BEFORE THE ILLLINOIS STATE BOARD OF ELECTIONS
SITTING *EX-OFFICIO* AS THE STATE OFFICERS ELECTORAL BOARD

STEVEN DANIEL ANDERSON, CHARLES J. HOLLEY, JACK L. HICKMAN, RALPH E. CINTRON, AND DARRYL P. BAKER,	)	No. 24 SOEB GP 517
Petitioners-Objectors,	)	
v.	)	
DONALD J. TRUMP,	)	Hearing Officer Clark Erickson
Respondent-Candidate.	)	

CANDIDATE'S EXCEPTIONS TO
HEARING OFFICER'S REPORT AND RECOMMENDATION

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Introduction

The hearing officer's principal recommendation is correct, and the Board should adopt it. As Judge Erickson explains, Illinois law does not authorize the board to engage in complex constitutional analysis, or to entertain objections of the type that was filed here.

The General Counsel's recommendation also is correct and provides an additional reason for overruling the Objection. As the General Counsel explains, the Board's statutory authority is properly construed to extend only to determining whether election paperwork contains knowing or willful misstatements. Since there is no evidence of that here, the Objection should be overruled.

The hearing officer's alternative recommendation, however, is wrong and unwarranted, and the Candidate takes exception to it. Although the hearing officer expressly declined to find that President Trump intended any violence on January 6th (*see* Hearing Officer Report and Recommended Decision ("*Report*"), at 16), the hearing officer suggests the Board could find that the candidate "engaged in insurrection" anyway. That recommendation is factually wrong and legally unsupportable, for several reasons.

First, the evidence squarely contradicts the hearing officer's factual conclusions. In the context of the history of violent American political protests—a history which the the City of Chicago and the State of Illinois is well acquainted—January 6 was not insurrection and thus no justification for invoking section 3. Moreover, Section 3 requires one to "engage" in insurrection, and "engaging" requires intent, as the U.S. Attorney General recognized even before ratification of Section 3. Here, all evidence shows that on January 6, 2021, President Trump never advocated or called for violence, but rather repeatedly called for protestors to be peaceful. And prior to January 6, 2021, President Trump authorized mobilization of the National Guard to forestall any violence.

Second, the hearing officer's factual conclusions draw heavily on a congressional committee report that is not admissible or reliable under settled Illinois law. Illinois law prohibits the use of hearsay legal conclusions or opinions contained in government reports. Ill. R.Evid 803(8). Further, the committee was highly biased and presented a one-sided argument in an effort to vindicate every committeemember's pre-conceived opinion that President Trump incited insurrection.

Third, the hearing officer has not articulated any legal definition of what qualifies as "engaging in insurrection" under Section Three of the Fourteenth Amendment, and the standard he implicitly suggests could be applied is mistaken and unworkable. The hearing officer's alternative recommendation depends on the legal conclusion that someone can "engage in insurrection" without even intending violence, or simply through political speech that does not even mention the alleged insurrection. That cannot be right.

Fourth and finally, the hearing officer's recommendation does not address a raft of legal issues that would have to be decided in order to sustain the Objection. The hearing officer's report notes several independent legal bases that President Trump identified for dismissing the objection. In order to uphold the Objection, the Board would be required to consider and reject each of these arguments. The hearing officer, however, engaged in no legal analysis and makes no recommendations as to any of these issues.

In short, the hearing officer correctly reaches the legal conclusion that the Board lacks power to analyze the constitutional issues in this case. Likewise, the General Counsel correctly concludes that the Board's inquiry should end once it determines the absence of any willful or knowing misstatement in election paperwork. That should end the Board's analysis.

Exception 1
President Trump did not engage in insurrection.

