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Intro

-this is potentially the most important story we’ve done

-Stormy Daniels: *is* there a legal pathway for then-President Trump to face the consequences of what he’s done. Answer to that was yes. Trump surrounded himself with unitary executive folks, a corrupt AG, and so debased our institutions that it didn’t matter.

-disappointed: no indication that the DOJ intends to bring charges in connection with the nine crimes that are laid out in the Mueller Report. If you want a charitable view of that, it would be AG Merrick Garland stating, in an address to the American people, that investigating 1/6 was the DOJ’s top priority. (If you want pessimistic, you know what that is.) Let’s assume that he’s telling the truth – and we have corroborating evidence that he is.

-today’s story is not just a story of how holding Trump accountable is legally *plausible*, but the very real signs that it is already underway. Specifically, it’s about the shared belief at the highest levels that Donald Trump committed crimes, including 18 U.S.C. § 371, conspiracy to defraud the US, on 1/6.

-our main villain is John Eastman. We talked about him last week on the show. He’s the architect of 1/6, the lawyer with Trump’s ear who fed him nonsense and stoked the fires of insurrection.

He is also an unapologetic racist, who not only pushed birtherism regarding Obama – On August 12, 2020, he published an article in Newsweek that made birther arguments about *Kamala Harris*, who was born in fucking Oakland. Those arguments were transparently stupid. If you’re asking, did Eastman weigh in on Ted Cruz, John McCain, who was literally born in Canada?

He did, in an article titled “Senator Ted Cruz is Eligible to be President” in the national Review

<https://www.nationalreview.com/2016/01/ted-cruz-natural-born-citizenship-eligibility-president/>

That bit of racism may have been an audition

<https://www.thedenverchannel.com/news/national/trump-tries-to-claim-kamala-harris-isnt-eligible-to-be-vp>

"I heard it today that she doesn't meet the requirements. And, by the way, the lawyer that wrote that piece is a very qualified, very talented lawyer,” Trump said.

-this is also unlike Stormy Daniels in that it is a story about people with which we fervently disagree, people who have spent their life in service to true-believers in right-wing evangelical Christian Republican conservatives.

One of our “heroes” is Gregory F. Jacob. He’s a member of the Federalist Society. He was the chief counsel to Vice President Pence and a deputy assistant to the President advising the White House Coronavirus Task Force. He’s a labor and employment lawyer who represents big corporations accused of DoL violations. So both his personal politics and his legal career are things we oppose.

Here’s what Jacob wrote to Eastman after the insurrection: “I respect your heart here. I share your concerns about what Democrats will do once in power. I want election integrity fixed.”

Can you imagine saying those sorts of flattering things to an unapologetic racist peddling conspiracy theory nonsense?

We don’t talk to Occupy Democrats that way!

Greg Jacob continues:

“But I have run down every legal trail placed before me to its conclusion, and I respectfully conclude that as a legal framework, it is a result-oriented position that you would never support if attempted by the opposition, and essentially made up. And thanks to your bullshit, we are now under siege.”

-courage of Jacob and hand-picked Trump loyalists like Steve Engel, Richard Donoghue, and Jeffrey Rosen. They’re now cooperating with the 1/6 committee, they’re going to be the reason why Trump goes to prison.

1. Background

-1/6 subpeona litigation in California – Eastman doesn’t want to turn over his documents – we told you last week this was going to be good. Attorney-client privilege

-1/6 Committee has now filed their opposition brief and it’s SO MUCH BETTER THAN anyone could have expected

<https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.uscourts.cacd.841840.160.0.pdf>

There are a lot of legal arguments – and a lot of legal arguments with consequences and we’re going to talk about NONE of them

1. P. 20: we don’t know that you have attorney-client privilege. You haven’t shown us a signed engagement letter. Weirdly – no affidavit from Trump that you represented him.
2. P. 22: you’ve disclosed your stuff to third parties. This isn’t an attorney-client relationship. They don’t have a *legal* interest, just a political/strategic one.
3. P. 25: You used your college server and email address and Eastman’s College is one of a minority that has an absolute no-privacy clause

That policy is clear: “Users should not expect privacy in the contents of University-owned computers or e-mail messages.” Policies and Procedures: Computer and Network Acceptable Use Policy, Chapman University, https://perma.cc/7ZUA-ZALN (last visited Mar. 2, 2022) (emphasis added). The policy also expressly bans personal use on its network and computing systems. Id. (all university computing and network systems and services are a “University-owned resource and business tool to be used only by authorized persons for educational purposes or to carry out the legitimate business of the University”). And through its policy, Chapman reserves “the right to retrieve the contents of University-owned computers and e-mail messages for legitimate reasons.”

