

THE TRUMP INDICTMENTS

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For those who are interested in trials of the century, there are two which make the list. The trials will occur in 2023 and 2024, and they both involve a former president of the United States. I am not referring to the 62 trials in which the claim was asserted that there was fraud in the 2020 presidential election. None of these cases resulted in a judicial decision that affected the outcome of the election.

Donald J. Trump, former U.S. President, is the first U.S. President to be the subject of a criminal indictment. And he has now been indicted four times.¹ This article will focus on the two indictments that concern the 2020 presidential election. I will refer to them as follows: (1) The DOJ indictment (“DOJ” is the federal Department of Justice) or the federal indictment; and (2) the Georgia indictment. The DOJ indictment was filed on July 28, 2023. The trial will be in Washington, D.C. The Georgia indictment was filed on August 14, 2023. The trial will be in Atlanta, Georgia.

Section 1—The DOJ indictment.

The DOJ indictment and the Georgia indictment provide issues relevant to legal philosophy and they are the most important of the four criminal cases filed against Trump. In the DOJ indictment, Trump was charged with four counts of federal crimes for activities that he was involved in while he was the sitting 45th U.S. President. These crimes occurred after the November 3, 2020, presidential election. They are primarily concerned with Trump’s false claims of election fraud, his efforts to overturn the results of the election, and the riot that occurred on January 6, 2021. The riot was the culmination of his effort to delay the certification of Joe Biden as the winner of the 2020 presidential election.

It is no surprise that Trump would contend that fraud had occurred in the 2020 election. He had previously made claims of election fraud before he himself became a candidate in 2015. After he announced his candidacy in Trump Tower and even more specifically after the election on November 3, 2020, he proclaimed many times that the elections would be and were rigged. In fact, on February 1, 2016, after Trump had lost the Iowa primary to Senator Ted Cruz, and before his private airplane left the airport in Iowa, Trump called the chairman of the Iowa Republican Party. He complained that Cruz had not won a fair election and that there should be an investigation to determine how Cruz had cheated before the official announcement that he, Trump, had not won the election in Iowa.

Trump frequently repeated his claims of election fraud after the November 3, 2020, election. He claimed that he had won the election before all the votes were counted. When the television pundits declared that Biden had won the election, Trump again claimed that there was fraud. To this day, he has not conceded that Biden had won the election, and he has not publicly withdrawn his claims of election fraud or his declaration that he in fact won the election.

He continued to claim that the election was fraudulent notwithstanding the failure of his supporters to prove outcome-determinative fraudulent events in the 62 lawsuits challenging the election results. No significant fraud was found in multiple recounts. Subsequent to investigations from various agencies, including the Department of Justice, there is still no evidence of substantial fraud. As the federal indictment clearly states, Trump was told by his own appointees and supporters on multiple occasions that there was no fraud, and that he lost the election. Trump cannot accept that he was the loser in the election.

Consequently, as a result of Trump's activities after the election, the DOJ charged him with four counts related to his efforts to prevent the peaceful transfer of power after he lost the election. Three of the counts are for conspiracy to commit federal crimes and the fourth count is for obstruction of an official proceeding.² To obtain a conviction for conspiracy, the government will have to prove that there was a plan (an agreement between two or more individuals), that the plan was to commit acts that would be criminal acts if consummated, and that specific acts to implement the plan were undertaken. All of this has to be proven at the trial.

The typical indictment is a short document that informs the defendant what the crimes are that will be the subject of the trial. It generally does not provide evidence nor list potential witnesses. In this instance, the DOJ indictment is 45 pages long, with 130 statements (and subsections to some of them). It is a talking indictment, rather than merely a notice indictment. In some of the statements, the actual words that will be offered into evidence are presented within quotation marks. This indicates that the quoted statements probably appear in a written document or in a recording or video.

Before the 1876 presidential election, there was a civil war that ended in 1865. As part of the effort of punishing the States that had withdrawn from the nation, and to eradicate the aftermath of slavery having existed in those States, the Constitution was amended by adoption of the Thirteenth, Fourteenth and Fifteenth Amendments. Reconstruction in the Southern States commenced. There was organized and passionate resistance to cultural realignment in the society in the former Confederate States. Slavery was now prohibited, but freedom for the emancipated slaves was resisted. In fact, there was very strong opposition to the change in their status.

The resolution of the 1876 presidential election dispute resulted in the disembowelment of the reconstruction effort and the beginning of the Jim Crow era. The drive for racial equality diminished. Barriers to the former slaves entering civil society were established. Hence, implementation of the constitutional amendments remained an issue.

We will consider whether Trump is likely to be convicted of any or all of the crimes that have been charged. As I mentioned, three of the charges in the four counts in the DOJ indictment are for conspiracies. One of the conspiracies is the crime of denying people the right to vote, which is based upon the provisions of the Ku Klux Klan (KKK) Acts.

Trump is being charged with violation of one of the provisions of the KKK Acts. The KKK Acts are three statutes that were adopted after the Civil War. South Carolina Governor Robert K. Scott told President Ulysses S. Grant in 1870 that white supremacists were murdering former enslaved African Americans for exercising their voting rights. Groups like the KKK wanted to keep the Republican Party, with its Black voter base, from winning local elections.

The three statutes were designed to give the federal government additional power, including the power to send troops to ensure fair elections. The Acts made it a crime to prevent people from voting. The Acts are also known as the Enforcement Acts, and they are still

considered to be valid laws. They have been applied to the following situations: police brutality; vote buying; and to a Klan member who burned a cross on the lawn of a Latino couple.

Trump is charged with violation of Section 241 of Title 18 of the U.S. Criminal Code, which is part of the first Enforcement Act passed in 1870. More specifically, the charge is that Trump and his unindicted co-conspirators sought to destroy trust in a fair election process and “pursued unlawful means of discounting legitimate votes and subverting the election results.”

Now, it is more than 150 years after the statute was adopted and Trump is being charged with violating this statute. The statute is being utilized to realize its original purpose of protecting the right to vote. Trump is challenging the voting process in areas in which predominantly African Americans live, such as in Milwaukee, Atlanta, Detroit, and Philadelphia or Hispanic areas in Arizona. It is in the predominantly Black areas or Hispanic areas where Trump concentrates his claims that voter fraud occurred. There is an element of poetic justice in charging him with violating the KKK Acts.

The claim for conspiracy for obstruction of an official proceeding relates primarily to the events that occurred on January 6, 2021. On that date, a mob incited by Trump at a rally earlier that day attacked the U.S. Capitol. They broke into the building, and they disrupted the counting of the votes of the Electoral College. The votes of the Electoral College were being counted on that date by the members of the House of Representatives and the Senate at a joint session in the Capitol. The counting was concluded only after the mob was evicted from the building and the counting resumed. This riot has often been referred to as an insurrection or a seditious act.

Section 2—The Georgia indictment.

A second case against Trump and his allies was filed in 2023 by Fani Willis, the District Attorney of Fulton County, Georgia. She was asked if she would abandon her investigation into Trump’s efforts to overturn the election results in Georgia after the DOJ indictment was filed. She replied that, as the District Attorney of Fulton County, it is her job to investigate crimes committed in Georgia. If she finds that a crime has been committed, it is her duty to prosecute.

Willis’ reaction to the question is a good example of a customary rule without the force of law. Customary rules are discussed in *The Judge and the President*. There is no legal way to force a district attorney to proceed with prosecution of a crime if she decides not to do so. Any effort to prevent her from prosecuting would also not be likely to be successful. Pursuant to the legal rules in the legal systems in the U.S. and in Georgia, there is a customary rule that prosecutors have prosecutorial discretion.

The case that was filed in Georgia is a RICO (Racketeer Influenced and Corrupt Organizations Act) case. Approximately 20 states have state RICO statutes modeled after the federal statute, and Georgia is one of them.³ The Georgia statute, in fact, is more detailed than the federal statute. The federal statute lists 36 crimes that can be filed in federal courts. The Georgia statute adds 30 additional crimes. The Georgia statute, unlike the federal statute, stipulates that making false statements as part of the criminal effort is a potential racketeering crime. I will discuss the RICO charge in section 4.

