

TRUMP IS GOING THROUGH THE MOTIONS TO DISMISS UNTIL HE RESUMES THE PRESIDENCY

One of the reasons I suspect that Trump-leaning Republicans replaced Kevin McCarthy with a key player in Trump's last attempted coup is because Trump shows no signs of any plan to try to win his Federal criminal trials.

For some time, it has appeared (to me at least) that he has approached these cases with the belief that if he can use them as a campaign prop with which to get reelected, then he can simply pardon himself or remain President indefinitely to beat the Federal rap. That's one of the reasons, I think, why he is treating many of his DC court filings as stunts, especially his extensive fundraising and messaging campaign around the gag order.

Delay, disinform, then dismiss.

I get that. I expected that. Yet, I still expected him to present the best legal case he could as insurance in case winning or stealing the election and self-pardoning doesn't work.

He has lawyers capable of making very competent legal arguments.

So I'm frankly shocked by how inadequate his Motions to Dismiss have been. I wrote them up here and made this nifty table summarizing the arguments.

Argument	Motion
"You can't prosecute me! I'm the former President! I have absolute immunity!"	MTD Absolute Immunity
"You can't prosecute me for lying!"	MTD Constitutional
"You can't prosecute me! No one in government actually believed my lies!"	MTD Statutory
"You can't talk about the way I mobilized a violent mob because you didn't charge me for mobilizing a violent mob!"	Motion to Strike Inflammatory Allegations
"Since I don't have anything to do with that violent mob that obstructed the vote certification, you can't charge me for obstructing the vote certification!"	MTD Statutory
"Sure, you've prosecuted over 300 people for some of these crimes, but prosecuting <i>me too</i> is selective prosecution because...Hunter Biden dick pics!"	MTD Selective and Vindictive Prosecution

This is not just a legal observation – though some of his purportedly legal arguments, most notably his selective prosecution motion – *are* legally shitty. Don't take my word for it: take Carissa Byrne Hessick's expert opinion, who says, "his motion is embarrassingly awful & should clearly be denied under current law."

This is not just a legal observation. Partly, it's box-ticking one. As I show below, Trump isn't even addressing all the allegations against him.

As DOJ noted in the response to Trump's MTD for Absolute Immunity, Trump totally misrepresented the indictment. As DOJ laid out, the indictment consists of four charges – three of them, conspiracy charges (18 USC 371, 1512(k), and 241). For each of those charges, DOJ alleged that Trump used five means of pursuing that conspiracy, laid out as five bullet points in the indictment. Those five bullets read:

- a. The Defendant and co-conspirators used knowingly false claims of election fraud to get state legislators and election officials to subvert the legitimate election results and change electoral votes for the Defendant's opponent, Joseph R. Biden, Jr., to electoral votes for the Defendant. That is, on the pretext of baseless fraud claims, the Defendant pushed officials in certain states to ignore the popular vote; disenfranchise millions of voters; dismiss legitimate electors; and ultimately, cause the ascertainment of and voting by illegitimate electors in favor of the Defendant. [state]

b. The Defendant and co-conspirators organized fraudulent slates of electors in seven targeted states (Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin), attempting to mimic the procedures that the legitimate electors were supposed to follow under the Constitution and other federal and state laws. This included causing the fraudulent electors to meet on the day appointed by federal law on which legitimate electors were to gather and cast their votes; cast fraudulent votes for the Defendant; and sign certificates falsely representing that they were legitimate electors. Some fraudulent electors were tricked into participating based on the understanding that their votes would be used only if the Defendant succeeded in outcome-determinative lawsuits within their state, which the Defendant never did. The Defendant and co-conspirators then caused these fraudulent electors to transmit their false certificates to the Vice President and other government officials to be counted at the certification proceeding on January 6.

