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TRUST AND  
CONSEQUENCES  
— POLITICS, MEDIA, AND LAW

# Dominion Voting: Big Lies vs. Big Lawsuits

BY JEN WIECZNER

TRUMP SUPPORTERS ACCUSED DOMINION OF RIGGING THE 2020 ELECTION. THE CLAIMS HAVE NEVER BEEN SUBSTANTIATED. NOW THE COMPANY IS TURNING TO THE COURTS IN A BID TO MAKE ITS CRITICS PAY A PRICE FOR SPREADING MISINFORMATION.



ON DEC. 9, NICOLE NOLLETTE, an executive at Dominion Voting Systems, was driving home from a doctor’s appointment when she noticed she’d missed a call from one of her customers.

The client, an elections official whose jurisdiction uses Dominion’s voting machines, had also sent her a link to a website. Nollette pulled up the site on her phone and saw her own photo—overlaid with bright red crosshairs, as though she were in the sights of a sniper’s rifle. The website, which bore the moniker “Enemies of the People,” also included an address in Nevada, showing aerial views of that property beneath Nollette’s picture. That alarmed Nollette even more, because she doesn’t live in Nevada but in Colorado, where Dominion is based. The address was for the home of her retired parents. Months later, the Navy veteran remembers the fear in her mother’s voice over the phone as her parents loaded the website: “They have a picture of the house,” her mom gasped.

Nollette was one of more than a dozen people, ranging from other Dominion

employees to Trump administration officials, whose photos were posted on the website. The site accused them all of playing a role in an elaborate conspiracy to rig November’s presidential election by “flipping” votes for Donald Trump to Joe Biden—and relying on Dominion’s machines, which are in use in 28 states, to do it. Later that day, the FBI showed up on Nollette’s parents’ doorstep to alert them to the menace. Soon, Nollette herself received death threats—including one sent to her personal email address, warning, “Your days are numbered.” She still doesn’t know who sent them,



though the FBI later notified Dominion and others that its intel had linked the hit list to Iran.

The threats have tapered in the months since President Trump left the White House. But Nollette, who lives alone, still watches for suspicious cars around her street. And while she once made a daily habit of taking walks before sunrise and after sunset, she now goes out only in the light of day. “This is the first time since I left the military that, at least in terms of security and threats, I’ve had to engage that military training,” she says.

Nollette’s life is one of many upended by perhaps the mother of all conspiracy theories: a far-fetched but pernicious tale spun up in a last-ditch attempt to overturn the outcome of the presidential election. It’s a tale that found its roots in a rat’s nest of misinformation and which has come to be known, among many who have encountered it, as the Big Lie. Judges, election officials, cybersecurity experts, and governors have been publicly badgered for discrediting it, or vilified for failing to prove it. Others have faced Nollette’s fate, or harassment still more severe. Eric Coomer, Dominion’s director of product strategy and security, was doxed by one of the theory’s espousers about a week after the election. A mountain climber and bread-baker with a Ph.D. in nuclear physics, Coomer has not been able to return home since the threats began and is hiding somewhere outside the U.S.; even his lawyer doesn’t know where he is.

The Dominion narrative drew oxygen from various corners of the Internet and conservative political spheres. Trump himself tweeted on Nov. 12 that Dominion “deleted” 2.7 million of his votes. But it passed a point of no return on Nov. 19. That’s when Rudy Giuliani, the former New York mayor, and Sidney Powell, an appellate lawyer and a onetime federal prosecutor, both then representing the Trump campaign, held a press conference at the Republican

National Committee headquarters in Washington to focus on “legal challenges” to the election results.

Up until that day, Dominion might have been able to mount a defense with a fact-checking campaign aimed at correcting the record; it had hired crisis PR specialists as well as a top physical- and cyber-security firm. “It never really dawned on me that these people had ruined our company,” says John Poulos, Dominion’s cofounder and CEO. But he felt his world tilt as he watched the press conference unfold.

Some 25 minutes into the event, Giuliani mentioned Dominion for the first time—just around the memorable moment that his hair dye began streaming down his face. He later singled out Coomer by name, calling him a “vicious, vicious man” who was “close to Antifa.” Giuliani and Powell went on to allege that Dominion’s software had been built in Venezuela under orders of dictator Hugo Chávez for the purpose of fixing elections, and that it counted votes in Germany and Spain—claims that were easily disproved, but were red meat to partisans convinced that the GOP had been victimized.

“It was just a surreal moment,” says Poulos, who was at home in Toronto with his wife, three teenagers, and two dogs. “I thought that they were working to incite a civil war.”

Earlier that month, Powell had promised to release the “Kraken,” a monster of Norse lore that was her metaphor for evidence of widespread voter fraud. That evidence, according to authorities ranging from the Department of Justice to Republican election attorneys, has yet to be delivered. What Powell and Giuliani unleashed instead was a barrage of misinformation that embedded shrapnel-like shards of doubt in the walls of democracy. In the days after the press conference, Giuliani and Powell would repeat their claims about Dominion many more times on right-leaning cable networks,

including the most popular of all, Fox News, which last year commanded more than 3.5 million nightly prime-time viewers. Other sources far less reputable or official picked up the story and ran with it: According to Signal Labs, which tracks opinion trends across media, Dominion has been mentioned in reference to rigging the election more than 400,000 times on Twitter, YouTube, and other social media. Dominion for countless Trump supporters quickly became a name synonymous with suspicion and scandal.

