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Yes, We Klan: Reviving the Ku Klux Klan Act to Punish Insurrectionists

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YES, WE KLAN: REVIVING THE KU KLUX KLAN ACT TO PUNISH INSURRECTIONISTS

ABSTRACT

A year after the January 6th attack on the United States Capitol, the first lawsuit by a government entity against the Proud Boys and Oath Keepers for their involvement in the insurrection is imminently before the United States District Court for the District of Columbia. The complaint for D.C. v. Proud Boys International, L.L.C. et al. *("*Proud Boys*") was filed on December 14, 2021 by the Office of the Attorney General for the District of Columbia and charges the Proud Boys and Oath Keepers (collectively "Militia Groups") with, among other things, violating the Ku Klux Klan Act ("Klan Act") a federal conspiracy statute codified as 42 U.S.C. § 1985. Enacted in direct response to Ku Klux Klan ("Klan") violence against freed slaves during Reconstruction, the Klan Act provides an avenue to punish private individual(s) who conspire to infringe on individual equal protection or equal privilege and immunities under the law. In* Proud Boys*, the Government employs section 1985(1), clauses one and three, to argue that the Militia Groups' "coordinated act[s] of domestic terrorism" amount to a conspiracy to prevent the discharge of duties by officers of the United States and to injure an officer of the United States. Use of section 1985(1) in such a high-profile case is notable because there is no predominant case that outlines its application. As such, the D.C. District Court should investigate historical context and prominent case law for all section 1985 litigation to provide needed clarity on its appropriate application. If applied faithfully, the court could rule in favor of the government and establish* Proud Boys *as a powerful precedent for using section 1985(1) to hold liable militia groups for conspiratorial insurrectionist activities. Such a showing is the ultimate goal of this note.*

INTRODUCTION

On January 6, 2021, the nation experienced a violent insurrection on the United States Capitol, with militia groups like the Proud Boys and Oath Keepers playing an "outsized role" in its execution.[1] At the implicit urging of former President Donald Trump, members of the militia groups inflicted physical violence and destroyed public property, marking the most recent use of mob rule to resist government action—which in this instance was the constitutionally (and statutorily)[2] mandated certification of state electoral votes for the duly elected President and Vice President of the United States.[3] A year after the attack, the first lawsuit by a government entity[4] against the Proud Boys and Oath Keepers for their involvement in the January 6th insurrection is imminently before the

1. Roger Parloff, *The Conspirators: The Proud Boys and the Oath Keepers on Jan. 6*, LAWFARE (Jan. 6, 2022, 10:21 AM), https://www.lawfareblog.com/conspirators-proud-boys-and-oath-keepers-jan-6 [https://perma.cc/5FHX-BGUH].

2. ELIZABETH RYBICKI & L. PAIGE WHITAKER, CONG. RSCH. SERV., RL32717, COUNTING ELECTORAL VOTES: AN OVERVIEW OF PROCEDURES AT THE JOINT SESSION, INCLUDING OBJECTIONS BY MEMBERS OF CONGRESS 1–4 (2016), https://crsreports.congress.gov/product/pdf/RL/RL32717/12 [https://perma.cc/VZ7Y-GGZA] (noting that the relevant constitutional provision is found in Article II, Section 1, and Amendment 12 and statutory authority was created by Electoral Count Act of 1887, codified as 3 U.S.C. §15, which requires Congress to convene a joint session to count and certify the electoral votes submitted by the states).

3. Dan Mangan, Jacob Pramuk & Kevin Breuninger, *Congress Confirms Biden Election as President, Morning After Trump-fueled Mob Invades Capitol*, CNBC (Jan. 6, 2021), https://www.cnbc.com/2021/01/06/electoral-vote-update-congress-resumes-counting-after-pro-trump-rioters-invade-capitol.html [https://perma.cc/8A8Z-NRBF]; Sam Cabral, *Capitol Riots: Did Trump's Words at Rally Incite Violence?*, BBC (Feb. 14, 2021), https://www.bbc.com/news/world-us-canada-55640437 [https://perma.cc/P2QL-H9BU] (Cabral points to five quotations made by Trump at his rally on January 6th that suggest he did intend to incite discord: "We won this election, and we won it by a landslide;" "We will stop the steal;" "We will never give up. We will never concede. It doesn't happen;" "Peacefully and patriotically make your voices heard;" "If you don't fight like hell you're not going to have a country anymore;" and "We are going to the Capitol."). Jennifer Jacobs & Mark Niquette, *Trump Team Hoping 'Peacefully and Patriotically' Will Be Shield*, BLOOMBERG (Feb. 10, 2021) https://www.bloomberg.com/news/articles/2021-02-11/trump-team-hoping-peacefully-and-patriotically-will-be-shield#xj4y7vzkg [https://perma.cc/5ELS-TQMN]. President Trump's impeachment team relied on his use of "peacefully" and "patriotically" as a defense against accusations of inciting an insurrection on January 6th. In response, House impeachment managers asserted that President Trump made disproportionately more statements urging violence than not.

4. Clare Hymes, *Proud Boys and Oath Keepers Sued by D.C. Attorney General over January 6 Attack,* CBS NEWS (Dec. 14, 2021), https://www.cbsnews.com/news/january-6-lawsuit-proud-boys-oath-keepers-dc-attorney-general/ [https://perma.cc/9C9X-HY2B]. Two other suits filed against the Oath Keepers and Proud Boys that invoke the Klan Act are *Conrad Smith v. Trump* and *Thompson v. Trump*, both of which were brought by private actors. *Civil Litigation Documents,* LAWFARE, https://www.lawfareblog.com/civil-litigation-documents [https://perma.cc/K4BY-YCWR] (last visited Sept. 25, 2022).

United States District Court for the District of Columbia.[5] The complaint for *D.C. v. Proud Boys International, L.L.C. et al.* ("*Proud Boys*") was filed on December 14, 2021 by the Office of the Attorney General for the District of Columbia and charges the Proud Boys and Oath Keepers (collectively "Militia Groups") with, among other things, violating the Ku Klux Klan Act ("Klan Act") a federal conspiracy statute codified as 42 U.S.C. § 1985.[6] Enacted in direct response to Ku Klux Klan ("Klan") violence against freed slaves during Reconstruction, the Klan Act provides an avenue to punish private individual(s) who conspire to infringe on individual equal protection or equal privilege and immunities under the law.[7] Each section of the Klan Act prohibits conspiracy against discrete actors, namely government officials (section 1985(1)), witnesses or jurors (section 1985(2)), and individuals (section 1985(3)).[8]

In *Proud Boys*, the Government employs section 1985(1), clauses one and three, to argue that the Militia Groups' "coordinated act[s] of domestic terrorism" amount to a conspiracy to prevent the discharge of duties by officers of the United States and to injure an officer of the United States.[9] In its complaint, the government asserts that members of the Militia Groups conspired to instigate and perpetrate acts of violence against the United States Congress with the express purpose of harming Vice President Mike Pence and preventing both him and Congress from certifying the 2020 Presidential Election.[10] Use of section 1985(1) in such a high profile case is notable because there is no predominant case that outlines its application.[11] As such, the D.C. District Court should investigate historical context and prominent case law for all section 1985 litigation to provide needed clarity on its appropriate application. If applied faithfully, the court could rule in favor of the government and establish *Proud Boys* as a powerful precedent for using section 1985(1) to hold militia groups liable for conspiratorial insurrectionist activities. Such a showing is the ultimate goal of this note.

Part I will discuss the social and legal history surrounding the Klan Act because legislative history is an enduring and essential component to the

5. Parloff, *supra* note 1; Jon Lewis & Seamus Hughes, *What Does the Seditious Conspiracy Indictment Mean For the Oath Keepers?*, LAWFARE (Jan. 21, 2022), https://www.lawfareblog.com/what-does-seditious-conspiracy-indictment-mean-oath-keepers [https://perma.cc/ZS3L-GL57]; Complaint, D.C. v. Proud Boys Int'l, LLC, No. 1:21-cv-03267 (D.D.C. Nov. 14, 2021).

6. Complaint, *supra* note 5, ¶¶ 280–81.

7. 42 U.S.C. § 1985 (1976); Michael Scott Russell, *The Ku Klux Klan Act and the Proper Perspective on the Scope of 42 U.S.C. § 1985(3)*, 2 REGENT U. L. REV. 73, 81 (1992); Nicholas Mosvick, *Looking Back at the Ku Klux Klan Act*, NAT'L CONST. CTR. (Apr. 20, 2021), https://constitutioncenter.org/blog/looking-back-at-the-ku-klux-klan-act [https://perma.cc/9HT5-QEJA].

8. 42 U.S.C. § 1985 (1976).

9. Complaint, *supra* note 5, ¶¶ 4, 280–83.

10. *Id.* ¶ 282.

11. Vicki Y. Wind, *State Judges as "Quasi-Federal" Officials: Section 1985(1) and* Lewis v. News-Press and Gazette Co., 61 UMKC L. REV. 571, 571 (1993).

reasoning in section 1985 case precedent. Part 1.A. will chronicle the activities of the Klan during Reconstruction to illustrate the violent social backdrop that spurred the creation of the Klan Act and demonstrate that Klan panic regarding freed slaves was a symptom of the Klan's larger concern with their perceived diminishing importance of white people. Part 1.B. will describe the political debate concerning passage of the Klan Act and show that the prevailing political debate largely concerned federalism, with members of the 42nd Congress fearful that the act would be used as a general federal tort law. To assuage this fear, Congress added equal protection language to certain clauses of the Klan Act in an effort to limit its scope. Indeed, the inclusion of such language was not motivated by race but by fear of encroachment. Part II will stitch together pieces of section 1985 case law; since each section of the Klan Act is related to the other, an exploration of the entire section 1985 lexicon will chart a proper legal framework for the District Court. Part II.A. will recount *Griffin v. Breckenridge*, in which the Supreme Court established a class-based animus requirement for claims under section 1985(3). Part II.B. will detail the Supreme Court case of *Kush v. Rutledge*, which applies *Griffin*'s animus requirement to only those portions of section 1985 with equal protection language, in an effort to mirror the 42nd Congress's intent to limit the reach of section 1985. Since there are no section 1985(1) Supreme Court cases, Part II.C. will outline the lower court cases most discussed, namely *Stern v. United States Gypsum, Inc.*, *Pope v. Bond, Lewis v. News-Press & Gazette Co.*, and *Thompson v. Trump*, which together establish a persuasive edifice for the District Court to apply. *Thompson* is of particular import because it addresses allegations against the Oath Keepers and Proud Boys for their role in the January 6th attack and, as a D.C. District Court case, will likely be highly persuasive. Finally, Part III will describe and discuss the imminent *Proud Boys* case and will use the alleged facts from the Government's complaint to support the legal edifice created by case precedent. In light of *Thompson*, it is likely that the D.C. District Court will find that the Militia Groups violated section 1985(1) of the Klan Act by storming the Capitol to prevent, by force, threat, and intimidation, government officers from discharging their duties and holding an office and injure Vice President Mike Pence. Coupled with *Thompson*, *Proud Boys* will establish clear precedent for punishing conspiracies to interfere with the functions of government by an organized mob.