1. P. 29: Your client, Trump, multiply waived the privilege including to Bob Woodward – put a pin in that
2. P. 31: Not work product because they were not prepared in anticipation of litigation – privilege log shows one document (redacted) over which Eastman claims privilege despite the fact that he sent copies to a journalist “who could well have published the exchange.” (Would love to know who that is.)
3. P. 34: Fairness – you’re the only source

Those six arguments are good. But what’s really good is argument #7, which begins on page 38.

“The Court Should Review the Documents In Camera Under the Crime Fraud Exception”

Communications in which a “client consults an attorney for advice that will serve him in the commission of a fraud or crime” are not privileged from disclosure. In re Grand Jury Investigation, 810 F.3d 1110, 1113 (9th Cir. 2016) (internal quotations omitted). This exception to the attorney-client privilege applies where (1) “the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme,” and (2) the attorney-client communications for which production is sought are “sufficiently related to” and were made “in furtherance of [the] intended, or present, continuing illegality.” Id. at 381-83 (internal quotation marks omitted). It bears emphasizing that this is true even if “the attorney is unaware that his advice may further an illegal purpose.” United States v. Laurins, 857 F.2d 529, 540 (9th Cir. 1988), cert. denied, 492 U.S. 906 (1989).

And it is likewise true where the crime or fraud is ultimately unsuccessful. In re Grand Jury Proceedings (Corporation), 87 F.3d 377, 382 (9th Cir. 1996). Critically for this case, an in camera review of the documents is warranted when the party seeking production has provided “a factual basis adequate to support a good faith belief by a reasonable person that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.” United States v. Zolin, 491 U.S. 554, 572 (1989) (citation omitted).

**FOR THIS TO BE CRIME-FRAUD, THE CLIENT HAS TO BE THE ONE COMMITTING THE CRIME WITH THE LAWYERS’S HELP, NOT THE OTHER WAY AROUND.** If I hire Saul Goodman in good faith, and I ask him to do something legal for me, and he does something criminal instead, I shouldn’t lose my attorney-client privilege.

So to make this argument, the 1/6 Committee must believe that TRUMP committed a crime and used EASTMAN to help him.

P. 39: “**That standard has plainly been met here**. As discussed in the Background section above, evidence and i**nformation available to the Committee establishes a good-faith belief that Mr. Trump and others may have engaged in criminal and/or fraudulent acts, and that Plaintiff’s legal assistance was used in furtherance of those activities**. Accordingly, this Court should conduct an in camera review of the documents to determine whether the crime-fraud exception applies.

I’ve been through not just the brief but all of the exhibits – they’re up on the OA webpage.

<https://openargs.com/wp-content/uploads/Wood-Decl.-Ex.-A.pdf>

Lays out two charges against the President. These are the knock-down charges that have been filed against other 1/6 insurrectionists

1. 18 U.S.C. § 1512(c)(2) – Obstruction of an official proceeding

<https://www.law.cornell.edu/uscode/text/18/1512>

(c) Whoever corruptly— (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

1. 18 U.S.C. § 371 – conspiracy to defraud the US

<https://www.law.cornell.edu/uscode/text/18/371>

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

For the 1512(c), there’s no argument that Congress meeting to count the electoral votes was an official proceeding, and that the conduct of spreading the Big Lie at least attempted to obstruct and influence that official proceeding. So the question is going to be what counts as “corrupt”

Similarly, for the 371 charge,

An individual “defrauds” the government for purposes of Section 371 if he “interfere[s] with or obstruct[s] one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.”

Were these means corrupt, dishonest, or deceitful?

You know what the argument is: no, Trump sincerely believes he won 100 billion votes, that Hugo Chavez hacked Dominion to steal the election and that only a guy who makes discount pillows knows the truth.