The Dominion narrative became one of the thickest clouds in a fog of calumny around the election. In the two weeks after the Associated Press called the race for Biden, Fox News either questioned or put forth conspiracy theories about the results at least 774 times, according to Media Matters, a nonprofit that tracks right-leaning misinformation. A survey around the same time by researchers from universities including Northeastern found that more than half of Republican voters either thought Trump had won or weren’t sure who did. Poulos’s own uncle, in Arizona, believes Dominion played some role in a conspiracy. “He doesn’t know what parts to disbelieve,” Poulos says.

The consequences played out in unspeakably tragic form on Jan. 6, when a mob, made up predominantly of those who believed the election was stolen, broke into the U.S. Capitol in a riot that left five people dead.

Two days later, Dominion filed its first defamation lawsuit. Poulos had decided to litigate not long after the November press conference. “The only remedy that we have is by taking *their* case to court,” he says. “The truth absolutely needs to come out.”

### Accidental Plaintiffs

**IN THE CHAOS** of the nation’s corrosive election dispute, it was easy to miss the significance of the attacks on Dominion. When Trump backers spread general (if largely baseless) rumors

OPENING SPREAD, ORIGINAL PHOTOGRAPHS: GIULIANI AND POWELL; TOM WILLIAMS—CQ-ROLL CALL, INC./GETTY IMAGES (2); CROWD: ERIC LEE—BLOOMBERG/GETTY IMAGES; COMPLAINT: US DOMINION INC., DOMINION VOTING SYSTEMS INC., AND DOMINION VOTING SYSTEMS CORPORATION V. RUDOLPH W. GIULIANI; FOX TICKER: US DOMINION INC., DOMINION VOTING SYSTEMS INC., AND DOMINION VOTING SYSTEMS CORPORATION V. FOX NEWS NETWORK, LLC



**WE ARE NOT INITIATING  
CLAIMS TO REACH A  
SETTLEMENT AGREEMENT WHERE THE  
TRUTH CAN’T COME OUT.”**

— **JOHN POULOS**, CEO, DOMINION VOTING SYSTEMS

PHOTOGRAPH BY **CHUCK MARCUS**



**LONG-HAUL LITIGANT**  
John Poulos, photographed in  
Atlanta in March 2021.

about wide-scale ballot and voter fraud, their allegations were easily defensible as free political speech. But when Powell and Giuliani pointed the finger at Dominion, they crossed a crucial line. Now the operatives were making specific claims about a specific party, in ways that were economically damaging. And because those claims were quickly discredited—including in investigations by GOP election operatives who had every motive to hope they were true—the speakers’ insistence on repeating them would seem, legally, to demonstrate “actual malice,” or reckless disregard for the truth.

“If they meet all of those elements, then you can hold people accountable, regardless of the fact that it is in the context of the political process,” says attorney Tom Clare. Clare has not lost a defamation trial since founding his libel-focused law firm, Clare Locke, seven years ago; now he’s representing Dominion.

On Jan. 8, Dominion filed a defamation case against Powell. Over the next few weeks it filed similar suits against Giuliani and Mike Lindell, the CEO of MyPillow, who has released hours-long videos rife with conspiracy theories starring Dominion; each suit requests damages of \$1.3 billion. The company filed its fourth suit on March 26 against Fox News, asking for a judgment of more than \$1.6 billion. (Dominion’s is the second big defamation case Fox is facing based on its coverage of voting machines: In February, Smartmatic—a competitor to Dominion with considerably smaller U.S. operations—sued Fox for \$2.7 billion.) It’s a history-making tornado of litigation, legal experts say, for the volume of claims against multiple defendants around the same issue. “That is, in my experience, unique,” says J. Erik



Connolly, Smartmatic's attorney, who successfully sued ABC News for its "pink slime" coverage on behalf of a beef company in the biggest defamation suit on record. "From a reputational damage perspective, it's a perfect storm."

The cases are also potentially groundbreaking in a more significant way, one whose ramifications are impossible to predict: They're an effort by private companies to make other parties literally pay for abusing political discourse—including a media giant that has had a huge influence on 21st-century public life. Fox argues that the voting-machine allegations were inherently newsworthy, and that the airtime it gave them is protected under the First Amendment's guarantee of freedom of the press. The plaintiffs argue that the falsity of the allegations, and the apparent endorsement of them by some Fox hosts, strips those protections away.

Companies are positioned to conduct this fight in a way that individuals rarely are. Politicians seldom sue for defamation, especially in the heat of a campaign. No matter how damaging the rumors spread by an opponent, they can't afford the distraction of hashing out the truth about their past in court. And few individuals, public or private, can afford the cost. A business, on the other hand, can bring deeper pockets to the battle—and can point to the tangible pain of lost profit and revenue to show that untruths have consequences.

In the case of the voting machine companies, Connolly points out that the allegations took aim at the very heart of their brands: accuracy and reliability. "When you have an attack like that on your core business model, a defamation lawsuit may become a business necessity," Connolly says. "It's one of the only ways you can restore your reputation." The multibillion-dollar question is whether, in protecting that business model, these relatively obscure companies can re-

shape the rules around accuracy and reliability in public debate.