[fake electors]

c. The Defendant and co-conspirators attempted to use the power and authority of the Justice Department to conduct sham election crime investigations and to send a letter to the targeted states that falsely claimed that the Justice Department had identified significant concerns that may have impacted the election outcome; that sought to advance the Defendant's fraudulent elector plan by using the Justice Department's authority to falsely present the fraudulent electors as a valid alternative to the legitimate electors; and that urged, on behalf of the Justice Department, the targeted states' legislatures to convene to create the

opportunity to choose the fraudulent electors over the legitimate electors.

[Jeffrey Clark]

d. The Defendant and co-conspirators attempted to enlist the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results. First, using knowingly false claims of election fraud, the Defendant and co-conspirators attempted to convince the Vice President to use the Defendant's fraudulent electors, reject legitimate electoral votes, or send legitimate electoral votes to state legislatures for review rather than counting them. When that failed, on the morning of January 6, the Defendant and co-conspirators repeated knowingly false claims of election fraud to gathered supporters, falsely told them that the Vice President had the authority to and might alter the election results, and directed them to the Capitol to obstruct the certification proceeding and exert pressure on the Vice President to take the fraudulent actions he had previously refused. [PenceCard]

e. After it became public on the afternoon of January 6 that the Vice President would not fraudulently alter the election results, a large and angry crowd—including many individuals whom the Defendant had deceived into believing the Vice President could and might change the election results—violently attacked the Capitol and halted the proceeding. As violence ensued, the Defendant and co-conspirators exploited the disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification based on those claims.

[mob] [red brackets my own]

Here's how DOJ described the indictment in their response to Trump's Absolutely Immunity filing.

A grand jury charged the defendant in a four-count indictment. ECF No. 1. The defendant moved to dismiss the indictment on the ground that he "is absolutely immune from prosecution." Mot. 1. When considering a motion to dismiss, the Court must view the indictment "as a whole[,] and the allegations must be accepted as true." United States v. Weeks, 636 F. Supp. 3d 117, 120 (D.D.C. 2022) (internal quotation marks omitted).

Count One, which charges a conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, alleges that the defendant, then a candidate seeking re-election to the presidency, conspired with, among others, several individuals outside the Executive Branch to "overturn the legitimate results of the 2020 presidential election by using knowingly false claims of election fraud to obstruct the federal government function by which those results are collected, counted, and certified." ECF No. 1 at ¶¶ 1, 7, 8. The indictment further alleges that the defendant aimed at accomplishing the conspiracy's objectives in five ways: [state] using deceit toward state officials to subvert the legitimate election results in those states, id. at ¶¶ 13-52; [fake electors] using deceit to organize fraudulent slates of electors in seven targeted states, and cause them to send false certificates to Congress, id. at ¶¶ 53-69; [Jeffrey Clark] leveraging the Department of Justice to use deceit to get state officials to replace the legitimate electoral slate with electors who would cast their votes for the defendant, id. at ¶¶ 70-85; [PenceCard] attempting to enlist the Vice President

to fraudulently alter the election results during the certification proceeding on January 6, 2021, and directing supporters to the Capitol to obstruct the proceeding, id. at ¶¶ 86-105; and [mob] exploiting the violence and chaos that transpired at the United States Capitol on January 6, 2021, id. at ¶¶ 106-124. Counts Two and Three, which incorporate allegations from Count One, charge conspiracy and substantive violations of 18 U.S.C. § 1512(c)(2) for corruptly obstructing the certification of the presidential election results on January 6, 2021. Id. at ¶¶ 125-28. Count Four, which likewise incorporates the allegations from Count One, alleges that the defendant conspired to violate one or more person's constitutional right to vote and have one's vote counted. Id. at ¶¶ 129-30. [red brackets my own]

Get used to this paragraph: you're going to see some version of it in the response to many if not all of the MTDs submitted last week.

To address the charges, you need to explain why each of those five means don't substantiate, either alone or in combination, the elements of the offense of the charges. Effectively, Trump has to show how these five means don't prove the three different ways they have been charged criminally.

