



July 20, 2022

Hamilton P. Fox, III  
Office of Disciplinary Counsel  
Board of Professional Responsibility  
District of Columbia Court of Appeals  
515 5th Street NW Building A, Suite 117  
Washington, DC 20001

VIA ELECTRONIC MAIL: [REDACTED]

Dear Mr. Fox:

The 65 Project is a bipartisan, nonprofit effort to protect democracy from abuse of the legal system by holding accountable lawyers who engage in fraudulent and malicious efforts to overturn legitimate elections.

We write to request that the Office of Disciplinary Counsel investigate the actions taken by Kenneth Klukowski relating to a concerted effort to overturn the legitimate 2020 presidential election results. Mr. Klukowski served as a lawyer and advisor to Donald Trump and his presidential campaign, working alongside Rudy Giuliani, John Eastman, Sidney Powell, and others in an effort to overturn the 2020 presidential election. Importantly, Mr. Klukowski assisted Jeffrey Clark, formerly acting head of the Department of Justice's Civil Division, as Mr. Clark pushed efforts to interfere with the electoral certification process in seven states. Your office is currently investigating Mr. Clark for his unethical conduct.<sup>1</sup>

A full investigation by the Office of Disciplinary Counsel will demonstrate the egregious nature of Mr. Klukowski's actions, especially when considered in light of his purposes and the direct and possible consequences of his behavior.

### **BACKGROUND**

Donald Trump lost the 2020 presidential election.<sup>2</sup> Anticipating his loss, Mr. Trump and his allies began questioning the election's legitimacy months before even one voter had cast a

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<sup>1</sup> <https://www.reuters.com/world/us/exclusive-two-former-us-officials-help-ethics-probe-trump-ally-clark-source-says-2022-03-29>.

<sup>2</sup> See United States National Archives, Electoral College Results – 2020, available at <https://www.archives.gov/electoral-college/2020>.

ballot.<sup>3</sup> In fact, this fit a pattern of Mr. Trump declaring fraud or a rigged election any time he lost or anticipated a loss.

Joe Biden received over 81 million votes in November 2020, defeating Mr. Trump by over seven million votes and over four percentage points.<sup>4</sup> Mr. Trump’s head of the U.S. Cybersecurity and Infrastructure Security Agency, Christopher Krebs, [announced](#) that the “November 3<sup>rd</sup> election was the most secure in American history. . . . There is no evidence that any voting system deleted or lost votes or changed votes or was in any way compromised.” Mr. Trump [fired him](#). William Barr, Mr. Trump’s own Attorney General, [declared that the Department of Justice](#) has “not seen fraud on a scale that could have effected a different outcome in the election.” Attorney General Barr announced his resignation less than two weeks later, but not before again confirming that the 2020 elections had been free and fair.<sup>5</sup>

Many of Mr. Trump’s own senior advisors agreed with Attorney General Barr and Mr. Krebs.<sup>6</sup> Indeed, Deputy (and later Acting) Attorney General Jeffrey Rosen and Associate (and later Acting) Deputy Attorney General Richard Donoghue regularly refuted the false information and allegations that Mr. Trump and his allies asserted about a fraudulent election.<sup>7</sup> Mr. Rosen has testified that on December 15, 2020, at a meeting that included Mark Meadows, White House Chief of Staff, he and others told Mr. Trump that the information he was receiving from his political allies was not correct.<sup>8</sup> And Mr. Donoghue has testified to the Select Committee to Investigate the January 6th Attack on the United States Capitol (Select Committee) that on December 27, 2020, he told Mr. Trump “in very clear terms” that after “dozens of investigations, hundreds of interviews” looking at “Georgia, Pennsylvania, Michigan, and Nevada,” the Department of Justice – Mr. Trump’s own Department of Justice – had concluded that “the major allegations are not supported by the evidence developed.”<sup>9</sup>

Despite clear proof that no fraud occurred, and that no one stole the election from him, Mr. Trump and his lawyers sought to overturn the legitimate results by filing 65 baseless lawsuits

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<sup>3</sup> Kevin Liptak, *A List of the Times Trump Has Said He Won’t Accept the Election Results or Leave Office if He Loses*, CNN (Sept. 24, 2020), <https://www.cnn.com/2020/09/24/politics/trump-election-warnings-leaving-office/index.html>.