The Georgia indictment is very different from the DOJ indictment. The DOJ indictment is focused on Trump’s efforts to stay in office. It is like a shot from a sniper’s rifle, very much aimed

at a specific target and designed to hit just that target. Hitting Trump, the specific target, will be the central theme in that trial.

In contrast to the DOJ indictment, the Georgia indictment is like shooting with a shotgun toward a crowd of potential targets. It proclaims and describes a massive, coordinated plot to steal the election. The Georgia indictment is more detailed and twice as long as the DOJ indictment, 98 pages compared to 45 pages. There are 41 counts in the Georgia indictment compared to 4 counts in the DOJ indictment. Instead of a single defendant (Trump is the only defendant in the DOJ indictment), the Georgia indictment refers to 19 named defendants, and 30 unnamed individuals. In other words, there are multiple unnamed potential additional defendants who are likely to be witnesses in the trial.

There are conspiracies alleged in both indictments. The conspiracies are three counts of the four counts in the DOJ indictment. The Georgia indictment is so detailed that I can only provide a sketch of its structure. I will start with some of the more important differences in the two indictments.

Section 3—Some differences in the two cases.

The Georgia indictment is filed in state court while the DOJ indictment is filed in federal court. In accordance with the policy of the DOJ, if Trump becomes the president by winning the 2024 election, the prosecution will be put on hold during his term in office. The Georgia District Attorney is not required to pause her prosecution during Trump's potential tenure as the president. In addition, the Georgia legal system offers to defendants the option of requesting a speedy trial, which I will return to below.

The DOJ indictment has only one defendant, even though it refers to six unindicted and unnamed co-conspirators. The Georgia indictment has 19 defendants and 30 additional unnamed, unindicted persons who may be involved in the conspiracies or the RICO enterprise (which I will describe below).

An equally important distinction is that Trump, if he becomes president again, could potentially give himself a pardon for the federal crimes. Alternatively, he could maneuver a pardon from his vice-president acting as president during a real or contrived Twenty-Fifth Amendment temporary hiatus in his presidency. The vice president acting as the president could pardon Trump. Trump could then reassume the presidency. Trump will have no power to pardon himself or arrange for his pardon from the vice president for the Georgia crimes.

From page 13 of the Georgia indictment to page 72 is just the RICO count (Count 1). There are another 40 counts in addition to Count 1. Count 41, the last of the counts, is on page 97. I will provide just a few examples from the Georgia indictment to allow the reader to get some sense of what the evidence in the Georgia trial will be.

Rudy Giuliani, one of the 18 co-conspirators named in the Georgia indictment (he is also generally believed to be one of the unnamed, unindicted co-conspirators in the DOJ indictment), is charged in 13 counts. John Eastman is charged in 9 counts (he is also a probable unnamed, unindicted co-conspirator in the DOJ indictment). Mark Meadows, the former White House Chief of Staff, is charged in 2 counts. Each of the 40 counts applies to some of the defendants, while the RICO count includes all of the defendants. Let's look at a closer look at the RICO charge.

Section 4—The RICO charge

The most important difference between the two cases is that the Georgia indictment is focused on a RICO crime. “RICO” refers to the Racketeer Influenced and Corrupt Organizations Act. The Georgia indictment charges Trump with violation of the Georgia RICO statute. His co-conspirators, the named 18 additional defendants, are also charged with violation of the Georgia RICO statute. As I already mentioned, there are also unnamed individuals in the Georgia indictment who are also potential co-conspirators and who may also ultimately become defendants. The charge of a RICO violation calls for a very different type of trial. I tried only one RICO case in my career as a trial lawyer and it was a trial unlike any other case. Let me explain why the RICO charge is so important.

The RICO charge in Georgia presents a heightened risk to Trump because of the nature of a RICO case. A RICO case allows the prosecution to charge various crimes committed by different people by establishing that they formed an enterprise. An enterprise demonstrates that the group of individuals decided to act together in order to achieve a goal that involves commission of a crime or crimes. The prosecution may present evidence to connect a series of crimes that have a relationship with each other based upon common objectives.

A RICO enterprise is similar to a conspiracy, but it allows for a series of conspiracies, like a conspiracy on steroids. It allows for one conspiracy to piggyback upon another conspiracy. For example, the Georgia indictment describes the effort to enlist alternate electors to sign false voting certificates. It also refers to an organized effort to tamper with voting machines in multiple locations. These activities are both associated with the criminal enterprise.

The presentation of the evidence in the Georgia RICO trial can include repeating any evidence that the DOJ presents in its federal trial on its indictment. The Georgia RICO statute opens a wide door because it defines racketeering in an extremely broad manner. It includes offenses that do not usually result in criminal charges.

The Georgia indictment, for example, has charges for perjury regarding testimony presented to the Grand Jury. It also has charges for impersonating a police officer, forgery, filing false documents, improperly influencing witnesses, computer theft and computer trespass, election fraud, invasion of privacy and defrauding the State of Georgia. This indictment not only refers to the alternate electors in Georgia but to the alternate electors in the other battleground states. It, therefore, goes beyond crimes committed in Fulton County and also includes crimes committed elsewhere in Georgia (in Coffee County, for instance) and in other states (like Michigan and Pennsylvania).

The indictment in the Georgia case has 41 counts. As I already mentioned, count 1 is the RICO count which refers to events that occurred between November 4, 2020, and September 15, 2022. The racketeering activity of the enterprise was the implementation of a plan to change the outcome of the 2020 presidential election. All 19 defendants are alleged to have been involved in the racketeering activity or in the conspiracy to implement the plans of the enterprise.

The explosion of the RICO bomb covers a much larger geographical area than the federal indictment and involves many more persons. Testimony concerning the RICO charge alone may include the 161 acts recited in the Georgia indictment (some of the acts having several sub-actions). This will be a long trial. And this is just the RICO charge. There are 40 other charges in

the Georgia indictment that may require additional testimony, though most of the testimony will be included within the RICO phase of the trial.

In the RICO case I tried, there were five defendants with four lawyers representing them. To get ready for the trial, you had not only to prepare your client to testify, but you had to consider the potential testimony of the other defendants. With five co-conspirators, there could be five different versions of the facts. Some might support your client's version, and some might contradict it. The crosscurrents of five defendants, each wanting to protect himself, with each considering potentially seeking immunity or a plea deal for testifying against the others, is very challenging.

Bear in mind that, with multiple defendants in the Georgia trial, every witness may be subject to cross-examination by multiple lawyers (for other defendants and the prosecuting attorney). In addition, every defendant is also potentially a witness for the prosecution. In a RICO trial, your potential "teammates" may be the witnesses whose testimony leads to your conviction. Every defendant will be concerned with their own risk of being found to be guilty and will have to consider whether they want to enter into a plea deal rather than proceed with the trial.

Section 5 –Defendants Chesebro and Powell in the Georgia case.

I discuss Kenneth Chesebro in several sections in *The Judge and the President*.⁴ He wrote two memos at the beginning stages of the criminal enterprise outlined in the Georgia indictment. After writing those two memos, he remained active in subsequent events. Here is one of the acts in the Georgia indictment:

Act 61:

"On or about the 11th day of December 2020, KENNETH JOHN CHESEBRO sent an e-mail with attached documents to MICHAEL A. ROMAN, unindicted co-conspirator Individual 5, whose identity is known to the Grand Jury, and others. The documents were to be used by Trump presidential elector nominees in Georgia for the purpose of casting electoral votes for DONALD JOHN TRUMP on December 14, 2020, despite the fact that DONALD JOHN TRUMP lost the November 3, 2020, presidential election in Georgia. This was an overt act in furtherance of the conspiracy."

