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## THE DEMOCRATIC THREAT OF FAR-RIGHT LAWYERING<sup>†</sup>

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### INTRODUCTION

Far-right movements gain power by harnessing preexisting social grievances and organizational capacity and channeling them through new normative frames that ignite episodes of political contention that disrupt democracy.<sup>1</sup> These movements succeed by developing innovative new tactics built on familiar templates, which provide democratic legitimacy and make them potent. In new autocratic movements, legal mobilization is a key element of success that focuses attention on the degree to which legal strategy is a continuation of familiar, acceptable moves or deploys forms that are different in kind.<sup>2</sup> This essay argues that there is something distinctive—and dangerous—about far-right lawyering as it has developed in the Trump era.

To explore the role of lawyering in far-right movements, this essay takes as its point of departure Reva Siegel and Mary Ziegler’s important new history of the Comstock Act.<sup>3</sup> It starts where they end, specifically, in their conclusion that the new mobilization of “revivalist” claims by right-wing legal actors, like Alliance Defense Fund, attempting to stretch the reach of the Comstock Act to impose a “categorical ban on mailing abortion-related materials” is “plainly wrong.”<sup>4</sup>

I want to suggest how the normalization of “plainly wrong” into “legally plausible” is not simply a feature of revivalist claims in the abortion context. It reflects a broader strategy of the far-right movement: the mobilization of law as a vehicle for delivering dramatic, and democratically dangerous, policy wins outside of the zone of normal politics. While legal and judicial activism

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<sup>†</sup> An invited response to Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. (forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4761751](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4761751).

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<sup>1</sup> MANUELA CAIANI, DONATELLA DELLA PORTA & CLAUDIUS WAGEMANN, *MOBILIZING ON THE EXTREME RIGHT: GERMANY, ITALY, AND THE UNITED STATES* (2012).

<sup>2</sup> Kim Lane Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 548 (2018).

<sup>3</sup> Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. (forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4761751](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4761751) [hereinafter *Comstockery*].

<sup>4</sup> *Id.* at 84–85.

was historically decried by the conservative movement, it has been not only been embraced, but transformed, in a way that raises serious questions about the relation of law to democracy.

In this respect, what Siegel and Ziegler label “Comstockery” can be seen as one facet of a broader far-right distortion of the principle of zealous advocacy into a style of lawfare<sup>5</sup> defined by the use of deeply misleading, often outright false, “factual” claims and legal interpretations in service of radical legal arguments designed to undermine long-settled democratic principles and institutions.<sup>6</sup> This style of lawyering is different from even the most aggressive forms of cause-oriented legal activism that has preceded it and constitutes a new force within American politics that will endure beyond 2024 no matter the outcome.

I use this short comment to give some illustrative examples of far-right lawyering that are continuous with new “revivalist” Comstock claims and offer cautionary tales for the future of American governance. Although far-right lawyering constitutes a radicalization of traditions of conservative right advocacy, it took center stage in the legal attack on the 2020 election, and has reemerged in advance of 2024, pushed forward by some of the same lawyers making recycled claims of election vulnerabilities inviting fraud.<sup>7</sup> Lawfare is also seen in the proposals of the lawyer-authors of Project 2025 to transform independent government legal offices into vehicles for authorizing extreme, and in some cases illegal, far-right policy. And it is seen in the legal challenges to ethical sanctions against the leaders of the 2020 Stop the Steal campaign.

Since 2020, I have carefully followed what has happened to the far-right lawyering. Rather than being chastened by its failure to overturn the 2020 election, it has grown into a political force, causing an unprecedented rupture in the conservative legal movement.<sup>8</sup> That movement emerged in the 1980s to provide a counterweight to progressive legal organizations that had pioneered the use of law as a tool of social policy reform, beginning with the NAACP’s victory in *Brown v. Board of Education*<sup>9</sup> and growing through the Warren Court era to produce America’s “Rights Revolution.” For the first three decades of its existence, the conservative legal movement—pioneered by organizations like the Pacific Legal Foundation and coordinated by the powerful Federalist Society—used the progressive legal playbook to bring

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<sup>5</sup> On lawfare and democracy, see Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CAL. L. REV. 513 (2024).