<sup>4</sup> See Federal Election Commission, *Official 2020 Presidential General Election Results*, available at <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf>.

<sup>5</sup> M. Balsamo, *Disputing Trump, Barr says no widespread election fraud*, Associated Press (Dec. 1, 2020), <https://perma.cc/4U8N-SMB5>.

<sup>6</sup> See Deposition of Jason Miller (Feb. 3, 2022), available at <https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf>; Interview of Jeffrey Rosen (Aug. 7, 2021), United States Senate Committee on the Judiciary, 117th Cong. 30, available at <https://www.judiciary.senate.gov/rosen-transcript-final>.

<sup>7</sup> See Interview of Jeffrey Rosen *see also* Interview of Richard Donoghue (Oct. 1, 2021), available at <https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf>

<sup>8</sup> Interview of Jeffrey Rosen.

<sup>9</sup> Interview with Richard Donoghue.

across the country.<sup>10</sup> None succeeded and, in fact, courts have imposed sanctions on the lawyers who participated in these suits and referred them for sanctions to their respective state bars.<sup>11</sup>

But as the Select Committee has revealed, lawyers participated in the effort to overturn the presidential election from behind the scenes, as well. Indeed, these lawyers played an even more malevolent role because they largely orchestrated the effort. Perhaps worst of all, a handful of these attorneys engaged in the endeavor to upend American democracy from inside the government.

Mr. Klukowski is one such attorney.

## FACTS GIVING RISE TO COMPLAINT

The effort to overturn the 2020 presidential election contained multiple strands. One involved litigating the 65 bogus lawsuits. Another involved arranging a slate of false electors from seven states to submit certificates to Congress declaring themselves to be the duly appointed electors from their respective states. Yet a third thread focused on pressuring Vice President Pence to rely on the false elector certificates to disregard the votes from those states and declare Mr. Trump the winner of the Electoral College. A fourth line sought to convince state legislatures to overturn the will of the voters by holding special sessions to rescind the electoral votes as cast for Mr. Biden and instead award them to Mr. Trump. And, of course, a fifth strand included summoning Mr. Trump's supporters to Washington, D.C. and, having spent months lying to them about fraud and a stolen election, sending them to the Capitol, agitated and armed, to stop the electoral vote count.

Mr. Klukowski served as a link between several of these ignoble efforts.

John Eastman, one of Mr. Trump's attorneys, helmed the drive to pressure Mr. Pence to overturn the election results during the January 6, 2021 electoral vote count. Mr. Eastman drafted [two memoranda](#) outlining this plan,<sup>12</sup> which has similarly been shown to be grounded in neither law nor fact, and that recommended that Mr. Pence take "BOLD" action to secure Mr. Trump's victory.<sup>13</sup> Importantly, even Mr. Eastman admitted at the time that he was offering an interpretation of the Twelfth Amendment or the Electoral Count Act that not even one member of the Supreme Court would agree with.<sup>14</sup> In fact, in an email to Mr. Pence's lawyer, Mr.

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<sup>10</sup> W. Cummings, J. Garrison & J. Sergent, *By the numbers: President Donald Trump's failed efforts to overturn the election*, USA Today (Jan. 6, 2021), available at <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>.

<sup>11</sup> See, e.g., *King v. Whitmer*, No. 20-13134 (U.S. Dist. Ct. E. Dist. Mich. Aug. 25, 2021), available at [https://www.michigan.gov/documents/ag/172\\_opinion\\_order\\_King\\_733786\\_7.pdf](https://www.michigan.gov/documents/ag/172_opinion_order_King_733786_7.pdf).

<sup>12</sup> The main Eastman memorandum is available at <https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html>.

<sup>13</sup> Available at <https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html>.

<sup>14</sup> Deposition of Gregory Jacob (Feb 1, 2022), available at <https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf>.

