LEGISLATIVE REFORMS TO END LAWFARE BY STATE AND LOCAL PROSECUTORS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION AND LIMITED GOVERNMENT

OF THE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

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C O N T E N T S

TUESDAY, MARCH 4, 2025

OPENING STATEMENTS

WITNESSES

LETTERS, STATEMENTS, ETC. SUBMITTED FOR THE HEARING

LEGISLATIVE REFORMS TO END LAWFARE BY STATE AND LOCAL PROSECUTORS

Tuesday, March 4, 2025

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND LIMITED GOVERNMENT

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to notice, at 2:22 p.m., in Room 2141, Rayburn House Office Building, the Hon. Chip Roy [Chair of the Subcommittee] presiding.

Present: Representatives Roy, Jordan, McClintock, Massie, Hageman, Hunt, Grothman, Harris, Onder, Gill, Scanlon, Raskin, Cohen, Jayapal, Balint, Kamlager-Dove, and Goldman.

Mr. ROY. The Subcommittee will come to order.

Without objection, the Chair is authorized to declare a recess at any time.

We welcome everyone to today's hearing on Legislative Reforms To End Lawfare. I will now recognize myself for an opening statement.

Welcome. We are here today to discuss potential legislative reforms to end lawfare by State and local prosecutors. Rather than debating political opponents on substance, my colleagues on the other side of the aisle thought they could win the 2024 election through the use of partisan lawfare tactics.

Lawfare has been defined as, quote, "the strategic use of legal proceedings to intimidate or hinder an opponent." Lawfare violates the fundamental mission of prosecutors. A prosecutor's job is to do justice. As a former Assistant United States Attorney, I made it my duty to uphold the law with fairness on those I charged, making sure their civil liberties were kept intact. Additionally, when I was a prosecutor, I methodically ensured the cases that were brought before me would not fall to political pressure or succumb to outside influence, especially to score cheap political points. Every American deserves to have a justice system that is divorced from the political whims of elected officeholders, political parties, and personal vendettas.

In their political pursuit of President Trump, however, we saw State and local prosecutors abuse professional norms in favor of achieving indictments against their target. Prior to the 2024 election, President Trump was criminally indicted four times. Let's

take a quick look at the State and local lawsuits brought against President Trump.

First up, Fulton County. Georgia District Attorney Fani Willis' 41-count indictment against 19 defendants, which included President Trump, his attorneys, his former White House Chief of Staff, and a former Justice Department official. The politicized nature of this prosecution is hard to ignore. A mere four days before the indictment, DA Willis launched a campaign-fundraising website highlighting her investigation into President Trump. Though DA Willis' investigation was first reported in February 2021, it was not until President Trump announced his candidacy that she brought charges. Later, DA Willis requested that the trial begin on March 4, 2024, the day before Super Tuesday and just eight days before the Georgia Presidential primary.

To charge President Trump and his codefendants, DA Willis used a broad interpretation of Georgia's RICO law, which is intended to be used to prosecute criminal enterprises that infiltrate legitimate businesses and use interstate commerce. For background, RICO statutes are used to prosecute organized crime mob bosses, street gang leaders, and other crime syndicate heads, not typically elected officeholders on absurd charges.

Prior to indicting President Trump, she coordinated with Special Counsel Jack Smith and the partisan January 6th Committee. Her lead prosecutor, Nathan Wade, met with the Biden–Harris White House on multiple occasions.

Then, we have New York Attorney General Letitia James, who has made her disdain for President Trump well known. When she ran for New York Attorney General, she made many personal attacks against President Trump, calling him things like con man, carnival barker, and even an illegitimate President. As soon as she took office, AG James began investigating President Trump. In September 2022, she sued the President, alleging that he and his company had committed fraud to inflate the value of his properties.

Now, let's turn to Manhattan District Attorney Alvin Bragg, who indicted President Trump with 34 counts of falsifying business records which was tied to an unknown Federal crime which aggravated the charges to felonies. The Manhattan District Attorney's Office had been investigating President Trump since 2018, but it wasn't until after President Trump announced he was running for President in late 2022 that Bragg elected to resurrect the zombie case against President Trump.

Who did he bring on to help this politicized investigation? Bragg hired senior Biden–Harris Justice Department official, Michael Colangelo, to jump-start his office's investigation of President Trump, reportedly due to Colangelo's, quote, "history of taking on Donald J. Trump and his family business," while working for the New York Attorney General's Office.

One should be equally concerned if it were a Republican District Attorney engaging in this conduct toward a former Democrat President, Cabinet Secretary, or White House official.

These prosecutions are precisely what former Attorney General Robert Jackson warned us about. Attorney General Jackson warned about the most dangerous power of the prosecutor, quote,

> That he will pick people that he thinks he should get rather than pick cases that need to be prosecuted. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

That is precisely what we have here.

This is why Congress must address Democrats' lawfare efforts by popularly elected State and local prosecutors against Federal officials. In fact, many of my Democratic colleagues on this Committee are vocal proponents of a fair criminal justice system, calling an end to perceived needless instances of overzealous prosecution, wrongful arrest, and detention and limiting incarceration overall. What better way to achieve these goals than engaging in this hearing to uncover possible missteps by State and local justice systems and ushering legislation to rectify these glaring blind spots.

Current law does not adequately protect Federal officials from rogue State and local attorneys who stack unwarranted charges against their political opponents. Under current law, the option to remove civil or criminal cases from a State Court to a Federal Court is limited to Federal agency officials and legislative and judicial officers.

Our colleague on the Judiciary Committee, Congressman Fry, has a bill that would fix this problem. The Promptly Ending Political Prosecutions and Executive Retaliation Act of 2025 is designed to protect our Nation's leaders from lawfare tactics. This bill gives both current and former Presidents of either party, Vice Presidents, and Federal officials the ability to remove civil and criminal cases against them from a State Court to a Federal District Court. The bill also codifies the immunity recognized by the U.S. Supreme Court for official acts carried out by a Federal official.

This bill should not be misconstrued as a get-out-of-jail-free card. Far from it. It should be an opportunity for individuals to have a shot of nonpoliticized due process experience. Make no mistake. If a Federal official were to commit theft, fraud, assault, or other crime, they should be held accountable regardless of political party or policy views. This bill introduced should be welcome by both parties as no individual acting within their duties should be sought after because of whom they work for or their political leanings.

I'm looking forward to discussing that particular bill as well as the need for legislative fixes in this space today. I want to thank all our witnesses for being here today. We look forward to your testimony and the robust conversation on how we can move forward and fix this problem.

I now recognize the Ranking Member, Ms. Scanlon, for her opening statement.

Ms. SCANLON. Thank you.

I would like to welcome our witnesses here to the Subcommittee on the Constitution, but it's a little hard to do so when this Committee and apparently the entire House Majority seems to have lost their way and forgotten the basic terms of that Constitution. Instead of acting as a coequal branch of government as designed by our founding document, this House Majority is content to abdicate Congress' authority to make and fund laws to a would-be dictator and his billionaire tech bro.

Speaker Johnson and House Republicans have gone along with White House efforts to gut basic services that Americans rely on, whether at the VA, Social Security Administration, or the National Institute of Health, and they've teed up huge cuts to Medicaid, SNAP, and more, all so they can give more tax breaks to their billionaire buddies that will explode our national debt. Instead of lowering costs for American families, they've encouraged the President's tariff wars that are already driving up inflation and tanking the stock market.

The bills our House Republican colleagues are filing and bringing to the floor are an embarrassment. They're seemingly engaged in a contest of who can debase and subjugate themselves to the President the most, with measures like adding Trump's face to Mount Rushmore, designating his birthday as a national holiday, and printing $250 bills with his portrait on them, which brings us to the bill that forms the basis for today's hearing.

It's another attempt to refashion the rule of law to flatter a narcissist and felon in chief. We know that because it was first introduced last term to benefit one man and one man only, Donald Trump, as he faced 34 felony convictions in New York, a criminal case in Georgia, and hundreds of millions of dollars in civil judgments all in State Courts.

This legislation appears to be an unconstitutional power grab by the Federal Government and a direct infringement on State sovereignty that would upend the Framers' carefully calibrated balance of power between what are supposed to be two equal sovereigns.

In their shameless quest to help Donald Trump and his cronies evade justice in our State Courts, Republicans would have Congress exceed the scope of its authority and grant Federal jurisdiction over a host of State Court cases. For all their talk about federalism, it begs the question: Is there any fundamental principle that House Republicans are not willing to abandon in servitude to this President?

The bill before us, the so-called Promptly Ending Political Prosecutions and Executive Retaliation Act, amends 28 U.S.C. 1442, the Federal officer removal statute, and other provisions related to the removal of cases from State to Federal Court.

Under Section 1442, a Federal officer can remove a State criminal or civil matter to Federal Court if the case relates to acts taken, quote, "under control of the office," meaning that the Federal officer was acting within the scope of his or her official duties. As a statutory and Constitutional matter, the party seeking removal bears the burden of showing that a case falls within the Federal Court's jurisdiction.

Under the Supreme Court's decision in *Mesa* v. *California*, removal is not permissible to absent a colorable Federal defense. The Federal officer removal statute is intended to prevent Federal officers from being improperly punished for carrying out their duties. It's not a license for them to go around doing whatever they want with no accountability.

While I'll leave the point-to-point analysis of this bill to our expert witness, Professor Elizabeth Beske, I will highlight that this bill is troubling for a few reasons.

First, it would allow any former Federal official to remove State cases for acts taken under color of office. More concerningly, the bill would allow a sitting or former President or Vice President to remove cases for or relating to any act while in office, even ones that involve their personal private conduct unrelated to their official duties.

It seeks to provide immunity for the President, Vice President, and political officers under a misguided understanding of the Supremacy Clause and effectively flips the normal presumption against removal to a presumption in favor of it. In other words, this bill goes a long way toward enshrining in American statute the idea that we're ruled by a king who's above the law.

Overall, this bill is unjustified, unworkable, and misguided, especially for the time we find ourselves in. Rather than admit that the legislation they proposed is blatantly unconstitutional, our Republican colleagues have tried to characterize it as a response to politicized law enforcement leveled at Mr. Trump and his allies. In fact, the Chair just tried to describe the bill under consideration as an effort to ensure that all Americans enjoy a justice system free of politicization.

As is so often the case, Republican accusations are frequently confessions. If our Republican colleagues want to talk about politicized law enforcement, let's have at it, because we don't have to go any further than right here in our Nation's capital to find the most egregious examples and in just the past six weeks.

Donald Trump's Department of Justice has fired hundreds of career prosecutors and FBI agents for doing their jobs without fear or favor. He has targeted those who helped investigate and prosecute the people who violently attacked the Capitol on January 6th, while also pardoning 1,500 of his MAGA followers who rioted and injured hundreds of law enforcement officers that day. In doing so, he put his Presidential seal of approval on political violence, so long as it supports him. His Department of Justice has made corrupt quid pro quo deals, dropping Federal corruption charges against Eric Adams in exchange for the mayor's agreement to his political agenda.

In just his first 44 days in office, Donald Trump's made his cynical vision of government clear. He's wasted no time using the power of the Presidency to silence the people whose job it is to hold him and his billionaire buddies accountable by firing at least 17 inspectors general, making it harder for the truth about fraud and abuse in our government to be exposed, and effectively ending investigations into fraud and abuse by—you guessed it—Elon Musk and the members of the Trump White House.

He's moved to take control of independent agencies designed to hold the powerful accountable, like the FEC, CFPB, and SEC, and using the FCC to go after broadcasters that produce content that the President doesn't like.

This President has undermined the power of the people and this Congress—something everyone in this room should be outraged by refusing to faithfully execute the laws that this body has passed and the money that we've appropriated, and is attempting to unilaterally dismantle programs and entire agencies that Congress created and only Congress can eliminate.

This is all happening every day out in the open. Condemning these blatant abuses of power is not the conversation our Republican colleagues want to have. Since the day he took office, Donald Trump has trampled on the rule of law that forms the very foundation of our democracy, using the power of the Presidency to demand vengeance and unquestioned loyalty. He's undertaken politically motivated legal actions against his perceived enemies. If you want to talk about lawfare, that's lawfare right there.

Our Founders designed a democratic Republic built on the rule of law, not the rule of a king. As this administration tests that fundamental principle, it's counting on our Republican colleagues to be too weak and cowardly to stand up to it. Thus far, that's true. We took an oath to preserve and protect the Constitution. That's our duty as Members of Congress, and that's what my Democratic colleagues and I plan to do.

I yield back.

Mr. ROY. I now recognize the Chair of the Full Committee, Mr. Jordan, for his opening statement.

Chair JORDAN. Thank you, Mr. Chair.

Lawfare is real. It's as real as it can be.

On November 15, 2022, President Trump announces he's running for office. Three days later, Attorney General Garland names Jack Smith as Special Prosecutor. Now, I understand that's Federal and we're focused on State and local prosecutors here, but it's lawfare nonetheless.

A few months after President Trump announced he's running for office, Alvin Bragg brings a case against President Trump, a case that his predecessor said wasn't there, a case that the Fed, the Southern District of New York, everyone said wasn't there, but Alvin Bragg brings it because President Trump is now running for the highest office in the land.

Then a few months after that, Fani Willis brings her ridiculous case against President Trump and other Federal officials, all designed to make it so President Trump wouldn't win the election.

Of course, all that was preceded by—all that was preceded by the whole Russia collusion baloney—complete baloney—where the FBI—think about this—the FBI went to the secret court. They took information from the Clinton campaign, that had first been sent to the Perkins Coie law firm, that are then being—that they then hired Fusion GPS, who then hired a foreigner who put together a bunch of lies in a dossier, they take it to the court, and they use that as a reason to go spy on President Trump's campaign.

So, lawfare is as real as it gets. We have a bill introduced by our colleague, Mr. Fry, that seeks to address part of this. It says if you're a Federal official and some crazy local prosecutor comes after you can move that case to Federal Court. Go figure. That makes so much sense. That's all this bill does.

I appreciate the Chair having this hearing. I appreciate our good witnesses who are here to talk about what we've witnessed in this great country where it's supposed to be equal treatment under the law. You're not supposed to use the law to target your political opponents. We have a piece of legislation that makes good commonsense that we hope to pass tomorrow in the Full Committee, but today we're going to hear about it.

With that—again, I appreciate our witnesses, and I appreciate the Chair of this important Committee having this hearing. I yield back.

Mr. ROY. I thank the Chair for his opening statement.

I now recognize the Ranking Member, Mr. Raskin, for his.

Mr. RASKIN. Thank you, Mr. Chair. Welcome to all our witnesses.

The Majority Republicans call it lawfare when Donald Trump is held to the rule of law and given every right of due process. We call it lawfare when the Trump Administration violates the rule of law and tramples the due process rights of Americans, including prosecutors and FBI agents.

Mr. Chair, we have no kings here, no queens, no titles of nobility, no serfs, and no slaves. Our revolution overthrew monarchy and the established church. It made our Constitution supreme over the monarchical and oligarchical political ambitions of any man. The 13th and 14th Amendments abolished slavery and gave equal protection to all, royal status to none. In our time, Donald Trump's crime spree throughout American society has tested the hard one principle that we are all equal and that no one is above the law.

The Supreme Court that Trump has repeatedly bragged about packing and stacking to destroy *Roe* v. *Wade* not only brought the curtain down on the freedom and health security of tens of millions of American women trapped in GOP-controlled, antichoice States; it also made the President absolutely immune from prosecution for crimes he commits under the so-called core functions of his office, presumptively immune from prosecution for other so-called official acts, and subject to prosecution only for private unofficial acts.

After more than two centuries, this bracing new taxonomy for licensing Presidential criminality was announced by the Roberts Court in a 6–3 decision in *U.S.* v. *Trump*. It creates Presidential exceptionalism, a plainly dangerous doctrine which overturned a unanimous ruling of the D.C. Circuit Court of Appeals.

Even that shocking burst of finger-painting on the Constitution isn't enough for Trump and his crowd who seek now complete immunity and impunity from the laws that bind the rest of us. It's not even enough for them to appoint a nationwide crew of embarrassingly servile judges like Aileen Cannon, who may as well be on the bench in Putin's Russia, as she shows little fidelity to the rule of law but fastidious devotion to the whims of her dear leader.

Now, they want to pass something called the PEPPER Act to let Trump and his accomplices get their political corruption and election-fixing cases removed from any State Court in the land and put in front of far more submissive and pliant Trump appointees in Federal Court.

Donald Trump tried this move in one of his criminal cases, the one in New York City where he was found guilty of 34 felony criminal counts of falsifying business records to cover up hush-money payments he had paid to a mistress before the 2016 election. There, his judge rejected his request to move everything to Federal Court, saying Trump had failed to meet both the current statutory and Constitutional requirements for doing that.

As Judge Hellerstein observed in his ruling, the evidence overwhelmingly suggests that the matter was a purely personal item of the President, a coverup of an embarrassing event. Hush money

paid to an adult film star is not related to a President's official acts. It does not reflect in any way the color of the President's official duties. Removal to Federal Court is reserved for cases where there is an actual Federal defense.

Let's say the President was tried in Florida State Court for assaulting a citizen but his defense was that the alleged victim was a soldier, and he was just administering fair punishment as Commander in Chief of the Army in a time of actual conflict. In that hypothetical case, it would be removed so the Federal judiciary could handle the Federal question defense. There was plainly no Federal question defense in Trump's hush-money record falsification scheme.

Now, scrambling to appease Trump, an incorrigible, recidivist lawbreaker who is looking for a way to disappear all of his State Court civil and criminal prosecutions, our colleagues propose to amend the law so that a President or Vice President or even a former President or Vice President can remove a State civil or criminal prosecution to Federal Court whenever that case is brought, quote,

> . . . for or relating to any act while in office, even if that act is of a completely private and personal nature, or where the State Court's consideration of the claim or a charge may interfere with, hinder, burden, or delay the execution of the duties of the President or Vice President.

This broad, gaping language would in practice mean that no State Court in America could ever conduct a criminal trial of Donald Trump or any other President again even if the alleged conduct—say, hypothetically, sexual abuse or criminal fraud—has no relationship to any of his official Presidential acts. After all, any litigation can obviously hinder or burden the execution of official duty.

It would also permit Trump and his associates to remove the State Court criminal cases now pending in Georgia related to the Trump conspiracy to overthrow the 2020 Presidential election.

This bill is designed to trash basic jurisprudential principles, including federalism, that have served us well since the 18th century. The conceit behind it is the pathetic claim that Donald Trump is just profoundly misunderstood and a victim of the judicial process and a target of unfair prosecutions, although no court has ever once found that.

Yes, that Donald Trump. He's the victim, according to our colleagues. The billionaire businessman who's been involved in—check this out—more than 4,000 lawsuits, some in which he is sued as a defendant by, for example, frustrated students at Trump University or ex-mistresses or golf clubs alleging nonpayment or plumbers, painters, electricians, and small business contractors alleging failure to pay on their contracts. Most of the ones I could find were ones in which he is the plaintiff, deploying his army of lawyers to sue thousands of people and businesses, including casino patrons, real estate partners, business tenants, and media entities. Most recently, he sued ABC and then CBS for $20 billion.

To hear our friends tell it, Donald Trump is just an Eagle Scout who respects women, would never cook the books, and keeps his hands to himself. The Donald Trump I know about is a civilly adjudicated sexual abuser in New York, a convicted criminal felon, and

the only twice-impeached President in American history, who was most recently impeached in this House for inciting an insurrection against the Constitution, the Congress, and his own Vice President. The Senate voted 57–43 to convict him, meaning that although Trump narrowly beat the Constitutional spread, robust bipartisan majorities voted that he had indeed incited insurrection against our government.

Now, look, if you want to see real lawfare, if that's something really in your scopes, then open your eyes to the U.S. Attorney's office here in the District of Columbia. The pro-January 6th insurrectionist turned U.S. Attorney for D.C., Ed Martin, has fired more than a dozen career prosecutors focused on violent crime from his office simply for doing their jobs and doing their jobs well. He fired them because they had worked on the January 6th cases which they were assigned to do, prosecuting Proud Boys, Oath Keepers, and other extremists who violently assaulted our police officers, and they were sacked.

Just last week, Mr. Martin demoted several other top prosecutors and career supervisors to entry-level positions, again, as retribution for having simply done their jobs in overseeing January 6th prosecutions. That is lawfare. That is a violation of the due process rights as well as the civil service rights of American citizens who did nothing other than obey the law and do their jobs.

This is just the tip of the iceberg when it comes to the administration's attacks on the rule of law in its first month, from the corrupt quid pro quo in New York City with Mayor Adams, which led to the resignation of multiple Department of Justice lawyers, including the U.S. Attorney for the Southern District who had been a Justice Scalia clerk and a career-long member of the Federalist Society, and she said she couldn't put up with that and she decided to quit; her assistant, another conservative lawyer who had clerked on the Supreme Court for Chief Justice Roberts, and he said you would have to be a fool or a coward to go along with that corrupt bargain between Donald Trump and Mayor Adams.

They have halted anticorruption task forces. They've suspended enforcement of the Foreign Corrupt Practices Act. They have suspended antikleptocracy and anticorruption initiatives, and on and on.

If you want to look at lawfare, let's look at what's going on right in front of our eyes today, Mr. Chair. That's what we should be doing instead of going after some imaginary lawfare by State and local prosecutors who did nothing other than their jobs, enforcing the law in their States, and not a single judge or appeals court or even the Supreme Court under Roberts Court's spell has said anything about those people doing anything remotely unethical.

I yield back to you.

Mr. ROY. Without objection, all other opening statements will be included in the record.

We will now introduce today's witnesses.

First, Mr. George Terwilliger. Mr. Terwilliger is an attorney with more than four decades of experience in both private practice and government service. Before entering private practice, he served for 15 years in the Department of Justice as a prosecutor, United States Attorney for the District of Vermont, Deputy Attorney Gen-

eral, and Acting Attorney General. In private practice, Mr. Terwilliger has represented a multitude of private companies, Members of the House and the Senate, Cabinet officers, and other Executive Branch officials.

