Guardians of Democracy:

The Criminal Justice Response to the 2021 Insurrection at the United States Capitol

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Introduction

By early adulthood, most of us have experienced at least one "where-were-you-when" moment–a historical event so momentous that our experience of first hearing about it is frozen in time and memory. My eighth grade history teacher once spoke of hearing about the Kennedy assassination on the radio when he was in a middle school classroom himself. My mother learned of the Challenger disaster at a similar age in school and has told stories of huddling around an office television upon arriving at work on September 11, 2001.

I experienced my first flashbulb memory on January 6, 2021. The coronavirus pandemic raged at a new, post-holiday season peak. Not yet vaccinated, I strapped on a KN-95 mask before picking up my grandmother and driving her to an appointment with a neurologist. Despite the long day ahead of waiting for scans and consultations, my spirits were up. The night before, Jon Ossoff and Raphael Warnock both scored tight victories in their runoff elections for the U.S. Senate in Georgia, ensuring a narrow Senate majority for the Democratic Party. As an ideological liberal and a staunch opponent of the policies of the previous four years, I was filled with hope that a new government would turn the tide of the pandemic, address the ongoing economic crisis, and return the country to a sense of normalcy.

In the neurologist's waiting room, I noticed a man wearing a hat and t-shirt expressing support for outgoing President Donald Trump. That afternoon, Congress was set to certify the results of the presidential election. I didn't think the proceeding to be of much importance; I could remember at least the past three presidential elections, and the certification of the Electoral College vote always seemed a formality not worthy of much attention. The man's garb seemed a

final, desperate, and futile protest over the victory of Joe Biden in the previous fall's presidential election.

An alert from *The New York Times* soon proved me wrong. Reading of an increasingly unruly protest at the Capitol building, I quickly pulled up a livestream of MSNBC on my phone. I spent the next few hours curled up in a hallway window bay, my mouth agape at what I was witnessing. A riotous crowd of enraged Trump supporters had begun pushing through the complex's external perimeter, seemingly encountering little resistance from law enforcement. Many in the violent mob scaled the facade of the building, navigating the structure erected in preparation for the inauguration of Joe Biden. Vice President Mike Pence was whisked off the Senate floor by the Secret Service to an undisclosed location, and Members of Congress fled their chambers wearing gas masks. The attackers stormed into the building, waving a mixture of Confederate and altered American flags as they vandalized iconic rooms such as Statuary Hall. On the hour-long drive home, my grandmother and I sat in silence and listened intently to NPR, wondering if we would still live in a democracy by the time we arrived home.

A mixture of emotions welled through me as I watched American democracy teeter on the brink that day. A love and reverence for our democracy had been a central tenet of my life since I witnessed the election of the first Black President at age eight. I was gripped with fear that this violent mob, inspired by the authoritarian aspirations of the outgoing President, would tear down a democracy built through two centuries of struggle. I was disgusted with the Republican elected officials who enabled and encouraged the President to stage this power-grab to further their own political careers. And, as a South Asian American raised in the shadow of 9/11, I was puzzled that this attack was not repulsed more forcefully by law enforcement. Something in my subconscious told me that if a group of Black or brown extremists stormed the

seat of government in the U.S. and attempted to install an unelected President, the struggle between the attackers and law enforcement would have ended with much more bloodshed.

The following day, President-elect Biden announced his appointment of Judge Merrick Garland to the post of Attorney General. Garland's appointment initially assuaged some of my anxieties. A former federal prosecutor who oversaw the Oklahoma City bombing prosecution and a federal judge known for his independent mind, Garland seemed the man for the task of bringing to justice the Capitol insurrectionists. Aggressive prosecution of those who tried to violently obstruct the transfer of power seemed a key component of Biden's pledge to "restore the soul of America."[1]

As the months went on, however, I grew more skeptical of this commitment. The horrors of the Capitol insurrection seemed to fade in the memories of many, and the initial condemnation of Trump's conduct by Republican leaders was gradually supplanted with denial and, for some, tolerance. Aghast that this attack on American democracy might go unpunished, I grew curious about the historical context for the insurrection and whether the insurrectionists were truly receiving lenient treatment given the legal avenues available to the Department of Justice.

In three parts, this thesis seeks to examine these concerns. First, I will discuss the historical context for the Capitol insurrection and address claims that the attack on the Capitol was historically "unprecedented." By paying particular attention to the Colfax massacre of 1873 and the Wilmington insurrection of 1898, I will show that the Capitol insurrection did not lack precedent. These two examples demonstrate that the Capitol insurrectionists represent the latest wave of a long history of majority-white anti-democratic violence. Just as on January 6, 2021, white anti-government terrorists have in the past taken up arms to overthrow democratically

[1] Joseph R. Biden Jr., "A Presidency for All Americans" (speech, Wilmington, DE, November 7, 2020), https://joebiden.com/presidency-for-all-americans/

elected governments and install leaders hostile to the principles of racial equality and constitutional democracy. From there, I will highlight the failed responses of the government to each of these incidents as warnings against the danger of leaving this violence unaddressed by the criminal justice system. The very existence of stable, pluralistic democracy in the United States depends on an aggressive response by the federal criminal justice apparatus to violence that aims to dismantle this democracy. I conclude that the history of anti-democratic white supremacist violence reveals the need for an activist federal intervention against these opponents of democracy in which the three branches of government work in harmony with one another.

With an understanding of the kind of response to the Capitol insurrection that history demands of the federal government, I next move to evaluate whether the response of the federal government to date lives up to these demands. To answer this question, I examine the strategy employed by the Department of Justice in charging and prosecuting the participants in the insurrection using the indictments, plea agreements, sentences, and other documents made available to the public by the department. I first observe that the majority of insurrectionists will face only minor charges for their attempt to overturn the election. I go on to analyze the charge of Obstruction of an Official Proceeding, which the Department of Justice has used liberally in prosecuting some of the more serious offenders, and I make two conclusions from this analysis. First, I argue that charging these insurrectionists *only* with Obstruction of an Official Proceeding is not wholly appropriate and does not capture the grave threat that these attackers posed to American democracy on January 6. I also observe that judicial skepticism of the application of this charge in the context of the Capitol insurrection shows the holes in the government's response, indicating that we may once again see a fractured response from the three branches of government rather than the united, whole-of-government approach needed to confront this threat.

I then discuss the limited scope in which the government has charged insurrectionists with seditious conspiracy and raise the possibility of applying it more broadly. Finally, I examine the consequences faced by those few insurrectionists who have entered into plea agreements and have already faced sentencing. Based on each of these points, I conclude that the response of the federal government to the Capitol insurrection has been insufficient and mostly weak, especially when juxtaposed against the history of failed government responses to past incidents of anti-democratic violence.

