
12 factual findings and recommendations.

13 Q. Have you submitted declarations in this
14 matter?

15 A. I have, yes.

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

19 A. Yes. I did earlier today.

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

22 A. Yes.

23 MR. GRIMSLEY: Your Honor, I'm not going
24 to go over the declarations. You have them. I know
25 the intent of this was for cross-examination.

1 But I do have some questions for
2 Mr. Heaphy regarding rebuttal issues.

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

5 MR. GRIMSLEY: Yes.

6 THE COURT: Okay.

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

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

14 A. Yes, I have.

15 Q. Now, he suggests that the January 6
16 report is somehow compromised by virtue of the fact
17 that the committee presented doctored evidence at the
18 hearings.

19 Are you familiar with that allegation?

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

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

24 A. I strongly disagree with that
25 characterization. As I said in my declaration, there

1 was a text message that I believe a member of the
2 committee used during one of our public proceedings
3 which incorrectly indicated that a particular sentence
4 from a text message ended as opposed to continued. A
5 period was inserted instead of an ellipsis. And when
6 that was called to the committee's attention through
7 our spokesperson, we acknowledged the mistake. It was
8 a mistake, not an attempt to doctor evidence or
9 mislead.

10 I think there was also some allegation
11 that there was video or audio that was doctored.
12 Again, I strongly dispute that.

13 There were some times where we used in
14 public proceedings silent Capitol police surveillance
15 footage and then dubbed over that contemporaneous
16 police radio transmissions in time -- in real time to
17 correspond to the images in the surveillance footage.
18 And I don't consider that to be doctoring them. It's
19 simply putting two pieces of evidence taken
20 contemporaneously together.

21 So that -- unless I'm forgetting
22 something from Congressman Nehls' declaration, I
23 believe those were the two allegations that I would
24 dispute.

25 Q. Those are the only two.

1 Did you ever hear any allegation that
2 other evidence was doctored somehow?

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

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

10 A. Pieces of evidence, broad term. You
11 know, we played clips of depositions, we showed
12 documents or images that had been obtained. Hundreds
13 or even thousands over the course of the hearings.
14 And then the hearings were a subset of what we
15 actually presented in the actual report.

16 So I think the report indicates exactly
17 with more specificity than I can recall how many
18 documents were able to obtain, how many witnesses we
19 interviewed. All of that is detailed with more
20 specificity in the report.

21 Q. Now, there was a question raised
22 yesterday about whether or not the January 6 committee
23 had interviewed leadership from the Capitol Police.

24 Did the January 6 committee interview
25 leadership from the Capitol Police, including Chief

1 Sund?

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

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

8 A. Yeah. There were a handful of national
9 security-related witnesses, primarily people that
10 worked in some -- and continue to work in sensitive
11 positions inside the White House that we agreed that
12 we would not release the identity of those witnesses
13 or the transcript because public release would be
14 debilitating to them individually and to the safety
15 and security of the White House complex.

16 So there were a handful, three to four,
17 I think, of those transcripts that we did not release
18 for that reason.

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

24 A. I don't believe so, no.

25 Q. Now, do you recall that the committee

1 took a deposition of a person named Kash Patel, former
2 chief of staff to Acting Secretary of Defense
3 Christopher Miller?

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

6 Q. Was his deposition transcript kept
7 confidential somehow?

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

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

14 A. No. Absolutely not.

15 Q. Was it the very last one released?

16 A. No, not that -- again, there was no
17 rhyme or reason to the order in which they were
18 released. We did them all at the end. And I don't
19 remember even when his -- we released them 10, 15, or
20 20 or 30 at a time over those last few days of the
21 committee's existence.

22 So I just don't know -- but if your
23 question was was there an intentional effort to hold
24 his to the end? Absolutely not.

25 Q. Did Mr. Patel ever reach out to ask to

1 provide testimony at a public hearing?

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

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

11 A. Any kind of investigation is hampered if
12 you're unable to discern what a witness is providing
13 for personal knowledge versus things the witnesses may
14 have heard from other sources.

15 So it's very important to try to prevent
16 the public release or the sharing in any way of
17 information that you're learning during the
18 investigation, because it makes it easier to sort of
19 ensure that you're getting personal knowledge.

20 So we didn't release either publicly or
21 to witnesses what other witnesses said, even who other
22 witnesses were, because we wanted to ensure that what
23 we were getting from each witness was a product of his
24 or her memory, not something that they read in a
25 transcript or saw in a news report.

1 And that's pretty standard. That was
2 not a unique practice of the Select Committee. That's
3 always -- that's the way I've always done it.

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

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

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

11 A. No. They were completely cooperative.

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

17 MR. GESSLER: Objection, Your Honor.

18 A. I'm not aware.

19 THE COURT: What's the objection?

20 MR. GESSLER: Your Honor, my
21 understanding is that -- well, first of all, this is
22 calling for speculation. And secondly, it's beyond
23 the scope of our understanding of what this witness is
24 here for is to describe the processes of the January 6
25 commission, not to rebut the testimony of earlier

1 witnesses or earlier pieces of evidence.

2 He is a -- he was called by the Court
3 essentially for the January 6 commission, not to be
4 used as a witness on the petitioners' behalf.

5 Had we -- we probably would have
6 prepared for a cross-examination if we had known that
7 his testimony would be used in a substantive manner in
8 this case.

9 THE COURT: Well, yesterday they advised
10 the Court that they were going to call him as a
11 rebuttal, specifically to the testimony of Mr. Patel
12 and Ms. Pierson. And so his testimony certainly isn't
13 a surprise to me.

14 And I don't think that the question is
15 speculative. Mr. Patel testified that there were
16 documents showing this authorization and that they
17 must not have been produced by the Department of
18 Defense. And what I believe Mr. Grimsley is asking
19 is, if those documents existed, you know, was there
20 any understanding of these were withheld.

21 So that's a long way of saying the
22 objection is overruled.

23 MR. GESSLER: Thanks, Your Honor.

24 Q. (By Mr. Grimsley) So let me repeat the
25 question.

1 Would the document requests that were
2 sent to the Department of Defense have been broad
3 enough to cover any documents that the Department of
4 Defense had showing records of an authorization by the
5 President for 10- to 20,000 National Guard troops to
6 be on the ready?

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

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

11 A. I did.

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

14 A. Both before and after. We asked him
15 about conversations that other witnesses had relayed
16 to us that they had with him. And then we continued
17 to, as you do in every investigation, attempt to
18 corroborate assertions.

19 So, yes, we plugged in the questions and
20 answers for Mr. Patel into the evolving body of work
21 of the Select Committee.

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

24 A. Yes.

25 Q. Based on your investigation, including

1 the deposition of Mr. Patel, do you have an opinion as
2 to Mr. Patel's character for truthfulness or
3 untruthfulness?

4 MR. GESSLER: Objection, Your Honor.

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

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

10 MR. GRIMSLEY: Your Honor, Colorado Rule
11 of Evidence 608(a) allows for extrinsic testimony by
12 individuals about a witness and specifically allows
13 them to provide an opinion as to that witness's
14 character for truthfulness or untruthfulness.

15 Mr. Heaphy has a basis for doing so, and
16 he is allowed to do so.

17 I'm certainly willing to provide the
18 Court with legal authority. If the Court would like
19 briefing on this, I think that would be fine, and we
20 can take the testimony and then just decide afterwards
21 whether it be stricken. But this is squarely within
22 the confines of Rule 608(a).

23 THE COURT: I'm going to -- I'm going to
24 sustain the objection. You may ask him what parts of
25 his testimony they were contradicting by other

1 evidence. But I'm not going to let you have him opine
2 on whether or not he thinks that Mr. Patel is a
3 truthful person.

4 MR. GRIMSLEY: Okay.

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

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

15 Q. Did you see --

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

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

21 MR. GESSLER: It -- the report is
22 hearsay. The comment -- any information within the
23 report about those statements is hearsay. The
24 witness's statement is -- you know, the testimony --
25 the statement that the witness is testifying to is

1 hearsay. It's intended to prove the truth of the
2 matter asserted, and it's an out-of-court statement.

3 If we had subpoena power and adequate
4 time, we would be able to talk to former Secretary of
5 Defense Mark Meadows -- or I'm sorry -- Chief of Staff
6 Mark Meadows. But -- I'm sorry, Your Honor. It's --

7 THE COURT: Miller.

8 MR. GESSLER: I'll get the right name
9 yet. Secretary of the Army Miller.

10 But it is hearsay, Your Honor.

11 THE COURT: I've already accepted the
12 finding that they could find no evidence, including
13 for Mr. Miller, about the 10- to 20,000 -- 10- to
14 20,000 troops.

15 So I'm going to sustain the objection
16 that the testimony is cumulative.

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

19 MR. GESSLER: Just one moment.

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

22 MR. GESSLER: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. GESSLER:

25 Q. Good afternoon, Mr. Heaphy.

1 Is it -- and I apologize. Do you
2 pronounce your name Heaphy or Heaphy? I've heard it
3 both ways.

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

6 Q. Okay. Thank you very much.

7 So let me ask you a little bit about
8 your experience.

9 So have you had experience running large
10 investigations?

11 A. Yes. I was a U.S. Attorney -- assistant
12 U.S. Attorney where I ran large investigations and a
13 U.S. Attorney where I supervised them. The
14 Charlottesville investigation was substantial and
15 actually similar.

16 So, yes, before taking this position, I
17 had supervised other investigations.

18 Q. Okay. And were those investigations --
19 would it be fair to say they were grand jury
20 investigations --

21 A. Some were and --

22 Q. -- mostly?

23 A. -- some were not.

24 Q. Okay. Did you supervise large grand
25 jury investigations?

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

2 Q. Okay. So I think in your -- in your
3 declaration you had talked a little bit about sort of
4 the number of documents and number of witnesses that
5 the Select Committee called.

6 Do you -- do you recall that?

7 A. Yes.

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

11 A. Yes.

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

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

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

20 A. Yes.

21 Q. Okay. And would it be fair to say that
22 you worked in grand jury investigations of over
23 100,000 documents?

24 A. Definitely. Yes.

25 Q. Okay. And would you -- you'd agree with

1 me that those are -- I guess, would you agree that
2 those are substantial numbers of documents and
3 witnesses?

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

5 Q. Okay.

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

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

10 A. Yes.

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

13 A. Someone does, yes.

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

16 A. Yeah.

17 Q. Okay.

18 A. Yes, that's right. Yes.

19 Q. And did you ever go to the judge and
20 say, Judge, we have a lot of witnesses, well over
21 100 witnesses, and we have over 100,000 documents, and
22 so therefore, you should accept these as true for --
23 and you need not accept any more for a conclusion of
24 guilt?

25 A. No. The majority of -- when you say

1 grand jury investigation, that is simply a first step
2 in a criminal case. And a judge, himself or herself,
3 cannot make a summary finding. It's a jury decision,
4 and it has to be proven at a much different standard,
5 beyond a reasonable doubt.

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

9 Q. Right. And part of the reason for that
10 is because that evidence would be subjected to the
11 adversarial process.

12 Would you agree with me on that?

13 A. Yes.

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

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

25 Q. But for a Court to make that

1 determination from a procedural standpoint, it has to
2 subject that evidence to the adversarial process,
3 correct?

4 A. It is -- adversarial process, yes --

5 Q. Okay.

6 A. -- is available in a criminal
7 proceeding. Not in a grand jury proceeding.

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

12 A. Yes.

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

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

18 Q. Okay. And it sounds like -- and I'm
19 asking you to repeat some of your testimony, but I
20 just want to make sure I'm clear.

21 So you talked, for example, about
22 Mr. John Woods as a member of the investigatory staff,
23 correct?

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

1 Q. Okay.

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

4 Q. And you received his name through a -- a
5 reference from Representative Cheney.

6 How did that work?

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

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

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

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

25 A. He was staff member on the committee

1 exclusively, but part of his responsibility was to
2 sort of be Mr. Kinzinger's counsel. So he had
3 separate conversations with Mr. Kinzinger of which I
4 was not part of.

5 Q. Okay. Now, you said normally -- and I'm
6 just trying to get a sense of the extent of your
7 knowledge.

8 You said normally congressional
9 committees don't include sort of seasoned
10 investigators of the type that you appointed or hired
11 on the committee; is that correct?

12 A. Perhaps a generalization, but my
13 anecdotal impression is that the sort of professional
14 background of the lawyers that we hired on the Select
15 Committee is atypical for congressional staff.
16 Congressional staff lawyers are generally, like,
17 policy people and experts on policy, whereas I was
18 looking more for investigative experience.

19 And there are people in Congress with
20 investigative experience, but not as much as in the
21 Department of Justice.

22 Q. Okay. Now, I think your -- in your
23 declaration you talked a little about the members and
24 the purpose of the committee.

25 What was the purpose of the committee?

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

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

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

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

18 A. Yes.

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

22 A. Yes.

23 Q. Okay.

24 A. He was the chairman, yes.

25 Q. Okay. I'd like to show you what's

1 Exhibit 1084.

2 MR. GRIMSLEY: And, Your Honor, I
3 believe these are going to be tweets that were sent by
4 members of the committee at some point after
5 January 6. We would object. The -- Mr. Heaphy does
6 not have personal knowledge of these. They have not
7 been authenticated.

8 But in any event, if the insinuation is
9 that somehow only the members of the committee had a
10 preconceived notion as to Mr. Trump's involvement, we
11 would like the opportunity on redirect to show the
12 many members of the Republican caucus who also had a
13 similar view after January 6.

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

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

19 Could you show Exhibit 1084, please.

20 Oh, boy. I can't even read that myself.

21 May I use your computer here?

22 MR. GRIMSLEY: Yes.

23 MR. GESSLER: Okay.

24 MR. GRIMSLEY: You can come stand over
25 here.

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

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

6 A. Yes.

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

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

11 Q. Okay. And do you see where he tweeted
12 "Trump fed this vile monster" -- I'm sorry. Said,
13 "Fed this monster with his vile and dangerous talk."

14 Do you see that?

15 A. I do.

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

19 A. I think there were things that were
20 obvious on January 6, like what Congressman Thompson
21 said. But the facts and circumstances that gave rise
22 to those events was uncertain, and that was the task
23 of the committee.

24 So, yes, I don't consider that statement
25 to be one that's closed-minded at all.

1 Q. And if I remember correctly, the
2 committee -- one of the things that the committee
3 concluded was that President Trump, himself, was
4 responsible for events -- for the violence that
5 occurred on January 6; is that correct?

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

8 Q. Okay. And so I'd like to -- we scrolled
9 down a little bit. I'd like you to look at that
10 second tweet where it says "The events of today" --
11 referring to January 6 -- "are the inevitable result
12 of the tyrannical and idiotic leadership of Donald
13 Trump."

14 In your view, would you view those as
15 consistent with someone entering into these -- an
16 investigation with a fair and open mind?

17 A. Yes. Again, it depends on what you mean
18 by fair and open mind. There were some things that
19 were obvious on January 6. But the overall view of
20 what facts and circumstances informed those events was
21 very much an open question and was the primary task of
22 the committee.