A. The hearing officer himself found that President Trump did not intend to cause or incite violence.

In order to find that President Trump "engaged" in insurrection, the hearing officer must necessarily find that President Trump *intended* to incite violence on January 6, 2021. But the hearing officer did not, and could not, make such a finding. Indeed, the hearing officer recognized that President Trump never intended to incite violence, stating that "[e]ven though the Candidate may not have intended for violence to break out…." *Report*, p. 16. To "engage," under Section Three, requires some overt, voluntary act. 12 Op. Att'y Gen. 141, 164 (1867); *see also* Cambridge Dictionary, "engage," avail. at https://dictionary.cambridge.org/dictionary/english/engage (to become involved, or have contact, with someone or something). It is a logical impossibility for President Trump to have "engaged" in "insurrection" absent specific intent to do so.

B. On January 6th, 2021 President Trump repeatedly called for peace, not violence.

The hearing officer reasoned that a tweet sent by President Trump encouraged violence on January 6, 2021, based on context. But the plain language of the tweet shows that it did not encourage violence. And importantly, the context supports this conclusion. The tweet was sandwiched between multiple other communications in which President Trump explicitly and unambiguously called for protestors to be peaceful, as demonstrated by the following timeline:

- At 1:15 pm President Trump speaks at length at the Ellipse. He refers to the protest at the Capitol once, telling the crowd "I know that everyone here will soon be marching over to the Capitol Building to peacefully and patriotically make your voices heard." *Anderson v. Griswold*, 2023 WL 8770111 (Dec.

19, 2023) (the "*Colorado Trial*"), Petitioners' Exhibit No. 49, at 16:25 to 16:35.

- One hour and nine minutes later, at 2:24 pm, President Trump tweets that "Mike Pence did not have the courage to do [the right thing]." *Colorado Trial*, Petitioners' Ex. 148, at 83.

- Just fourteen minutes later, at 2:38 pm, President Trump tweets, "Please support our Capitol Police and Law Enforcement. They are truly on the side of our Country. Stay Peaceful." *Id*.

- Exactly 35 minutes later, at 3:13 pm, President Trump again instructs protestors to be peaceful; "I am asking everyone at the U.S. Capitol to remain peaceful. No violence! Remember, WE are the Party of Law & Order – respect the Law and our great men and women in Blue. Thank you!" *Id*., at 84.

- Again, 50 minutes later, at 4:03 pm, President Trump instructs protestors to be peaceful. In this instance he records and issues a short video statement, expressing understanding of the protestors' "pain" and then forcefully telling them to "go home" and that we "need peace." *Colorado Trial*, Petitioners' Ex. 68.

The Hearing Officer focused on only one of the five above communications. Further, all inferences regarding President Trump's intent or goals were unsupported by any evidence, but instead interpreted one tweet that – on its face – was entirely nonviolent. And the hearing officer also failed to consider President Trump's tweet just *fourteen minutes* later admonishing protestors to "stay peaceful," as well as his previous speech admonishing those who were peacefully rallying at the Ellipse to walk to the Capitol building "peacefully and patriotically." And President Trump's words had their intended effect; eyewitnesses who participated in the rally at the Ellipse testified in Colorado court that the crowd was happy and peaceful after President Trump's speech. *Colorado Trial,* Trial Transcript, Day 4, November 2, 2023, 47:17-48:7.; *Id*., at 54:7-15; *see also* Affidavit of T. Evans, Ex. C to Candidate's Opposition to Objectors' Motion for Summary Judgment; Affidavit of C. Burgard, Ex. D to Candidate's Opposition to Objectors' Motion for Summary Judgment.

C. President Trump sought to prevent violence on January 6th, by authorizing use of the national guard.

The hearing officer also did not consider ample evidence the President Trump exercised his presidential authority as Commander in Chief to authorize the National Guard troops to be on hand to *prevent* violence on January 6, 2021. Unrebutted evidence shows that:

- On January 3, 2021, President Trump met with the Acting Secretary of Defense and the Chairman of the Joint Chiefs of Staff and concurred in activation of the Washington, DC, National Guard to support law enforcement. *Colorado Trial*, Intervenor President Trump's Ex. 1027, Department of Defense Time Line; *Colorado Trial,* Trial Transcript, Day 3, November 1, 2023, 205:11-206:25.