After making this conclusion, I take the final step of evaluating whether the government can employ any alternative approaches in prosecuting the participants in the insurrection. In analyzing the history of the seditious conspiracy charge, I note that it has only successfully been applied against minority groups in recent years despite attempts to use it against white and Christian groups as well. Warning against a reluctance to apply the charge in the Capitol insurrection due to these biases, I conclude that seditious conspiracy could be applied more broadly to bring to justice those who participated in the insurrection. I next explore an alternative path that entails the resurrection of the insurrection charge first enacted in 1862 and demonstrate that the charge is not only uniquely appropriate in this context, but that the government should be able to navigate any judicial concerns about its use. Finally, I argue that the pursuit of criminal charges for the leaders of the effort to overturn the presidential election, including President Trump himself, is both critically important and legally viable given recent actions by the judiciary and the House Select Committee to Investigate the January 6th Attack on the United States Capitol.

In sum, this paper presents an argument in three parts: (1) that the history of failed responses to anti-democratic white supremacist violence demonstrates the need for a robust,

activist, and whole-of-government response to the Capitol insurrection by the federal government; (2) that the government's response thus far has failed to meet this standard; (3) and that the government could take several different approaches to better align their response to these demands.

With this roadmap charted, I will begin by first taking a look at the past, transporting us to the American South in the aftermath of the Civil War.

Chapter I: Historical Instances of White Anti-Democratic Violence

Despite the lofty democratic ideals written into our founding documents, the history of American democracy is largely a tale of subjugation, violence, and exclusion. The 'democratic' order of liberty and equality originated in 1776, cemented in 1787, and refined in 1791 extended its privileges only to a few. Indeed, the dehumanization of racial minorities was perhaps accelerated and entrenched by the adoption of this new "republican" order. In a country built upon racial apartheid, it is not surprising that efforts to eradicate barriers to political participation were met with fierce resistance. Nevertheless, episodes of violent opposition to the expansion of American democracy remain unknown to most. When analyzing the criminal justice response to anti-democratic violence today, we must first examine the historical background that underpins the priorities and attitudes of the federal government.

Two episodes in particular highlight the ugly history of anti-democratic violence that plagues American history: the Colfax Massacre of 1873 and the Wilmington Insurrection of 1898. While a flame of hope for multiracial democracy in the South glimmered after the Civil War, these two incidents of white supremacist violence helped to extinguish that flame. In these episodes, mob violence successfully wrested control of local and state governments from the people at-large, ousting democratically elected leaders. In the aftermath of both incidents, the federal government failed to use the tools at its disposal to quell this violence and uphold democratic rule.

A. Colfax Massacre

(i) Background: Political Violence in Louisiana, 1866-1873

With the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments in 1865, 1868, and 1870, respectively, the people of the United States expressed hope that the rule of law could tame the violence of the Civil War as the southern states were folded back into the Union. Nevertheless, parts of the former Confederacy suffered some of the worst prolonged episodes of violence in American history during Reconstruction. Nowhere did this ring truer than in Louisiana. Though the Confederacy had formally capitulated to the Union, white supremacists enraged by the outcome of the war continued to press for racial subjugation. When the state's pro-Union Governor called a convention to root out former rebels from the state legislature in the summer of 1866, a mob of white vigilantes and white supremacist police officers massacred both Black and white Republican delegates to the convention, spilling the blood of thirty-eight innocents in the streets of New Orleans.[2] Two years later, as Republican General Ulysses S. Grant campaigned for the presidency pledging to uphold civil rights for Blacks, white terrorists unleashed a bloody campaign of violence, terror, and intimidation to deny Republicans an electoral victory in Black-majority Louisiana. This rampage left 1,081 dead in politically motivated killings in the eight months between April and November of 1868.[3]

The state of political instability and bloodshed in Louisiana continued into the Grant administration. The 1872 gubernatorial election was bitterly contested between Republican William Pitt Kellogg and Democrat John McEnery, who enjoyed "Fusionist" backing from less

[2] Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (Henry Holt and Co., 2008), 17-18.
[3] Ibid., 18-19.

radical Republicans such as outgoing Governor Henry Clay Warmoth.[4] Though the campaign itself was largely free of violence, it could hardly have been considered free or fair. Supporters of McEnery "made sure that the voter rolls included as many whites as possible and a minimum number of colored men."[5] McEneryites tipped the scales by changing Black registration sites and making bogus demands for voter identification.[6] Furthermore, Louisiana "state election supervisors kept federal election monitors...away from the ballot boxes on Election Day," undermining federal efforts to uphold democracy in Reconstruction Louisiana.[7] As the new year began, both Kellogg and McEnery had claimed victory, taking separate oaths of office, and two one-sided partisan legislatures also claimed legitimate authority in the state. After taking his case to court, Kellogg and the Republican-majority legislature were declared the legitimate winners of the 1872 elections in Louisiana by a Republican federal judge. Supporters of McEnery mounted another violent attempt to overthrow Kellogg and the legitimately elected Republicans in early March of 1873. Yet, with the backing of the federal judiciary and the threat of enforcement by the U.S. Army, state militia forces loyal to Kellogg quelled the uprising, cementing, for the time being, Kellogg's authority as Governor and control over the city of New Orleans.[8]

(ii) The Colfax Massacre: Slaughter and Insurrection on Easter Sunday

Kellogg and McEnery supporters fought bitterly over the governor's mansion not only to secure the power to sign and veto legislation; the Governor of Louisiana exercised power over

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[4] Ibid., 63.
[5] Ibid., 65.
[6] It is worth noting the similarities between these voter suppression tactics from 1872 Louisiana and those proposed and supported by Republicans today in states across the South, including Georgia and Texas, especially in the aftermath of the Capitol insurrection and unsupported claims of voter fraud by President Donald Trump.
[7] Lane, *The Day Freedom Died*, 65.
[8] Ibid., 13-14.

local affairs by providing commissions to local officers elected in each parish. These commissions provided the election winners legal claim to the offices they sought to occupy. As the self-declared winners of the 1872 election, both Kellogg and McEnery claimed the authority to issue these commissions. Before the federal courts had confirmed his claim to the Governor's Mansion, Kellogg had issued commissions to the Republican victors of local elections in Grant Parish in January of 1873. Officers backed by Kellogg included William Ward, the parish's most prominent Black leader, as State Representative.[9] Despite last minute pleas from the parish's opposing Fusionist slate led by white supremacists Christopher Columbus Nash, William R. Rutland, and Wilson L. Richardson, Kellogg affirmed his support for Republican authority in Grant Parish after receiving federal backing for his claim to the power.[10] With state and, ultimately, federal backing for their authority over Grant Parish, local Republican leaders such as Ward faced one final obstacle before cementing their power. Authority over Grant Parish was primarily recognized by control over the parish courthouse in Colfax, which the Republicans established under the cover of darkness on the night of March 25th. Finally, with local control asserted, the duly elected Republicans submitted their oaths of office to the Kellogg administration on March 29th, assuming authority in the face of rampant ballot stuffing, voter intimidation, and violence.[11]