23 So, yes, I would consider Chairman
24 Thompson to be open-minded throughout the course of
25 the investigation.

1 Q. Okay.

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

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

9 A. I do.

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

13 A. Same response. Yes.

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

18 Do you see that?

19 A. I do, yes.

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

25 A. I don't think he's open-minded about

1 that fact, but he's certainly open-minded about the
2 scope of the investigation. I think that fact was
3 obvious on January 6 --

4 Q. That Donald Trump --

5 A. -- that it was plugged into --

6 Q. I'm sorry. I apologize.

7 A. Go ahead.

8 Q. Go ahead.

9 THE COURT: Please finish your answer.

10 A. So -- yeah. You start any investigation
11 with certain things you know and certain things you
12 don't know. The fact that President Trump instigated
13 the attack was obvious on January 6 just from his
14 words on the -- during his speech on the Ellipse. We
15 were plugging those facts into what motivated them,
16 how he reacted to them, the facts and circumstances
17 and the response of law enforcement and otherwise.

18 So just because certain facts are sort
19 of obvious at the beginning of an investigation
20 doesn't mean that the investigation has reached a
21 conclusion or is closed-minded.

22 So, again, to answer your question, I
23 don't believe that that statement reflects that there
24 was a -- you know, that he was -- I think your term
25 was "closed-minded." While certain facts were, in his

1 view, established, we still needed to plug them into a
2 much broader context.

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

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

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

13 Do you see that?

14 A. I do.

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

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

25 So in terms of his overall approach to

1 the investigation to fill out all of the relevant
2 facts and circumstances, I don't believe he was in any
3 way biased or had a preconceived notion.

4 Q. So you said there were certain facts
5 that were obvious at the start of the investigation.
6 And I believe -- and I just want to make sure I'm
7 correct -- that one of the facts that was obvious at
8 the start of the investigation was that Donald Trump
9 instigated the violence.

10 Is that correct?

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

13 Q. So is that a yes to my question?

14 A. I'm sorry. Repeat the question.

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

17 THE COURT: Yeah.

18 (Previous question was read back.)

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

21 THE COURT: Yeah. I can read it. I'm
22 going to read it because you can't hear the court
23 reporter because she doesn't have a microphone.

24 So the question was "So you said there
25 were certain facts that were obvious at the start of

1 the investigation, and I believe -- and I just want to
2 make sure I'm correct -- that one of the facts that
3 was obvious at the start of the investigation was that
4 Donald Trump instigated the violence; is that
5 correct?"

6 A. Yes. Donald Trump said, "You have to
7 fight like hell or you won't have a country anymore."
8 That was something that was stated at the Ellipse,
9 which did, in fact, instigate violence.

10 So, yes, the answer to that question
11 would be yes.

12 Q. (By Mr. Gessler) Okay. Let's go to
13 Exhibit 1086.

14 Was Representative Lofgren a member of
15 the commission?

16 A. She was a member of the Select
17 Committee, yes.

18 Q. I'm sorry. The committee. My
19 apologies.

20 So I'm going to show you what's
21 designated as Exhibit 1086. And in that -- are you
22 able to see that?

23 A. Yes.

24 Q. Okay. And I ask you that because at the
25 moment I can't see you. But we'll continue from the

1 video. I can certainly hear you.

2 And she says in the last sentence of
3 that tweet, "Trump incited this, and he's a threat to
4 the security of our country."

5 Is it your testimony that that statement
6 is consistent with being fair and impartial in the
7 investigation?

8 A. Yes.

9 Q. Okay.

10 MR. GESSLER: Let's go to Exhibit 1087.

11 Q. (By Mr. Gessler) And this, it looks
12 like at the top, is an official press statement from
13 Ms. Lofgren. And in it she says that --

14 MR. GESSLER: Can you scroll down just a
15 little bit?

16 Excuse me one moment, Mr. Heaphy.

17 Q. (By Mr. Gessler) She says -- if you see
18 that paragraph that begins in italicized font towards
19 the bottom -- towards the bottom of it: "Today we
20 don't need a long investigation to know the President
21 incited right-wing terrorists to attack Congress" --
22 "the Congress to try to overturn constitutional
23 government."

24 And it's your view that that statement
25 is consistent with Ms. Lofgren being fair and

1 impartial on the committee; is that correct?

2 A. Yeah. Like -- I would characterize that
3 and every -- and all of these tweets as essentially
4 sort of hypothesis based on observations at that point
5 that certainly informed the investigation. But I
6 don't consider them to represent a closed mind about
7 those facts and circumstances.

8 Same answer as I had with Chairman
9 Thompson's tweets.

10 Q. Okay.

11 A. Yes, they certainly had opinions at the
12 beginning based on observations that I would call
13 hypotheses that were a starting point. But we were
14 comparing everything we learned to those hypotheses.
15 That's what happens in an investigation.

16 Q. Okay. I'm going to go through a number
17 of additional exhibits. We'll go through them
18 quickly. I'll ask you the same questions. I assume
19 you'll give me the same answers. And we'll --

20 A. Yeah.

21 Q. -- try to --

22 A. Yeah. You provided these to me earlier
23 today, and I've seen them all. And, yes, I will have
24 the same answer to all of the member tweets reflecting
25 this perspective.

1 Q. Okay. So let's do this since we
2 personally, on our side, didn't provide them. I'm
3 just going to go through the exhibits, and I'm going
4 to say "Is that one of the exhibits you saw to which
5 you would provide the same answer if I read you parts
6 of the exhibit?"

7 Can we do that?

8 THE COURT: So I'm not going to put this
9 into evidence. It's being used for impeachment. So
10 if you want me to hear the impeachment, you're
11 unfortunately going to have to walk through it.

12 MR. GESSLER: Let's walk right through
13 it then.

14 Let's go to Exhibit 1088, please.

15 MR. GRIMSLEY: And, Your Honor, I would
16 object to this being impeachment because it's not
17 impeaching the witness's testimony at all.

18 THE COURT: Well, yes, it is. It's
19 impeaching his -- he says that everybody was fair and
20 open to any possibilities of where the investigation
21 could lead. And Mr. Gessler is saying, no, they
22 weren't.

23 I think that's proper impeachment.

24 MR. GESSLER: Thank you, Your Honor.

25 Q. (By Mr. Gessler) So do you see this

1 exhibit here?

2 A. I do, yes.

3 Q. So it says "While we were performing our
4 duties, the President of the United States in an
5 unconscionable act of sedition and insurrection
6 incited a violent mob to attack the Capitol."

7 Do you see that?

8 A. I do.

9 Q. And in your view is that consistent with
10 someone being fair and impartial in an investigation?

11 A. I think that was Mr. Schiff's hypothesis
12 informed by events that he observed, but does not
13 reflect him or others to have a closed mind.

14 MR. GESSLER: Okay. Let's go to
15 Exhibit 1095, please.

16 Q. (By Mr. Gessler) One moment,
17 Mr. Heaphy.

18 And it says -- towards the end of the
19 first paragraph, it says "Aguilar spoke on the House
20 floor to call on his Republican colleagues to uphold
21 their oaths of office by holding the President
22 accountable and supporting impeachment."

23 So here is where Representative Aguilar
24 is asking others to hold the President accountable and
25 support impeachment.

1 And then later in the next paragraph, it
2 says "When the President sent a mob to the Capitol
3 radicalized by his lies about the assault on free and
4 fair elections to stop the counting of the electoral
5 votes, he made it clear that he poses a grave threat
6 to our democracy."

7 In your view, that statement is also
8 consistent with Representative Aguilar being fair and
9 impartial in the investigation into January 6?

10 A. Yeah. The reference of impeachment is
11 instructive because there was a proceeding in Congress
12 seeking to impeach the President based on the same --
13 some of the same facts that were at issue in our
14 investigation. And I think all nine members had
15 already voted that he should be impeached when that
16 proceeding took place before the committee even
17 started.

18 So, yes, they had made some preliminary
19 determinations, hypotheses, based on what they saw;
20 but, again, wanted us to plug that into and test
21 against all of the evidence that we were finding.

22 So I don't believe Mr. Aguilar or any of
23 the others had made any conclusion other than that
24 preliminary one informing that impeachment veto.

25 Q. Okay. Do you see where it says

1 Representative Stephanie Murphy -- I'm showing you
2 tweets from her.

3 Was she a member of the Select
4 Committee?

5 A. Yes, she was.

6 Q. Okay. And here she says "the President
7 incited a violent insurrection against our democracy,
8 proof he's unable to uphold the Constitution."

9 Is that statement consistent with her
10 being fair and impartial in this investigation?

11 A. Yes. I believe so.

12 MR. GESSLER: Okay. Let's go to
13 Exhibit 1099, please. And scroll down, please.

14 Q. (By Mr. Gessler) Okay. So this says
15 that "The nine impeachment managers will present" --
16 this is the second-to-the-last paragraph.

17 "The nine impeachment managers appointed
18 by the House of Representatives will present
19 overwhelming evidence of the facts of former President
20 Trump's incitement of the violent insurrection that
21 took place in and around the Capitol on January 6,
22 2021."

23 Is that statement consistent with
24 Representative Raskin's ability to be fair and
25 impartial as a member of the committee?

1 A. Yes. Same response. Mr. Raskin led the
2 impeachment proceeding as the chief prosecutor, if you
3 will. But I don't believe that made him closed-minded
4 about the overall facts and circumstances that gave
5 rise to those actions.

6 Q. Okay. So even though he said there was
7 "overwhelming evidence," and even though he said there
8 was overwhelming evidence that President Trump had
9 incited a violent insurrection, and even though he
10 actually led the prosecution of President Trump,
11 you're saying that he was -- he remained fair and
12 impartial in determining the conclusion in
13 investigating and coming up with conclusions on the
14 January 6 Select Committee; is that correct?

15 A. Yes, because the goal of the January 6
16 committee was not about the culpability of any one
17 person. It was about the overall facts and
18 circumstances that informed the attack. All of the
19 various components of it.

20 The President's incitement of a violent
21 insurrection was one among hundreds of facts and
22 circumstances that were considered. And even that, if
23 there had been contrary evidence, we would have
24 presented that.

25 So I don't believe any of these

1 statements about this one fact among many represent
2 that any of our members were, to use your term,
3 "closed-minded" in the approach to the investigation.

4 Q. I'll represent to you that I have not
5 used "closed-minded," but I'm not going to object to
6 your characterization.

7 Let's go to the next --

8 A. Oh, I apologize.

9 MR. GESSLER: Let's go to the next
10 exhibit, 1101, please.

11 Q. (By Mr. Gessler) So here it says -- and
12 this is a remark from -- I'll represent to you that
13 this is a remark from Representative Luria.

14 Did Representative Luria serve on the
15 commission -- I'm sorry, on the committee?

16 A. Yes, on the committee, she did.

17 Q. Okay. And here it says that --
18 "encouraged and emboldened by President Trump."

19 Do you agree with me that that statement
20 indicates that President Trump encouraged and
21 emboldened people, that that's the meaning of that
22 phrase?

23 A. I believe that's what Ms. Luria
24 intended, yes.

25 Q. Okay. And it's your belief that that

1 statement is consistent with the investigation -- with
2 the fair and impartial investigation by the January 6
3 committee; is that correct?

4 A. Yes.

5 Q. Okay.

6 MR. GESSLER: Let's go to Exhibit 1105,
7 please.

8 Q. (By Mr. Gessler) And this looks like an
9 official statement from Representative Cheney; is that
10 correct?

11 A. I think so, yes.

12 Q. Okay. And did Representative Cheney
13 serve on the Select Committee?

14 A. She was the vice chairwoman of the
15 Select Committee.

16 Q. Okay.

17 MR. GESSLER: And scroll up just a
18 little bit. I'm sorry, scroll down.

19 Q. (By Mr. Gessler) And so do you see
20 where it says "The President of the United States
21 summoned this mob, assembled the mob, and lit the
22 flame of this attack. Everything that followed was
23 his doing. None of this would have happened without
24 the President"? Do you see where it says that?

25 A. I do, yes.

1 Q. And is that statement consistent with
2 Representative Cheney approaching the -- approaching
3 the workings of the Select Committee in a fair and
4 impartial manner?

5 A. I believe Ms. Cheney was always fair and
6 impartial, yes. And I apologize for using the wrong
7 term before, "closed-minded."

8 All of the members were fair and
9 impartial throughout the process.

10 Q. Okay. There is no apology needed,
11 although I appreciate that.

12 MR. GESSLER: Let's look at
13 Exhibit 1106, please.

14 Q. (By Mr. Gessler) And this looks like an
15 official statement from Representative Kinzinger; is
16 that correct?

17 A. I think so, yes.

18 Q. Okay. And if you look at sort of the
19 second -- I'm sorry -- the third paragraph, the final
20 paragraph I'll say, where it says "There is no doubt
21 in my mind that the President of the United States
22 broke his oath of office and incited this
23 insurrection."

24 Do you see where it says that?

25 A. Yes.

1 Q. Okay. And is that statement consistent
2 with approaching the workings of the commission in a
3 fair and impartial manner?

4 A. I believe so, yes.

5 And this also re-reminds me that all --
6 I think all of these statements that you're showing me
7 were put forth at the time of the impeachment
8 proceeding. And they were declaring their position on
9 impeachment. "I will vote" -- I believe he says in
10 this very statement, "I will vote for impeachment."

11 So they had made it -- he had made a
12 personal decision that with what he had seen and had
13 been presented was sufficient to vote in favor of
14 impeachment.

15 Our lens was much broader --

16 Q. Okay.

17 A. -- in terms of -- and had a very
18 different standard. So I don't believe that it --
19 Mr. Kinzinger or any others were anything other than
20 fair and impartial --

21 Q. So let's talk about --

22 A. -- in that.

23 Q. -- let's talk about that impeachment
24 proceeding for a second.

25 So the impeachment proceeding, is it

1 your understanding that the Articles of Impeachment
2 were whether or not President Trump had engaged in
3 an -- in an insurrection; is that correct?

4 A. Yeah. I was not involved in that, and
5 don't remember the specific allegations in the
6 Articles. Generally, my belief is they believed he
7 was unfit to continue service, but I just don't recall
8 the specific Articles of Impeachment.

9 Q. Okay.

10 A. I think they did involve insurrection,
11 but I just don't recall.

12 Q. Okay. I'm going to represent to you for
13 purposes of my question, in fact it did include a vote
14 on whether or not President Trump incited an
15 insurrection.

16 And you said that all members of the
17 commission had voted yes on the impeachment question;
18 is that correct?

19 A. I believe that's right, yes.

20 Q. Okay. Do you know how many -- do you
21 know, roughly, what the vote was overall?

22 A. I don't --

23 Q. Okay.

24 A. -- recall. I -- I'm sorry. I don't
25 recall. I think all Democrats and some Republicans

1 voted for impeachment.

2 Q. Okay. I'm going to represent to you
3 that there were 232 votes in favor of impeachment,
4 which constituted 54 percent of the voting members.
5 And I'm going to represent to you that 197 members
6 voted no, which constituted 46 percent.

7 What percentage -- just to be sure
8 again, what percentage of the members of the Select
9 Commission voted no on the impeachment?

10 A. I don't believe any of our members had
11 previously voted no. I believe all of them are in
12 that 54 percent majority that voted yes.

13 Q. Okay. So would you agree with me, then,
14 that with respect to the perspective that President
15 Trump incited an insurrection, that 46 percent of the
16 members of Congress, their points of view were not
17 represented on the committee?