This act involving Trump's alternate electors in Georgia and several other acts prove that the Trump Campaign orchestrated the alternate elector program. The setting up of the slates of the alternate electors in the seven battleground states was an organized event. They, the alternate electors, while acting independently in their respective state capitols, were acting jointly in the criminal enterprise. Many of the Georgia alternate electors have accepted immunity, presumably in exchange for their testimony in the trial.⁵

In the context of the RICO trial, the prosecutor may present testimony from many alternate electors from several or all of the battleground states. There are 84 alternate electors from seven battleground states who are potential witnesses.

It is known that members of the Trump team lied to some of the alternate electors urging the alternate elector candidates to sign the false certificates and to send them to the National Archivist, the Congress, and other officials. Signing the false certificates and filing them with the appropriate authorities as though they were genuine (and the signatories were the true electors)

is the criminal enterprise in action, and the evidence of the commission of this crime will be compelling.

In the Georgia indictment, the activities of Chesebro in the formulation of the strategy of the criminal enterprise and its implementation are detailed. Chesebro is charged in seven counts of the indictment. I anticipate that much of the testimony in Chesebro's trial will relate to the efforts to avoid the peaceful transfer of power after the 2020 election. It could start with the memoranda that he prepared concerning initially the election in Wisconsin and continue with the efforts to pressure Vice President Michael Pence, the January 6 riot and many other activities of the enterprise.

In messages and memoranda relating to Chesebro's activities, he acknowledges that the program he is suggesting represents a "bold controversial strategy." He mentions that the legal rules could make assembling alternate slates "very problematic" in Nevada and "somewhat dicey" in Michigan and Pennsylvania. Without the cover of first presenting his theory in a case filed in the Supreme Court, Chesebro admits that the strategy could appear "treasonous".

In addition, I do not believe that Chesebro's potential defense that he was acting in accordance with his honest and forthright interpretation of the Constitution and election law will be credible. As an experienced attorney, he knows the difference between giving legal advice based on what the law is, rather than a theory about what the law should be. He knows the difference, and his opinion about what the law should be does not justify claiming that his statement of what the law is represents an accurate description of the law.

There are two additional reasons why his testimony will not be credible. He was at the Capitol during the riot on January 6, 2021, and he was not there to help protect the Capitol. In addition, he may have performed his legal services on a pro bono basis (he did not collect a fee). This will give him the appearance of being a zealot rather than a lawyer performing legal services as a typical practicing lawyer. His advice, and his actions based upon his questionable legal theories, will not be convincing.

Sidney Powell is another lawyer associated with the Trump effort to overturn the results of the election. She is charged in seven counts. Here is an example, according to the Georgia indictment, of her role in an important part of the efforts of the criminal enterprise.

Act 90:

"On or about the 18th day of December 2020, DONALD JOHN TRUMP met with RUDOLPH WILLIAM LOUIS GIULIANI, SIDNEY KATHERINE POWELL, unindicted co-conspirator Individual 20, whose identity is known to the Grand Jury, and others in the White House. The individuals present at the meeting discussed certain strategies and theories intended to influence the outcome of the November 3, 2020, presidential election, including seizing voting equipment and appointing SIDNEY KATHERINE POWELL, as special counsel with broad authority to investigate allegations of voter fraud in Georgia and elsewhere. This was an act in furtherance of the conspiracy."

Act 91:

"On or about the 21st day of December 2020, SIDNEY KATHERINE POWELL sent an e-mail to the Chief Operations Officer of SullivanStricker LLC and instructed him that she and unindicted co-conspirators Individual 6, Individual 21, and Individual 22, whose identities are known to the Grand Jury, were to immediately 'receive a copy of all data' obtained by SullivanStricker LLC from Dominion Voting Systems in Michigan. This was an overt act in furtherance of the conspiracy."

The case against Sidney Powell is especially strong, and I view her as a likely candidate ultimately to plead guilty. SullivanStricker is a forensics data firm in Fulton County, Georgia. Sidney Powell on December 6, 2020, signed the contract with them to analyze the voting tabulations in several states. On January 7, 2021, SullivanStricker was given access to the voting machines and copies of voting data from the election system in Coffee County, Georgia. There is surveillance footage showing entry by their representatives into the elections office where the data breach took place.

Other Acts in the Georgia indictment, like this data breach in Coffee County, relate to the distribution of voting data. This might include how individual voters voted in what is supposed to be a private act. This is obviously an invasion of privacy and is clearly a criminal act (conspiracy to commit computer invasion of privacy). In addition to the RICO count, Powell has also been charged with conspiracy to commit election fraud, conspiracy to commit computer trespass, conspiracy to commit computer theft, and conspiracy to defraud the state. The prosecution is likely to be able to prove all of these crimes. They are all clear violations of Georgia law. And, as Act 91 declares, Coffee County is not the only place where Sidney Powell was involved in election tampering.

Powell was authorized by Trump himself and Rudy Giuliani to commit these crimes. In Act 159 in the Georgia indictment, Powell is charged with making false statements on May 7, 2022, to the January 6 Committee (the Committee in the House of Representatives that investigated the January 6 riot). She testified “that she ‘didn’t’ have any role in really setting up ‘efforts to access voting machines in Coffee County, Georgia or Antrim, Michigan.’” She also testified: “She was aware there was an ‘effort by some people’ to get access to voting machines in Georgia but that she did not ‘know what happened with that’ and did not ‘remember whether that was Rudy or other folks.’”

Yet, Powell signed the contract with SullivanStricker, and she met with Rudy Giuliani and Donald Trump in the White House to plan for the breach of the voting machines. This example illustrates why the RICO count allows for a broad approach to offering testimony about multiple events that are related to the enterprise. As part of the enterprise’s criminal acts, Powell made the false statements mentioned in the prior paragraph.

Powell may testify in an effort to explain why she participated in these acts or why these acts should not be considered to be crimes. This defense will be unconvincing. She is likely to be convicted of the crimes and to be potentially sentenced to serve time in prison. Trump, even if he is elected to another term as the president, will not be able to pardon her for these violations of the Georgia statutes. The “Individuals” named in Acts 90 and 91 will probably be witnesses in her trial. Powell may be called as a witness in the trials of the other co-conspirators.⁶

Section 6—Pretrial motions

Before the trials begin, there will be pre-trial motions filed by the defendants raising legal issues about whether there was a crime, challenging the legal basis for the indictment, and other preliminary legal issues that should be resolved before there is a trial. The prosecutors are also likely to file pretrial motions. The issues raised in the pretrial motions will be resolved at the trial court level. There usually is no appeal from the trial court decision on these issues before the trial. There will then be a trial.

Chesebro and Powell filed pretrial motions for a speedy trial in the Georgia case. The potential trial date for them in a joint trial is October 23, 2023. Some of the other defendants may also request a speedy trial, though the time period for doing so will expire 30 days after their arraignment. Judge Scott McAfee, the judge in the Georgia trial, has stated that, if their requests for a speedy trial are timely, the defendants will join Chesebro and Powell in the first trial.⁷

One of the factors in wanting to be either in the first trial or a later trial may be financial. The financial strain of a long trial may be the deciding factor for whether a defendant prefers to be in the first or the second (or there is likely to be a third or fourth) trial. Whether it is desirable to be in the same trial as Trump could be both a financial and a tactical issue.

Bear in mind that most defendants will want to be present during their trials in order to let the jury get to know them and to appreciate the importance to them of the outcome of the trial. They will, therefore, lose income that they would have earned had they not been sitting through the trial. Moreover, the legal fees for a four-month trial could be in the area of \$500,000. That will definitely be a factor for some of the defendants in deciding whether they want to be in the first trial or a later trial. It may even induce them to cooperate with the prosecutors and become a witness in exchange for a plea deal.

There will be some pressure on the prosecutors in the first trial to achieve a good result. If the first trial does not result in a conviction or convictions, it will create a problem for the following trials and it will affect how other defendants decide whether they want to plead guilty. The results of the first trial could also affect the testimony in the later trials. In addition, the first trial, which may last as long as four months, may still be shorter than the second trial.