- Also on January 3, 2021, President Trump specifically asked the Acting Secretary of Defense and the Chairman of the Joint Chiefs of Staff about preparations for the anticipated protests on January 6, and the acting Secretary of Defense told him, "We've got a plan and we've got it covered." *Colorado Trial*, Intervenor President Trump's Ex. 1031, Department of Defense Inspector General report, "Review of the DOD's Role, Responsiblities, and Actions to prepare for and Respond to the Protest and its Aftermath at the U.S. Capitol Campus on January 6, 2021, dated November 16, 2021.

- During the January 3, 2021, meeting, President Trump told the Acting Secretary of Defense Christopher Miller and the Chairman of the Joint Chiefs of Staff that he wanted to authorize the Washington, DC, National Guard (beyond the 346 troops authorized for traffic control) to support law enforcement on January 6, 2021, Trial Transcript, Day 3, November 1, 2023, 205:11-206:25, as witnessed by Kash Patel, Chief of Staff to the Acting Secretary of Defense. *Colorado Trial*, Trial Transcript, Day 3, November 1, 2023, 212:7-20.

- Patel testified that in the days leading up to January 6, 2021, President Trump authorized the deployment of 10,000- 20,000 National Guard troops for January 6, 2021. *Colorado Trial*, Trial Transcript, Day 3, November 1, 2023, 212:7-20.

- In a separate meeting on January 4, 2021, President Trump told staff helping plan the Ellipse rally that "we need to call the Guard to make sure there isn't a problem … Let's get 10,000 National Guard." *Colorado Trial*, Trial Transcript, Day 3, November 1, 2023, 295:2-17.

- That same day, a staff member who participated in the meeting, confirmed President Trump's comments about the National Guard in a text. *Colorado Trial*, Petitioners' Ex. 265, pp. 1, 37.

Two meetings, three witnesses, and one corroborating report. This evidence is unrebutted. And it all demonstrates that President Trump sought to prevent violence on January 6, 2021, by authorizing the deployment of National Guard troops to immediately squelch any potential violence.

In addition to authorizing National Guard troops, President Trump vetoed speakers at the Ellipse who could be considered provocative or incendiary. *Colorado Trial*, Trial Transcript, Day 3, November 1, 2023, 286:21-287:17; 292:8-294:4.

D. Any opinions or conclusions about President Trump's intentions are drawn from the January 6th Report's biased, untrustworthy opinions and conclusions.

The only witness testimony admitted by the hearing officer came from live testimony at the Colorado hearing, held from October 30 to November 3, 2023. Not a single witness at that hearing testified that President Trump intended to incite the people at the Capitol to riot and storm the Capitol building. By contrast, the Colorado Petitioners called an expert witness who testified that he could not opine on President Trump's intent. *Colorado Trial*, Trial Transcript, Day 2, October 31, 2023, 205:19-23; 208:8-11.

Accordingly, any evidence to the contrary is drawn from the January 6th Report. That report was inadmissible, biased and untrustworthy, as explained in Exception 2.

Even before the Committee was formed, every single member voted to impeach President Trump for "inciting insurrection." The committee did not contain a single member who disagreed with that conclusion, or who was drawn from the 46% of Congressional Members who rejected the opinion that President Trump incited insurrection. Indeed, the

chief investigator of the Committee admitted that every member on the Committee, prior to any investigation by the Committee, held the opinion that President Trump "incited insurrection" as an "obvious fact." *Colorado Trial*, Trial Transcript, Day 5, November 3, 2023, 204:4-16. The Committee's procedures were so biased and so unfair that one Congressional Representative who had been involved in the impeachment debates, who had served as a prosecutor for 28 years, and who had even served as a staffer on the highly publicized Iran-Contra Congressional investigation, believed that the Committee's procedures were like a prosecutor showing up to a trial without the defense even being present. *Colorado Trial*, Trial Transcript, Day 4, November 2, 2023, 230:14-231:6.

Exception 2

The Conclusions From The January 6 Report And Other Record Materials Are Not Admissible Under Illinois Law.