Mr. Daniel Epstein. Mr. Epstein is the Vice President at the America First Legal Foundation, a nonprofit public interest law firm. He is also an Assistant Professor of Law at St. Thomas University School of Law, where his research includes Constitutional law, American legal history, Federal Courts and jurisprudence, and civil procedure.

Ms. Elizabeth Price Foley. Ms. Foley is of counsel at Baker-Hostetler, where she practices Constitutional Appellate Law. She also serves as a Professor of Law at the Florida International University College of Law where she teaches Constitutional law, separation of powers, and civil procedure.

Professor Elizabeth Beske. Ms. Beske is a Professor of Law and Associate Dean for scholarship at the American University Washington College of Law. Her research focuses on civil procedure, Constitutional law, Federal Courts, and legal writing.

We thank our witnesses for appearing today, and we'll begin by swearing you in. Would you please rise and raise your right hand?

Do you swear or affirm under penalty of perjury that the testimony you're about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

Let the record reflect that the witnesses have answered in the affirmative.

Thank you, and please be seated.

Please know that your written testimony will be entered into the record in its entirety. Accordingly, we ask that you summarize your testimony in five minutes. I remind each of you to turn the microphone on before you begin speaking.

Mr. Terwilliger, you may begin.

STATEMENT OF GEORGE J. TERWILLIGER

Mr. TERWILLIGER. Thank you, Mr. Chair, Ranking Member, and the Members of the Committee, for inviting me to appear here today to discuss lawfare by State authorities.

I have three suggestions for your consideration to curb State lawfare targeting Federal officials and to restore the Federal officer removal statute to be as Congress has intended it over many years.

First, amend the removal law to expressly cover former Federal officials.

Second, support the Supremacy Clause with legislation providing an expanded scope of removal to include Federal Court jurisdiction where there are questions of Federal law in removal cases.

Third, codify Supremacy Clause immunity of Federal officials.

A Constitutional line is crossed when State officials use State law to control Federal activity. In 1819, Chief Justice Marshall laid down the law in *McCulloch* v. *Maryland,* ruling that under the Supremacy Clause, quote,

> The States have no power to impede, burden, or in any manner control the operations of the general government.

Congress, over the decades, in a succession of amendments of the Federal officer removal statute, expanded the protection of Federal

officers from State prosecutions. As recently as 2011, Congress expanded removal to cover conduct merely, quote, "related to," a Federal official's functions, but courts have pushed back, ruling contrary to that Congressional intent.

In a 2023 decision, the 11th Circuit Court of Appeals overruled 200 years of practice by taking removal possibility away from all former Federal officials and again raising the bar for removal contrary to Congress' 2011 amendment that lowered it. Two members of that appeal panel urged Congress to amend, recognizing what they called a, quote, "nightmare scenario," where allowing, quote,

> A rogue State's weaponization of the prosecution power could go unchecked and fester, which could paralyze our Republic-democratic system of government which depends on having talented and enthusiastic people willing to serve.

Congress should amend 1442(a) to expressly cover former officials, but it needs to do more than that to curb the burgeoning lawfare by States using legal actions to attack the discretionary exercise of Executive authority.

Georgia DA Fani Willis' prosecution of my client, Mark Meadows, is a great example of that lawfare. Congress, in 1939, passed a statute which authorized Presidential Assistant positions and established that their duties, by law, quote, "shall be as prescribed by the President." Willis, nonetheless, claims that the Fulton County District Attorney can decide what Presidential Assistants can and cannot do. Her State prosecution charged the White House Chief of Staff for setting up and participating with the President in a telephone call to a Georgia official.

The case against Mr. Meadows should have been removed and summarily dismissed under the Supremacy Clause, but the Federal Courts in Georgia, in contravention to Congressional intent, misapplied the removal statute, not only ruling out former officials, but raising the bar by adding the absurd requirement that to get a State prosecution removed to Federal Court a Federal official has to prove that he was authorized to commit the very crime the State alleges in his Federal role.

Now, a Federal Court in Arizona has followed the 11th Circuit's lead, blocking the path to Federal immunity and allowing the Arizona Attorney General to prosecute conduct in the very West Wing of the White House, the beating heart of the Executive Branch.

Congress needs to act, reaffirming its intent to ensure that State claims against Federal officials doing their jobs get moved to Federal Courts and those that are barred by the Supremacy Clause are summarily dismissed.

Chief Justice Marshall had it right 200 years ago when he drew that bright line for closing State control of Federal activities. The draft legislation here presents commonsense steps for Congress to address lawfare where State authority oversteps Constitutional bounds. It may be that even more needs to be done, but this bill would be a solid start.

Thank you, Mr. Chair.

[The prepared statement of Mr. Terwilliger follows:]

Statement of

Hon. George J. Terwilliger III

United States House of Representatives

Committee on the Judiciary

Subcommittee on the Constitution and Limited Government

Hearing On

"Legislative Reforms to End Lawfare by State and Local Prosecutors"

March 4, 2025

(Submitted for the Record)

Mr. Chairman, ranking member and members of the committee, thank you for inviting me to appear to discuss with you the potential need for Congress to address aspects of so-called "lawfare" by state authorities that targets the work of federal officials. Claims made against and prosecutions charging federal officials in state courts can do great harm to federal operations and upset the delicate balance in law between federal and state governmental authority. My perspective on this issue is the result of 15 years of public service in the US Department of Justice, where I endeavored every day to demonstrate that in fact government can work for the benefit of our citizens, and another 30 years in the private practice of law where I all too often saw the damage that can occurs when law and politics collude and collide.

I have three suggestions for your consideration to curb state "lawfare" targeting federal officials and Executive Branch operations.

First, get these cases into federal court where questions of federal law should be addressed.

Second, put statutory teeth into Chief Justice Marshall's 1819 Supreme Court ruling that the Supremacy Clause bars state authorities from controlling federal government functions in any manner.

Third, provide by law a means to obtain summary dismissal of non-meritorious claims against present *or former* federal officials that interferes with federal operations.

For government to work for the benefit of our citizens, federal officials must be free to act subject only to *federal* constraints that establish the scope of their official authority. In many, if not most instances, such federal officials are also - under federal law -accorded substantial discretion in the execution of their federal duties. As the Supreme Court recognized in *Harlow v. Fitzgerald*[1], the higher the official position, the greater the discretion needed and the greater the deference the law, and courts in particular, need to accord the exercise of that discretion.

Today, however, we are seeing an unprecedented attack on the exercise of lawful discretion at the highest levels in the executive branch of our government. I respect those who may disagree with federal officials' exercise of their discretion. Those disagreeing have no shortage of legitimate means to seek redress through, for example, congressional

[1] 457 US 800, 807 (1981) (*"[W]e acknowledged that high officials require greater protection than those with less complex discretionary responsibilities*.")

oversight, political campaigns, as well as public commentary through the vast array of communications channels that exist today.

Such disagreement is a hallmark of our democracy. However, a constitutional line is crossed when state officials, whether they be attorneys general, governors, prosecutors or judges, attempt to use the authority of state law to in any manner control federal officials' work and federal operations. James Madison, writing in the Federalist Papers, explained the necessity of having a Supremacy Clause in the Constitution, noting that *"otherwise, a monster, in which the head was under the direction of the members"* would be created.[2] Chief Justice John Marshall in 1819 laid down the law prohibiting state interference in federal operations when in *McCullough v. Maryland* the Supreme Court ruled conclusively that *"The states have no power to impede, burden or in any manner control the operations of the general government."* [3] In short, the Constitution of the United States establishes beyond any question that under the Supremacy Clause, federal law controls the activity of federal officials, and that state law has no authority to do so.

Today, we are witnessing in general efforts by state authorities to utilize legal actions – "lawfare" - to undermine the supremacy of federal law by attempting to interfere with and control federal government operations, even at the highest levels involving the president and his most senior advisors. Lawfare goes nuclear, however, when states prosecute federal officials or otherwise make claims against them in *state* courts. Such assaults on

[2] Federalist No. 44
[3] 17 U.S. (4 Wheat) 316, 436 (1819)

federalism deserve congressional attention, including by applying the authority of the Supremacy Clause to create a more solid statutory bulwark against state interference.

Congress has over decades, through successive statutes, demonstrated a clear intent that state claims or state prosecutions brought in state courts against federal officials for conduct undertaken pursuant to an official role are to be removed from state court to federal court[4]. A principal reason for that procedure is to ensure that questions of federal law, including those concerning control over federal officials' actvities, should be decided in federal, not state, courts. Otherwise, the vagaries of various state court rulings would create a confusing and confounding tableau of state regulation and constraint on federal operations.

But now, the courts, including federal courts, are frustrating that congressional intent. Until just very recently, for 200 years both present *and former* federal officials doing their jobs who are sued or prosecuted in state court could obtain review of the viability of that state claim in a federal court. In a very unwise decision, in 2023 the 11th Circuit Court of Appeals denied that protection to *former* federal officials. That court went so far as to also claim purported judicial authority to rule on what a presidential advisor working in the West Wing of the White House could or could not do. [5] And now at least one other court has echoed that decision and claimed like power over the co-equal Executive Branch. [6]

[4] 28 USC 1442(a(
[5] See *Georgia v. Meadows*, 88 F.4th 1331 (11th Cir. 2023)
[6] See *Arizona v. Meadows,* No. CV-24-02063-PHX-JJT (D. Ariz. Sep. 16, 2024)

Two members of that 11th Circuit panel, concurring in the result, recognized the chilling effect of having all former federal officials subject to the whims of state claims brought by, for example, politicized state prosecutors. Those judges -appointees of Democrat presidents - wrote: ***"In short, foreclosing removal when states prosecute former federal officers simply for performing their official duties can allow a rogue state's weaponization of the prosecution power to go unchecked and fester."***[7]

Those judges further noted that Congress could revise the law and urged Congress to promptly do so[8]. Congress can do so easily by amending 28 USC 1442(a) to permit expressly removal by both present *and former* federal officials. But in my view, there is more that Congress should do to ensure that such lawfare by state prosecutors cannot act as Lilliputians tying down and tying up the exercise of executive authority and intruding on federal affairs.

Please forgive me for getting technical for a moment, but for Congress to act decisively it needs to act precisely. In order to more solidly provide federal court jurisdiction over state claims against federal officials, Congress needs to make the basis for federal court jurisdiction explicit. It can do so by providing that where a removal case involves one or more questions of federal law, the state case should be removed to federal court so that those federal questions are addressed in federal courts. It is important to make clear that a federal question begets federal jurisdiction. By bringing those federal questions into the federal judicial system, over time the courts of appeal and the Supreme Court can

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[7] *Georgia v. Meadows*, US Court of Appeals for the 11th Circuit, No. 23-12958, Slip Op. at 37.
[8] Id.

establish a uniformity of rulings that will govern such questions. Otherwise, leaving such questions for resolution through the courts of the 50 states and their subordinate jurisdictions invites chaos in rulings on federal questions that govern the official activity of federal officers.

There are also further steps that are necessary to effect congressional intent to foreclose states from using their authority to try to control the exercise of discretion by federal officials. In recent times, state prosecutors have brought criminal cases against ranking federal officials in connection with the latter doing their jobs and in so doing have sought authority to have state courts define the nature and extent of such officials' roles, a quintessential federal question.

Fani Willis' prosecution of my client Mark Meadows is a great example. She charged Meadows for following the president's direction to set up and participate with the president in a telephone call with the Georgia Secretary of State. The federal statute establishing the position of presidential assistants states that they ***"shall perform such duties as the President may prescribe."***[9] In bringing such a case, state prosecutors usurped the authority that Congress gave explicitly to the president to specify the duties of his senior aides. Because Mr. Meadows was doing his job as the White House Chief of Staff – the president's most senior advisor - the Georgia case should have been removed to federal court and summarily dismissed under Supremacy Clause immunity. But here we are, years later with those charges still pending - and now the Democrat Attorney General in Arizona

[9] *An Act to Provide for Reorganizing Agencies of the Government,* Section 301, 53 Stat. 561, 565 (1939)

piling on with yet another prosecution charging Meadows based on his conduct as Chief of Staff in the West Wing of White House, the beating heart of the Executive Branch. This is contrary to unmistakable decades of congressional intent and this Congress should act to end the empowerment of state prosecutors to engage in such lawfare aimed at federal officials.

Apart from getting such cases into federal courts, Congress also needs to codify and thereby strengthen the immunity protection federal officials can assert when performing their federal roles. Unless you do, there will be more injustice at the hands of state prosecutors and, even more perniciously, some good people who could take on federal roles will so 'no thanks' because they do not want to be collateral damage in state political lawfare. As the 11th Circuit concurring judges again wrote, ***"And federal officers who are reluctant to do their duty, or a dearth of talented and enthusiastic people willing to serve in public office, could paralyze our democratic-republic system of government."***[10]

At present, the immunity of federal officials from such state claims exists only by judicial decisions of the Supreme Court and inferior federal courts. In my view that is a threat to the separation of powers because it has the potential to allow courts, including federal judges, to themselves exercise oversight and control of executive branch decision making through prolonged litigation brought by state authorities that delves into the exercise of discretion by Executive Branch officials. Evidence that this is a real-life problem today is easy to find.

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[10] *Georgia v. Meadows,* supra, Slip Op. at 38.

Terwilliger Statement

One need look no further than the numerous lawsuits brought most recently in federal court by state attorneys general seeking to control the exercise of authority vested by the President in an individual acting as a senior presidential advisor. You do not have to be a lawyer to understand that lawsuits -even if eventually won - eat up tremendous amounts of time, money, attention and energy, including by the federal officials subject to them. There may be legitimate policy questions worthy of debate, reconsideration and even change, but lawfare should not be the means to address them.

In my view, Congress should act to simply provide that non-meritorious lawsuits that interfere with federal operations are subject to summary dismissal where there is a preliminary showing that the claim interferes with legitimate Executive Branch decision-making authority and officials' exercise of discretion under it. In this way, there will be a presumption in the law against litigants inviting what too often seems a hostile judiciary to substitute its judgment for that of executive policy-making officials exercising lawful authority provided to them by Congress. This would do no more than codify in statute the deference to Executive authority and discretion that the Supreme Court has said that Separation of Powers dictates.[11]

As importantly, codifying the immunity of federal officials from claims and prosecutions against them by state authorities helps to ensure that, contrary to the foretelling predictions of the 11th Circuit judges above, federal officials can do their jobs unfettered by

[11] See *Trump v United States, -- U.S. –- (2024);* No. 23–939, Decided July 1, 2024

intrusions into their roles by state authorities and, indeed, good people will continue to seek the honor of public service.

I respectfully submit that these are not radical proposals, but rather common-sense ideas for the Congress to consider to end the madness of litigation by state authorities that seeks to control federal officials exercising discretion in performing their federal roles. I further submit that this is especially necessary in regard to claims brought by state officials using the authority of state law. Chief Justice Marshall had it right when he drew a bright line foreclosing state control of federal activities. I humbly suggest it is time for Congress to underscore that bright judicial line with statutory law so federal officials can take that law in front of federal judges and dispose of efforts by state authorities to overstep constitutional bounds.

Thank you.

Mr. ROY. Thank you, Mr. Terwilliger.
Mr. Epstein, you may begin.

STATEMENT OF DANIEL Z. EPSTEIN

Mr. EPSTEIN. Chair Roy, Ranking Member Scanlon, and the Members of the Subcommittee on the Constitution and Limited Government, thank you for inviting me to testify on this important matter.

President Trump overcame the most vindictive weaponization of the justice system against an American leader in our Nation's history. Partisan operatives sought to destroy President Trump in 2016, when the Clinton campaign branded him as a Russian asset by laundering campaign opposition research to the FBI to spy on the Trump campaign, leading to multiple investigations by Special Counsel Mueller. The Mueller investigation substantiated no criminal activity by President Trump, nor could it. Its jurisdictional authority was based on a lie manufactured by Christopher Steele.

As the American people would witness, the first special counsel investigation was mere child's play. Two impeachment attempts, four criminal indictments, one $400 million civil judgment, one mugshot, three States attempting to disqualify him from their ballots, two Democratic-nominated Presidential opponents, and two assassination attempts later, Democrats would finally claim their scalp when they obtained a conviction against President Trump in a New York State Court, weeks before the American people overwhelmingly reelected him with a historic landslide mandate.

The American people saw through the coordinated hit job on their President that culminated in a conviction by a radically liberal jury pool in front of a judge who donated to Trump's first 2024 election opponent, President Joe Biden, and whose daughter works for a firm that represented both Joe Biden and Kamala Harris' Presidential campaigns—campaigns against President Trump, a party arguing before her father.

Despite these clear questions about Acting Justice Juan Merchan's ability to appear impartial, the jury unanimously convicted President Trump of concealing a crime that it did not even need to agree on or share publicly. While the New York jury, despite obvious legal errors and corrupt motivations, did convict President Trump, the voters overwhelmingly acquitted him on election day, making it clear that they understood the fix was in.

The State of New York lacked jurisdiction over the campaign charges against President Trump. The State of New York did not have jurisdiction to hear a case centered on Federal election law. The District Attorney Alvin Bragg violated the Supreme Court doctrine known as the primary jurisdiction doctrine, which says that a court should stay or dismiss a claim when it implicates issues within the special confidence of a Federal administrative agency. Here, that agency was the Federal Election Commission.

The *New York* case against President Trump alleged violation of the Federal Election Campaign Act of 1971. The FECA violates—vests exclusive jurisdiction over issues of Federal elections and the FEC and the Department of Justice. In President Trump's case, the FEC did look at the allegations and then decided they were not worth further investigation. This should have been the end of the

matter, but Biden's DOJ did not enforce its exclusive jurisdiction, allowing a politically motivated district attorney to bring his own case built on the alleged violation of FECA.

Second, a top official in Biden's Justice Department was dispatched to assist the Manhattan District Attorney's Office's prosecution of President Trump. In coordination with President Biden and his campaign's lawfare strategy, the New York District Attorney Alvin Bragg resurrected a hush-money zombie case under a legal theory that Bragg's predecessor had previously sent back into the grave out of concerns that felony charges would not hold up in court.

Bragg's commitment to getting Trump gained him the support of senior Biden political operatives. One day after Bragg announced his primary campaign against his predecessor, Bragg received a contribution from Chiraag Bains, who would later become Deputy Assistant to the President in the Biden White House.

Biden's operatives for Bragg did not stop there. In December 2022, New York District Attorney Alvin Bragg reportedly hired Mike Matthew Colangelo to jump-start his office's investigation of President Trump due to Colangelo's history of taking on Donald Trump and his family's businesses. At the Biden Department of Justice, Colangelo served as a politically appointed Acting Associate Attorney General, the third highest-ranking official in the Department of Justice.

The Committee's thorough investigation revealed that Bragg's—this Committee's thorough investigation revealed that Bragg's hush-money prosecution was coordinated with Biden. Despite the obvious links between Biden's Department of Justice and Bragg's District Attorney Office, Attorney General Merrick Garland refused during a Congressional hearing to commit to turning over communications between his Department of Justice and Bragg's office, and the Department of Justice's followup response to the Committee denied the existence of such communications.

Our work at America First Legal revealed that, in fact, 36 responsive records existed between the Department of Justice and the New York District Attorney's Office.

Thank you.

[The prepared statement of Mr. Epstein follows:]

Written Testimony of Daniel Z. Epstein

Vice President, America First Legal

Submitted to the House Judiciary Subcommittee on the Constitution and Limited Government hearing on

"Legislative Reforms to End Lawfare by State and Local Prosecutors"

March 4, 2025

Chairman Roy, Ranking Member Scanlon, and members of the Subcommittee on the Constitution and Limited Government. Thank you for inviting me to testify on this important matter.

President Donald J. Trump overcame the most vindictive weaponization of the justice system against an American leader in our Nation's history.

Partisan operatives sought to destroy President Trump in 2016, when the Clinton campaign branded him as a Russian asset by laundering campaign opposition research to the FBI to spy on the Trump campaign, leading to multiple investigations by Special Counsel Mueller. The Mueller investigation substantiated no criminal activity by President Trump, nor could it: its jurisdictional authority was based on a lie manufactured by Christopher Steele. But as the American people would witness, the first Special Counsel investigation was mere child's play. Two impeachment attempts, four criminal indictments, one $400 million civil judgment, one mugshot, three states attempting to disqualify him from their ballots, two Democrat-nominated Presidential opponents, and two assassination attempts later, Democrats would finally claim their scalp when they obtained a conviction against President Trump in

a New York state court—weeks before the American people overwhelmingly reelected him with a historic landslide mandate.

The American people saw through the coordinated hit-job on their president—a hit job that culminated in a conviction by a radically liberal jury pool in front of a judge who donated to Trump's first 2024 election opponent President Joe Biden and whose daughter works for a firm that represented both Joe Biden's and Kamala Harris's presidential campaigns—campaigns against President Trump, a party arguing before her father. Despite these clear questions about Acting Justice Juan Merchan's ability to appear impartial, the jury unanimously convicted President Trump of concealing a crime that it did not even need to agree on or share publicly. That's right: while some members of this Committee celebrated the dark verdict by repeating the talking point, "no one is above the law," they cannot even be certain of *which* law.

Had the New York jury considered the obvious legal errors and corrupt motivations by those tasked with enforcing the law and acquitted Trump, Bragg and Biden would not have successfully sidelined President Trump from the campaign trail,[1] drained his resources,[2] and harmed his reputation among voters.[3] But while

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[1] Jordan Boyd, *Democrats' Election Interference Starts With Lawfare That Keeps Trump From Campaigning*, THE FEDERALIST (Feb. 16, 2024), https://perma.cc/T8RS-HS4A.
[2] Richard Lardner & Aaron Kessler, *Trump Spent $76 Million Over Last Two Years on Attorneys as Legal Troubles Mount Ahead of Election*, ASSOCIATED PRESS (updated Feb. 2, 2024), https://perma.cc/HQP2-4WN7.
[3] Eric Levitz, *Trump's Felony Conviction Has Hurt Him in the Polls*, VOX (June 7, 2024), https://perma.cc/6NJQ-XGSK; *see also* Reid J. Epstein & Nicholas Nehamas, *Democrats Push Biden to Make Trump's Felonies a Top 2024 Issue*, N.Y. TIMES (June 1, 2024), https://perma.cc/J5D5-PAAF.

the New York jury did convict President Trump, the American voters acquitted him overwhelmingly on Election Day, making it clear that they understood the fix was in.