Eastman acknowledged he was proposing violating the Electoral Count Act – though he considered it only a “relatively minor violation.”<sup>15</sup>

Mr. Klukowski worked with Mr. Eastman during this time, even though Mr. Klukowski was also an attorney with the Department of Justice. Kenneth Blackwell, a conservative activist, wrote in an email that Mr. Pence would “benefit” from meeting with Mr. Klukowski and Mr. Eastman.<sup>16</sup> The email Mr. Blackwell sent cc’d Mr. Eastman and Mr. Klukowski, going to the latter’s personal Gmail account.<sup>17</sup>

Coincidentally, Mr. Klukowski was placed as a political appointee in the Department of Justice in December 2020, to work directly under Jeffrey Clark.<sup>18</sup> Mr. Clark was, at the time, the acting head of the Civil Division. Mr. Klukowski has stated that the transfer from a political appointment in the Office of Management and Budget had been in the works for several months and was unrelated to the effort to overturn the election.<sup>19</sup> In fact, Mr. Klukowski publicly declared that the purpose of the transfer was so that he could gain more “litigation experience.”<sup>20</sup> That explanation lacks credibility. By the time the transfer occurred, Mr. Trump would be in office only a few more weeks (unless Mr. Eastman’s effort succeeded). How much litigation experience could Mr. Klukowski truly hope to gain in those final days? Further, even if the original request had been made in June 2020, as Mr. Klukowski alleges, why would it have sat dormant for several months, but only effectuated in mid-December 2020, at the very moment when Mr. Clark was seeking to get the Justice Department to assist with Mr. Trump’s fraudulent effort to overturn the election? These issues bear serious investigation. Should it be determined that Mr. Klukowski was not telling the truth when he offered these explanations, this might be one of those situations where the cover-up is, for purposes of the Rules of Professional Conduct, as bad as the crime. It certainly would show guilty knowledge.

Mr. Klukowski has suggested that he presented the January 6<sup>th</sup> Committee with documents supporting his claims.<sup>21</sup> But, if he did, the January 6<sup>th</sup> Committee evidently did not believe him. Instead, at the Committee’s fourth public hearing, the Committee presented its view that Mr. Klukowski did seek to assist Mr. Clark in the effort to subvert the election.<sup>22</sup>

The January 6<sup>th</sup> Committee’s skepticism likely stems from the role Mr. Klukowski played in drafting a letter with Mr. Clark that sought to convince the Governor of Georgia and legislative

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<sup>15</sup> Email from John Eastman to Gregory Jacob on Jan. 6, 2021, available at <https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf>.

<sup>16</sup> See June 23, 2022 Select Committee Hearing at 1:14:53, available at <https://january6th.house.gov/legislation/hearings/062322-select-committee-hearing>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1:13:44.

<sup>19</sup> See Statement of K. Klukowski, available at <https://ia601509.us.archive.org/9/items/ken-klukowski-public-statement-of-6-25-22/Ken%20Klukowski%20Public%20Statement%20of%206-25-22.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See June 23, 2022 Select Committee Hearing.

leadership to call a special session and to overturn the will of the people.<sup>23</sup> And this letter stood as a template for what would be sent to multiple other governors and state legislative leaders.

The letter hardly represents the “litigation experience” Mr. Klukowski proffered as the basis for moving to work under Mr. Clark. Instead, the document Mr. Klukowski drafted demonstrates a willingness to concentrate the Department of Justice’s power and authority towards overturning the legitimate election results so that Mr. Trump could remain in office. And, most importantly, Mr. Klukowski’s draft letter did so through false statements and misrepresentations. The letter states:

The Department of Justice is investigating various irregularities in the 2020 election for President of the United States. The Department will update you as we are able on investigatory progress, but at this time we have identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia. No doubt many of Georgia’s state legislators are aware of irregularities, sworn to by a variety of witnesses, and we have taken notice of their complaints.<sup>24</sup>

As noted above, these assertions lacked any basis in fact. The Justice Department did not identify concerns that called into question the election outcome. The Department’s leadership had spoken out privately and publicly to reject such suggestions. Additionally, the sixteen Assistant U.S. Attorneys who had been tapped to monitor elections in fifteen separate districts reported publicly that no evidence existed of election anomalies in those districts.<sup>25</sup> And courts had heard and dismissed dozens of lawsuits raising allegations of fraud, including in Georgia.<sup>26</sup>

Incredibly, the letter then proceeds to rely on these false statements to propose steps that amounted to a call to end democracy:

[T]he Department recommends that the Georgia General Assembly should convene in special session so that its legislators are in a position to take additional testimony, receive new evidence, and deliberate on the matter consistent with its duties under the U. S. Constitution. Time is of the essence, as the U. S. Constitution tasks

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<sup>23</sup> Available at <https://s3.documentcloud.org/documents/21087991/jeffrey-clark-draft-letter.pdf>.