18 A. That assumes that everyone who voted no
19 voted true to their conscience and their personal
20 belief. And I'm not certain I can say that that was
21 accurate. I think a lot of people voted no when they
22 actually thought he should have been. That's my
23 personal opinion.

24 Q. Okay. Now, did the committee have any
25 minority -- any staff that was controlled by a

1 minority opinion? Let me back up a little bit.

2 Is it your understanding that
3 congressional committees normally have a majority
4 staff and a minority staff?

5 A. Yes.

6 Q. Okay. And your commission did -- and
7 your procedures for the Select Committee did not have
8 a separate minority staff; is that correct?

9 A. We had one staff, that's right. There
10 was not a majority and a minority.

11 Q. Okay. Were there any -- do you know of
12 any other commission in -- or I'm sorry --
13 committee -- and I understand the limitations of your
14 testimony earlier.

15 But are you aware of any other committee
16 in congressional history or modern congressional
17 history that lacked a second minority staff?

18 A. I just don't know. There may be, but I
19 just -- I don't have any personal knowledge of a point
20 of comparison.

21 Q. Okay. Let's --

22 MR. GESSLER: One moment, please.

23 Excuse me just one moment, please, Your Honor. I'm
24 going to pull up what's been marked as Exhibit 1108.

25 Q. (By Mr. Gessler) Do you see that?

1 A. I do.

2 Q. Okay. Let's go to the third page of
3 that, the top of the third page.

4 Do you see the paragraph that begins
5 with "There was a lot of advance intelligence about
6 law enforcement"?

7 Do you see that?

8 A. I do. Yes.

9 Q. And that's a quote. And I believe the
10 article quotes you.

11 Did you make that statement?

12 A. I did.

13 Q. Okay. And you said there was a lot of
14 intel in advance that was pretty specific, and "it was
15 enough, in our view, for law enforcement to have done
16 a better job," correct?

17 A. Have done a better job, yes.

18 Q. Okay.

19 A. I still believe that to be accurate.

20 Q. Okay. And that advance intelligence was
21 about the potential for violence at the Capitol,
22 correct?

23 A. Yes.

24 Q. Okay. Now, when you say "advance
25 intelligence," did you mean intelligence reports

1 appearing before January 6?

2 A. Yes.

3 Q. Okay. Do you remember how far in
4 advance, by any chance? I mean, the spectrum of
5 advance knowledge, do you have any memory? I'm trying
6 to get a sense.

7 Was it, you know, one hour before the
8 start of January 6? Was it two years before the start
9 of January 6?

10 Can you provide a time frame there?

11 A. Yeah. I can try -- I can tie it very
12 specifically to a tweet from President Trump on
13 December the 19th where he made a very first reference
14 to January 6 and encouraged people to come to the
15 Capitol and said "Big protest in D.C. Be there. Will
16 be wild."

17 It was immediately thereafter that the
18 intelligence started showing people's intent to come
19 and the potential for violence. That was the spark
20 really that ultimately erupted in violence on
21 January 6.

22 Q. Okay. And so you started receiving lots
23 of intel after that tweet, correct?

24 A. I --

25 Q. Or various law enforcement agencies

1 received that intel after -- after that tweet?

2 A. Yes.

3 Q. Okay. Okay. And let's go to the ninth
4 page.

5 Okay. Now, you see -- okay. Do you see
6 where it says "One of the tips entered in Guardian on
7 December 27 came from a person who was reading traffic
8 on a website called the TheDonald.win, a hive of
9 January 6 rhetoric."

10 Do you see that?

11 A. I do.

12 Q. Okay. What was Guardian?

13 A. Guardian was an FBI system in which
14 field agents submit information into a central
15 database. And they're called guardians. The tips
16 themselves are called guardians.

17 And the FBI, I believe, received 50, 55
18 guardians that were all placed under that CERTUNREST
19 umbrella. And I believe that this piece from
20 TheDonald.win was one such guardian.

21 Q. Okay. And it says:

22 "'They think they will have a large
23 enough group to march into D.C. armed and will
24 outnumber the police so can't be stopped,' the tipster
25 wrote. 'They believe that since the election was

1 stolen that it's their constitutional right to
2 overtake the government, and during this coup no laws
3 apply . . . Their plan is to kill people. Please take
4 this tip seriously and investigate further.'" "

5 Was that one of the pieces of evidence
6 or one of the -- was that the tip that was entered
7 into Guardian on December 27?

8 A. That was one of many tips that were
9 entered into the Guardian system. I don't recall this
10 one specifically, but I -- I know that was
11 December 27. But that sounds consistent with the kind
12 of information that was starting to emerge in -- in
13 between December 19 and between -- and the attack on
14 the Capitol.

15 Q. Okay. Now, did you or the committee
16 form an opinion that there was a -- that there were
17 plans for violence that were made in advance of
18 January 6?

19 A. Yes. I believe the Proud Boys, the Oath
20 Keepers, there were multiple people in the crowd that
21 did have very specific plans to commit acts of
22 violence at the Capitol on January 6.

23 Q. Okay.

24 A. And I'm sorry. I believe there have
25 been criminal convictions to that effect, seditious

1 conspiracy, which requires a use of force, in criminal
2 courts, separate and apart from this committee
3 process.

4 Q. Okay. Now, let me ask you this: This
5 article also says -- this article also says -- and I'm
6 looking for the quote, but I'll simply ask you -- that
7 the final commission reports downplay the failures of
8 other -- of law enforcement agencies to fully prepare
9 for January 6.

10 Do you agree with that conclusion in the
11 article?

12 A. No. No. We published every interview
13 that we did with law enforcement and otherwise. There
14 were several appendices to the report as well that
15 detailed law enforcement failures. So I don't believe
16 anything was downplayed in the report.

17 Q. Okay.

18 A. I'll say that the report puts together
19 the whole facts and circumstances. Failures of law
20 enforcement was a context, but it took nothing away in
21 our view from the proximate cause of the event, which
22 was President Trump inciting the mob.

23 That law enforcement failures made
24 violence, unfortunately, more prevalent, but it did
25 not detract from the overall conclusion that the

1 causation of the attack was the President's statements
2 and the whole conspiracy to disrupt the transfer of
3 power in the joint session.

4 Q. Okay. And that causation was one of the
5 obvious facts that members of the commission and
6 yourself concluded had occurred even before the
7 January 6 Select Committee began its investigations,
8 correct?

9 A. I guess I would call it more of a -- an
10 hypothesis with which we started. It was what they
11 already decided at least preliminarily through the
12 impeachment process. But we were continually testing
13 our evidence against that hypothesis. It did not
14 change. It ultimately reinforced our conclusions --

15 Q. So --

16 A. -- over the course of our investigation.

17 Q. So let me ask you this. And we --
18 obviously, this transcript will be used as part of the
19 proposed findings of fact and conclusions of law and
20 used by the judge.

21 But I'll represent to you that earlier
22 in your testimony you stated that the fact that
23 President Trump instigated was viewed as a fact as --
24 that was obvious on January 6; is that correct?

25 A. At the beginning, yes, it was obvious.

1 But I would classify it as an obvious fact which gave
2 rise to an operating hypothesis that informed the
3 approach to the investigation. Continually tested by
4 evidence.

5 Q. So you're saying that it began as an
6 obvious fact, it then became a hypothesis, and then it
7 resulted in the same conclusion at the end of the
8 committee's work; is that correct?

9 A. No. It never changed. It was -- it's
10 something that was obvious from the events of the day,
11 from people that were there. It was the hypothesis
12 that began the investigation. It informed the
13 impeachment proceeding.

14 But I'm saying we tested it, as you
15 always do in an investigation, against other facts as
16 they emerge. And it never changed. The hypothesis
17 was not rebutted or disputed, so there's no evolution.

18 But it was, to be clear, tested and
19 plugged into a much more fulsome body of work beyond
20 what had been obvious at the time of those tweets and
21 the impeachment proceeding.

22 Q. Okay. So, Mr. Heaphy, you were -- you
23 were appointed by President Obama as a U.S. Attorney,
24 correct?

25 A. Yes.

1 Q. And President Obama was and, I believe,
2 still is a Democrat, correct?

3 A. Yes, he is.

4 Q. Okay. And you were appointed to the
5 January 6 committee as an investigator by
6 Representative Pelosi; is that correct?

7 A. Well, Chairman Thompson made the
8 decision, but, yes, the Speaker was involved in the
9 hiring of the senior staff.

10 Q. Okay. And both former-Speaker Pelosi
11 and Representative Thompson, they were both Democrats,
12 correct?

13 A. Yes, that's correct.

14 Q. Okay. Have you ever been appointed to a
15 position by a Republican?

16 A. I don't think so. No.

17 Q. Okay.

18 A. No. I've only been appointed --

19 Q. In fact, you were fired -- I'm sorry.
20 Did I cut you off? Please complete your
21 question [sic]. I apologize.

22 A. No. If you want to talk about the
23 firing, I'm happy to.

24 I was removed in my position as
25 University counsel by a Republican attorney general

1 who defeated an incumbent Democrat. I was an
2 assistant attorney general of Virginia as University
3 counsel. And without explanation, without -- over the
4 objection of my client, the University -- the new
5 Republican attorney general terminated my leave of
6 absence while I was working on the Select Committee.

7 Q. Thank you, Mr. Heaphy. You just saved
8 me a few questions, so I appreciate that openness.

9 Now, Mr. Heaphy, you've made a number of
10 political contributions over the years, correct?

11 A. Yes.

12 Q. Okay. I'll see if we can short-circuit
13 a number of questions.

14 But have you ever -- have you ever made
15 contributions -- have you made any contributions to
16 Democrats?

17 A. Yes.

18 Q. In fact, almost, if not all, of your
19 contributions have been to Democrats, correct?

20 A. I think so. I don't know for sure, but
21 I -- I don't recall right now making a contribution to
22 a Republican.

23 Q. I'm sorry. Did you say you don't recall
24 making a contribution to a Republican?

25 A. I do not.

1 Q. Okay.

2 A. I was talking about Mr. John Woods when
3 he ran for Senate. I just don't think I -- I don't
4 believe I did.

5 THE STENOGRAPHER: Can he repeat that
6 name?

7 THE COURT: Can you repeat? What was
8 the name of the person that you considered making a
9 contribution to?

10 A. John was a staffer on -- of the
11 January 6 committee, and he left to run for the Senate
12 in Missouri. I may -- I just don't know if I gave him
13 money or not. I took a huge pay cut to be on the
14 Select Committee, so I may not.

15 But -- yeah. To back up -- so to be
16 clear, I'm a Democrat. I've given money to Democrats
17 my whole life. That's right.

18 Q. (By Mr. Gessler) Okay. Are you
19 currently investigating or seeking the possibility of
20 being appointed as a federal judge?

21 A. No.

22 Q. Okay. Have you had any conversations
23 with anyone about seeking a federal judicial
24 appointment?

25 MR. GRIMSLEY: Objection.

1 A. I have had conversations with so many
2 people. I'm not interested in being a federal judge.
3 With all due respect to judges, no, I --

4 Q. (By Mr. Gessler) I am not insulted by
5 that answer. It's a difficult job.

6 MR. GESSLER: One moment, please.

7 Mr. Heaphy, thank you very much for your
8 time today. I have no further questions --

9 THE WITNESS: Thank you.

10 MR. GESSLER: -- right now.

11 THE WITNESS: Thank you.

12 THE COURT: All right. Any redirect?

13 MR. GRIMSLEY: Yes, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. GRIMSLEY:

16 Q. Mr. Heaphy, I think you may have
17 answered this question.

18 But you had answered in response to many
19 questions about statements and tweets that had been
20 issued in kind of the January 2021 time frame that
21 they were hypotheses that were tested.

22 How were those hypotheses tested by the
23 investigative staff on the January 6 committee?

24 A. We compared them to what we were hearing
25 from other witnesses, what we were seeing in

1 documents, from what we were learning from our review
2 of open-source material. Every investigation starts
3 with a hypothesis. It's just the nature of it. It's
4 the suspect in a criminal investigation. Sometimes
5 that's reinforced; sometimes that's rebutted.

6 So it's hard to answer that question,
7 Mr. Grimsley, because literally everything we did was
8 always plugging in, continuing to synthesize, and
9 comparing it to our understanding of facts and
10 circumstances.

11 Q. And if you had found evidence that
12 contradicted that hypothesis, what would you have
13 done?

14 A. Absolutely, we would have found it as
15 such. We would have made that clear. When I was
16 hired by the chairman, he gave me an instruction that
17 was reinforced throughout, which is follow the facts
18 and circumstances, wherever they lead. And that's
19 what we tried to do. We followed them.

20 They ended up affirming the hypothesis,
21 but that was a constant reassessment in the course of
22 our work.

23 Q. And after over a year of investigation
24 and discussions with the numerous witnesses that you
25 all had and the review of documents and video, what

1 was the -- in testing that hypothesis, what was the
2 conclusion of the January 6 committee with regard to
3 President Trump's culpability in the January 6 attack?

4 A. Well, over the course of our hearings in
5 the report, the conclusion we found as fact was that
6 there was an intentional, multipart plan led by the
7 President and facilitated by him and others to disrupt
8 the joint session and prevent the transfer of power.

9 It's palpable throughout our hearings,
10 and it's explicitly stated in our report.

11 Q. And what were your conclusions about
12 whether . . .

13 THE COURT: I'll ask you to start over.

14 Q. (By Mr. Grimsley) What were your
15 conclusions about whether President Trump incited a
16 violent insurrection on January 6?

17 A. His incitement of violence was the final
18 step of that multipart prong to try to disrupt the
19 transfer of power. We reinforced the hypothesis of
20 his incitement. It broadened from just his words at
21 the Ellipse, "Fight like hell or not have a country
22 anymore," to a much broader pattern, which inciting
23 the mob was just one final desperate step.

24 Q. Now there has been some suggestion that
25 the January 6 committee was populated by Democrats and

1 RINOs who had already prejudged President Trump's
2 guilt.

3 Are you familiar with other members of
4 Congress who had also made statements in the weeks and
5 months after the attack on January 6 regarding
6 President Trump's culpability, including Republicans?

7 A. Yeah. I believe our hearings featured
8 some statements by Leader McCarthy and Senator
9 Minority Leader McConnell and other Republicans
10 essentially agreeing that the President bore every
11 responsibility and incited the violence. Those things
12 came up soon after the events in the course of the
13 impeachment proceedings.

14 MR. GRIMSLEY: Are you just waiting?

15 MR. GESSLER: (Nodding head.)

16 Q. (By Mr. Grimsley) You had mentioned
17 that Speaker McCarthy said that President Trump, in
18 the days after the attack, bore responsibility,
19 correct?

20 MR. GESSLER: Your Honor, I am going to
21 object --

22 A. Yes.

23 MR. GESSLER: -- to this line of
24 questioning. I asked him his understanding with
25 respect to actual members of the committee, because

1 we're talking about the processes of the committee,
2 not processes or political opinions people may have
3 had outside of the committee. Those are not relevant
4 nor part of my questioning, nor do we think
5 appropriate for part of the direct exam.