I. LEGISLATIVE HISTORY

As described by Justice Stephen Breyer, legislative history is important for "explaining specialized meanings of terms or phrases in a statute which were previously understood by the community of specialists (or others) particularly

interested in the statute's enactment."[12] With respect to the Klan Act, the language "equal protection of the laws" has been hotly disputed by courts adjudicating matters under section 1985. The proceeding discussion will give context to both the historical significance of the Klan Act and the congressional intent behind the equal protection language. Indeed, while the act was originally enacted to address Klan violence, as outlined below in Part I.A., its true intent was to uphold states' rights and, as outlined in Part I.B., prevent a general tort law.

A. Social Conditions

After the Civil War, the Southern condition was precarious due to "the frenzy of a bitter civil war, the anguish of an ignominious defeat, the resentment over Lincoln's sudden emancipation of the Negro, chagrin at the new status of freed slaves becoming equals, with the possibility, through franchise, of becoming superiors."[13] Like most Confederate towns, Pulaski, Tennessee, the birthplace of the Klan, was a tinderbox of conflict as embittered Southern whites anxiously grappled with the changing post-war zeitgeist.[14] Having emancipated slaves during the war, Pulaski offered fertile political ground for powerful and highly respected Black leaders to rise to prominence and garner the esteem of both Union officers and Democratic elites.[15] The increased influence of Republicans and Black men enraged Pulaski residents whose resentment began to quickly thicken.[16] Entrenched anti-Black sentiment intensified as community and ex-Confederate leaders galvanized racist sentiment urging residents to create civil guard companies to protect against freedmen and so-called carpetbaggers.[17] Like rubbing two sticks together, the confluence of this environment and the rebellious attitude of disaffected Confederate soldiers supplied the heat for anti-government organizing throughout the South.[18] As

12. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 853 (1992).

13. Joseph Silverman, *The Ku Klux Klan Paradox*, 223 N. AM. REV. 282, 284 (1926).

14. ELAINE FRANTZ PARSONS, THE BIRTH OF THE KLAN DURING RECONSTRUCTION 27 (2015).

15. *Id.* at 27–28, 32 (describing Rhodes as "a brickmason, aged fifty-three at the end of the war, who had been buying his time from his master for some years before the war and owned several horses and mules; he sharecropped with his sons during the war and would report $1,900 in property on the 1870 census").

16. Richard T. Schaefer, *The Ku Klux Klan: Continuity and Change*, 32 PHYLON: ATLANTA U. REV. RACE & CULTURE 143, 145 (1971) ("The Klan struck against real or perceived resentment by the former slaves and quickly mobilized at the scattered signs of blacks achieving economic success.").

17. PARSONS, *supra* note 14, at 29.

18. Silverman, *supra* note 13, at 282–83.

Elaine Parsons observed, "The Ku-Klux Klan was created at this moment and in this place."[19]

The origins of the Klan are somewhat benign and began when ex-Confederate soldiers and elite Pulaski intellectuals started "a club of society of some description" to soothe their weary spirits following Southern defeat.[20] The club was called the Ku Klux Klan, a name derived from the Greek word *Kuklos*, which means a band or circle, and would provide "diversion and amusement" for its members.[21] At the time, acts of amusement often included racist traditions like minstrel shows that "cannot be separated fully from the racial derision and stereotyping at its core."[22] In addition, violence against freed Black people that resembled organized Klan activity were reported throughout Pulaski during the early days of the club.[23] Such acts demonstrate the Klan's early commitment to white supremacy, with its ultimate message of white superiority resonating throughout the South.[24]

From 1867-68, Klan dens rapidly proliferated throughout the country and, after a national Klan convention in Nashville, Tennessee, the Klan adopted the Revised and Amended Prescript of the Order of the Ku Klux Klan ("the Prescript"), thereby establishing a unified purpose and structure.[25] In certain respects, the document was unremarkable, laying out the bylaws of local Klan groups by describing various leadership positions, creating rules for elections, establishing judicial mechanisms, and designating appropriate revenue streams.[26] In other respects, the document was unique in its emphasis on protecting the Constitution while selectively rejecting its mandates, e.g., the Thirteenth, Fourteenth, and Fifteenth Amendments. The Prescript outlined three objectives for the organization, with the latter two invoking the Constitution

19. PARSONS, *supra* note 14, at 29.

20. *Id.* at 29–30, 32 (stating that McCord was the editor of the *Pulaski Citizen* and Jones, Lester, and Reed were lawyers) and (quoting Allen Trelease, "[t]he Ku-klux was designed purely for amusement, and for some time after its founding, it had no ulterior motive or effect. All the evidence supports this.").

21. JOHN C. LESTER AND D.L. WILSON, KU KLUX KLAN, ITS ORIGINS, GROWTH AND DISBANDMENT 53, 55 (1905).

22. *Blackface: The Birth of An American Stereotype*, SMITHSONIAN, https://nmaahc.si.edu/explore/stories/blackface-birth-american-stereotype [https://perma.cc/Q3DW-SGAP] (last visited Sept. 11, 2022); *see also* Elaine Frantz Parsons, *Midnight Rangers: Costume and Performance in the Reconstruction-Era Ku Klux Klan*, 92 J. AM. HIST. 812, 813 (2005).

23. PARSONS, *supra* note 14, at 59.

24. *See* Parsons, *supra* note 22, at 814.

25. *Revised Prescript of the Order of the Ku Klux Klan*, 5 AM. HIST. MAG. 7–8 (Jan. 1900) ("It is probable that the prescript above given was either adopted at this convention or was subsequently prepared by an authorized committee to Pulaski to be secretly printed."); PARSONS, *supra* note 14, at 46, 48 ("We know for certain only that a document called a Revised Prescript had been written by mid-1868.").

26. AM. HIST. MAG., *supra* note 25, at 3, 13, 16–18.

directly: (1) to protect the innocent and weak, (2) "[t]o protect and defend the Constitution of the United States, and all laws passed in conformity thereto," and (3) "[t]o aid and assist in the execution of all constitutional laws."[27] In stark defiance of these objectives was the questionnaire at the end of the Prescript that outlined questions to be asked of budding recruits, including, "Are you opposed to negro equality, both social and political?" and, "Are you in favor of a white man's government in this country?"[28] The juxtaposition of the Klan's fidelity to the Constitution and opposition to racial integration is well articulated by the first Grand Wizard of the Klan, Nathan Bedford Forrest, who said, "I loved the old government in 1861; I love the old Constitution yet. I think it the best government in the world if administered as it was before the war. I do not hate it; I am opposing now only the radical revolutionists who are trying to destroy it."[29]

According to the Klan, by encouraging racial equality, radical Republicans were betraying the nation's white founding by letting the Republic "fall into the hands of an inferior and degraded race."[30] In its opinion, the way to restore the Constitution's original majesty was to elect Democrats who would disenfranchise the new Republican voting bloc: freedmen.[31] By 1870, there were Klan organizations in almost every Southern state, committed to terrorizing Republican leaders and Black voters in the name of political advocacy.[32] The Reconstruction-era Klan became the "glory of all conservatives," vanquishing the jaundice of Southern defeat.[33] Though the Klan officially disbanded in 1869, it continued to operate underground as local dens secured the support of

27. *Id.* at 5.

28. *Id.* at 21.

29. Jared A. Goldstein, *The Klan's Constitution*, 9 ALA. C.R. & C.L. L. REV. 285, 301 (2018).

30. *Id.*

31. Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 J. NEGRO HIST. 34, 36 (1964) ("The objectives of the Klan were clearly political. Confessed members avowed that the Klan aimed at the prevention of Negro voting and the disruption of the Union Leagues."); Schaefer, *supra* note 16, at 145 ("It was in their role as citizens that black men became the target of Klan vengeance.").

32. *The Ku Klux Klan*, HISTORY, https://www.history.com/topics/reconstruction/ku-klux-klan [https://perma.cc/2S49-UV9H] (last modified Feb. 4, 2022); Shapiro, *supra* note 31, at 36 ("Activity by the Klan in 1868 was closely associated with the Democratic Party. It is impossible in many places to separate the violence engaged in by groups of Democrats from that of organized Klans."); GLENN FELDMAN, THE IRONY OF THE SOLID SOUTH: DEMOCRATS, REPUBLICANS AND RACE, 1865–1944 10 (2013):

> [The Alabama Klan] burned black schools and churches, long perceived as centers for political action, and physically prevented the freed slaves from making it to the polls. Kluxers set up roadblocks on rural pikes, broke up Republican caucuses, and ran political opponents out of town. Planters threatened to slash the miserable wages of black laborers and tenants if they dared to vote anything but Conservative and Democratic.

33. FELDMAN, *supra* note 32, at 9.

community leaders.[34] With the election of Ulysses S. Grant, the Klan would finally gain a formidable enemy as the Union government became increasingly concerned with the Klan's actions.[35]

B. Political Debate

Since state and local courts were unable to control the Klan, the federal government had to respond directly.[36] After taking office, President Grant announced that Klan savagery would be met with a strong federal rejoinder declaring:

> [T]here is a deplorable state of affairs existing in some portions of the south demanding the immediate attention of Congress. If the attention of Congress can be confined to the single subject of providing means for the protection of life and property in those sections of the Country where the present civil authority fails to secure that end, I feel that we should have such legislation.[37]

In response to the declaration, Congressman Samuel Shellabarger of Ohio introduced H.R. 320, entitled "a bill to enforce the provisions of the Fourteenth Amendment to the Constitution and for other purposes."[38] The bill was introduced to both protect civil rights and restore civil authority amidst "improper interference" by the Klan.[39] Debate concerning its passage largely concerned issues of federalism with states' rights advocates apprehensive about its passage.[40] Democratic detractors claimed that the bill transgressed state sovereignty, stating it "overrides the reserved powers of the States. It reaches out and draws within the despotic circle of central power all the domestic,

34. *Id.* at 11.

35. *President Grant Takes on the Ku Klux Klan,* NAT'L PARK SERV., https://www.nps.gov/articles/000/president-grant-takes-on-the-ku-klux-klan.htm [https://perma.cc/4VUE-GCXD] (last visited Oct. 14, 2022).

36. Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 536 (1985).

37. NAT'L PARK SERV., *supra* note 35.

38. Gormley, *supra* note 36, at 537; CONG. GLOBE, 42nd Cong., 1st Sess. 317 (1871):

> That if two or more persons shall, within the limits of any State, band, or conspire, or combine together to do any act in violation of the rights, privileges, or immunities of another person, which, being committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny, and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, and, upon conviction thereof, shall be liable, &c., and the crime shall be punishable as such in the courts of the United States.