One of the advantages of waiting for the second trial is that the defendants will have a clearer picture of the prosecution's case. Also, witnesses who appear in both trials may be cross-examined in the second trial based on their testimony in the first trial. These witnesses, however, may be more nervous in the first trial and may be better prepared for the second and third time that they testify. But there are likely to be more witnesses in the trial involving Trump than in the first trial, and the probability of defendants and unindicted individuals being persuaded to testify is greater in the later trials than in the first trial.

Mark Meadows, Jeffrey Clark, and some of the alternate electors have filed motions in federal court in an effort to move the case against them from state court to federal court. They might prefer federal court because the jury pool will be wider than in state court. Also, there may be other advantages to federal court from the perspective of the procedural rules and the pool of prospective judges.

Meadow's effort to move his case to federal court was unsuccessful at the District Court level and before the Court of Appeals. Clark has a slightly different argument to be in federal court based upon what his activates were compared to those of Meadows, but I do not think that his case is likely to be transferred to federal court.⁸ Finally, the alternate electors have a weaker case to be in federal court than both Meadows and Clark. Their selection as an elector is the subject of state law rather than federal law, even though it is a federal election.

Trump's lawyers have notified the Georgia court that they do not intend to move his trial to federal court. There are several possible reasons why Trump has decided not to proceed to attempt to transfer his case to federal court. He may prefer Judge McAfee, who appears to be quite fair in his handling of the case, rather than the federal judges. He may prefer to be in a trial that is televised. The federal trial might be scheduled earlier than the Georgia trial. Trump would

have to testify in federal court in support of the motion. The motion to transfer the trial to federal court is likely to be denied.

Section 7—Trump’s defense.

Here is my first question about the defense to be asserted by Trump. Can Trump’s defense be that he believes and always believed, that there was election fraud (even though he could not prove it) and that he in fact won the election? To assert this defense, it would probably be necessary for Trump to be a witness at the trial. I do not expect that he will be a witness, so I conclude that he will be unable to prevail with this defense based upon what he believed was true. This is a defense that cannot be easily established without him testifying.

Moreover, to assert the defense of Trump not being able to accept that he lost the election is to invent a variant of a mental impairment defense. He was told many times that there was no outcome-determinative fraud in the election. Trump maintains that he is a “stable genius,” and he has declared that he is so on many occasions. He would not allow his attorneys to offer a form of mental deficiency defense.

Did Trump know that he lost the election? On January 3, 2021, Trump met with the Chairman of the Joint Chiefs of Staff and others. When he was told that inauguration day was only 17 days away, Trump said: “Yeah, you are right, it’s too late for us. We’re going to give that to the other guy.”

I do not anticipate that whether there was fraud in the election will be a major issue in the trials as distinct from offering statements made by the defendants and others claiming specific fraudulent acts. No other candidates in the 2020 election are contending that they lost the election because there was fraud. When Trump claimed that there was fraud, and local officials were asked if there was fraud, the local election officials generally responded that they did not know of any significant fraud.

The strength of the electoral system in the U.S. is that it is locally controlled. Most of the election officials in Republican controlled states are Republicans. Virtually none of them have maintained that their local election was fraudulent. In fact, as I have already mentioned, the indictment raises the issue of whether the individuals who agreed to be alternate electors in the battleground states were lied to in order to induce them to become electors. Many of them did not believe that there was provable fraud in the election.

Many of Trump’s supporters are claiming that Trump cannot be convicted of these crimes because he has the right of freedom of speech. This defense is not likely to be successful because, as the indictments state, he is not being charged with having claimed either that there was fraud in the election or that he was the winner in the election. He is being charged with having committed criminal acts in furtherance of his claims of election fraud. It is not what he said that is the crime, but what he did to prevent the peaceful transfer of power after the election.

It is an important aspect of the charges in the two indictments that there is an element of fraud on the part of Trump that is being charged. The claim that the election was fraudulent, while knowing that there is no credible proof of sufficient fraudulent voter activity to have affected the outcome of the election, is itself a false and, therefore, a fraudulent statement.

Trump and the co-conspirators tried to get the Department of Justice involved in a sham investigation of their election fraud claim. A letter was drafted by Jeffrey Clark, a lawyer working

in the DOJ, that could be sent from the DOJ to state legislators claiming that the DOJ had discovered election fraud in their state. The letter was never sent, but the act of drafting the letter was an act in furtherance of the conspiracy.

The conspiracy also included the pressuring of Vice President Pence to undertake various acts to overturn the election results or to delay the counting of the votes. I discuss these strategies in *The Judge and the President* when I review the memos written by Ken Chesebro and John Eastman. The pressure on Vice President Pence was asserted prior to and during the riot. The riot itself was the result of Trump's incitement of the January 6 invasion of the Capitol in an effort to halt the counting of the electoral college votes. The indictments present what I call "The Pence Card" as culminating in the January 6 mob attacking the Capitol when "the Defendant attempted to use a crowd of supporters that had gathered in Washington, D.C. to pressure the Vice President to fraudulently alter the election results."⁹

Section 8—The alternate electors

The alternate electors claiming to be the duly elected electors and signing certificates stating such is a fraudulent act. The Georgia indictment frames their actions as having been the result of yet another fraud. This fraud is based upon the claims made by Trump and his co-conspirators that the certificates would be used only if Trump prevailed in his lawsuits claiming election fraud in their state.

There was, for example, a conference call on December 12, 2020, to the Pennsylvania Republican potential electors. Biden had won the election in Pennsylvania. Rudy Giuliani told the alternate electors that the certificates of the alternate electors were to be used only on a contingency basis. The elector certificates would be submitted to the Congress only if Trump prevailed in his litigation contesting the result of the election in Pennsylvania.

The Pennsylvania alternate electors requested an opinion letter from a national law firm that they could sign the false certificate. They also requested that the opinion letter be certified to be accurate by a Pennsylvania lawyer. They received, instead, a memo from Kenneth Chesebro, one of the unnamed co-conspirators in the DOJ indictment and a defendant in the Georgia indictment, stating that the plan in Pennsylvania is "dicey". It was this response that led to the Pennsylvania certificate being modified with insertion of a disclaimer. The alternate electors in Pennsylvania agreed to proceed only if language constituting a disclaimer was inserted in the certificate. But they were cautioned to not inform alternate electors in other states about this modification in the certificate.

Of the seven battleground states, only in Pennsylvania and New Mexico was the disclaimer included in the certificates. In the five other battleground states, including Georgia, this limitation in the certificates was absent. The certificates in these five states proclaimed that the signatories were the legitimate electors, and they used the exact same language that was in the authentic certificates.

Trump, Giuliani, and others misled these Republican alternate electors in the five battleground states other than Pennsylvania and New Mexico. The 16 Republican electors in Michigan have been charged in a separate Michigan case with defrauding the State of Michigan. Their defense will probably be that they were lied to by Trump and his co-conspirators.

As I mentioned above, defense attorneys for the alternate electors in Georgia stated in a court filing in May 2023, that at least eight of the 16 alternate electors in Georgia accepted immunity in the Georgia potential litigation. It appears, therefore, that this will be an element in the Georgia litigation based upon the Georgia indictment. Only three of the 16 Georgia alternate electors are indicted co-conspirators.

Regarding the alternate electors, it does not appear that the Department of Justice has finished its investigation concerning them. A new batch of subpoenas has been served in multiple states. It is possible that some of the alternate electors will be witnesses in the trial on these indictments or that new indictments will be issued.

Section 9—The advice of counsel defense.

Trump's best defense is that he was acting on advice of counsel. It appears that the prosecutors are anticipating this defense. In the DOJ indictment, six individuals are depicted as co-conspirators. They are not identified in the indictment. The only defendant in the indictment is Trump. By not including other defendants, the prosecution is keeping Trump as the central figure in the trial. The trial will be a shorter trial than the trial in Georgia, with just one defendant, and it will be easier to present the evidence without having to contend with issues other than the crimes committed by Trump.