<sup>24</sup> *Id.*

<sup>25</sup> Matt Zapotosky & Tom Hamburger, *Federal Prosecutors Assigned to Monitor Election Malfeasance Tell Barr They See No Evidence of Substantial Irregularities*, Wa. Post (Nov. 13, 2020), available at [https://www.washingtonpost.com/national-security/william-barr-election-memo/2020/11/13/6ed06d20-25e4-11eb-a688-5298ad5d580a\\_story.html](https://www.washingtonpost.com/national-security/william-barr-election-memo/2020/11/13/6ed06d20-25e4-11eb-a688-5298ad5d580a_story.html).

<sup>26</sup> *See, e.g., In re Enforcement of Election Laws and Security Ballots Cast or Received after 7:00pm on November 3, 2020*, SPCV20-00982 (Sup. Ct. of Chatham Cty.); *Brooks v. Mahoney*, 4:20-cv-00281-RSB-CLR (S.D. Ga. Nov. 11, 2020); *Wood v. Raffensperger*, 1:20-cv-04651-SD (N.D. Ga. Nov. 13, 2020); *Pearson v. Kemp*, 1:20-cv-04809-TCB (N.D. Ga. Nov. 27, 2020); *Boland v. Raffensperger*, 2020CV343018 (Sup. Ct. of Fulton Cty.); *Trump v. Raffensperger*, 2020CV343255 (Sup. Ct. of Fulton Cty.), S21Mo561 (Sup. Ct. of Ga.).

Congress with convening in joint session to count Electoral College certificates, see U. S. Const., art. II, §1, cl. 3, consider objections to any of those certificates, and decide between any competing slates of electoral certificates, and 3 U. S. C. §15 provides that the session shall begin on January 6, 2021 with the Vice Pres. presiding over the session as President of the Senate.

...

Given the urgency of this serious matter, including the Fulton County litigation's sluggish pace, the Department believes that a special session of the Georgia General Assembly is warranted and is in the national interest.

...

The purpose of the special session the Department recommends would be for the General Assembly to (1) evaluate the irregularities in the 2020 election, including violations of Georgia election law judged against that body of law as it has been enacted by your State's Legislature, (2) determine whether those violations show which candidate for President won the most legal votes in the November 3 election, and (3) whether the election failed to make a proper and valid choice between the candidates, such that the General Assembly could take whatever action is necessary to ensure that one of the slates of Electors cast on December 14 will be accepted by Congress on January 6.<sup>27</sup>

The substance of these paragraphs is alarming enough, but we ask that your office pay particular attention to the word "recommends." Through this letter, Mr. Clark and Mr. Klukowski sought to harness the integrity and authority of the United States Department of Justice to encourage several state governments to take the destructive step of using false claims of voting irregularities to reverse the outcome of the presidential election. Despite knowledge that investigations turned up no evidence of fraud. Despite hand recounts that verified the outcome. Despite the vote already being certified by the State. And despite the Georgia Supreme Court rejecting efforts to overturn the results.

"The Department recommends" is an incredibly powerful statement, holding enormous weight with anyone receiving such a directive. Writing these words carries with it a similar degree of responsibility. Mr. Klukowski failed to live up to that obligation.

Further, realizing that Georgia's governor, Brian Kemp, had already certified the election, despite pleas from Mr. Trump not to, the letter goes on to speak to the legislative leaders, providing highly suspect legal analysis:

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<sup>27</sup> Available at <https://s3.documentcloud.org/documents/21087991/jeffrey-clark-draft-letter.pdf>.

While the Department of Justice believes the Governor of Georgia should immediately call a special session to consider this important and urgent matter, if he declines to do so, we share with you our view that the Georgia General Assembly has implied authority under the Constitution of the United States to call itself into special session for the limited purpose of considering issues pertaining to the appointment of Presidential Electors.<sup>28</sup>

The letter then proceeds to explain why, in the Department of Justice's "view," the United States Constitution grants the Georgia General Assembly the "implied authority" to call itself into special session. The suggestion would be laughable were so much not at stake. The U.S. Constitution establishes the parameters for federal authority. State constitutions and laws determine how and when state legislatures hold sessions. And, in Georgia, the state constitution grants that power to the Governor.<sup>29</sup> Thus, Mr. Clark and Mr. Klukowski were suggesting that Georgia's legislative leaders disregard state law and call a special session based on a theory of implied authority that disregards the entire constitutional order and lacks any historical support.