<sup>6</sup> *Comstockery*, *supra* note 3, at 90 (stating that revivalists “have disturbed a nearly century-long settlement”).

<sup>7</sup> Shawn Musgrave, *Trump’s Big Lie Attorneys Are Back*, THE INTERCEPT, (Oct. 17, 2024, 8:39 AM), <https://theintercept.com/2024/10/17/trump-lawyers-election-fraud-lawsuits-strategy/> [<https://perma.cc/G7MN-US7K>].

<sup>8</sup> Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CAL. L. REV. 513 (2024).

<sup>9</sup> 347 U.S. 483 (1954).

large-scale litigation to shift policy to the right.<sup>10</sup> And as the Supreme Court itself moved to the right, the conservative legal movement won significant success in cases like *District of Columbia v. Heller*,<sup>11</sup> which established an individual right to bear arms.<sup>12</sup> While these cases asserted novel and aggressive readings of the Constitution, they remained within the zone of normal constitutional conflict. That is, they sought to change policy, not attack democratic institutions.

When Trump took office in 2016, the conservative legal movement functioned, as it had in prior administrations, as the pipeline filling top legal spots in the White House and Department of Justice (“DOJ”). Don McGahn, White House Counsel, was a partner at Jones Day, which along with Kirkland & Ellis supplied many lawyers appointed to key positions in the DOJ.<sup>13</sup> These were mainstream conservatives who believed that they could keep Trump within guardrails while advancing long-sought policy changes, like reversing *Roe v. Wade*.<sup>14</sup> And while they did achieve many legal goals, from very early on there were profound tensions. Trump famously clashed with his first Attorney General, Jeff Sessions, when Sessions recused himself from the Russian investigation, allowing Deputy Attorney General Rod Rosenstein to appoint Special Counsel Mueller to investigate Russian election interference in 2016.<sup>15</sup> McGahn threatened to resign after Trump ordered him to fire Mueller.<sup>16</sup> Precisely because he chafed against the very government lawyers that he had selected, Trump turned to private lawyers to do his bidding. Only two years into his administration, he retained Giuliani as his private lawyer, assigning him to Ukraine to negotiate a deal to investigate Hunter Biden leading to Trump’s first impeachment.<sup>17</sup> Giuliani was also charged with

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<sup>10</sup> STEVEN M. TELLES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

<sup>11</sup> 554 U.S. 570 (2008).

<sup>12</sup> *Id.* at 576.

<sup>13</sup> David Enrich, *How a Corporate Law Firm Led a Political Revolution*, N.Y. TIMES (Aug. 25, 2022), <https://www.nytimes.com/2022/08/25/magazine/jones-day-trump.html>.

<sup>14</sup> 410 U.S. 113 (1973).

<sup>15</sup> Kaelyn Forde, Cheyenne Haslett & Mike Levine, *Attorney General Jeff Sessions Fired by President Trump, Leaving Mueller Probe in New Hands*, ABC NEWS (Nov. 8, 2018), <https://abcnews.go.com/Politics/attorney-general-jeff-sessions-resigns-trumps-request/story?id=59037350> (“Tensions developed between Trump and Sessions in March 2017, when Sessions recused himself from the Russia investigation and Deputy Attorney General Rod Rosenstein took over.”).

<sup>16</sup> Michael S. Schmidt & Maggie Haberman, *Trump Ordered Mueller Fired, but Backed Off When White House Counsel Threatened to Quit*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/03/07/us/politics/trump-witnesses-special-counsel-priebus-mcgnahn.html>.