39. McCord v. Bailey, 636 F.2d 606, 615 (D.D.C. 1980).

40. Brian J. Gaj, Note, *Section 1985(2) Clause One and Its Scope*, 70 CORNELL L. REV. 756, 760 n.28 (1985).

internal, and local institutions … of the States."[41] They further claimed that the Act "absorbs the entire jurisdiction of the States over their local and domestic affairs [by a] sweeping usurpation of universal criminal jurisdiction in the States."[42] Similarly, Republican detractors asserted that the bill "far exceeded" the authority of the Thirteenth, Fourteenth, and Fifteenth Amendments and needed a limiting provision.[43] Clearly, congressional concern reached beyond the faithful operation of the federal government, and included racial equality.[44] In response to criticism, the bill was split into twenty clauses and amended to include equal protection language for the four clauses relating to areas traditionally under state control.[45] The other sixteen clauses, found throughout section 1985, dealt with the government's inherent right to self-protection and, therefore required no substantiating equal protection language.[46] In response to the amended bill, Republican James Garfield affirmed:

> I believe, Mr. Speaker, that we have at last secured a bill, trenchant in its provisions, that reaches down into the very heart of the Ku Klux Klan organization, and yet is so guarded as to preserve intact the autonomy of the States, the machinery of the State governments, and the municipal organizations established under State laws.[47]

While the January 6th riot was certainly shocking, it was not unique. As shown above, and as Professor Joyce Appleby described, Americans possess a "revolutionary consciousness, a state of mind" that periodically suspends traditional norms to promote morally ambivalent conduct in reaction to actual or perceived social or political angst.[48] This consciousness is superimposed to the Proud Boys' and Other Keepers' explicit hostility toward the peaceful transfer of power, and the revisionist fear that white culture is being erased by the growing presence of non-white persons, similar to grievances held by the Klan.[49] Indeed, the Klan Act was enacted to obviate the violence that resulted from Klan fear of impending irrelevance.[50] The Klan Act is now similarly being used

41. *Id.* at 760 n.25.

42. *Id.* at 760.

43. Gormley, s*upra* note 36, at 538.

44. *McCord*, 636 F.2d at 615.

45. Stephen Crocker, *42 U.S.C. Section 1985(2) Part One: The Inapplicability of the Animus Requirement from* Griffin v. Breckenridge, 77 NW. U. L. REV. 168, 175 n.49, 176 (1982).

46. *Id.* at 176.

47. Gormley, *supra* note 36, at 540.

48. Joyce Appleby, *Liberalism and the American Revolution*, 49 NEW ENG. Q. 3, 5 (1976).

49. Alan Feuer, *Fears of White People Losing Out Permeate Capitol Rioters' Towns, Study Finds*, N.Y. TIMES (Apr. 6, 2021), https://www.nytimes.com/2021/04/06/us/politics/capitol-riot-study.html [https://perma.cc/PQJ6-CY35].

50. *See* Erick Trickey, *The 150-year-old Ku Klux Klan Act Being Used Against Trump in Capitol Attack*, WASH. POST (Feb. 18, 2021), https://www.washingtonpost.com/history/2021/02/18/ku-klux-klan-act-capitol-attack/ [https://perma.cc/N3JP-K2CH].

against the Militia Groups, who carry the same fear as the Reconstruction-era Klan, as punishment for trying to prevent the peaceful transfer of power.[51]

II. CASE LAW

The Ku Klux Klan Act, codified as 42 U.S.C. § 1985, creates federal causes of action for conspiracies that deny (1) the equal protection of individuals under the law,[52] or (2) the inherent governmental powers of self-protection as guaranteed by Article one of the Constitution.[53] An analysis of the Klan Act is akin to opening a Russian doll in that each section is nested in the last. As such, the following discussion will address each section in reverse order because section 1985 case precedent develops in this manner. Accordingly, the following discussion will first address the section 1985(3) Supreme Court case *Griffin v. Breckenridge*, which established a class-based animus requirement for claims brought under that specific section.[54] Given the common legislative history and statutory construction of sections 1985(3) and 1985(2), lower courts look to *Griffin* to properly interpret the latter.[55] The discussion will subsequently explore the section 1985(2) Supreme Court case of *Kush v. Rutledge*, where the Court interpreted section 1985(2) as having two distinct clauses, namely clause one with no equal protection language, and therefore no animus requirement, and clause two with explicit equal protection language subject to an animus requirement.[56] Finally, the discussion will turn to the section 1985(1) cases of

51. *Id.*

52. Griffin v. Breckenridge, 403 U.S. 88, 96–97 (1971):

> [1985(3)] specif[ies] the motivation required 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.' This language is, of course, similar to that of § 1 of the Fourteenth Amendment . . . .

53. Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1338 (1977):

> We find untenable any suggestion that the constitutional authority of Congress to enact § 1985(1) depended on such a nexus to the Fourteenth Amendment as appellants suggest. Protection of federal officials from force, intimidation, threat, or injury at the hands of those who would disrupt, obstruct, or prevent the formulation and execution of federal functions is but a necessary incident of sovereignty.

54. *Griffin*, 403 U.S. at 102:

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

55. Gaj, *supra* note 40, at 761 ("Because of the common legislative history and similar language of the sections, the courts have looked to the Supreme Court interpretations of section 1985(3) for guidance when interpreting section 1985(2)."); Crocker, *supra* note 45, at 171 ("Courts generally agree that, because section 1985(2) part two contains equal protection language similar to that in section 1985(3), *Griffin*'s animus requirement applies to it.").

56. *See* McCord v. Bailey, 636 F.2d 606, 614 (D.D.C. 1980) ("Given the manifest meaning and the absence of reason for restrictive reading, we do not believe a class-based, invidiously

Stern v. United States Gypsum, *Inc.*, *Pope v. Bond*, *Lewis v. News-Press Gazette Co.*, and *Thompson v. Trump.*[57] Since the Supreme Court has yet to interpret section 1985(1), these cases provide a tapestry for discretionary application. *Thompson* is of particular importance because it directly addresses an identical argument to *Proud Boys* and, as a D.C. District Court case, will be highly persuasive to the Court. In exploring these cases, it will become clear that the *Proud Boys* court has ample fodder to properly adjudicate in favor of the government.[58]

A. Section 1985(3)

Section 1985(3) can be split into three, discrete clauses, each establishing a separate cause of action. The seminal case of *Griffin v. Breckenridge* was the first to address section 1985 in any substantive way, holding that section 1985(3) clause one, which states:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . .[59]

necessitates class-based animus because it contains equal protection language.[60] In *Griffin*, plaintiffs, Black residents of Kemper County, Mississippi, appealed the Ninth Circuit's dismissal of allegations that defendants, white residents of Kemper County, "willfully and maliciously conspired, planned, and agreed to block the passage of said plaintiffs in said automobile upon the public highways, to stop and detain them, and to assault, beat and injure them with deadly weapons," in an effort to deny them equal protection of the laws.[61] In reversing the Ninth Circuit's decision, the Court reasoned that, based on the construction of related laws and legislative history, section 1985(3) extends to private conspiracies, therefore plaintiff had alleged a valid cause of action under the statute.[62] The Court reasoned that since the companion criminal provision, 18 U.S.C. § 241, had been interpreted to apply to private action, section 1985(3)

discriminatory intent is an element of a cause of action under the first clause of section 1985(2)."); Crocker, *supra* note 45, at 170 ("Modern courts have unofficially divided Section 1985(2) to separate the first part's provisions relating to the federal judiciary from the second part's provisions relating to equal protection of the laws.").

57. *See infra* Part II.C.

58. *See infra* Part II.B.

59. 42 U.S.C. § 1985(3) (1976).

60. *Griffin*, 403 U.S. at 102.

61. *Id.* at 89–90; Gormley, *supra* note 36, at 547 (stating that the plaintiffs "alleged a conspiracy to deprive them of the equal protection of the laws of the United States and Mississippi, including the right to first amendment freedoms, the right not to be enslaved, the right to life and liberty, and the right to travel public highways").

62. *Griffin*, 403 U.S. at 96, 103.

should as well.[63] It stated that "[n]othing in [the] terms [of § 241] indicates that color of State law was to be relevant to prosecution under it . . . A like construction of § 1985(3) is reinforced when examination is broadened to take in its companion statutory provisions."[64] The Court further reasoned that, based on congressional debate, members of the 42nd Congress were insistent that section 1985 apply to private action.[65] The Court quoted Representative Shanks, who said, "I do not want to see [this measure] so amended that there shall be taken out of it the frank assertion of the power of the national Government to protect life, liberty, and property, irrespective of the act of the State."[66] Based on the aforementioned, the Court comfortably extended the scope of section 1985(3) dangerously close to a federal tort law.[67]

To forestall this result, the Court qualified its extension by adding a "class-based, invidiously discriminatory animus" requirement, citing fidelity to congressional intent in its reasoning.[68] The Court stated that sponsors of the limiting amendment to add equal protection language were concerned with conspiracies motivated by animus and therefore that motivation should be reflected in its application, though it failed to cite explicit language supporting its theory of the legislative intent.[69] While it said little more to justify its decision, its holding had a profound effect on litigation involving section 1985(2) and, by extension, section 1985(1). Indeed, in an effort to properly apply *Griffin* to section 1985(2), the Supreme Court in *Kush* (discussed below) bifurcated the section into equal protection and non-equal protection clauses based on the presence or absence of the applicable language.[70] Later courts conducted a similar parsing of section 1985(1) in an effort to appropriately clarify the nuances of its language.[71]

B. Section 1985(2)

The Supreme Court first interpreted section 1985(2) in *Kush v. Rutledge*, holding that the *Griffin* requirement does not apply to section 1985(2) clause one

63. *Id.* at 98–99, 100 n.8.

64. *Id.* at 98.

65. *Id.* at 101.

66. *Id.*

67. *See id.* at 102.

68. *Id.*:

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

(emphasis in original).