Only Acting Attorney General Rosen's and Acting Deputy Attorney General Donoghue's integrity and professionalism prevented the letter from being sent to Georgia and other states' governors and legislatures. As Mr. Donoghue recently testified:

LIZ CHENEY: Thank you very much, Mr. Kinzinger. I thank the gentleman for yielding. As we discussed earlier, at the center of Mr. Clark's plan to undo President Trump's election loss was a letter. Mr. Donoghue, on December 28th, Mr. Clark emailed you and Mr. Rosen a draft letter that he wanted you to sign and send to Georgia state officials. You testified that this could have "grave constitutional consequences." Mr. Donoghue, can you tell us what you meant by that?

RICHARD DONOGHUE: Well, I had to read both the email and the attached letter twice to make sure I really understood what he was proposing, because it was so extreme to me I had a hard time getting my head around it initially. But I read it and I did understand it for what he intended. And I had to sit down and sort of compose what I thought was an appropriate response. I actually initially went next door to the acting AG's office, but he was not there. We were both on that email. I knew we would both have probably a very similar reaction to it. He was not in his office. So, I returned to my office and I sat down to draft a response, because I thought it was very important to give a prompt response rejecting this out of hand.

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<sup>28</sup> *Id.*

<sup>29</sup> *See* Georgia Constitution, Art. 5, § 2.

There were — in my response, I explained a number of reasons. This is not the department's role to suggest or dictate to state legislatures how they should select their electors. But more importantly, this was not based on fact. This was actually contrary to the facts as developed by department investigations over the last several weeks and months.

So, I respond to that. And for the department to insert itself into the political process this way, I think would have had grave consequences for the country. It may very well have spiraled us into a constitutional crisis. And I wanted to make sure that he understood the gravity of the situation, because he didn't seem to really appreciate it.<sup>30</sup>

The email response Mr. Donoghue referred to was as follows:

[T]here is no chance that I would sign this letter or anything remotely like this. While it may be true that the Department "is investigating various irregularities in the 2020 election for President" (something we typically would not say publicly), investigations I am aware of relate to suspicions of misconduct that are such a small scale that they simply would not impact the outcome of the Presidential Election. AG Barr made that clear to the public only last week, and I am not aware of intervening developments that would change that conclusion. Thus, I know of nothing that would support the statement, 'we have identified significant concerns that may have impacted the outcome of the election in multiple states.' . . . More important, I do not think the Department's role should include making recommendations to State legislatures about how they should meet their Constitutional obligation to appoint Electors.<sup>31</sup>

Fortunately, Mr. Rosen and Mr. Donoghue refused to move forward with the letter Mr. Klukowski drafted, sparing the nation from "grave constitutional consequences."

Mr. Klukowski has justified his work on this letter by stating:

[W]hile it is correct that I "assisted" in the draft letter for which Jeff Clark later sought approval, that letter was Clark's idea, largely dictated or outlined by him, and my role as his subordinate was to commit his dictations and outline to writing and fill in legal

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<sup>30</sup> Available at <https://www.npr.org/2022/06/23/1106700800/jan-6-committee-hearing-transcript>.

<sup>31</sup> *Subverting Justice: How the Former President and His Allies Pressured DOJ to Overturn the 2020 Election*, Senate Committee on the Judiciary at 193, available at <https://www.judiciary.senate.gov/imo/media/doc/Interim%20Staff%20Report%20FINAL.pdf>.



citations at the direction of my then-boss over the course of a single day, December 28, 2020.<sup>32</sup>

In other words, Mr. Klukowski wrote the letter, including the language regarding the Department's recommendations.

It is worth noting that despite his effort to diminish his role, at the time Mr. Klukowski participated in this effort, he was twelve years out of law school, having graduated from George Mason University with his juris doctor in 2008. According to the biography that Mr. Klukowski has posted about himself:

Ken Klukowski is senior counsel at Schaerr Jaffe LLP, with extensive experience in constitutional law, administrative law, election law, civil rights, and federal courts. Mr. Klukowski has held multiple appointed positions in the U.S. government, including serving as senior counsel in the Civil Division of the U.S. Department of Justice, and prior to that serving in the White House as special counsel in the Office of Management and Budget. Previously, he was senior advisor for constitutional rights on the policy staff of the Presidential Transition Team of President Donald J. Trump. In the private sector, Mr. Klukowski has worked as senior counsel at First Liberty Institute, as a legal journalist, and a senior fellow at the American Constitutional Rights Union. He has litigated constitutional cases in the U.S. Supreme Court, including the landmark Establishment Clause case *American Legion v. American Humanist Society*. Mr. Klukowski has also litigated before several lower federal courts, including successfully arguing a Ninth Circuit appeal on federal abstention doctrine in *United States v. California Water Resources Control Board*. Additionally, Mr. Klukowski regularly contributes to media coverage of the nation's highest court and legal issues, and testifies before Congress and other policymaking bodies.