1. Eastman’s lie

Eastman wrote 2 memos that led to us calling him the architect of the Insurrection – they surfaced in September again thanks to Bob Woodward

Memo 1 (2 pages)

<https://s3.documentcloud.org/documents/21066248/eastman-memo.pdf>

-says the Electoral Count Act, 3 U.S.C. § 15, is “likely unconstitutional”

<https://www.law.cornell.edu/uscode/text/3/15>

-then says “so here’s what we propose”: then sets out a six-step process for Pence to declare 7 states of electors invalid, throw them out, and just count up Trump as the winner 232-222 among the “valid” votes. Concludes with paragraph 6: “The main thing here is that Pence should do this without asking for permission – either from a vote of the joint session or from the Court. Let the other side challenge his actions in court … We should take all of our actions with that in mind.”

So that looked like seditious conspiracy, and in damage control, Eastman released a longer, six-page memo which he said provided the full context

<http://cdn.cnn.com/cnn/2021/images/09/21/privileged.and.confidential.--.jan.3.memo.on.jan.6.scenario.pdf>

-that memo begins with a longer recitation of bullshit about supposed election fraud, including the outright false claim that 7 states submitted alternate slates of electors. They did not. Insurrectionists met in the parking lot and faked certificates; we’ve talked about that on the show.

-then it repeats the ‘ECA is unconstitutional” argument

-then in place of the “so here’s what we propose,” it has three pages entitled “War Gaming the Alternatives”

-includes the “just declare ‘em”

-also includes “send it to the house”

-and “well, maybe we just delay for a while and see what the states do, and maybe they’ll throw out the electors if they find enough evidence of fraud”

CRUCIAL LIE: Eastman went on our buddy Lawrence Lessig’s “Another Way” podcast on Sep. 27 (and a bunch of other shows and said, publicly, that the memo needed context. “I’m just the lawyer, and I wanted to run through all the other possibilities, no matter how remote, and – and this is the crucial part – when he talked to Pence, he said ‘obviously you shouldn’t do this one.’”

Two clips:

1. 4:57 – just 10 seconds – this is Eastman’s voice

I’ve done this show in consultation with the President of the United States as my client. (This is super bad for the waiver argument I told you to put a pin in.)

1. 1:15:20 – for 40 seconds – this is the lie.

You hear that, you hear him call it “foolish,” and you hear Lessig defend him, and **that would be perfectly reasonable for a lawyer to do**.

And that is why, before yesterday, I would not have thought this is how Trump gets arrested. I thought 1/6 would be damning, would show the Oath Keepers, would be useful politically but not criminally.

But what if you could prove that John Eastman was lying there? What if he was stupid enough to put in writing that nobody believed this nonsense, and that not only did he not call his advice foolish, but that he kept pressuring Mike Pence to knowingly break the law even AFTER the insurrection?

That’s where we enter our hero, Mike Pence’s chief counsel, Greg Jacob.

Lessig is going to come back on the show – I emailed him last night and he emailed me back this morning. Next week?

1. Jacob’s testimony

Portions of his deposition are attached to the pleading – these are not otherwise public documents.

Ex. F

<https://openargs.com/wp-content/uploads/Wood-Decl.-Ex.-N.pdf>

page 90, he’s asked about Eastman’s lie.

“War Gaming the Alternatives” – can you tell us whether Dr. Eastman went through these alternatives with the President on the meeting on the 4th?

A: “I don’t think he said”

“OK, can you tell us whether he went through *some* of these alternatives in the meeting with the President on the 4th?”

A: “Not at length.”

Then they play a radio interview with Peter Boyles where Eastman gives the same canned answer that he does to Lessig. “Oh, I was just laying out the alternatives, but it would be foolish to reject the electors.” And Jacob is asked “do you think that’s an accurate description of the advice Eastman gave to the President and Vice-President?”

A: “Not all of it.” And then I want to read you verbatim what Jacob says, because it shows how rehearsed Eastman’s lie is. Remember this was on a different radio show:

Well, it's the part where he -- up to the point where he says, "Open question," that sounds -- he might have used those words. I don't recall whether he used them specifically.

[[As I've noted before, he thought that the more prudent course was a procedural send it back to the States, rather than reject electors.]]