69. *Id.*

70. Kush v. Rutledge, 460 U.S. 719, 725–26 (1983).

71. *See infra* Part II.C.

because it lacks the triggering equal protection language.[72] Section 1985(2) clause one states, in relevant part, that conspiracy to interfere with civil rights occurs "[i]f two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully . . . ."[73] In *Kush*, respondent, a white football player, asserted that petitioners "engaged in a conspiracy to intimidate and threaten various potential material witnesses in order to prevent them from testifying 'freely, fully, and truthfully' in [his] lawsuit" against Arizona State University.[74] Petitioners, Arizona State University's athletic director, head football coach, and assistant football coach, asserted that respondent's claim was without merit because it did not meet *Griffin's* class-based animus requirement.[75] In response, the Court first evaluated statutory construction, asserting that the Klan Act explicitly enumerated five broad conspiratorial categories, namely conspiracies that interfere with "(a) the performance of official duties by federal officers; (b) the administration of justice in federal courts; (c) the administration of justice in state courts; (d) the private enjoyment of 'equal protection of the laws' and 'equal privileges and immunities under the laws'; and (e) the right to support candidates in federal elections."[76] It reasoned that categories concerning federal interests, namely federal officers (section 1985(1)), federal judicial proceedings (section 1985(2), clause one), and federal elections (section 1985(3), clause two), purposefully lack equal protection language because there is no usurpation of states' rights in these exclusively federal dealings.[77] The other categories, namely state judicial proceedings and private enjoyment, directly implicate the state, and, therefore, require equal protection language to be actionable in only a limited fashion by the federal government.[78]

Second, the Court applied legislative history explaining that the sponsors of the original bill added equal protection language to assuage concerns that the bill "vastly extended federal authority and displaced state control over private conduct."[79] Section 1985(2), clause one addresses the administration of justice that is already within the scope of federal authority; since it neither extends federal authority nor displaces state authority, by establishing an unrestricted

72. *Kush*, 460 U.S. at 723 n.4, 726.
73. *Id*.
74. *Id.* at 720–21.
75. *Id.* at 720.
76. *Id.* at 724.
77. *Id.* at 724–25.
78. *Id.*
79. *Id.* at 726.

federal tort law, it needs no restriction.[80] As the Ninth Circuit articulated in the lower court ruling,

> No constitutional doubt with respect to the power of the federal government to protect that interest existed in 1871 nor does any exist today. To require that a class-based discriminatory intent be shown to establish a cause of action under the first part of section 1985(2) would attribute to Congress in 1871 a constitutional concern that did not exist.[81]

As such, the Court held that respondent need not show racial animus to sustain a claim under section 1985(2), clause one because it fails to invoke equal protection.[82] *Kush* essentially established a bright-line test for when the *Griffin* requirement applies: situations where the federal government breaches the perimeter of designated state action.[83]

C. Section 1985(1)

Stern v. United States Gypsum, *Inc.*, *Pope v. Bond*, *Lewis v. News-Press & Gazette Co*., and *Thompson v. Trump* interpret various aspects of Section 1985(1), giving color to its language. *Stern* establishes a basic analytical framework and defines the phrase "force, intimidation, or threat."[84] *Pope* explores whether the section covers internal disagreements between federal employees and their supervisors.[85] *Lewis* defined the phrase "an office, trust, or place of confidence under the United States,"[86] and *Thompson* applied section

80. *Id*. at 723:

> Noting the Federal Government's unquestioned constitutional authority to protect the processes of its own courts, and the absence of any need to limit the first part of § 1985(2) to avoid creating a general federal tort law, the Court of Appeals declined to impose the limitation set forth in *Griffin v. Breckenridge* . . . [W]e agree with the Ninth Circuit's analysis.

Id.; Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1355 (9th Cir. 1981) ("Part one of section 1985(2) requires no such [animus] limitation because it is limited by its terms to private conspiracies designed to obstruct certain processes of any court of the United States. This provision has within it no seeds from which could spring a general federal tort law.") (internal quotation marks omitted).

81. *Rutledge*, 660 F.2d at 1355.

82. *Kush*, 460 U.S at 726–27.

83. *Id.* at 722–23, 727:

> Protection of the processes of the federal courts was an essential component of Congress' solution to disorder and anarchy in the Southern States. Neither proponents nor opponents of the bill had any doubt that the Constitution gave Congress the power to prohibit intimidation of parties, witnesses, and jurors in federal courts.

84. Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1336–37 (1977).

85. Pope v. Bond, 641 F. Supp. 489, 497 (D.D.C. 1986).

86. Lewis v. News-Press & Gazette, Co., 782 F. Supp. 1338, 1341–42 (W.D. Mo. 1992) (internal quotation marks omitted).

1985(1) to the Militia Groups specifically.[87] Each provides an indication as to how the court might analyze the facts in *Proud Boys*.

Section 1985(1) was first interpreted by the Seventh Circuit in *Stern v. United States Gypsum*, *Inc*.[88] The plaintiff, an agent of the Internal Revenue Service (IRS), alleged that the defendant, Gypsum, a company being audited by the agent, "conspired to injure [plaintiff] on account of the lawful performance of his official duties and to molest, interrupt, hinder, and impede him in the performance of those duties" as stated in section 1985(1), clauses one and four.[89] The plaintiff asserted that, in furtherance of the conspiracy, defendants "knowingly and maliciously fabricated false and defamatory charges of serious professional misconduct by [plaintiff] in the course of [the company's] audit" and complained to plaintiff's supervisors.[90] Plaintiff further asserted that, as a result of these complaints, he was dismissed from Gypsum's audit and issued an adverse employment notice with a "propos[ed] reduction in grade, salary, and responsibility, and geographic transfer."[91] Plaintiff claimed that the incident caused irreparable reputational damage, thereby forestalling future advancement opportunities.[92] In response, defendants argued that plaintiff did not state a proper cause of action under section 1985(1) because plaintiff's allegations were outside the historical scope of the Klan Act.[93] Defendants further argued that, even if plaintiff made a proper claim, he failed to prove both that defendant's conduct amounted to "force, intimidation, or threat" or that there was class-based animus.[94] To determine the first issue of scope, the Seventh Circuit reviewed the legislative history of section 1985(1), concluding that, although southern violence inspired the Klan Act, its applicability was not limited to those specific circumstances.[95] The court stated that, while "the Forty-Second Congress was focused on circumstances which bear little resemblance to the facts alleged in Stern's complaint," it still intended section 1985(1) to have a "sweep as broad as [its] language," meaning it was to have general application

87. Thompson v. Trump, No. 21-cv-00400 (APM), 2022 WL 503384, *47 (D.D.C. Feb. 18, 2022).

88. *Stern*, 547 F.2d at 1331, 1331 n.1 ("This interlocutory appeal…presents questions of first impression in the construction of 42 U.S.C. § 1985(1)" and "[t]he parties have cited no authorities construing [§ 1985(1)], and our research has disclosed none.").

89. *Id.* at 1332–33.

90. *Id.* at 1333.

91. *Id.*

92. *Id.*

93. *Id.* at 1334.

94. *Id.* at 1340.

95. *Id.* at 1335:

> [W]e think it important to note here that Congress, in enacting what became § 1985(1), did not fashion a narrow and limited remedy applicable only to the southern states in 1871. The outrageous conditions there at that time were, no doubt, what induced Congress to act, but it chose to do so with a statute cast in general language of broad applicability.

without embedded limitations or qualifiers.[96] Like in *Griffin*, the court compared section 1985(1) with a companion statute from the same historical period, 42 U.S.C. § 1983, to determine how broad the statute sweeps.[97] The court asserted that cases brought under section 1983 establish "factual settings utterly unlike those prevailing in 1871 and in all probability entirely unforeseen by the Forty-Second Congress. Yet where the statutory language has been satisfied, such lawsuits have generally been sustained."[98] Thus, the court concluded that section 1985(1) can be invoked in situations wholly different from those that predominated Reconstruction.[99] While this portion of the analysis is seemingly irrelevant to *Proud Boys*, as the events of January 6th are of the type Congress intended to prevent,[100] it is important because it provides a response to a contrary argument that the Militia Groups could employ in their defense.

With respect to the second issue concerning the "force, threat, or intimidation" language, the court explored the verbiage of section 1985(1) concluding that, based on its use of the disjunctive "or," its clauses have independent significance and are not uniformly subject to a "force, threat, or intimidation" requirement.[101] Indeed, similar to *Kush*, the court split section 1985(1) into four clauses, explaining that clause one is the only provision containing the pertinent phrase:

> If two or more persons in any State or Territory conspire (1) *to prevent*, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; (2) *or to induce* by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, (3) *or to injure* him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, (4) *or to injure* his [person or][102] property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties . . . .[103]

Since plaintiff's allegations implicated the last two clauses only, the court reasoned that he is not required to show that defendant's conduct amounted to "force, intimidation, or threat."[104] The court essentially held that the threat

96. *Id.* at 1335–36 ("But Congress surely may use the lesson of a particular historical period as the catalyst for a law of more general application.").

97. *Id.* at 1335.

98. *Id.*

99. *Id.*

100. *See supra* Part I.B.

101. *Stern*, 547 F.2d at 1336–37 ("The statute makes perfectly good sense without imposing a 'force, intimidation, or threat' requirement on each of its parts.").

102. *Id.* at 1336 (italics in original; emphasis added). Note, the court leaves out the statutory phrase "in his property" for inexplicable reasons. It has been added to the quotation to maintain uniformity with the statute.

103. *Id.*

104. *Id.* at 1338.

requirement only applies to clause one.[105] This distinction is important to *Proud Boys* because the government alleged prohibited conduct under both clause one and clause three of section 1985(1).[106] Applying *Stern,* the court must conduct their analysis of these clauses differently because the former includes equal protection language while the latter does not, i.e., to prevail under clause one, it must show that the Militia Group's preventative actions amounted to "force, threat, or intimidation;" in contrast, the government need only show intent to injure under clause three.[107]

Finally, to determine the third, and arguably most important issue of the applicability of the *Griffin* animus requirement to section 1985(1), the court looked to statutory language and counterpart statutes, to conclude that claims arising under section 1985(1) require no showing of class-based animus because it lacks the necessary equal protection language.[108] The court asserted that Congress intended equal protection to apply in only certain instances, evidenced by its discretionary insertion.[109] The court stated, "Unlike § 1985(3), § 1985(1) does not limit its scope to conspiracies aimed at the deprivation of equal protection or equal privileges and immunities.[110] Moreover, the existence of such a limit in § 1985(3) is persuasive evidence that Congress knew how to impose it when it was intended."[111] The court then looked to the counterpart criminal statute, 18 U.S.C. § 372, claiming that it is routinely applied "to circumstances in which no invidiously discriminatory animus was alleged or proved or even remotely inferable."[112] Accordingly, the court saw no need to impose a more restrictive reading to the civil counterpart.[113] Essentially, *Stern* unequivocally eliminated the animus requirement from section 1985(1) analysis, thereby removing it from consideration in *Proud Boys*, which means the District

105. *Id.* at 1336 ("While the requirement is express in the first substantive phrase, and incorporated by the words 'by like means' in the second, it does not modify the last two substantive phrases.").

106. Complaint, *supra* note 5, at ¶ 282.

107. United States v. Demott, No. 05-cr-0073, 2005 U.S. Dist. LEXIS 37599, at *5–6 (N.D.N.Y. Sept. 22, 2005):

> Notably, that phrase ("by force, intimidation, or threat") appears after the verb "to prevent," which verb relates to the first potential object of the conspiracy. This suggests that the phrase "by force, intimidation, or threat" applies only to (or modifies) this first object of the conspiracy. Had the "by force, intimidation, or threat" phrase appeared before the verbs relating to the conspirators, there would be a stronger argument for Defendants' position. By putting this qualifying phrase after the verb "to prevent," it is understood to qualify the preceding verb ("to prevent") and not any ensuing verbs, which express different concepts.