One reason you have to address the alleged means of conspiracy is that First Amendment protected activities, if they are part of a conspiracy, may be included as overt acts in that conspiracy. Scores of January 6 defendants have already made the same First Amendment argument Trump is, including some members of the Proud Boys and Oath Keepers who, like Trump, didn't breach the Capitol. But if DOJ can prove speech was part of a conspiracy, that speech can come in as evidence of that conspiracy. Trump's MTD on Constitutional Grounds, for example, which is

substantially the same argument about the First Amendment that has already failed for other Jan6ers, names each of the crimes alleged.

These points are not in dispute. Nonetheless, in an astonishing display of doublethink, the prosecution simultaneously claims that President Trump—simply by speaking his mind and petitioning for a redress of grievances—also somehow conspired to “defraud the United States,” “oppress rights,” and “obstruct an official proceeding.” Id. at ¶ 5–6, 125–130.

Then, purportedly citing to the five bullets that describe the means, he spins the five means as giving voice to concerns about election integrity, not his unlawful goal of trying to invalidate the votes of 81 million Biden voters.

As the indictment itself alleges, President Trump gave voice to these concerns and demanded that politicians in a position to restore integrity to our elections not just talk about the problem, but investigate and resolve it. See id. at ¶ 10(a) (state legislators and election officials) act) [sic]; ¶ 10(b) (Vice President and other government officials); ¶ 10(c) (state officials); ¶ 10(d) (vice president); ¶ 10(e) (members of Congress).

This passage replaces the *instrumentality* alleged with the *targets* of what Trump calls persuasion. Trump correctly describes one target of the state means (but not the coercion involved). But then he spins the creation of fraudulent documents as, instead, an attempt to persuade Mike Pence. He redefines the hijacking of DOJ in order to make a seemingly authoritative false statement as an attempt to persuade state officials (long after the involvement of state officials was concluded). He describes efforts to get Pence to violate the

law as instead an attempt to persuade him. And he calls a violent mob threatening to assassinate members of Congress as, instead, an attempt to persuade those members.

Trump is a con man. And his First Amendment argument is a breathtaking claim that the means he uses to sustain his con – including fraud and coercion backed by violence – are merely free speech.

To some degree, this quick sleight of hand doesn't matter: In the discussion of the First Amendment that follows, he never returns to address the charges against him. As a result, Trump's First Amendment argument is sloppy fluff compared to the First Amendment January 6 challenges that have gone before and *will* be before the DC Circuit by the time Trump goes to trial.

Having at least acknowledged the existence of all five "means" bullet points in his MTD on Constitutional Grounds (even if he redefined them as targets of persuasion), the section of Trump's MTD on Statutory Grounds addressing 371 pretends the indictment names just three means, not five.

As relevant here, the indictment alleges three types of conduct that supposedly involved making a false statement: (1) claims that the 2020 Presidential election was rigged or tainted by fraud or other irregularities, made both in public and in communications with public officials; [state] (2) organizing and submitting contingent slates of electors to the President of the U.S. Senate and the Archivist of the United States; [fake electors] and (3) making public claims about the scope of the Vice President's legal authority with respect to the election certification. [PenceCard] [red brackets my own]

Trump doesn't even pretend to address two of the

five means alleged involve a conspiracy to defraud the government: the Jeffrey Clark and mob means. In the sections addressing 1512 and 241, Trump never revisits those other two means (or, in any specificity, the three he does include).

And that's how, in the section on 1512 (an area where he could, but does not, piggyback on two years of determined work from other January 6 defense attorneys, including several who are members of his larger defense team), he claims he did nothing that could have obstructed the official proceeding – the January 6 vote certification – that he never even identifies.