## A Distrusted Industry

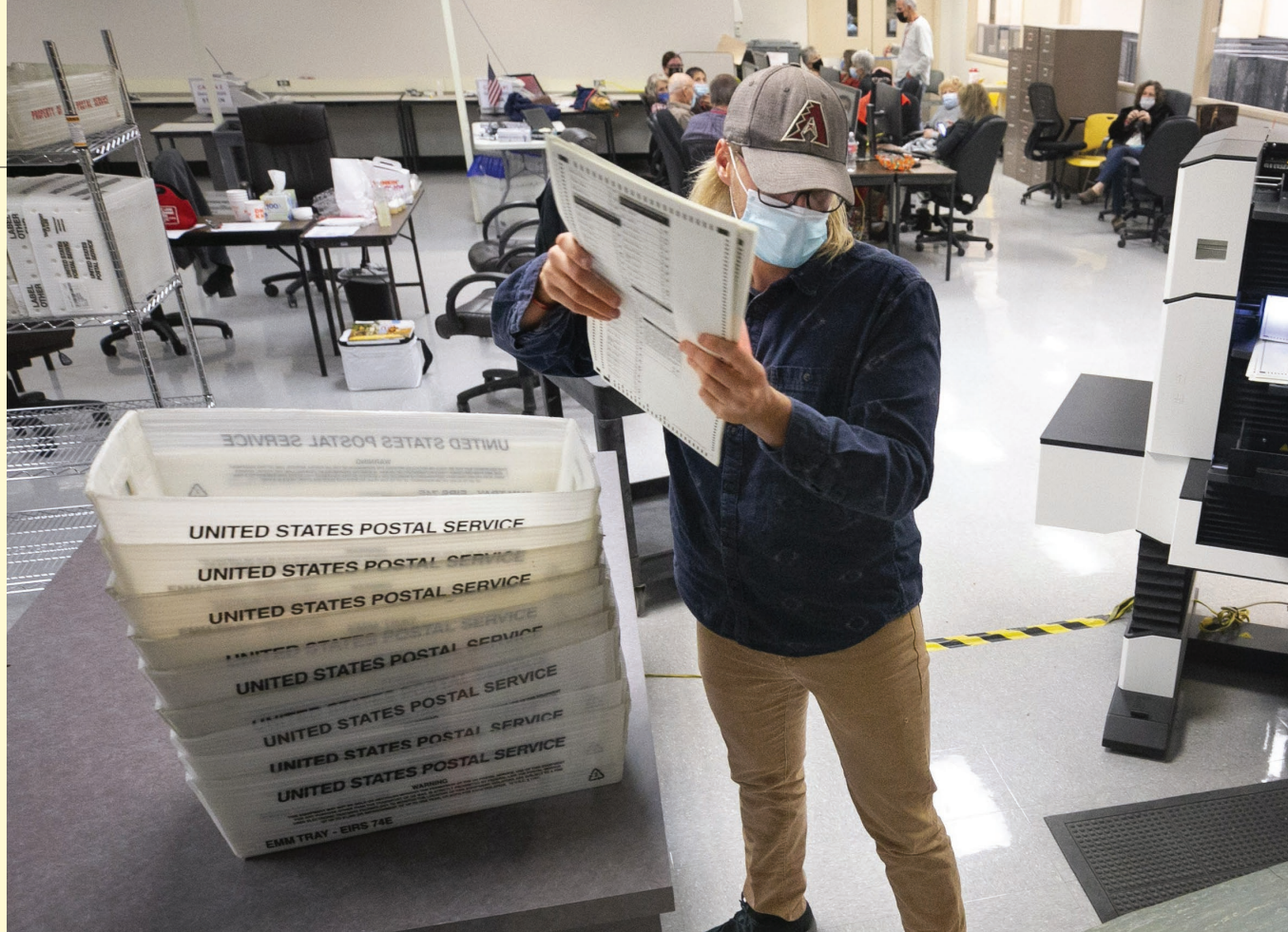
**JOHN POULOS** started Dominion out of his basement in Toronto in 2003. A Canadian who doesn't even vote in the U.S., he'd recently moved back home from Silicon Valley after selling his first startup, a telecom technology company. He found his next big idea in the aftermath of the 2000 U.S. presidential election, with its controversies over butterfly ballots and hanging chads. Congress had subsequently passed the Help America Vote Act focused on improving voting technology and accessibility. Poulos had an idea for creating a system that would help blind people vote without compromising the secrecy of their ballots. He named the company after Canada's Dominion Elections Act of 1920, which expanded women's suffrage. "We thought that would be a nice homage to helping voters vote," Poulos says.

Dominion voting machines could also be used by sighted voters, and Poulos gradually built a clientele among state and local governments. He recruited a staff dedicated to the company's democratic mission, if not the "obscene" hours and seven-day election season workweeks. By 2020, Dominion was the second-largest voting-machine business in the

United States, with its machines used in 1,500 elections in 28 states and Puerto Rico, and a staff of about 300.

