



STATEMENT OF THE NEW YORK CITY BAR ASSOCIATION CALLING FOR THE REMOVAL OF DONALD J. TRUMP AS PRESIDENT

BACKGROUND

The New York City Bar Association has earlier expressed its grave concern about the illegal insurrection and invasion of the Capitol on January 6, 2021 by supporters of President Trump intent on disrupting the certification of the Electoral College results, supporters who were incited by the words of President Trump himself.¹ In that message, we called for Congress to fulfill its constitutional duty to certify the November 3 Presidential election and announced our intention to address separately the President’s culpability for his own actions and those of his supporters. We do so now.

On January 6, 2021, shortly before the United States Senate and House of Representatives were scheduled to meet in joint session to count the votes of the Electoral College, President Trump addressed a crowd of his supporters that he had summoned to Washington, via public pronouncements on television and social media, for the purpose of overturning the results of the 2020 presidential election. During his lengthy remarks at the Ellipse near the White House, President Trump reiterated the false claims that he had “won this election, [and] we won it by a landslide.”² Trump added “[w]e will never give up, we will never concede” and urged his followers to continue to “fight” the election results and not show “weakness.”³ He criticized the Vice President for refusing to alter the election results⁴ and then exhorted the crowd to descend on the Capitol to express their displeasure with the proceedings then underway in the Joint Session of Congress in the House of Representatives. Representative Mo Brooks of Alabama made his own incendiary remarks to the assemblage, including that “Today is the day American patriots start

¹ Sheila S. Boston and Stephen Kass, “New York City Bar Ass’n Condemns Today’s Events at U.S. Capitol, and Urges Congress to Proceed with Electoral College Certification,” Jan. 6, 2021, <https://www.nycbar.org/media-listing/media/detail/new-york-city-bar-association-condemns-todays-events-at-us-capitol-and-urges-congress-to-proceed-with-electoral-college-certification> (all websites last visited Jan. 10, 2021).

² Erik Wasson, Billy House and Daniel Flatley, “Congress Resumes Electoral Vote Tally After Mob’s Disruption,” Bloomberg, Jan. 6, 2021, <https://www.bloomberg.com/news/articles/2021-01-07/congress-resumes-electoral-vote-tally-after-disruption-by-mob>.

³ *Id.*

⁴ John Haltiwanger, “Trump Attacks Pence for Not Having Courage to Overturn Election,” *Business Insider*, Jan. 6, 2021, <https://www.businessinsider.com/trump-attacks-pence-for-not-having-courage-to-overturn-election-2021-1>.

taking down names and kicking ass.”⁵ The event also featured remarks from Trump’s personal attorney, Rudy Giuliani, who after offering numerous false and unsubstantiated claims of voter fraud, urged the crowd to pursue “trial by combat,”⁶ and from the President’s son, Donald Trump, Jr., who warned Republican lawmakers, “If you’re gonna be the zero and not the hero, we’re coming for you and we’re going to have a good time doing it.”⁷

Incited by the President’s false claims of election fraud and exhortations, an angry mob stormed the Capitol, overran barricades, broke windows, overwhelmed the Capitol Police on site, ransacked offices and desecrated the halls of Congress in the greatest breach of the building since the War of 1812.⁸ This seditious conduct menaced the members of Congress, the Vice President, the Speaker of the House and their staffs, who had to be evacuated to secure locations, and disrupted the joint session of Congress until order could be restored hours later.⁹ It resulted in the deaths of five persons, including a police officer, and injuries to dozens more.¹⁰ This incident of domestic terrorism also revealed a grievously serious failure of the security systems and protocols that should have protected the Capitol from any such attack. Moreover, the tepid law enforcement response to the actions of these rioters was in stark contrast to the heavily armed response by numerous federal law enforcement agencies to the largely peaceful protests in Lafayette Square

⁵ Jason Lemon, “Mo Brooks Attacks ‘Weakling, Cowering, Wimpy’ GOP Congressmen During D.C. Protest Speech,” *Newsweek*, Jan. 6, 2021, <https://www.newsweek.com/mo-brooks-attacks-weakling-cowering-wimpy-gop-congressmen-during-dc-protest-speech-1559345>.