<sup>17</sup> Maggie Haberman & Michael S. Schmidt, *Giuliani to Join Trump’s Legal Team*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/2018/04/19/us/politics/giuliani-trump.html>; David L. Stern, *Ukraine Stayed Quiet During Trump-Era Pressures. Now It’s*

defending Trump in the media, pioneering a new role as legal influencer in which he famously asserted that “truth isn’t truth” in explaining why Trump should not have to testify in the Russia investigation.<sup>18</sup>

By the 2020 election, therefore, Trump had already broken a critical democratic norm: hiring outside counsel to circumvent hand-picked government lawyers to represent him on matters serving Trump’s political interests. In breaking that norm, Trump made clear what he wanted from his lawyers: total personal loyalty, a willingness to disregard or even subvert truth, and a commitment to eschew ethical and legal constraints in service of unprecedented efforts to subvert the election. This was the new model for far-right lawyering.

The 2020 election was the catalytic event that propelled this style of lawyering into public view. While it tragically culminated in violence on January 6, Stop the Steal was, at bottom, a legal campaign designed and executed by three key lawyers. Rudy Giuliani, Trump’s private lawyer, oversaw election litigation, personally taking over the federal case challenging results in Pennsylvania after local voting rights counsel withdrew for lack of credible claims. This did not bother Giuliani, who argued that there was “widespread, nationwide voter fraud,” which the court dismissed as “unsupported by evidence.”<sup>19</sup> Roughly forty other cases making versions of fraud arguments met similar fates. These cases were well-known to John Eastman, who was also retained as a private lawyer to Trump, enlisted to draft memos that purported to justify vice-presidential authority to refuse to count legally certified electors on the false ground that lawsuits showed that the “election was stolen.”<sup>20</sup> When these lawsuits continued to reveal no such thing, Trump recruited Department of Justice lawyer Jeffrey Clark to draft (and pressure superiors to send) a letter falsely stating that the department had found “significant irregularities” in the election supporting the fake elector plan, even though Clark, as head of the civil division, had no role in any investigations.<sup>21</sup>

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*Sharing Some Giuliani Tales.*, WASH. POST (Jan. 30, 2021), [https://washingtonpost.com/world/europe/ukraine-giuliani-biden-hunter/2021/01/29/592cecd6-54f7-11eb-acc5-92d2819a1ccb\\_story.html](https://washingtonpost.com/world/europe/ukraine-giuliani-biden-hunter/2021/01/29/592cecd6-54f7-11eb-acc5-92d2819a1ccb_story.html).

<sup>18</sup> Rebecca Morin & David Cohen, *Giuliani: ‘Truth Isn’t Truth,’* <https://www.politico.com/story/2018/08/19/giuliani-truth-todd-trump-788161> POLITICO (last updated Aug. 19, 2018, 6:16 PM).

<sup>19</sup> Memorandum Opinion at 2, *Trump v. Boockvar*, No. 4:20-CV-02078 (M.D. Pa. Nov. 21, 2020); Report and Recommendation at 17, *In the Matter of Rudolph W. Giuliani*, D.C. Ct. App. Bd. Prof. Resp., No. 22-BD-027 (May 31, 2024).

<sup>20</sup> Memorandum from John Eastman, January 6 Scenario, at 4 (Jan. 30, 2020), <https://cdn.cnn.com/cnn/2021/images/09/21/privileged.and.confidential.—jan.3.memo.on.jan.6.scenario.pdf> [https://perma.cc/V5CP-WARM].

<sup>21</sup> Report and Recommendation at 63 n.9, *In re the Matter of Jeffrey B. Clark*, D.C. Ct. App. Bd. Prof. Resp., No. 22-BD-039 (Aug. 1, 2024).