But Dominion had joined an industry that was already viewed with suspicion from across the political spectrum. In the push to modernize voting technology, some jurisdictions had upgraded to electronic systems whose traceability was opaque—particularly in cases in which machines left no paper records. In 2006, Robert F. Kennedy Jr., the political scion, environmental attorney, and future anti-vaccination activist, published an article in *Rolling Stone* questioning whether the 2004 election had been "stolen" by the GOP with help from such machines. In 2008, a Princeton University computer science professor named Andrew Appel demonstrated how to hack certain voting machines using a screwdriver.

The paranoia helped set off a rollback to more old-school methods; most machines today, including



**THERE ARE MANY, MANY PLACES WHERE A BAD ACTOR WOULD HAVE TO MAINTAIN THE LACK OF DETECTION, AGAIN AND AGAIN AND AGAIN," TO RIG VOTING MACHINES.**

— **EDWARD PEREZ**, THE OSET INSTITUTE

Dominion's, generate or tally paper ballots that can be recounted. Still, mistrust kept percolating, particularly after reports of Russian interference dogged the 2016 presidential elections. (That meddling included extensive misinformation campaigns, but investigations found no evidence of voting-system tampering.) Dominion wasn't immune from the suspicion: Green Party presidential

candidate Jill Stein sued to review the source code of Dominion and other machines in Wisconsin after her loss there four years ago; that litigation is ongoing.

Despite that backdrop of distrust, the 2020 election might have unfolded with little drama for Dominion—if not for Antrim County. That northern Michigan jurisdiction is a Republican stronghold, but on Election



**DOUBLE-CHECKED** An election worker handles ballots in Phoenix. Arizona was one of the states where investigators sought, but didn't find, evidence of vote-rigging.

Night, and as the vote was counted into Wednesday morning, Biden and down-ballot Democrats appeared to be winning by a landslide. When campaign attorneys brought the anomaly to election officials' attention, they discovered the problem: There had been a change in the candidates listed on the ballot, but a local official had neglected to reprogram some of the machines—which used Dominion's software—with the new template. As a result, voters' selections were essentially transposed down a row in initial tallies, their votes accruing to another party's candidate.

Election officials corrected the human error the same day it was caught; in the end, Trump was the clear winner in Antrim. Antrim "shows that the problems and process leads to the correct result," says Edward Perez, global director of technology development for the OSET Institute, a nonpartisan nonprofit focused on researching election tech. "It seems a strange circumstance to pick on to show how the election was rigged."

The damage, however, was done, and conspiracy theorists had a kernel of doubt to run with. Dominion's machines were in use in some of the most closely contested states: Michigan, Georgia, and Arizona, to name a few. On Nov. 6, before the election was officially called, Rep. Paul Gosar, an Arizona Republican, citing the Antrim incident, began tweeting calls to "audit all Dominion software" for its "massive fraud potential." Calls for investigations grew louder, and President Trump, determined to fight the election results, was happy to amplify them.