The Fusionists of Grant Parish, however, could not tolerate multiracial democracy in their backyard. Inspired by the previous episodes of violence that had marked recent Louisiana history, a posse led by Nash and James W. Hadnot (among others) plotted a violent *coup* against the parish's legitimate, democratically-elected government. Their cause was bolstered by an

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[9] Ibid., 68.
[10] Ibid., 69.
[11] Ibid., 70.

erroneous claim in the *New Orleans Republican*, "the official journal of the state," that Nash and the Fusionists had been commissioned as the rightful local officers of Grant Parish.[12] Led by William Ward, Republicans (especially Black Republicans) began to gather at the Colfax courthouse to defend their lives and claim to power.[13]

On the morning of April 13, 1873, a group of 140 armed white supremacist vigilantes marched on Colfax.[14] While thousands across Louisiana and millions across the country gathered to celebrate Easter Sunday, Nash, Hadnot, and their gang fought for a different resurrection: that of unquestioned, brutal, and undemocratic white supremacist rule in Grant Parish.

Ward and the Republicans had prepared for days to defend the courthouse and their claim to power by digging a protective trench around the courthouse and amassing the limited arms at their disposal.[15] Nevertheless, the Republicans were overmatched by the firepower of the mob. Cannon-fire scattered the defenders of the courthouse, sending most into the protective confines of the building.[16] Nash and his followers upped their barbarity, setting the courthouse ablaze to force the Republicans out. After most inside concluded their cause was hopeless, the Republicans signaled their surrender, hoping to escape from the courthouse without their rights, but at least with their lives.[17] For the mob, however, the battle had not yet gone far enough; they opened fire on the first twelve Black Republicans to emerge from the burning courthouse, chasing down and murdering several others who attempted to flee the senseless slaughter. The mob only halted the massacre of the defenseless Republicans when friendly fire struck one of their leaders, Jim Hadnot.[18] After forcing the defeated Black Republicans to extinguish the fire

[12] Ibid., 71.
[13] Ibid., 79.
[14] Ibid., 90-91.
[15] Ibid., 93.
[16] Ibid., 98-99.
[17] Ibid., 101.
[18] Ibid., 102.

meant to kill them, the mob took the remaining Republicans as prisoners. The carnage would not end there. Some of Nash's followers proved even more bloodthirsty than their leader, as Bill Cruikshank goaded the mob into murdering several of their prisoners against Nash's orders.[19] Foolishly, the Colfax mob failed to finish off several of their intended victims, including some of the prisoners whom they attempted to slaughter.

By day's end of Easter 1873, Nash and his mob had murdered between sixty and eighty Black residents of Grant Parish who had tried to defend the legitimate, democratically elected Republican government at the Colfax courthouse.[20] Bodies lay strewn about the town until the arrival days later of deputy U.S. Marshals Theodore W. DeKlyne and William Wright, who organized the interment of the unburied dead before beginning the federal investigation into the massacre.[21] The white terrorists of Grant Parish succeeded in overthrowing their democratically elected local government while slaughtering dozens of Black citizens who fought to defend it, effectively exterminating any hope for multiracial democracy in the parish without forceful intervention from the state or U.S. government. Even amidst Louisiana's troubles since the Civil War, the Colfax incident marked a turning point. If such violent defiance could go unchallenged, the democratic prospects for Louisiana appeared dim. One critical question remained: would the Colfax terrorists be brought to justice?

(iii) Prosecution and Interpretation: The Federal Intervention in Colfax

The task of prosecuting the perpetrators of the Colfax massacre fell to U.S. Attorney James Beckwith. A son of abolitionist Upstate New York, Beckwith was fiercely devoted to the

[19] Ibid., 102-107.
[20] Ibid., 266.
[21] Ibid., 108-109.

rule of law and had developed a reputation as one of the best lawyers in Louisiana when he was nominated as U.S. Attorney by President Grant.[22] Beckwith was intent on bringing the Colfax terrorists to justice. Informed of the severity of the events in Colfax by the reports of U.S. Marshals DeKlyne and Wright, Beckwith expressed outrage in a cable to his boss, Attorney General George H. Williams. Beckwith received a full-throated endorsement from Williams to use all the tools in the federal arsenal of justice to prosecute the terrorists and an offering of U.S. Army troops if required to maintain order.[23] Beckwith thus enjoyed the full support of the executive branch in attempting to uphold democracy and the rule of law in Louisiana. Furthermore, he enjoyed the support of a Congress dominated by Radical Republicans intent on using the Reconstruction Amendments to rebuild the country and guarantee civil rights for Blacks in the South. Critically, Congress produced in 1870 the Enforcement Act, which empowered the federal government to criminally prosecute individuals for violating the civil and political rights guaranteed to Blacks under the Constitution. Indeed, the Department of Justice itself was created by Congress in 1870 to help implement the Enforcement Act and protect the Constitution under the leadership of the Attorney General.[24] Thus, Beckwith found support in a deep-rooted and cooperative federal approach to protect democracy in the South that included the military, executive departments, and the legislative authority of Congress.

With the nation and its government behind him, Beckwith began his prosecution of the Colfax terrorists, using the Enforcement Act to levy charges against ninety-eight defendants.[25] A lengthy manhunt, however, yielded only seven prisoners, including Bill Cruikshank.[26]

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[22] Ibid., 15, 19.
[23] Ibid., 21-22.
[24] Ibid., 4.
[25] Ibid., 126.
[26] Ibid., 153.

Nevertheless, Beckwith intended to use the federal courts to make an example out of the Colfax terrorists and send the message that democracy would prevail in Louisiana. Unsurprisingly, Louisiana white supremacists undermined his efforts. Their tactics included bribing otherwise pro-Republican witnesses to flip to the side of the defendants.[27] Beckwith nevertheless laid out the details of the case with his witnesses, hoping to show the jury and the public that the murders were indisputably committed by the defendants to intimidate Black voters and Republican officials from participating in the system.[28] Despite Beckwith's strong case for conviction, he was unable to convince a three-quarters white jury. There was no consensus for any of the defendants. Facing a hung jury, Circuit Judge William B. Woods declared a mistrial.[29]

The hung jury gave Beckwith a second go-round at the trial and a chance to correct his mistakes from the first. However, Beckwith met a new wrinkle in the second trial. Though Judge Woods had been largely friendly to the prosecution and was "privately convinced of the…defendants' guilt,"[30] he was now joined by Associate Justice Joseph P. Bradley of the Supreme Court of the United States, who was tasked with riding circuit in the South in the summer of 1874.[31] Importantly, Bradley was skeptical of federal authority to govern the behavior of individuals with respect to civil rights, as stipulated by the Enforcement Act, when he arrived from Washington. Sensing this doubt, defense counsel Robert H. Marr objected to the constitutionality of the charges under the Fourteenth Amendment in the presence of both Judge Woods and Justice Bradley, who presided over the trial together. Bradley initially allowed the case to go forward, and Beckwith proceeded with his opening argument and first few witnesses.