**But I do not recognize the statements that he makes thereafter where he says that it would be foolish to reject the slates. I don't recall him using that word, and I would be shocked if he had. And I don't recall any of that sequence that sort of goes from that point forward.**

Q: And what he describes there as being a foolish move, meaning the Vice President unilaterally rejecting electors, is that exactly what he urged the Vice President to do when he met with you on the 5th?

**A: When he met on the 5th -- and I have contemporaneous notes of that meeting that reflect this -- he came in and said, "I'm here asking you to reject the electors." That's how he opened at the meeting.**

Those notes were not attached to the motion, by the way, so everything we have here is actually WAY worse. And I’m about to show you how bad it is for Eastman and Trump just now.

Jacob’s testimony is this, it’s crystal clear, on page 96

A: So on the 5th we have the meeting that starts late morning because he was delayed for the Georgia proceedings, and there he makes it clear: Reject. When he comes back with the procedural theory later [that day], at that point he's very clear, "I know you are not going to just reject. Would you consider this?" – and “this” is “okay, instead of rejecting, just delay it for a while to see if the states will certify alternate slates or whatever.”

So that’s Jacob’s testimony. It would mean not certifying the electors pursuant to the Electoral Count Act despite the fact that it says the VP as President of the Senate

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o’clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the[States,](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=3-USC-80204913-1227756099&term_occur=999&term_src=title:3:chapter:1:section:15) beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, **shall make a list of the votes as they *shall* appear from the said certificates**; **and the votes having been ascertained and counted according to the rules in this subchapter provided,** -- that means you resolve all the objections, which comes next -- **the result of the same *shall* be delivered to the President of the Senate, who *shall* thereupon announce the**[**state**](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=3-USC-80204913-1227756099&term_occur=999&term_src=title:3:chapter:1:section:15)**of the vote, which announcement *shall* be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United**[**States,**](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=3-USC-80204913-1227756099&term_occur=999&term_src=title:3:chapter:1:section:15) and, together with a list of the votes, be entered on the Journals of the two Houses.

In other words, the ECA says “you have to do this,” and in fact they did this. After the insurrection, the Senate and House reconvened, ascertained the votes, went back to the VP, who announced the results.

So Eastman pivoted to a position that seemed less extreme in implementation but required the same philosophical justification; namely, that the Electoral Count Act doesn’t apply because the VP can just do whatever the hell he wants.

**You might be asking: but even if this position is super fucking stupid, so long as Eastman and Trump sincerely believe it, isn’t that a defense?** It’s not “corrupt, dishonest, or deceitful.”

Except that now we have two things. First, we have Jacob’s testimony. Not going to read all of it, you can starting at page 107 – Jacob says, “So from his perspective, his [Eastman’s] objective was to persuade me. I sort of viewed it as my challenge to use Socratic questioning during the course of the thing to see if I could persuade him that there's just no way that a small mind [what a great Freudian slip]-- a small government conservative would ever adopt the position that he was taking. So that was my basic reaction.”

Four pages describing that dialogue and then we end with this:

But he acknowledged by the end that, first of all, no reasonable person would

6 actually want that clause read that way because if indeed it did mean that the Vice

7 President had such authority, you could never have a party switch thereafter. You

8 would just have the same party win continuously if indeed a Vice President had the

9 authority to just declare the winner of every State.

10 He acknowledged that he didn't think Kamala Harris should have that authority in

11 2024; he didn't think Al Gore should have had it in 2000; and he acknowledged that no

12 small government conservative should think that that was the case.

13 And I said, **"If this case got to the Supreme Court, we'd lose 9-0, wouldn't we**, if we

14 actually took your position and it got up there?" **And he started out at 7 to 2**.

15 And I said, "Who are the two?"

16 And he said, "Well, I think maybe Clarence Thomas."

17 And I said, "Really? Clarence Thomas?"

18 And so we went through a few Thomas opinions **and, finally, he acknowledged**,

19 "**Yeah, all right, it would be 9-0**." Except that his fallback --

20 Q Did he say who the other one was?

21 A I don't recall. I don't recall.

22 But he ultimately acknowledged that none of them would actually back this

23 position when you took into account the fact that what you have is a mildly ambiguous

24 phrase, a nonsensical result that has all kinds of terrible policy implications, and uniform

25 historical practice against it. It just didn't work.