6 MR. GRIMSLEY: Well, there was a
7 suggestion, Your Honor, that if one held a certain
8 opinion shortly after January 6, they were
9 closed-minded and wouldn't change it. But I think
10 Speaker McCarthy -- or former-Speaker McCarthy is a
11 pretty good example of somebody whose opinion may have
12 changed over time.

13 THE COURT: I think that you can bring
14 in hearsay to impeach, but I'm not sure that you can
15 bring in hearsay to rehabilitate the impeachment.
16 Plus, I really don't -- so I'm going to sustain the
17 objection.

18 MR. GRIMSLEY: That's fine, Your Honor.
19 I'll move on. I think the point is made.

20 Q. (By Mr. Grimsley) You were asked some
21 questions about Exhibit 1108, which was an article, I
22 think published earlier this year, in which you gave
23 some quotes or at least there were some things you
24 said were quoted in.

25 Do you recall that?

1 A. I do.

2 Q. And do you recall there being some
3 effort to use the quotes from that article to suggest
4 that the January 6 committee had somehow omitted key
5 evidence?

6 A. Yes. I think Congresswoman Greene used
7 a clip -- a link to that interview and suggested that
8 the January 6 committee found that the law enforcement
9 was at fault. And I rebutted that in my first and
10 only series of tweets. The only time I've ever
11 actually tweeted something was a direct response to
12 her in the wake of that NBC report.

13 MR. GRIMSLEY: Can we put up Plaintiffs'
14 Exhibit 320, please.

15 MR. GESSLER: Your Honor, I guess I
16 would object to this. The question was did he agree
17 with the statement in that article. He said no, did
18 not authenticate it, did not endorse it, and that was
19 sort of the end of it.

20 MR. GRIMSLEY: I think the article was
21 brought up to suggest that there were other -- yes,
22 exactly.

23 THE COURT: Dissent among the ranks.

24 Q. (By Mr. Grimsley) Do you see
25 Plaintiffs' Exhibit 320?

1 A. I do.

2 Q. Was that one of the tweets, your
3 15 minutes of fame on Twitter, where you sent out a
4 tweet following the publication of the article?

5 A. Yeah. I think I actually opened my
6 account that day for this purpose. And there were
7 maybe three or four successive statements that
8 directly addressed my statements in that article.

9 And, yes, this looks like the first or
10 one of the series of tweets that -- it looks like
11 February 5, I see was the date.

12 Q. Could you read this tweet, please?

13 A. "President Trump and his co-conspirators
14 devised and pursued a multipart plan and prevent the
15 transfer of power" -- that should be "to prevent the
16 transfer of power."

17 "He incited the crowd on January 6 and
18 failed to act during the riot despite being able to do
19 so. He and his enablers bear primary responsibility
20 for the attack."

21 Q. And I'll ask you to read just a little
22 more slowly, because I'm going to ask you to read a
23 second one too.

24 A. Okay. I'm sorry.

25 MR. GRIMSLEY: Can you put up exhibit --

1 Plaintiffs' Exhibit 321.

2 A. It says:

3 "I recently spoke to NBC news about law
4 enforcement planning for January 6. Since that
5 interview, some have used my comments to suggest that
6 law enforcement could have prevented the riot. That
7 is false. The proximate cause of the attack on the
8 Capitol was President Trump."

9 Q. (By Mr. Grimsley) And finally, I want
10 to ask you some questions about intelligence that was
11 gathered prior to January 6, following December 19,
12 and specifically the Guardian platform that you had
13 talked about during cross-examination, okay?

14 A. Sure.

15 Q. Was the committee ever able to discover
16 or find out what specific intelligence was
17 communicated to the President that the FBI had
18 gathered?

19 A. No. Unfortunately, I can't say how
20 much, if any, of those guardians or other intelligence
21 was briefed to the President. We did have testimony
22 that on the morning of January 6, the President was
23 directly informed about the presence of weapons in the
24 crowd. We had evidence that the night before he
25 commented to a group of White House staffers, "They're

1 very depressed. They're angry."

2 So there's some evidence of his
3 awareness of danger or the potential for violence
4 before his speech on the Ellipse. But I can't say,
5 Mr. Grimsley, that we were able to determine that he
6 was directly briefed about any of that intelligence.
7 That was one of the many things that we just could
8 never get to the bottom of.

9 Q. Was there some evidence about what
10 Mr. Trump was told at the Ellipse about individuals
11 having weaponry?

12 A. Yes. We had testimony that he was told
13 about weaponry, that he actually asked that the
14 magnetometers be moved, and saying "These people
15 aren't here to hurt me." That he was very
16 specifically made aware by staff of the presence of
17 weapons in the crowd and proposed, actually, that
18 people bring weapons into the event.

19 Q. So I want to look very quickly at one of
20 the pages you were shown from Exhibit 1108.

21 MR. GRIMSLEY: And if we could go to
22 page 9, please.

23 Q. (By Mr. Grimsley) And this will be the
24 same, I think, quote from the Guardian, from the
25 tipster that you were asked about.

1 MR. GRIMSLEY: If you could blow up the
2 second-to-last paragraph, please.

3 Q. (By Mr. Grimsley) And do you recall
4 being asked a question about this very specific -- or
5 this very piece of evidence?

6 A. Yes.

7 Q. And the tipster says "They think they
8 will have a large enough group to march into D.C.
9 armed and will outnumber the police so they can't be
10 stopped."

11 The quote goes on: "They believe that
12 since the election was stolen, that it's their
13 constitutional right to overtake the government, and
14 during this coup, no U.S. laws apply. Their plan is
15 to literally kill. Please, please take this tip
16 seriously and investigate further."

17 Do you see that?

18 A. I do.

19 Q. And did you review the President's
20 speech at the Ellipse on January 6 as part of the
21 investigation?

22 A. Yes. Absolutely. Consistent message:
23 The election was stolen, constitutional right to
24 overtake the government, different rules apply,
25 different laws apply.

1 I may be confusing that speech with
2 other speeches, but the "no rules apply, different
3 rules apply" is consistent with the President's
4 rhetoric.

5 Q. Let me put up the speech.

6 MR. GRIMSLEY: So Plaintiffs'
7 Exhibit 1029, page 14. Blow up the top, please.

8 Q. (By Mr. Grimsley) And this is from --
9 this is a transcript of the Ellipse speech. And
10 President Trump says:

11 "The Republicans have to get tougher.
12 You're not going to have a Republican party if you
13 don't get tougher. They want to play so straight.
14 They want to play so 'Sir, yes, the United States, the
15 Constitution doesn't allow me to send them back to the
16 states.' Well, I say 'Yes, it does, because the
17 Constitution says you have to protect our country and
18 you have to protect our Constitution, and you can't
19 vote on fraud, and fraud breaks up everything, doesn't
20 it?' When you catch somebody in a fraud, you're
21 allowed to go by very different rules."

22 How does that compare to that piece of
23 intelligence taken from the Guardian inside of
24 Exhibit 1108?

25 A. Very, very close. The President

1 repeatedly talked about the election being stolen,
2 about actual support, and did confirm to them that, in
3 fact, different rules apply. Saying that to an angry
4 mob of people on the Ellipse incited violence.

5 MR. GRIMSLEY: No further questions.

6 THE COURT: Okay. Let's recess until --
7 let's make it 3:05, so 20 minutes, and we'll finish up
8 with --

9 MR. GRIMSLEY: Just for the record --

10 THE COURT: Oh, sorry.

11 MR. KOTLARCZYK: No questions for this
12 witness, Your Honor.

13 MS. RASKIN: No questions.

14 THE COURT: Thank you, Mr. Grimsley.

15 MR. GRIMSLEY: Yes.

16 THE COURT: Now that Mr. Kotlarczyk is
17 sitting all alone, it's really easy to forget you.
18 It's like you're at the kids' table.

19 MR. KOTLARCZYK: This is the
20 appropriately sized table for these chairs, Your
21 Honor. The others have the, you know, much higher
22 tables.

23 THE COURT: Okay. So we'll go back on
24 the record at 3:05 to finish up with Professor
25 Delahunty.

1 MR. GRIMSLEY: Can we excuse Mr. Heaphy?
2 I apologize.

3 THE COURT: Thank you, Mr. Heaphy.
4 Well, first of all, Mr. Heaphy, I've been
5 mispronouncing your name all week, so I apologize for
6 that.

7 THE WITNESS: Honest mistake, Your
8 Honor. It's okay.

9 THE COURT: You are released.

10 THE WITNESS: Thank you.

11 (Recess from 2:43 p.m. to 3:07 p.m.)

12 THE COURT: You may be seated.

13 Professor Delahunty, you're still under
14 oath.

15 THE WITNESS: Sorry, Judge?

16 THE COURT: You're still under oath.

17 THE WITNESS: Yes, yes. I know. Thank
18 you.

19 MR. MURRAY: And, Your Honor, I just
20 wanted to flag for the Court that after
21 Mr. Delahunty's testimony we'll have just five to
22 ten minutes of sort of evidentiary housekeeping
23 matters if that's all right.

24 THE COURT: Yeah. We -- I'll want to
25 talk about a few things about the proposed findings of

1 facts and conclusions of law, so . . .

2 MR. MURRAY: Thank you.

3 CONTINUED CROSS-EXAMINATION

4 BY MR. MURRAY:

5 Q. Mr. Delahunty, did you speak with
6 anybody about your testimony since you were last on
7 the stand?

8 A. No.

9 Q. When we talked before lunch, we had just
10 been discussing your testimony that Section 3 is
11 ambiguous. And we finished talking about the meaning
12 of the phrase "insurrection." So now I want to turn
13 our attention to your opinion about the meaning of the
14 phrase "engaged in" --

15 A. Yes.

16 Q. -- "insurrection."

17 Now, do you recall talking about
18 opinions by Attorney General Stanbery?

19 A. Yes.

20 Q. And I believe you called Attorney
21 General Stanbery's opinions good evidence about the
22 meaning of Section 3?

23 A. Yes.

24 Q. Now, at the time that Attorney General
25 Stanbery issued these opinions, that was in 1867,

1 right?

2 A. Yes. This was before the ratification
3 of Section 3.

4 Q. 1868 was before the states ratified
5 Section 3 but after Congress had enacted legislation
6 proposing Section 3 to the states, right?

7 A. Yes.

8 Q. Let's pull up Attorney General
9 Stanbery's first opinion. This is on page 788 of
10 Professor Magliocca's appendix.

11 You talked about how the Reconstruction
12 Acts were a statute.

13 A. Yes.

14 Q. So I just want to look briefly at this.

15 The sixth section of the Reconstruction
16 Acts provides, among other things, "No person shall be
17 eligible to any office under any such provisional
18 governments who would be disqualified from holding
19 office under the provisions of the third article of
20 said constitutional amendment" --

21 A. Yes.

22 Q. -- correct?

23 A. Yes. That's what it says.

24 Q. So the Reconstruction Acts incorporated
25 fully Section 3 of the Fourteenth Amendment? The

1 language was -- the applicable language was identical,
2 correct?

3 A. I think -- I think in reading this,
4 that's what it says. It says "No person shall be
5 eligible to the office under any such provisional
6 governments" --

7 THE STENOGRAPHER: Would you please use
8 the microphone?

9 THE WITNESS: Yes. I'm sorry.

10 A. "No person shall be eligible to any
11 office under any such provisional governments."

12 Well, that's not the language of
13 Section 3. It's talking there about offices -- state
14 offices under former Confederate, now provisional,
15 governments. So there's that difference.

16 Q. (By Mr. Murray) Well, to be clear,
17 though, this is saying that people would be
18 disqualified from holding office under Section 3.

19 A. Yes.

20 Q. And so when we're talking about engaged
21 in insurrection or rebellion, that phrase was the
22 phrase he was interpreting among others here --

23 A. Yes.

24 Q. -- correct?

25 A. I think it's fair to say that -- well,

1 the text of the statute itself incorporates the --
2 well, the jurisdictional provision of Section 3.

3 Q. Do you recall testifying in your direct
4 examination about official versus individual capacity?

5 A. Yes.

6 Q. And I think the point you were trying to
7 make was that it wasn't totally clear what kinds of
8 conduct were disqualifying in an official capacity
9 versus in an individual capacity?

10 A. That seems to be Stanbery's opinion,
11 yes.

12 Q. I want to look at that discussion in
13 Stanbery's opinion.

14 A. Okay.

15 Q. If we go to page 799 of the appendix,
16 there's a discussion here at the top.

17 "All those who in legislative or other
18 official capacity were engaged in the furtherance of
19 the common unlawful purpose or persons who, in their
20 individual capacity, have done any overt act for the
21 purpose of promoting the rebellion may well be said in
22 the meaning of this law to have engaged in rebellion."

23 Do you see that?

24 A. Yes.

25 Q. And then the paragraph after that gives

1 some examples of what might be considered engaging in
2 rebellion in an official capacity.

3 A. Yes.

4 Q. And then later on in that page in the --
5 at the bottom, Stanbery says "So much for official
6 participation. I now recur to what amounts to
7 individual participation in the rebellion."

8 Do you see that?

9 A. I do.

10 Q. And that's at the bottom of page 799.

11 If we go to the top of page 799 -- and
12 really that whole page is about individual
13 participation in rebellion, correct?

14 A. I'm not sure --

15 THE STENOGRAPHER: I can't hear you.

16 I'm sorry.

17 A. What page did you say the previous one
18 was?

19 Q. (By Mr. Murray) Well, we just looked at
20 the bottom of page --

21 A. 7 --

22 Q. -- 799.

23 A. And then --

24 THE STENOGRAPHER: I can't hear you.

25 A. And then what follows.

1 MR. GESSLER: Your Honor, may I approach
2 the witness just to readjust the screen and the
3 microphone to help out a little bit?

4 THE COURT: Yeah. Of course.

5 A. Okay. So this --

6 THE STENOGRAPHER: One moment.

7 THE COURT: Okay. When you lean in,
8 it's getting all that feedback. So let's try to . . .

9 Does that help, Professor?

10 THE WITNESS: I hope it helps everybody
11 else. It helps me, yes. Thank you, all.

12 MR. BLUE: Remember to speak into the
13 microphone.

14 THE WITNESS: Oh, thank you, all.

15 A. I'm sorry?

16 Q. (By Mr. Murray) So at the bottom of
17 page 799 --

18 A. Yep.

19 Q. -- Attorney General Stanbery transitions
20 from the subject of official participation --

21 A. Yes.

22 Q. -- to individual participation --

23 A. Yes.

24 Q. -- is that correct?

25 A. Yes.

1 Q. And then the following page, page 800 --

2 A. Yes.

3 Q. -- there is a discussion of what it
4 means to have engaged in individual participation --

5 A. Yes.

6 Q. -- and rebellion?

7 A. Yes.

8 Q. And on page 799, Stanbery says "It
9 requires some direct overt act done with the intent to
10 further the rebellion."

11 Do you see that?

12 A. He says that's a necessary condition of
13 bringing the party within the purview and meaning of
14 this law. Not sufficient. He says it's a necessary
15 condition.

16 Q. Well, sir, later in that same passage --

17 A. Yeah.

18 Q. -- he says "But wherever an act is done
19 voluntarily and in aid of the rebel cause, it would
20 involve the person and it must work disqualification
21 under this law."