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[27] Ibid., 160.
[28] Ibid., 166-171.
[29] Ibid., 187.
[30] Ibid., 170.
[31] Ibid., 189.

However, Bradley later permitted Marr to challenge the constitutionality of the Enforcement Act mid-trial but declared that he would rule on the constitutionality of the charges only in the case of a conviction and permitted the case to proceed. Confident that he had steered the case in the right direction and that his presence was no longer necessary, Bradley left New Orleans.[32]

With Bradley gone, Beckwith plowed full-steam-ahead with his case. Additional time to prepare for the second trial brought Beckwith more witnesses. In bringing his total to eighty-nine, Beckwith hoped that sheer numbers would trump shaky, bribed alibis.[33] He also capitalized on the senseless mistakes of Cruikshank and his co-conspirators by calling to the stand prisoners who had survived and escaped the mob's attempts to murder them while in their custody. This time around, Beckwith fared better. Though he failed to secure total victory, he won convictions for three of the seven defendants, a shocking outcome for the powerful and well-connected white supremacist communities of Louisiana.[34] Yet, Bradley's ruling on the constitutionality of the Enforcement Act remained unresolved. With the convictions, he had reserved the authority to rule on the constitutionality of the charges levied against Cruikshank and his co-conspirators. Bradley made a grand return to New Orleans within weeks of the convictions to announce his opinion.[35] After considering Marr's argument against the constitutionality of the Enforcement Act, Bradley ruled that the Reconstruction Amendments only permitted Congress to restrain the *states* from violating the civil and political rights of its citizens (including Blacks), not to proscribe such behavior by *individuals*. This latter category of conduct remained a matter for the states to regulate. Supported by this argument, Bradley overturned each count of the three

[32] Ibid., 195-197.
[33] Ibid., 198.
[34] Ibid., 203-204.
[35] Ibid., 205.

convictions.[36] Beckwith's year of work had come to naught. Judge Woods disagreed heartily with Bradley's decision, and the divided trial court opinions sent the matter to the Supreme Court. Though Congress had provided the tools to combat anti-democratic violence and the Department of Justice had wielded them with zeal, the Supreme Court would ultimately determine the power of the federal government to uphold democracy in the South. True democracy depended on unity and consensus by the three federal branches.

Unfortunately for the Grant administration, judicial support for the federal civil rights intervention was already teetering even before the Colfax case reached the Supreme Court. Just a day after the bloodshed in Grant Parish, the Supreme Court handed down a landmark decision in the *Slaughter-House* cases, the high court's first ruling involving the newly-ratified Reconstruction Amendments. The case concerned a Louisiana regulatory scheme that granted a monopoly to certain slaughter-houses in New Orleans. Excluded butchers took issue with the scheme, asserting that it violated their newly-endowed constitutional rights as U.S. citizens as stipulated by the Privileges or Immunities Clause of the Fourteenth Amendment. Though an opponent of slavery and racial apartheid, Justice Samuel F. Miller blundered in his majority opinion upholding the regulatory scheme, narrowing those federally protected rights under the Privileges or Immunities Clause to only "those rights which depended on the Federal government for their existence or protection" such as the right to freely travel between states or the universally protected writ of *habeas corpus*.[37] *Slaughter-House* provided potent ammunition to opponents of the Enforcement Act, who asserted that the political rights protected by the legislation did not fall under the purview of the Privileges or Immunities Clause of the Fourteenth Amendment. While the Reconstruction Amendments did prohibit *states* from

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[36] Ibid., 208-210.

[37] *The Slaughter-House Cases*, 83 U.S. 36 (1873).

interfering with these rights, they gave no power to the federal government to regulate *individual* behavior concerning rights that did not enjoy protection by the Privileges or Immunities Clause. *Slaughter-House* proved an insurmountable obstacle for Attorney General Williams and his Solicitor General, Samuel F. Phillips in their arguments before the Supreme Court.[38] Despite their best efforts, Williams and Phillips failed to distinguish the questions surrounding the Enforcement Act from the determinations of the court in *Slaughter-House*. Only three years out from that decision, the Supreme Court affirmed Bradley's trial court decision, throwing out the only convictions to come out of the Colfax Massacre in *United States v. Cruikshank*, 92 U.S. 542 (1876).[39] Finally, after three years, the legal war of attrition over the Colfax Massacre had ended. Democracy lost. White supremacy, violence, and lawlessness had won.

(iv) Historical Significance of the Colfax Massacre

The Colfax Massacre presents a sad saga of anti-democratic and white supremacist violence. Ahead of the massacre, violence had already plagued Louisiana as the federal government, local white Republicans, and newly-freed Black citizens struggled to uphold democracy and safeguard their elections. Grievances over an allegedly "stolen" election inspired the formation of an angry and violent white supremacist mob that stormed the local seat of government to wrest power from its democratically elected leaders. After a bloody struggle, the white mob slaughtered the surrendering Black Republicans, murdering several prisoners in cold blood. Yet, there was cause for hope. U.S. Attorney James Beckwith, responsible for the prosecution of the murderers, felt a deep devotion to the rule of law and the tenets of democracy.

[38] Lane, *The Day Freedom Died*, 235.
[39] Ibid., 244.

His tenacious effort to prosecute the terrorists enjoyed the strong endorsement of the Attorney General, the newly-created Department of Justice, and the Grant administration. In his quiver of arrows, Beckwith carried the Enforcement Act, enacted by Congress in 1870 to punish white vigilantes who violently trampled upon the newfound civil and political rights granted by the Reconstruction Amendments. The executive and legislative branches of the federal government forcefully injected themselves into Louisiana, determined to ensure Reconstruction would continue unabated.

Yet, the democratization of the South was felled by another foe. The judiciary blunted the efforts of Congress and the Department of Justice to protect southern democracy and the political rights of Black citizens with its ruling in *United States v. Cruikshank.* With the Enforcement Act weakened by the Supreme Court, the federal government was left with little ability to protect the Fourteenth and Fifteenth Amendment rights of Black citizens in the South from vigilante violence, and Democrat-dominated southern states happily turned a blind eye to the bloodshed that kept them in power. The Supreme Court's decision in *Cruikshank* proved one of the final nails in the coffin for multiracial democracy in the Deep South ahead of the withdrawal of Union troops in 1877, as the threat of violence prevented Black citizens from exercising their political rights across the region.