Trump is the central figure in each of the charges. It is ultimately his plan to overturn the results of the election that is driving the events forward. Trump admitted in an interview with Kristen Welker on September 17, 2023, in response to a question about legal exposure, that it was his decision that the election was fraudulent. He was not acting on the advice of his attorneys to challenge the 2020 election results. But he qualified this response by saying that he was listening to some people who said that there was fraud in the election. He also said in this interview that he demanded that the counting of the votes should be stopped. This constitutes the admission of a crime, and it is admissible in the two trials that I am discussing.

As a result of the admission that he was acting on his own reasoning and not on the advice of his attorneys, the legal advice defense will not be successful. Trump may have made this admission in anticipation of some of the attorneys testifying that they told him that taking the actions he was contemplating could be criminal acts that should be avoided. They could so testify in order to diminish their guilt for their involvement in the criminal enterprise. Trump is preempting their testimony by making it clear that he did not rely on their advice. Therefore, Trump is signaling to them that they do not have to testify that they advised him that he may be committing a crime because he has already declared that he did not act based upon their advice, and he made his own decision.

Consequently, Trump by this admission may be abandoning the defense of reliance upon the advice of legal counsel. He will be left with his defenses of the right of freedom of speech, that he did not commit any crimes, and that he has some form of immunity or executive privilege since these acts primarily occurred while he was still the President. Trump's attorney, John Lauro, stated that his client, Trump, was not trying to stop the electoral college votes being counted but only trying to delay the counting. This admission may result in a guilty verdict since delaying the count would be a criminal act. This then leads us to the role of the attorneys in these cases.

Section 10—The role of the attorneys.

The trials will focus on the activities of Trump’s lawyers to spread the lie that the election was fraudulent, their attempts to get states to not certify the election results, their promoting the program for alternate electors, their putting pressure on Vice President Pence to take the actions proposed by John Eastman and Ken Chesebro in their memos, and, ultimately, the riot that occurred on January 6.

Five of the six co-conspirators in the federal case are attorneys (the sixth one, identified as a campaign official, may also be an attorney). There is a consensus among the journalists about the identity of the first five co-conspirators. We have already met some of these individuals in this discussion.

Kenneth Chesebro is one of the two attorneys who wrote influential memos related to the legal theories that called for the events described in the two indictments. He is probably Co-conspirator 5 in the federal case. He is described as an attorney who devised and implemented the plan of the alternate electors (8e of the DOJ indictment). He wrote and circulated two memos (54). He participated in a telephone call with the alternate electors in Pennsylvania (61). On December 13, 2020, he was involved in an email message that they would use the certificates signed by the alternate electors even if the litigation challenging the results of the election in a particular state was not successful (62). Chesebro is a defendant in the Georgia case.

The reasoning in the Chesebro memos was adopted and expanded upon in John Eastman’s two memos. He is probably Co-conspirator 2 in the federal case, who is described as an attorney who devised the scheme to and attempted to get Vice President Mike Pence to obstruct the certification of the electors (8b). He called officials in Arizona on January 4, 2021, to request that the legislature decertify the legitimate electors who had already voted for Biden. When that request was denied, he said that he “didn’t know enough about facts on the ground,” but that they should decertify and “let the courts sort it out” (18). In another meeting concerning the Arizona election, Eastman made false statements of fraudulent activities and again requested that the legitimate electors be decertified (21).

Eastman was also involved in some of the lawsuits claiming that there was fraud in the election. He filed a lawsuit in Georgia claiming election fraud when he had been informed by the Georgia officials that they found no evidence of such fraud (30). Eastman participated in the call with the chairwoman of the national Republican Party requesting her help in finding potential alternate electors who would be activated only if the lawsuit in their state was successful (34). He wrote and circulated his first memo claiming that the vice president had the authority to overturn the results in the election even though he had earlier stated that there was no such authority (88).

There was also a second memo written by Eastman and circulated in early January 2021, again claiming that the vice president had the authority to overturn the results of the election ((91). He spoke to the crowd in the rally before the riot on January 6, 2021, once again claiming fraud in the election (102). Later, on the same date, Eastman sent an email to the Vice President’s counsel requesting that the Vice President commit a “relatively minor violation [of the Electoral Count Act] and adjourn for 10 days to allow the legislatures to finish their investigations, as well as to allow a full forensics audit of the massive amount of illegal activity that has occurred there” (122). Eastman is a defendant in the Georgia case.

The best known of Trump's attorneys and the most active in public appearances claiming election fraud is Rudy Giuliani. He is probably Co-conspirator 1, who is described as an attorney who spread the lies (8a). He admitted to the Arizona officials that they had no evidence of fraud, but they had theories (16). He appeared in a subcommittee meeting in Georgia and requested that the voting of the legitimate electors be blocked when he made false claims of election fraud (21). He mischaracterized a video of election workers claiming that they were committing fraud (26). In a separate lawsuit, these workers sued Giuliani for libel, and judgment was entered in their favor.

Giuliani sent a text message to Michigan officials requesting that they schedule hearings because of the election fraud there (38). He claimed that the results of the election are in dispute, and that the legitimate electors are not the legal electors (39). Shortly after the election, Giuliani participated in a meeting with state legislators in Gettysburg, Pennsylvania, at which he falsely claimed that there was fraud in the election in Pennsylvania (43). He lied to the Pennsylvania electors when he told them that the false certificates would be filed only if the litigation claiming election fraud was successful (61). He and Chesebro decided to file the false certificates even though the lawsuits were unsuccessful (62).

Like Eastman, Giuliani spoke at the rally before the riot on January 6 (103). During the riot, he called legislators and tried to delay the counting of the votes (119). Giuliani was obviously a very active participant in many of the efforts to overturn the results of the election.

Giuliani is also a defendant in the Georgia case. He is apparently under extreme financial difficulty. His residence has been listed for sale. He is being sued by his former attorneys. He is a prime candidate for a guilty plea, and a favorable sentence in exchange for testifying against Trump, as Michael Cohen, another former Trump attorney did.

Co-conspirator 3 is probably Sidney Powell, who is an attorney who was active in the litigation claiming election fraud. In the DOJ indictment, she is described as an attorney who Trump embraced, and he publicly amplified her claim of election fraud, even though he called her "crazy" (8c). She made false claims about voter fraud in Georgia, which claims she repeated in a losing lawsuit (30). I have already discussed her activities related to the voting machines.

She is also a defendant in the Georgia case. In the Georgia trial, she, along with Ken Chesebro, has filed for a speedy trial and their trial will commence in October 2023. I have predicted that she will be found to be guilty or will negotiate a plea deal and testify for the prosecution.

The most likely candidate for Co-conspirator 4 is Jeffrey Clark. He is described as a Department of Justice official (he is also an attorney) who attempted to get the Department of Justice to open sham crime investigations and influence state legislators "with knowingly false claims of election fraud" (8d). He is also a defendant in the Georgia case.

Co-conspirator 6 is described as a political consultant who helped implement the plan of the alternate electors (8f). There is speculation about who this might be. It is likely that he is either one of the indicted co-conspirators in the Georgia case or one of the unnamed individuals who are mentioned as "Individuals" in the Georgia indictment.

One of the questions presented in these cases is similar to a question raised at the time of the Watergate burglary. Why were so many attorneys involved in the coverup along with Richard Nixon? I once wrote an article with a co-author about the incidence of lying among attorneys in obtaining divorces in Pennsylvania before no-fault divorces were permitted in 1973.¹⁰

It is clear that there needs to be more emphasis on the teaching of the ethical standards that apply to attorneys as part of a legal education.

Section 11—Evidence at the trials.

Based upon the format of the DOJ indictment, we should consider why it refers to six individuals as co-conspirators and what will their role in the trial be. The co-conspirators are not indicted, but they are also not described as unindicted co-conspirators. It is possible that they will be indicted. Does the prosecution in the federal trial intend to call them as witnesses? If they are not called by the prosecution, will the defense call them?

It is quite possible, and maybe even likely, that one or more of the co-conspirators is going to receive, or has received, immunity from prosecution for agreeing voluntarily to testify for the prosecution. If this is the case, they could state that Trump knew that he had lost the election and that his efforts after the election were directed toward overturning the results of the election.