22 That was Attorney General Stanbery's
23 interpretation, correct?

24 A. Yes.

25 Q. I want to turn to page 804 of Professor

1 Magliocca's appendix. And just highlighting that now
2 we're talking about Attorney General Stanbery's second
3 opinion.

4 Do you see that?

5 A. Yes.

6 Q. And if we look at page 815 of that
7 opinion -- I just wanted to direct your attention to
8 the second-from-the-bottom paragraph there where
9 Attorney General says that "While forced contributions
10 are not disqualifying, voluntary contributions to the
11 rebel cause, even such indirect contributions as arise
12 from the voluntary loan of money to rebel authorities
13 or purchase of bonds or securities would work
14 disqualification," correct?

15 A. Are we talking about the second
16 highlighted --

17 Q. Yes.

18 A. -- language? That's what he says, yes.

19 Q. And then later on that page, he
20 specifically says "When a person has, by speech or
21 writing, incited others to engage in rebellion, he
22 must come under disqualification," correct?

23 A. Yes. But here he is talking about those
24 who are subject to disqualification as -- because of
25 their actions in an official -- in official

1 capacities. "Discharge" -- "Officers who, during
2 rebellion, discharge official duties not incident
3 to" -- or like being an ambassador, a purported
4 ambassador, to the Confederacy, to France -- those
5 people are not, in his judgment, subject to
6 disqualification in light of actions such as speech or
7 writing that incited others to engage in rebellion.

8 So here he is talking about action in an
9 official capacity. I don't know if that, in his view,
10 translates into a disqualification for actions done in
11 an individual capacity.

12 Q. Well, sir, the first sentence of this
13 says that "Officers during the rebellion discharged
14 official duties not incident to war but only such
15 duties as belonged to a state of peace and were
16 necessary to the preservation of order and the
17 administration of law are not to be considered as
18 thereby engaging in rebellion or disqualified,"
19 correct?

20 A. I think what he has in mind there is
21 that the use of law enforcement officials on the level
22 of constable, let's say, who are keeping the peace in
23 some county in the Confederacy. And in doing -- in
24 keeping the peace locally, they're engaging in
25 official duties but not official duties incident to

1 war. So that's the class of the person there.

2 Q. Correct. In the first sentence he's
3 saying this is the class of persons that are not
4 disqualified, and in the second sentence he says "When
5 a person has, by speech or writing, incited others to
6 engage in rebellion, he must come under
7 disqualification," correct?

8 A. Well, I take that to refer to incitement
9 by speech or writing in the discharge of official
10 duties.

11 Q. But nowhere in that sentence does it say
12 "in the discharge of official duties" --

13 A. Well, if --

14 Q. -- correct, sir?

15 A. -- you read it in the context with the
16 immediately preceding sentence, that strikes me as the
17 clear implication.

18 Q. That's your interpretation --

19 A. Yes --

20 Q. -- correct?

21 A. -- it is.

22 Q. In your report, you didn't discuss any
23 of the pre-Civil War treason cases about incitement,
24 did you?

25 A. No.

1 Q. This is page 44 of Professor Magliocca's
2 appendix. And here we're looking at "Charge to the
3 grand jury treason from the Circuit Court in the
4 Eastern District of Pennsylvania in 1851."

5 Do you see that, sir?

6 A. I do.

7 Q. If we look at page 46 -- and by the way,
8 this is from Judge Kane charging the grand jury.

9 Judge Kane says "There has been, I fear,
10 an erroneous impression on this subject among a
11 portion of our people if it has been thought safe to
12 counsel and instigate others to acts of forcible
13 oppugnation to the provisions of a statute to inflame
14 the minds of the ignorant by appeals to passion and
15 denunciations of the law as oppressive, unjust,
16 revolting to the conscience, and not binding on the
17 actions of men. To represent the Constitution of the
18 land as a compact of iniquity, which it were
19 meritorious to violate or subvert, the mistake has
20 been a grievous one."

21 Do you see that?

22 A. Yeah.

23 Q. And do you see at the end of that
24 paragraph Judge Kane instructs the grand jury that
25 "Successfully to instigate treason is to commit it"?

1 A. Yes.

2 Q. But you didn't consider that in your
3 report in this case --

4 A. No --

5 Q. -- correct?

6 A. -- because it's about treason and, in
7 particular, about levying war. So if this case is
8 relevant, I think it's relevant to a part of Section 3
9 that does not appear to be at issue, and that is the
10 part that refers to aid or comfort to the enemy.

11 So that doesn't really speak to the
12 meaning of insurrection or insurrection against the
13 Constitution.

14 Q. Your opinion --

15 A. He refers to --

16 Q. Sorry. Go ahead.

17 A. Well, show me where it talks about
18 insurrection other than in the context of treason.

19 Can we go back to the first page?

20 Q. Let me just ask you a question.

21 Is it your opinion that incitement was
22 enough to have levied war against the United States
23 for purposes of the Treason Clause -- let me finish --
24 but was not enough to have engaged in insurrection
25 under Section 3? Is that your opinion?

1 A. I don't know the answer to your
2 question.

3 Q. I want to move to the subject of
4 self-execution --

5 A. Yeah.

6 Q. -- that you testified about on direct
7 examination.

8 You know that states can enforce federal
9 constitutional provisions through their own procedural
10 rules --

11 A. Yes.

12 Q. -- correct?

13 A. Yes.

14 Q. That would include, for example,
15 Section 1 of the Fourteenth Amendment, right?

16 A. In -- as a shield.

17 Q. Well, certainly, a state could pass
18 legislation providing remedies for violations of due
19 process or equal protection, correct? There's nothing
20 unconstitutional about that?

21 A. Not that I can see, no.

22 Q. You're not an expert in Colorado
23 election law, fair to say?

24 A. No. That's very fair to say.

25 Q. And you're not here to offer an opinion

1 as to whether Colorado law grants a right of action to
2 enforce federal constitutional qualifications in
3 presidential primaries?

4 A. I have not read any Colorado law,
5 statutory law.

6 Q. Let's just briefly discuss Griffin's
7 case.

8 A. Yes.

9 Q. So Griffin was convicted of a crime in
10 Virginia; is that right?

11 A. Yes.

12 Q. And he was convicted of a crime by a
13 state court judge who presumably was disqualified
14 under Section 3?

15 A. Very likely -- yes.

16 Q. And so then Griffin brought a federal
17 habeas petition in federal court, arguing that his
18 conviction should be overturned because the judge was
19 disqualified under Section 3?

20 A. Yes.

21 Q. And on direct examination, you said that
22 Griffin's case had kind of three separate holdings.

23 Do you recall that?

24 A. Yes. Alternative holdings, yes.

25 Q. One of the holdings denied habeas relief

1 to Griffin on the basis of the de facto officer
2 doctrine.

3 Do you recall that?

4 A. Yes.

5 Q. And as I understand it, the de facto
6 officer doctrine essentially said this judge was, in
7 fact, in that office at the time, even if perhaps not
8 lawfully so, and we're not going to allow a collateral
9 attack on the conviction of someone who was convicted
10 by a de facto judicial officer.

11 A. Yes.

12 Q. Was that the reasoning?

13 A. Essentially, yes.

14 Q. And the Court also denied relief based
15 upon the scope of habeas relief available under
16 federal law, right?

17 A. Yes.

18 Q. So just so we're all clear, Griffin's
19 case did not involve a party invoking state procedural
20 rules to enforce federal qualifications, correct?

21 A. Right.

22 Q. Do you know what year Griffin's case was
23 decided?

24 A. I think it was decided in late
25 July 1869.

1 Q. What was the status of Virginia in 1869?

2 A. Well, there is another attorney general
3 opinion -- I think it is the second opinion of
4 Stanbery, but I'd have to confirm that -- that
5 discusses the powers of states not yet admitted --
6 readmitted to the Union.

7 And the tenor of that, maybe, the clear
8 language, is to the effect that the powers of the
9 Union Army, Union military are very circumscribed, but
10 they are part and parcel of the provisional government
11 of the state. And the provisional government has,
12 basically, all powers that an unreconstructed state
13 would have, barring those that are expressly conferred
14 upon the military.

15 Q. But Virginia was under federal military
16 occupation in 1869, right?

17 A. I don't know, but -- I don't know. I
18 think so, but I -- I have not confirmed that.

19 Q. And, in fact, Virginia didn't get
20 readmitted to the Union until 1870? Do you know that?

21 A. No, but I will take that representation
22 as correct.

23 Q. I want to turn to your opinion that
24 Section 3 does not cover the President.

25 A. Well -- sorry.

1 Q. Oh, well, that the President is not an
2 officer of the United States.

3 That's your opinion, correct?

4 A. Yes.

5 Q. Before this case, before you became an
6 expert in this case, you had previously suggested that
7 Section 3 does cover the presidency.

8 Do you remember that?

9 A. Well, I -- what I said and what I think
10 you're referring to was that there is support for the
11 view that it does not -- the jurisdictional language.
12 I didn't use that term, but that Section 3 does not
13 include the President as the subject -- as subject to
14 the section.

15 THE COURT: Can you -- can you move the
16 microphone back next to you?

17 THE WITNESS: Like that?

18 THE COURT: Yeah. Thank you.

19 Q. (By Mr. Murray) You addressed this
20 issue in your article -- your op-ed in The Federalist
21 in August of this year --

22 A. That's right.

23 Q. -- correct? And in that op-ed, you
24 said --

25 A. May I qualify what I just said?

1 I addressed this issue in a sentence in
2 passing, basically to take it off the table by saying
3 I did not really want to discuss the issue any
4 further.

5 Q. Understood. And in that portion of your
6 article, you said that "Although Section 3 does not
7 explicitly refer to Presidents or presidential
8 candidates, comparison with other constitutional texts
9 referring to officers supports the interpretation that
10 it applies to the presidency too."

11 Were those your words --

12 A. Yes.

13 Q. -- back in August?

14 A. Yes.

15 Q. Your article from The Federalist in
16 August of this year certainly didn't argue that the
17 President was not covered by Section 3, right?

18 A. That is correct.

19 Q. You wrote that article in August of this
20 year, before you were hired by Donald Trump as a paid
21 expert in this case, right?

22 A. Yes.

23 Q. Since the time you wrote that article in
24 The Federalist, you've been paid about \$60,000 --

25 A. Yes.

1 Q. -- by Donald Trump for your work --

2 A. Yes.

3 Q. -- in this case?

4 I want to pull up the language of
5 Section 3 just so we're all clear on offices and
6 officers. And let's start with offices.

7 So no person shall hold any office,
8 civil or military, under the United States if they are
9 disqualified and have not received amnesty --

10 A. Yes.

11 Q. -- correct?

12 A. Uh-huh.

13 Q. You agree that the presidency is an
14 office under the United States, don't you?

15 A. I take no position on that. That is
16 disputed among scholars. I think Professor Lash does
17 not believe that that language applies to the
18 presidency as an office. Other scholars, maybe the
19 preponderance, think it does. It is the subject --
20 that language of the colloquy that I think the judge
21 questioned me about earlier, the colloquy between
22 Senator Reverdy Johnson and Senator Morrill Lot.

23 So I don't take a position on the --
24 that, whether the presidency as an office is covered
25 or not. I haven't --

1 Q. So you're not going to tell us today
2 whether the presidency is an office under the United
3 States?

4 A. That's right. I haven't formed a
5 scholarly opinion about that.

6 Q. Well, sir, you know that the
7 Constitution repeatedly refers to the office of the
8 presidency, don't you?

9 A. That's one of the reasons I would be
10 inclined to think that that language does apply to the
11 office of the presidency.

12 Q. You would be inclined to that view, or
13 you don't know?

14 A. Well, they're consistent statements.

15 Q. Let's look at Petitioners' Exhibit 235.
16 This is just the U.S. Constitution.

17 And Article 2 is the portion of the
18 Constitution that defines the powers of the
19 presidency, right? Or at least one of them? And the
20 executive branch?

21 A. Well, if that's the President of the
22 United States with the executive power. I mean, does
23 the President have powers outside of Article 2?
24 That --

25 Q. No, no. I think we're -- I'm just

1 saying that Article 2, at least in part, sets out the
2 powers of the executive branch, correct?

3 A. Yes. I'm trying to think whether
4 Article 7 refers to the President, to -- the powers of
5 the President, to respond fully to your question.

6 Q. Understood. But I just want to
7 highlight a little bit of language here in Article 2.

8 In Section 1 it says that the President
9 shall hold his office during the term of four years,
10 right?

11 A. Yes.

12 Q. And it refers to eligibility for the
13 office of President?

14 A. Yes.

15 Q. And being eligible to that office?

16 A. Yes.

17 Q. And it talks about the removal of the
18 President from office and the duties of that said
19 office?

20 A. Yes.

21 Q. And the President, in fact, before he
22 takes -- enters on the execution of his office, he has
23 to take his oath, right?

24 A. That's right.

25 Q. You know that the Twelfth Amendment also

1 refers to the presidency as an office?

2 A. Yes.

3 Q. And despite all that, you're not going
4 to offer an opinion that the presidency is an office
5 under the United States?

6 A. No, I am not.

7 Q. Well, let me ask you this: You agree it
8 was well understood that Section 3 would not allow
9 Jefferson Davis to become the President of the Union
10 after the Civil War unless he got amnesty, right?

11 A. Well, if the language that we're
12 discussing in Section 3, the disqualification or
13 liability language, includes the office of the
14 presidency, then Jefferson Davis would clearly have
15 been disqualified from holding that office because, as
16 a senator from Mississippi and perhaps in other
17 connections, he had taken the Article 6 oath to
18 support the Constitution.

19 Q. Correct. And you understand that after
20 the Civil War it was incredibly well understood that
21 Jefferson Davis could not be the President of the
22 Union unless he received amnesty, right? You recall
23 seeing some of that evidence?

24 A. It was well -- may well have been well
25 understood, but there was a -- okay. Yes. Certainly,

1 it was what he desired. There's no question of that.
2 And this was the worry that Senator Johnson raised and
3 Senator Lot sought to allay by pointing to the
4 liability or disqualification clause.

5 Q. And that colloquy that you're referring
6 to --

7 A. Yes.

8 Q. If we go to page 477 of Petitioners'
9 Exhibit 144, this colloquy between Mr. Johnson and
10 Mr. Morrill is what you're referring to?

11 A. Yes.

12 Q. And you, in your report, said that this
13 colloquy may tend to show that the presidency is an
14 office covered by Section 3, right?

15 A. An office covered by the
16 disqualification liability language of Section 3.

17 Q. And you would agree that in the debates
18 about amnesty after the Civil War, one of the main
19 arguments against blanket amnesty was that it would be
20 absurd to allow Jefferson Davis to be the President of
21 the United States, and if you granted amnesty for
22 everybody under Section 3, then Jefferson Davis would
23 become eligible to become president.

24 Have you seen all that historical
25 evidence?

1 A. Well, there may have been people who
2 thought that, but they would have been wrong if an
3 office -- the office of the presidency is covered by
4 the language that Senator Morrill posed. Whatever
5 they thought, he would have been disqualified --

6 Q. Yes, and --

7 A. -- because he falls within the
8 jurisdictional element of Section 3, which is having
9 taken an oath to support the Constitution.