Earlier in his career, Mr. Klukowski served as special deputy attorney general of Indiana and worked on faculty at Liberty University School of Law. His academic works have been published by legal journals such as the *Harvard Journal of Law & Public Policy* and *Yale Law & Policy Review*, and his op-eds have appeared in the *Wall Street Journal* and other national publications. His amicus briefs and nine law review articles have been cited by various federal courts and top legal journals. He has participated in numerous Supreme Court cases, and lectured at dozens of law schools nationwide.<sup>33</sup>

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<sup>32</sup> Available at <https://ia601509.us.archive.org/9/items/ken-klukowski-public-statement-of-6-25-22/Ken%20Klukowski%20Public%20Statement%20of%206-25-22.pdf>.

<sup>33</sup> Available at <https://www.schaerr-jaffe.com/kenneth-a-klukowski>.

In contrast, Mr. Clark had spent his career as an environmental lawyer, with no expertise in constitutional or election law.<sup>34</sup>

The entire basis for the Department's views and recommendations in the letter rested on constitutional arguments. As the constitutional lawyer between the two of them, and with over a decade of legal experience, Mr. Klukowski was well-positioned to halt Mr. Clark's effort – if it were truly only Mr. Clark's effort. Instead, it seems more likely that Mr. Clark and Mr. Klukowski worked together on the letter's substance. In fact, the January 6th Committee revealed that Mr. Clark forwarded the letter to the proposed co-signatories, Mr. Rosen and Mr. Donoghue, just twenty minutes after Mr. Klukowski emailed him the draft.<sup>35</sup>

Mr. Klukowski appears to be offering post hoc explanations that do not match the events as they actually unfolded. Rather, according to the January 6th Committee:

The committee has also learned that Mr. Clark was working with another attorney at the department named Ken Klukowski, who drafted this letter to Georgia with Mr. Clark. Mr. Klukowski had arrived at the department on December 15th with just 36 days left until the inauguration. He was specifically assigned to work under Jeff Clark.

And Mr. Klukowski also worked with John Eastman, who we showed you at our hearing last week, was one of the primary architects of President Trump's scheme to overturn the election. The Georgia letter that we've been discussing specifically talks about some of Dr. Eastman's theories, including "The purpose of the special session the department recommends would be for the General Assembly to determine whether the election failed to make a proper and valid choice between the candidates, such that the General Assembly could take whatever action is necessary to ensure that one of the slates of electors cast on December 14th will be accepted by Congress on January 6th." The committee has also learned that the relationship between Dr. Eastman and Mr. Klukowski persisted after Mr. Klukowski joined the Justice Department.<sup>36</sup>

In short, Mr. Klukowski positioned himself within the Department of Justice to work alongside Mr. Clark as the latter sought to use the Department's power, prestige, and authority to create a false narrative of a stolen election and to encourage state legislatures to overturn democracy itself.

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<sup>34</sup> See Biography of Jeffrey Bossert Clark, United States Department of Justice, Environmental and Natural Resources Division, available at <https://www.justice.gov/enrd/jeffrey-bossert-clark>.

<sup>35</sup> See *Subverting Justice* at 39.

<sup>36</sup> Available at <https://www.npr.org/2022/06/23/1106700800/jan-6-committee-hearing-transcript>.

**A SUBSTANTIAL BASIS EXISTS FOR THE OFFICE OF DISCIPLINARY COUNSEL  
TO INVESTIGATE MR. KLUKOWSKI’S CONDUCT AND TO IMPOSE  
APPROPRIATE DISCIPLINE**

The Office of Disciplinary Counsel should investigate on the following bases:

1. Mr. Klukowski used tactics to burden other persons.

Rule 4.4(a) (Respect for Rights of Third Persons) provides that, “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.”