As critical as lawyers were to pushing Stop the Steal forward, they were also essential to stopping it. Clark's planned letter was foiled by White House Counsel Pat Cipollone and top DOJ lawyers, including Richard Donoghue, who assiduously tracked down and debunked every wild conspiracy claim of voter fraud offered by Clark supporting his letter, dramatically confronting Clark in the White House and threatening to resign.<sup>22</sup> Eastman's pressure campaign against Vice President Mike Pence was resisted by Pence's counsel, Greg Jacob, who similarly tracked down every case and law review article that Eastman proposed in support of his fake elector plan and rebutted Eastman point by point.<sup>23</sup> In short, it was because these government lawyers performed their independent professional roles and followed the rules of legal ethics that the election attack was a "near miss."<sup>24</sup> This was an instance of mainstream conservatives prevailing over the far-right.

Project 2025 was designed, in part, to make sure this would not happen again. It reads like a compendium of autocratic best practices, compiling a roadmap for giving government legal offices a MAGA makeover. It does so by taking control over building the pipeline into a new Trump administration away from the mainstream conservative legal movement, which has dramatically broken from the far-right (although the Federalist Society has sought to maintain its influence).<sup>25</sup> Much of this 922 page document was drafted by lawyers under the advisory of far-right legal organizations, like America First Legal (headed by anti-immigration Trump advisor Stephen Miller) and the Center for Renewing America (where Jeffrey Clark is Director of Litigation).<sup>26</sup>

The document bears the telltale signs of far-right lawyering: using conspiracy-laced factual assertions to support radical legal arguments targeting independent government institutions. It is not a coincidence that

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<sup>22</sup> *Id.* at 20-25, 67.

<sup>23</sup> Decision and Order of Involuntary Inactive Enrollment at 53-59, In the Matter of: John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024).

<sup>24</sup> Tom Ginsburg & Aziz Z. Huq, *Democracy's "Near Misses,"* 29 J. DEMOCRACY 16 (2018).

<sup>25</sup> MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE PROJECT 2025: PRESIDENTIAL TRANSITION PROJECT (Paul Dans & Steven Groves eds., 2023), [https://static.project2025.org/2025\\_MandateForLeadership\\_FULL.pdf](https://static.project2025.org/2025_MandateForLeadership_FULL.pdf) [<https://perma.cc/2AAC-MTD6>]; Matt Ford, *The Decline and Fall of the Federalist Society's Never Trumpers*, NEW REPUBLIC (June 11, 2024), <https://newrepublic.com/article/182542/decline-fall-federalist-societys-never-trumpers> [<https://perma.cc/76E7-6NDV>].

<sup>26</sup> Jonathan Blitzer, *Inside the Trump Plan for 2025*, NEW YORKER (July 15, 2024), <https://www.newyorker.com/magazine/2024/07/22/inside-the-trump-plan-for-2025>; America First Legal, *Leadership*, <https://aflegal.org/about/#leadership> (last visited Oct. 31, 2024); *Jeff Clark: Senior Fellow and Director of Litigation*, CTR. FOR RENEWING AM., <https://americarenewing.com/team/jeff-clark/> [<https://perma.cc/2K5G-RSFT>] (last visited Oct. 31, 2024).

Project 2025 singles out the very legal entities that thwarted Trump's 2020 attack: the Department of Justice and White House Counsel. Falsely claiming that "[l]arge swaths of the [Department of Justice] have been captured by an unaccountable bureaucratic managerial class and radical Left ideologues," the report proposes a staff purge resulting in a "vast expansion of the number of appointees in every office and component across the department."<sup>27</sup> The report outlines a similar plan for White House Counsel, repudiating its traditional role representing the institutional interests of the White House (not the president) to propose a radical new role "as an activist yet ethical plaintiffs' firm" advancing the administration's goals (and making clear, in a snub to mainstream conservative elites, like Cipollone (who came from Kirkland), that it "cannot serve as a finishing school to credential the next set of white-shoe law firm attorneys or federal judges in waiting").<sup>28</sup>