State courts must never be allowed to baselessly interfere with the elections of federal officials, especially when the charges at issue concern federal law.

I. The State of New York lacked jurisdiction over the campaign charges against President Trump

The State of New York did not have jurisdiction to hear a case centered on federal election law. District Attorney Alvin Bragg violated a Supreme Court doctrine known as the "primary jurisdiction doctrine," which says that a court should stay or dismiss a claim when it implicates issues within the special competence of a federal administrative agency, here, the Federal Election Commission (FEC).[4]

The New York case against President Trump alleged a violation of the Federal Election Campaign Act of 1971 (FECA). The FECA vests *exclusive jurisdiction* over issues of federal elections in the FEC and the Department of Justice. As FEC Commissioner Trainor testified before this Committee last year:

> The relevant sections of FECA clearly articulate this exclusive jurisdiction. Specifically, 52 U.S.C. § 30106(b)(1) grants the FEC the authority to initiate civil enforcement actions, while 52 U.S.C. § 30109(a)(5) outlines the procedures for handling alleged violations, including the role of the DOJ in criminal prosecutions. This bifurcation of authority is designed to harness the expertise and resources of federal agencies, thereby maintaining the integrity and consistency of campaign finance law enforcement.[5]

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[4] Daniel Z. Epstein, *Bragg's Prosecution of Trump Violates This Important Legal Doctrine*, WASH. EXAMINER (May 9, 2024), https://perma.cc/6XWU-G4ZE.

[5] *H. Comm. on the Judiciary Hearing on the Manhattan Dist. Attn'y's Off.*, 118th Cong. 1 (June 13, 2024), (written testimony of James E. "Trey" Trainor III, Commissioner, Federal Election Commission), available at https://perma.cc/A2AW-XYSJ.

Accordingly, Commissioner Trainer explained that District Attorney Bragg "usurped the jurisdiction that Congress has explicitly reserved for the federal authorities" and "undermin[ing] the statutory framework established by FECA."[6]

In President Trump's case, the FEC *did* look at the allegations and then decided they were *not* worth further investigation.[7] This should have been the end of the matter, but Biden's DOJ did not enforce its exclusive jurisdiction, allowing a politically motivated District Attorney[8] to bring his own case built on this alleged violation of the FECA.

II. A top official in Biden's Department of Justice was dispatched to assist the Manhattan District Attorney's prosecution of President Trump

In coordination with President Biden and his campaign's lawfare strategy to take out his political opponent (President Trump), New York County District Attorney Alvin Bragg resurrected a "hush money" "zombie case" under a legal theory that Bragg's predecessor had previously sent "back into the grave," out of concerns that the felony charges would not hold up in court.[9]

The case concerned federal subject matter identical to a matter that the United States Department of Justice had previously declined to prosecute in 2018, and Bragg's prosecution relied heavily on the testimony of Michael Cohen—a felon convicted for lying to Congress with a documented animus towards President

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[6] *Id.*
[7] *See* Statement of Reasons of Comm'rs Sean J. Cooksey and James E. "Trey" Trainor III, MURs 7313, 7319, and 7379 (Apr. 26, 2021).
[8] America First Legal (@America1stLegal), (Sept. 12, 2024, 2:46 PM), https://perma.cc/NH9R-SRSN
[9] *See* Erica Orden, *How a Hush Money Scandal Turned into a Criminal Case*, POLITICO (Apr. 15, 2024), https://perma.cc/M9BE-KXH6 (quoting MARK POMERANTZ, PEOPLE V. DONALD TRUMP (2023)); *see also* STAFF OF H. COMM. ON THE JUDICIARY, INTERIM REPORT: AN ANATOMY OF A POLITICAL PROSECUTION (Apr. 25, 2024), https://perma.cc/HNC7-X97B.

Trump.[10] In February 2022, two prosecutors leading the case, Mark Pomerantz and Carey Dunne, resigned from the District Attorney's Office because Bragg "had doubts about moving forward with the case against Trump."[11] But even Pomerantz acknowledged that any charges would rely on "untested" legal theories.[12]

New York Rule of Professional Conduct 3.8 provides, *inter alia*, that a prosecutor "shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause."[13] Comment 1 to Rule 3.8 provides, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[14] Comment 5 provides that, "a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused."[15] Bragg did exactly this. During his campaign to become District Attorney, Bragg "remind[ed] voters frequently that in his former job, he sued Mr. Trump's administration 'more than a hundred times.'"[16] Bragg would not have prosecuted Trump but for Trump's candidacy.

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[10] Letter from Chairman Jim Jordan, H. Comm. on the Judiciary, to the Hon. Merrick Garland, Att'y Gen., U.S. Dep't Justice (Apr. 30, 2024), https://perma.cc/T6VZ-TADY.
[11] William K. Rashbaum et al., *2 Prosecutors Leading N.Y. Trump Inquiry Resign, Clouding Case's Future*, N.Y. TIMES (Feb. 23, 2022), https://perma.cc/FQU7-A8NP.
[12] Luc Cohen, *Trump Hush Money Trial Stems From 'Zombie Case' Brought Back to Life*, REUTERS (Apr. 9, 2024), https://perma.cc/54BL-WEEY.
[13] N.Y. RULES OF PRO. CONDUCT r. 3.8.
[14] N.Y. RULES OF PRO. CONDUCT r. 3.8 cmt. 1.
[15] N.Y. RULES OF PRO. CONDUCT r. 3.8 cmt. 5.
[16] Jonah E. Bromwich et al., *2 Leading Manhattan D.A. Candidates Face the Trump Question*, N.Y. TIMES (June 2, 2021), https://perma.cc/EFZ4-ZP6D.

Bragg's commitment to getting Trump gained him the support of senior Biden political operatives. One day after Bragg announced his primary campaign against his predecessor,[17] Bragg received a contribution from Chiraag Bains,[18] who would later become a Deputy Assistant to the President in the Biden White House.[19] On June 29, 2019, Bragg received a contribution from Adam Hickey,[20] who would later serve as a senior official in Biden's Department of Justice.[21] Bragg's commitment to getting Trump also gained him the support of Billionaire George Soros and Color of Change, a progressive prosecutor front group.[22] On May 8, 2021, the Political Action Committee for Color of Change endorsed Bragg, and a week later, Soros gave $1 million to Color of Change, who then used part of that money to support Bragg's

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[17] *See* Anna Sanders, *Alvin Bragg Announces Democratic Primary Campaign Against Manhattan DA Cy Vance*, N.Y. DAILY NEWS (June 18, 2019), https://perma.cc/PQG6-9V3J.

[18] *NYSBOE Public Report System: Contributions By Recipient*, N.Y. STATE BD. ELECTIONS, https://perma.cc/VQB6-QMJ8 (search in "Candidate Name" search bar for "Alvin Bragg – District Attorney"; then search in the search bar for "Bains").

[19] *Chiraag Bains*, PAUL & DAISY SOROS FELLOWSHIPS FOR NEW AMERICANS, https://perma.cc/2VR2-22DW.

[20] *NYSBOE Public Report System: Contributions By Recipient*, N.Y. STATE BD. ELECTIONS, https://perma.cc/VQB6-QMJ8 (search in "Candidate Name" search bar for "Alvin Bragg – District Attorney"; then search in the search bar for "Hickey").

[21] *Senior Justice Department Official Joins Mayer Brown as Partner*, MAYER BROWN (May 15, 2023), https://perma.cc/ALX9-9HBY.

[22] Charles "Cully" Stimson & Zack Smith, *Commentary: Washington Post Fact-Checker Should Try Checking Facts About Soros Prosecutors*, HERITAGE FOUND. (Apr. 12, 2023), https://perma.cc/4GEB-MLVH; *see also* Rashad Robinson, Statement, *Color of Change Asserts That Trump Indictment Points to the Importance of Progressive Prosecutors*, COLOR OF CHANGE (May 31, 2024), https://perma.cc/ZVU3-DYEB ("Color of Change PAC worked to help elect and hold progressive prosecutor Alvin Bragg accountable once in office. *We have seen the fruits of our labor*, not only *with Bragg's prosecution of Trump* but with thousands of decisions that he has made and millions of decisions made by progressive prosecutors we helped elect nation-wide.") (emphasis added).

election.[23] Between 2019 and 2021, Soros' son, Jonathan Soros, and his wife, Jennifer Allan Soros, made five separate contributions to Bragg's campaign.[24]

But Biden's operatives' support for Bragg did not stop there; in December 2022, New York County District Attorney Alvin Bragg reportedly hired Matthew B. Colangelo to "jump-start" his office's investigation of President Trump, due to Colangelo's "history of taking on Donald J. Trump and his family business."[25] Colangelo contributed to Bragg's campaign for District Attorney three separate times.[26] Colangelo previously served in senior positions in Biden's Department of Justice and the New York Attorney General's Office, both of which had competing investigations related to President Trump.[27]

At the Biden Department of Justice, Colangelo served as the politically-appointed Acting Associate Attorney General (AAG)—the third highest-ranking position in the Department.[28] Historically, the AAG position is a rocketship to become partner at a major law firm or a top position at a multinational corporation, but we are expected to believe that Matthew Colangelo went from the third highest-ranking

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[23] *Id.*
[24] *NYSBOE Public Report System: Contributions By Recipient*, N.Y. STATE BD. ELECTIONS, https://perma.cc/VQB6-QMJ8 (search in "Candidate Name" search bar for "Alvin Bragg – District Attorney"; then search in the search bar for "Soros"); *see also* America Firs Legal, *supra* note 8.
[25] Jonah E. Bromwich, *Manhattan D.A. Hires Ex-Justice Official to Help Lead Trump Inquiry*, N.Y. TIMES (Dec. 5, 2022), https://perma.cc/NF8F-B8RK.
[26] *NYSBOE Public Report System: Contributions By Recipient*, N.Y. STATE BD. ELECTIONS, https://perma.cc/VQB6-QMJ8 (search in "Candidate Name" search bar for "Alvin Bragg – District Attorney"; then search in the search bar for "Colangelo").
[27] *Id*; s*ee also* Letter from Chairman Jim Jordan, H. Comm. on the Judiciary, to Matthew B. Colangelo, Senior Couns., N.Y. Co. District Att'y's Off. (Apr. 7, 2024), https://perma.cc/L6VM-3LU8.
[28] Letter from Chairman Jim Jordan, H. Comm. on the Judiciary, to the Hon. Letitia James, Att'y Gen. of the State of N.Y. (May 15, 2024), https://perma.cc/SM79-T7V5.

official in Biden's Department of Justice to the Manhattan District Attorney's Office, which just happened to be criminally prosecuting President Trump.

This Committee's thorough investigation revealed that Bragg's hush money prosecution was "coordinated" with Biden,[29] *i.e.*, it was made "in cooperation, consultation or concert with, or at the request or suggestion of" Biden.[30] The FEC Office of the General Counsel has consistently recommended that the Commission find reason to believe that acts by a third party intended to influence an election and "coordinated" with a candidate, authorized committee, or agent thereof result in a contribution by the person making the expenditure or political committee with whom the expenditure is coordinated.[31]

Despite that link between Biden's Department of Justice and Bragg's District Attorney's Office, Attorney General Merrick Garland refused during a congressional hearing to commit to turning over communications between his Department and

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[29] *See, e.g.,* Press Release, Chairman Jim Jordan, Chairman Jordan Investigates Justice Department Coordination with Alvin Bragg's Politicized Prosecution (Apr. 30, 2024), https://perma.cc/3DGL-B77Y; Press Release, Mo. Att'y Gen. Andrew Bailey, Attorney General Bailey Demands DOJ Turn Over Documents Relating to Prosecutions of President Trump (May 9, 2024), https://perma.cc/A9D5-W8BE ("Given the timing (Bragg charged Trump only after Trump declared his candidacy for President), the transparent weakness of the charges, and the effect the charges have in keeping Trump off the campaign trail, there is substantial reason to suspect the Biden administration has coordinated with Bragg and others to bring prosecutions against Trump").

[30] 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20(a)–(b). The Commission has explained that expenditures that are not made for communications are analyzed under the Commission's regulation at 11 C.F.R. § 109.20(b) and not under the Commission's three-part test for "coordinated communications" under 11 C.F.R. § 109.21. Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003).

[31] *See* 11 C.F.R. § 109.20(a)–(b); *see, e.g.*, First Gen. Counsel's Report at 29–41, MURs 7313, 7319, and 7379 (Michael D. Cohen, *et al.*) (recommending finding reason to believe that Cohen made, and Trump and the Trump Committee knowingly accepted, an excessive contribution in contribution in the form of a coordinated expenditure).

Bragg's Office,[32] and the Department's follow-up response to the Committee stated that a "comprehensive search for email communications … between any officials in Department leadership … and the District Attorney's office regarding any investigation or prosecution of the former President," turned up nothing.[33] But at, America First Legal, our investigation had already uncovered that the District Attorney's Office identified "36 responsive records" to our request for their communications with the DOJ "mentioning or regarding Donald J. Trump," and we're currently suing in New York to bring these records to light.[34]

On the final day of President Trump's trial in New York, the Biden campaign held a press conference across the street from the courtroom.[35] Moments after the jury verdict, the Biden campaign posted the statement: "In New York today, we saw that no one is above the law …. Convicted felon or not, Trump will be the Republican nominee for president. The threat Trump poses to our democracy has never been greater."[36]

The true threat to democracy was a partisan and legally unprecedented local prosecution that came so close to taking down the duly-elected President of the United States.

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[32] Press Release, Rep. Matt Gaetz, Congressman Gaetz Slams AG Garland on Alleging the DOJ Communicating with State Prosecutors Against President Trump is a 'Conspiracy Theory' (June 4, 2024), https://perma.cc/D85Z-2K4R.
[33] Letter from Carlos Felipe Uriarte, Assistant Att'y Gen, U.S. Dep't of Just., to the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, (June 10, 2024), available at https://perma.cc/M8LK-EZPL.
[34] America First Legal Sues the New York District Attorney's Office for Illegally Concealing Records on Alvin Bragg's Partisan Persecution of President Trump, AM. FIRST. LEGAL FOUND. (Aug. 13, 2024), https://perma.cc/4746-MHG5.
[35] Colleen Long & Zeke Miller, *Biden Campaign Sends Allies de Niro and First Responders to Trump's NY Trial to Put Focus on Jan. 6*, ASSOCIATED PRESS (May 28, 2024), https://perma.cc/L4LS-ARUM.
[36] Biden-Harris HQ (@BidenHQ), X (May 30, 2024, 5:44 PM), https://perma.cc/49NF-PUQC.

Mr. ROY. Thank you, Mr. Epstein.
Professor Foley, you may begin.

STATEMENT OF ELIZABETH PRICE FOLEY

Ms. FOLEY. Chair Roy, Ranking Member Scanlon, and the Members of the Subcommittee, first, good afternoon, and thank you for the opportunity to testify.

Lawfare is something we should all agree is bad. The definition of lawfare is using the legal system either through criminal or civil suits to go after your political opponents. Firing people in the Executive Branch doesn't fit that definition. So, it's not lawfare.

Lawfare is something that has torn this country apart. It's deepened our political divide, it's undermined the rule of law, and it's distorted, if not destroyed, America's trust in government, particularly its courts. So, the good news, however, is that Congress can do something about it.

I want to talk about the removal amendment, the bill that was just dropped, which I had a draft of a little bit earlier. I will focus on that, but on the drive over I thought to myself, what really Congress ought to do—if I had my wish list—is I would ask you to consider reorganizing the Federal Courts.

You have plenary control over lower Federal Courts under Article III, Section 1. You could take DDC, the District Court in D.C., and the D.C. Circuit, and you could fold it into a new 13th Circuit. You could wrap it into a circuit with West Virginia, Tennessee, and Arkansas, and you could help dilute a lot of the bias that's happening today that's fueling a lot of this lawfare. It's not going to solve all problems, but, frankly, I think that's a very deep problem that we have with the D.C. Circuit and the DDC that you need to think about finding creative ways to solve. So, that's one point.

With regard to removal, you can also discourage lawfare by toying with or amending the Federal officer removal statute. That's going to be really important, because if you make removal more readily available, you discourage lawfare because you allow these cases to be taken into the Federal Court where you have lifetime-tenured judges who will represent the interest of the Federal sovereign and they're more insulated from the political whims than their State counterparts are. These Federal judges will then be responsible for deciding the legal scope of important Federal defenses such as immunity.

Removal to Federal Court also allows a Federal jury to decide the merits of the charges levied by the State against the Federal official, and that's really important because Federal jury pools are often geographically larger, and this is going to help reduce or dilute the bias that a State or a locality may have against the Federal Government, particularly if that hostility toward the Federal Government is sort of focused in one particular locality, such as Fulton County, Georgia, or Manhattan.

Now, if we don't have liberal removal standards, if the current removal statutes are not being liberally construed as the Supreme Court says they should be, then we have a problem—as the Supreme Court identified in *Tennessee* v. *Davis*—of having rogue States that are hostile to actions by the Federal Government, and

those rogue States then undermine Federal authority through lawfare waged against Federal officials.

The lawfare that has occurred in Georgia and New York have revealed at least three substantive amendments to the removal statute that I think are important. First, George has already talked about the need to have the removal statute clearly State that it applies to former Federal officials, such as Mark Meadows.

It is remarkable that the 11th Circuit which denied removal of Mr. Meadows' case did so because he was a former official, but two of the three judges on the panel is Judge Rosenbaum and Judge Abudu; the first one is an Obama appointee and the second one is a Biden appointee. Two of the three judges on the panel implored you, implored Congress, to amend 1442 to include former officials. That says everything you need to know that this is not political. This is for the good of the country.

They even said—they went so far as to say that, if you don't do this, it could destroy the entire system of government. They said it is a risk that, quote, "keeps them up at night." OK? Those are not light words by Democratic appointees. So, at a minimum, I think you need to amend 1442 for that.

The other thing I think you need to do is make clear that removal is allowed for the President and the Vice President. George already touched on that issue.

I'll stop there and look forward to your questions. Thank you.

[The prepared statement of Ms. Foley follows:]

Written Statement
of
Elizabeth Price Foley
Professor of Law, Florida International University College of Law
and
Of Counsel, BakerHostetler, LLP

"Legislative Reforms to End Lawfare by State and Local Prosecutors"

Subcommittee on the Constitution and Limited Government
of the Committee on the Judiciary
United States House of Representatives

March 4, 2025

Chairman Roy, Ranking Member Scanlon, and members of the Subcommittee, thank you for the opportunity to testify on the need for legislation to end State lawfare against federal officials. By way of brief background, I am a tenured Professor of Law at Florida International University College of Law, a public law school located in Miami, where I teach constitutional law, separation of powers, and civil procedure. I also serve Of Counsel with the Washington, D.C. office of BakerHostetler, LLP, where I practice constitutional and appellate law.

I. The Purpose of the Federal Officer Removal Statute (28 U.S.C. § 1442)

The federal officer removal statute, 28 U.S.C. § 1442, allows any federal officer—in the executive, legislative, or judicial branches—to remove to federal court any State proceeding (civil or criminal) relating to an act undertaken "under color of" their federal office or in the performance of their official duties. Its purpose is to effectuate the Supremacy Clause of Article VI of the Constitution, which deems "[t]he Constitution, and laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States . . . the supreme Law of the Land."

As the Supreme Court explained in *Tennessee v. Davis*,[1] Congress has authority under the Necessary and Proper Clause[2] to carry into execution the federal judicial power over federal questions.[3] When a State initiates civil or criminal proceedings against a federal officer, explained *Davis*, the case inherently threatens the ability of the federal government to "preserv[e] its own existence" because the federal government "can act only through its officers and agents,

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[1] Tennessee v. Davis, 100 U.S. 257 (1879).

[2] U.S. Const. art. I, § 18, cl. 18.

[3] Article III, section 2 extends the federal judicial power to, *inter alia*, cases "arising under th[e] Constitution, the Laws of the United States, and Treaties Made . . . under their Authority . . . ."

and they must act within the States."[4] If federal "officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,--if their protection must be left to the action of the State court,--the operations of the general government may at any time be arrested at the will of one of its members."[5]

Davis observed that "legislation of a State may be unfriendly" to federal officials and State proceedings against them may "paralyze the operations of the [federal] government."[6] "[E]ven if," the Court noted, the State's final judgment against a federal official "can be brought into the United States court for review" by the Supreme Court, it would be too late, for the federal officer would be "withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested."[7] The Court concluded, "No State government can . . . obstruct [the federal government's] authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument [the Constitution] has committed to it."[8]

The federal officer removal statute thus protects federal supremacy—including immunity arising under federal statutory or constitutional law—by giving federal officials the right to have a federal forum adjudicate the charges levied against them. As the Supreme Court noted in *Willingham v. Morgan*, "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in federal court."[9] The *Willingham* Court concluded that if a federal official is "on duty" when the relevant acts occurred (upon which an immunity defense is based), he is entitled to removal; if the prosecutor/plaintiff argues the official was "engaged in some sort of 'frolic on their own," . . . then they [federal officers] should have the opportunity to present their version of facts to a federal, not a state, court. This is exactly what the removal statute was designed to accomplish."[10]

It should also be noted that under *Davis*, the removal of a State criminal prosecution against a federal official is no different than the removal of a civil case: "There is no distinction in this respect between civil and criminal cases. Both are within [the federal judiciary's] scope. Nor is it any objection that questions are involved which are not at all of aa Federal character. If one of the latter exists, if there be a single ingredient in the mass, it is sufficient."[11] "It ought, therefore, be considered as settled that the constitutional powers of Congress to authorize removal of criminal cases for alleged offences against State laws from State courts to the [trial]

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[4] *Davis*, 100 U.S. at 262, 263.