In addition to the allegations in section 10 above which are in the DOJ indictment, here are some additional examples of what the prosecutors might offer into evidence in the various trials. Trump declared that 36,000 non-citizens had voted in Arizona. He claimed that election workers in Detroit had counted phony ballots. He repeated these claims in meetings with the Michigan Speaker of the House and Minority Leader of the Michigan Senate.

Trump also claimed that the vote count in Philadelphia, Pennsylvania was fraudulent. As a result of these false claims, Al Schmidt, the Philadelphia City Commissioner, and his family later received death threats.

Trump, at the rally on January 6, notwithstanding the caution being exercised by the Pennsylvania legislature, mischaracterizes their response: “After the Defendant falsely stated that the Pennsylvania legislature wanted ‘to recertify their votes. They want to recertify. But the only way that can happen is if Mike Pence agrees to send it back.’ The crowd began to shout, ‘Send it back.’”¹¹

Giuliani could be called as a witness in either trial or asked what his source were for making the statement that dead people had voted in Georgia. There were several meetings that Giuliani attended with Republican leaders in Pennsylvania during which he, according to the Georgia indictment, “falsely claimed that Pennsylvania had issued 1.8 million absentee ballots and received 2.5 million in return.” He was told that this was not true, but he continued to repeat the false claim. On December 31 and January 3, Trump claimed that there were 250,000 more votes than voters in Pennsylvania. The DOJ informed him that this was not true, but he repeated the claim on January 6.

As I already mentioned, the impact of the expenses involved in defending themselves will ultimately result in some of these defendants testifying for the prosecution. The financial pressure on the defendants is a factor in these cases that is often ignored by commentators.

I also already mentioned that Sidney Powell claimed that there was fraud in the Georgia election and repeated her claims in an unsuccessful lawsuit. Trump signed the verification for the lawsuit swearing that the facts alleged in the lawsuit were true, even though he knew that they were not.

Trump’s attorney, John Lauro, stated on the night of the arraignment in a television interview that Trump was attempting only to delay the certification. This he claimed would be an

effective defense. In fact, since he is Trump's attorney, this statement could be introduced into evidence even if Trump does not testify. It is proof of Trump's intention to delay the certification of the electoral college vote, which is a criminal offense.

There can be little doubt that the counting of the electoral college votes is an official function. In accordance with constitutional and statutory norms, the counting of the votes was scheduled for January 6. Undoubtedly, the prosecution will put into evidence the videos of the riot that occurred on January 6.

I am being kind by calling it a riot. It could also be described as an insurrection. But and this is very important, Trump is not being charged with causing an insurrection. If he were so charged and convicted of this offense, his ability to run as a candidate in the 2024 election would be questionable. This is based upon the language of the Fourteenth Amendment to the U.S. Constitution. The January 6 Committee in its report referred various crimes to the Department of Justice to be considered for prosecution. The two indictments in the federal case and the Georgia case do not accept that recommendation regarding this specific crime of inciting an insurrection.

Section 12—Timing of the federal trial.

I discuss in *The Judge and the President* the difficulty of obtaining jury verdicts to convict white supremacists of murder in the lynching of African Americans. Juries in the South would usually not convict the white male defendants and white males were the jurors in these cases (this is called jury nullification). Now, Trump will be before a jury of his peers in the District of Columbia, a jury that almost certainly will include African American jurors. My guestimate is that the trial in Washington, D.C. based on the federal indictment will be a six to eight weeks trial. It is likely to occur sometime in 2024, though Trump has requested that it be delayed until 2025.

It is also ironic that the star witness at the federal trial is likely to be former Vice President Mike Pence. Pence is the unlikely hero of this tragedy. For the 48 months of the Trump presidency, Pence was like a lap dog sleeping on the sofa in the oval office during important meetings. He was in the room, but he was irrelevant. For the 30 months after the riot, Pence, ignoring the threat to himself and his family, did not condemn the events of January 6.

Now, he is talking at last. He did not testify before the January 6 Committee, and he did not disclose that he had contemporaneous notes prepared during and immediately after his meetings and discussions with Trump. It is important that they were contemporaneous because that will ensure that they will be able to be introduced at the trial as an exception to the hearsay rules. Pence will, when the federal trial is over, have been the star witness.

Section 13—The federal court trial

After reading the indictments and being familiar with the evidence gathered by the January 6 Committee, some of which will be part of the record in this case, it appears very possible that Trump will be convicted by a District of Columbia jury. Bear in mind that it is difficult to predict jury verdicts. Also, the jury has to reach a unanimous verdict. It will only take one recalcitrant juror to avoid a conviction. But the January 6 defendants have been convicted and, from the point of view of ultimate responsibility, Trump is more guilty than they are.

If the jury cannot reach a unanimous decision, there may be no verdict from the jury. As I already mentioned, and I want to repeat the statement, it takes only one reclaimant juror, one holdout from a conviction, to have a hung jury. In that event, the prosecutor will have to decide if there will be a retrial. I think that a retrial is unlikely.

If the jury decides that Trump is not guilty, the case is over. There cannot be an appeal. Trump is innocent, and the trial is just an historical event.

If Trump is convicted in the DOJ trial, there will undoubtedly be an appeal to the Court of Appeals. The Court of Appeals will rule on the legal issues raised in the pretrial motions and at the trial, such as whether the judge made an error in her charge to the jury. The conviction will be reversed only if there is an error at the trial or the judge erred in allowing the trial to proceed (for example, appellate review of her decision on a pretrial motion that no crime was committed). If the conviction is affirmed by the Court of Appeals, Trump will almost undoubtedly file a petition for writ of certiorari to the Supreme Court.

If Trump loses in the Court of Appeals, he will file a petition for writ of certiorari in SCOTUS (the Supreme Court of the United States), which may accept the case for review. It is very difficult without knowing what happens at the trial and on the appeal to predict whether the Supreme Court will hear the case. Four Justices have to vote to hear the case. In the typical case, it would be unlikely that the Supreme Court would grant the writ and decide the appeal. This is not, of course, the typical case. I think the likelihood of the case being accepted by SCOTUS is less than 50%.

I do not anticipate that there will be a decision by SCOTUS before the 2024 election. If that is true, and if Trump wins the 2024 presidential election, there is something else to consider. Pursuant to the policy of the DOJ, the case will not continue to be processed. It will most likely never reach a conclusion.

Section 14—Timing of the Georgia trial.

The Georgia trial, which will be in Atlanta, Georgia, will take four to six months. There will be multiple trials. The first trial is scheduled to commence on October 23, 2023. There will be at least one more trial or multiple additional trials. As of this writing, the dates for the subsequent trials are not known. Trump is not a participant in the first trial.

Section 15—The Georgia trials.

It is the distinct possibility, and even highly likely, that some of the indicted co-conspirators in the Georgia trial, and some of the “Individuals” who are not named but are known to the Grand Jury (and, therefore, to the prosecution), will be the key witnesses. I predict that a number of the indicted co-conspirators in the Georgia trial will plead guilty and will testify against the other participants in the enterprise. This is one of the reasons why the Georgia trial poses a higher risk to Trump than the Washington, D.C. trial.

Trump’s strongest potential defense is that he was acting pursuant to the advice of his lawyers. Some of these lawyers may eventually be the key witnesses in his RICO trial. And they may throw Trump under the bus, just as he would if it was advantageous to him to do so. The RICO trial sets the table for the sharks to feed on each other. Bear in mind that Trump is likely not

to be a witness, and the prosecution may not introduce into evidence Trump's admission that he was not relying on legal advice. The defendants who are lawyers may offer this admission at their trial.

Once again, if Trump is convicted in the Georgia trial, there will be an appeal through the Georgia judicial appellate system. If the Georgia Supreme Court confirms the conviction, Trump will, once again, file a petition for writ of certiorari to SCOTUS. I think the likelihood of that case, the appeal from the Georgia Supreme Court, being accepted is less than 15%.

One very important difference between the federal trial and the Georgia trial is that the Georgia trial may proceed to a final decision even if Trump wins the 2024 election. There is no legal basis for a hiatus in the Georgia proceedings even if Trump becomes the president.