By the time Powell and Giuliani

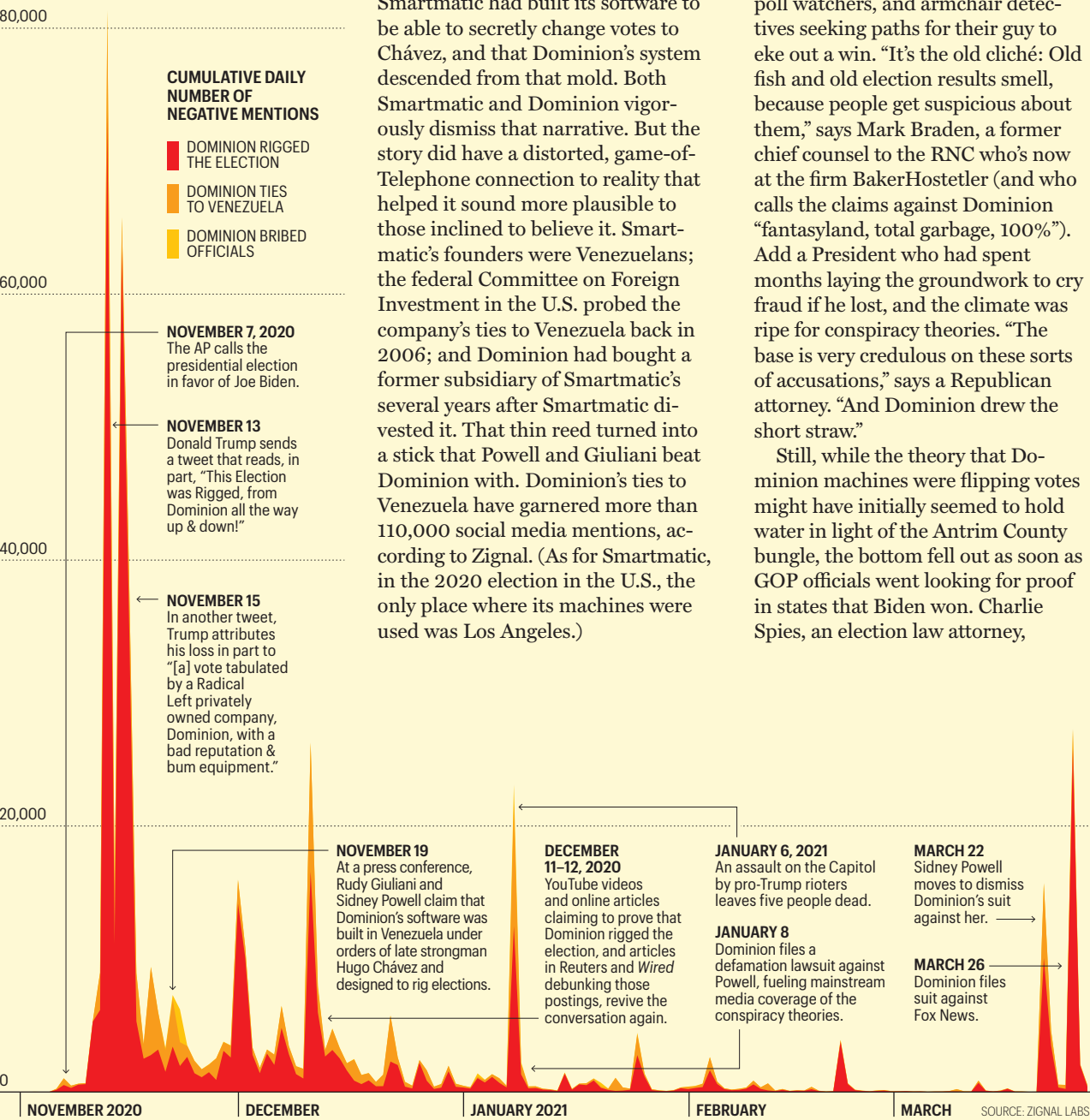
**\$1.6B**

▲ **DAMAGES SOUGHT**  
BY DOMINION VOTING  
SYSTEMS IN ITS  
DEFAMATION SUIT  
AGAINST FOX NEWS



# The Aftershocks of Innuendo

THIS VISUALIZATION OF DATA FROM MEDIA-RESEARCH FIRM SIGNAL LABS SHOWS HOW VARIOUS UN-SUBSTANTIATED CLAIMS ABOUT DOMINION PERSISTED ONLINE.



held their press conference, things had taken a more outlandish turn. Conspiracy-mongers had assigned Dominion a partner in evil: Venezuelan strongman Chávez, who had died in 2013. Powell’s narrative relied significantly on a heavily redacted affidavit from a supposed “Venezuelan whistleblower” who alleged that Smartmatic had built its software to be able to secretly change votes to Chávez, and that Dominion’s system descended from that mold. Both Smartmatic and Dominion vigorously dismiss that narrative. But the story did have a distorted, game-of-Telephone connection to reality that helped it sound more plausible to those inclined to believe it. Smartmatic’s founders were Venezuelans; the federal Committee on Foreign Investment in the U.S. probed the company’s ties to Venezuela back in 2006; and Dominion had bought a former subsidiary of Smartmatic’s several years after Smartmatic divested it. That thin reed turned into a stick that Powell and Giuliani beat Dominion with. Dominion’s ties to Venezuela have garnered more than 110,000 social media mentions, according to Signal. (As for Smartmatic, in the 2020 election in the U.S., the only place where its machines were used was Los Angeles.)

The bizarre conditions around the election provided particularly fertile ground for skepticism. The combination of a close result and a long vote-counting process—caused by the unprecedented millions who cast absentee ballots owing to COVID-19 concerns—created a tense nationwide spectator sport, with party lawyers, poll watchers, and armchair detectives seeking paths for their guy to eke out a win. “It’s the old cliché: Old fish and old election results smell, because people get suspicious about them,” says Mark Braden, a former chief counsel to the RNC who’s now at the firm BakerHostetler (and who calls the claims against Dominion “fantasyland, total garbage, 100%”). Add a President who had spent months laying the groundwork to cry fraud if he lost, and the climate was ripe for conspiracy theories. “The base is very credulous on these sorts of accusations,” says a Republican attorney. “And Dominion drew the short straw.”

Still, while the theory that Dominion machines were flipping votes might have initially seemed to hold water in light of the Antrim County bungle, the bottom fell out as soon as GOP officials went looking for proof in states that Biden won. Charlie Spies, an election law attorney,

represented Republican hopeful John James in the 2020 Michigan Senate race. If the Antrim County glitch had carried over into the other counties using Dominion machines in the state, his candidate would have won. “My goal was to find evidence of a problem large enough to have impacted the results,” says Spies. He says he tried to run down every claim raised by Powell, hoping it would help, but all came up short. “Where I get lost on the big conspiracy is, these machines aren’t interconnected,” he says. “And one machine doesn’t change a statewide election.”

Republican campaign attorneys and candidates across the country were trying to do the same thing. In Arizona, lawyers from both in and out of state descended to investigate Dominion’s machines, but after nearly a week of digging and interviewing technicians and election workers, they found no statistical anomalies, improper Internet connections, nor any other problems.

Over in Virginia, Republican party officials and attorneys were surprised to hear Giuliani reference fraud in their state during the Nov. 19 press conference; they had heard nothing of the sort from their own poll watchers. When they followed up with the Trump campaign, no one got back to them. If there were examples of malfeasance, the officials thought it was odd not to be asked to investigate them. “We could never get anyone to tell us what proof they had,” says Chris Marston, a Republican campaign attorney and founder of Election CFO, a campaign-finance compliance company. “But we feel comfortable there was no widespread machine-based fraud in Virginia.”