10 Q. So even though everybody at the time
11 knew that Section 3 disqualified Jefferson Davis to be
12 President, you don't think that's good enough evidence
13 to take a position as to whether or not the presidency
14 is an office that is covered by Section 3's --

15 A. No, because this is a matter of active
16 scholarly dispute. Kurt Lash, Professor Lash, and
17 Professors Blackman and Tillman do not think that the
18 language which the two senators here are discussing
19 comprehends the office of the presidency.

20 Q. And they also don't think it's enough
21 that the presidency is referred to as an office about
22 a dozen times in the Constitution?

23 A. Apparently not.

24 Q. Let's talk about oaths.

25 I believe you testified on direct that

1 you thought there's a difference between an oath to
2 support the Constitution of the United States and the
3 President's oath.

4 Do you recall that testimony?

5 A. Yes.

6 Q. And I believe you said that the
7 President's oath to preserve, protect, and whatever
8 else it says, isn't an oath to support the
9 Constitution, right?

10 A. It obviously was, contextually, a
11 different oath. And it's in a different article of
12 the Constitution as well.

13 Q. Okay. It's preserve, protect, and
14 defend the Constitution, right? That's what the
15 President has to do?

16 A. That is -- he is required to take that
17 oath and, having taken it, to carry it out.

18 Q. And they use different words, but you
19 would certainly agree with me that preserving,
20 protecting, or defending the Constitution of the
21 United States, as a practical matter, includes an
22 obligation to support it, right?

23 A. I don't think it is relevant whether, as
24 a practical matter, it requires to support the
25 Constitution. As a practical matter, sure.

1 But we're not talking about practical
2 matters. We're talking about the actual language of
3 the Constitution. The actual language of Article 6 is
4 palpably different from the Oath Clause in Article 2.
5 Palpably different.

6 Q. And, sir, are you going to take the
7 position -- well, strike that.

8 Preserving, protecting, and defending
9 the Constitution of the United States may not be
10 limited to supporting it but certainly includes
11 supporting the Constitution, right?

12 A. As a practical matter, yes. But, again,
13 I don't see the real relevance of that because
14 constitutional language is crafted carefully and
15 precisely so as to achieve the intended objects. And
16 I do not believe that the framers of Section 3 were
17 careless in their draftsmanship.

18 It may be that there are some
19 formulations of the Article 6 oath or its equivalent
20 that vary linguistically slightly, but there's a
21 palpable difference between the language of the
22 Article 2 oath and the language of the Article 6 oath.
23 I think that linguistic difference, which is a
24 substantial one, supports the view that the President
25 is not comprehended under the disqualification

1 language of Section 3 because he does not take an oath
2 which members of Congress do to support the
3 Constitution. He takes a different oath and has ever
4 since George Washington was inaugurated in 1788. And
5 I think the framers of the Section 3 understood that
6 perfectly well.

7 Q. Sir, we talked about dictionaries
8 earlier. And you testified on direct that in some of
9 the historical research you've done in the past,
10 you've looked at a dictionary by Samuel Johnson.

11 Do you remember that?

12 A. To the best of my recollection, I did,
13 yes.

14 Q. Yeah. And you cited Samuel Johnson
15 because that dictionary in the late 1700s was
16 considered kind of one of the gold standards for
17 lexicography and definition, right?

18 A. Yes, if maybe not the unique dictionary
19 of the English language.

20 Q. All right. So let's pull up
21 Petitioners' Exhibit 280. This is Samuel Johnson's
22 fifth edition, which I will represent to you is from
23 1773.

24 And I want to look at how Samuel Johnson
25 defined "defend," that word that appears in the

1 Article 2 oath, okay?

2 A. Yes.

3 Q. "Defend: To stand in defense of. To
4 protect. To support."

5 A. Right.

6 Q. Do you see that, sir?

7 A. Yes.

8 Q. I want to go back to our Section 3.

9 Your position is that you're not going
10 to tell us whether the presidency is an office under
11 the United States, but you know that the President is
12 not an officer of the United States --

13 A. I am --

14 Q. -- is that your testimony?

15 A. I am very confident that the President,
16 for this purpose, is not an officer of the United
17 States. And I rest that position on the occurrence of
18 that term, that specific term, that exact language, in
19 other parts of the Constitution and judicial
20 interpretation of that language in other parts of the
21 Constitution from -- up to the time of Chief Justice
22 John Roberts' opinion in the Free Enterprise case.

23 There's a consistent body of judicial
24 opinion from the Supreme Court and other lower courts
25 concerning the meaning of "officer of the United

1 States" elsewhere in the Constitution. And some of
2 that case law is around the time of the
3 ratification -- discussion and ratification of
4 Section 3.

5 Q. Okay, sir. And you talked about some
6 case law on direct examination as well. And I believe
7 that you said that some of those cases were about the
8 Appointments Clause, which you said was the anchorage
9 of the meaning of the phrase "officer," right?

10 A. Yes.

11 Q. Let's look at the Appointments Clause.
12 Our Constitution, again, on page 7.

13 The Appointment Clause says that "The
14 President shall nominate and by and with the advice
15 and consent of the Senate shall appoint ambassadors,
16 other public ministers, and consoles, judges of the
17 Supreme Court, and all other officers of the United
18 States" --

19 A. Yes.

20 Q. -- correct?

21 A. Yes.

22 Q. And the President can't appoint himself,
23 right?

24 A. No. That's because he's not an officer
25 of the United States.

1 Q. Well, he's certainly not an "other"
2 officer of the United States, right?

3 A. Well, not being an officer of the United
4 States, he can't be an "other" officer of the United
5 States.

6 Q. Right. But if we're talking about the
7 Appointments Clause, and the Appointments Clause is
8 talking about "other officers of the United States,"
9 clearly the Appointment Clause couldn't cover the
10 President even if he was an officer, right?

11 A. Well, let me refer again to Chief
12 Justice Roberts' opinion in the Free Enterprise case
13 where he explains the language that's at issue right
14 now in the Appointments Clause as indicating this,
15 that the Constitution establishes quite clearly a
16 distinction -- it's a fundamental distinction in the
17 Constitution -- between those who are elected to their
18 offices like the President and those who are appointed
19 to the offices, like the Secretary of State or the
20 Chief Justice or other officers of the United States.

21 And that's why -- and that fundamental
22 Constitution distinction, which is reflected here
23 between elected and appointed, is -- that's recognized
24 and established in the case law.

25 Q. All right. So let's look at that. I

1 want to look -- let me ask you this first.

2 You know that President Trump has
3 previously argued that he is an officer of the United
4 States, correct?

5 A. I do not know that. But if I wanted a
6 constitutional interpretation of that language, he
7 would not be the first person to whom I would look.

8 Q. Fair enough. But let's look at it
9 anyways. Petitioners' Exhibit 287.

10 I'm showing you "President Donald J.
11 Trump's Memorandum of Law in Opposition to the People
12 of the State of New York's Motion for Remand."

13 Do you see that on your screen?

14 A. I do.

15 Q. Okay. And the way this case came up is
16 that there was a criminal prosecution of President
17 Trump that then got removed to federal court.
18 President Trump tried to remove it to federal court.

19 A. Yes.

20 Q. And then the district attorney of
21 New York tried to remand it back to state court,
22 right?

23 A. I'll take your word for it.

24 Q. Okay. If we go to page 8, legal
25 argument, point one: "The President is an officer of

1 the United States who can remove cases to federal
2 court."

3 Do you see that?

4 A. I do.

5 Q. Later on -- and this is page 2 of the
6 motion itself, numbered page 2 -- there's a citation
7 to Josh Blackman and Seth Barrett Tillman.

8 And do you imagine that those are the
9 same scholars that you had cited in your direct
10 testimony?

11 A. Yes. They're the same. I'm confident.

12 Q. And President Trump says, "Well, this
13 argument that elected officials, including the
14 President, are not officers of the United States has
15 been advocated by these professors for some time. To
16 our knowledge, it has never been accepted by any
17 Court."

18 Do you see that?

19 A. Yes.

20 Q. And if we go to the next page -- well,
21 actually, at the bottom of this page there's a
22 Footnote 1. And they're citing some articles, and
23 then the footnote continues on page 2.

24 And President Trump says, "To be clear,
25 we mean no disrespect to either of these fine

1 academics, but their views on this matter are
2 idiosyncratic. See, e.g., Our Next President at 5
3 through 6 (collecting the contrary views of numerous
4 scholars) and of limited use to this Court."

5 Do you see that?

6 A. Yeah.

7 Q. Did you know that this brief also
8 specifically addresses the Free Enterprise case that
9 you were just talking about?

10 A. No, I didn't know that. I have not read
11 the New York lawyer's brief.

12 Q. Well, on the next page, page 4, there's
13 a citation to Free Enterprise Fund, and that's the
14 case you were just referring to, right?

15 A. Yes.

16 Q. And it says that case addresses the
17 President's removal power under the Article 2
18 Appointments Clause?

19 A. Yes.

20 Q. And then it says later "It is clear that
21 the Supreme Court was not deciding the meaning of
22 'officer of the United States' as used in every clause
23 of the Constitution, let alone in every statute of the
24 United States code. Rather, the Court was simply
25 describing the meaning of 'other officers of the

1 United States' as used in U.S. Constitution, Article
2 2, Section 2, Clause 2."

3 Do you see that?

4 A. Yes.

5 Q. And then that paragraph goes on to say
6 obviously the President cannot appoint himself, and so
7 other officers of the United States, as used in
8 Article 2, Section 2, Clause 2 must be a reference to
9 nonelected officials, right?

10 A. Uh-huh.

11 Q. And then President Trump says, "This
12 stray line in Free Enterprise Fund says nothing about
13 the meaning of 'officer of the United States' in other
14 contexts such as the relevant context the Court must
15 consider here," correct?

16 A. Yes.

17 Q. I want to take us back to the 19th
18 century now.

19 A. Uh-huh. Did you want me to speak to
20 this or no?

21 Q. No. Your counsel can ask you questions
22 about that if they'd like.

23 A. Okay.

24 Q. Let's go back to the 19th century.

25 Petitioners' Exhibit 144 again, Magliocca's materials.

1 And we're going to go back to Attorney General
2 Stanbery's first opinion.

3 A. Yes.

4 Q. You're aware that he also addresses
5 officers of the United States, correct?

6 A. In the statutory context.

7 Q. Yeah. In the context of the
8 Reconstruction Acts applying Section 3,
9 disqualification?

10 A. Yeah.

11 Q. And Attorney General Stanbery says,
12 "This brings me to the question who is to be
13 considered an officer of the United States within the
14 meaning of the clause under consideration? Here the
15 term 'officer' is used in its most general sense and
16 without any qualification as legislative or executive
17 or judicial. And I think as here used, it was
18 intended to comprehend military as well as civil
19 officers of the United States who had taken the
20 prescribed oath," correct?

21 A. Yes.

22 Q. And did you know that Attorney General
23 Stanbery also addressed the meaning of "officers" in
24 his second opinion?

25 A. Yes.

1 Q. Page 811. Excuse me. Page 814.
2 "Officers of the United States. As to these, the
3 language is without limitation. The person who has at
4 any time prior to the rebellion held any office, civil
5 or military, under the United States and has taken an
6 official oath to support the Constitution of the
7 United States is subject to disqualification."

8 Do you see that?

9 A. I do.

10 Q. So here, Stanbery isn't drawing a
11 distinction between office, officers, and those who
12 hold offices, correct?

13 A. Not that I can see.

14 Q. Did you know that Attorney General
15 Stanbery also referred to the President as an officer?

16 A. I don't -- I think he said that, though
17 he wasn't there purporting to interpret the language
18 of Section 3. My recollection is that he said that a
19 military governor of a not-yet-readmitted state, if he
20 usurped powers that were not his, would be placed
21 himself on a higher footing than the President, who
22 is, if I remember the language, not to be
23 considered -- who is merely an executive officer of
24 the United States. I think that's what it says. It
25 doesn't appear on the screen, but I think you have to

1 read what Stanbery is talking about here in construing
2 the statute in light of what he says elsewhere.

3 Q. Yeah. And your opinion or what you just
4 said -- you actually -- you quoted it spot-on. And
5 that was from the same second opinion --

6 A. Yeah.

7 Q. -- of the -- on the Reconstruction Acts,
8 correct?

9 A. Yes.

10 Q. Andrew Johnson was president when the
11 Fourteenth Amendment was ratified, right?

12 A. Yes. He issued the proclamation that it
13 had been ratified.

14 Q. And he also issued other presidential
15 proclamations, correct?

16 A. He did.

17 Q. And in some of those proclamations,
18 Andrew Johnson referred to himself as the chief
19 executive officer of the United States?

20 A. He did. He referred to himself as the
21 chief executive officer of the United States.

22 Q. Do you know whether other presidents
23 during the 19th century were referred to as the chief
24 executive officer --

25 A. I think --

1 Q. -- of the United States?

2 A. -- it probably was a common way of
3 referring to the President and may still be now.

4 Q. In the 19th century, it was a common way
5 to refer to the President -- to refer to him as the
6 chief executive officer of the United States.

7 You would agree with that?

8 A. A common way. Not common in connection
9 with the interpretation of the Appointments Clause,
10 however. And, indeed, the "chief executive officer of
11 the United States" is a different term colloquially
12 from the term "officer of the United States" as used
13 in various places in the Constitution, principally
14 Article 2's Appointments Clause.

15 So I don't consider that evidence of
16 not -- it's not really terribly relevant, if it's
17 relevant at all, which I doubt, to the interpretation
18 of the Constitution in any of its parts that uses the
19 term "officer of the United States."

20 Q. So you --

21 A. I think that the focus needs to be not
22 on how "officer" or "officer of the United States"
23 even is understood in statutory context, in official
24 proclamations, in colloquial usage. The question
25 before the Court is how is it understood for purposes

1 of the framing ratification and later understanding of
2 Section 3. Legal terms and ordinary uses of language
3 cannot simply be mapped on to the constitutional
4 language.

5 Q. You don't think it was relevant in
6 interpreting the phrase "officer of the United States"
7 as used in Section 3 in the 1860s to look at what
8 people in the 1860s thought "officer of the United
9 States" meant?

10 A. Not given the language of the original
11 Constitution of 1788, no, I do not think it is
12 particularly relevant at all. It's a legal term,
13 constitutional term of art.

14 Let me give you --

15 Q. And --

16 A. -- an example of what I mean.

17 Q. Well, let me ask you a question, sir,
18 and then you can answer my question.

19 So you wouldn't think it was relevant
20 that Presidents Jefferson, Jackson, Van Buren,
21 Harrison, Polk, Taylor, Fillmore, Buchanan, Lincoln,
22 Grant, and Garfield were all also referred to as the
23 chief executive officer of the United States?

24 A. No, I don't. And let me give you an
25 example.

1 Q. I'm just going to -- that was just a
2 yes-or-no question. If you want to --

3 A. Okay.

4 Q. -- expound, I'm sure --

5 A. I just said --

6 Q. -- your counsel can follow up on it.

7 A. -- I don't think that it's particularly
8 relevant.

9 Q. And therefore, you didn't look at any of
10 that historical evidence in your report, correct?

11 A. The Constitution says what it says. And
12 you interpret one clause of the Constitution in
13 connection with other terms that use the same language
14 or extremely close language.