The hearing officer's recommended factual findings are drawn almost exclusively from a congressional committee report on the events of January 6. But blackletter Illinois law makes clear that the materials from this report are inadmissible.

A. The opinions and conclusions from the January 6 report are inadmissible under the plain text of the Illinois Rules of Evidence.

The January 6 report falls squarely within the standard definition of hearsay: it is a series of statements made out of court, which Objectors now present to the Board for the purpose of proving the truth of what they state. The hearing officer found that the report nevertheless is admissible pursuant Illinois Rule of Evidence 803(8). This rule provides an exception from the hearsay bar for "factual findings from a legally authorized investigation, ***but not findings containing expressions of opinions or the drawing of conclusions.***" (emphasis added).

There is a very good reason for the "opinions and conclusions" exception to this admissibility rule. No matter their party or ideology, government officials (and their allies) should not be able to shut down disagreement with their opinions or conclusions simply by publishing them in official reports, and then using the publication to establish those opinions or conclusions as "facts" in litigation against their political opponents. But the core of the hearing officer's alternative factual recommendations consists of his wholesale adoption of public-record conclusions of exactly this forbidden type.

The hearing officer's recommendation includes, at most, three paragraphs of recommended factual findings by the hearing officer himself. (*Report*, at 16-17, ¶¶ 5-7.) By contrast, the hearing officer recommends adopting, and re-prints in full, ***seventeen*** paragraphs of conclusions from the January 6 House Select Committee Report. (*See Report*, at 16, ¶¶ 19-20.) These seventeen paragraphs include numerous inferences drawn by the January 6 committee about President Trump's and others' state of mind. For instance, the hearing officer repeats the January 6 committee's conclusions that "Donald Trump purposely disseminated false allegations" that "provoked his supporters to violence on January 6," and that he "kn[ew] that" it "would be illegal" for Vice President Pence "to refuse to count electoral votes." (*Id.* at 18.) Most importantly, with respect to the hearing officer's "fan the flames" recommendation, the January 6 committee concluded that President Trump "kn[ew] that" his tweet criticizing Vice President Pence "would incite further violence." (*Id.* at 19.) Indeed, it appears that the hearing officer's own recommended findings of fact also rely heavily, if not exclusively, on the conclusions and opinions in the January 6 report. (*See id.* at 16-17.)

It is difficult to think of a better example of hearsay "opinions" or "conclusions" that are, and should be, inadmissible under Rule 803(8). These conclusions are not the

result of any testimony or admissions by President Trump himself. Rather, they are inferences or conclusions that the House committee investigators purported to draw from their review of other materials. If state-of-mind conclusions of this kind were admissible, that would create a powerful temptation for government officials of all stripes to publish "reports" about their political opponents' culpable mental state, for purposes of establishing liability in proceedings like this one.

And finally, the January 6th Report itself contained hearsay and unsupported opinion, as President Trump identified in his objection to its admissibility. **Ex. 1**, *Colorado Trial*, Intervenor Trump's Objections to Specific Findings Contained in January 6th Report (Ex. No. 78), October 28, 2023. For instance, recorded interviews, such as those of Cassidy Hutchinson, Bill Barr, and Pat Cipollone, contain multi-level hearsay outside of any exception: the recording of each interview and the underlying content are both hearsay because in neither instance was proper cross-examination permitted. *See People v. McCullough*, 2015 IL App (2d) 121364, ¶ 113; *United States v. Green*, 258 F. 3d 683, 690 (7th Cir. 2001). These statements all went to President Trump's intent: Cassidy Hutchinson stated that she overheard someone (unnamed) telling President Trump that some of his supporters at the Capitol were armed; Barr and Cipollone stated that President Trump did not want to do anything about the riots and that President Trump thought Vice-President Pence should be hanged. *Colorado Trial,* Petitioners' Reply to Trump's Motion in Limine to Exclude Petitioners' Exhibits, October 20, 2023, p. 12. This is the only type of testimony that Petitioners in Colorado, and Objecters here, offered to support the argument that President Trump had the specific intent to cause the riot—someone allegedly heard somebody else say something to President Trump. This is inadmissible hearsay.