All along, Powell was making her case, both in the media and behind the scenes. GOP candidates who’d lost their races say they were fielding calls from Powell and her team, urging them to “keep on fighting,” that she was “going to break this wide open” and that they’d “better get on

board.” But when campaign lawyers asked for evidence, “we’d never get anything back other than general, ‘It’s bad, they cheated, it was stolen,’” says a Republican attorney. “There’s no ‘there’ there,” says another.

**“Air-Gapped”**

WHAT THE Republican operatives were—or weren’t—finding was exactly what experts in voting systems expected. In the new, lower-tech era, most voting machines including Dominion’s are designed to operate fully offline, with no connection to the Internet—they’re “air-gapped,” to

use the cybersecurity term. Appel—the Princeton computer scientist who has hacked a voting machine with a screwdriver—notes that there are still at least a couple of ways to compromise the new breed remotely, generally involving a touchpoint to the Internet. One would be to install malicious software on the machines before they’re shipped out from warehouses, such as through a phishing attack on a Dominion employee. Another way would be to hack the laptops that county officials use to program the machines at a local level, which typically involves uploading the ballot data to a memory card or thumb drive and transferring that—with the addition of a fraudulent algorithm—to the machines. If pulled off successfully, the machines could be “hacked in a networked way, where one hack covers thousands of machines,” Appel says.

Still, would-be hackers face formidable obstacles. One is that under current practice, even the programming laptops are, except in rare lapses, not connected to the Internet, making them virtually inaccessible to a remote hacker. Second, even if an attacker did install fraudulent vote-switching software on machines, it’s extremely unlikely that it would escape discovery during the various certification and accuracy testing protocols the machines undergo ahead of an election, or in the postelection audits that certain states conduct. “There are many,

**“WHERE I GET LOST ON THE BIG CONSPIRACY IS, THESE MACHINES AREN’T INTERCONNECTED, AND ONE MACHINE DOESN’T CHANGE A STATEWIDE ELECTION.”**

— CHARLIE SPIES, REPUBLICAN ELECTION-LAW ATTORNEY

many places where a bad actor would have to maintain the lack of detection, again and again and again and again,” explains OSET’s Perez. And at the end of the day, if the paper ballots match the machine tallies—as they did in the states that conducted 2020 recounts—“that’s pretty strong evidence that the voting computers weren’t hacked,” says Appel.

If a hack like the one Powell and Giuliani were describing were to take place, in other words, 2020 is the year it would have been caught. Between November and January, there have been hand recounts of votes involving more than 1,000 Dominion machines—including the third recount of Georgia’s 5 million-plus ballots. None found errors or irregularities on any meaningful scale.

As legal challenges regarding more mundane allegations fell apart soon after the election, other law firms

dropped the Trump campaign as a client—consolidating the campaign’s legal strategy, and its legal complaints, in the hands of Giuliani and allies like Powell. Powell had built a reputation for her expertise in appeals litigation; she didn’t lack for legal experience or acumen.

But the evidence that Powell and her team attached to legal briefs in suits related to Dominion often reads like a hodgepodge of disconnected headlines. Some documents cite a computer game found downloaded onto a laptop running Dominion software as evidence of potential hacking; others point to unusually high voter turnout numbers as proof of something fishy. In some affidavits, witnesses explain that they are basing their testimony on things they found in Google searches. In December, when an Arizona judge dismissed one of Powell’s cases in its entirety, she concluded, “Allegations that find favor in the public sphere of gossip and innuendo cannot be a substitute for earnest pleadings and procedure in federal court.” To critics, the evidence Powell and her allies have aired against Dominion, both in court and in the media, is at best an illustration of confirmation bias—conspiracy theorists citing one-off irregularities as proof of that conspiracy, without connecting any dots.

Put another way, just because a voting machine could be hacked doesn’t mean it was—a distinction that Mark Braden finds himself explaining a lot lately. Braden, the former chief counsel to the RNC, has worked on roughly 100 recounts in his career, more, he thinks, than any other Republican lawyer in the country. He’s recently been fielding calls from others in the party wondering about the Dominion allegations, and he’s been trying to shoot them down. “They think, ‘Oh, there’s so much smoke, there must be some fire,’” Braden says. “And the answer is, everyone just has clouds in their mind. It’s not smoke—these are just

clouds of confusion.”

By Christmas of 2020, more than 50 lawsuits from the Trump campaign and its associates alleging election improprieties had been dismissed—and the legal and cybersecurity establishments had increasingly shrugged off the Dominion story. Before leaving office in December, Attorney General William Barr said that after federal investigations, “to date, we have not seen fraud on a scale that could have effected a different outcome in the election.” In March, the DOJ along with the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (CISA) declassified a joint report that addressed “multiple public claims that one or more foreign governments—including Venezuela, Cuba, or China” controlled voting machines and manipulated vote counts. Upon investigation, the report said, the agencies “determined that they are not credible.”