⁶ Charlotte Klein, “Watch Rudy Giuliani Demand Trial by Combat to Settle the Election,” *New York Magazine*, Jan. 6, 2021, <https://nymag.com/intelligencer/2021/01/watch-giuliani-demand-trial-by-combat-to-settle-election.html>.

⁷ Gustaf Kilander, “Rudy Giuliani Calls for ‘Trial by Combat’ to settle election in rant at Wild DC Rally,” *The Independent*, Jan. 7, 2021, <https://www.independent.co.uk/news/world/americas/us-election-2020/rudy-giuliani-dc-trump-rally-b1783428.html>; David Goldiner, “‘We will never concede,’ Trump urges thousands of supporters to keep fighting to overturn election,” *New York Daily News*, Jan. 6, 2021, <https://www.nydailynews.com/news/politics/us-elections-government/ny-election-trump-rally-20210106-iyklhshknfchhl2ct53pf7452m-story.html>.

⁸ “Photos show damage to Capitol following 1st mass breach since War of 1812,” *Today*, Jan. 7, 2021, <https://www.today.com/news/photos-show-damage-capitol-following-1st-mass-breach-war-1812-t205222>.

⁹ “Electoral Vote Count Disrupted by Protesters,” *Boston Herald*, Jan. 6, 2021, <https://www.bostonherald.com/2021/01/06/congress-electoral-college-vote-count-disrupted-by-protesters/>. Jim Bourg, a Reuters editor who was on the scene during the storming: “I heard at least 3 different rioters at the Capitol say that they hoped to find Vice President Mike Pence and execute him by hanging him from a Capitol Hill tree as a traitor. It was a common line being repeated. Many more were just talking about how the VP should be executed.” Jim Bourg (@jimbourg), Twitter (Jan. 8, 2021, 10:01 AM), <https://twitter.com/jimbourg/status/1347559078831284227>; see also Travis Gettys, “‘Hang Mike Pence!’ Trump supporters intended to execute vice president during Capitol riots,” *Raw Story*, Jan. 8, 2021, <https://www.rawstory.com/mike-pence-donald-trump-2649791644/>. NBC corroborated the report of the mob calling for the death of Pence, erecting a scaffolding with a noose for hanging and specifically searching for the Vice President and Speaker Pelosi for purposes of kidnapping or harming them in the following report, “Must-see new video shows Capitol riot was way worse than we thought,” *MSNBC*, Jan. 8, 2021, <https://www.msnbc.com/all-in/watch/chris-99178053752>.

¹⁰ Eric Levenson, Amir Vera and Mallika Kallingal, “What we know about the 5 deaths in the pro-Trump mob that stormed the Capitol,” *CNN*, Jan. 8, 2021, <https://www.cnn.com/2021/01/07/us/capitol-mob-deaths/index.html>.

by Black Lives Matter sympathizers on June 1, 2020,¹¹ suggesting, as the President-elect has observed,¹² a disparate, two-tiered standard of federal police response by the Trump Administration based upon racial considerations.

The President's actions on January 6th were consistent with his earlier efforts to subvert the certification of the free and fair presidential election of 2020.¹³ Most notable among these efforts was the President's telephone call on January 2, 2021 to Georgia Secretary of State Brad Raffensperger, imploring him to "find" enough votes to overturn the state's presidential election results and threatening him with criminal prosecution should he fail to do so.¹⁴

Our democracy has been grievously threatened by these events and, incredibly, by the actions of the President in inciting them. President Trump has betrayed his oath to the American people. Immediate steps must be taken to prevent any further seditious action by him and to ensure the integrity of our democracy and the security of the nation. Beyond these grave internal wounds, our reputation around the world as a nation governed by law and not by would-be tyrants has been deeply damaged, as evidenced by the reactions of both allies and adversaries abroad.¹⁵

REMEDIES

These actions by the President and his supporters must not go unpunished. We believe the following actions are now appropriate:

¹¹ See Letter to Members of Congress Request for Prompt Investigation Into the Events of June 1, 2020 at Lafayette Square Park, Washington, DC, NEW YORK CITY BAR ASSOCIATION, July 26, 2020, <https://s3.amazonaws.com/documents.nycbar.org/files/2020726-LafayetteSquareInvestigationCongress.pdf>.