So I kind of wound up, "Can't we just acknowledge that this is a really bad idea?"

2 And he didn't quite say yes, but, he said, "Well, all right. I get everything you're

3 saying." He said, "They're going to be really disappointed."

4 I don't know who the "they" is. You can -- I know what your follow-up question

5 is going to be. He said, "They're going to be really disappointed."

6 Q My follow-up question is, who's the "they"?

7 [Laughter.]

8 A I don't know. I don't know.

9 He said, "They're going to be really disappointed that I wasn't able to persuade

10 you." And he left.

Okay, still he said/he said. Except that we have four separate exhibits of Eastman pestering Jacob to change his mind

<https://openargs.com/wp-content/uploads/Wood-Decl.-Ex.-K.pdf>

<https://openargs.com/wp-content/uploads/Wood-Decl.-Ex.-L.pdf>

<https://openargs.com/wp-content/uploads/Wood-Decl.-Ex.-M.pdf>

<https://openargs.com/wp-content/uploads/Wood-Decl.-Ex.-N.pdf>

These corroborate the Jacob position and the last two are proverbial smoking guns.

Ex K – This was sent at 9:29 PM eastern time on Tuesday, January 5th, the night before the insurrection.

It attaches a letter from the PA Republicans saying “we ask for more time given that the US Supreme Court is to hear Trump v. Boockvar in the coming days. We ask you to delay certification of the Electoral College to allow due process as we pursue election integrity in our Commonwealth.”

That’s terrifying – the Supreme Court ruled against Trump in the Boockvar case as every court but one did in every single election case, 61 times – the only exception being the “yes you can sneeze on people” PA Supreme Court decision. But as terrifying as it is, Eastman lies about it to Jacob

He says: “Greg, good talk earlier tonight. [Remember ‘tonight’ is Jan. 5th, when Jacob says that Eastman started the day with ‘reject the electors’ and then pivoted to ‘well, just delay certification’]

Major new development attached. This is huge, as it now looks like PA legislature will vote to recertify its electors if Vice President Pence **implements the plan we discussed**.”

ALSO HELPS TO BRING UP A TIMELINE of 1/6

<https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when>

Ex L – this is a lengthy email chain of responses to that letter. [start at the bottom] Jacob apparently slept on the 9:30 one, because in the morning – now this is 10:44 am, we’re an hour away from the President’s speech on the Ellipse and a little over two hours away from when Pence will convene the joint session of Congress to open and count the electoral votes.

VERY lawyerly reply: Jacob says:

“Thanks, John. Will call. Is it unconstitutional for the ECA [Electoral Count Act] to direct that the members should do objections, at least in the first instance? Would the constitutional imperative you argue for not kick in only after that statutorily required mechanism has been applied, and failed to uphold the Constitution?”

-not going to not start – that was the first part of their plan

-provides motive for wanting to interrupt the process and WE’LL GET TO THAT

-until that morning, Trump & Eastman were still holding out hope that Pence might cancel or postpone or hold open or whatever

We know, because Eastman’s reply to this very lawyerly email is:

“I’m sorry, Greg, but this is small-minded. You’re sticking with minor procedural statutes while the Constitution is being shredded. I gave you the Lincoln example yesterday. Here’s another. In the situation room at the White House during the first Iraq war, the Secretary of Interior said th alw required an environmental impact assessment before the President could order the bombing of Iraq oil fields. **Technically true.** But nonsense. **Luckily, Bush got statesmanship advice and ignored that statutory requirement**.”

1 – Lincoln – suspended habeas corpus

2 – this is saying, repeatedly, break the law

[read response]

This is WHILE THE CAPITOL IS UNDER SIEGE

[read Eastman response]

NOW WE MOVE TO EXHIBIT M – this is the first smoking gun and you might miss it.

<https://openargs.com/wp-content/uploads/Wood-Decl.-Ex.-M.pdf>

Jacob tries to cool down the rhetoric

Eastman says “hey, I gave you another option”

Jacob says “yeah that’s based on the same theory and did you ever advise the president?”