Despite the tragedy of the massacre and the injustice of *Cruikshank*, the episode in Grant Parish demonstrates that hope indeed flickered for multiracial democracy in the South, even if for a brief moment. As newly-freed Black citizens jumped at the opportunity to exercise their political rights, the federal government threw its power and resources behind building democracy in the rebel states. Congress enacted strong legislation to enforce the Reconstruction Amendments, and the Grant administration and Department of Justice forcefully implemented

these laws. Federal backing of democracy and opposition to lawlessness and racial apartheid proved a possible antidote to the scourge of white supremacy that lingered after a quarter millennium of slavery. These efforts proved effective enough to produce convictions in three of the Colfax massacre cases, even in Deep South Louisiana. Yet, the failure of the judiciary to uphold these federal interventions shattered democracy in Louisiana. The Colfax incident provides the critical lesson that, even in the most racially-tense and violent periods of American history, multiracial democracy could perhaps have survived in the Deep South. However, it required the exhaustive efforts of all three branches of the federal government to overcome the white supremacy entrenched in the local political culture. Without enthusiastic and coordinated support from the three branches of the federal government for fair elections, voting rights, and the rule of law, democracy burned in a fiery storm of violence.

B. Wilmington Insurrection

(i) Background: Multiracial Democracy in 1890s North Carolina

Though pre-Colfax Louisiana had a troubling history of violence, it was the initial response of the federal government in 1873-1874 that provided hope for federally protected democracy in the post-bellum South. Sadly, the Supreme Court ensured in *Cruikshank* that any tools the federal government could draw upon would be blunt, and the end of Reconstruction in 1877 signaled the death knell for the pro-democracy and civil rights movements brought about by the Union's triumph in the Civil War. By the late 1880s, many of the equalizing schemes imposed by military Reconstruction had been scaled back, and Black representation in state and local government was almost non-existent. White Democrats who had just years before rebelled against the Union increasingly dominated statehouses and governor's mansions.

Out of this abyss, North Carolina in the early 1890s emerged as a diamond in the rough where marginalized groups cobbled together effective political coalitions. Facing inflation and economic hardship, poor white farmers sought to oust laissez-faire Democrats from the statehouse and in their local governments. They found allies in unlikely places: the African American community and the Republican Party. Recognizing their common political goals, Black Republicans and white populists organized an effective Fusionist movement across the state, ushering in a Fusionist government and tearing down schemes that stripped Black-majority towns of local control.[40] The Fusionist legislature and Governor went further, reversing Democratic policies that had denied Blacks access to the ballot.[41]

By the late 1890s, Fusionists had found their way into power in Wilmington, a large city with a slight Black majority. Political power emboldened a Black community with an increasingly prosperous Black middle class. In addition to representation in government, a newspaper published by Black community leader Alex Manly, *The Wilmington Daily Record*, gave the community a voice in the press as well. Unsurprisingly, many whites in Wilmington chafed at living under biracial government.[42] As whites grew increasingly agitated by Fusionist, biracial governments across the state, white supremacy as a political movement picked up steam ahead of the 1898 state elections. In Wilmington, a group of nine local Democrats conspired to

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[40] There is an important distinction between the meaning of the label "Fusionist" in North Carolina in the 1890s and the meaning of the "Fusionist" label in Louisiana in the 1870s. In the latter, "Fusionist" referred to the coalition of white supremacist Democrats and those white Republicans who opposed the radical policies of local Black Republicans and the Radical Republicans in Congress. In the case of the former, "Fusionist" referred instead to a coalition that *included* Black Republicans who, together with poor white farmers (traditionally a Democratic voting bloc), worked to topple Democratic dominance two decades after the end of Reconstruction in the South. In North Carolina, the Fusionist movement was the only means for minority Blacks to have their voices heard in government, whereas the Fusionist movement of Louisiana helped whites from across the political spectrum deny power to the majority Black population.

[41] H. Leon Prather, "We Have Taken a City," in *Democracy Betrayed*, ed. David S. Cecelski and Timothy B. Tyson (University of North Carolina Press, 1998), 18-19.

[42] Ibid.

remove Blacks from power in the city by any means necessary. They later became known as the "Secret Nine."[43]

(ii) Insurrection and Massacre: Toppling the Wilmington Government

In trying to recoup the white vote, white supremacist politicians emphasized inflammatory issues likely to provoke backlash against Blacks, especially sexual violence committed by Black men against white women.[44] Taking issue with the proliferation of this trope by white supremacist politicians, Alex Manly called out these claims in *The Record*, emphasizing that there were Black men "sufficiently attractive for white girls of culture and refinement to fall in love with them."[45] Manly's editorial provoked seething anger among whites and fueled the flames that were to erupt in November of 1898. Many Wilmington whites began to rally behind the white supremacist cause upon perceiving this threat from growing Black power.[46]

In advance of the November election, white vigilantes intimidated Black voters in order to suppress turnout, patrolling polling stations with weapons and threatening to use violence against those Blacks who tried to exercise their right to vote. White supremacist intimidation won the day, as Democrats beat out Fusionists in the local election driven by an anemic Black turnout.[47] The "Secret Nine" saw this as their license to act. Some Fusionist Blacks not up for re-election remained in power after the 1898 elections, but the "Secret Nine" viewed the overwhelming Democratic victory as their mandate to forcibly drive out the remaining Blacks

[43] Ibid., 20.
[44] Ibid., 21.
[45] Ibid., 23.
[46] Ibid., 24-25.
[47] Ibid., 28-29.

and Fusionists from the political order. The morning after the election, a group of whites gathered in the town courthouse and approved a "Wilmington Declaration of Independence," which resolved to remove Blacks from government and expel Manly (who had already fled) from the town. The group summoned a contingent of middle-class Blacks and delivered to them the ultimatum to remove Manly, giving them only until the following morning to reply.[48] When this group of Black leaders responded without taking responsibility for Manly's words in *The Record*, the vigilantes took action. Gathering at the city armory the following morning, hundreds of heavily armed white men prepared to take the city by force. As the prospect of restored white dominance in Wilmington grew increasingly plausible, the crowd swelled to a size of 2,000.[49]

Led by Confederate veteran and former U.S. Congressman Alfred Waddle, the armed mob set ablaze the building that housed Manly's press for *The Record* in a move reminiscent of the Colfax courthouse a quarter-century earlier. As the building burned, the armed insurrectionists spread throughout the city, provoking clashes with some of the Black residents.[50] Only revisionist history could cast these skirmishes a two-sided; Waddle's armed mob paraded throughout the city as they toppled the government, threatening to murder those Blacks who stood in their way. The result was a massacre. By the day's end, Waddle and his supporters had "taken" the city of Wilmington.[51] Though the democracy guaranteed by the U.S. Constitution had yielded a biracial government, control of the city now lay in the hands of an unelected white minority.