**Fact, Opinion, and News**

**AMID ALL THE HATE MAIL** and death threats last fall, Poulos received an unexpected message from a Greek Orthodox priest in Long Island, N.Y. The priest had correctly guessed Poulos’s denomination and reached out to offer support. The men have never met, but they’ve spoken a handful of times, and the priest has sent Poulos books, from the spiritual to historical. “We’d have these conversations about how this is not the first time in history that something unfair has happened, and it seems hopeless,” Poulos recalls. “And he kept reminding me that in truth, we are on the right side of history.” A catharsis came in one of the counseling sessions, when the priest quoted Winston Churchill: “When you’re going through hell, keep going.” For Poulos and his employees, that phrase is now a sort of mantra.

To a certain degree, Dominion’s pushback is already having its desired effect. In November and

December, both Dominion and Smartmatic sent warning letters to Fox News about the allegations the network was airing. After that, Fox ran some “fact-checking” segments including an interview with OSET’s Perez debunking the claims. Powell, Giuliani, and the story itself have largely receded from the network since early January.

The story continues to ricochet around conservative media and social media, however, and Poulos and his colleagues say the damage endures. Dominion, as a privately held company, does not disclose its finances, but its latest lawsuit against Fox enumerates some of the harm it claims to have suffered, including anticipated voting-machine deals in Ohio and Louisiana that have been put on ice since the election. The damages the company is requesting include \$600 million in lost profits, as well as lost enterprise value of at least \$1 billion, along with hundreds of thousands of dollars spent on security and “combatting the disinformation campaign.” Although the many zeroes have raised some eyebrows, Clare, Dominion’s attorney, defends the calculations. “The scope and the reach and the number of people that heard this and believed it and acted upon it is something that is just unprecedented in the 25-plus years that I’ve been doing this.”

To win in court, Dominion’s and Smartmatic’s lawyers know it won’t be enough to prove the Big Lie isn’t true. Because the companies will likely be considered “public figures” in the eyes of the law (corporations almost always are) there’s a higher bar to clear to show defamation: They’ll need to prove the presence of actual malice—that the speaker of the false information either lied knowingly or with a reckless disregard for the truth. That means the trial could turn on a question that’s particularly urgent in an age of incompatible realities and “alternative facts”: Does putting trust in a false narrative count



Excerpted from US Dominion Inc., Dominion Voting Systems Inc., and Dominion Voting Systems Corporation v. Fox News Network, LLC

(d) On November 14, 2020, Fox and Dobbs published the following false statement to the @loudobbs Twitter account:

Read all about Dominion and Smartmatic voting companies and you’ll soon understand how pervasive this Democrat electoral fraud is, and why there’s no way in the world the 2020 Presidential election was either free or fair. #MAGA @realDonaldTrump #AmericaFirst #Dobbs.

Embedded in that tweet was another tweet from Rudy Giuliani (retweeted and adopted by Fox and Dobbs) with the following false statement:

Did you know a foreign company, DOMIMION, was [sic] counting our vote in Michigan, Arizona and Georgia and other states. But it was a front for SMARTMATIC, who was really doing the computing.<sup>197</sup>

as reckless disregard for truth?

The defendants’ responses in the Dominion cases refract this question in different ways. Rudy Giuliani, who has so far represented himself in suits by Dominion and Coomer, did not respond to requests for comment, and his court filings to date give little indication of his strategy. Mike Lindell, the MyPillow CEO, has yet to respond to Dominion in court, but he says he plans to double down on his claims. Lindell says he received a “smoking gun” that he aims to release as part of a later evidence dump, though he declined to let *Fortune* review it. “We’re going to countersue them with the biggest First Amendment lawsuit in history,” he says, adding, “It’s not defaming if you’re telling the truth about somebody.”

Sidney Powell responded to Dominion’s lawsuit in late March with a motion to dismiss. One of the arguments in her brief is particularly provocative: Even if her statements could be proved true or false, it reads, “no reasonable person would

▲  
**REPORTING, OR DECIDING?**  
In filings in Dominion’s defamation suit, Fox News argues that its airing of claims of vote-rigging involving Dominion was legitimate coverage of “matters of public concern”; Dominion says Fox was promoting falsehoods. Here, a page from Dominion’s complaint shows a screenshot and a tweet that Dominion argues amount to endorsements of claims by Trump attorney Sidney Powell.

conclude that the statements were truly statements of fact.” On one level, that puzzles defamation experts because it seems to undermine Powell’s authority. Sandra Baron, a First Amendment attorney and a senior fellow at the Information Society Project of Yale Law School, thinks it’s a long shot: “The last I looked, that defense worked best for a group of shock jocks—‘nobody takes what we’re saying seriously,’” Baron says. “But I think that’s a hard argument for a lawyer to make.” In an interview with *Fortune*, Powell’s lawyer,

Howard Kleinhendler, clarifies the argument somewhat. Powell’s public statements weren’t facts, he argues, but became opinions when she presented testimony of other people she judged to be expert witnesses. Kleinhendler acknowledges that those witnesses’ credentials could have been flimsy, but says that by itself shouldn’t disqualify their arguments, or put Powell at fault. “These expert reports weren’t just idle chatter—they were supported by documents, by screenshots, by analyses,” Kleinhendler says. He and Powell had hoped—and still hope—their documents would have been enough to “warrant discovery” of additional evidence in court.