EASTMAN SAYS YES BECAUSE YOU WERE ON THAT CALL

Exhibit N

<https://openargs.com/wp-content/uploads/Wood-Decl.-Ex.-N.pdf>

Eastman sends one more unsolicited email at 11:45 that night. After the violence. After Lindsey Graham says “I’m out.” After Pence says: "Today was a dark day in the history of the United States Capitol. ... Let's get back to work," he says to applause.

After Mitch McConnel says: “The United States Senate will not be intimidated," he says. "We will not be kept out of this chamber by thugs, mobs or threats.”

Formally reconvened at 11:32 pm EST –

[go through whole statement]

Pence would certify the election at 3:42 am.

1. Trump wriggles out of this?

-Eastman would have to have no docs, notes, or anything

-Then he’d have to say he was lying in those emails and on Lessig’s show and everywhere

-And he’d have to want to do 20 years for someone who very likely won’t be President again

Could a jury find that Trump authorized Eastman to engage in conduct that was “corrupt, dishonest, or deceitful.” They knew.

1. More stuff that’s good news–

Jason Miller- Feb 3 2022, **Greg Jacob – Feb 1, 2022**

Jeffrey Rosen’s Dep

<https://openargs.com/wp-content/uploads/Wood-Decl.-Ex.-C.pdf>

And Richard Donoghue’s

<https://openargs.com/wp-content/uploads/Wood-Decl.-Ex.-B.pdf>

were attended by reps of the DOJ

start on p. 123

575

1. Doe v. Abbott

In 573, we discussed the Abbott letter, a 1-pager to the Texas Dep’t of Family & Protective Services

<https://twitter.com/ErinInTheMorn/status/1496511215719399431/photo/1>

Says that “sex change” operations constitute child abuse under Texas Law

**-our trans listeners wrote in to say we focused on the GRS aspect but that buys into right-wing framing. Sylvie:**

I did want to say however that your recounting of the letter focused in on Gender Reassignment Surgery and gave the impression that was all the letter was about. But the letter also included hormone therapy, puberty blockers, and other less invasive and much more common interventions. The broadness of the letter to include even puberty blockers was a big part of why this felt so terrible.

To analogize to abortion, it would be like the letter banned everything from late term abortions to voluntary birth control, and only having late term abortions mentioned in the segment. GRS in minors is extremely rare, on par with late term abortions in relative impact, whereas puberty blockers are by far the most common intervention.

So not an Andrew was wrong note, but I think it's worth noting when we accidentally buy into the right wing framing of the issue when they lump in the nonexistent "genital mutilation of children" with actually common lifesaving interventions like puberty blockers.

I love this – I am learning -

So we gave you two takeaways from the letter

1. The mandatory reporting is bullshit
2. AG opinion letters are binding on state agencies, so… get to fucking work

ACLU has gotten to work.

Filed a lawsuit challenging the instructions as ultra vires

<https://www.aclu.org/sites/default/files/field_document/doe_v._abbott_-_petition.pdf>

Gotten a TRO for their named plaintiffs

Have a PI hearing this Friday 3/11 against the whole directive

-not supported by the APA

-procedural defects, lack of factfinding, goes beyond delegated authority

1. Ukraine – ICJ

<https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf>

Hired C&B!

10. In response to Russia’s claim, the Ministry of Foreign Affairs of Ukraine issued a statement that Ukraine “strongly denies Russia’s allegations of genocide and denies any attempt to use such manipulative allegations as an excuse for Russia’s unlawful aggression,” noting that under the Genocide Convention, “Russia’s claims are baseless and absurd.”8

11. A dispute has therefore arisen relating to the interpretation and application of the Genocide Convention, as Ukraine and Russia hold opposite views on whether genocide has been committed in Ukraine, and whether Article I of the Convention provides a basis for Russia to use military force against Ukraine to “prevent and to punish” this alleged genocide.

12. Accordingly, pursuant to Article 36 (1) of the Court’s Statute and Article IX of the Genocide Convention, the Court has jurisdiction to hear the claims submitted in the present Application by Ukraine against the Russian Federation.