108. *Stern*, 547 F.2d. at 1340.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

Court need only find "force, intimidation, or threat" in the clause one allegation.[114]

Building on *Stern*, *Pope v. Bond* held that section 1985(1), clause one—which states, "[i]f two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof,"—is not applicable to issues of federal employment.[115] In *Pope*, plaintiff, a former official in the Office of General Aviation of the Federal Aviation Administration (FAA) alleged that defendants, FAA officials, conspired to silence him and ultimately forced his resignation.[116] Plaintiff asserted that, because he took a contrary stance to the FAA regarding the superiority of a particular airplane collision system,[117] defendants "conspired to punish him for lawfully discharging his duties as a federal official and to prevent his further 'whistleblowing' to members of Congress."[118] Defendants responded asserting that plaintiff lacked a cause of action because section 1985(1), clause one was not intended to address internal personnel disputes.[119] In adjudicating the matter, the court looked to the plain language of clause one and concluded that it "is designed to protect against all conspiracies seeking to impede the operation of government through interference with an official in the discharge of his official duties."[120] It then qualified this statement by asserting that the legislative history suggested section 1985(1) is only actionable against actors operating outside the federal government.[121] Though its ultimate holding is inapplicable to the facts in *Proud Boys*, the court's insistence on outside interference is relevant, in so far as the Militia Groups are outsiders wholly unaffiliated with the government.

In *Lewis v. News-Press Gazette Co*., the District Court of Missouri held that a state judge had standing to sue under section 1985(1), clauses one, which states, "[i]f two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof . . .," because his duties involved federal authority or responsibility.[122] In *Lewis*, plaintiff, a circuit court judge, alleged that because he denied a request by defendant, News-Press, to release the names of grand jury members, defendants conspired to "harass, obstruct, and humiliate" him by

114. *Id.* at 1336.
115. *Id.* at 1342–43.
116. Pope v. Bond, 641 F. Supp. 489, 492 (D.D.C. 1986).
117. *Id.*
118. *Id.* at 497.
119. *Id.*
120. *Id.*
121. *Id.* at 498.
122. Lewis v. News-Press & Gazette, Co., 782 F. Supp. 1338, 1341 (W.D. Mo. 1992).

criticizing and antagonizing him in the open press.[123] Plaintiff further alleged that this harassment was intended to impair the performance of the official duties of his "office, trust, or place of confidence under the United States."[124] Defendants counterargued that plaintiff lacked standing to bring a claim because section 1985(1) only applied to federal officials.[125] The court reasoned that the judge assumed a quasi-federal role because he had the authority and responsibility to resolve federal constitutional issues which placed him in a position of trust and confidence.[126] It further reasoned that state judges are bound by federal institutions, such as the Constitution and the Supreme Court, which further confirms their quasi-federal nature.[127] In application to *Proud Boys*, *Lewis* confirms that the targets of the Militia Groups' conspiracy, Congress, the Vice President, and the then President- and Vice President-elect, are incontrovertibly federal officials because they have federal duties established by Article I and Article II of the Constitution.[128] Indeed, *Lewis* provides a means to resolve whether an individual holds a federal office for purposes of section 1985(1), namely if they assume a place of federal authority or responsibility.[129] Below, *Thompson* refines the *Lewis* holding by providing a more meaningful analysis of what constitutes "office, trust, or place of confidence under the United States."[130]

In the recent case *Thompson v. Trump*, the D.C. District Court held that, in violation of section 1985(1), clauses one and three, the Oath Keepers and Proud Boys entered into a conspiracy to interfere with the certification of the 2020 Presidential Election and prevent President-elect Joe Biden and Vice President-elect Kamala Harris from holding office.[131] In *Thompson*, plaintiffs, eleven members of the House of Representatives and two Capitol Police officers,

123. *Id.* at 1340.

124. *Id.* at 1341.

125. *Id.*

126. *Id.* 1342.

127. *Id.* at 1342–43.

128. *Id.* at 1342; U.S. CONST. art. I, §1 (William Hickey, Constitution of the United States of America, with an Alphabetical Analysis; the Declaration of Independence; the Prominent Political Acts of George Washington; Electoral Votes for All the Presidents and Vice-Presidents; the High Authorities and Civil Officers of Government, from March 4, 1789, to March 3, 1847; Chronological Narrative of the Several States; and Other Interesting Matter; with a Descriptive Account of the State Papers, Public Documents, and Other Sources of Political and Statistical Information at the Seat of Government (2) at 1 (1847) (ebook)) ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); U.S. CONST. art. II, §1 ("[President] shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected.").

129. *Lewis*, 782 F. Supp. at 1342–43.

130. *Id.* at 1341.

131. Thompson v. Trump, 21-cv-00400, 2022 U.S. Dist. LEXIS 30049, at *124 (D.D.C. Feb. 18, 2022).

alleged that, due to President Trump's rhetoric regarding the doubtful validity of the 2020 Presidential Election, the Militia Groups violently and lawlessly attacked the Capitol in an effort to thwart the proper discharge of congressional duties and prevent the legitimate transfer of power.[132] The Oath Keepers sought a motion to dismiss, counterarguing that plaintiffs lacked standing under section 1985(1), clause one because their injuries "derive exclusively from their positions as members of the House," meaning, as individual members, they could not assert institutional injury.[133] They further argued that plaintiffs are not federal officials under section 1985(1), were not discharging a "duty" on January 6th, and failed to properly allege a "plausible conspiracy among Defendants and others."[134]

In denying the Oath Keepers' motion, the court first addressed the issue of standing. In order to satisfy Article III standing, a plaintiff must show that the alleged injury is (1) concrete, particularized, and actual or imminent (injury in fact); (2) reasonably traceable to the defendant's alleged conduct (causation); and (3) redressable by a favorable court decision (redressability).[135] The Oath Keepers make no mention of causation and redressability in their argument confining their analysis to the injury in fact requirement.[136] The court contended that plaintiffs do not allege institutional, but actual injury in the form of emotional and physical distress and reasoned "[p]ersonal harm is the basis for their standing and, as discussed, it is sufficient for purposes of Article III."[137]

Second, the court addressed whether, as Congresspeople, plaintiffs are considered federal officials under section 1985(1). Defendants claimed that, consistent with the Constitution, the word "officer" means any person "appoint[ed] by the President, or of one of the courts of justice[,] or heads of departments authorized by law to make such an appointment."[138] Defendants further claimed that because the Constitution distinguishes between congressional members and, as stated in Article II, a "[p]erson holding an Office of Trust or Profit under the United States," plaintiffs do not hold "any office, trust, or place of confidence" as required by section 1985(1).[139] In addition, defendants cited Article I, section six arguing that the provision "disqualifies 'a Member of either House during his Continuance in Office' from 'holding any Office under the United States,'" meaning active duty Congresspeople cannot

132. *Thompson*, 2022 U.S. Dist. LEXIS 30049, at *9–10.

133. *Id.* at *20.

134. *Id.* at *49.

135. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

136. *See generally Thompson*, 2022 U.S. Dist. LEXIS 30049, at *69–97.

137. *Id.* at *37 ("[Plaintiffs] do not advance an institutional injury, such as the 'dilut[ion] [of] their Article I voting power'…Their injuries are instead personal: emotional distress in the main, as well as physical injury to [Congresswoman] Jayapal.").

138. *Id.* at *51.

139. *Id.*

be considered officers.[140] The court rejected these assertions, stating that it was incredulous that Congress intended the Constitution to be used as a dictionary to interpret section 1985(1).[141] It asserted that the court does not automatically introduce constitutional meaning when interpreting federal statutes and that defendants failed to present case law corroborating their contrary method of statutory interpretation.[142] The court reasoned that, based on Reconstruction-era legal dictionaries which defined "office" as "a right to exercise a public function or employment…," legislators hold an office in satisfaction of section 1985(1).[143] In addition, the 42nd Congress would have understood "trust," which was defined as "a confidence reposed in one person for the benefit of another," to include members of Congress.[144] Finally, the court asserted that, although Reconstruction-era legal dictionaries did not define "place of confidence," the plain meaning of the phrase is as broad as "trust."[145] Accordingly, the court concluded that "[t]here can be little doubt that the plain text of § 1985(1) reaches members of Congress."[146]

Third, the court addressed whether plaintiffs were actually discharging their duties during the Capitol attack. Defendants claimed that the Twelfth Amendment requires House members to merely observe the opening of electoral ballots and, therefore, evokes no discharge of duty.[147] The court found this argument patently absurd, reasoning that the presence of Congress members is required for the, so-called, observance to occur and the Constitution need not enumerate every underlying action associated with a particular Congressional duty.[148]

Fourth, the court addressed whether plaintiffs alleged a plausible conspiracy among defendants. The court asserted that civil conspiracy requires "that there was a single plan, the essential nature and general scope of which were known

140. *Id.*

141. *Id.*

142. *Id.* at *51.

143. *Id.* at *52.

144. *Id.* at *53.

145. *Id.*

146. *Id.*

147. *Id.* at *56 ("[The Oathkeepers] contend that the Constitution requires the opening of electoral ballots 'in the presence of . . . the House of Representatives,' U.S. Const. amend. XII, and therefore vests in individual members no duty but only 'the opportunity to observe' the Electoral College vote.").

148. *Thompson*, 2022 U.S. Dist. LEXIS 30049, at *56:

> [T]he Constitution lacks such express appearance requirements as a general matter. Article I, which establishes the Congress and defines its powers, nowhere requires that an individual Senator or Representative appear for any particular proceeding. Article I, § 7, for example, which sets forth the process for passing legislation, does not require a Senator or Representative to cast a vote, but no one would reasonably say that the Constitution affords them only an "opportunity" to vote but no duty.

to each person who is to be held responsible for its consequences" and that one or more persons commits an overt act in furtherance of the conspiracy.[149] The court reiterated that the conspiracy in question was to prevent, by "force, intimidation, or threat," the discharge of congressional duties to certify the election and the assumption of office by the President and Vice President-elect.[150] The Oath Keepers claimed that plaintiffs' complaint lacked sufficient detail to establish conspiracy and inappropriately held the organization responsible for acts of group members.[151] In response to these claims, the court asserted that the well-pleaded complaint formulation of Rule Eight of the Federal Rules of Civil Procedure does not require the level of specificity that defendants demanded at the motion to dismiss stage.[152] The court further asserted that plaintiffs pled sufficient facts to extend liability to the organization under *respondeat superior*.[153] The court concluded that, as evidenced by Facebook posts and messages, the Militia Groups created an alliance and coordinated preparation for the January 6th attack by obtaining tactical and communication equipment and bear mace.[154] Accordingly, defendants committed a conspiracy which precluded dismissal of the section 1985(1) claim.

Cumulatively, the proceeding cases establish an analytical framework for the District Court to employ in adjudicating *Proud Boys.* In its complaint, the government invokes both section 1985(1), clause one, which prohibits conspiracies that intend to use "force, intimidation, or threat" to prevent an individual from holding or discharging any duties of "any office, trust, or place of confidence," and section 1985(1), clause four, which prohibits conspiracies to injure someone for lawfully discharging the duties of their office.[155] Neither

149. *Id.* at *60.

150. *Id.* at *61.

151. *Id.* at *76–77.

152. *Id.* at *77; FED. R. CIV. P. 8:

> A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

153. *Thompson*, 2022 U.S. Dist. LEXIS 30049, at *125; General Bldg. Contractors Ass'n v. Pa., 485 U.S. 375, 392 (1982):

> The doctrine of respondeat superior . . . enables the imposition of liability on a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant. . . . "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." [ ] A master-servant relationship is a form of agency in which the master employs the servant as "an agent to perform service in his affairs" and "controls or has the right to control the physical conduct of the other in the performance of the service."