Section 16—Television

One additional observation. It is unlikely that the trial based on the DOJ indictment will be televised. It is likely that the Georgia trial will be televised. It is difficult to speculate how this will affect the outcome of the two or more trials in Georgia. It will undoubtedly make the Georgia trials more significant than the DOJ trial regarding its impact on how the electoral system in the United States functions, and the future of the American experiment in maintaining a democracy.

Section 17—Trump's potential sentence

The judge on the federal case, Tanya Chutkan, has the reputation of being a no-nonsense judge. She has imposed stiff sentences on defendants convicted of participating in the January 6 riot. She has declared in one of her decisions that "Presidents are not kings." Many of the January 6 defendants have argued that they were only following the instructions of the President. Now, it is the former president who is on trial for having invited them to "stop the steal," or, perhaps, more accurately, implement the steal. If you are going to prosecute the rioters, which is ongoing, you should also pursue the organizers, the instigators, and the enablers. Judge Chutkan has denied the motion of Trump's attorneys that she recuse herself.

Section 18—Trump as a candidate in 2024

So, the next question you might ask is what impact, if any, would a jury conviction have on Trump's candidacy in the 2024 presidential election. Here are the things that you should understand about this issue. Trump is not the first president to have committed a crime. Richard Nixon also committed a crime, and his fate was resolved by a presidential pardon. Trump is the first former president to be tried for felony offenses after his term in office.

There have been other individuals who were charged with crimes and who were candidates for the presidency. So, convictions for the crimes in these indictments would not bar Trump from being a candidate. Suppose that he is convicted by one or more of the juries. There will undoubtedly be appeals. I anticipate that the appeals would not be resolved by the highest court in the land before the 2024 election. Trump could, then, be elected to be the next president.

If Trump is the next president, he could serve as such even while the Georgia case is pending during his presidency. In short, none of the 78 felonies that he is accused of having

committed would prevent him from being the president. In any event, in accordance with current DOJ policy, there will not be ongoing litigation against a sitting president in the federal case.

Section 19—The possibility of a pardon

It is also possible that Trump, if he becomes President Trump, will pardon himself. This has never happened (a president pardoning himself). If he did pardon himself, who could challenge it and how would it be challenged? These are interesting questions. He could also allow the Twenty-Fifth Amendment to be invoked, and his vice president could become the acting president, and he could pardon Trump. After being pardoned, Trump could resume being president.

If Trump is convicted, it is inconceivable to me that he would ever be sentenced to serve time in a prison. He is legally entitled to lifetime protection by the Secret Service. It would be impossible for them to perform this duty while he is in prison. He might be sentenced to house confinement.

The Georgia case, as I already mentioned, will not be subject to a similar delay as the federal case. The final decision regarding Trump will be made in 2025, and, if not then, almost certainly in 2026. Therefore, the risk to Trump is much greater in the Georgia case than in the federal case.

Section 20—The bottom line

Predicting jury verdicts is very difficult. It is, however, necessary because all preparations for trial and all discussions of the settlement of a case is ultimately based upon a prediction of what the jury will decide. Each defendant bases his decision of how he will ultimately plead and whether he will enter into a settlement based on his calculation of the probabilities associated with what the jury will do.

The DOJ case involves one defendant. It will be a shorter trial than the Georgia trial. But it may never come to a resolution because Trump may win the 2024 presidential election. It may never come to an end-of-the-road conclusion.

The Georgia trials are much more complicated, with 41 counts, including RICO, 19 defendants, and multiple trials. Each trial will be longer than the federal trial, with more documents and witnesses, multiple cross-examinations, and complexities associated with different counts applying to different defendants, blended into the multi-flavored individual milk shakes. And there may be no final resolution of Trump's fate with a final result in his case before Inauguration Day in 2025.

Here are the facts that will be the foundation of the jury's decision:

1. There was a riot on January 6, 2021.
2. There was a clear effort to delay the counting of the electoral college vote.
3. There was fraud in denying that Biden won the election.
4. The alternate electors were an organized effort.
5. The tampering with the election machines was an organized effort.
6. The effort to prove that the presidential election was fraudulent failed, and it is well established that it was a fair and honest election and Biden was the winner of the election.

7. Since Biden won the election, the efforts listed above to prevent him becoming the president were contrary to the law and some of the actions were criminal offenses.

The only credible interpretation of the Constitution is that the winner of the election becomes the president. If I say to you, “let’s race to the front door,” it is implicit in the concept of a race that the one who gets to the front door first is the winner. I do not have to say that getting there first means that you win. When the Founding Fathers decided that the president should be elected, they did not have to state that the person who receives the most votes would win the election. Since Trump and his supporters were not able to prove fraud, Biden won the election. No other result is logically conceivable.

While the Constitution does not mention the peaceful transfer of power, if there is an election, the winner of the election must become the president. The efforts to overturn the election cannot succeed, and they should never be repeated. Those who attempted to prevent the peaceful transfer of power should be penalized in order to ensure that their actions will never happen again. Ultimately, the law in order to be successful as an institution, has to be effective.

¹ Donald Trump’s first indictment is in the state courts in New York and concerns the payment of hush money to Stormy Daniels. It also raises Trump’s “catch and kill scheme” with the National Enquirer’s parent company. That involves payments to a second woman. The indictment also alleges payments were made to a Trump Tower doorman who had information about a child Trump fathered out of wedlock. Trump is charged with 34 felony counts for falsifying business records. The events giving rise to this offense occurred prior to the 2020 election.

The second indictment is in federal court, and it concerns Trump’s mishandling of classified documents, lying to federal authorities, displaying the documents to individuals who lacked security clearance, and attempting to destroy evidence. These events happened after his term as president had ended.

² The four counts in the DOJ indictment are as follows:

Count 1—Conspiracy to defraud the U.S., 18 U.S.C. Section 371. This Count is described in Sections 106 to 124 of the indictment. The riot on January 6 is described. Defendant Trump incited the riot and did not act timely to end it. He sent a tweet at 2:24 p.m. on January 6, 2021, when the riot was ongoing: “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our constitution giving States a chance to certify a correct set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth.” Trump had a phone call with the Minority Leader of the House, and he told him that the crowd was more upset about the election than he was. Lawmakers were asked to delay the certification of the votes of the Electoral College.

Count 2—Conspiracy to obstruct an official proceeding, 18 U.S.C. Section 1512(k). This Count is described in Sections 125 and 126. It also incorporates the averments in Count 1.

Count 3—Obstruction of and attempt to obstruct an official proceeding, 18 U.S.C. Section 1512(c)(21.2). This Count is described in Sections 127 and 128 and it incorporates the averments in Count 1.

Count 4—Conspiracy against rights, 18 U.S.C. Section 241. This Count is in Sections 129 and 130 and it incorporates the averments in Count 1.

³ Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act was adopted on March 20, 1980, and is in Georgia Code Section 16-14-1 (2022). The Georgia statute is based upon the federal statute, but it is much broader. Both the federal and the Georgia statute make it a crime to engage in a pattern of acts that will constitute a criminal enterprise. The federal statute requires multiple individuals, while the Georgia statute allows for a single individual to violate the statute by being engaged in a criminal enterprise. The list of underlying crimes in the Georgia statute is more extensive than those in the federal statute. Violation of the Georgia statute is a felony. Conviction in Georgia may involve a prison term of five to 20 years, and a fine of three times the amount of money gained from the criminal activity, or a fine of \$25,000, or both. Application of the statute has not been limited to organized

crime or street gangs. For example, it was applied to 35 educators in the Atlanta school system for a cheating scandal.

⁴ See sections 2.1, 3.7 and 3.11 in *The Judge and the President*. Chesebro wrote an initial memo concerning the election in Wisconsin. He then expanded the theory in that memo and applied it to additional battleground states (states in which the election was expected to be close). The ideas in these two memos were incorporated into the two memos written by John Eastman. Both Chesebro and Eastman were active in developing the slates of the alternate electors in the seven battleground states and in other aspects of the conspiracies to overturn the results of the election. Chesebro and Eastman were involved in emails with an unindicted co-conspirator, Boris Epshteyn (who was a political advisor to Trump) regarding the strategy of pressuring Vice President Mike Pence to overturn the results of the election on January 6, 2021.