III. FACTS

13. In an effort to assert its influence and dominance over Ukraine, since the Spring of 2014, the Russian Federation and persons within Russia have systematically supplied illegal armed groups, including the Donetsk People’s Republic (“DPR”) and the Luhansk People’s Republic (“LPR”), with heavy weaponry, money, personnel, and training. With active Russian support, these illegal armed groups comprised of pro-Russian Ukrainians and Russian nationals emerged in the Donbas region of eastern Ukraine, spanning the Donetsk and Luhansk oblasts.9 In March and April 2014, these illegal armed groups occupied public and administration buildings in Donetsk and Luhansk.10 On 11 May 2014, the DPR and LPR announced their political goal as autonomy from Kyiv, and held a purported “referendum” that has been roundly condemned.11

[citation to a UN Office of the United Nations High Commissioner for Human Rights report – likely to be pretty persuasive!]

14. In early September 2014, in the midst of negotiations in Minsk between the Ukrainian and Russian governments to end the conflict in eastern Ukraine, the DPR and LPR articulated a list of political demands, including that the Ukrainian government recognize the special status of their territories and grant them greater autonomy; grant them the right to make Russian their official language; and grant each region the ability to engage in its own economic relations with Russia.12

15. In February 2015, on the eve of further negotiations in Minsk and amidst a wave of attacks on Ukrainian civilians by the illegal armed groups, leaders of both the DPR and LPR again released a detailed list of political demands including “constitutional reforms in Ukraine, including extensive decentralization by granting individual areas of the Donbas an autonomous status.”13 In service of these aims, the DPR and LPR engaged in what the Office of the United Nations High Commissioner for Human Rights (“OHCHR”) has described as a “reign of intimidation and terror.”14

16. The Court already has pending before it a case on the merits concerning the Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation). Ukraine’s pleadings in that case document Russia’s sustained violations of its international obligations from 2014 onwards by failing to take measures to prevent the provision of weapons and other support for the DPR and LPR, as well as engaging in a campaign of discrimination in occupied Crimea. Over the last few days, Russia has moved beyond these already serious breaches of international law to launch a full-scale invasion against Ukraine, based on false and pretextual allegations of genocide in Ukraine’s Luhansk and Donetsk oblasts.

17. Further, in December 2019, leaders from Russia, Ukraine, France and Germany met to affirm their commitment to the deal reached in Minsk in 2015, but there has been no progress since.15 After a spike in violence, the Joint Forces Operation of Ukraine sought to strengthen a new ceasefire in July 2020.16 A full ceasefire was restored in December 2021 after numerous violations of the July 2020 ceasefire.17

18. After a well-documented military build-up around Ukraine’s borders, on 21 February 2022, the President of Russia issued a statement announcing that he “consider[ed] it necessary to take a long overdue decision and to immediately recognise the independence and sovereignty of the Donetsk People’s Republic and the Luhansk People’s Republic.”18 President Putin grounded Russia’s actions on unsupported allegations of “horror and genocide” allegedly sponsored, tolerated or somehow initiated by Ukraine [quotes Putin speech]

Russia’s counsel to the ICJ, Baiju Vasana, has resigned!

<https://globalarbitrationreview.com/russia-ukraine-conflict/vasani-quits-ivanyan-in-wake-of-russian-invasion>

1. Baseball

-noneconomic terms are largely agreed upon

-no structural changes going back and forth (with one asterisk)

Last Proposal From MLB: 3-1-22

Last Proposal From MLBPA: 3-1-22

Next Up: In-person meetings in Florida concluded without a deal. Commissioner Rob Manfred said the earliest a deal could be reached is Thursday, March 3. He implied that he expects the MLBPA to come back with the next proposal. Manfred announced on 3-1-22 that MLB has canceled the first two series of the regular season.

Here’s where each side stands on the key issues, as far as we know.

Minimum Salary

MLB: $700K in 2022 increasing to $740K by 2026

MLBPA: $725K in 2022, $745K in 2023, $765K in 2024, $765K plus consumer price index increase in 2025, same increase in 2026

Current gap: $25K in 2022

Competitive Balance Tax

MLB: Base tax thresholds at $220MM in 2022/ $220MM in 2023/ $220MM in 2024 / $224MM in 2025 / $230MM in 2026.

MLBPA: $238MM in 2022 / $244MM in 2023 / $250MM in 2024 / $256MM in 2025 / $263MM in 2026.

