

Without Fear or Favor

Merrick Garland's Tragic Failure as Attorney General of the United States



"All I Need Are 11,780 Votes: The Fulton County Election Interference Case. On January 2, 2021, Trump called Georgia Secretary of State Brad Raffensperger. The transcript of that call was made public by CNN on January 4, 2021. Also, on the call were Chief of Staff Mark Meadows along with three personal Trump lawyers and two Georgia officials on Raffensperger's end, including Ryan Germany, a lawyer for the State of Georgia. Trump spoke first and delivered a long, mostly nonfactual, rambling statement claiming he won Georgia and setting forth his reasons for the call.

When Raffensperger (a staunch Republican and Trump voter) finally had an opportunity to speak, he did not mince words. He told Trump his information regarding fraudulent conduct by "Never-Trumpers," "harvesting," shredding of ballots, signature verification failure, voting by non-residents--the kitchen sink--was incorrect, and Trump's allegation about Dominion "moving

machines out of Fulton County" was not supported by the facts on the ground in Georgia. Not surprisingly, Raffensperger's unflinching insistence that the voting in Georgia was secure and accurate and that he would not accede to Trump's demands to find him 11,780 votes ("one more than I need"), changed Trump's tone dramatically. Trump told both Raffensperger and Ryan Germany that because they know of the fraud and failed to act "[t]hat's a criminal offense...That's a big risk to you and to Ryan, your lawyer...I'm notifying you that you're letting it happen." The full transcript of the call is public and available online.

When I heard the tape of the conversation and the follow-on public statements by Raffensperger about Trump's call, my initial reaction was that Trump had stepped in it big-time. He was toast. I hadn't counted on Garland remaining AWOL and Fani Willis tearing up the manual on prosecutorial best practices. I will explain Willis' missteps later in this essay. But first a refresher on what SCOTUS held in its immunity decision about the false elector cases, Georgia included.

The foundation of Roberts' analysis of the fraudulent elector allegations is the precept that under the Constitution the President plays no direct role in a state's electoral process, "nor does he have authority to control the state officials who do. And the Framers, 'wary of ... corruption,' specifically excluded [anyone] who might be suspected of too great devotion to the president in office." " Roberts wrote that Trump's conduct with state election officials "cannot be neatly categorized as falling within a particular Presidential function." Stated simply, Roberts concluded that Trump would not have immunity for the alleged fraudulent elector conspiracy because it "was a private scheme with private actors."

The fraudulent elector charges against Trump were the only ones to survive the Supreme Court's immunity decision. SCOTUS sent those charges back to District Court Judge Tanya Chutkan to determine whether Trump's conduct in the elector scheme was "official" or "unofficial." The case did not get back to Chutkan until early August. SCOTUS' remand would've resulted in a drawn-out series of motions before Chutkan, the DC Circuit, back up to SCOTUS and back down to Chutkan. The case was effectively frozen until the presidential election after which it was dismissed by Chutkan on motion by Jack Smith.

Had Garland consolidated the elector fraud cases before a federal grand jury in D.C., those cases could have been charged as a single "hub and spoke" conspiracy and tried as one case. The "hub" of the conspiracy comprised the planners in D.C. (principally, but not exclusively, Trump, Giuliani, John Eastman, Kenneth Chesebro, Mark Meadows, Roger Stone). The "spokes" of the conspiracy were the principal actors in each of the involved states. The "rim" that connects the "spokes" is the common illegal purpose to overturn the election of Joe Biden using fraudulent electors. (In Pennsylvania the fake electors added a clause to their false electoral certificates saying that their votes should be counted only if a court found them to be valid electors. In Pennsylvania, that conditional clause makes it unlikely the fake electors could be criminally prosecuted.)

Consolidating the false elector cases in DC would have resulted in the appointment of a supervising federal judge (ala John Scirica in Watergate), which would have given the grand jury the efficiencies of real time rulings critical to the advancement of the investigation. (See my earlier essay, "Prosecution 101: The Watergate Paradigm.")

Had Garland consolidated the false elector cases in D.C., a trial jury comprising D.C. residents would ultimately decide the outcome. Suffice to say, the Federal Rules of Evidence overwhelmingly favor the prosecution once the conspiracy has been established by *proof aliunde*. Instead, Garland left individual false elector cases to the vagaries of state law and to local prosecutors. Consequently, each case was a standalone so that the Georgia case, for example, could not use evidence of the Michigan false elector to prove the Georgia conspiracy.

Fani Willis broke the two most important rules followed by experienced prosecutors: first, keep it simple; second, do your talking in court. The Georgia case was straightforward. There was an incriminating taped telephone call involving the two primary defendants, Trump and Meadows. Giuliani was the "boots on the ground" manager of the fraud assisted by Kenneth Chesebro and Jenna Ellis (both of whom pleaded guilty). Willis' star witnesses were Brad Raffensperger and Ryan Germany, both staunch Republican, Trump voters, and unassailable. Willis grossly overcharged the case and, along the way, held a series of drama-laden pressers. The Georgia RICO statute created a legal maze of confusion. She indicted 19 people most of whom were peripheral players, each with his or her own lawyer. Her personal and personnel missteps further delayed the prosecution and ultimately ended with the dismal of the Georgia elector fraud case.