[5] *Id.* at 263.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Willingham v. Morgan, 395 U.S. 402, 407 (1969).

[10] *Id.* at 409.

[11] *Davis*, 100 U.S. at 270.

courts of the United States . . . is as ample as its power to authorize the removal of a civil case."[12] When a state case is removed to federal court, the law of the State continues to apply where relevant: In removed cases, federal courts "adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and so long as they keep within the jurisdiction assigned to them, their [the federal courts'] general powers are adequate to the trial of any case."[13] It is therefore to be expected that "even in cases of criminal prosecutions for alleged offenses against a state, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding."[14]

II. State Lawfare and Attempts at Removal

After President Trump left office in January 2021, his political opponents began a litigation campaign—"lawfare"—to prevent him from running for President again and to both punish and deter other individuals (e.g., attorneys and advisors) for/from working with him. Four major criminal cases were launched after Trump lost reelection in 2020, all of which implicated acts undertaken by federal official.

Two criminal cases were filed in federal court against President Trump by Special Counsel Jack Smith, and the other two were filed in State court by Fulton County, Georgia District Attorney Fani Willis[15] and New York County District Attorney Alvin Bragg.[16] In addition, one civil suit alleging business-related fraud (overvaluation of real estate) was brought in New York by New York Attorney General Letitia James, which covered conduct occurring before, during and after Trump's first term as President.[17]

The two State criminal cases are most relevant here because defendants in those cases sought removal but were unsuccessful for different reasons, discussed below. The inability to remove these State prosecutions suggests that amendments to Section 1442 are needed to effectuate the purpose of removal. Indeed, in the Georgia litigation, two of the three judges on

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[12] *Id.* at 271.

[13] *Id.* at 271-72.

[14] *Id.* at 272.

[15] The Georgia prosecution was brought against nineteen defendants, including President Trump, his Chief of Staff Mark Meadows, and several nationally prominent attorneys including Prof. John Eastman, Rudy Guiliani, Jeffrey Clark, and Jenna Ellis. It was based principally on violation of the Georgia RICO statute. *See* Indictment No. 23SC188947, Fulton Cty. Super. Ct, Aug. 14, 2023, *available at* https://d3i6fh83elv35t.cloudfront.net/static/2023/08/CRIMINAL-INDICTMENT-Trump-Fulton-County-GA.pdf.

[16] The New York prosecution was brought only against President Trump, and it was based on New York's law against falsification of business records. See Indictment, People v. Trump, N.Y. Sup. Ct., *available at* https://manhattanda.org/wp-content/uploads/2023/04/Donald-J.-Trump-Indictment.pdf.

[17] The relevant conduct occurred from 2011-2021. People v. Trump, No, 452564/2022, available at https://ag.ny.gov/sites/default/files/decisions/trump-decision.pdf (bench trial judgment of over $450 million against Trump and his company). No removal was attempted in this civil case, so it will not be discussed here.

the U.S. Court of Appeals for the Eleventh Circuit—one appointed by President Obama and the other by President Biden—implored Congress to amend Section 1442.

A. The Georgia Criminal Litigation

In the Georgia prosecution, the U.S. Court of Appeals for the Eleventh Circuit held that removal was improper for two reasons: (1) Section 1442 did not apply to *former* federal officials such as plaintiff Mark Meadows, the Chief of Staff for President Trump; and (2) the acts that formed the basis of the indictment (conspiracy under Georgia's RICO statute) were not undertaken "under color of" Meadows' federal role.[18]

1. Section 1442 does not apply to former officials

The Eleventh Circuit held that Section 1442 removal is not available to *former* federal officials based upon the text and structure of the statute.[19] It acknowledged that "no court has ruled that former officers are excluded from removal" and that "former officers have removed actions in other circuits," but differentiated those decisions by stating that they "did not discuss the text of section 1442 at all."[20] Meadows argued that that the *purpose* of Section 1442--i.e., protective jurisdiction—suggests that removal should be permitted by former officials whose acts were undertaken *while in office*, but the Eleventh Circuit disagreed, concluding that "state prosecution of a *former* officer does not interfere with ongoing federal functions—case-in-point, no one suggests that Georgia's prosecution of Meadows has hindered the current [Biden] administration."[21]

The Eleventh Circuit's reasoning is deeply flawed. The purpose of the federal officer removal statute, as recognized by the *Davis* Court, is to protect the federal government's supremacy, including immunities provided by federal statutory and constitutional law.[22] Removal is necessary, explained the Court, for three independent reasons: (1) "for the preservation of the acknowledged powers of the [federal] government"; (2) to provide "a uniform and consistent administration of national laws"; and (3) "for the preservation of that supremacy which the Constitution gives to the federal government . . . ."[23] These three rationales apply equally to proceedings against *former* federal officials relating to acts undertaken *while serving as federal officials*.

While the Eleventh Circuit may be correct that denying removal to former officials like Mr. Meadows would not have "hindered the current [Biden] administration,"[24] removal was nonetheless "essential . . . to a uniform and consistent administration of national laws" relating to

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[18] Georgia v. Meadows, 88 F.4th 1331 (11th Cir. 2023).

[19] *Id.* at 1138-1343.

[20] *Id.* at 1342.

[21] *Id.* at 1343 (italics in original).

[22] *Davis,* 100 U.S. at 263.

[23] *Id.* at 265-66.

[24] *Meadows*, 88 F.4th at 1343 (italics in original).

immunity and was "required for the preservation of that supremacy which the Constitution gives to the federal government . . . ."[25] These interests exist separate and apart from any *current* presidential administration. Immunities granted by federal law to federal officials *protect the interests of the federal government generally*, not the *current* occupants of any one branch.

Even if the Eleventh Circuit's construction of Section 1442 is correct—i.e., it does not allow removal by *former* federal officials—it only emphasizes the need for Congress to amend the statute to permit such removals. Notably, two of the three Eleventh Circuit judges in *Meadows*—judges Rosenbaum and Abudu (Obama and Biden appointees, respectively)—penned a concurrence beseeching Congress to amend Section 1442 to allow former officials to remove. An amendment was necessary to prevent lawfare: "[F]oreclosing removal when states prosecute former federal officers simply for performing their official duties can allow a *rogue state's weaponization of the prosecution power to go unchecked and fester*."[26]

Judges Rosenbaum and Abudu acknowledged that disallowing former officials to remove has "consequences . . . that are profound" because it will encourage further divisive lawfare.[27] They did not mince words about the failure to amend the statute:

> [P]rosecutions of former federal employees for undertaking locally unpopular actions—but actions that are still within the bounds of their official duties—can cause a crisis of faith in our government and our courts. Not only that, but these types of actions can cripple government operations, discourage federal officers from faithfully performing their duties, and dissuade talented people from entering public service. After all, who needs the aggravation and financial burden from being criminally prosecuted (even in one state) just for carrying out official responsibilities? And federal officers who are reluctant to do their duty, or a dearth of talented and enthusiastic people willing to serve in public office, could paralyze our democratic-republic system of government.
>
> This nightmare scenario keeps me up at night. In my view, not extending the federal-officer removal statute to former officers for prosecutions based on their official actions during their tenure is bad policy, and it represents a potential threat to our republic's stability.[28]

The "nightmare scenario" keeping Judges Rosenbaum and Abudu up at night is the continuation of lawfare that has divided this country and deeply wounded trust in government. The incentive to engage in lawfare can be reduced substantially by amending Section 1442 to apply to former officials. Doing so will not cause a sea-change in Section 1442 removal but instead align its text with the statute's long-understood purposes. As Judges Rosenbaum and Abudu put it:

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[25] *Davis*, 100 U.S. at 265-66.

[26] *Meadows*, 88 F. 4th at 1350 (Rosenbaum, J., concurring).

[27] *Id.* (Rosenbaum, J., concurring).

[28] *Id.* at 1350-51 (Rosenbaum, J., concurring).

> Congress created federal-officer removal statutes because it recognized that the risks to our federal government are just too great if a state court isn't capable—for whatever reason—of quickly, correctly, and fairly adjudicating federal defenses when a federal officer has been indicted for carrying out his official federal responsibilities. . . .
>
> [S]tate prosecutions of former federal officers for doing their official duties can also cripple the federal government, just like prosecutions of current federal officers can. Consider an ongoing federal policy or operation. If a state prosecutes a former federal officer for his official role in that, current federal officers who are responsible for continuing to carry out that policy or operation may well be chilled from doing so out of concern that they, too, will be prosecuted by the state when they leave their positions.
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> Or if states start indicting high-profile former federal officers, upon stepping down, for their official actions while in office, our national leaders may cease taking any significant action for the country in an effort to avoid later state prosecution. After all, it's hard to think of any federal policy that's not unpopular somewhere in the country. If undertaking meaningful action within the scope of official authority becomes too risky for a federal officer because she will have to pay the state piper later, why bother even entering public service in the first place? But without talented and enthusiastic people willing to serve our country, the future would be bleak.
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> And I haven't even started to discuss the undermining effect that constant and repeated state prosecutions of former federal officers for doing their official duties would have on the perceived legitimacy of our system of government. . . .
>
> These harms are serious. Fortunately, though, they can also be easily addressed if Congress amends the federal-officer removal statute to expressly include former federal officers.[29]

Congress should heed the advice of Judges Rosenbaum and Abudu and amend Section 1442 to allow removal by former federal officials.

2. The "Color of Office" Test of Section 1442 Was Not Satisfied

The Eleventh Circuit alternatively held that "even if Meadows were an 'officer,' [under Section 1442], his participation in an alleged conspiracy to overturn a presidential election was not related to his official duties."[30] To reach this conclusion, the Eleventh Circuit reasoned that Georgia's prosecution of Mr. Meadows did not "relate to" his official duties as Chief of Staff to the President because the prosecution was for the "inchoate crime of conspiracy" which is "not defined by any single *actus reus* in furtherance" of the conspiracy but merely by agreeing to join the it and undertaking "conduct in the aggregate furthered the alleged enterprise to overturn the election."[31] In other words, "[B]ecause Meadows [conspiracy] culpability does not depend on

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[29] *Id.* at 1354-55 (Rosenbaum, J., concurring).

[30] *Id.* at 1338.

[31] *Id.* at 1344, 1345.

nay discrete act, he cannot remove by proving that one act was undertaken in his official capacity."[32]

This was error. The *Willingham* Court made clear that if an official, such as Mr. Meadows, is "on duty" when the relevant acts occurred (upon which an immunity defense is based), he is entitled to removal.[33] As explained in *Maryland v. Soper*, the "color of office" test for Section 1442 removal requires a "causal connection between what the officer has done under asserted official authority and the state prosecution."[34] Thus, if the officer "*assert[s]* official authority" to do X and X is causally connected to the state prosecution, the "color of office" test is satisfied. In other words, if the prosecution relies upon *any asserted official acts*, the "color of office" test is satisfied. As *Sope*r further explained, "the [removal] statute does *not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority*. It is enough that his acts or his presence at the place . . . constitute the basis, though mistaken or false, of the state prosecution."[35] Thus, Georgia's prosecution did not have to be, as the Eleventh Circuit believed, "for the very acts [Meadows] admits to have been done by him under federal authority"; it was "enough that [Meadows'] acts . . . constitute the basis . . . of [Georgia's] prosecution" of him. It clearly did.

Whether Mr. Meadows *was or was not actually acting in an official capacity* as Chief of Staff is not relevant to the issue of *removal* under Section 1442. It is relevant to the *merits* of his defense of federal immunity. And the merits of a federal immunity defense should be decided by a federal court, once the case is removed. This distinction—between the "color of office" test for removal versus the merits of federal immunity—was clearly recognized by the Supreme Court in *Jefferson County v. Acker*.[36] There, the court recognized that federal officer removal exists "if the defense depends on federal law."[37] The federal defense (such as immunity) must be "colorable" and must show a nexus "between the charged conduct and asserted official authority."[38] The removal statute must be liberally construed because ""one of the most important reasons for removal is to have the validity of the defense of official immunity tried in federal court."[39]

In *Acker*, federal district court judges sought removal of state court proceedings against them, claiming federal immunity under the intergovernmental tax immunity doctrine. The State argued that despite the federal immunity defense, the case was not removable because *the State charges levied* against them—non-payment of a county tax—related to the federal officials' *personal* obligations rather than their *official* judicial duties. The Supreme Court disagreed,

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[32] *Id.* at 1345.

[33] *Willingham*, 395 U.S. at 409.

[34] Maryland v. Soper, 270 U.S. 9, 33 (1926))

[35] *Id.* (emphasis added).

[36] Jefferson Cty. v. Acker, 527 U.S. 423 (1999).

[37] *Id.* at 431.

[38] *Id.*

[39] *Id.* (quoting *Willingham*, 395 U.S. at 409).

stating that determining whether the state charges implicated the federal judges' official duties went to "the merits of th[e] case"—i.e., the validity of the immunity defense--not the judges' entitlement to removal.[40] Importantly, *Acker* stated that, "The *circumstances that gave rise to* the [state charges] . . . constitute the basis for the [] lawsuits at issue."[41] In other words, the *facts/actions giving rise to the state charges*—not the charges themselves—create the nexus required to satisfy the "color of office" test under Section 1442.

Eleventh Circuit clearly misunderstood Supreme Court precedent and thought it had power to second-guess an official's claim of federal immunity for purposes of *removal.* It denied removal because it refused to "blindly accept an expansive proclamation of executive power relying on no source of positive law. Instead, our judicial duty demands an independent assessment of the limits of Meadow's office." This inquiry—the extent of executive power and the immunity granted to a federal official pursuant to the Supremacy Clause—cannot, under *Soper* and *Acker*, be decided at the *removal* stage. As *Willingham* put it, if the prosecutor/plaintiff argues the federal official was "engaged in some sort of 'frolic on their own," . . . then they [federal officers] should have the opportunity to present their version of facts *to a federal, not a state, court*. This is exactly what the removal statute was designed to accomplish."[42]

In d, whether a federal immunity defense is valid goes to the *merits* of the State's case, not to the *removability* of the State case. Under the federal officer removal statute (Section 1442), the assertion of a recognized federal immunity creates a right to removal. The case cannot be remanded to state court; the federal immunity defense must be decided on the merits by the federal district court. Federal courts cannot remand the case because the State charges levied do not directly involve acts claimed to be official. Instead, a broader construction of Section 1442 is required: If the "*circumstances that gave rise to* the [state charges]"[43] involve the asserted use of official federal authority, the "color of office" test is satisfied. This broader construction ensures that the protective goal of removal jurisdiction—especially immunity grounded in federal law—is achieved.

Because of the Eleventh Circuit's inappropriately narrow construction of the "color of office" requirement of Section 1442, an amendment clarifying that the phrase is satisfied if the State proceeding involves evidence of any act alleged to be official (even if such acts are not part of the elements of the charged offense) is needed to effectuate the purpose of the statute.

B. The New York Criminal Litigation

President Trump attempted to remove New York's prosecution of him based on felony falsification of business records. Like the Georgia litigation, however, the federal court

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[40] *Id.* at 432.

[41] *Id.* at 433.

[42] *Willingham*, 395 U.S. at 409 (emphasis added).

[43] *Acker*, 527 U.S. at 433.

concluded that removal under Section 1442 was improper and remanded the case back to State court.[44] Specifically, Judge Alvin Hellerstein of the Southern District of New York concluded that removal was improper because the "color of office" test was not satisfied, and Trump had not articulated a "colorable defense" based on federal law.

1. Section 1442 Does Apply to Former Officials

Interestingly, unlike the Eleventh Circuit in the Georgia litigation, Judge Hellerstein held that Section 1442 *does* apply to former federal officials. Specifically, he concluded "that Trump, although not presently a federal officer, can remove a case otherwise qualified for removal" because "it would make little sense if thus were not the rule, for the very purpose of the Removal Statute is to allow federal courts to adjudicate challenges to acts done under color of federal authority."[45]

Judge Hellerstein acknowledged, however, that there is a "difficult question" as to whether the President is an "officer . . . of the United States" within the meaning of Section 1442.[46] Without extensive discussion, the judge acknowledged that the federal Circuit Courts of Appeal in the Fifth, Ninth and D.C. Circuits had previously allowed removal for the President and Members of Congress,[47] even though none are appointed as "officers" under the Appointments Clause of Article II, section two of the Constitution. The Supreme Court has not addressed this question as to whether the President (or Vice President) qualify as "officers" under Section 1442(a) and given that Judge Hellerstein characterized it as a "difficult question," an amendment to expressly add the President (and Vice President) to the federal officer removal statute would be important to effectuate the purpose of the constitutionally-based "official acts" immunity provided to the President pursuant to *Nixon v. Fitzgerald*[48] (civil cases) and *Trump v. United States*[49] (criminal cases).

2. The "Color of Office" Test of Section 1442 Was Not Satisfied

President Trump asserted that he hired attorney Michael Cohen "as a direct result of [his] role as President . . . in order to separate his business affairs from his public duties."[50] More fundamentally, "Trump conceded in his Notice [of removal] that he hired Cohen to attend to this private matters" and Judge Hellerstein concluded, "Even if I accept Trump's allegations . . . that the payments to Cohen were compensation for his services as Trump's personal attorney, the requirement that the removing party demonstrate a relationship to an official act is not

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[44] New York v. Trump, 683 F. Supp.3d 334 (S.D.N.Y. 2023).

[45] *Id.* at 343.

[46] *Id.*

[47] *Id.*

[48] Nixon v. Fitzgerald, 457 U.S. 731 (1982).

[49] Trump v. United States, 603 U.S. 593 (2024).

[50] New York v. Trump, 683 F.Supp.3d at 345.

satisfied."[51] Cohen's invoices were maintained in the Trump Organization's records, and "Trump paid Cohen from private funds, and the payments did not depend on any Presidential power for their authorization."[52] Trump accordingly failed to satisfy the court that the criminal prosecution by New York State was "for or relat[es] to" acts he undertook "under color of" his presidential office.[53]

3. There Was No "Colorable" Federal Preemption Defense

Finally, Judge Hellerstein concluded that Trump had failed to raise a colorable federal defense, as necessary under Section 1442.[54] Trump asserted two federal defenses: (1) Supremacy Clause-based immunity[55]; and (2) preemption. The court concluded that the Supremacy Clause immunity was not "colorable" because he did "not explain[] how hiring and making payments to a personal attorney to handle personal affairs carries out a constitutional duty."[56] [57]

Judge Hellerstein also concluded that Trump's preemption defense was not "colorable," but this conclusion lacks analytical rigor. Specifically, Trump argued that the New York prosecution was preempted by the Federal Election Campaign Act ("FECA") because New York's prosecution for felony falsification of business records was *predicated* on Section 17-152 of New York Election Law. Judge Hellerstein concluded that this was not a "colorable" preemption defense because Section 17-152 of New York Election Law did not "directly target campaign contributions and expenditures . . . ."[58] However, as I have previously pointed out:

> FECA declares that its provisions "supersede and preempt any provision of state law *with respect to* election to Federal office." The 1974 congressional conference committee report accompanying enactment of FECA's pre-emption language states: "It is clear that the Federal law occupies the field with respect to reporting and disclosure of political contributions and expenditures by Federal candidates." Federal Election Commission regulations likewise declare that FECA "supersedes State law" concerning the "disclosure of receipts and expenditures by Federal candidates" and "limitation on contributions and expenditures regarding Federal candidates."[59]

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[51] *Id.*

[52] *Id.*

[53] *Id.* at 345-46.

[54] *Id.* at 346.

[55] Oddly, Trump "expressly wived any argument premised on a theory of absolute presidential immunity." *Id.* Later, in the summer of 2024, the Supreme Court recognized an absolute presidential immunity against criminal prosecution predicated on a President's official acts. Trump v. United States, 603 U.S. 593 (2024).

[56] New York v. Trump, 683 F.Supp.3d at 346-47.

[57] *Id.* at 347.

[58] *Id.* at 350.

[59] David B. Rivkin, Jr. & Elizabeth Price Foley, *Why Trump's Conviction Can't Stand*, Wall Street Journal, Sept. 8, 2024.

New York used its election law to brand Mr. Trump a felon based on how he *reported expenditures* with respect to his 2016 presidential campaign—a *federal* campaign governed by FECA. The use of New York election law as the predicate to justify charges against Trump thus subverted FECA's goal of providing predictable, uniform national rules for disclosure of federal campaign contributions and expenses. For these reasons, Mr. Trump's FECA preemption defense was more than "colorable" and Judge Hellerstein's conclusion to the contrary is inexplicable. As was the case with the Eleventh Circuit's inappropriately narrow construction of the "color of office" requirement of Section 1442, an amendment clarifying that the phrase is satisfied if the State proceeding involves any act alleged to be official (even if such acts are not part of the elements of the charged offense) is needed to effectuate the purpose of the statute.

III. Conclusion

In sum, based upon the recent experience with attempting to remove to federal court the State cases (in Georgia in New York) brought against federal officials, it has become clear that amendments to the federal officer removal statute, 28 U.S.C. § 1442, are required to effectuate the protective purpose of the statute and discourage continued lawfare against federal officials. Specifically:

(1) The statute should expressly permit removal by *former* federal officials;

(2) Since there is ongoing debate as to whether the President (and Vice President) are "officers" within the meaning of the statute, an amendment should clarify that they *are* entitled to remove to effectuate the immunity articulated by the Supreme Court in *Nixon v. Fitzgerald* (civil immunity for official presidential acts) and Trump v. United States (criminal immunity for official presidential acts).

(3) To prevent inappropriately narrow construction and effectuate the protective purpose of the statute, an amendment should clarify that the phrase "color of such office" is satisfied if the State proceeding involves evidence of any act alleged to be official, even if such acts are not part of the elements of the charged offense.

