Litigation as Disinformation

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Abstract

The January 6th insurrection began as a legal theory: law professor John Eastman came up with an idea for how to help Donald Trump remain in power and overturn the results of the 2020 presidential election, which had awarded clear victory to his rival, Joe Biden. The theory was set out in a "coup memo,"[1] in which Eastman argued that the vice president had the authority to reject the certification of the votes on January 6th under the Twelfth Amendment as well as the Electoral Count Act.[2] Eastman hoped that by disqualifying the electors of 7 states, Vice President Pence would throw the election into doubt and would thus create a void in which Trump's claim to have prevailed in the election could find an outlet. The memo set forth a step-by-step plan, according to which Pence was to announce "that because of the ongoing disputes in the 7 States, there are no electors that can be deemed validly appointed in those States."[3] After rejecting the reported electoral counts of the 7 states, there was a further plan for certifying the election in Donald Trump's favor. At this point, either the matter was to fall to the states to vote directly on the electors, or the vice president was to declare Donald Trump the winner after declaring the election invalid. As Eastman wrote, "The main thing here is that Pence should do this without asking for permission – either from a vote of the joint session or from the Court." He

[1] eastman-memo.pdf (documentcloud.org)
[2] He also claimed that the Electoral Count Act is unconstitutional. *Id.* at 1.
[3] *Id.* at 2.

goes on to justify this plan by saying "The fact is that the Constitution assigns this power to the Vice President as the ultimate arbiter. We should take all of our actions with that in mind."[4]

Eastman and other lawyers such as Rudy Giuliani who participated in the attempt to overthrow a valid election by disrupting the electoral count session of Congress on January 6th, 2021, knew that their theory was not law.[5] As the January 6th Committee revealed, Eastman not only admitted that his plot was illegal, but he also sought a pardon for his conduct in attempting to subvert the 2020 election.[6] Yet he and all those who were willing to try to implement the Eastman plan, including Donald Trump, persisted in fomenting the idea that the vice president had the right to reject the electoral count, and even declared the Electoral Count Act unconstitutional, at the same time that they figured out ways to fan the flames of insurrection among Donald Trump's conspiracy-minded followers. Why did they pursue legal a legal theory to invalidate a valid election that they knew was incorrect? Why did they bother writing memos laying out a false theory of the Electoral Count Act and articulate an approach to invalidating that Act?

In the run-up to January 6, Trump's lawyers filed over 60 lawsuits in pursuit of the theory that Donald Trump was the rightful winner of the 2020 election.[7] State-by-state they pursued various theories challenging the result. All were ultimately unsuccessful, including several decided by Trump-appointed judges. The former president's lawyers could not have been in any doubt about the result of these lawsuits: beyond a shadow of a doubt they knew that their attempt to reverse the results of the 2020 election would not find favor with federal judges,

[4] Id. at 2.
[5] John Eastman Told Trump That Pence Jan. 6 Plan Was Illegal | Time.
[6] Jan. 6 Hearings: Trump Advisor Eastman Asked For Pardon After Riot (forbes.com),
[7] See Post-Election Litigation - Democracy Docket.

regardless of their political orientation or their indebtedness to Donald Trump. Yet they continued to pursue these bogus legal claims at great expense and trouble. Why?

In this paper I will explore an answer to this question that is novel in existing reporting and literature. My suggestion is that, costly and unsuccessful through they were, the main value of the patently frivolous filings was to create doubt in the minds of members of the public about the state of the law and to create the impression that matters that are settled law are not, in fact, settled. In short, the answer to the question why Trump and his legal team would file manifestly bogus legal actions premised on patently false legal theories lies in the disinformation value of the legal complaints being filed. If this is correct, then courts and judges are lending themselves to this form of disinformation – assisting politicians who are unwilling to abide by and respect the basic facts of U.S. democracy by allowing their courtrooms and the court system more generally to serve as a purveyor of disinformation about the foundations of democratic governance. This practice, and the seeming patience the legal system has for the creation of legal disinformation through the filing of frivolous lawsuits, demands an explanation. From Bar associations that fail to discipline lawyers who knowingly file meritless lawsuits, to judges that look the other way and refuse to impose sanctions, to clients who are willing to pay large sums to hire lawyers who are lacking in ethics to the occasional judge that is willing to grant absurd legal theories coming from a political source to whom they are beholden – many factors combine to induce the legal profession to entertain theories lacking in integrity and violating basic presuppositions of democratic norms. In this paper, we will consider the growing risk this politicization of the court system poses, and in particular the eroding hold that law and facts have over the consciences of litigators, judges and members of the public alike.