154. *Thompson*, 2022 U.S. Dist. LEXIS 30049, at *78.

155. Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1336 (1977).

clause includes equal protection language, so neither are subject to an animus requirement. To prove conspiracy under clause one, the government will have to show that the Militia Groups mutually agreed to incite aggression toward Congress through "force, intimidation, or threat" and did at least one overt act in furtherance of its objective.[156] While courts have yet to fully define the phrase "force, intimidation, or threat," the plain meaning comports with the actions of the Militia Groups.[157] Second, the government will have to prove that Congress, the Vice President, and President have some level of federal authority or responsibility which will be easily corroborated by Articles I and II of the Constitution which explicitly outline these roles. *Thompson* further corroborated this conclusion by explicitly stating that "office," "trust," and "place of confidence" includes Congress.[158] Indeed, observance of a governmental process, like the certification of an election, would be considered a "discharge of duty."[159] Finally, to prove conspiracy under clause three, the government need only show that the conspirators intended to injure Vice President Mike Pence.

III. *D.C. V. PROUD BOYS INTERNATIONAL*

On December 14, 2021, Plaintiff, the District of Columbia brought suit against Defendants, Proud Boys International, Inc. and Oath Keepers for conspiring to commit acts of violence against the United States Congress and Vice President Mike Pence with the express purpose of thwarting their constitutional duty to certify the 2020 Presidential Election for President Joe Biden and Vice President Kamala Harris.[160] The District argued that, over the course of several weeks, the Militia Groups "worked together to plot, publicize, recruit for, and finance" a strategic terrorist attack on the Capitol in an effort to reinstate President Donald Trump.[161] It asserted that, as planned, the conspiracy resulted in Militia Group members assembling from across the country to break police barriers and ransack the Capitol.[162]

While an in depth discussion of federal conspiracy is beyond the scope of this discussion, a brief overview of the conspiratorial nature of the Militia Groups' activities is appropriate because a cause of action under section 1985(1) necessitates such a showing.[163] *Thompson* is the only section 1985 case to plainly articulate the nature of conspiracy under the statute and employs the

156. *Id*.
157. *Id*.
158. *Id*.
159. *Id.* at 1337.
160. Complaint, *supra* note 5, ¶¶ 1–6.
161. *Id.* ¶ 3.
162. *Id.* ¶¶ 3–6.
163. Thompson v. Trump, 21-cv-00400, 2022 U.S. Dist. LEXIS 30049, at *94–95 (D.D.C. Feb. 18, 2022) ("Section 1985(1) is a conspiracy statute, and so pleading a plausible conspiracy is an essential element of all Plaintiffs' § 1985(1) claims.").

Supreme Court's mindset that "[w]hen Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition. [When] [t]he relevant statutory phrase is 'to conspire,' [w]e presume Congress intended to use the term in its conventional sense, and certain well-established principles follow."[164] The most conventional definition of conspiracy is outlined in the federal conspiracy statute 18 U.S.C. §371, which states that a crime is committed "[i]f two or more persons conspire…to commit any offense against the United States … and one or more of such persons do any act to effect the object of the conspiracy." Indeed, regardless of the statute in question, the common elements of conspiracy are (1) an agreement (2) between two or more persons (3) to commit an illegal act through (4) overt action.[165] First, an agreement must be more than mere association and can be proven by word or action, through direct or circumstantial evidence.[166] All coconspirators must share in the objectives of the conspiracy, though it is unnecessary for them to know all the detailed plans.[167] Second, an overt act in furtherance of the conspiracy, as with 18 U.S.C. §371, requires one or more persons "do any act to effect the object of the conspiracy."[168] This act may be minor, i.e., a simple "manifestation that the conspiracy is being executed."[169] Hence, full commission of the intended crime is not required for purposes of proving

164. Salinas v. United States, 522 U.S. 52, 63 (1997).

165. Pinkerton v. United States, 328 U.S. 640, 647 (1946).

166. *Thompson*, 2022 U.S. Dist. LEXIS 30049, *97 (quoting Halberstam v. Welch, 705 F.2d 472, 476, 227 U.S. App. D.C. 167 (D.C. Cir. 1983)):

> [A] plaintiff "need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished."

Id. ("It is enough 'that members of the conspiracy in some way or manner, or through some contrivance, positively or tacitly[,] came to a mutual understanding to try to accomplish a common and unlawful plan."). *Id.*; CONG. RSCH. SERV., R41223, FEDERAL CONSPIRACY LAW: A BRIEF OVERVIEW 6 (2020); United States v. Feldman, 936 F.3d 1288, 1305 (11th Cir. 2019):

> [T]he existence of an agreement may "be proved by inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme. A conspiracy conviction will be upheld if 'the circumstances surrounding a person's presence at the scene of conspiratorial activity are so obvious that knowledge of its character can fairly be attributed to him."

167. FEDERAL CONSPIRACY LAW, *supra* note 166.

168. Whitfield v. United States, 543 U.S. 209, 212 (2005) ("[The Eleventh Circuit] concluded, however, that those decisions [of sister Circuits] were erroneously based on case law interpreting the general conspiracy statute, 18 U.S.C. § 371 [18 USCS § 371], which . . . expressly includes an overt-act requirement.").

169. Malcolm T. Yawn, *Conspiracy*, 51 MIL. L. REV. 211, 220–21 (1971); Hyde v. Schneider, 225 U.S. 347, 388 (1912) ("[I]f an overt act is required, it does not matter how remote the act may be from accomplishing the purpose, if done to effect it; that is, I suppose, in furtherance of it in any degree.").

conspiracy.[170] In addition, to fully incorporate section 1985(1), the overt action must be in service of forceful, threatening, or intimidating conduct intended to prevent any person from discharging an official duty.

Based on the evidence, an agreement was clearly made between two parties, the Oath Keepers and Proud Boys, as evidenced by leader of the Oath Keepers and defendant, Kelly Meggs, confirming the alliance in a Facebook message, "[w]ell we are ready for the rioters, this week I organized an alliance between Oath Keepers, Florida 3%ers, and Proud Boys. We have decided to work together and shut this shit down."[171] Meggs further confirmed the alliance through subsequent Facebook posts and messages which delineated strategies for January 6th, including explicitly establishing the Proud Boys as a "force multiplier."[172] Meggs claimed that the Oath Keepers and Proud Boys leadership agreed that the Oath Keepers would march with the Proud Boys for a period of time, but would eventually separate to ambush police in the event they tried to intervene in a conflict between the Oath Keepers and other protestors.[173]

Further, members of the Militia Groups committed overt acts in furtherance of the conspiracy. Members of the Militia Groups used social media and electronic messaging to coordinate the attack, recruit participants, arrange for the collection and distribution of tactical gear and weapons, and organize travel for themselves to the Capitol.[174] Between December 12, 2020, and January 3, 2021, Meggs organized approximately 10 online meetings through GoToMeeting to plan the attack in more detail as evidenced by the meeting titles, including "se leaders dc 1/6/21 op call," "dc planning call," and "florida dc op planning chat."[175] On or around January 3, 2021, Meggs and members of the Oath Keepers, Graydon Young and Kenneth Harrelson, joined an invitation-only encrypted Signal group entitled "OK FL DC OP Jan 6" to establish a channel for secret communication to be used before and during the attack.[176] Messages sent by the Militia Groups encouraged participants to bring certain types of weapons and tactical gear, also constituting overt acts.[177] Indeed, Meggs messaged at least one participant suggesting they bring gas masks, mace, batons, and armor.[178] In the days leading up to the attack, Proud Boys members acquired tactical vests and military-style communications equipment to be used at the

170. FEDERAL CONSPIRACY LAW, *supra* note 166.

171. Complaint, *supra* note 5, at ¶ 113.

172. *Id.* (quoting Meggs' Facebook messages) ("Contact with PB and they always have a big group [sic] Force multiplier…I figure we could splinter off the main group of PB and come up behind them. F-ing crush them for good.").

173. *Id.* ¶ 115.

174. *Id.*

175. *Id.* ¶ 119.

176. *Id.* ¶ 128.

177. *Id.* ¶ 130.

178. *Id.* ¶ 131.

Capitol on January 6th.[179] In addition, the Oath Keepers created a Quick Reaction Force as a means to bring additional weapons to the Capitol.[180] As these facts suggest, the government should be able to prove the elements of conspiracy because the Militia Groups entered into an agreement to violate section 1985(1) and committed overt acts in furtherance of that agreement.

Allegation Two: Supported by a history of brutality, The Militia Groups assembled and coordinated acts of violence to attack the Capitol on January 6th.

The District explained that January 6th was not an isolated attack as violence is an inextricable link between the Proud Boys who have repeatedly "instigated, incited, and executed acts of violence and intimidation against their perceived enemies" and the Oath Keepers who are "willing to engage in armed confrontations with the government and with people and groups they perceive as supporting government actions."[181] Indeed the District asserted that the Proud Boys have a long history of using small slights to justify violence in the name of self-defense.[182] For example, on October 28, 2018, men connected to the Proud Boys claimed they had been assaulted when they were arrested for punching, kicking and stomping four protestors.[183] Similarly, in April 2019, Proud Boy members used an encrypted messaging platform to coordinate and plan violence in anticipation of a rally in Rhode Island.[184] One message stated, "[i]f any contact is made with you, that's assault. If they take your hat, spray you with silly string, spit, push. . . . It's assault. We need to have all our guys there before we retaliate though if we can. The cops aren't going to let us fight long. We need to inflict as much damage as possible in the time we have."[185]

179. *Id.*

180. *Id.*

181. *Id.* ¶¶ 51, 66.

182. *Id.* ¶ 54.

183. *Id.* ¶ 55; Daniel Politi, *Members of Far-Right Men's Group "Proud Boys" Beat Up Protesters in New York*, SLATE (Oct. 13, 2018, 6:21 P.M.), https://slate.com/news-and-politics/2018/10/proud-boys-members-beat-up-protesters-in-new-york-after-event-with-gavin-mcinnes.html [https://perma.cc/8MXX-ED9D] ("Members of the far-right men's group 'Proud Boys' beat up at least three protesters Friday in the streets of Manhattan after an event Friday night.").

184. Complaint, *supra* note 5, ¶ 56; Julia Arciga, *Proud Boys Members Plotted Ways to Injure Protesters at April Rally*, DAILY BEAST (May 22, 2019, 4:01 P.M.), https://www.thedailybeast.com/proud-boys-members-plotted-ways-to-injure-protesters-at-april-rally-report [https://perma.cc/4DQ4-RZGY]:

> Private chats between about 30 Proud Boys members and allies show that they discussed using physical violence against "antifa" at an April rally, HuffPost reports. The website reports members talked about their April "Resist Marxism" rally in Providence, Rhode Island, as being a sort of comeback after 10 members were arrested at a New York City GOP event.