(4) All amendments should be effective for any pending suits (at the time of enactment) or future suits. To effectuate any amendments' application to *pending* suits, however, the 30-day timeline for removal of civil actions (specified in 28 U.S.C. § 1446(b)) and for criminal actions (specified in 28 U.S.C. § 1455(b)) should be modified to specify that post-enactment, a *new 30-day removal clock begins* for all pending state actions.

Mr. ROY. Thank you, Professor Foley.
Professor Beske, your time may begin.

STATEMENT OF ELIZABETH EARLE BESKE

Ms. BESKE. Thank you.

Chair Jordan, Ranking Member Raskin, Chair Roy, Ranking Member Scanlon, and the Members of the Subcommittee, it is a great honor and a privilege to be part of your deliberative process, and I thank you for the invitation.

My name is Elizabeth Earle Beske, and I'm a Professor of Law at American University Washington College of Law where I teach Federal Courts, Constitutional law, and civil procedure. I went to Princeton University and Columbia Law School, and after law school, I clerked for Patricia Wald and Justice Sandra Day O'Connor, and then I spent some time working as a litigator at Munger, Tolles & Olson. As will be apparent, I come to you today not as a politician but as a nerdy law professor.

My message today is a simple one. You can add the proposed language to the statute, but it may not have the immediate broad and sweeping effect you intend. In fact, in many instances, it may not do very much.

Congress, as my colleague just noted, has extensive power to confer jurisdiction on the lower Federal Courts. Indeed, the Framers conferred on Congress the authority to decide whether lower Federal Courts exist in the first place. This vast power was limited, however, by Article III of the Constitution.

The Supreme Court has made clear that Congress may not expand the jurisdiction of the lower Federal Courts beyond the bounds established by the Constitution. In this area, the Constitution requires that all cases have a Federal ingredient.

Section 1442, which you're seeking to amend, allows the removal by Federal officers of civil and criminal actions brought against them in State Court for actions they take under color of their office, a unanimous Supreme Court held in *Mesa* v. *California*—written by my boss—that the Constitution only permits these kinds of removal where Federal officers assert a colorable Federal defense. That is the only time there is the requisite Federal ingredient. Any other reading, the court made clear, would raise grave Constitutional questions. Even though the statute does not include this limitation on its face, we must read it in line with the colorable Federal defense requirement.

The *Mesa* court confirmed that Section 1442 is a pure jurisdictional statute, nothing more. In other words, it provides a pathway to Federal Courts for a defendant, but does not establish a defendant's entitlement to get there. That has to come from somewhere else.

This bill clarifies, as Judge Hellerstein of the Southern District of New York had already concluded, that the statute covers the President and Vice President. This bill also takes up 11th Circuit Judge Rosenbaum's call in *Georgia* v. *Meadows* to expand coverage to include former Federal officers. The 11th Circuit had other things to say on the point of Mr. Meadows' effort to remove.

Of course, current and former Federal officers cannot remove simply because they hold a particular Federal office or because the

suit charges conduct under color of that office. The Supreme Court's unanimous opinion in *Mesa* considered and specifically rejected that argument.

Perhaps anticipating *Mesa*'s clear instruction, the bill proposes to create a new immunity provision, 1456. This provision confers on all officers a rebuttable immunity under Article VI, Section 2, of the Constitution, from any charges or claims made under authority of State law.

The Article VI, Section 2, is the Supremacy Clause. The Supremacy Clause does three things. It declares that Federal law is the law of the land even in the States, it establishes Federal law is supreme, and it states that if ever there is a conflict between State law and Federal law, Federal law wins. It's basically a choice of law provision.

In 2015, in another unanimous Supreme Court decision written by Justice Scalia, the Supreme Court made clear that the Supremacy Clause does nothing else. Stating it plainly, Justice Scalia wrote, "The Supremacy Clause is not the source of any Federal rights." In other words, it lacks independent content.

A unanimous Supreme Court has clearly told us we cannot look at the Supremacy Clause to find Federal rights. It just tells us what to do when we find them. Plainly, Section 1456 and the Supremacy Clause themselves cannot provide content for a brand-new and very expansive defense. Section 1456 by itself does not solve a *Mesa* problem.

The proposed new official immunity provision certainly does not enact what some have called the Supremacy Clause immunity defense. That term, coined by lower Federal Courts, has no relation to the Supremacy Clause it confers immunity where officers can demonstrate their actions were necessary to fulfill Federal duties—nor does it enact quietly any immunity recognized in *Trump* v. *United States*.

Thank you for your time.

[The prepared statement of Ms. Beske follows:]

The Subcommittee on the Constitution and Limited Government

U.S. House of Representatives

Committee on the Judiciary

"Legislative Reforms to End Lawfare

By State and Local Prosecutors"

March 4, 2025

Testimony of Elizabeth Earle Beske

Professor of Law

American University

Washington College of Law

Chairman Roy, Ranking Member Scanlon, and Members of the Committee, it is a great honor and privilege to be part of your deliberative process, and I thank you for the invitation.

My name is Elizabeth Earle Beske, and I am a Professor of Law at American University, Washington College of Law, where I teach Federal Courts, Civil Procedure, and Constitutional Law. I went to Princeton University and Columbia Law School, and after law school, I clerked for Judge Patricia Wald and Justice Sandra Day O'Connor. Thereafter, I worked as a litigator at Munger, Tolles & Olson.

As will soon be apparent, I come to you not as a politician, but as a nerdy law professor. My message today is a simple one. You can add the proposed language to the statute, but it may not have the immediate, broad, and sweeping effect you intend. In fact, in most instances, it may not do very much.

Congress has extensive power to confer jurisdiction on the lower federal courts. Indeed, the framers conferred on Congress the authority to decide whether lower federal courts ought to exist in the first place. This vast power is limited, however, by Article III of the Constitution. The Supreme Court has made clear that "Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983). In this area, the Constitution requires that all cases have a "federal ingredient." *Osborn v. Bank of the United States*, 22 U.S. 738, 823 (1824).

28 U.S.C. Section 1442 allows removal by federal officers of civil and criminal actions brought against them in state court for actions they take under color of their office. A unanimous Supreme Court held in *Mesa v. California* that the Constitution only permits these kinds of removal where federal officers assert a "colorable federal defense." 489 U.S. 121, 129 (1989). That is the only time there is the requisite "federal ingredient." Any other reading, the Court made clear, would raise "grave" constitutional questions. *Id.* at 137. So even though the statute does not include this limitation on its face, we must read it in line with the "colorable federal defense" requirement. The *Mesa* Court confirmed that 28 U.S.C. Section 1442 is "a pure jurisdictional statute"—nothing more. *Id.* at 136. In other words, it provides a pathway to federal court for a defendant but does not establish the defendant's entitlement to get there. That must come from somewhere else.

This bill clarifies, as Judge Hellerstein of SDNY had already concluded, that the statute covers the President and Vice President. The bill also takes up Eleventh Circuit Judge Rosenbaum's call in *Georgia v. Meadows* to expand coverage to include former federal officers. Of course, the President, Vice President, and current and former federal officers cannot remove to federal court simply because they hold a particular federal office, or because the suit charges conduct under color of that office. The Supreme Court's unanimous opinion in *Mesa*, written by my former boss Justice O'Connor, considered and specifically rejected that very argument. *See id.* at 136-

37. The *Mesa* requirement applies to the original statute and to the proposed amendment. The President and Vice President, former federal officers, and former Presidents and Vice Presidents may only remove actions to federal court under the amended statute where they have in pocket a "colorable federal defense." Again, you don't see it, but it is there because the Constitution requires it.

Before turning to a discussion of these defenses, there is another feature of the proposed bill that requires attention. The proposed bill adds a new (5) to section 1442(a), permitting removal of any action against "[t]he President or Vice President . . . where the state court's consideration of the claim or charge may interfere with, hinder, burden, or delay the execution of the duties of the President or Vice President." On its face, this provision only applies, and it can only logically apply, to sitting Presidents and Vice Presidents. Assuming continued adherence to the norm of not criminally charging a sitting President or Vice President, this refers only to civil charges. *See Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office,* Op. O.L.C. (Sept. 24, 1973); *A Sitting President's Amenability to Indictment and Criminal Prosecution,* Op. O.L.C. (Oct. 16, 2000). *Nixon v. Fitzgerald* establishes absolute immunity for civil damage actions based on official acts. 457 U.S. 731, 749 (1982). The Supreme Court has repeatedly rejected the argument that the Constitution requires immunity for actions—civil or criminal—based on unofficial or private acts. *See Clinton v. Jones*, 520 U.S. 681, 694 (1997); *Trump v. United States*, 603 U.S. 593, 615 (2024).[1] The Court likewise rejected President Clinton's effort to get "temporary immunity" from the Paula Jones lawsuit for the duration of his term. *Clinton*, 520 U.S. at 695. Providing such a reprieve, the Court explained, would not serve the principal purpose of immunity—preventing public servants from approaching their designated functions fearful of liability. *See id.* at 693. Nor was the Court persuaded by the argument that private suits would pose burdensome distractions. *See id.* at 699-706.

Okay, so no application to past Presidents and Vice Presidents. Or to sitting Presidents and Vice Presidents for criminal charges. Or to sitting Presidents and Vice Presidents for civil charges based on official conduct. There is only one thing left to which this provision can apply: Civil suits against sitting Presidents and Vice Presidents for *unofficial* conduct. If, by this provision, the bill seeks to expand removal to encompass lawsuits against Presidents and Vice Presidents involving purely private matters—the Trump University cases, the Paula Jones suits, and whatnot—this is a dramatic expansion of the removal statute and a restructuring of the state-federal balance that ought to merit your full attention. Removal is intrusive; it divests state courts of jurisdiction. It would be surprising to see Congress make a move with such federalism implications in the absence of a clear statement, particularly because the Supreme Court has repeatedly, and recently, made clear that the Constitution provides no shield against these lawsuits. *Cf. Gregory v. Ashcroft*, 501 U.S. 452 ("If Congress intends to alter the 'usual

[1] Again, though, the norm is that no criminal prosecutions, even for unofficial acts, take place while a President or Vice President is in office.

constitutional balance between the States and the Federal Government,' it must make its intention to do so unmistakably clear in the language of the statute."); *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990) (requiring clear statement before Congress can oust state courts of jurisdiction over a federal claim). Of course, even if Congress *were* attempting quietly to make such a far-reaching expansion of federal jurisdiction, per *Mesa*, no removal would be permissible unless the President or Vice President had in pocket a "colorable federal defense." The *Mesa* limitation, required by the Constitution, restricts all jurisdiction conferred by the statute. But it is worth flagging that the new section (5) appears to propose something rather extraordinary.

Perhaps anticipating *Mesa*'s clear instruction that Section 1442 only permits removal for defendants with "colorable federal defenses," the bill proposes to create a new immunity provision, Section 1456. One assumes this intends to stand in as the defense the Court found lacking in the *Mesa* case, and it is to have a one-size-fits-all, very broad compass. This provision confers upon all federal officers a rebuttable immunity under Article VI section 2 of the Constitution from any charges or claims made under authority of state law. Article VI section 2 is the Supremacy Clause. The Supremacy Clause does three things. It declares that federal law is the law of the land, even in the states; it establishes that federal law is supreme; and it states that if ever there is a conflict between state and federal law, federal law wins. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 245-260 (2000). It's a rule of priority—basically, a choice of law provision. In 2015, another unanimous Supreme Court case, *Armstrong v. Exceptional Child Center*, made clear that the Supremacy Clause does nothing else. Justice Scalia—one of the best writers on the Supreme Court, then and since—stated it plainly: "the Supremacy Clause is not the source of any federal rights." 575 U.S. 320, 324 (2015). In other words, it lacks independent content. So, a unanimous Supreme Court has clearly told us we cannot look to the Supremacy Clause to *find* any federal rights. It just tells us what to do once we have found them. Plainly, then, Section 1456 and the Supremacy Clause themselves cannot provide content for a brand new, very expansive defense. Section 1456, by itself, does not solve a *Mesa* problem.

The proposed new "Official Immunity" provision certainly does not enact what some have called "Supremacy Clause Immunity." This term hearkens back to *Cunninham v. Neagle* (commonly called "*In re Neagle*"), 135 U.S. 1 (1890), which leading commentators note "stands virtually alone in the Supreme Court's jurisprudence on this issue." Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2197 n. 1 (2003). Neagle, a federal marshal charged by the U.S. Attorney General with protecting Justice Field—who was repeatedly threatened by disgruntled litigant David Terry—shot and killed Terry as he leapt menacingly at the Justice. California authorities promptly arrested Neagle and charged him with murder. Neagle filed a petition for habeas that eventually reached the Supreme Court, which puzzled over whether he was held in violation of federal law notwithstanding the absence of a federal statute. Unsurprisingly, the Court found itself able to grant relief, concluding that he was authorized by federal law to act and had done no more than was necessary and proper under the circumstances in discharging his

duties. *See Neagle*, 135 U.S. at 75. The Supreme Court has largely ignored the case since, and most lower courts, which have drawn on *Neagle* and coined the term "Supremacy Clause immunity,"[2] have required that officers demonstrate an objectively reasonable, well-founded belief their actions were necessary to fulfill federal duties. *See, e.g.*, *Texas v. Kleinert*, 855 F.3d 305, 314-15 (5th Cir. 2017); *Wyoming v. Livingston*, 443 F.3d 1211, 1221 (10th Cir. 2006); *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004). Although they used the term "Supremacy Clause" to name the defense (the Supreme Court never did), these courts have not found content for the defense *in the Supremacy Clause itself*. Instead, they have evaluated extrinsic sources to find authorization under federal law and satisfaction of the necessary and proper standard. *See, e.g., Livingston*, 443 F.3d at 1226-27 (concluding that U.S. Fish & Wildlife Service employees were acting pursuant to regulatory authority requiring them to monitor wolves). Tying an "Official Immunity" provision to the Supremacy Clause, in other words, does not enact a "Supremacy Clause Immunity" defense (or any other substantive defense).

So, too, the "Official Immunity" provision does not quietly codify any immunity recognized in *Trump v. United States*, 603 U.S. 593 (2024). Rather, as a unanimous Court recognized in *Mesa*, this statute is purely jurisdictional, and inclusion of a provision tethered to the Supremacy Clause, which another unanimous Court said includes nothing of substance, does not change that. Section 1442 provides a jurisdictional vehicle by which federal officers can get to federal court armed with a "colorable federal defense." It does not provide that defense itself.

One last point. Proposed Section 1456(d) purports to bar courts from defining or limiting the "scope of the duties of an official of the Executive Office of the President." This provision relates to the requirement of Section 1442(a) that removable suits relate to acts "under color of such office." As all courts have sensibly found, to determine whether an act is "under color of such office," one needs to understand the role of the office. Presumably, the proposed language responds directly to that portion of the Eleventh Circuit opinion in *Georgia v. Meadows* finding two limits to former White House Chief of Staff Mark Meadows' duties—that the Chief of Staff had no role either supervising state elections or electioneering on behalf of a political campaign. The Eleventh Circuit examined positive law—both constitutional and statutory sources—that gave only the states and Congress a role in overseeing state elections. It noted that Mr. Meadows had conceded both points. The court declined to infer a role in overseeing state elections derivatively from the President's general duties under the Take Care Clause. Mr. Meadows and his attorney disagreed with this conclusion. With respect to the electioneering point, the Eleventh Circuit noted that, because the Chief of Staff was expressly forbidden by the Hatch Act from engaging in the conduct with which he was charged, it followed that it could not be part of the official duties of his office.

The proposed language in this bill seems to declare that, in future cases, Mr. Meadows would win on both points without argument: courts would be powerless to ask what roles an executive

[2] Interestingly, they have done so even though the *Neagle* case does not cite to the Supremacy Clause at all.

office does and does not include. What does this mean? Is this provision saying a court must accept that an officeholder's job includes conduct that another statute expressly forbids? Must a court accept a defendant's assertion that charges arise out of or relate to his office without any inquiry? If so, this effectively writes a key element out of the statute and, problematically in the case of the Hatch Act, requires a court to accept as official conduct something that conflicts with another federal statute. It likely doesn't offend the Constitution, as Mr. Meadows must still bring with him a "colorable federal defense" to remain in federal court under *Mesa*, but it is worth flagging that once we start down the road of requiring a court to accept that a suit implicates duties of a federal office on defendant's say-so, the statute inches more toward a general removal provision (and, again, in its broad, largely unexamined sweep brings with it a host of federalism issues).

To conclude, the proposed bill clarifies the inclusion of the President and Vice President in Section 1442 (something Judge Hellerstein was undoubtedly correct to presume before), it takes up Eleventh Circuit Judge Rosenbaum's call to add former officers to the removal statute, and it adds a new immunity provision that, in my view, does nothing of substance. It remains a "pure jurisdictional statute" qualified by Article III of the Constitution and by *Mesa*'s requirement that defendants must carry with them a "colorable federal defense" to remove. A possible expansion to encompass purely private lawsuits would radically affect the federal/state balance without any recognized federal interest or clear statement. With regard to Section 1456(d), it takes certain questions completely from the purview of judges, possibly even when doing so might conflict with other federal statutes, and it would seem to require that courts assume satisfaction of certain elements of Section 1442(a) on defendant's say-so. Perhaps this is the intent; it must be understood, though, that this enlarges the potential sweep of removability and requires judges to rubber stamp a defendant's assertion that he has met the element. As before, however, it is important to remember that this statute is just a pathway for getting to federal court, a purely jurisdictional statute. As Justice O'Connor reminded us for a unanimous Court, this removal statute on its own provides no substantive basis for staying there.

Mr. ROY. Well, thank you, Professor Beske.

Ms. BESKE. Thank you, sir.

Mr. ROY. My apologies. We will now proceed under the five-minute rule with questions.

The Chair recognizes the gentleman from California for five minutes.

Mr. MCCLINTOCK. Thank you, Mr. Chair.

This is the simple, awful truth of the Biden Administration. For the first time in American history, a Presidential administration targeted its chief rival for criminal prosecution, concocted the flimsiest criminal charges, turned the Federal law enforcement machinery against it, colluded with the Democratic State law enforcement officials to do the same. This is the historical record. This happened. When we speak of the threats of democracy, what greater threat can there be than one party trying to jail its political opposition?

Now, I would, frankly, advise the Ranking Member to be very careful in citing the conviction of the President in the kangaroo court of Judge Merchan. A staggering range of legal experts, from Alan Dershowitz on one side to Jonathan Turley on the other, have commented at great length on just how outrageous these proceedings were and how likely they are to be overturned on competent review. If these professors turn out to be correct, the Ranking Member and his many acolytes here in this Congress are going to have their words quoted back to them for the rest of their lives.

Now, those who've tried to put their political opponents in jail have never fared well before history and nor have their apologists. Omar Khayyam put it this way. He said,

> The moving finger writes; and, having writ, moves on: Nor all thy piety nor wit can call it back to cancel half a line, nor all thy tears wash out a word of it.

My Democratic colleagues might want to take a step back and consider how history will judge them in the years ahead when passions have cooled and the facts remain.

Now, Mr. Terwilliger, in the events leading up to the Civil War, the Confederate States asserted a power of nullification and supremacy over the Federal Government that ultimately was resolved at Appomattox Court House. I am unaware of any assertion by the Confederate States that they could, say, seize Abraham Lincoln and try him in their State Courts.

Is there any precedent in the entire history of our country of what the Biden Administration and its partisans in New York and Atlanta attempted to do?

Mr. TERWILLIGER. Not that I'm aware of, Mr. McClintock. In fact, privately and to others perhaps in the President's circle, I described the command that Mr. Trump be in Judge Merchan's courtroom when he was already a declared candidate ready to campaign, that he was truly America's first political prisoner. That case needs to be able to be removed from Federal Court—to Federal Court, rather.

Suppose some State authority had decided that Joe Biden was not of sound mind and was a danger to himself or others, including the country, and decided to civilly commit him under State law. Do

we think that case ought to have stayed in State Court? Of course not. This is a very important step.

If I may just take the opportunity because I think this is so important. Professor Beske is exactly right about the *Mesa* decision which her justice, Justice O'Connor, wrote, and it's why I think that when the Committee marks this bill up, you ought to just simply incorporate Federal question jurisdiction into the basis for removal, because all these removal cases involve Federal questions such as what is the scope of the duties of the Federal officer. We don't want those decided by State Courts.

Mr. MCCLINTOCK. Professor Foley, you mentioned how dangerous this precedent is to both political parties. What's to stop a partisan Republican prosecutor from going after the next Democratic Presidential nominee?

The Democrats keep telling us that any day now, President Trump will try to do the same thing to them, even though he had four years to do that in his first term and didn't and hasn't, of course, in the second so far. If we simply follow the precedent that the Democrats have already set, he certainly could do that. What other measures do we need to take to prevent this from ever happening again?

Mr. Terwilliger said that President Trump was the first political prisoner. We better make damn sure he's the last.

What can you guide us on?

Ms. FOLEY. Couldn't agree more. This is bad for the country.

Yes. Based on this precedent, any Republican State Attorney General or now President Trump could appoint a Special Counsel and go after Biden and anybody in Biden's Administration. The precedent has been set, and it's a bad precedent.

What's stopping that from happening? Honestly, we were talking about it in the conference room beforehand. It's because Republicans actually believe in the rule of law. We actually believe in norms and preserving them.

Mr. MCCLINTOCK. By the way, Liberals used to believe that too. Liberals still do, but the Left does not.

Ms. FOLEY. They did. When I worked on the Hill from 1987–1992, I worked for a Democratic Member of Congress who is now a U.S. Senator, Senator Ron Wyden. Back then, when Ron Wyden was in the House, he was actually kind of moderate and reasonable and liberal but not progressive, and he had classical liberal values that he adhered to. I think that's been completely lost by the Democratic Party. It's why I am no longer a Democrat and why so many others are no longer Democrats, including, for example, Elon Musk. I know that name makes people go crazy.

Mr. ROY. Ms. Foley, we've gone over the time.

With that, I will thank the gentleman from California.

Ms. FOLEY. Thank you.

Mr. ROY. I'll recognize the gentleman from Maryland and the Ranking Member, Mr. Raskin.