The Third Circuit Court of Appeals addressed the notion of throwing out the valid votes of millions of Pennsylvanians by stating:

Granting relief would harm millions of Pennsylvania voters too. The Campaign would have us set aside 1.5 million ballots without even alleging fraud. As the deadline to certify votes has already passed, granting relief would disenfranchise those voters or sidestep the expressed will of the people. Tossing out those ballots could disrupt every down-ballot race as well. There is no allegation of fraud (let alone proof) to justify harming those millions of voters as well as other candidates.<sup>37</sup>

Mr. Klukowski’s efforts went further than the plaintiffs in the Pennsylvania case. He drafted a letter that, if not stopped by Mr. Rosen and Mr. Donoghue, would have led to a “constitutional crisis” and possibly the disenfranchisement of tens of millions of voters. He sought to harm those individuals without any basis and his effort burdened nothing less than American democracy.

2. Mr. Klukowski Engaged in Misconduct that Violates Rule 8.4

Rule 8.4 (Misconduct) provides that it constitutes professional misconduct to:

- (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- ...
- (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) Engage in conduct that seriously interferes with the administration of justice...

Courts interpreting this provision have held that:

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<sup>37</sup> *Donald J. Trump for President, Inc.*, 830 F. App'x at 390.

“[D]ishonesty” . . . encompasses fraudulent, deceitful, or misrepresentative behavior. In addition to these, however, it encompasses “a lack of probity . . . integrity . . . fairness and straightforwardness”; statements that are “technically true” but fail to state the whole truth qualify as “conduct . . . of a dishonest character.”<sup>38</sup>

Further, “sufficiently reckless conduct is enough to sustain a violation of the rule.”<sup>39</sup> And as Comment 7 to the ABA Model Rule explains, “Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of lawyers.”

As outlined above, Mr. Klukowski lacked any basis for asserting in his draft letter that the Department of Justice had “identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia.” In truth, the Justice Department found no such concerns and the Department’s leadership – including the Attorney General – had publicly stated no fraud occurred. Moreover, the State of Georgia conducted two hand recounts that confirmed Mr. Biden’s victory in the state.

Mr. Klukowski has indicated that he was not aware of the status of Justice Department investigations when he drafted the letter.<sup>40</sup> That’s difficult to believe, given the public nature of the Department’s assurances that no fraud existed sufficient to call the election’s outcome into question. But accepting it as true only further demonstrates that Mr. Klukowski made dishonest statements, since he represented the status of an investigation that he “had no knowledge of.” Additionally, knowledge of the false statement is not required and Mr. Klukowski, at a minimum, acted recklessly by making these incorrect statements of fact without conducting any research on the sweeping claims he asserted as a basis for seeking to overturn the 2020 presidential election and place our democracy in unquestionable jeopardy.

That Mr. Rosen’s and Mr. Donoghue’s integrity prevented the letter from being sent does not save Mr. Klukowski from having violated Rule 8.4. Under subsection (a), a lawyer engages in misconduct by violating or *attempting* to violate the Rules or by assisting another in doing so. By drafting the December 28 letter and sending it to Mr. Clark, Mr. Klukowski assisted Mr. Clark’s violations and attempted to violate the Rules himself.

Mr. Klukowski further violated Rule 8.4(a) by attempting to send a letter to third parties who were either represented by counsel (which would violate Rule 4.2) or to unrepresented parties and providing legal advice to the Georgia officials (which would violate Rule 4.3).

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<sup>38</sup> *Matter of Shorter*, 570 A.2d 760, 768 (DC 1990). See also *In re Ekekwe-Kauffman*, 210 A.3d 775, 795–96 (D.C. 2019).

<sup>39</sup> *In re Boykins*, 999 A.2d 166, 172 (D.C. 2010)

<sup>40</sup> “Moreover, I had no knowledge of any purported evidence uncovered in DOJ election investigations, nor did I communicate with anyone outside DOJ regarding the letter.” See Statement of K. Klukowski, available at <https://ia601509.us.archive.org/9/items/ken-klukowski-public-statement-of-6-25-22/Ken%20Klukowski%20Public%20Statement%20of%206-25-22.pdf>

Finally, Mr. Klukowski further attempted to violate Rule 8.4(d) by interfering with the administration of justice.