¹² Julia Manchester, "Biden Says There Was Double Standard in Treatment of Capitol Mob, BLM Protesters," *The Hill*, Jan. 7, 2021, <https://thehill.com/homenews/campaign/533194-biden-says-there-was-double-standard-in-treatment-of-capitol-mob> (President-Elect Biden: "a clear failure to carry out equal justice").

¹³ Anita Kuman & Gabby Orr, "Inside Trump's pressure campaign to overturn the election," *Politico*, Dec. 21, 2020, <https://www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486>.

¹⁴ Full Transcript and Audio of the call between Trump and Raffensperger, *Washington Post*, Jan. 5, 2021, https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html. The day after the President's call to Mr. Raffensperger, the U.S. Attorney for Atlanta was also forced to resign by the President after he refused to bring voter fraud cases that he and his staff considered meritless. Aruna Viswanatha, Sadie Gurman and Cameron McWhirter, "White House Forced Georgia U.S. Attorney to Resign," *Wall St. J.*, Jan. 9, 2021, <https://www.wsj.com/articles/white-house-forced-georgia-u-s-attorney-to-resign-11610225840>.

¹⁵ "World leaders express 'shock' after pro-Trump rioters storm Capitol," *NBC News Digital*, Jan. 6, 2021, <https://www.nbcnews.com/news/world/world-leaders-express-shock-after-pro-trump-rioters-storm-1capitol-n1253146>; Tucker Reals, "Foreign reaction to the 'disgraceful scenes' at the U.S. Capitol," *CBS News*, Jan. 7, 2021, <https://www.cbsnews.com/news/us-capitol-riot-donald-trump-protests-foreign-reaction>; Evelyn Cheng, "China Compares U.S. Capitol Riots With Hong Kong Protests," *CNBC*, Jan. 7, 2021, <https://www.nbcnewyork.com/news/business/money-report/china-compares-u-s-capitol-riots-with-hong-kong-protests/2817208/>.

A. Twenty-Fifth Amendment

Vice President Pence and the principal officers of the Executive Department should fully consider whether, by virtue of his conduct attempting to obstruct the orderly transition of the government through constitutional process or otherwise abusing his powers, the President is able to discharge the powers and duties of his office. If a sufficient number consider he is not able to do so, they should then transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration to that effect. The City Bar believes that such action would be fully warranted in light of the President's conduct over the past week and is a necessary precaution to safeguard the nation's constitutional processes against further unlawful intrusions by the President.

B. Impeachment

The House of Representatives should immediately, through an expedited process, take up one or more articles of impeachment against the President predicated upon his conduct:

1. in soliciting, on January 2, 2021, the fraudulent modification of election certificates from the state of Georgia for purposes of obstructing the Constitutional process of tallying and certifying the vote of the Electoral College prior to the assembly of Congress in joint session on January 6, 2021;
2. by organizing, on January 6, 2021, a gathering of his political followers in the immediate proximity of the Capitol, and inciting them to acts of violence, storming the Capitol, for the express purpose of obstructing the constitutional process of tallying and certifying the vote of the Electoral College by the House of Representatives and Senate, jointly assembled for that purpose; and
3. in instigating and condoning, on January 6, 2021, the storming and ransacking of the Capitol by a violent mob seeking to suspend the constitutionally mandated process of democratic transition, forcing elected politicians into hiding as their physical security was threatened, and leaving five people dead, including one policeman brutally murdered by the mob inside the Capitol itself, and several injured.

These acts were in violation of the President's duty to preserve, protect and defend the Constitution and execute the laws of the United States and were carried out and orchestrated by the President to serve his seditious objective of extending his control over the Executive Department beyond the end of his term. The City Bar believes that these acts should be found to be High Crimes and Misdemeanors within the meaning of the Constitution, warranting the impeachment of the President and his removal from office.