As discussed above, lobbying members of Congress and state officials to act in a certain way when they conduct an official proceeding does not “obstruct” or “impede” that official proceeding. Nothing about lobbying Congress to act a certain way “places an obstacle” or “impediments,” “hinders ... from action,” “gets in the way of the progress of,” “holds up,” or “blocks” Congress from acting. See *id.* at 1132, 1159. On the contrary, lobbying Congress to act in a certain way presupposes that Congress will conduct an official proceeding, and it seeks to persuade Congress to act in a certain way during that official proceeding. That is the antithesis of “obstructing” or “impeding” the proceeding.

Think about that! If Trump bothered to mention the vote certification, he would literally be claiming that he had absolutely nothing to do with its interruption on January 6, 2021. Nothing.

Even the illegal order to Pence, clearly identified as item 3 in Trump's 371 section and a primary focus of both Judge David Carter's opinion finding it likely this did amount to obstruction and the January 6 Report, is gone

here. Jeffrey Clark never gets put back in. Most importantly, the obvious means of sending thousands of angry Trump supporters, many armed, to Congress to chase lawmakers out of their chambers remains absent from Trump's discussion.

This is why (as I noted earlier) I think Trump is simply trying to make his incitement of actual mobsters go away with the Motion to Strike. His legal arguments ignore the incitement of the mob entirely, even after his recusal stunt introduced evidence of someone convicted under 1512, Robert Palmer, who said he committed crimes "at the behest" of Trump, even after his gag fight introduced evidence of a Jan6er stalking Obama immediately after Trump sent him.

To the extent that Trump's MTDs don't result in the wholesale dismissal of his indictment (and DOJ argued that by allegedly conspiring with five people outside of government, most of the allegations against Trump couldn't be treated as official acts even if he did win the Absolute Immunity argument) Trump's failure to address some of the means he allegedly used will lead to the failure of these efforts.

With the exception of the MTDs for Absolute Immunity (arguing that as a former President Trump, can't be charged for things he did as President) and Selective Prosecution, these MTDs don't attempt to argue that the entire indictment should be dismissed. And where in some cases he could make compelling arguments – I think the Jeffrey Clark means, for example, is particularly prone to legal challenge, though Trump barely addresses it – so long as you leave one of the means intact, you won't succeed in dismissing the indictment.

In practice, the scope of what Trump actually addresses in his MTDs looks something like this:

	Absolute Immunity	Constitution	Statutory	Selective	Strike
State	✓	✓	✓		
Fake Electors	✓		✓		
Jeff Clark	✓				
PenceCard	✓	✓	✓		
Mob					✓

Not only doesn't Trump ever address the indictment as alleged (DOJ notes that a Motion to Dismiss must accept the facts alleged as true), but in none of these MTDs does he address all the means alleged. The only place he fully deals with the Jeffrey Clark allegation (which, again, I think is the most susceptible to legal challenge) is in the Absolute Immunity filing that is weak for other reasons. The only place he deals with the mob means is in the Motion to Strike, his legal effort to sweep his role in the violence all under the rug.

If his effort to do that – to remove the descriptions of his own role in the violence from the indictment with his Motion to Strike – fails, then that means alleged in the indictment will survive no matter what else happens.

To be sure, these MTDs have no bearing on whether he'll ultimately be successful. Trump doesn't need any of these MTDs to succeed to be acquitted. There will be a contentious fight about admissible evidence and arguments, where this First Amendment argument will be even more contentiously argued than it is here. The fight over advice of counsel arguments has already started, And ultimately he only needs to find one MAGAt willing to ignore all evidence to keep on a jury.

But the big gaps in Trump's MTD arguments, to say nothing of the way he spins having his campaign submit fraudulent documents to NARA and Congress, seem to reflect points where even his lawyers recognize his case is so weak they just won't bother – they'll just try to sweep it all under the rug some other way, like that Motion to Strike.

Again, even if this goes to trial in March as

currently scheduled, Trump needs only persuade one voter. If he can use these court filings as a means to delay that trial and as campaign props to win the election, these weak points won't matter.

Update: Corrected trial date, which is scheduled to start on March 4, per Sean Sullivan.