Perhaps because the events in Wilmington spread across an entire city in a chaotic and tumultuous manner, no single death toll can be considered accurate or official. Estimates vary

[48] Ibid., 29-30.
[49] Ibid., 31-32.
[50] Ibid., 32-25.
[51] Ibid., 39.

from the teens to the hundreds.[52] If closer to the upper end of this spectrum, the Wilmington insurrection would prove far bloodier than the Colfax massacre. In addition to the dead, hundreds more Black residents of Wilmington fled the city after suffering traumatic violence and terrorism, assuring total control of the city for white supremacists for decades to come.[53] Wilmington morphed from a flourishing oasis of multiracial democracy into yet another hotbed of racial discrimination in the postbellum South.

Again paralleling Colfax, the duly elected government in Wilmington was politically aligned with those in power in the state capital. Fusionist Governor Daniel L. Russell attempted to quell the violence and restore democratic rule to Wilmington by ordering the Wilmington Light Infantry into action, but the largely white supremacist militia joined the insurrection instead. The forces of the state began to turn on its own government and democratic institutions. The violence and lawlessness were worsened by the presence of many Rough Riders who had recently returned from action in the Spanish-American War and devoted their combat experience to the insurrectionist cause.[54] These groups joined the Red Shirts, "a terrorist wing of the Democratic Party," many of whom had spearheaded a campaign of electoral fraud and voter intimidation across the state.[55] Thus, elements of the state commingled with those staging the *coup* in Wilmington, providing the insurrectionists extra strength and protection. Statewide, the successful *coup* indicated to white Democrats that they held unchecked power. The white supremacist mobs of North Carolina had once again been emboldened by the violence in

[52] Ibid., 35.
[53] Ibid., 36.
[54] Ibid., 33-35.
[55] Ibid., 25.

Wilmington, intimidating Governor Russell by threatening him politically with impeachment and bodily with murder.[56]

(iii) Failed Federal Response to the Wilmington Coup

Having successfully supplanted the democratically-elected government in Wilmington, the new white dictatorship exercised full control over the city's law enforcement. The insurrectionists thus unsurprisingly faced no charges in the city of Wilmington. Under total threat by the white vigilantes of North Carolina, Governor Russell was left impotent to use the power of the state to restore democracy to Wilmington or to bring the insurrectionists to justice.[57] This left only the federal government to intervene on behalf of democracy and the rule of law. At the outset, the McKinley administration seemed alarmed by the uprising in Wilmington. President McKinley quickly consulted his Cabinet, including Secretary of War Russell A. Alger and Attorney General John W. Griggs, who was compelled to hurry back to Washington. The head of the Department of Justice held a lengthy audience with the President on the evening after the insurrection.[58] As President, McKinley enjoyed the power to use military force to quash an insurrection and protect constitutional rights of the citizens of a state.[59] Nevertheless, McKinley awaited a request for federal aid from Governor Russell, whose hand was frozen by the threats of the white vigilante mob. Without any formal appeal for help from the Governor, McKinley saw

[56] LeRae Umfleet, "1898 Wilmington Race Riot Report." Research Branch, Office of Archives and History, North Carolina Department of Cultural Resources, May 31, 2006, 194-197.
[57] Ibid.
[58] H.Leon Prather, *We Have Taken a City: Wilmington Racial Massacre and Coup of 1898* (Cranbury: Fairleigh Dickinson University Press 1984), 151.
[59] Ibid., 151-152.

no need for military intervention despite the desperate entreaties of the Black residents of Wilmington who wrote to and lobbied the President.[60]

Mirroring the approach of the President, the Department of Justice initially expressed interest in wielding the arm of federal law to bring the insurrectionists to justice. Though McKinley did not militarily respond to the pleas of Black victims and national leaders, Attorney General John Griggs did order Claude Bernard, the U.S. Attorney for the Eastern District of North Carolina, to investigate the events of the insurrection. Griggs himself later visited North Carolina along with his Assistant Attorney General James E. Boyd to support Bernard's efforts. Unfortunately (yet predictably), the Justice Department's efforts to prosecute the insurrectionists quickly petered out. Griggs and his deputy returned to Washington without calling a grand jury, and he left Boyd, previously a supporter of the Ku Klux Klan, in charge of overseeing Bernard's prosecution. Despite Griggs' rapid return to the capital, Bernard later pressed on by impaneling a grand jury to investigate several Wilmington insurrectionists. However, Bernard failed to collect sufficient testimony and the grand jury was soon discharged. During the final year of the century, Bernard continued to chase down the Wilmington insurrectionists with the endorsement of Attorney General Griggs. Yet, when a new Acting Attorney General assumed leadership of the Justice Department in 1900, Bernard was ordered to halt the faltering investigation. Unlike Beckwith in the Colfax case, Bernard's determined efforts failed to garner sufficient federal support to complete a successful investigation, let alone produce convictions.[61] Where there had been hope that the federal government would intervene to uphold democracy in the South, the Department of Justice failed to act.

[60] Ibid., 152-159.
[61] Umfleet, "1898 Wilmington Race Riot Report," 198-199.

Desperate for some means to pursue justice, Bernard implored Griggs in December 1898 to request a congressional investigation into the violence and electoral fraud that had struck Wilmington the previous month.[62] Wary of upsetting the tenuous stability that had been reached in North-South relations, Republicans in Congress declined to use their legislative power to pursue such an investigation.[63] In the case of Wilmington, both the executive and legislative branches failed to effectively utilize the power of the federal government to quell vigilante subversion of democracy in the South. Such failures precluded any need for the courts to get involved. Once a glimmering example of hope for democracy in the South over thirty years after the Civil War, Wilmington and North Carolina saw democracy and the rule of law collapse without any resistance from a federal government that had promised self-government to all citizens.