C. Censure

We regard a simple resolution of censure against the President to be inadequate as the sole remedy for the actions described above. While expressing disapproval of his dangerous and unlawful conduct and loss of confidence in his ability to faithfully perform his constitutional

duties,¹⁶ a censure resolution normally carries no penalty and would permit President Trump to remain in office for the duration of his term and be eligible to seek national office in the future. Such a remedy is simply not commensurate with his blatant violations of his oath of office and constitutional duties. Nevertheless, a strong statement of presidential censure, in addition to the remedies discussed above, by both the Senate and the House, could make clear that the President's incitement to insurrection and related actions have been found intolerable by the Congress and violated his oath of office so that, in accordance with Section 3 of the Fourteenth Amendment, he is barred from holding any future federal or state office absent an affirmative waiver by two-thirds of both the Senate and the House.¹⁷ Congress should, in addition, consider censure or other disciplinary action against its own members who were complicit in the President's January 6th activities and emboldened his supporters either by their participation in his rally that day or other actionable conduct.¹⁸

D. Criminal Investigations/Law Enforcement Actions

The Acting United States Attorney for the District of Columbia announced on January 7 that his office has commenced an investigation into the January 6 riot, including the role of "all actors, not only the people that went into the building, but . . . others that maybe assisted or facilitated or played some ancillary role in this. We will look at every actor and all criminal charges."¹⁹ Subsequently, on January 8, a spokesperson for the Department of Justice told reporters that "at this point" the Department was focused on events at the Capitol and no one was as of yet being charged with incitement or insurrection.²⁰ He said that investigators will continue to follow the facts and the law in the case.²¹ At this writing, at least 13 individuals have been criminally charged in the incident in the United States District Court for the District of Columbia and dozens have been charged in D.C. Superior Court.²² Both the FBI and the District of Columbia Metropolitan Police Department have reported that their investigations of the incident are continuing.²³

It should not need stating that the January 6 insurrection and the culpability of those who incited, aided or abetted it, including President Trump, merit thorough investigation. Further, the failures by various law enforcement agencies to quell the uprising must also be vigorously

¹⁶ *Resolutions to Censure the President*, CONGRESSIONAL RESEARCH SERVICE (Nov. 20, 2019) (CRS *Censure*).

¹⁷ U.S. Const. amend. XIV, § 3.

¹⁸ U.S. Const., art. I, § 5; CRS *Censure*.

¹⁹ Devin Barrett, "Trump's remarks before Capitol riot may be investigated, says acting U.S. attorney in D.C.," *Washington Post*, Jan. 7, 2021, https://www.washingtonpost.com/national-security/federal-investigation-capitol-riot-trump/2021/01/07/178d71ac-512c-11eb-83e3-322644d82356_story.html.

²⁰ Dan Mangan, "Trump not expected to be criminally charged—at least for now—with inciting Capitol riot, DOJ says," *CNBC*, Jan. 8, 2021, <https://www.cnbc.com/2021/01/08/capitol-riot-trump-will-not-face-charges-for-inciting-mob-doj-says.html>.

²¹ *Id.*

²² "Thirteen Charged in Federal Court Following Riot at the United States Capitol," *U.S. Dept. of Justice*, Jan. 8, 2021, <https://www.justice.gov/opa/pr/thirteen-charged-federal-court-following-riot-united-states-capitol>

²³ *Id.*

examined, both by Congress and by the appropriate law enforcement agencies of the federal and local D.C. governments. Absent that, the investigation will lack credibility and will serve little purpose in restoring the public's confidence in our justice system and the evenhanded administration of the rule of law.

The House of Representatives and the Senate should, through appropriate process of inquiry, consider whether any of their members were involved in inciting, aiding and abetting the riotous assault on Congress, and should consider appropriate disciplinary measures in the event of an affirmative finding, as well as a possible referral for prosecution to criminal justice authorities.

With respect to the President's extortionate telephone call to the Georgia Secretary of State on January 2, although the Georgia Secretary of State has recused himself and his office from conducting any investigation or referral for prosecution of the President's call because of his own involvement as a witness, our Association urges that a thorough and vigorous investigation of the matter be conducted by the United States Department of Justice, the United States Attorney for the Northern District of Georgia, the Georgia Attorney General and the District Attorney of Fulton County, Georgia, which county was falsely mentioned by Trump during the call as a locus of fraudulent voting practices and was a target of his demand that Secretary Raffensperger "recalculate" the votes cast.