B. The Congressional committee that produced the January 6th Report was heavily biased and treated "incitement" of insurrection as an "obvious fact."

Even before the Committee was formed, every single member voted to impeach President Trump for "inciting insurrection." Not a single member on the Committee disagreed with that conclusion, and none as drawn from the 46% of Congressional Members who rejected the opinion that President Trump incited insurrection. Indeed, the chief investigator of the Committee admitted that every member on the Committee, prior to any investigation by the Committee, treated the clai, that President Trump "incited insurrection" as an "obvious fact." *Colorado Trial,* Trial Transcript, Day 5, November 3, 2023, 204:4-16. And the Committee's procedures were so biased and so unfair that one Congressional Representative who had been involved in the impeachment debates, served as a prosecutor for 28 years, and even served as a staffer on highly publicized Iran-Contra Congressional investigation, believed that the Committee's procedures were like a prosecutor showing up to a trial without the defense even being present. *Colorado Trial,* Trial Transcript, Day 4, November 2, 2023, 230:14-231:6.

Exception 3
The Hearing Officer's Implicit Definition of "Engaging In Insurrection" Is Mistaken And Unworkable.

The third problem with the hearing officer's alternative recommendation is that it applies a legal definition of "engaging in insurrection," under Section Three of the Fourteenth Amendment, that is mistaken and unworkable.

Consistent with his primary recommended conclusion that the Board lacks authority under Illinois law to engage in constitutional analysis, the hearing officer did not expressly address or analyze the definitions of "insurrection," or "engag[ing] in" insurrection, pursuant to Section Three. That by itself makes the alternative recommendation infirm. The Hearing Officer could not properly recommend factual findings about whether the

candidate engaged in insurrection without first making a legal recommendation about what it means to engage in insurrection.

Examining the recommendation's factual findings, moreover, reveals that they implicitly adopt a legal definition of "engaging in insurrection" that is impossibly broad. The hearing officer recommends finding that the candidate "engaged" on January 6th even though the candidate "may not have intended for violence to break out on January 6th." (*See Report*, at p.16.) Moreover, the hearing officer states that it is "absolutely damning" that, during the time when the candidate knew that violence and crimes were occurring on January 6, the candidate sent a Tweet that did not call for or approve of violence, but that criticized Vice President Pence.

In other words, the hearing officer implicitly construes "engaging in" insurrection, under Section Three, to include (i) conduct taken without any intent that violence occur, and (ii) pure speech that does not call for crimes or violence, but that expresses ideas held by other individuals who allegedly are committing crimes or violence. This cannot be correct. It bears no resemblance either to the common English meaning of the words "engaged in insurrection," or to any historical usage or understanding of those words.

On top of that, the hearing officer engages in no discussion at all regarding what Objectors were required to prove to establish that an "insurrection" occurred, or whether Objectors have shown that the events of January 6, 2021, met that standard. "Insurrection" as understood at the time of the passage of the Fourteenth Amendment meant the taking up of arms and waging war upon the United States. When considered in the context of the time, this makes sense. The United States had undergone a horrific civil war in which over 600,000 combatants died, and the very survival of the nation was in doubt. Focusing on war-making was the logical result. By contrast, the United States has a long history of

political protests that have turned violent—a history which the City of Chicago is well acquainted. For example, the 1968 Democratic National Convention in Chicago saw hundreds of people injured in violent political protests. *See* Olivia B. Waxman, '*Violence Was Inevitable': How 7 Key Players Remember the Chaos of 1968's Democratic National Convention Protests*, Time (Aug. 8, 2018), https://time.com/5377386/1968-democratic-national-convention-protesters/. More recently, in the summer of 2020 alone, violent protestors targeted the federal courthouse in Portland, Oregon, for over 50 days, repeatedly assaulted federal officers and set fire to the courthouse, all in support of a purported political agenda opposed to the authority of the United States. See Portland Riots Read Out: July 21, U.S. Department of Homeland Security (Jul. 21, 2020), https://www.dhs.gov/news/2020/07/21/portland-riots-read-out-july-21. In the context of the history of violent American political protests, January 6 was not insurrection and thus no justification for invoking section 3. Yet the hearing officer did not even set forth a standard for assessing whether a riot or protest is an "insurrection," let alone provide in-dept analysis.