15 Q. Okay. But you would agree with me that
16 the original Constitution was ratified roughly
17 80 years before Section 3 of the Fourteenth
18 Amendment --

19 A. Yes.

20 Q. -- right?

21 A. Yeah.

22 Q. Okay. Right now we're in the 117th
23 Congress.

24 Do you know which Congress was the
25 Congress that enacted legislation proposing

1 ratification of Section 3?

2 A. It was proposed in 1866.

3 Q. And what number Congress was that?

4 A. I don't remember that.

5 Q. So you're not aware that it was the 39th
6 Congress --

7 A. I --

8 Q. -- one of the most famous Congresses in
9 American history, that proposed Section 3?

10 A. Well, I'm grateful to be reminded.

11 Q. And so you also didn't think it was
12 relevant that the 39th Congress repeatedly referred to
13 the President as the chief executive officer of the
14 United States?

15 A. Again, unless -- no. I don't think it's
16 particularly relevant. I mean, may I finally give the
17 example that I need to underscore my claim that it's
18 not relevant?

19 Q. Sure.

20 A. Article 2 says that the Senate shall
21 advise and consent to presidential nominations to
22 certain offices, and the Senate shall advise and
23 consent to treaties.

24 Well, if you took those words, "advise
25 and consent," in their ordinary meaning outside the

1 context of the Constitution, then the Senate would
2 have to consent to every treaty and consent to every
3 presidential nomination.

4 The Senate doesn't always consent to
5 treaties or nominations, right? So I deduced from
6 that that the term "advise and consent" was a term of
7 art as used in the Constitution.

8 My recollection -- I never studied this
9 deeply -- but my recollection is that the term "advise
10 and consent" was used as a term of art in English law
11 and then entered our Constitution in 1788 with the
12 understanding that that was the legal meaning of
13 advise and consent, not -- clearly not the only -- not
14 at -- not understanding of the term "advise and
15 content" that those words had in common acceptance.

16 Q. And because of your view about
17 constitutional interpretation and methodology, you
18 didn't think it was relevant to see how the 39th
19 Congress that enacted the Fourteenth Amendment used
20 the phrase "officers of the United States," correct?

21 A. Not particularly relevant, no.

22 Q. And so if I were to show you ten pages
23 from the congressional Globe of the 39th Congress that
24 repeatedly referred to the President as an officer of
25 the United States again and again and again, and these

1 were the very same people who enacted Section 3 of the
2 Fourteenth Amendment, you wouldn't think any of that
3 was relevant, would you, sir?

4 A. They're proposing the language of
5 Section 3 against the backdrop of the Constitution
6 that had been in existence for -- what? -- 80 years
7 and as that constitutional language would have been
8 understood even before 1868. Well before 1868.

9 Q. So there's some sort of technical
10 term-of-art meaning in the phrase "officers of the
11 United States" that was different from the way that
12 everybody was actually using those phrases in public
13 during the ratification or during reconstruction?
14 That's your testimony?

15 A. No. I don't want to characterize it
16 that way.

17 MR. MURRAY: All right. I have no
18 further questions. Thank you.

19 THE COURT: The court reporter would
20 like a five-minute break, so . . .

21 MR. GESSLER: My questions are going to
22 be less than that, Your Honor.

23 THE COURT: I know, but I think she
24 needs --

25 THE STENOGRAPHER: My computer froze.

1 MR. GESSLER: That's a non-negotiable
2 five minutes. I understand, Your Honor.

3 (Recess from 4:00 p.m. to 4:06 p.m.)

4 THE COURT: You may be seated.

5 Mr. Gessler, the floor is yours.

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

8 REDIRECT EXAMINATION

9 BY MR. GESSLER:

10 Q. Professor Delahunty, I'm going to ask
11 you to grab that microphone and get it close to you
12 there.

13 So you were asked some questions about
14 your opinion with respect to the payments you were
15 receiving in this case, correct?

16 A. Yes.

17 Q. Okay. Do you remember having a
18 conversation with me about a version of the Fourteenth
19 Amendment that was introduced into the House of
20 Representatives by Representative McKee?

21 A. Yes.

22 Q. Okay. And you remember I said -- and
23 that particular version said -- specifically spoke to
24 the portion of the Fourteenth Amendment involving
25 the -- the first phrase, the one involving "under

1 the" -- "office under the United States."

2 And that first version introduced by
3 Professor McKee -- I'm sorry -- Representative
4 McKee -- specifically said not -- specifically
5 included the President and Vice President of the
6 United States.

7 Do you remember that?

8 A. Yes.

9 Q. And you remember I was pretty
10 enthusiastic about that provision and thought that
11 that should be included in your expert report? Do you
12 remember that?

13 A. You were.

14 Q. I was very enthusiastic.

15 A. Yes.

16 Q. And did you include it in your expert
17 report?

18 A. No.

19 Q. Why not?

20 A. Because I thought it was irrelevant to
21 the use of the term "officer of the United States" in
22 the disqualification language. I thought it just
23 wasn't really --

24 Q. And --

25 A. -- relevant evidence.

1 Q. And at the time --

2 A. Not relevant at all.

3 Q. I'm sorry. And at the time you refused
4 to include it, did you know that you were receiving
5 compensation for putting together this report?

6 A. I'm not sure that I -- I don't know the
7 answer. I think -- I don't know the answer.

8 Q. Okay. Did you understand that you were
9 getting paid for --

10 A. Yes.

11 Q. -- your work --

12 A. Yes.

13 Q. -- by the -- by President Trump?

14 A. Yes.

15 Q. Okay. Now, do you earn your living as a
16 testifying expert witness?

17 A. No.

18 Q. Do you --

19 A. Not at all.

20 Q. Do you have plans to market yourself as
21 a testifying --

22 A. Absolutely not. No.

23 MR. GESSLER: No further questions, Your
24 Honor.

25 THE COURT: Mr. Delahunty, you are

1 released. Thank you so much.

2 THE WITNESS: Thank you, Your Honor.

3 THE COURT: So I think that there was
4 some additional evidence that the petitioners wanted
5 to offer; is that correct?

6 MR. OLSON: Yes, Your Honor. We've, I
7 think, reached agreement on -- each side has a few
8 more things we would like to put in --

9 THE COURT: Okay.

10 MR. OLSON: -- to make sure we can
11 complete the record. And I think they have three
12 things. We have three documents and a handful of
13 videos, total running time of less than ten minutes.

14 THE COURT: Okay.

15 MR. OLSON: Would you like to do that
16 now?

17 THE COURT: Yeah. Let's --

18 MR. OLSON: Okay.

19 THE COURT: -- let's take care of
20 everything.

21 MR. OLSON: Great. And first -- and
22 then a couple other just quick notes.

23 Exhibit 78 is the findings of the final
24 report of the January 6 Select Committee that we would
25 like to submit. We mentioned we were going to reduce

1 the size of those findings, even ones you deemed
2 admissible, because the evidence came in through other
3 ways.

4 Our plan, if it's okay with Your Honor,
5 is to use the weekend to look at the transcripts and
6 then submit, when we submit the final exhibits to you,
7 the shortened version of that Exhibit 78, if that's
8 okay with Your Honor.

9 THE COURT: Yeah. That's fine. When
10 you do so, will you just make sure that you make a
11 notation as to whether the intervenors agree that -- I
12 know that they object to them all, but that they agree
13 that those are ones that I've otherwise held --

14 MR. OLSON: Yeah.

15 THE COURT: -- admissible, et cetera.

16 MR. OLSON: Yeah. Great. We will do
17 that.

18 THE COURT: Without waiver, Mr. Gessler,
19 all the arguments you've made about January 6.

20 MR. GESSLER: Thank you, Your Honor.

21 MR. OLSON: Secondly, just a clean-up on
22 the transcript. When we qualified Dr. Simi as an
23 expert, I think the transcript reflects his
24 testimony -- he was admitted as an expert on political
25 extremism "excluding" a bunch of specific things, and

1 I think it should say "including."

2 I offered him as an expert on political
3 extremism, including how extremists communicate, his
4 interpretation of January 6 vis-à-vis his expertise in
5 extremism, and extremism communication. We just want
6 to be clear that that second phrase is part of what he
7 was qualified as an expert on.

8 THE COURT: So would you say the
9 transcript -- you mean do you think it was just
10 mistranscribed or did you misspoke or . . .

11 MR. OLSON: I think you misspoke, Your
12 Honor.

13 THE COURT: Oh, I misspoke. Okay. I'm
14 sure I meant to say "including" --

15 MR. OLSON: Okay. Great.

16 THE COURT: -- because I wouldn't
17 exclude the very things he was going to testify about.

18 MR. OLSON: Yeah. That -- we just
19 wanted to clarify.

20 And then there are a few portions of
21 admitted documents that Your Honor hasn't seen. Our
22 proposal would be just to call those out in the
23 proposed findings rather than show them to you right
24 now. But we're happy to show them to you right now if
25 you want to see them before we submit the proposed

1 findings, but really welcome guidance from Your Honor.

2 THE COURT: I didn't really follow. So
3 there's . . .

4 MR. OLSON: A few portions of some
5 admitted documentary evidence --

6 THE COURT: Okay.

7 MR. OLSON: -- that we have not shown on
8 the screen.

9 THE COURT: Okay.

10 MR. OLSON: We would like to reference
11 those portions in the proposed findings of fact. But
12 because it's admitted evidence, our proposal would be
13 just to reference it in the findings of fact rather
14 than show you the documents now, but if you'd like, we
15 can have a slideshow and look at the documents.

16 THE COURT: No. If the -- if what you
17 want to cite in the proposed findings of fact and
18 conclusions of law is from an admitted exhibit --

19 MR. OLSON: Yeah.

20 THE COURT: -- that we just haven't
21 talked about, I consider that to be evidence --

22 MR. OLSON: Okay.

23 THE COURT: -- that's been admitted.

24 MR. OLSON: Great. Thank you. That was
25 our understanding too. Thank you, Your Honor, for the

1 clarification.

2 So now, let me turn to the, I guess,
3 just two documents that we would like to move for
4 admission. Again, these are not objected to.

5 And just to make it move and be a little
6 more interesting, I'll put the first page of the
7 document on the screen. But I'm not going to walk
8 through the whole document.

9 The first is Exhibit 30.

10 THE COURT: Okay.

11 MR. OLSON: Give me one second, Your
12 Honor.

13 You would think by Friday we'd have this
14 figured out, so my apologies.

15 All right. Here we go.

16 The first, Your Honor, is a -- in fact,
17 we move for the admission of the artisanal flowers.

18 I'm just glad it made it this long.

19 Thank you very much.

20 First is Exhibit 30. It's a Government
21 Accountability Office report on the Capitol attack.
22 And we're mainly -- exhibit -- offering it for --
23 there's a table on page 24 that we'll reference in our
24 findings of fact.

25 The next is Exhibit 157, which is the

1 readout from the teleprompter that Donald Trump saw
2 during the Eclipse [sic] speech. And so this differs
3 from the actual speech in ways that we'll discuss, but
4 this is what was on the prepared remarks for Donald
5 Trump. And if you see at the bottom, it's an official
6 government record from the General Accounting [sic]
7 Office that you'll see along the bottom left.

8 Turning to the -- so we move for the
9 admission of Exhibits 30 and 157.

10 THE COURT: Okay. So 30 I know has been
11 stipulated to.

12 Do the -- does President Trump object to
13 157?

14 MR. GESSLER: Your Honor, we don't.
15 We're going to argue its lack of relevance with
16 respect to weight, but I guess we're -- both counsel
17 are following the rule of the big bucket of evidence.
18 And so under that, you know, we'll -- we'll argue it
19 has little if any bearing, but as far as its
20 authenticity and to the extent the Court wants to
21 accept its relevance, we don't object.

22 THE COURT: Okay. So how about the
23 Colorado Republican Party? Any objection to those two
24 exhibits?

25 MS. RASKIN: No objection.

1 MR. KOTLARCZYK: No objection, Your
2 Honor.

3 THE COURT: Okay. So 30 and 157 are
4 admitted.

5 (Exhibits 30 and 157 admitted into
6 evidence.)

7 MR. OLSON: Thank you. Now turning to
8 the videos, Your Honor. The first is Exhibit 58.

9 (Video was played.)

10 MR. OLSON: And I'll just go through all
11 of the video exhibits and move for the admission at
12 the end, Your Honor, if that's okay.

13 THE COURT: Okay.

14 MR. OLSON: The next is Exhibit P-62 --
15 or Exhibit 62, Plaintiffs' Exhibit 62.

16 (Video was played.)

17 MR. OLSON: And, Your Honor, this was on
18 August 24, 2020, and you can see at the bottom, a
19 speech at the Republican National Convention.

20 The next video --

21 MR. GESSLER: Eric, can I just make a
22 comment on that one?

23 MR. OLSON: Yeah.

24 MR. GESSLER: Your Honor, we do not
25 object to this as statements from President Trump.

1 What I would ask -- and I'll just go through these
2 one-by-one -- is that we nonetheless have a right to
3 introduce the entire speech if necessary, because
4 there's a few editing -- there may have been a former
5 Colorado Secretary of State wildly applauding -- wild
6 applause of his in the background during that
7 convention.

8 THE COURT: And you want to make sure
9 that that's part of the record?

10 MR. GESSLER: Exactly, Your Honor.
11 So -- but, yeah, we may want to include the entire --
12 or additional portions.

13 MR. OLSON: Yeah. And we, of course,
14 have no objection.

15 THE COURT: That's fine.

16 MR. OLSON: Yeah. And the first one we
17 watched was May 8 -- P-58 was a May 8, 2019, speech in
18 Florida, in the Florida Panhandle.

19 The next is P-64 -- Plaintiffs' -- or
20 Petitioners' Exhibit 64.

21 (Video was played.)

22 MR. OLSON: And this was -- P-64 was on
23 September 23, 2020.

24 Our next video is P-67 from November 1,
25 2020, in Michigan. And this speech is referring to

1 the Trump train with a bus. I can show the setup
2 video that Trump had retweeted if you'd like, Your
3 Honor. This was -- the truck surrounded the Biden bus
4 on the Texas interstate, then Trump retweeted the
5 video.

6 THE COURT: Have I seen that?

7 MR. OLSON: Yes, but let me show it.

8 It's P-71. I'll start with that. So this is a
9 tweet -- this is a video that Trump retweeted.

10 (Video was played.)

11 THE COURT: Well, I had missed what was
12 actually happening, so thank you.

13 MR. OLSON: You're welcome. And so, if
14 you recall, he retweeted that video saying -- "I love
15 Texas" was on top.

16 And then this is a video in Michigan
17 shortly after this event where he talks about this
18 event. It's Exhibit P-67.

19 (Video was played.)

20 MR. OLSON: The next video is from
21 Miami, Florida, October 23, 2015, Petitioners'
22 Exhibit 127.

23 (Video was played.)

24 MR. OLSON: The next video is Exhibit --
25 Petitioner Exhibit 134 from a CNN town hall. We'll

1 provide the date shortly. I don't have that on my
2 notes.

3 (Video was played.)