Critically, each investigating body for either event must immediately gather and secure all relevant evidence of potential criminal or actionable conduct against any person involved in the incidents of January 2 and January 6. It is essential that the American people learn the truth about these events, and that those persons who were responsible for or complicit in these efforts to undermine a legitimate presidential election be held accountable, and if appropriate, criminally responsible. If there is no accountability, there will be no deterrent to repetition of these heinous acts, and our democracy may be irreparably damaged.

E. Disparate Treatment

As suggested above, the required investigation needs to include another important subject: the lack of advance planning and preparation to protect the Capitol, and the subsequent actions of some Capitol police which appeared to show tolerance for, and in some cases assistance to, the rioters. These actions and inactions were conspicuous and require the prompt investigation that Senator Schumer and Speaker Pelosi have demanded. The largely white mob, which brandished flags and insignia proclaiming racist taunts and slogans familiar from Charlottesville and earlier Trump rallies, was left largely undisturbed as it roamed the Capitol, occupied the Senate and House chambers, ransacked offices (including the Speaker's office) and removed papers and property from the building. Few individuals were arrested during the hours that they terrorized the Senators and Representatives locked in their offices or other secure locations.²⁴

We have no wish to see anyone subjected to the kind of unlawful brutality that many Black, Latinx, other minority groups, and their allies have experienced when participating in peaceful demonstrations. However, the failure to meaningfully prevent or detain the Capitol

²⁴ We understand that some arrests have taken place since January 6 and that reports indicate further arrests are forthcoming; however the lack of meaningful arrests at the scene calls for further inquiry.

invaders while they engaged in extended illegal, threatening and destructive behavior was a shocking demonstration of the disparate treatment afforded by police to citizens based on their race. This alone is a compelling reason for a thorough review of the training and personnel practices of the Capitol police force.

We acknowledge that many Capitol police did attempt to prevent further entry by the rioters, and that some suffered grievous and, in one case, fatal injuries as a result. A full and proper investigation must shed light on the entire series of events which led to these terrible consequences.

F. Unlawful Orders

In a recent memorandum, Gen. Mark Milley, the Chairman of the Joint Chiefs of Staff, reminded all military personnel that they are not required to, and should not, comply with unlawful orders, even if from the President of the United States.²⁵ Ten former secretaries of defense (Ashton Carter, Dick Cheney, William Cohen, Mark Esper, Robert Gates, Chuck Hagel, James Mattis, Leon Panetta, William Perry and Donald Rumsfeld) have similarly reminded service personnel that unlawful orders are not to be obeyed.²⁶

The obligation to refuse unlawful orders is not limited to military services. All federal employees and contractors have a similar obligation not to carry out unlawful orders from superior officers within their agencies or firms. Under the present circumstances of a continuing pattern of unlawful behavior by the President and his representatives, we remind all federal employees of the importance of taking appropriate steps to ascertain the legality of orders or directives which tell them to take action that they believe may be unlawful. These steps should include (a) consulting with counsel to confirm the accuracy and legality of any questionable orders; (b) recording or making carefully preserved notes of any such questionable orders; and (c) including witnesses on any telephone call or email chain relating to such orders. In evaluating the lawfulness of questionable orders and directives, it is fair, under present circumstances, to view them in the context of the President's now-apparent orchestrated effort to defy the results of the November 3 Presidential election and to see individual actions as part of that effort. If independent counsel is not available to provide advice to a government employee who receives such a questionable order, it may be possible to obtain pro bono representation.

CONCLUSION

When, as now, our Constitutional democracy is threatened by the actions of the very President sworn to uphold it, Congress must act promptly and decisively to preserve the

²⁵ "Top general says no role for military in U.S. presidential election," Associated Press, Aug. 29, 2020 (Milley said, "I will not follow an unlawful order"), <https://www.cnbc.com/2020/08/29/top-us-general-says-no-role-for-military-in-presidential-vote.html>.

²⁶ Ashton Carter, Dick Cheney, William Cohen, Mark Esper, Robert Gates, Chuck Hagel, James Mattis, Leon Panetta, William Perry and Donald Rumsfeld, "All 10 living former defense secretaries: Involving the military in election disputes would cross into dangerous territory," *Washington Post*, Jan. 3, 2021, https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba_story.html.

foundations of our nation. The remedies suggested above are, we believe, necessary first steps that must be taken immediately to preserve our democracy and the rule of law.

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About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world. www.nycbar.org