There’s a “very basic mistake” in that argument, says George Freeman, executive director for the Media Law Resource Center who was a longtime libel defense attorney at the *New York Times*. “Those disclosed facts have to be true,” he says. If they aren’t, “the defense falls apart.” (Powell may also be taken to task, in court, for the vehemence with which she framed those “opinions” as facts. On Lou Dobbs’s eponymous Fox Business primetime show in early December, for example, she told the host, “You would have to be a damn fool and abjectly stupid not to see what happened here, for anybody who’s willing to look at the real evidence.”)

The distinction between fact and opinion, and who’s responsible for the accuracy of the former, are bound to be the main themes of the suits against Fox News—undoubtedly the most consequential pieces of the voting-machine litigation. Whatever their outcome, those cases could send ripples throughout the media, attorneys say, redefining the role of organizations in both covering and correcting misinformation. Fox had yet to respond to Dominion’s suit when this article went to press, but its response to Smartmatic offers a look into its strategy. (Fox News declined to make staffers available



for interviews for this story.)

The network argues in the Smartmatic case that President Trump's election challenges were "undeniably newsworthy" and "matters of public concern"—categories of speech which the law affords some greater protection. "If the First Amendment means anything, it means that Fox cannot be held liable for fairly reporting and commenting on competing allegations in a hotly contested and actively litigated election," Fox said in a statement. Fox also points to the "fact-checking segments" it aired, as well as instances where its own on-air staff said that no evidence of widespread fraud had emerged.

The defense Fox appears to be employing, says Freeman, is known as neutral reportage—the idea that news outlets are allowed to report on and restate important claims made by responsible people. Freeman is one of many advocates who argue that the media should have this right. Neutral reportage is a privilege recognized in few courts, however, and in New York, where Fox is based (and being sued by Smartmatic), the courts have rejected it. And even if a court was receptive, attorneys say Fox might still stumble over the neutrality part; after all, a jury will have to weigh the totality of its coverage, and whether it endorsed its guests' points. Examples of such perceived endorsement pepper the complaints from Dominion and Smartmatic. In November, for example, Dobbs ended a discussion with Powell about Dominion saying

he was "glad" she was working "to straighten out all of this. It is a foul mess, and it is far more sinister than any of us could have imagined." (Fox dropped Dobbs's show in February—the day after Smartmatic served its lawsuit—but the network says that the cancellation was unrelated to the defamation cases.)

If Fox were to lose, Dominion and some mainstream commentators will likely hail the win as a triumph of business against misinformation, a line drawn in the sand between facts and alternative facts—and a possible template for future lawsuits. That may be a be-careful-what-you-wish-for scenario, says Yale's Baron. The benefits of reining in actually fake news, if you will, could have a chilling effect on the freedom of the press and on some speech in general. "The hope is that it will only chill those who are likely to lose libel suits," she says. "I think the country may get an opportunity to learn a lot about the limits, for good or for ill, of libel law in the context of this litigation."

Beyond the First Amendment, there are other spheres for holding accountable those responsible for the Big Lie. Powell and Giuliani, along with several other attorneys who filed election challenges, are facing complaints from government officials seeking to disbar them from the legal profession entirely. And some lawmakers who have spread and acted on claims like Powell's and Giuliani's are being punished by some donors: Multiple companies have discontin-

ued their donations to the campaigns of lawmakers who declined to certify the validity of the 2020 election.

There's also the question of whether Dominion's lawsuits will progress far enough, fast enough, to make a difference. Ironically enough, the toxic information climate exemplified by the Dominion narrative may make it harder to get to the truth. Once it goes to trial, it may be a challenge to empanel enough jurors whose views have not been tainted by the pervasive allegations. Any definitive verdict is likely three to four years down the road, which means there could be another presidential election before a ruling can vindicate the voting machine companies. Should Dominion prevail, its less clear whether it will even make a difference in the minds of the millions for whom the conspiracy theories are gospel.

For Poulos, the issues around integrity and democracy outweigh those concerns. He says Dominion, which is paying the lawyer bills out of its own coffers, has enough runway to pursue the litigation for years and does not plan to settle. "We are not initiating claims to reach a settlement agreement where the truth can't come out," he says. "That's just not of interest to us." In the meantime, Poulos and his colleagues have been embracing a different mission: explaining to American voters how their elections work. As long as most jurisdictions are using paper ballots—which electoral experts expect even the few holdouts will eventually adopt—there's a simple path to peace of mind. Nicole Nollette, the Dominion executive, has made it a priority to clear up misinformation. "You don't need to take our word for it," she constantly explains. Not when the proof is right there: "You can recount the paper ballots by hand; you can recount them by a machine," she says. In the future, more states just might—which could be a more effective way to quell conspiracy theories before they catch fire. ■



**LAST I LOOKED, THAT DEFENSE  
WORKED BEST FOR A GROUP OF  
SHOCK JOCKS. BUT I THINK THAT'S A HARD  
ARGUMENT FOR A LAWYER TO MAKE."**

**SANDRA BARON**, THE INFORMATION SOCIETY PROJECT,  
YALE LAW SCHOOL, ON SIDNEY POWELL'S LEGAL STRATEGY