The takeaway from Project 2025 is clear. Trump needs far-right lawyers in key government positions to legally design, authorize, and defend his agenda, which includes radical (and potentially illegal) proposals that Trump has endorsed including: prosecuting political enemies and election workers, and using the military to detain and deport immigrants without due process.<sup>29</sup> This is because the Supreme Court's immunity decision protects these proposals so long as they are laundered through government lawyers. The Court's conservative majority held that a president is entitled to "absolute immunity" for actions within his "core constitutional powers"—and made clear that this immunity extends to "discussions with Justice Department officials" and that the president's "intent" does not matter.<sup>30</sup>

Trump's lawyers, however, are not immune from the bar, which is why they are attacking its regulatory authority through lawfare strategies in the ethics cases of the 2020 Stop the Steal architects. Over the past year, the three most important bar associations in the United States—New York, California,

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<sup>27</sup> Gene Hamilton, *Department of Justice*, in MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE PROJECT 2025: PRESIDENTIAL TRANSITION PROJECT 545, 569 (Paul Dans & Steven Groves eds., 2023).

<sup>28</sup> Rick Dearborn, *White House Office*, in MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE PROJECT 2025: PRESIDENTIAL TRANSITION PROJECT, 23, 27 (Paul Dans & Steven Groves eds., 2023).

<sup>29</sup> Charlie Savage, Maggie Haberman, Jonathan Swan & Michael Gold, *Trump Steps Up Threats to Imprison Those He Sees as Foes*, N.Y. TIMES (Sept. 9, 2024), <https://www.nytimes.com/2024/09/09/us/politics/trump-prison-threats-opponents.html>; Nick Corasaniti & Alexandra Berzon, *Trump's Talk of Prosecution Rattles Election Officials*, N.Y. TIMES (Sept. 18, 2024), <https://www.nytimes.com/2024/09/18/us/politics/donald-trump-2024-election-officials.html>; Charlie Savage, Maggie Haberman & Jonathan Swan, *Sweeping Raids, Giant Camps and Mass Deportations: Inside Trump's 2025 Immigration Plans*, N.Y. TIMES (Nov. 11, 2023), <https://www.nytimes.com/2023/11/11/us/politics/trump-2025-immigration-agenda.html>.

<sup>30</sup> *Trump v. United States*, 144 S. Ct. 2312, 2327, 2335 (2024).

and Washington, D.C.—have revoked or suspended the licenses of these three lawyers and, in so doing, have established that lawyers may not use lawfare to attack elections. However, while these key ethics opinions provide crucial lessons for what the bar can do to help prevent antidemocratic legal attacks, they also reveal the far-right plan to undermine the bar.

Ominously, the ethics opinions include radical arguments made by lawyers in their defense that would, if accepted, transform the democratic role of the legal profession in the United States—and insulate future government lawyers from professional oversight. Across the cases, Giuliani, Eastman, and Clark have argued that they lacked knowledge of wrongdoing based on a “good faith” belief in voter fraud derived from debunked conspiracy claims. The bar committees have forcefully rejected this claim, making factual findings entitled to deference by a reviewing court, and firmly defending the principle that lawyers cannot rely on unverified claims from affiants, websites, or other sources that a reasonable attorney would find unreliable with minimal investigation. The lawyers have also argued that the disciplinary system is engaged in “political” prosecutions and that they have a First Amendment right to lie.

While these arguments are troubling, Clark’s specific defenses are the most potentially transformative since they seek to withdraw the regulatory authority of the D.C. bar over government lawyers. These defenses follow the moves of far-right lawyering: throwing every possible legal challenge, no matter how absurd or untested, as a barrier to legal enforcement. Clark’s first defense turns on a contorted interpretation of a federal statute that provides government attorneys are “subject to State laws and rules . . . in the same manner as other attorneys in that State.”<sup>31</sup> Clark claims that because D.C. is not a state, he cannot be bound by its rules—a claim that the bar committee rightly noted stands the rule “on its head” by seeking to exempt Clark from the rules of the bar he voluntarily joined to practice at the Justice Department.<sup>32</sup> Clark’s main constitutional argument asserts that the Supremacy Clause preempts D.C. professional regulation by prohibiting the bar from imposing rules that impede federal lawyers in the “requirements or exigencies of federal service” (an argument also raised by Eastman in the Georgia election interference trail), though failing to explain how federal supremacy authorizes legal misconduct.<sup>33</sup> Clark also makes the even more novel argument that the arcane nondelegation doctrine, which prohibits federal lawmakers from delegating regulatory authority to a private entity, prohibits the D.C. bar from prosecuting him—since the D.C. Court of Appeals, overseeing the bar, was created by Congress.<sup>34</sup> In a final Hail Mary,