Mr. RASKIN. Thank you, Mr. Chair.

First point. The Republicans demanded a Special Counsel in the Biden case, and the Republicans demanded a special counsel to look into Trump, because they said that the Attorney General

couldn't be trusted. The Special Counsel was a demand on the Republican side.

In any event, just to get back to the heart of this matter in terms of the law, Professor Beske, you point out that the Supreme Court rendered this unanimous decision in *Mesa* v. *California*, establishing that there needs to be a Federal question defense to remove from State Court to Federal Court. The burden of your testimony is to say that, even if this bill were passed that our colleagues are proposing, it wouldn't alter that in any way because you can't overturn a Constitutional ruling with a mere statute.

Would there, in fact, be this intended effect of being—of allowing Donald Trump and all his associates to be removed from State Court prosecutions even if there's no Federal—independent Federal question defense?

Ms. BESKE. No. It's really important to flag that *Mesa* considered and specifically rejected the United States' argument in that case that Federal officers can remove simply because they hold a Federal office or simply because the suit charges conduct under color of that office. That was specifically the United States' argument, and Justice O'Connor specifically rejected it.

Mr. RASKIN. That would be like creating a title of nobility. If you hold a Federal office, whether it's elective or appointed, you can never be charged under State law for murder, rape, armed robbery, theft, fraud, and whatever it might be. It's just amazing to me that our colleagues would make such an argument that's so breathtakingly anti-federalism that the States are just drained of all sovereignty over the common law crimes that would take place within their State.

If you're right—and I believe that Mr. Terwilliger just conceded that you were—I wonder what you think about his suggestion as a way to repair their bill to simply say that there must be Federal question jurisdiction. That just is tautological. That just restates what the Supreme Court's already found, right?

Ms. BESKE. Well, I think what he's saying is it's enough that the statute says he's operating under color of his office and that this should satisfy *Mesa*.

Mr. RASKIN. That runs into the Supremacy Clause fallacy that you pointed out originally.

Ms. BESKE. Right. That's the argument that *Mesa* rejected. *Mesa* said that's not enough. That does not satisfy the requisite Federal ingredient necessary under Article III, necessary to satisfy the Constitution. That argument is a nonstarter. They have rejected that unanimously.

Mr. RASKIN. What this really adds up to is some people complaining about the fact that Georgia law enforcement authorities and New York law enforcement authorities, operating independently as States within the sovereignty they've got, without any actual evidence that Joe Biden or Joe Biden's Department of Justice had anything to do with it, decided to prosecute people for crimes committed under their laws.

They don't like the fact that they weren't able to remove to Federal Court where they felt that they had a more receptive audience because Donald Trump had appointed a lot of the judges, right? So,

what is there actually to do? The Supreme Court has rendered its decision in the matter, right?

Ms. BESKE. It has. One thing I always teach my civil procedure students is, when someone attempts to remove, it's as if you pull a lever. It automatically goes to the Federal Court, and it's the Federal Court that makes the call as to whether removal is or is not a good thing.

So, Hellerson is a Federal judge. It is Hellerson that made the call as to whether the requisites of the Federal removal statute were satisfied.

Mr. RASKIN. In the *Mark Meadows* case, you're saying?

Ms. BESKE. No.

Mr. RASKIN. In the *Mesa* case.

Ms. BESKE. Hellerson is in the Southern District of New York.

VOICE. *Hellerstein*.

Ms. BESKE. *Hellerstein*, I'm sorry. He is the person that made the call as to whether it was under color of the office and whether there was a color of—

Mr. RASKIN. You're saying it was a Federal Court ruling on the question of removability.

Ms. BESKE. Correct.

Mr. RASKIN. That would be the same also in *Meadows*' case.

Ms. BESKE. Correct.

Mr. RASKIN. In the *Mesa* case. All of them go to Federal Court. What you have is Federal judges saying, with the Supreme Court backing them up, this doesn't belong in Federal Court.

Ms. BESKE. Correct.

Mr. RASKIN. This is a run-of-the-mill State criminal law prosecution.

Ms. BESKE. Correct. It's not under the color of the office, and there's no colorable Federal defenses.

Mr. RASKIN. Our colleagues want to turn a Federal case—turn it into a Federal case because Donald Trump doesn't like it.

With that, I'll yield back to you, Mr. Chair.

Mr. ROY. Now, I'll recognize the gentlelady from Wyoming for five minutes.

Ms. HAGEMAN. Thank you.

Ms. Foley, can you describe for us what lawfare is.

Ms. FOLEY. Lawfare is the use of legal processes, either civil or criminal, to go after a political opponent.

Ms. HAGEMAN. Mr. Epstein, Alvin Bragg's 34-count indictment against President Trump was the first time a former President had been indicted in history. Is that correct?

Mr. EPSTEIN. That is correct.

Ms. HAGEMAN. The facts of that case had been known for years. Isn't that also true?

Mr. EPSTEIN. Yes, and litigated.

Ms. HAGEMAN. Why did Federal prosecutors then choose not to charge President Trump?

Mr. EPSTEIN. Obviously, they didn't think that the evidence substantiated any crimes.

Ms. HAGEMAN. Do we yet know what the underlying crime was that Donald Trump allegedly committed that was the basis for the convictions?

Mr. EPSTEIN. Well, obviously, the underlying New York criminal statute was interpreted broadly, but the supposition is that the President, through this alleged hush money scheme, was engaging in election crimes, and even, of course, the case directly referred to Federal election crimes.

Ms. HAGEMAN. What do you mean by supposition? Didn't they have to prove that's what he had done?

Mr. EPSTEIN. Right. Of course, there was no unanimous jury determination on that. In fact, there was, of course, no proof. The argument was there must have been some conspiracy with the Trump Organization and others.

Ms. HAGEMAN. They didn't prove the underlying crime. They just convicted him of something in State law. Is that correct?

Mr. EPSTEIN. Yes. I would also note that based off an executive action in New York, there was a stay of these types of indictments during COVID. There was, of course, a very aggressive reinterpretation of a stay designed to protect criminal defendants to go after the President.

Ms. HAGEMAN. Have you ever seen anything like that *New York* case in your entire years of practice?

Mr. EPSTEIN. No, never.

Ms. HAGEMAN. Were you shocked at what happened in that court?

Mr. EPSTEIN. I was, as were many in the legal academy and many practitioners.

Ms. HAGEMAN. I sit here and I listen to all of that, the caterwauling on the other side about Elon Musk. I don't know what he has to do with anything today. I listen to all the accusations about Russia, Russia, Russia. Boy, I wish we could retire that word someday. That has nothing to do with what we're talking about.

I listen to all this nonsense that is being spewed out there, and what I can't understand is why anyone wants to undermine our criminal or civil justice system in the manner that has been done over the last couple of years with lawfare, whether you're a Republican or a Democrat.

Can you understand that, Ms. Foley?

Ms. FOLEY. No, absolutely not. If they can do it, one side can do it; the other side can do it too.

Ms. HAGEMAN. Isn't that kind of what happens in our political system?

Ms. FOLEY. Yes, because it's politics.

Ms. HAGEMAN. It's politics, that's right.

Ms. FOLEY. Politics and law should be different.

Ms. HAGEMAN. Don't you think that most of the American people understand what happened in these cases? Do you really think—does anybody really think that anybody was confused or that we couldn't figure this out or we didn't even know exactly what was happening with these cases in New York and the Fani Willis cases.

We all knew what was happening, right? It was to stop him from running for President. Pretty simple to figure out. Isn't that a classic example of lawfare? Is that what we want our justice system to turn into, again, whether you're a Republican or Democrat? Is that what our Constitution is here for?

Mr. Terwilliger, do you think that that's a good use of our criminal justice system?

Mr. TERWILLIGER. No, ma'am.

Ms. HAGEMAN. Well, we have focused a lot on how politically motivated the State and local officials can target—have been when they target our Federal officials, but we also need to consider the Biden DOJ's role in all this that happened.

For example, Mr. Epstein, what agency has Congress charged with adjudicating and enforcing Federal campaign finance violations?

Mr. EPSTEIN. That's the Federal election Commission.

Ms. HAGEMAN. All right. From a Congressional perspective, why shouldn't every Member of this Committee—why should every Member of this Committee care about the proper enforcement and interpretation of a law Congress drafted? Isn't that our role?

Mr. EPSTEIN. Absolutely, they should.

Ms. HAGEMAN. In Mr. Bragg's prosecution, did the Biden DOJ enforce its exclusive jurisdiction?

Mr. EPSTEIN. No. In fact, we know that the Public Integrity Section at the Department of Justice has historically prosecuted election crimes, and yet here they ceded authority to a State prosecutor.

Ms. HAGEMAN. They allowed a State Court to prosecute a former President in a case that the court had no jurisdiction. Is that fair?

Mr. EPSTEIN. Yes. Ms. Congresswoman, it's even worse, because we have a tradition of Federal agencies; even if you want to say that Federal agencies have expertise in these questions, we certainly know that State Courts don't have expertise in Federal questions relating to elections.

Ms. HAGEMAN. They wouldn't have developed it because they don't have jurisdiction.

Mr. EPSTEIN. Exactly. That's the meaning of jurisdiction.

Ms. HAGEMAN. Then, when you bring in Mr. Colangelo and his involvement with this, we know that the Biden Administration was knee deep in the prosecution of Mr. Trump in New York, don't we?

Mr. EPSTEIN. Yes. In fact, as America First Legal found out, of course, these documents were withheld under privilege protections, but 36 records existed of communications between the District Attorney of New York, that office, and the Attorney General's Office. Yet, Attorney General Garland came to this Committee and said that, "there were no communications."

Mr. ROY. Thank you, Mr. Epstein.

Ms. HAGEMAN. Thank you, and I yield back.

Mr. ROY. I thank the gentlelady from Wyoming.

I now recognize the gentleman from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Roy.

I watched the testimony earlier, and the first part I saw was Jim Jordan incorrectly saying a lot of things about President Trump. He started with saying that this Mueller investigation didn't show anything concerning Trump; there was no connection. That's because Bill Barr redacted it and made his own opinion of the front end of what the case said, what Mueller said.

Mueller's report made it clear that there was Russian involvement. The first thing that the Russians did was to send some folks

up to Trump Tower to talk to Junior and son-in-law and a few other Trumpers and talk about getting something done.

That woman that came up there to meet with him ended up being in the Russian Dumas. Russians must have thought pretty well of her. She did her job well.

The Senate did a study, a bipartisan study on whether there was Russian collusion. The Senate Intelligence Committee came out and said, "yes, there was, that Manafort went over to France or wherever and met with Kilimnik and gave him the polling data and this is where we need help."

Then that ended up getting to Prigozhin in St. Petersburg, and then they started spewing out all the false social media stuff to make Blacks think they shouldn't vote, and other people get confused about this and that and trying to help Trump.

That's what they did. The Russians helped Trump get elected in 2016. The Senate Intelligence Committee said that, and the Mueller Committee said—Mueller report said that.

Then, as far as this trial goes that you say there's not been a President indicted before, there's never been a President that was so easy to indict. The guy has committed more crimes than all the other Presidents put together.

Michael Cohen got tried and sent to prison because of what he did in this case, but Bill Barr didn't want to try the President, who was individual one, basically saying, "The President did it, but we're sending Michael Cohen to jail," and to protect individual one. That's what they did. He should have been tried in Federal Court, but Bill Barr wasn't man enough to do it because he was bought.

The President paid off Stormy Daniels and whatever she was, Ms. August, whatever, and paid them off so that it wouldn't become public and hurt his Presidential campaign. Michael Cohen took the orders that he had to do it, and they did that.

It was Federal election involvement and criminal law. The jury found him guilty. How many counts did they find him—Professor, how many counts were there that he was found guilty? Thirty-four?

Ms. BESKE. Thirty-four.

Mr. COHEN. Thirty-four times. A jury, Americans, citizens voir dired by both sides, chosen, on 34. They all agreed, 34 to nothing. Every single one of them said guilty beyond a reasonable doubt.

You all are questioning the American jury system and say, because they're in a State Court their ruling wasn't proper. You could commit a murder. Hamilton and Burr had their duel in New Jersey I guess it was, and there should be a criminal case and there was.

They want it—this whole law is about helping Trump, who's still hung up on this guilty verdict, which he's not going to spend any time on or even have to pay a fine.

There's no need for this law. Trump wants to get it in Federal Court because he's got friends there and, like Mr. Raskin mentioned, Aileen Cannon and what she did, which was disgusting all around. She ruined the classified briefs, files case, and classified information. He was guilty as hell of that. She held it and held it and held it until they can't even get the Special Counsel's report out.

The Supreme Court put the case on January 6th off and off and off so it wouldn't be heard. The Supreme Court is also involved in this. They were wrong to give Trump a free pass. Donald Trump

shouldn't make law. He shouldn't do—he shouldn't be where he is. That's what happens when you elect someone who is emotionally, morally, and intellectually incapable of performing the job that they're chosen. You give him a pass from DOGE and says, "You're bad work; you're fired."

I yield back.

Mr. ROY. I thank the gentleman from Tennessee. I find it interesting that we're now concerned about the intellectual capacity of the President of the United States.

I'll now recognize the gentleman from North Carolina, Mr. Harris.

Mr. HARRIS. Thank you, Mr. Chair.

I thank all of you on the panel for your time today and for your testimony.

Mr. Epstein, on August 8, 2022, the FBI raided Mar-a-Lago, and the American people witnessed an unprecedented attack on the home of a former President by a politicized FBI.

Almost a year after the raid on Mar-a-Lago, on June 7, 2023, Steven D'Antuono, the former Assistant Director in charge of the Washington Field Office, sat down with the House Judiciary Committee for a transcribed interview as a part of this Committee's oversight of the FBI. In the interview, Mr. D'Antuono described what he viewed as several abnormalities about the way in which that raid was conducted.

Mr. Epstein, in a notice of claim filed in the DOJ in 2024, you argued that the FBI's conduct in the raid, where established protocol was violated, "constitutes a severe and unacceptable intrusion that is highly offensive to a reasonable person."

Would you explain to us today how the FBI's raid of Mar-a-Lago was inconsistent with standard protocols?

Mr. EPSTEIN. Well, Congressman, precisely as Mr. D'Antuono testified before this Committee. That we have protocols. We let the attorneys know before the raid is going to be conducted. We typically use the local office to be in charge of it, not the Washington Field Office to be in charge of that.

The protocols here were wholly inconsistent, and I think that's part of the concerns about when political goals inform what otherwise should be doing justice.

Mr. HARRIS. Why do you suppose they opted out of such protocols?

Mr. EPSTEIN. Here the tone was set from the top. I'll just note that, on this question of records and what was probable cause to do these investigations, so much of that was based off the views of the National Archives that these were records that were in the proper ownership of the United States.

In large part because of America First Legal's work, we recently showed that the former Archivist of the United States, David Ferriero, actually said that we should treat President Trump's records as if they were Federal records, and violations of the Federal Records Act allows us to make referrals to the Department of Justice.

That was an arbitrary, capricious legal determination that led to the ability for the Department of Justice to have probable cause to

conduct this raid. That's something that is a direct piece of evidence of politicization of the law.

Mr. HARRIS. Thank you, Mr. Epstein.

Mr. Terwilliger, your client, Mark Meadows, is being sued by Fulton County, originally by the very partisan District Attorney Fani Willis. Meadows sought to have his court case moved to a Federal Court arguing it was more appropriate because he was acting in the official capacity as Trump's White House Chief of Staff.

After his bid was rejected by the Supreme Court, you argued that the risk puts former Federal officials such as Meadows, quote, "at risk of being left to the wiles of every particularly hostile district attorney or State AG in the country."

I happen to agree with you. Something needs to be done to protect future former officials from being subjected to the type of lawfare that Mr. Meadows is facing.

My question to you, Mr. Terwilliger, does Congress have a responsibility to protect Federal officials from lawfare?

Mr. TERWILLIGER. Yes, sir, it does. It has tried repeatedly to do that. The courts have repeatedly pushed back for whatever reason, including in the *Mesa* v. *California* decision.

What Mr. Raskin's comments miss is the fact that all Federal Courts, all inferior Federal Courts other than the Supreme Court are created by this body, by the U.S. Congress. You establish their jurisdiction.

What I'm suggesting to you very simply to do what you want to get done is that you incorporate standard Federal question jurisdiction into the removal statute.

So, in a case like in *Mesa*, where the question was whether or not, if I recall correctly, postal employees could speed or not in doing their job, that those questions get decided by Federal judges in Federal Courts. Otherwise, we will have an incredible body of confusion of State Courts deciding Federal questions.

It is important, because of the *Mesa* decision, to make clear that Federal questions belong in Federal Court. Indeed, over the decades, many Federal Courts have said the very reason for the removal statute is to have Federal questions decided in Federal Court.

Mr. HARRIS. Well, thank you, sir. I look forward to our markup tomorrow in which this Committee will be taking a look at important legislation seeking to address these issues and prevent future lawfare.

Thank you, Mr. Chair.

Mr. ROY. I thank the gentleman from North Carolina.

I'll now recognize the gentlelady from Washington for five minutes.

Ms. JAYAPAL. Thank you, Mr. Chair.

President Trump has a long and documented history of attacking the judiciary simply for following the law. He once suggested that a judge who granted class certification in a fraud case against Trump University could not be impartial because the judge was of Mexican descent. He called other judges, quote, "crooked, corrupt and evil."

Most recently, he refused to comply with judicial orders blocking the implementation of his unlawful funding freeze. My colleagues

on the other side have unfortunately endorsed this behavior, and now they propose legislation that would further empower President Trump to evade accountability in the courts.

Professor Beske, what effect does this kind of behavior toward the judiciary have on the integrity of the court system, just briefly?

Ms. BESKE. Well, it takes us into dangerous territory. The whole premise of Article III judges is they have life tenure. The Framers tried to remove them from the political process. The whole idea was to have a body of judges free from political considerations. The idea of disobeying a court order, boy, that's a Constitutional crisis.

Ms. JAYAPAL. It is a Constitutional crisis.

Ms. BESKE. That's terrifying.

Ms. JAYAPAL. Yes, it is terrifying. In May 2024, Donald Trump was found guilty of 34 felony charges under New York State law for falsifying business records to conceal hush money payments made to Stormy Daniels.

Republicans believe that this prosecution was politically motivated and corrupt, but they seem to forget about the role of a citizen jury, which came to the ultimate unanimous conclusion of Donald Trump's guilt after hearing both defense and prosecution lay out the arguments.

Can you just remind us why the Founding Fathers actually adopted the jury system, one or two sentences if you can.

Ms. BESKE. That's hard.

Ms. JAYAPAL. I know it's tough for a law professor.

Ms. BESKE. That was kind of the genius of the Framers, right, to put front and center ordinary citizens there to be safeguards against the government to protect and be the decisionmakers, right?

Prosecutors might be motivated to get the conviction, but to have the ultimate decisionmakers be people, ordinary people who are weighing the evidence and coming to decisions. That was kind of their genius.

Ms. JAYAPAL. It is genius. There are even some checks and balances built into the system to make sure that jury members are impartial. What are one or two of those?

Ms. BESKE. Well, you have challenges for the cause. They're unlimited typically in every State. Peremptories, there are some limits on those but there's voir dire, I mean that—sequestration. Typically, judges are kept from things—or, rather, jurors are kept from things that might prejudice them. Judges obviously have the ability to call a mistrial in the event there's anything.

Ms. JAYAPAL. That's correct. So, there's lots of things built-in to make sure that this is a fair process. There was no evidence of improper bias or behavior by any members of the jury, right, in that criminal case?

Ms. BESKE. No.

Ms. JAYAPAL. Once again to confirm, did the citizen jury, this genius system that you've described, unanimously conclude that Donald Trump was guilty of 34 felony charges?

Ms. BESKE. With respect to each of 34 charges.

Ms. JAYAPAL. Each one.

I want to turn to this legislative proposal, which seeks to amend Federal law to allow Presidents to remove cases against them from

Federal Court to State Court. Under existing law, removal is only granted in limited cases. Motions have to be made on specific grounds that allow for removal, and one of those grounds is that a Federal officer, Member of Congress, or judge can remove a case if the case relates to, quote, "any act under color of office." The Supreme Court, as you've mentioned, has interpreted "color of office" to mean acts in performance of an official duty.

The other side's legislation exceeds this requirement by allowing Presidents to remove any case to Federal Court for any act in office—that's a quote from their legislation—regardless of whether it relates to exercising their official powers.

Why is it a bad idea to eliminate that, quote, "color of office" requirement?

Ms. BESKE. Well, you're certainly expanding the possible pool—now, again, always qualified by the *Mesa* Federal defense.

Ms. JAYAPAL. Yes.

Ms. BESKE. You're expanding the possible pool of people who can take this bridge to Federal Court. I'm a federalism person, and I believe that having two sovereigns in our system, States and the Federal Government, is a protection against tyranny.

The Framers really thought about this. That protects individual rights, and to take from States their ability to prosecute violations of State law in their own courts is very intrusive. The more that's allowed, that's a problem in our system.

Ms. JAYAPAL. Protection against tyranny, that's really what we're talking about here. I really appreciate your input.

I yield back, Mr. Chair.

Mr. ROY. I will recognize the gentleman from Texas for five minutes.

Mr. HUNT. Thank you, Chair.

The past few years, the Left has used every weapon, including weaponizing the Department of Justice against President Trump. Of course, they didn't stop at the DOJ. The Left used State and local prosecutors to do their biddings as well.

Do you remember the so-called hush money case in New York? This is the case that was led by Matthew Colangelo, the former No. 3 at the DOJ. That's right, a high-ranking DOJ official left his job to work for a local DA's office. That's pretty ridiculous and does not pass the smell test to anybody that's competent.

Of course, there's the so-called RICO case in Georgia, as if this guy was Al Capone. Thanks, Fani. Then there's Tish James. She ran solely on prosecuting Donald Trump. Now, isn't her main job to protect New Yorkers? She was clearly distracted. You cannot tell me that these cases were not politically motivated. If President Trump were not running for President again, none of this would have happened, period. None of this would have happened.