4 MR. OLSON: And, Your Honor, Mr. Murray
5 informs me this is from May 10, 2023.

6 And our last video is from an August 9,
7 2016, speech in Wilmington, North Carolina.

8 THE COURT: Okay. What number?

9 MR. OLSON: 159.

10 (Video was played.)

11 MR. OLSON: And, Your Honor, this -- it
12 goes on, but the portion that we wanted to introduce
13 was the portion on the Second Amendment piece.

14 So those are the videos that we'd like
15 to move into evidence: Petitioners' Exhibits 58, 62,
16 64, 67, 127, 134, and 159.

17 THE COURT: Any objection, Mr. Gessler?

18 MR. GESSLER: Your Honor, for the
19 record, you know, we always have objections on
20 relevance, but for the standards before this Court, we
21 recognize any of those objections go to the weight.
22 We're not going to dispute the authenticity or, you
23 know, the admissibility in that sense, Your Honor.

24 THE COURT: Okay. The Republican Party?

25 MS. RASKIN: No objections.

1 MR. KOTLARCZYK: No objection, Your
2 Honor.

3 THE COURT: Great. So 58, 62, 64, 67,
4 127, 134, and 159 are admitted.

5 (Exhibits 58, 62, 64, 67, 127, 134, and
6 159 admitted into evidence.)

7 THE COURT: And had 71 already been
8 admitted, the Biden bus one?

9 MR. OLSON: Yes. It had already been
10 admitted.

11 THE COURT: Okay.

12 MR. OLSON: And with that, subject to
13 submitting the revised Exhibit 78, which is the
14 findings from the January 6 committee, I think that's
15 the evidence that we plan to present in this hearing.
16 Thank you very much, Your Honor.

17 THE COURT: Okay.

18 MR. GESSLER: Thank you, Your Honor. We
19 have three additional exhibits that I believe
20 petitioners have agreed to -- or agree to the
21 admissibility of as well.

22 First is the full video exchange for the
23 presidential debate involving Proud Boys. So we'll
24 play that very briefly.

25 THE COURT: Okay.

1 MR. GESSLER: 1083, please.

2 THE COURT: And do we have an exhibit
3 number for this?

4 MR. GESSLER: That's 1083, Your Honor.

5 THE COURT: Okay.

6 (Video was played.)

7 MR. GESSLER: Your Honor, I don't mean
8 to interrupt this argument, but we're seeking -- we
9 don't need to listen to any more. It's for that
10 relevant part that we had there, but it will be the
11 entire -- that portion of the video.

12 Next is a transcript from this same
13 debate. This is the full transcript. We're only
14 seeking to introduce it for purposes of the portion of
15 that Proud Boys -- I'll call it the Proud Boys
16 exchange that you just saw.

17 THE COURT: And that is what number?

18 MR. GESSLER: And that's Exhibit 1080.

19 THE COURT: Okay.

20 MR. GESSLER: And then lastly, there's a
21 transcript of President Trump's remarks the day
22 after -- and that's Exhibit 1081 -- before a Marine
23 One departure. We're not able to locate a video.
24 We're not really sure it exists.

25 THE COURT: The day after what?

1 MR. GESSLER: The day after the Proud
2 Boy debate exchange.

3 And if you could scroll down a little
4 bit, please.

5 Okay. And the question is
6 "Mr. President, can you explain what you meant last
7 night when you said that the Proud Boys should, quote,
8 stand back and stand by?

9 "The President: I don't know who the
10 Proud Boys are. I mean, you'll have to give me a
11 definition because I really don't know who they are.
12 I can only say they have to stand down, let law
13 enforcement do their work. Law enforcement will do
14 the work more and more. As people see how bad this
15 radical liberal Democratic movement is and how weak --
16 the law enforcement is going to come back stronger and
17 stronger.

18 "But again, I don't know who Proud Boys
19 are. But whoever they are, they have to stand down.
20 Let law enforcement do their work."

21 And then it goes on a little bit. But
22 that's what we'll be seeking to introduce our -- we
23 seek to introduce as well. And that's Exhibit 1081.

24 THE COURT: Okay.

25 MR. GESSLER: And with that, Your Honor,

1 we rest with respect to our evidence as well.

2 While I have the podium, I know that
3 there's a standing order or request from the Court
4 within two days of the close of evidence to provide
5 arguments to whether 113 has to be decided within two
6 days. I believe we've discussed that but I just, from
7 a housekeeping standpoint, want to do -- to point that
8 out. And I think that was your order of October 2,
9 which was about a lifetime ago.

10 I assume we have resolved that, but I at
11 least wanted to draw it to your attention from a
12 formal standpoint.

13 THE COURT: Okay. So 1080 -- well,
14 first of all, do the petitioners object to 1080, 1081,
15 and 1083?

16 MR. OLSON: No, Your Honor.

17 THE COURT: Republican Party?

18 MS. RASKIN: We do not object.

19 THE COURT: Secretary of State?

20 MR. KOTLARCZYK: No objection.

21 THE COURT: Okay. So 1080, 1081, and
22 1083 are admitted.

23 (Exhibits 1080, 1081, and 1083 admitted
24 into evidence.)

25 THE COURT: On the issue of

1 Section 1-1-113, the hearing is now concluded. It
2 will be continued until oral arguments on November 15.
3 I think it was at 3:00, from 3:00 to 5:00 -- for
4 closing arguments from 3:00 to 5:00?

5 MR. GESSLER: I believe that's correct,
6 Your Honor.

7 THE COURT: And everybody believes that
8 that's enough time to conclude the closing arguments?

9 MR. GESSLER: I don't know if there's
10 ever enough time, Your Honor. But, I mean, I think
11 both counsel are prepared to make their case with an
12 hour of time allotted to them. At least we are. I
13 assume the sage and concise counsel on the other side
14 are as well, Your Honor.

15 MR. GRIMSLEY: We will be.

16 THE COURT: Okay. So on the proposed
17 findings of fact, which are due on November 8, just a
18 few comments.

19 All the proposed -- all the proposed
20 findings should have cites either to the record or to
21 the law. If possible, the Court would appreciate
22 receiving just full transcripts for the days versus
23 clips of what's being cited. So if that can be
24 arranged, that would be helpful.

25 This is specifically to you,

1 Mr. Gessler. Can you please put your citations in the
2 text and not in footnotes?

3 MR. GESSLER: Yes, Your Honor. We'll
4 abide by that guidance.

5 THE COURT: Well, the hope is is that
6 I'm going to cut and paste them, and it's hard to do
7 with the footnotes.

8 MR. GESSLER: I understand. No problem,
9 Your Honor.

10 THE COURT: So it's to your benefit.

11 To that end -- to that end, if the
12 parties could please try to avoid rhetoric in the
13 proposed findings of fact and conclusions of law. The
14 idea and hope is that I'm going to use them, and if
15 they're very argumentative, that's difficult to do.

16 So if you can just lay out the case --
17 the facts that you think have been established and the
18 law that you think you have applied in a manner in
19 which a Court might rule, that would be the most
20 helpful to me, especially given the limited time that
21 I'm going to have between submission and November 17,
22 which is when the time will talk -- the time will --
23 when my rulings are going to be required to be
24 submitted under the 1-1-113.

25 And if you can -- I'm not going to make

1 page limitations, but I just request that people be
2 judicious with length so that I have time to actually
3 process them, read any cases I haven't already read,
4 et cetera, in the limited time between November 8 and
5 November 17.

6 And then I just want to make sure. So
7 first of all, Mr. Kotlarczyk, do you anticipate that
8 the Secretary of State will be making any proposed
9 findings?

10 MR. KOTLARCZYK: I do, Your Honor.

11 THE COURT: Okay. And will they just be
12 on very discrete issues?

13 MR. KOTLARCZYK: Your Honor, we haven't
14 had a chance to fully confer with my client since
15 we're concluding the hearing now, but I would
16 anticipate proposed findings specifically around
17 Ms. Rudy's testimony, documentation practices at the
18 Secretary of State's office, and some of the legal
19 issues that I think we've briefed previously.

20 THE COURT: Okay. So if you could just
21 try to -- that's fine. I'm -- I just don't -- I just
22 don't want a lot of duplication. But I understand
23 that you're kind of a lone wolf in this process. And
24 so if you can just do as everybody else is and try not
25 to make them too long, that would be great.

1 MR. KOTLARCZYK: I would wager, Your
2 Honor, than mine will be substantially shorter than
3 other parties in the case, but there are some
4 important institutional interests that the Secretary
5 of State wants to vindicate through this process.

6 THE COURT: Well, and I'm absolutely
7 not -- she's the respondent in the case. She
8 obviously has the right to submit proposed findings of
9 facts and conclusions of law, so . . .

10 MR. KOTLARCZYK: Thank you.

11 THE COURT: Okay. And can the
12 Republican Party and President Trump coordinate and
13 submit one set?

14 MR. GESSLER: I think this would be the
15 first time in history that President Trump and the
16 Republican Party have stated in court that they will
17 cooperate. But we will do that, Your Honor. Of
18 course.

19 MS. RASKIN: Yes. We can do that.

20 THE COURT: Okay. Great. So I will
21 expect to see three submissions. No page limits, but
22 just please don't go overboard.

23 MR. GESSLER: Your Honor, would you like
24 us to coordinate so that we have a unified submission
25 on behalf of President Trump and the Colorado

1 Republican Party?

2 THE COURT: Yeah. That's what I -- I'd
3 like --

4 MR. GESSLER: Okay.

5 THE COURT: -- one submission --

6 MR. GESSLER: Okay.

7 THE COURT: -- if possible.

8 And then on the exhibits, you need to --
9 you're going to have to submit all the exhibits that
10 have been offered and not admitted -- I'm not sure if
11 there are any. But if you've offered them and I
12 excluded them, they need to be submitted as that with
13 a cover pleading.

14 And then if they've been offered and
15 admitted, they need to be under a separate pleading,
16 and they need to be submitted. And this is online.
17 Understanding that the videos are going to probably
18 have to be, you know, like, a page, like, video,
19 submit it to the clerk's office separately or
20 something like that. But in order to have a clear
21 record, you're going to have to do that on the
22 judicial electronic filing system.

23 And then I think the best thing to do is
24 for the videos if each side can submit the videos that
25 were both admitted and offered and not admitted on,

1 like, flash drives so that the clerks -- and the
2 clerk's office, I believe, will accept that that way.
3 But showing them to me or handing them to me doesn't
4 cut it and won't make it to the Supreme Court if and
5 when this gets appealed.

6 MR. OLSON: Just one question on that,
7 Your Honor.

8 Is it your -- it's a little complicated
9 here because we have the anti-SLAPP motion. We filed
10 a bunch. The was a motion practice for the admission
11 of evidence before it was officially offered in court.

12 So for the exhibits offered but not
13 admitted, just confirming for us, that includes
14 information that we tried to use on the anti-SLAPP
15 motion that you then said you would not admit into
16 evidence? Or is it just what happened this week in
17 terms --

18 THE COURT: So, I mean, did the
19 anti-SLAPP motion include videos and stuff?

20 MR. OLSON: The anti-SLAPP motion, I
21 don't -- it referenced videos. I don't know that we
22 included videos.

23 MR. GRIMSLEY: I think we did.

24 MR. OLSON: Oh, we did. Okay. Yes, it
25 did include videos.

1 THE COURT: Okay. So the extent that
2 the -- those exhibits -- the ones that you filed,
3 that's fine. If you -- if you were -- if part of the
4 support for the anti-SLAPP motion was videos, then
5 those should probably be submitted to the clerk's
6 office as the videos in support of the anti-SLAPP
7 motion.

8 MR. OLSON: All right.

9 THE COURT: And then, in my view, this
10 is totally different. And so any videos -- any
11 exhibits or videos that were presented and admitted in
12 this hearing need to be separately submitted.

13 MR. OLSON: Okay. Thank you, Your
14 Honor.

15 And then just on the transcripts, would
16 you like the transcripts with the filings on
17 Wednesday? I think we're going to receive the final
18 ones on Monday. Would you like them on Monday or do
19 you want to wait with the -- when we submit our
20 proposed findings of fact and conclusions of law on
21 Wednesday? And do you have a particular format that
22 you prefer them in?

23 THE COURT: No.

24 MR. OLSON: Okay.

25 THE COURT: Not for format. And I plan

1 on spending Monday, Tuesday, and Wednesday catching up
2 on my other --

3 MR. OLSON: Okay.

4 THE COURT: -- 199 cases and probably
5 reading some of the case law and things that have been
6 talked about during the course of the trial. So we'll
7 have plenty to do.

8 MR. OLSON: Great. Thank you, Your
9 Honor.

10 THE COURT: Anything from you,
11 Mr. Gessler?

12 MR. GESSLER: No, Your Honor.

13 MR. GRIMSLEY: Sorry. One last thing,
14 Your Honor. And I think we forgot sometimes that the
15 Secretary of State and the Republican Party are
16 parties here. So in the closing arguments, I still
17 assume two hours will be fine, but if we find out they
18 have robust closing arguments they'd also like to
19 present, we may get back to you.

20 MR. KOTLARCYK: I don't anticipate
21 robust closing arguments, Your Honor. If they're
22 mindful of the Court's advisement that we are on the
23 same clock, in advance of the 15th, we will huddle
24 internally and I'll confer with the petitioners if we
25 want to take any of their time.

1 THE COURT: Okay. And why don't you --
2 you know, if you huddle and they say, "We really need
3 the full hour," and you need 20 minutes of your own --
4 and that goes the same for the Colorado Republican
5 Party. If you feel like you've got something that you
6 need to say outside of what President Trump is saying
7 and you need a little bit of extra time, just get in
8 touch with us so that we can -- you know, we can start
9 a half hour earlier if we need to.

10 MR. KOTLARCZYK: Understood.

11 THE COURT: I don't want to deprive you
12 of making your arguments.

13 MR. KOTLARCZYK: Thank you, Your Honor.

14 THE COURT: Anything else that we need
15 to address?

16 MS. RASKIN: Not from us, Your Honor.

17 THE COURT: Well, I want to thank
18 everyone. It's been super helpful. And I really want
19 to -- I thank everybody, that I appreciate the decorum
20 that the parties have had throughout these entire
21 proceedings.

22 I know that this case, like all cases,
23 but maybe particularly, is very deeply felt on both
24 sides. And despite those deep feelings, I feel like
25 the counsel for the parties has been very, very

1 professional and has put on a really outstanding
2 presentation of the evidence and the arguments.

3 So we will continue this hearing until
4 either 2:30 or 3:00 on November 15.

5 * * * * *

6 WHEREUPON, the foregoing deposition was
7 concluded at the hour of 4:46 p.m. on
8 November 3, 2023.

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REPORTER'S CERTIFICATE

I, Jennifer Bajwa Melius, a Verbatim
Stenographic Reporter and Registered Professional
Reporter, do hereby certify that the within
proceedings were taken in stenotype by me at the time
and place herein set forth and was thereafter reduced
to typewritten form by me; and that the foregoing is a
true and correct transcript of my stenotype notes
thereof; that I am not an attorney nor counsel nor in
any way connected with any attorney or counsel for any
of the parties to said action nor otherwise interested
in the outcome of this action.

IN WITNESS WHEREOF, I have affixed my
signature on this day, November 6, 2023.



Jennifer Bajwa Melius
Registered Professional Reporter

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