185. Complaint, *supra* note 5, ¶ 56.

Likewise, in August 2020, the Proud Boys violently confronted activists in Oregon following the murder of George Floyd by spraying a journalist with bear mace and severely beating protestors.[186] The District argued that these types of attacks are often "anticipated, instigated, coordinated, and encouraged" by Proud Boy leadership.[187]

The District further alleged that the Oath Keepers have a similar history of violence which they justify on the belief that a nefarious group has taken over the federal government and will use a major subverting event, like a terrorist attack or pandemic, to institute martial law, force individuals into detention camps, and revoke their right to bear arms all in an effort to enslave them under a singular, socialist government.[188] Certainly, evidence suggests that the Oath Keepers consider themselves a militia group tasked to protect society from these perceived threats.[189] For example, in 2014, Oath Keeper members from Arizona and New Hampshire took part in an armed standoff at the Bundy Ranch in Nevada.[190] In the same year, members occupied parts of Ferguson, Missouri with arms and tactical gear.[191] In 2018, the Oath Keepers began to raise money for a new "Spartan Training Group" which was created to establish a vigilante force.[192] Members of the Oath Keepers have been convicted of activities in

186. *Id.* ¶ 58; Ryan Haas and Jonathan Levinson, *Gunfire Erupts after Proud Boys and Anti-fascists Openly Brawl in Portland Without Police Intervention*, OPB (Aug. 22, 2021, 11:46 P.M.), https://www.opb.org/article/2021/08/22/far-right-activists-counterprotesters-gather-in-portland/ [https://perma.cc/TEG2-LP23] ("The Proud Boys and anti-fascists ran along 122nd Avenue, exchanging paint balls and bear mace. Some people in the crowd threw mortar fireworks.").

187. Complaint, *supra* note 5, at ¶ 59.

188. *Id.* ¶ 64.

189. *Id.*

190. *Id.* ¶ 73; Mike Levine, *How a Standoff in Nevada Years Ago Set the Militia Movement on a Crash Course with the US Capitol*, ABC NEWS (Jan. 5, 2022, 4:10 A.M.), https://abcnews.go.com/US/standoff-nevada-years-ago-set-militia-movement-crash/story?id=82051940 [perma.cc/V8FT-NU4P]:

> Armed militia members from across the country, most prominently Rhodes and members of his Oath Keepers, converged on the Bundy ranch. The standoff grew increasingly volatile over several days, with federal agents deploying dogs and stun guns, and rifle-carrying militia members taking sniper-like positions on an overpass overlooking the area.

191. Complaint, *supra* note 5, ¶ 74; Cassandra Vinograd, *Oath Keepers Turn Up at Michael Brown Protests in Ferguson, Missouri*, NBC NEWS (Aug. 11, 2015, 4:24 P.M.), https://www.nbcnews.com/storyline/michael-brown-shooting/oath-keepers-turn-michael-brown-protests-ferguson-missouri-n407696 [https://perma.cc/SL6T-HT7Z] ("Protesters and police confirmed that a handful of Oath Keepers with what appeared to be assault rifles, bulletproof vest and camouflage gear were seen early Tuesday on the streets of Ferguson, which was under a state of emergency following demonstrations pegged to the anniversary of Michael Brown's death.").

192. Complaint, *supra* note 5, ¶ 77; David Neiwert, *Oath Keepers Announce National Spartan Training Program Aimed at Violent Left*, S. POVERTY L. CTR. (Aug. 23, 2018), https://www.splcenter.org/hatewatch/2018/08/23/oath-keepers-announce-national-%E2%80%98 spartan%E2%80%99-training-program-aimed-%E2%80%98violent-left%E2%80%99 [https://perma.cc/PEG8-SXB2]:

connection to violence, including storing napalm, tweeting threats of violent attacks, firearms violations, conspiracy to impede federal workers, possession of explosives, and threatening public officials.[193] Jon Ryan Schaffer, a founding, lifetime member of the Oath Keepers, was the first to plead guilty to criminal charges surrounding the January 6th attack and, in his plea deal, admitted to unlawfully entering the Capitol on January 6th "with the purpose of influencing, affecting, and retaliating against the conduct of the government by stopping or delaying the Congressional proceeding by intimidation or coercion."[194] In sum, the government argued that the Militia Groups' activities on January 6th were unsurprising and anticipated because they were simply an extension of a well-established orientation towards violence.

With respect to coordinating and assembling acts of violence, the Militia Groups congregated and readied themselves at the January 6th riot posting YouTube videos that proclaimed their intention to take the Capitol.[195] During President Trump's rally, where he ordered supporters to march down to the Capitol to "show strength" and "fight like hell," the crowd, which included members of the Militia Groups, yelled, "Yeah! Let's take the Capitol" and "Yes! Storm the Capitol! Invade the Capitol building! Let's take the Capitol! Right now!!"[196] Even before the end of Trump's speech, members of the Militia Groups left the rally and headed towards the Capitol to execute their plans.[197]

> Appearing on Infowars with host Owen Shroyer on Monday, [Stewart] Rhodes explained that Oath Keepers is organizing "Spartan Training Groups" in every state with the aim of bolstering efforts to combat "antifa and the far left." He spun the effort as part of a larger vision of becoming a national militia that could be called into action by President Trump.

193. Complaint, *supra* note 5, ¶¶ 71–72.

194. *Id*. ¶¶ 79–80.

195. *Id.* ¶¶ 162–69; Quentin Young, *What I Learned from Watching More Than 500 Jan. 6 Videos*, IDAHO CAP. SUN (Feb. 14, 2022, 3:45 A.M.), https://idahocapitalsun.com/2022/02/14/what-i-learned-from-watching-more-than-500-jan-6-videos/ [https://perma.cc/U4MK-SZCC] ("But nothing provides the kind of granular and exhaustive understanding of that day like a mass of videos taken by rioters themselves as they converse with one another, chant together, coalesce as a mob, commit violence, and take stock of what they accomplished.").

196. Complaint, *supra* note 5, ¶¶ 171–75; Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 P.M.), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial [https://perma.cc/N6LL-PJ57] (quoting Donald Trump) ("We fight like hell. And if you don't fight like hell, you're not going to have a country anymore.") and ("Because you'll never take back our country with weakness. You have to show strength and you have to be strong."); Aleszu Bajak, Jessica Guynn & Mitchell Thorson, *When Trump Started His Speech Before the Capitol Riot, Talk on Parler Turned to Civil War*, USA TODAY (Feb. 1, 2021, 5:01 A.M.), https://www.usatoday.com/in-depth/news/2021/02/01/civil-war-during-trumps-pre-riot-speech-parler-talk-grew-darker/4297165001/ [https://perma.cc/X68G-CNMA] ("A Parler video that captured Trump's voice saying 'show strength' captures one man in the crowd responding, 'Invade the Capitol building.' 'Let's take the Capitol,' others in the crowd shouted in the video. 'Take the Capitol right now!'").

197. Complaint, *supra* note 5, ¶ 174; Lauren Leatherby, et al., *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/interactive

According to the District, they wore paramilitary equipment, helmets, and reinforced vests—and conveyed and coordinated movements through encrypted channels on communication devices.[198] In sum, the government argued that the Militia Groups convened their partnership at the rally and readied themselves for coordinated acts of violence. By mid-morning on January 6th, they commenced their violent plans as a large group, including Militia Group members, gathered outside of the Capitol, and began physically attacking Metropolitan and Capitol Police officers who were trying to block their entrance with futility.[199] After breaching the outer barrier, Proud Boys members led the frenzied mob to breach the Capitol building by helping individuals climb the Capitol wall and spraying a noxious substance to destabilize police guards.[200] Upon hearing of the breach, Oath Keeper members gathered their gear and headed toward the Capitol coordinating logistical details with other members using walkie-talkie radios and apps, cellular telephones, social media, and the encrypted messaging app Signal.[201] Oath Keeper members allegedly directed Proud Boys members to meet at the south side of the Capitol to create a military-style stack formation to penetrate the crowd and enter the building.[202] Once

/2021/01/12/us/capitol-mob-timeline.html [https://perma.cc/V5AF-8F8E] ("Supporters leave the rally in a steady stream before Mr. Trump's speech ends, and they head toward the Capitol.").

198. Complaint, *supra* note 5, ¶¶ 179, 182.

199. *Id.* ¶¶ 185–87; Evan Hill, Arielle Ray & Dahlia Kozlowsky, *'They Got a Officer!': How a Mob Dragged and Beat Police at the Capitol*, N.Y. TIMES (Apr. 21, 2021), https://www.nytimes.com/2021/01/11/us/capitol-mob-violence-police.html [https://perma.cc/N9QK-6BGL] ("Of all the scenes of violence, one of the most intense occurred during a struggle to breach a west-side door, during which multiple rioters dragged police officers out of a formation and assaulted them while they were trapped in the crowd.").

200. Complaint, *supra* note 5, ¶¶ 191–92; Jay R. Jordan, *Dramatic Photo Shows Trump Supporters Scaling Capitol Wall*, CHRON (Jan. 6, 2021), https://www.chron.com/news/nation-world/article/photo-capitol-lockdown-trump-supporter-riot-dc-15850767.php [https://perma.cc/33H9-AVKR] (commenting on pictures in the article) ("Washingtonian photographer Evy Mages captured protesters scaling the walls of the building after they broke through a police barricade and broke into the building.").

201. Complaint, *supra* note 5, ¶¶ 201–02, 245; Siladitya Ray, *Some Capitol Invaders Used Walkie-Talkie App Zello To Coordinate Assault*, FORBES (Jan. 14, 2021, 7:12 A.M.), https://www.forbes.com/sites/siladityaray/2021/01/14/report-some-capitol-invaders-used-walkie-talkie-app-zello-to-coordinate-assault/?sh=6eddb8838b33 [https://perma.cc/9AB5-KQRD] ("Members of one of the militia groups which participated in the violent insurrection at the Capitol last week used the walkie-talkie app Zello to organize and coordinate the attack.").

202. Complaint, *supra* note 5, ¶¶ 203–04, 208; Alanna Durkin & Michael Kunzelman, *U.S. Narrows in on Organized Extremists in Capitol Siege Investigation*, PBS NEWS HOUR (Mar. 10, 2021, 11:00 A.M.), https://www.pbs.org/newshour/nation/u-s-narrows-in-on-organized-extremists-in-capitol-siege-investigation [https://perma.cc/8AQK-AJMQ]:

> "All I see Trump doing is complaining. I see no intent by him to do anything. So the patriots are taking it into their own hands. They've had enough," [Stewart Rhodes, leader of Oath Keepers,] said in a Signal message to a group around 1:40 p.m., authorities say. A little

successful, the group seemingly attacked police officers by throwing objects and deploying chemical irritants.[203] Militia Group members continued to breach the Capitol from different points of access livestreaming and messaging their activities on social media.[204] The District alleged that pictures of the event clearly show members of the Militia Groups in the crowd.[205] In sum, the government argued that the Militia Groups were able to execute their plan because they coordinated the ambush to make it easy to assemble and attack successfully.