(iv) Historical Significance of the Wilmington Insurrection

Much like the Colfax massacre, the story of the Wilmington insurrection plays out like a Greek tragedy. A once flourishing multiracial democracy collapses under the pressure of rampant white vigilante violence, and an indifferent federal government fails to act on behalf of its most vulnerable citizens. When studying this episode for the purposes of understanding the historical context behind January 6, a few details must remain top of mind. Ahead of the 1898 elections, white supremacists in North Carolina organized a widespread voter intimidation campaign, forcibly choking off the Black vote and thereby tampering with the outcome of the election. In Wilmington, Democratic victory emboldened vigilantes disgruntled with biracial

[62] Prather, *We Have Taken a City*, 153-154.
[63] Ibid.

government to forcibly overthrow the remaining Black and Fusionist elected officials. In the process, this thuggish gang massacred dozens, if not hundreds, of innocent Black residents of the city in cold blood, intimidating hundreds, if not thousands more into exile. The insurrectionists who assumed power in the city happily excused the violence of those who backed their coup. Increasingly powerful white mobs, backed by the Wilmington Light Infantry and the returning Rough Riders, blocked any effective response from the state, while the federal government failed to use its military resources to halt the violence. The federal justice system then failed to bring the insurrectionists to justice, once again providing cover to violent white supremacist attacks on the democratic process.

Two observations emerge from these details as critical. First, the Wilmington insurrection represents the failure of the federal government to shepherd the cause of multiracial democracy through a turbulent and violent postbellum political climate in the South. The organizing and coalition-building of Blacks across North Carolina in the 1890s demonstrated that even thirty-three years after the Civil War and two decades after the end of Reconstruction, there remained hope for multiracial democracy and Black voting rights in the South. When aggrieved white supremacists took matters into their own hands and overthrew a government to which they owed their loyalty, the only institution with any real power to enforce the rule of law failed to show up: the federal government. The Wilmington insurrection thus demonstrates the central role that the federal government must play, especially (in this case) the executive branch, in intervening on behalf of minority voting rights and the electoral process in order to safeguard democracy in each state and on a national level.

Second, the events of the Wilmington insurrection greatly resemble those of the Capitol insurrection. In both cases, whites and minorities built grassroots political coalitions to oust

right-wing governments and install leadership more friendly to progressive political causes and racial equality. Unhappy with the elected leadership, majority-white mobs banded together and resorted to violence to overthrow the government and replace its legitimate officers with their preferred authoritarian leaders. And, while some may dispute a classification of the January 6 mob as white supremacist, the flags and signs carried along with the groups who prepared and organized the insurrection indicate that white supremacists were certainly among their ranks. Though only the Wilmington mob was successful in its quest, in both cases the mobs enjoyed support from a major political party pushing for prosecutorial leniency or a total lack of punishment.

These similarities between the two incidents further underscore the troubling conclusions reached above about the inadequate federal response to Wilmington. In order to protect multiracial democracy and the electoral process, a forceful intervention by the federal government is required. As the only arm of the state with sufficient power and reach to smother anti-democratic violence wherever it occurs, the federal government bears a responsibility to minority voters and to its own legitimacy to treat the growing white supremacist movement as a sincere and dangerous threat to constitutional government in the United States.

C. Conclusions from Colfax and Wilmington

The violence in Colfax, Louisiana, in 1873 and Wilmington, North Carolina, in 1898 clearly marked seminal moments in the history of both American democracy and American race relations. Both incidents confirmed that too much of American history is not one of liberal democracy and the rule of law, but of authoritarianism, vigilante violence, and mob rule. Both tell tales of unthinkable racial tragedy that left hundreds of innocent Black Americans dead. And

both illustrate the severity of the obstacles faced by Black citizens who attempted to participate in the political process, confronting dangers far more treacherous than literacy tests or poll taxes.

Taken together as parts of a more complete history of anti-democratic violence in the United States, the Colfax massacre and Wilmington insurrection provide three key takeaways for the purposes of contextualizing the U.S. Capitol insurrection of 2021 within American history. First, contrary to popular media narratives in the immediate aftermath of the Capitol insurrection, the events of January 6, 2021 do not lack precedent in American history. While many contests for power and elections in American history have been marked by some level of violence, these two incidents provide explicit examples of episodes in which armed white supremacist mobs attempted (and, in these cases, succeeded) to overthrow a democratically elected government. As they stormed the Capitol, the insurrectionists of 2021, from Stewart Rhodes to Jake Angeli to Donald Trump, marched in the footsteps of Bill Cruikshank and Alfred Waddle and Christopher Columbus Nash. Fortunately for American democracy and the members of the 117th United States Congress, these insurrectionists can claim far less success than their forebears. Yet, when politicians, historians, and prosecutors analyze the Capitol insurrection, history demands they refrain from considering it a tragic, one-off incident. An ugly history of *coups*, insurrections, and massacres stains the United States; the Capitol insurrection merely proved that we have yet to leave this history behind.

Next, although both the Colfax and Wilmington massacres ended in heartbreaking tragedy, each incident was preceded by real hope for stable multiracial democracy. In Wilmington, the fearless organizing of Blacks and poor whites unseated a Democratic government that had deeply entrenched its power since the end of Reconstruction. The Fusionist government brought democracy back to postbellum North Carolina by taking on the Democratic

political machine and undoing the ballot restrictions enacted by previous administrations. A democratic optimist could look to North Carolina as a blueprint for combatting Jim Crow restrictions on voting rights in the South. In the case of Louisiana, though violence plagued efforts to democratize the state soon after the end of the Civil War, the zealous effort to protect democracy and the electoral process by Congress, James Beckwith, and the Grant administration reflected the sincere hope that, when the dust settled, democracy would prevail in the South. Despite the ugly history of racial discrimination and voting restrictions in the Jim Crow South, the origin points of both the Colfax massacre and the Wilmington insurrection demonstrate that, even in darkest and most racially fraught periods of American history, hope for a democratic future shined through.

Sadly, it was the very government that promised this hope that failed to deliver. In both of these cases, the lack of effective federal support for voting rights and free elections allowed democracy to fracture in these southern states. At the outset, the Colfax incident provided an example of an enthusiastic effort by the legislative and executive branches to take on anti-democratic white supremacist violence with the Enforcement Act of 1870, the impassioned prosecution of the Colfax terrorists by James Beckwith, and the strong support he received from Attorney General Williams and the Grant administration. However, the failure of the judiciary to uphold the power of Congress and the executive branch to protect the civil and political rights of Blacks doomed even the most fervent efforts by the government to protect democracy in such a hostile climate. In North Carolina, democracy initially seemed to sprout more organically than in Louisiana. Yet, the abject failure of the federal government, from Congress to the military to the Justice Department, to obstruct or punish a bloody *coup d'état* spelled democracy's doom for the next six decades.