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<sup>31</sup> Report and Recommendation at 125, *In re the Matter of Jeffrey B. Clark*, D.C. Ct. App. Bd. Prof. Resp., No. 22-BD-039 (Aug. 1, 2024).

<sup>32</sup> *Id.* at 124.

<sup>33</sup> *Id.* at 119.

<sup>34</sup> *Id.* at 127.

Clark contends that presidential immunity permits government lawyers serving the president from practicing “without complying with Rules of Professional Conduct,” a sweeping argument that, along with the others, the bar panel found to “attack the very idea of holding lawyers to bar standards.”<sup>35</sup>

The D.C. bar panel correctly makes short work of all these arguments, but the threat to professional authority—and democratic accountability—remains real. To be clear, these defeated arguments are a roadmap for legal appeal, an invitation for the Supreme Court to ultimately decide the matter of whether lawyers, sworn to uphold the rule of law, should have to answer for attacks on it. It is not difficult to understand that if these views were to prevail, there would be a dramatic realignment of professional regulatory power away from the traditional structure of bar control over federal lawyers, leaving them to break rules and institutions with no professional consequence. It would, in short, empower far-right lawyers to take over the Justice Department with no ethical constraints on their behavior, permitting them to authorize Trump’s illegal conduct without professional repercussion. This is, needless to say, an unprecedented legal view that can only be ultimately resolved by the Supreme Court, which—as the immunity decision reveals—has unfortunately indulged a dangerous penchant for radical argument.

These legal strategies are part of a broader antidemocratic playbook that seek to normalize far-right conspiracies and undermine long-standing, essential democratic practices, like permitting easy access to voting, requiring voting boards to certify results, accepting election results, and permitting peaceful protest.<sup>36</sup> To succeed, this playbook requires lawyers to provide the veneer of legal plausibility to arguments that are normatively out of bounds. In this sense, lawfare is the leading spear of authoritarian movements.

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<sup>35</sup> *Id.* at 200.

<sup>36</sup> See, e.g., Alexandra Berzon, Rebecca Suner, James Surdam & Bron Moyi, *Inside a Pro-Trump Network Ready to Challenge the Election*, N.Y. TIMES (Oct. 28, 2024), <https://www.nytimes.com/video/us/elections/100000009783600/inside-a-pro-trump-network-ready-to-challenge-the-election.html>; Julie Bosman, Alexandra Ostasiewicz, Laura Salaberry, Erik Ljung & Christina Shaman, *Inside Wisconsin’s Fight over Ballot Drop Boxes*, N.Y. TIMES (Oct. 19, 2024), <https://www.nytimes.com/video/us/elections/100000009765217/inside-wisconsins-fight-over-ballot-drop-boxes.html>; Nick Corasaniti, *Local Officials Cannot Refuse to Certify Election Results, Georgia Judge Rules*, N.Y. TIMES (Oct. 15, 2024), <https://www.nytimes.com/2024/10/15/us/elections/georgia-election-ruling.html>; Lisa Lerer & Michael Gold, *Trump Escalates Threats to Political Opponents He Deems the ‘Enemy,’* N.Y. TIMES (Oct. 15, 2024), <https://www.nytimes.com/2024/10/15/us/politics/trump-opponents-enemy-within.html>.