> *Allegation Three: The Militia Groups intended to prevent by "force, intimidation, or threat" "any person," namely Congress from discharging their duty to certify the 2020 Presidential Election.*
>
> Recall, 1985(1) reads in relevant part:
>
> If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof . . . or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties.[206]

By parsing the clause into subclauses as the courts have clearly done in the past, it becomes evident that preventing the discharge of duty does not require a showing that the individual holds "any office, trust, or place of confidence." The location of this particular subclause, behind a second "from," denotes a separate clause unaffiliated with the first. As such, subclause two relates to "any person" who was prevented from discharging their duties. The plain meaning of "person," namely "a human being as distinguished from an animal or object,"

later, Rhodes, who has not been charged in the attack, instructed the group to "come to South Side of Capitol on steps."

203. Complaint, *supra* note 5, ¶ 210; Katelyn Polantz, *Justice Department Releases Video of Attack on Capitol Police Officer*, CNN (Apr. 28, 2021, 8:53 P.M.), https://www.cnn.com/2021/04/28/politics/brian-sicknick-capitol-riot-videos/index.html [https://perma.cc/76G3-ZB9X] ("Police body camera footage and surveillance cameras outside the Capitol building captures defendant Julian Khater raising his arm to spray a canister of chemical into the faces of three officers from just feet away. The officers then recoil, rubbing their eyes and seeking water to wash their faces.").

204. Complaint, *supra* note 5, ¶ 218; Durkin & Kunzelman, *supra* note 202 ("Around 2:40 p.m., members of a military-style 'stack' who moved up Capitol stairs in a line entered the building through a door on the east side, authorities say [alleged capitol rioter Thomas Caldwell], who did not join the stack, climbed up to the west side balcony, authorities say.") and ("Caldwell received a Facebook message saying 'all members are in the tunnels under capital seal them in,' authorities said. 'Turn on gas,' the message said.").

205. Complaint, *supra* note 5, ¶¶ 220–23.

206. 42 U.S.C. § 1985(1).

obviously includes members of Congress and the Vice President.[207] In addition, *Thompson* explicitly stated that watching the electoral count in an effort to certify the election is a duty of Congress and the Vice President. Based on identical facts, the court should find that Congress and the Vice President are "any person" who were prevented from discharging their official duties. Preventing President and Vice President from holding office under subsection one, requires a showing of "office, trust, or confidence." *Thompson* defined the terms based on Reconstruction-era law dictionaries, stating that "office" is "a right to exercise a public function or employment . . .," "trust" is "a confidence reposed in one person for the benefit of another," and "confidence" assumes the same meaning as trust. Based on *Thompson*, the President and Vice President assume such a place.

Finally, the Militia Groups undoubtedly displayed force, intimidation, or threat when storming the Capitol as evidenced by their hostility toward and violence against Capitol Police, other protestors, and government officials. To force, threat, and intimidate, the Militia Groups collected weapons and firearms to use against any opposition.[208] They injured at least 65 Metro Police officers resulting in lacerations, shattered spinal discs, irritated lungs, and concussions.[209] One officer suffered a heart attack from being repeatedly attacked with a stun gun while another was electrocuted and beaten unconscious.[210] Many were attacked with foreign objects and became victims of noxious substances released by Militia Group members.[211] In an effort to intimidate, some Proud Boys members wore clothing with the slogan "F— Around and Find Out."[212] One Oath Keepers member wore a patch that cautioned, "I don't believe in anything. I'm just here for violence."[213] Furthermore, Proud Boys leader and Defendant Ethan Nordean used a bullhorn to shout orders and messages to a gathered crowd.[214] Showing incredible force, the Militia Groups violently pushed passed police barricades and, using a stolen police shield, broke the windows of the Capitol building in an effort to enter and destroy.[215] Oath Keepers members created a military-inspired stack formation to power through the rambunctious crowd.[216] Once inside, members of the Militia Groups continued to attack police officers with one Proud Boys member

207. *Person*, DICTIONARY.COM, https://www.dictionary.com/browse/person [https://perma.cc/XN28-QDRV] (last visited Dec. 11, 2022).

208. Complaint, *supra* note 5, ¶¶ 131–34.

209. *Id.* ¶¶ 265–66.

210. *Id.*

211. *Id.* ¶ 194.

212. *Id.* ¶ 181.

213. *Id.* ¶ 204.

214. *Id.* ¶¶ 169, 179.

215. *Id.* ¶¶ 193–94, 198.

216. *Id.* ¶ 208.

shouting at an officer, "You shoot and I'll take your f—ing a— out."[217] Through violence, the Militia Groups were able to enter the House and Senate chambers abusing and vandalizing the premises.[218] Later validating the use of force, Oath Keepers member and Defendant Jessica Marie Watkins confirmed, "[f]orced. Like Rugby. We entered through the back door of the Capitol."[219] She further confirmed by later posting, "Yeah. We stormed the Capitol today. Teargassed, the whole, [sic] 9. Pushed our way into the Rotunda. Made it into the Senate even."[220] These facts clearly show that Defendants used force, threat, and intimidation to enter the Capitol.

Allegation Four: The Militia Groups intended to prevent through injury an "officer," namely the Vice President from discharging his duty to certify the 2020 Presidential Election.

To prove a violation under section 1985(1) clause four, a plaintiff must show that the defendant conspired to injure (1) an officer of the United States (2) in his person or property (3) on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof.[221] With respect to the first element, the *Thompson* court's definition of "office" as a "public function or employment" applies to the Vice President of the United States as a constitutionally created officer under Article II. Though the *Thompson* court looked unfavorably on the defendants' use of the Constitution to interpret statutory language, in this instance, the Constitution is not being used as a dictionary but as an index of government positions. With respect to the second element, the Militia Groups were very clear in their intent to physically harm Vice President Mike Pence "in his person." Because of his refusal to suspend electoral vote counting, the feverish mob chanted, "Hang Mike Pence!" The Militia Groups beat the doors of the House chamber hoping to enter, disrupt, and injure.[222] Vice President Pence was in such grave danger that he was forced to evacuate and retreat to a secured location.[223] With respect to the third element, Article II, section I, clause III provides that "the President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted." The Electoral Count Act further establishes Pence's constitutional duty to certify the election mandating that the President of the Senate, i.e., the Vice President, preside over the proceedings, physically open the certificates and papers, and announce the

217. *Id.* ¶ 221.
218. *Id.* ¶ 230.
219. *Id.* ¶ 211.
220. *Id.*
221. 42. U.S.C. § 1985(1).
222. Complaint, *supra* note 5, ¶¶ 226–28.
223. *Id.* ¶ 229.

results of the vote.[224] As such, the Militia Groups not only conspired to injure the Vice President on account of his lawful discharge but also while he was engaged in said discharge. Therefore, the court should find that the Militia Groups violated section 1985(1) clause four by conspiring to harm Vice President Mike Pence.

In sum, assuming the facts of the case are substantiated, the government alleged credible violations, under section 1985(1), clauses one and four, against the Militia Groups aptly charging them with conspiracy to prevent Congress and Vice President Mike Pence from certifying the election, and President Biden and Vice President Harris from assuming their new roles, and to injure Vice President Mike Pence. They engaged in a bonafide conspiracy by creating an alliance on Facebook furthered by collaborative strategies for executing the attack, meetings to plan the attack, and mechanisms for gathering weapons and tactical gear. They used weapons, rhetoric, and messaging to threaten and intimidate individuals so they could use force to storm the Capitol and galvanize others to do the same in an effort to physically stop the certification. Once inside, the Militia Groups veritably hunted Vice President Mike Pence requiring him to flee for his life. Based on these facts and the analysis above, the District Court should find for the government.

CONCLUSION

Fear was the cosmology of postbellum Southern aggression, as preoccupied whites fought to maintain their social, political, and economic privilege.[225] The South became but a shell of itself and experienced overpowering symptoms of what Glen Feldman calls Reconstruction Syndrome, which included anti-Black, anti-federal government, anti-liberal, anti-outsider, and pro-military beliefs.[226] Indeed, animosity toward freed slaves, by activist groups like the Klan,[227] was suggestive of a sense of collective insecurity, suddenly brought forth by a crushing military defeat.[228] With emancipation, the white majority could no longer assert absolute dominance over Black people and their abolitionist, Republican supporters.[229] Thus, Reconstruction was a perceived attack on the natural superiority of whites as black people were seen as intruding on white

224. 3 U.S.C. § 15 (1887).

225. GLENN FELDMAN, THE IRONY OF THE SOLID SOUTH: DEMOCRATS, REPUBLICANS, AND RACE, 1865–1944 5 (Univ. of Ala. Press ed., 2013).

226. *Id.* at 2.

227. Goldstein, *supra* note 29, at 292 n.25 ("The history of Klan illustrates group threat theory, which posits that members of culturally and politically dominant groups develop hostility to subordinate groups in response to perceived threats posed to the dominant group's interests.").

228. FELDMAN, *supra* note 225, at 2.

229. *Id.* at 6.

people's ordained proprietary condition.[230] Southerners believed that the founders intended a white nation and, seeing themselves as prototypical Americans, understood aggression towards them as aggression toward the nation herself.[231] As such, the Thirteenth, Fourteenth, and Fifteenth Amendments were illegitimate additions to an already perfect document. The Grant administration adopted the Klan Act to address Klan violence against freed slaves and Republicans who the Klan blamed for their predicament.

150 years later, America is in the throes of similar upheaval as shifting demographics bring fear and discomfort to the white majority. Motivated by these emotions, organizations like the Oath Keepers and Proud Boys fight to entrench the status quo similar to the Reconstruction-era Klan. In bringing *Proud Boys*, the government is laying satisfying ground for future section 1985(1) cases implicating violent insurrectionist organizations. The Klan Act was used in 1871 to forestall tremendous unrest and is similarly used today. As D.C. deputy attorney general, Karl Racine, states, "our intent [with the suit], as we indicated, is to hold these violent mobsters and these violent hate groups accountable . . . . When hate is dispatched and eliminated, that's a good day."[232] In adjudicating for the government, the court in *Proud Boys* will send a powerful message to insurrectionist groups that the resurrection of hatred will be no longer tolerated.

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230. STANFORD M. LYMAN & ARTHUR J. VIDICH, SELECTED WORKS OF HERBERT BLUMER 199 (Univ. of Ill. Press, ed., 1st ed. 2000) ("Thus, acts or suspected acts that are interpreted as an attack on the natural superiority of the dominant group, or an intrusion into their sphere of group exclusiveness, or an encroachment on their area of proprietary claim are crucial in arousing and fashioning race prejudice."); Goldstein, *supra* note 29.

231. Goldstein, *supra* note 29.

232. Ryan Lucas, *D.C.'s Attorney General is Suing the Proud Boys and Oath Keepers over Capitol Attack*, NPR (Dec. 14, 2021), https://www.npr.org/2021/12/14/1064144431/d-c-attorney-general-karl-racine-sue-proud-boys-oath-keepers-jan-6-capitol [https://perma.cc/3AZA-BW4T].

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