⁵ There are 30 unnamed, unindicted co-conspirators in the Georgia indictment. It has been suggested that the alternate electors in Georgia are co-conspirators 2, and 8 to 19. The Georgia indictment alleges that they signed papers “unlawfully falsely holding themselves out as the duly elected and qualified presidential electors from the State of Georgia.” The other three of the 16 Georgia alternate electors are more actively involved and are indicted co-conspirators.

⁶ Let me expand upon why I predict that Sidney Powell will either plead that she is guilty or will be found to be guilty in the Georgia case (she has not been indicted in the federal case, though she could be during or after the Georgia case).

An article in CNN has stated that it is likely that Co-conspirator 6 (mentioned in Act 91 of the Georgia indictment) is Phil Waldron. He is described as being involved in the following events. He was at a meeting in the White House with a group of Pennsylvania legislators on November 25, 2020. Cassidy Hutchinson, an aide to Mark Meadows (Trump’s Chief of Staff), was also at the meeting and she testified before the January 6 committee and has written a book entitled *Enough*. She is likely to be a

witness in both Atlanta and Washington. Waldron received an email from Sidney Powell on December 21, 2020, that he (and Co-conspirators 21 and 22) would immediately “receive a copy of all data” from Dominion’s voting systems in Michigan. See Elizabeth Stuart, Jeremy Herb, and Zachary Cohen, “The identities behind the 30 unindicted co-conspirators in Trump’s Georgia case,” *CNN*, August 21, 2023.

It is not clear who is Co-conspirator 20 (mentioned in Act 90), though it is known that Trump and Giuliani met with Powell on December 18, 2020. There was a boisterous argument at that meeting according to two of Trump’s White House lawyers—Pat Cippalone and Eric Herschmann. They testified before the January 6 committee. *Ibid.*

Co-conspirators 21 and 22 (mentioned in Act 91) are Conan Hayes and Todd Sanders. They are affiliated with the “America Project,” a conservative advocacy group. This group contributed funding to Arizona’s Republican ballot audit. On December 21, 2020, Powell sent the email described above to Co-conspirators 6, 21 and 22. *Ibid.*

Powell not only helped coordinate, but she also funded, the access to various voting systems. There was tampering with voting systems in Coffee County, Georgia, Antrim County, Michigan, and Fulton County, Pennsylvania. There was also an election audit in Arizona. See Zachary Cohen and Paula Reid, “Special counsel election probe continues with focus on fundraising, voting equipment breaches,” *CNN*, September 5, 2023. The information unearthed by the special counsel of the DOJ, Jack Smith, will be available to the prosecutors in Georgia.

The funding of the breaches of the voting machines was by a non-profit corporation called “Defending the Republic,” which was controlled by Sidney Powell. In Fulton County, Pennsylvania, for example, there is a handwritten note about the agreement between the non-profit corporation and Pennsylvania officials for the financing of the breach of the voting machines. Doug Mastriano, a Pennsylvania state senator, was involved in this audit. He was a candidate for governor of Pennsylvania in 2022. As I discuss in *The Judge and the President*, if he won the gubernatorial election in Pennsylvania, he could have appointed the

Secretary of State in Pennsylvania and he would have controlled the certification process of the members of the Electoral College in Pennsylvania in the 2024 presidential election.

⁷ Georgia law provides for severance in criminal trials in GA Code, Section 17-8-4 (2020). Any defendant, if there are 2 or more, may elect to be separately tried. Jointly indicted defendants may testify for other jointly indicted defendants or on behalf of the State.

By case law, it is within the discretion of the trial court to try defendants jointly or separately when 2 or more defendants are indicted. Chesebro and Powell have filed, in addition to their motions for a speedy trial, motions to sever their trials from the rest of the defendants, including from each other. In deciding these motions, the court must consider three factors: (1) Will the number of defendants create confusion as to the law and evidence to be applied to each? (2) Does a danger exist that evidence admissible against one defendant might be considered against the other notwithstanding instructions to the contrary? and (3) Are the defenses antagonistic to each other or each other's rights?

At a hearing on September 14, 2023, Judge McAfee granted the motions of Chesebro and Powell for speedy trials. He denied their motions to sever their individual trials and ruled that they shall be jointly tried. They contended that each of them would be unfairly tainted by evidence concerning the other. They were involved in different aspects of the enterprise. Chesebro was directly involved with developing the alternate electors plan based upon his erroneous legal theories. Powell was directly involved in the breach of the voting machines. They never met each other, had no contact with each other, and were clearly involved in aspects of the enterprise that are not directly related.

Hence, the flexibility and risks associated with a RICO trial are evident. Just as defendants in California and Pennsylvania, who have never met each other and may not even have known of the other's existence may be both indicted for participation in a criminal RICO

enterprise, so Chesebro and Powell will be tried together. Moreover, their trial is severed from the trial of the other 17 indicted defendants.

In a Georgia RICO trial, there is no right to joint trial of coindictees. Severance may be denied if there is no clear showing of prejudice. In a RICO trial, all of the evidence is admissible against all of the defendants. See *Overton v. State*, 295 Ga.App. 223, 671 S.E.2d 507 (2008), *cert. denied*, No. SO9CO654, 2009 Ga. LEXIS 212 (Ga. 2009). This is the law even if one defendant chose to testify against the others.

The trial of Chesebro and Powell is scheduled for October 23, 2023. As of this writing, no trial dates have been set for the trials of the other 17 defendants in the Georgia RICO case. The pretrial motion of the prosecution to have the 17 defendants tried in this first trial was denied by Judge McAfee. Judge McAfee did set a pretrial motions deadline of December 1, 2023.

Judge McAfee also noted that additional divisions of the remaining 17 defendants may be required because of the logistical problems presented by so many defendants. There is no courtroom in Fulton County large enough for so many defendants to be in a single trial. These logistical issues will be resolved after the pretrial motions are decided.

⁸ Clark was in the environmental and natural resources division of the DOJ. He was charged with drafting a letter to be sent by the DOJ claiming that there was evidence of fraud in the election. Clark drafted the letter for Acting Attorney General Jeffrey Rosen to sign and to be sent to Georgia Governor Brian Kemp and to legislative leaders. The letter said that the DOJ had “identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia.” The letter was never signed or sent. Clark contended that drafting the letter was part of his official duties as a lawyer in the DOJ. Since the DOJ had not found fraud in the election, the letter was false. Drafting the letter is evidence of the criminal enterprise in action. The District Court will probably deny his request to be tried in federal court.

⁹ No. 86 in the Georgia indictment.

¹⁰ See Fair, Daryl R. and Moskowitz, David H., “The Lawyer’s Role: Watergate as Regularity Rather Than Aberration,” 2 *Journal of Contemporary Law* 75 (1975). In this article, we contend that the explanation for why so many lawyers were involved in the illegal activities that became known as Watergate was not an outlier but a common feature of our legal system.

We mailed a questionnaire to 427 lawyers. There were 127 responses and 91 of those responses were from lawyers who practiced divorce law. The responses included which ground for divorce was asserted in the cases each lawyer handled. Adultery was the claim in 17% of the cases. 95% of the cases were uncontested. 95% of the uncontested cases resulted in a divorce.

The lawyers responded that 60.4% of their clients lied to get their divorce. Only 21.1% of the cases were cases in which the lawyers thought their clients did not lie. In the contested cases, only 26.4% of the applicants were granted divorces. The lawyers thought that only 16.5% of the uncontested cases would have resulted in a divorce had they been contested cases.

The point of the preliminary study is that lying was common in divorce cases and the lawyers knew that it was. In other words, lying was part of the system, which was facilitated by lawyers and judges, who knew that the testimony was false.

¹¹ No. 104(b) in the Georgia indictment.