President Trump's motion to dismiss, filed before the hearing officer, discusses these matters in depth. The hearing officer's alternative recommendation does not engage with these arguments and issues, let alone decide them. Its conclusion is mistaken and the Board should not adopt it.

Exception 4

The Hearing Officer Acknowledged, But Did Not Decide, The Many Legal Issues Necessary To Reach His Alternative Recommendation.

Finally, the most fundamental procedural problem with the hearing officer's alternative recommendation is that the great majority of the legal analysis that would be necessary for it is simply missing.

Beyond the Board's lack of authority to hear this Objection under Illinois law, the hearing officer identifies four other, completely independent, legal grounds that President Trump identified for dismissing the objection. President Trump's *Motion to Dismiss the Objection* explained these grounds at length, and the *Recommendation* itself even describes them in considerable detail. Those grounds are:

(1) "[T]hat this matter is a political question" that the Board cannot decide—a proposition for which, according to the Recommendation, President Trump "offers precedent that is directly on point." (*Report*, at pp. 4-5.)

(2) "[T]hat enforcement of Section 3 is limited to Congress," or more precisely, to procedures prescribed or authorized by Congress. (*Id.* at 5.)

(3) "[T]hat Section 3 of the Fourteenth Amendment bars holding office, not running for office," and that "the Constitution prohibits States from accelerating qualifications for elected office to an earlier time than the Constitution specifies." (*Id.* at 5-6.)

(4) "[T]hat the president is not an officer of the United States under the constitution." (*Id.* at 6.)

In addition to these grounds, President Trump's briefing additionally argued that the Presidency is not an "office … under the United States" to which Section Three applies. The General Counsel's recommendation similarly acknowledges and these lists five arguments. (At p.2.)

Each of these arguments is a separate and independent legal ground for why the Objection fails and must be dismissed. Therefore, the hearing officer could not logically reach his alternative recommendation—that the Objection could be sustained—without addressing and making recommendations with respect to each of these five arguments.

But the hearing officer did not do so. Although the Recommendation accurately describes four of these five arguments in some detail (and the General Counsel's recommendation does the same), it makes no attempt to analyze, let alone resolve, any of them. That is wholly consistent with the hearing officer's primary conclusion that the Board lacks statutory authority to engage in complex constitutional analysis. But the Board cannot consider or adopt the hearing officer's alternative recommendation—which turn on the merits of the Objection—without first resolving these other five reasons why the Objection fails as a matter of law and should be dismissed.

Conclusion

The hearing officer's primary recommendation is correct: the Board lacks authority to take up this Objection, and it therefore should be dismissed. Precisely because of that lack of authority, the Board's analysis should end there. The General Counsel recommendation also is correct: there is no evidence of any willfully or knowingly false statement, and by statute the Board's inquiry ends there. But to any extent the Board engages in further analysis, it should (i) hold as a matter of law that the Petition fails and must be dismissed, for the many reasons explained in President Trump's motion to dismiss and above, and (ii) find as a matter of fact that President Trump did not "engage in insurrection" and may appear on the ballot in Illinois, for the many reasons explained in President Trump's opposition to summary judgment, in President Trump's argument before the hearing officer, and above.

Dated: January 29, 2024

Respectfully submitted,

CANDIDATE DONALD J. TRUMP

By: /s/ Adam P. Merrill
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CERTIFICATE OF SERVICE

I, Adam P. Merrill, hereby certify that before 5:00 p.m. on January 29, 2024, I caused a true and correct copy of the foregoing EXCEPTIONS TO HEARING OFFICER REPORT AND RECOMMENDATION to be served via email as follows:

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