Rule 8.4(d) is read broadly to “uphold the integrity and competence of the legal profession”<sup>41</sup> and applies to more than just judicial proceedings.<sup>42</sup> The rule “encompass[es] derelictions of attorney conduct considered reprehensible to the practice of law.”<sup>43</sup> In fact, courts have likened it to “conduct unbecoming a member of the bar.”<sup>44</sup> Violating Rule 8.4(d) requires three elements: “First, of course, the conduct must be improper. . . . Second, as explained in *Shorter*, the conduct itself must bear directly upon the judicial process (i.e., the ‘administration of justice’) with respect to an identifiable case or tribunal. . . . And third, the attorney’s conduct must taint the judicial process in more than a de minimis way; that is, at least potentially impact upon the process to a serious and adverse degree.”<sup>45</sup>

Mr. Klukowski’s letter directly referred to legal proceedings in Fulton County. If it had been sent, the publicity around it would have affected the Fulton County proceeding. The letter also sought to interfere with the electoral vote count, which would be finalized on January 6, 2021, when Congress convened to conclude the process of confirming Mr. Biden’s victory. Prosecutors have charged many January 6 insurrectionists with obstructing an official governmental proceeding by storming the Capitol, which demonstrates that Mr. Klukowski’s effort to have the state legislature convene was aimed at an official proceeding.

The specific request by the Department of Justice of the United States for the Georgia Legislature to call itself into session and substitute its own presidential electors for those chosen by Georgia citizens would have also interfered with the administrative process within Georgia, which places the responsibility for resolving certification disputes with the Secretary of State. It sought to use the Department of Justice to call into question the certifications in seven states, without any evidence or basis for such an assertion – thereby interfering with those administrative processes.

The potential consequence of Mr. Klukowski’s attempted interference with the administration of justice cannot be overstated. His proposed letter would, in the words of Mr. Donoghue, represented a grave constitutional threat. To some extent, linking conduct that sought to overturn American democracy with a relatively mundane rule of professional conduct may seem almost trivial – almost like prosecuting Al Capone for tax evasion. But the enormity of Mr. Klukowski’s conduct does not mean, of course, that he should escape accountability. Mr. Klukowski’s conduct in drafting the December 28 letter violated Rule 8.4(a) and (c) and warrants appropriate discipline.

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<sup>41</sup> *In re Hopkins*, 677 A.2d 55, 59 (DC 1996).

<sup>42</sup> *See, e.g., In re Mason*, 736 A.2d 1019, 1022-23 (D.C. 1999).

<sup>43</sup> *In re Alexander*, 496 A.2d 244, 255 (D.C. 1985).

<sup>44</sup> *In re Solerwitz*, 575 A.2d 287, 292 (D.C.1990) (per curiam).

<sup>45</sup> *In re Hopkins*, 677 A.2d at 60-61; *Accord, In re White*, 11 A.3d 1226, 1230 (D.C. 2011); *In re Okwu*, 926 A.2d 1106, 1143 (D.C. 2007).

That a member of our esteemed profession would engage in such actions – conduct that contributed to substantial harm to American democracy – should cause considerable distress within the entire legal community.

False statements intended to foment a loss of confidence in our elections and resulting loss of confidence in government generally damage the proper functioning of free society. When those false statements are made by an attorney, it also erodes the public’s confidence in the integrity of attorneys admitted to our bar and damages the profession’s role as a crucial source of reliable information.<sup>46</sup>

Mr. Klukowski abused his place of trust and played a significant role in the effort to overturn the 2020 election results.

For the reasons set forth above, The 65 Project respectfully requests that the Office of Disciplinary Counsel investigate Mr. Klukowski’s conduct and impose appropriate discipline. And, because he has demonstrated a willingness – perhaps even eagerness – to engage in the same problematic behaviors and to defend his conduct, we ask that you treat this matter with urgency.

Sincerely,



Michael Teter  
Managing Director, The 65 Project

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<sup>46</sup> *In the Matter of Rudolph W. Giuliani*, Supreme Court of the State of New York Appellate Division, First Judicial Dept., May 3, 2021, available at [https://www.nycourts.gov/courts/ad1/calendar/List\\_Word/2021/06\\_Jun/24/PDF/Matter%20of%20Giuliani%20\(2021-00506\)%20PC.pdf](https://www.nycourts.gov/courts/ad1/calendar/List_Word/2021/06_Jun/24/PDF/Matter%20of%20Giuliani%20(2021-00506)%20PC.pdf).