What people have got to understand is that this is really, really good for fundraising for Democrats, but I'm going to say the quiet part out loud here. They want their veneer of legitimacy.

You may have forgotten this but, again, they threw everything at President Trump. They impeached him twice and tried to remove his name from the State Presidential ballots. They laser focused Lady Justice to eliminate the competition. How did he sur-

vive this? Because he is clearly not like the average person. He is a political force of nature.

What happened over the course of the past four years to President Trump should shock everyone in this country, because one thing he would always say on the campaign trail was this: If he could do it to me, they could do it to you. I'm just standing in their way.

This is repulsive behavior that we saw from the Left to prevent a man from becoming the President of the free world. Guess what happened? We the people saw right through the crap, and we still made him our 47th President. Thank God for the resolve of the American people.

Mr. Epstein, I have a question for you, sir. Thank you for your work to expose weaponization against President Trump. You said that the Alvin Bragg case was coordinated with Biden. For those of us at home, can you walk us through this process and how it happened? Can you explain how Biden and his fingerprints were all over this operation?

Mr. EPSTEIN. Yes. Thank you, Congressman. I wish we could tell you what the documents would reveal. That's still up in litigation. What we did at America First Legal is we obviously used a FOIA request to Main Justice to look for communications with the New York District Attorney's Office. The response, consistent with what Attorney General Garland said to this Committee, was that there were no responsive records.

So, what we did is what any good investigative lawyer does, is you send a similar request to the District Attorney's Office in New York, the Manhattan DA, and you say, "Give us all communications with the Department of Justice."

While they didn't disclose those records, they said, there's 36 responsive records, which suggests that, in fact, there were communications. It's important for the public to know what was said in those communications.

Mr. HUNT. Thank you very much for answering the question.

I also want the American public to understand something. The reason why the Left is still railing on President Trump even though he won the Presidency, we won the Senate, and we were able to keep the Majority in the House is because, quite frankly, they have nowhere else to go because its lawfare fell flat on its face.

We cannot allow this to happen again in the future of this country. That's why we've got to understand our history and how this works. We have to understand that we are a Constitutional Republic, and we must protect the average citizen in this country, ranging from President Trump to the average person that works every day here in America that makes a decent wage just taking care of their family. Everybody must be treated fairly under the law, regardless of what they do or regardless of what they aspire to be.

With that, I yield back the remainder of my time. Thank you, Mr. Chair.

Mr. ROY. I thank my friend from Texas.

I now recognize the gentlelady from Vermont.

Ms. BALINT. Thank you, Mr. Chair.

I want Vermonters to understand the stakes of what's happening right now at the Department of Justice. I know many Americans feel in this moment that they can't trust government, and I certainly understand why they might feel that way.

Democracies have long struggled with rooting out public corruption. As long as there is public trust, there are those who will betray the trust for their own power, for their own profit. How do we combat corruption? How do we ensure the responsible use of power? Those are the things that I think about a lot and that my constituents ask me about.

One of the ways that we do that is by entrusting that we have independent, ethical prosecutors to uphold the law no matter who is in office.

I want to acknowledge and thank everyone for being here today. I especially want to acknowledge Mr. Terwilliger, who previously served the people of Vermont and the Nation under the Reagan Administration in various roles, including the U.S. Attorney. So, thank you so much for being here.

Mr. Terwilliger, do you agree that one of the most effective ways to fight corruption is to establish and maintain a group of nonpartisan prosecutors who are dedicated to the rule of law?

Mr. TERWILLIGER. I certainly agree with that, ma'am. If you'll allow me just 30 seconds, when I was the U.S. attorney in Vermont, I had no idea if my assistants were Republicans or Democrats. They were people who believed in the rule of law and applying the rule of law.

If one of them had ever come in and said, "We should go after so-and-so because or on account of," I sadly have to tell you, ma'am—

Ms. BALINT. If I could, if I could just because I only get five minutes.

Mr. TERWILLIGER. Let me just finish, 10 seconds. I sadly have to tell you that culture at the Department of Justice has changed completely in the last 10–15 years.

Ms. BALINT. The whole idea—so, to stay with what you're saying, the whole idea behind the Department of Justice, right, is supposed to be enforcing the law without fear or favor, correct?

That's what the American people want. That's what Vermonters want. I hear that from them all the time. That's what our Constitution actually demands.

So, when a U.S. attorney stands before a judge and say that they are there not to represent the people, but to represent a President, understandably, there are alarm bells that start ringing.

We're two months into this administration. So far, we've had a U.S. attorney publicly State that his office is composed of President Trump's lawyers, not lawyers for the people, not lawyers supporting the Constitution, but President Trump's lawyers.

We've seen political purges of nonpartisan career civil servants because they did their jobs, including those who were involved in the January 6th prosecutions. We've seen a shocking quid pro quo involving the indicted mayor of New York. You said so yourself: "It should not be about partisanship within the office." I applaud you for that.

Thank you for being here.

I'd like to turn now to Professor Beske.

Professor Beske, under the legislation offered by the majority, specifically section 1456(c), the Attorney General could represent a Federal official in any case, subject to removal under the statute.

Is it true that this provision could make the Department of Justice the personal counsel for the President, the Vice President, or for Federal officials in State criminal or civil cases? Is there a danger there?

Ms. BESKE. There is certainly a danger, because there are typically, the norm is that there's a separation there.

Ms. BALINT. Does that terrify you to contemplate that?

Ms. BESKE. It certainly doesn't help me sleep at night.

Ms. BALINT. OK. All right. I'll take that as in the affirmative.

I do think that it goes strongly against what Americans want, what Vermonters want. They want to make sure—without fear or favor, they want to make sure we're doing this in a way that is not corrupt.

There is, in fact, what I think another important key element here, which is how the public perceives those attorneys charged with enforcing the law. How important, again to Professor Beske, how important is the public trust in those who enforce anticorruption laws?

Ms. BESKE. It's extremely important.

Ms. BALINT. Tell me more.

Ms. BESKE. If the public doesn't have trust in our Federal justice system, in the justice system, we don't have very much left.

Ms. BALINT. It doesn't hold together, does it?

Ms. BESKE. It doesn't hold together.

Ms. BALINT. It doesn't hold together.

If the people don't believe that justice is blind, anticorruption efforts are doomed to fail, and authoritarians thrive in that environment where there is no public trust.

What my Republican colleagues have done for many years and in this Committee as well, they've attacked prosecutors. They've attacked judges. They've dragged public servants, public servants down here for baseless—in my opinion, baseless depositions, sent letters full of baseless accusations, blasted theories, many of them hateful, all over the internet.

What happens then is that Americans become incredibly skeptical, cynical about if there is any such thing as a justice system without fear or favor, and I think that should scare all of us.

I understand, Mr. Chair, I'm over time. I yield back.

Mr. ROY. I thank the gentlelady from Vermont.

I am now going to recognize the gentleman from Missouri, Mr. Onder, for five minutes.

Mr. ONDER. Thank you, Mr. Chair. Thank you to all the witnesses for being here today.

Last June, the Attorney General from my home State of Missouri appeared before this Committee, Andrew Bailey, and testified that Missouri removed a prosecutor who filed politically motivated cases while refusing to prosecute violent crimes, even murders.

What the St. Louis prosecutor and Alvin Bragg had in common was that their campaigns were funded through the Vera Institute, which receives tens of millions of taxpayer dollars, as well as fund-

ing from George Soros, essentially, being funded to not prosecute crimes but to take political actions against political opponents, in the case of Ms. Gardner in St. Louis, the Governor of the State of Missouri.

It's no secret, of course, that in New York, Alvin Bragg was on a vendetta to prosecute President Trump.

Mr. Epstein, I wanted to—the Ranking Member said that there was, quote, "no Federal question in Alvin Bragg's case in New York." I just wanted to run through that briefly. There was the allegation, of course, in the New York case that money was paid in return for a nondisclosure agreement with Ms. Clifford. Is an NDA illegal?

Mr. EPSTEIN. No.

Mr. ONDER. No. Then, in the course of making that payment, somehow the allegation was that business records were falsified. As I understand it, that was a misdemeanor with a two-year statute of limitations that had expired. Am I correct there?

Mr. EPSTEIN. Yes, Congressman.

Mr. ONDER. OK. If the business records were falsified in furtherance of another crime, then the statute of limitations wouldn't be expired, and it would be a felony, not a misdemeanor. Is that right?

Mr. EPSTEIN. Right.

Mr. ONDER. Then the question is, what law was violated? It's my understanding, as stated earlier in your inquiry with Congresswoman Hageman, it's the FECA of 1971, the Federal Election Law of 1971.

Congress invested exclusive jurisdiction over that statute with the FEC and the Department of Justice, as I understand it. I think that was in your testimony. The FEC looked at the case that—looked at that allegation and decided that it was without merit, and the New York court did not have jurisdiction over that anyway.

Can you explain again how the issue of campaign finance was crucial to this case and was, indeed, a Federal question?

Mr. EPSTEIN. Yes, I know. Your bewilderment is justified and explained by a longstanding principle in our American jurisprudence that, when you have an agency like the FEC that has expertise in Federal election campaign contributions or expenditures, and then you have a State trial judge who has no expertise, that our doctrines say that this judge should stay the case, refer it to the expert agency, and allow them to first adjudicate.

If they, in this case, look at the facts and determine we are not going to act, then you can potentially proceed with a further criminal prosecution.

I can say that the primary jurisdiction doctrine has been used in State law prosecutions before to stay those cases. That was not something that this court was willing to do.

Mr. ONDER. A federally motivated—I'm sorry, a politically motivated prosecutor in front of a politically motivated judge in a venue, a jurisdiction where President Trump could not get a fair trial shoehorned a Federal statute over which they had no jurisdiction or expertise to bring charges against President Trump on a very obscure crime.

It's just absolutely unbelievable. We had the statue of Lady Justice being blind. I think justice was anything but blind in this case.

Well, thank you, Mr. Epstein.

I yield back.

Mr. ROY. With that, I'll now recognize the gentlelady from California, five minutes.

Ms. KAMLAGER-DOVE. Thank you, Mr. Chair.

So, Mr. Epstein, I have a yes-or-no question for you. Do you believe in due process?

Mr. EPSTEIN. Yes.

Ms. KAMLAGER-DOVE. OK, thank you.

Mr. Terwilliger, another yes-or-no question for you. Do you believe in the jury system? Yes or no.

Mr. TERWILLIGER. I'm not sure what you mean by believe in it. Do I think that it's a good system in our criminal justice system? Yes.

Ms. KAMLAGER-DOVE. OK, thank you.

Professor Beske, do you believe that the right to a jury trial is the very foundation of due process, yes or no?

Ms. BESKE. It is one of the mainstays of our system, both civil and criminal.

Ms. KAMLAGER-DOVE. Absolutely. In fact, our Founding Fathers would agree with you, because the right to a jury trial is mentioned three times in the Constitution. It's kind of important. Not free speech, not even the right to guns, but the right to a jury trial and to be judged by your peers. Jury trials are, in fact, how we decide conflicts in this country.

In fact, the President is no stranger to this system. He has routinely said, "I don't want a judge to decide my case. I want a jury, because I want it to be fair."

So, Professor Beske, are you familiar with the Russian term "arbitrazh," yes or no?

Ms. BESKE. Arbitrazh?

Ms. KAMLAGER-DOVE. Yes. It's OK; you can say no.

Ms. BESKE. I know the English term. I'm not sure of the Russian term.

Ms. KAMLAGER-DOVE. The Russian term means the opposite of fair. You don't get a trial. You have a case that's decided by a so-called professional judge. There's no due process. There's no jury of peers. The judges are there to appease the powers who put them there. So, in Russia, that means the billionaires.

Legislative reforms to end lawfare by State and local prosecutors is really—let's just say it. It's overburdening the Federal Government and taking away State sovereignty at a time when Republicans are talking about cutting costs. This idea significantly adds more waste, money, resources, and confusion to an already weighed-down system, because now you want to push lawsuits to the Federal Courts when the vast majority of lawsuits involve State interests, State crimes, not Federal concerns.

For example, sexual assault, bribery, and landlords threatening tenants, where there's little or no Federal statutory equivalent, these cases would be outside of Federal jurisprudence. They want to overwhelm the Federal system by litigating a State matter in

Federal Courts and then force Federal judges to interpret States' laws.

Well, Federal trial courts are not set up to try State law cases. What State of jury instruction would they give out, State or Federal? An Article III judge is important, because they have lifetime appointments, supposedly to free them from political affiliations, misgivings, and bias. They have a very specific type of jurisdictional bandwidth, and State cases are not within it.

This is how I see the idea going. The President—any President's cousin gets into a bar fight and sucker punches a man and knocks out his tooth. So, if the bar fight results in a civil suit for money damages, the President could pluck the case and remove it to Federal Court.

Now, we want to cherry-pick the litigants ad nauseam, maybe only judges with red hats, because the only reason to do any of this is to be able to put one's finger on the scale of justice and decide the outcome. That's not justice. What that really is a merger of the Executive and Judicial Branches, and that is not Constitutional here in the United States. The Judicial Branch is supposed to be independent. Without an independent judiciary, there is no longer a system of checks and balances.

How does this even make sense at a time when you're talking about shrinking the Federal Government? This ineptitude would overwhelm the capacity of the Federal judicial system.

I don't know how many people know what goes into the managing of a Federal Courtroom, but there are a lot of people who are needed to manage a courtroom. You're going to exacerbate the system by increasing its caseload?

I challenge anyone in this room to find a single Federal judge who wants more cases in their courtroom. Their dockets are already full. This seems to be a violation of the States' rights to handle their own matters. It is a disastrous attempt to manipulate the judicial system, and it is a weaponization of waste when, in fact, you will have more cases improperly or selectively prosecuted.

My fellow Congress Members, I urge you to get over your feelings from the last four years and recommit to the United States Constitution. I urge everyone to turn to your neighbor and say, "I don't want my judiciary coopted. I believe in State sovereignty. I believe in a jury trial of my peers, and I don't want arbitrazh here in this country, because I do not speak Russian."

With that, I yield back.

Mr. ROY. I now recognize the gentleman from Wisconsin for five minutes.

Mr. GROTHMAN. Thank you.

First, I'd like to thank Congressman Roy for having this hearing.

We're dealing with a very serious matter and scary matter. I don't know if people on the other side of the aisle know it, but, right now, if I show up at your average Lincoln Day Dinner filled with Republicans or a room full of people who are primarily Republican, they think what happened in Georgia and what happened in New York is just a joke. They have zero confidence, for example, in the New York justice system. I don't like the fact that we're there, but I think that is what people think, and I'm one of those people who thinks that way.

By the way, it goes beyond the justice system. I think the same way about the IRS. They think the same way about our customs system. They just think today the Federal Government is something that I would have guessed was from some banana republic growing up.

The first question can be for any one of you: Do any of you know any situation other than what just happened in this country in which a former Chief of State was charged with crimes and at one point appeared to be facing prison time after they were removed from office anywhere in the world?

Ms. FOLEY. Venezuela.

Mr. GROTHMAN. Venezuela. OK. Well, we're headed toward Venezuela. Anybody else can think of any time around the world in which—

Mr. TERWILLIGER. Well, your description, sir, of what many people think is the degradation of our system, there are many examples of it around the world. You have Pakistan, for example, where it seems like every other President is either assassinated or prosecuted, and then the Judges of the Supreme Court are themselves prosecuted and investigated.

It's what I was trying to explain to the gentlelady of Vermont. We used to have a Justice Department where there wasn't fear or favor, where politics didn't play. Those days are long gone.

Mr. GROTHMAN. Right. Kind of scary. I agree with you entirely.

A general question I guess for Mr. Epstein: How does the lawfare impact the broader relationship between State and Federal Governments, particularly in terms of Constitutional authority and separation of powers? I should also say, how does it affect how the American people view their government?

I mean, we know to a certain extent just the fact that Donald Trump won the election that people, they just felt being prosecuted by a court in New York was completely meaningless, but go ahead.

Mr. EPSTEIN. Yes, Congressman, I think the American people, who the Constitution was written for them, well understand that Federal questions are within the Federal sphere, and State questions are within the State sphere.

The test is, if a legal question can be appropriate, if not more appropriate, for a Federal Court, that's where it belongs, not a State Court.

Mr. GROTHMAN. I'll give you three guys a question because you all hang around with lawyers. Do you know anybody among the lawyers you hang around with who considered what happened in New York a serious—something to be taken seriously, something to be taken as other than just a trumped-up political persecution to try to prevent Donald Trump from being elected?

How do your lawyer friends when they hear about this case in the paper, what do they think of it? Do they think, oh, my goodness, well—

Mr. TERWILLIGER. I guess the ones I hang out with wouldn't be expected to extol the virtues of that process if—even assuming there were any, sir.

Your point is the essential one. Regardless of what lawyers think, people look at that, and commonsense tells you this was a travesty of justice.

The gentlelady can talk about the jury system, but if you cannot admit, based on 200-and-some odd years of our history, that juries make major mistakes—

Mr. GROTHMAN. We're in a moral free fall in this country. Juries and apparently prosecutors in New York, just say, "I've got power here today; I'm going to harm a politician I don't like."

Is that what you were going to say, Mr. Epstein?

Mr. EPSTEIN. Well, what I was going to say is juries are great in theory, but a lot of what a jury does depend on instructions that come from the judge.

If you have judges who view their role as political or who believe that the ends justify the means in terms of what prosecutors are pursuing, they're going to give instructions that are limited, that are problematic.

The Federal Courts, certainly, have had numerous examples of where there becomes judicial review of jury instructions that raise substantial issues for a defendant's rights. If you think about the President in the State Court system, that remedy wasn't necessarily available to him.

Mr. GROTHMAN. Thank you much. We're about where Venezuela would be. Thank you again.

Mr. ROY. I thank the gentleman from Wisconsin.

I now recognize the gentleman from New York for five minutes.

Mr. GOLDMAN. I will just say, as a Representative of New York, New York City, and a former prosecutor in New York, I resent and object to the insinuation from my colleagues on the other side of the aisle that a jury of 12 New Yorkers cannot issue a fair and impartial verdict.

I'm sure that, if I said a jury in Wisconsin could not issue a fair and impartial verdict because a defendant was a Democrat, you would object too. You should, because it's baseless.

All these accusations about lawfare that we hear over and over and over again have no evidence to support it. You say the judge in that trial was politically motivated. Why? You say the judge was motivated. Is it because his daughter works for a fundraising, digital fundraising firm that all of a sudden that's politically motivated, that the jury, he can't get a fair trial now in New York? Give me a break.

Mr. Terwilliger, did you read the search warrant for Mar-a-Lago?

Mr. TERWILLIGER. I might have read parts of it. I don't know that I read the whole thing.

Mr. GOLDMAN. You spent 15 years in the Justice Department as a prosecutor. I spent 10. I left seven years ago. I hear you say that, in the last 10–15 years it's been completely politicized.

I have no idea what you're talking about. When I was there, I didn't—just like you, I had no idea the political leanings of my colleagues, of the FBI agents I worked with.

I appreciate your accusations. Maybe, after my five minutes since I don't have time, I'd love to hear why you think that all the sudden 15 years ago the Department of Justice changed.

If you read that search warrant and you were a Deputy Attorney General and you were asked to review that, would you say that this did not have probable cause?

Mr. TERWILLIGER. I would assume, without my having read it, that a magistrate signed it and determined that there was probable cause. I don't think—

Mr. GOLDMAN. Well, that's obvious. I'm asking you.

Mr. TERWILLIGER. That's not either here or there.

Mr. GOLDMAN. Well, it is. See, this is why it is, Mr. Terwilliger, because this is the accusations and allegations from my colleagues on the other side of the aisle, that the search of Mar-a-Lago for classified documents after Donald Trump repeatedly and persistently obstructed justice, obstructed an investigation, held onto classified documents, lied about it, told his lawyer to lie about it, that all of a sudden that search warrant is unprecedented and must be lawfare and politically motivated. Wrong.

I don't have a question for you right now, Mr. Terwilliger, but I will because I want to know, and I want to focus on the here and now. I want to focus on the last six weeks. You were a Deputy Attorney General, correct, Mr. Terwilliger?

Mr. TERWILLIGER. Yes.

Mr. GOLDMAN. It was under the George H.W. Bush Administration. You spent 15 years. You may be Republican now or were then. I'm sure it had no impact on the job you did. You're here as a Republican-called witness.

Let me ask you something: As Deputy Attorney General, did you ever appear yourself in court, because no one underneath you would actually appear in court to represent the Department of Justice?

Mr. TERWILLIGER. I don't recall having to do that, but I would have if I had to.

Mr. GOLDMAN. OK. I don't know what that means, but you never did that.

Have you ever heard of any Deputy Attorney General doing that before the last three weeks?

Mr. TERWILLIGER. I actually do have some recollection of that, but it's not sufficiently clear for me to be able to give you that. Probably not.

Mr. GOLDMAN. Fair enough. Maybe you're right. It was quite remarkable that the Acting Deputy Attorney General, Emil Bove, had to appear in the Southern District of New York himself as the Deputy Attorney General, because seven prosecutors underneath him resigned rather than defend a plea agreement that he put in writing was not based on the facts, evidence, or the law.

Mr. Terwilliger, I'm sure you'll agree with me that the only job that the Department of Justice has is to follow the facts, evidence, and the law. Is that right?

Mr. TERWILLIGER. I would agree with that. I would also say, sir, that district attorneys have a duty to follow their orders.

Mr. GOLDMAN. OK, I got to cutoff. Mr. Terwilliger, I didn't ask you another question.

The other problem we have here is the U.S. Attorney in Washington, DC. Unfortunately, I don't have enough time to get into him.

To say that I am the President's lawyer, I hope you recognize, Mr. Terwilliger, as someone who cares about the Department of Justice, that this undermines the entire law enforcement system

more than anything that anyone else prior to January of this year has ever done.

I yield back.

Mr. ROY. I thank the gentleman from New York.