Current gap: $18MM in 2022, growing to $33MM in 2026

Draft Pick Compensation

MLB: Has proposed eliminating draft pick forfeiture for teams that sign free agents. Their plan still calls for teams to get draft picks for losing free agents, depending on the quality of the player.

Pre-Arbitration Bonus Pool

MLB: $30MM pool with no increases throughout the CBA

MLBPA: $85MM pool with $5MM annual increases throughout the CBA

Current gap: $55MM in 2022, growing to $75MM by 2026

Arbitration Eligibility

Super Two is expected to remain at the top 22% of 2+ players.

Service Time Manipulation

MLB: Offering two draft picks within the player’s first three years if he finishes in the top three in Cy Young, Rookie of the Year or MVP voting (per Jesse Rogers). A player finishing first or second in Rookie of the Year voting would receive a full year of service time.

MLBPA: Players receive a full year of service time in their rookie season if infielders, catchers, and designated hitters finish among the top five for their position in WAR in each league, with outfielders, relief pitchers and starting pitchers finishing among the top 15, per Evan Drellich of The Athletic. “The union also said it would accept a modification of MLB’s proposal that would reward draft pick compensation to teams whose players finish among the top three in the Rookie of the Year, MVP and Cy Young voting.” (per USA Today’s Bob Nightengale on 2-1-22)

Anti-Tanking Measures

MLB: Lottery for top five picks. “Equal odds for bottom three record (16.5%). Revenue-sharing payees ineligible to be in lottery 3 straight years; non-payees ineligible in consecutive years. Ineligible teams can’t pick higher than 8th overall,” according to Mark Feinsand.

MLBPA: Lottery for top seven picks. All teams that did not qualify for the postseason in the preceding season would be part of this lottery. So in a 12-team playoff field, 18 teams would have a chance at the #1 pick. In the MLBPA’s proposal, the odds for the #1 overall pick would be as follows:

Team 1: 15% (the team with the worst record in baseball)

Team 2: 15% (the team with the second-worst record in baseball)

Team 3: 15%

Team 4: 12.5%

Team 5: 10%

Team 6: 8%

Team 7: 6.5%

Team 8: 5%

Team 9: 3.25%

Team 10: 2.25%

Team 11: 1.5%

Team 12: 1.25%

Team 13: 1.12%

Team 14: 1%

Team 15: 0.88%

Team 16: 0.75%

Team 17: 0.625%

Team 18: 0.375%

These odds would be adjusted as each of the first seven picks are given out via this lottery system. After those seven lottery picks are assigned, the remaining non-playoff teams would be assigned picks in the reverse order of winning percentage.

The MLBPA is also proposing competitiveness adjustments. Revenue sharing payors that finish in the bottom eight in winning percentage in each of the two previous seasons or in the bottom 12 in each of the three previous seasons would pick no earlier than 10th. Additionally, any team that does not receive revenue sharing that finishes in the bottom 12 in each of the four or more previous seasons would have their pick moved to #18.

Also, beginning with the 2024 draft, any revenue sharing recipient finishing in the bottom eight in each of the three previous seasons would pick no earlier than 10th. Any such club in the bottom eight in each of the four or more previous seasons would have their pick moved to #18.

Revenue Sharing

MLB: Seeking to move Oakland Athletics back to revenue sharing payee

MLBPA: Has plan to incentivize small market teams to spend, with money coming from central revenue

Expanded Playoffs

The two sides seem to currently be proposing 12-team playoffs, although the MLBPA has suggested they could pull expanded playoffs off the table if games are permanently lost.

On-Uniform Advertising

MLB: Seeking uniform patches and helmet decals

MLBPA: Has not yet agreed to this

International Draft

MLB: Included in their proposal

MLBPA: Opposes international draft

Minor League Options

The two sides have agreed to limit the number of times a player can be optioned to the minors in one season to five.

Rule Changes

MLB: Seeking ability to implement on-field rule changes 45 days after formally proposing them to players. MLB seeks a pitch clock, bigger bases, and the elimination of the shift for the 2023 season.

MLBPA: Appear to want to keep one-year status quo

Universal Designated Hitter

This seems to be generally agreed upon by both sides.