I'd recognize the Ranking Member.

Ms. SCANLON. Yes. I have a couple of unanimous consent requests. First, I would ask unanimous consent to enter into the record an excerpt from the Committee's transcripted interview with Steven D'Antuono, former Assistant Director of FBI Washington Field Office, on June 7, 2023, in which he explained that the FBI executed a search warrant for classified material at Mar-a-Lago because there was probable cause to believe that Donald Trump did not fully comply with the subpoena to turn over classified documents.

Mr. ROY. Without objection.

Ms. SCANLON. OK. I also would ask unanimous consent to enter into the record another excerpt from the transcribed interview with Steven D'Antuono in which Mr. D'Antuono explained that he would describe the search of Mar-a-Lago not as a raid but as a lawful search pursuant to warrant.

Mr. ROY. Without objection.

Mr. GOLDMAN. Mr. Chair, I have a unanimous consent request.

Mr. ROY. Briefly.

Mr. GOLDMAN. I'd like to introduce a *The New York Times* article, dated yesterday, entitled "U.S. Attorney rebuffed by Justice Department in push to escalate inquiry into Schumer," related to Ed Martin, the Acting U.S. Attorney in Washington.

Mr. ROY. Without objection.

Mr. GOLDMAN. Then one more. I have a letter, dated February 12, 2025, signed by me and six other former DOJ lawyers to the inspector general, Michael Horowitz, asking him to investigate Acting Deputy Attorney General Bove and Acting U.S. Attorney—

Mr. ROY. Without objection.

Mr. GOLDMAN. Thank you.

Mr. ROY. I now recognize the gentleman from Texas, Mr. Gill, for five minutes.

Ms. GILL. Thank you, Mr. Chair.

Lawfare is antithetical to the American experiment. It's explicitly contrary to the rule of law. Yet, it seems to have been the Democrats' last ditch effort to win the 2024 election cycle.

In the lead-up to the 2024 election, Democrats knew that they couldn't fairly win. They were running a candidate whose cognitive State was in question, that was declining before our very eyes on national TV while they were trying to tell us that he was sharper than ever.

Their political strategy reminds me of the line in Orwell's "1984," which was the party told you to reject the evidence of your eyes and ears. It was their final, most essential command. That was consistent with the Left's messaging. They were trying to tell the American people, for instance, that defunding the police makes our communities safer, that men can get pregnant and should be sharing locker rooms with our daughters, and that flooding our country with millions of cheap serf laborers would be somehow economically beneficial to our working class.

To get over this messaging issue, they attempted to, again, flood the country with people that they thought would eventually become Democrat voters, knowing even now that our election system had legitimate vulnerabilities to it.

They directed social media companies to censor lawful speech of American citizens and illegally put President Trump behind bars for made-up Federal charges in an attempt to prevent him from getting back into the White House.

What we witnessed was a grotesque exercise of raw political power by the Democrats against their enemies. That's why I'm excited about our markup tomorrow. We've got a series of bills that I think are a good first step in helping ensure this lawfare doesn't happen again.

I want to talk about one instance in particular, which was Democrats calling upon corrupt State-level officials to peruse State-level lawfare and punish President Trump and the millions of Americans who supported his campaign. Their one last hope leading up to the election was to concoct a novel legal theory by Manhattan DA Alvin Bragg. Alvin Bragg in the State of New York didn't have jurisdiction to hear this case. They knew that moving forward would violate the settled Supreme Court doctrine, but, again, this was their last best hope.

The State of New York, with Democrat donor Judge Juan Merchan overseeing the case, finally got their wish. They landed a conviction of the President. The American people knew it was a sham, and now they know the lengths to which the other side of the aisle will go to attack their political opposition.

Mr. Epstein, thank you so much for being here. We really appreciate it and appreciate your work to restore law and order in this country. I want to ask you a couple of questions.

The charges in the case against President Trump in New York largely revolved around the Federal election Campaign Act. Is that correct?

Mr. EPSTEIN. Yes, Congressman.

Mr. GILL. That act grants exclusive jurisdiction over Federal election issues to the FEC and the DOJ. Is that correct?

Mr. EPSTEIN. That's correct.

Mr. GILL. Did the State of New York and DA Bragg have any jurisdiction over those supposed campaign finance violations?

Mr. EPSTEIN. No. In fact, Congressman, I would point out that President Trump, during his first administration, made disclosures about payments in his financial disclosures, which is clear evidence that's a kind of Federal nexus and it's wholly within not just the FEC but the Office of Government Ethics.

Mr. GILL. Alvin Bragg was certainly aware he was pursuing a frivolous case here, yet he decided to very aggressively and very publicly move forward with support from the Biden DOJ.

What motive do you think, or would you ascribe to Bragg to move forward with such a clearly baseless case?

Mr. EPSTEIN. I can't speculate on what his motives were, but I think enough is spoken by how the American people recently determined who should be the President of the United States. That there is a general view in the public mood of the American public

that looking to prosecute political enemies raises serious concerns about not just the law but what culture do we want in America.

Mr. GILL. I agree. Thank you, Mr. Epstein.

With that, Mr. Chair, I yield back.

Mr. RASKIN. Mr. Chair, a UC request. This is from *Reuters*, January 20, "Who has Donald Trump threatened to criminally prosecute as President?"

Mr. ROY. Without objection.

Mr. RASKIN. Thank you.

Mr. ROY. I would now recognize the Ranking Member for five minutes.

Chair JORDAN. I thank the Chair. Mr. Epstein, it backfired, didn't it?

Mr. ROY. Wait, Mr. Jordan—

Mr. EPSTEIN. Yes, sir.

Mr. ROY. Who was it, Mr. Gill who went last? Then, it's the Ranking Member.

Chair JORDAN. Oh, I'm sorry.

Mr. ROY. I'm sorry, Mr. Jordan.

So, now I'll recognize the Ranking Member, Ms. Scanlon, for five minutes.

Ms. SCANLON. Thank you. Thank you very much.

Sometimes things get a little more complicated around here than they should be. We're dealing now with a fairly complex statute, basic core Constitutional principles and civil and criminal procedure. Gets pretty far in the weeds. Of course, there is a really simple way to prevent States from bringing criminal charges against Presidents and former Presidents, and that is, of course, for Presidents and former Presidents not to commit prosecutable crimes, and that's been something that's served our country really well with one notable exception.

Since we are here on this bill, Professor Beske, you explained in your testimony that this bill has the potential to expand the Federal officer removal statute to encompass purely private lawsuits based on personal conduct rather than official duties. I know my colleagues across the aisle are very concerned about the importance of federalism, but it seems like this bill threatens to undercut that federalism, and the Constitutional division of power. Can you talk more about that provision?

Ms. BESKE. Yes. I'm looking at provision—

Ms. SCANLON. I think it's Section 2(a)(2) of the bill that would add section 5.

Ms. BESKE. Yes. Section 5, which permits removal of any action against the President or Vice President where the State Court's consideration will hinder, burden, or delay the execution of the duties of the President or Vice President.

This applies on its face only to sitting Presidents and Vice Presidents. Of course, we have a norm that we don't charge sitting Presidents and Vice Presidents with criminal conduct. There's a Supreme Court opinion that says they are immune from suits for civil conduct that is official. So, not criminal. Not civil conduct that's official. The only thing that's left is civil conduct that is personal, private.

Essentially, the way I'm reading this, the only thing left on the table is this proposed bill adds permitting removal of actions against the President or Vice President where the State Court's consideration may interfere, hinder, burden, or delay private suits and—OK. The Supreme Court has specifically said private suits—for example, *Clinton* v. *Jones* said you can totally sue the President during Clinton's term. He asked for temporary immunity, and the Supreme Court said. "no." You can sue President Clinton during his term, no temporary immunity granted. This appears to expand and say, sorry, we're going to allow removal when a court determines that it might interfere.

Ms. SCANLON. OK. That would be with respect to a President, a sitting President, or Vice President. So, basically—

Ms. BESKE. Private suits.

Ms. SCANLON. —simply the act of being President would give him a pass on everything.

Ms. BESKE. The *Trump University* suits and *Clinton* v. *Jones* suits. That's a big, huge expansion.

Ms. SCANLON. Sure. There's another provision in here that I found really troubling. It says—it's section (d)—"No court may define or limit the scope of duties of an official of the Executive Office of the President."

That would mean that no court could decide—that only the President could decide what were the President's official duties. How does that square with our Constitution?

Ms. BESKE. Well, what it does is basically read the color of office requirement out of the statute, because how can you decide what is—whether someone's active within the color of their office if you can't ask, well, what is their office? What does it entail? What's within and without the scope of their duties? It seems to be saying you can't look at what their duties entail. If you can't look at what their duties entail, you sort of can't answer that question. If you can't answer it, then it's not really an element.

Ms. SCANLON. Well, then doesn't that really strike at the core idea of checks and balances, the different branches of government acting as checks and balances, if the courts are forbidden from determining whether or not something is within the duties of the President?

Ms. BESKE. Well, it certainly removes that question from the court's purview altogether. What it also does is it greatly expands the number of cases that you are resting from State Courts and, in theory, allowing into Federal Courts. So, for me, it raises some serious federalism issues and that's problematic.

Ms. SCANLON. OK. Feels like it's an ultimate get-out-of-jail-free card.

It looks like my time's expired, so I'll yield back.

Mr. ROY. I thank the gentlelady from Pennsylvania.

I'll now recognize the Chair of the Committee, Mr. Jordan, for five minutes.

Chair JORDAN. Thank you, Mr. Chair. It backfired, didn't it, Mr. Epstein?

Mr. EPSTEIN. Yes, sir.

Chair JORDAN. The gentleman from New York, our colleague on the other side, talked about he trusts 12 jurors in New York, but

the real jury was the 330 million Americans. We the people are the ultimate jury in our great country.

You think about what did—I love the list you put together, on page 1 or 2 here of your testimony. It was the dossier—false dossier that they took to a secret court to get a warrant to spy on a Presidential campaign. That wasn't enough. The Mueller investigation—they could do all the Trump–Russia Mueller investigation—finds no collusion and no coordination, none whatsoever.

Then they raid his home, part of the Jack Smith investigation, Alvin Bragg, Fani Willis, the other Jack Smith investigation, the 14th Amendment, and the American people saw through it all. They saw through it all because it was lawfare. The Democrats' argument seems to me to be, oh, criticizing lawfare is worse than the lawfare itself. It's just not what it is.

Tell me this—part of this lawfare and some of the details. Who's Matthew Colangelo?

Mr. EPSTEIN. Matthew Colangelo was an Acting Associate Attorney General in the Garland Department of Justice who then moved to the Manhattan DA's Office to work on the Bragg prosecution.

Chair JORDAN. What did he do before he was at the Department of Justice? Where did Matthew Colangelo work prior to that?

Mr. EPSTEIN. I don't recall.

Chair JORDAN. I think it was the New York Attorney General's Office, wasn't it?

Mr. EPSTEIN. OK. Makes sense.

Chair JORDAN. Tish James' office. Here's a guy who worked for Tish James, then worked for the Biden–Garland Justice Department, and then Alvin Bragg says we want him to work for us. According to media, he came to work for Alvin Bragg for what reason? I think you put it in your testimony.

Mr. EPSTEIN. Yes. He obviously was motivated by the case against President Trump.

Chair JORDAN. Yes. To jumpstart their investigation, is the term that was used in the press.

We asked for any communications between Alvin Bragg and the Biden Justice Department, and they said we've looked, and we can't find any. You disagree with that. You disagree with what Mr. Garland told this Committee, the House Judiciary Committee. You disagree with that. Tell me why you disagree with that.

Mr. EPSTEIN. Well, it's not just a question of disagreement. It's a question of facts. The New York Manhattan DA's Office let America First Legal know that there were 36 responsive records.

Chair JORDAN. When Merrick Garland told this Committee we can't find anything, that wasn't accurate, was it?

Mr. EPSTEIN. I'll let this Committee make that inference, but it seems so.

Chair JORDAN. Wasn't accurate based on what Alvin Bragg told the court, right?

Mr. EPSTEIN. Correct.

Chair JORDAN. Well, go figure. We'd like that information. That's going to be the next thing we ask Attorney General Bondi, if we can get access to some of those 36 responsive records that you talked about.

Now, Mr. Terwilliger, this legislation that we're talking about where you can take the case to Federal Court when you got some State and local prosecutor coming after a Federal official, it's not just for Republicans, is it?

Mr. TERWILLIGER. It's certainly not. In fact, both as to formers and as to the reinstalling the substantive scope, expanded scope that Congress intended going back to at least 2011, every former official of the Biden Administration would cheer you on.

Chair JORDAN. Yes. It's just as important for if some prosecutor in Arkansas, Oklahoma, some Red State decides, for whatever reason, he's going to—I'm assuming based on the facts and the evidence, but let's say it's maybe a little shaky. Maybe not. Maybe it's a great case. Still, we're saying OK to the Chief of Staff of President Biden, Mr. Zients, if they're coming after you, you can move that to Federal Court. You don't have to go into some State Court in a Red State. You can go to Federal Court. It applies across the board because we want equal treatment under the law in this great country.

Mr. TERWILLIGER. So true, Mr. Jordan. The fact of the matter is that I really would urge, particularly your colleagues on the other side of the aisle on this Committee, to go back and look at what those two Democrat-appointed Presidential judges said in the 11th Circuit Case. They recognized just how perniciously dangerous it is. What is a Chief of Staff supposed to do when the President says, I want you to set up a phone call. I need to talk to so-and-so. Oh, wait a minute. Am I going to get in trouble with Fani Willis because I do this?

Chair JORDAN. Yes.

Mr. TERWILLIGER. It's absurd.

Chair JORDAN. No, it's absurd. That's absurd. Just the overall attack on Executive privilege, for goodness' sake. This goes clear back to George Washington. Something we have honored.

The people most close to the President are the White House Counsel and his Chief of Staff, and they've always had that privilege there until now. In their effort to get President Trump, they said we're going to violate something that's been around since Washington, and they did this. What we're saying is let's at least fix it so that you can go to Federal Court, fix part of it so that you can go to a jury that's different than some local prosecution, some jury at a local level.

Mr. TERWILLIGER. Yes, sir. These are quintessential Federal questions that have to be brought into Federal Court.

Chair JORDAN. I thank the Chair and our witnesses for—I'm sorry, Professor Foley. I didn't get to you. I usually like to try to get a question to all our witnesses in these type of hearings.

With that, I will yield back to the Chair.

Mr. ROY. I thank the Chair of the Full Committee, Mr. Jordan.

I'll now recognize myself for five minutes for questions.

One thing that was raised earlier a little bit is about how 15 years ago, the DOJ may have gotten a little bit politicized. Mr. Terwilliger, you were referencing to that.

I served in the Department of Justice about 15 years ago—right on the number—when I was a Special Assistant United States Attorney. One thing that I would note—Jack Smith has been at the

center of a lot of these issues and debates in terms of lawfare. Obviously, that's in the Federal context. When he entered his role as Special Counsel, Smith had already had a pattern of targeting Republican politicians.

For example, in 2013, when he served as the head of DOJ's Public Integrity Section, Jack Smith encouraged his subordinates to contact IRS official Lois Lerner to discuss how the Federal Government could bring charges against conservative nonprofit organizations.

Was that a depoliticized Department of Justice, Mr. Terwilliger?

Mr. TERWILLIGER. No, sir. You've hit right on it. When you use your commonsense to look at what's happened. When you see some of the former prosecutors that were involved in some of these cases showing up as commentators on MSNBC, spouting political rhetoric, you don't have to be a genius to figure out what happened at the Department.

Mr. ROY. It's not the only example, right? We can go down Lois Lerner. We can go down a whole bunch of different possibilities. How about Eric Holder himself with Fast and Furious? Wasn't like the Department of Justice was looking to go dive deeply into what was going on with respect to specifically what Eric Holder did.

Mr. TERWILLIGER. I love that example, Mr. Roy, because can you imagine if Pam Bondi stood up today and described herself as Donald Trump's wingman as Eric Holder described himself for President Obama?

Mr. ROY. Well, you can see why I was only a Special Assistant U.S. Attorney for a couple of years during the Holder era and decided to move on and work for Governor Perry down in Austin.

Let me tell you something—let me ask you this question. You've cited the two members of the 11th Circuit panel, right. They concurred in the result, but they raised this issue. Is that right?

Mr. TERWILLIGER. That's correct.

Mr. ROY. The issue they raised—and I'm quoting,

> In short, foreclosing removal when States prosecute former Federal officers simply for performing their official duties can allow a rogue State's weaponization of the prosecution power to go unchecked and to fester.

Is that a correct quotation?

Mr. TERWILLIGER. That is correct, yes, sir.

Mr. ROY. You share that concern, do you not?

Mr. TERWILLIGER. Absolutely.

Mr. ROY. Could you just describe a little bit—we've discussed it at some length here, but as we take up this legislation, at the heart of it lies the question that was going on here in the exchange between the Ranking Member and Professor Beske and some others about the job and the nature of the job.

If you're in the case of your client, the Chief of Staff to the President of the United States, and the President of the United States asks you to set up a call—and there's the inherent blend between official and political in what we do, right. Something we see as official, you're the Chief of Staff and working through it, then there's some political questions that come up.

How is it that we can proceed if we don't have clarity with respect to the actual job with respect to how you were describing that earlier? Can you expand on that a little bit?

Mr. TERWILLIGER. Well, I would submit to you, Mr. Roy, that there is absolute clarity in terms of that job. In 1939, Congress passed a statute and said, OK, "we're authorizing assistants to the President." Never existed before. Before that, they had always been borrowed from agencies and brought into the White House. Presidential Assistants were authorized by Congress, and Congress said their duty shall, quote, "be as prescribed by the President."

When the President asks you to make a phone call, you're acting within the scope of your office.

Mr. ROY. Do you think it would be good for the country were it to be true that, for example, some, I don't know, pretty aggressive district attorneys in South Texas or maybe in working coordination with the Attorney General of Texas decided to say, you know what, we think that the actions of—maybe it was DH Secretary Mayorkas, maybe it was the Attorney General—maybe their actions in leaving the borders wide open to endanger Texans was actually in violation of law. Maybe they should be prosecuted under Texas law because of what they did to the people of the State of Texas, the people in my district who are no longer alive, the people who have suffered, the $11 billion we've had to spend in Texas.

Do you think it's a good direction for us to go to have it such that State DAs and State Attorneys General can then go after officials in their—carrying out their official capacity and the ranges around that official capacity? Do you think that's a good thing or a bad thing, and do you think it's important for us to clarify that law?

Mr. TERWILLIGER. It's a terrible thing to go in that direction, but that's the direction it's going. It is inevitable that the worm will turn and there will be Democrat officials of political appointees who will be subject of just the kind of action you describe.

This is a place for Congress to assert itself and to say, just as the title of this statute says, we want to try to end this kind of lawfare. We may not be able to do it completely, we may not be able to do it perfectly, but it's a very, very important step.

Mr. ROY. Thank you, Mr. Terwilliger. Thank you to the witnesses. I think the Chair of the Committee seeks recognition.

Chair JORDAN. If I could, if the Chair would indulge, I have one other question.

Mr. ROY. I would be happy to—

Chair JORDAN. Give an extra question to the Ranking Member?

Mr. ROY. I would be happy to ask you another question if you'd like it.

Ms. SCANLON. Go ahead.

Mr. ROY. Yes, sir.

Chair JORDAN. Just wanted to underscore a subject we got in right at the end of my five minutes with Mr. Terwilliger.

Mr. Terwilliger, why do we have Executive Privilege?

Mr. TERWILLIGER. It's an excellent question. Because the President needs the most candid possible advice that he can get, and his aides have to know that if they say, no, Mr. President, that's a really dumb idea, that this communication is going to be privileged and protected.

Chair JORDAN. Who ultimately benefits from Executive Privilege, though? Who's the prim-—

Mr. TERWILLIGER. The people. The people.

Chair JORDAN. We the people. Exactly. It doesn't exist to protect the President or his staff. It exists for us, for the American people. We the people. That's why you want candid communications to take place between the top officials in the West Wing, so they can make decisions that benefit "We the People."

The Left has said we want Donald Trump so bad, we're willing to forgo that, hurt the people so we can get President Trump. Thank the Good Lord it didn't work.

I yield back.

Mr. ROY. I'll recognize the Ranking Member for—the gentleman used about a minute—for a question that's along those lines.

Ms. SCANLON. Oh, I have to ask a question, not just make a screed? OK.

Mr. ROY. You can use your minute as you see fit—as the Ranking Member sees fit.

Ms. SCANLON. Can we just bring this back to maybe why we're supposed to be here?

We're looking at this statute, Professor Beske. Why did the Supreme Court in *Mesa* say that Federal officers have to have a colorable Federal offense, and what would this statute do to it?

Ms. BESKE. That's because of Article III. Article III—we live in a system of enumerated powers per the Constitution. Just like Congress has a list of things it can do under Article I, so, too, there's a list of things that courts can do, and that's Article III.

Even though you have power to confer on lower Federal Courts what they get to do and whether they exist, you are bet on by Article III, and they have to have a Federal ingredient. That Federal ingredient is—as *Mesa* said, "that Federal ingredient is the colorable Federal defense." *Mesa* said here's what it's not. It's not just you have a Federal job and this is one of your Federal job's duties. *Mesa* rejected that.

Ms. SCANLON. It's pretty well established. This attempt would expand Federal jurisdiction beyond Article III boundaries, and that's why we suggest everyone should oppose it.

I yield back.

Mr. ROY. I thank the gentlelady. I thank her for her indulgence. I tried to recognize you equally.

I appreciate the witnesses. This concludes today's hearing. We thank the witnesses for appearing before the Subcommittee.

Without objection, all Members will have five legislative day to submit additional written questions for the witnesses or additional materials for the record.

Without objection, the hearing is adjourned.

[Whereupon, at 4:41 p.m., the Subcommittee was adjourned.]

All materials submitted for the record by Members of the Subcommittee on the Constitution and Limited Government can be found at: *https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=117974*.

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