Thus, this lengthy historical analysis of anti-democratic violence in the United State more than debunks the claim that the January 6 insurrection was unprecedented. It provides valuable and concrete lessons for how we must now confront that violence which has so dangerously shaken the foundations of our system of self-government. Protecting democracy and the electoral process against violent subversion by white supremacist groups requires massive intervention by all three branches of government. Wilmington warns of the dangers of total abandonment, while Colfax demonstrates that the most forceful efforts by two branches of government can be neutralized by the actions (or inaction) of the third. Countering this threat to the Republic requires a whole of government approach through which Congress provides the appropriate tools to protect democracy, the Department of Justice effectively prosecutes anti-democratic insurrectionists, and the courts uphold the laws that deter such groups from resorting to violence in the first place.

With this historical analysis complete, we must now turn to the present day. How does the Capitol insurrection of January 6 compare to these historical events, and has the response of the government thus far lived up to the demands of history?

Chapter II: The Federal Response to the Capitol Insurrection

Despite the history just recounted, the Capitol insurrection on January 6, 2021 was, in a sense, a uniquely twenty-first century spectacle. On no other day in modern American history (except perhaps September 11, 2001) has the general public witnessed blatant criminality on such a massive scale in real-time. The entire insurrection was broadcast live on television, as cable news channels had already begun covering the certification of the presidential election by Congress and the Save America rally outside the White House before the mob had begun to storm the Capitol. The wall-to-wall coverage of the insurrection on cable news and broadcast networks was supplemented by real-time updates provided by the attackers themselves and their victims (congressmen, congresswomen, senators, and their staffs) on social media. By the day's end, thousands of hours of video had comprehensively documented a sprawling mob's attempt to install an illegitimate government in the United States.

Investigators and prosecutors faced a daunting task. Though they swam in a sea of evidence, it would take months to identify each perpetrator and apply every appropriate criminal charge. The Justice Department confronted an opposition party largely supportive of the attempt to overturn the election, fostering skepticism of the legitimacy of the new administration among their supporters. Many observed that the outgoing President bore some responsibility for the insurrection. The potential prosecution of a former President for the attempted overthrow of his incoming successor would be truly unprecedented. As demonstrated by the Colfax massacre and the Wilmington insurrection, the fate of stable, multiracial democracy in the United States depended on successfully holding the insurrectionists accountable.

More than a year since the insurrection, the work of the Justice Department has borne fruit. The Department has informed the public of its progress by publishing a database of all charges, indictments, and plea agreements and updating case statuses on its website.[64] As of March 24, 2022, the Department of Justice has charged at least 740 individuals with at least one crime relating to activities at the U.S. Capitol on January 6, 2021.[65] Most estimates place the total number of insurrectionists far above this figure; it is believed that thousands of rioters entered the Capitol building during the attack.[66] After fifteen months of investigation and prosecution, how has the pursuit of justice fared? The following chapter seeks to evaluate the response of the federal government to the Capitol insurrection, including the severity with which insurrectionists are being treated and the appropriateness of the charges applied.

A. Low-Level Charges

The words of President Trump and Rudy Giuliani at the Save America rally confirmed the goal of the attack on the U.S. Capitol on January 6, 2021: to prevent congressional certification of the Electoral College vote as required by the Twelfth Amendment and to forcibly

[64] This database, cited below, is referenced extensively in this chapter. Many of the facts and figures, including counts of a particular charge, are taken through analysis of this database. However, due to inconsistent record-keeping practices in the database, some figures may be slightly inaccurate. For example, the charges faced by some of the defendants do not appear in the table published by the Department of Justice, but instead on a separate webpage that is linked in the spreadsheet. There does not appear to be a pattern or reason for these inconsistencies in the publishing of data. Therefore, all figures sourced from this table are approximate figures. Because there appears to be only a handful of these discrepancies, the table as a whole can still be a useful instrument to observe general trends and patterns in the prosecutorial efforts of the Justice Department. While these figures are helpful for these purposes, they should not be taken to state the number of defendants facing a particular charge or sentence with total accuracy.

[65] "Capitol Breach Cases," The United States Department of Justice, March 26, 2021, https://www.justice.gov/usao-dc/capitol-breach-cases.

[66] Ryan Lucas, "Where the Jan. 6 Insurrection Investigation Stands, One Year Later," NPR (National Public Radio, January 6, 2022), https://www.npr.org/2022/01/06/1070736018/jan-6-anniversary-investigation-cases-defendants-justice.

obtain a second term for Trump despite his loss in the 2020 presidential election.[67] Though this effort directly threatened the continuation of American democracy, a general readout of the charges levied against most Capitol insurrectionists would not indicate that democracy teetered on the brink on January 6. While individual indictments and statements of facts do allude to these perpetrators' participation in the events of January 6, many of the charges themselves could easily have been applied in other, less consequential protests, riots, or confrontations with law enforcement.

The vast majority of those insurrectionists charged with a crime face charges that seem incommensurate with the gravity of their aim. The most common charges levied against the insurrectionists include Entering and Remaining in a Restricted Building (334 charges), Disorderly and Disruptive Conduct in a Restricted Building (369 charges), Parading, Demonstrating, or Picketing in a Capitol Building (207 charges), and Knowingly Entering or Remaining in any Restricted Building or Grounds Without Lawful Authority (175 charges). These specific charges do not include the dozens of minor variations resulting in similar charges for many other perpetrators, such as Impeding Passage Through the Capitol Grounds or Buildings (twenty-four charges).[68] In comparison, only 195 charges referring to "violence" have been issued.[69] This figure exaggerates the total number of individual perpetrators charged with a violent crime, as many of the more zealous insurrectionists face multiple charges referring to

[67] Donald John Trump, "Remarks at Rally on Electoral College Vote Certification" (speech, Washington, D.C., January 6, 2021), Associated Press, https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-media-e79eb5164613d6718e9f4502eb471f27; Rudolph Giuliani, "Remarks at Rally on Electoral College Vote Certification" (speech, Washington, D.C., January 6, 2021), Politico, https://www.politico.com/video/2021/02/08/giuliani-lets-have-trial-by-combat-122543

[68] "Capitol Breach Cases," https://www.justice.gov/usao-dc/capitol-breach-cases.

[69] Note, this does not include charges that use the adjective "violent." The vast majority of such charges are "violent entry" charges. Given the way the insurrectionists entered the Capitol, it is fair to say that few entered the building "peacefully." Instead, this figure refers to acts of violence committed aside from entry into the Capitol building.

"violence."[70] Furthermore, the Department has issued 159 charges referring to some kind of "assault" and 192 that relate to the possession or use of a "weapon."[71] Both of these *types* of charges (not specific charges) also overstate the severity of the allegations most insurrectionists face in terms of sheer numbers, as many of those who face "violence"-related charges also face several "assault" and "weapon(s)" charges, which refer to similar behavior.[72]

All of these charges far outnumber the use of the most serious charge–seditious conspiracy–which has only been levied against eleven individuals.[73] While the data published by the Department of Justice does not provide comprehensive figures detailing the precise severity of charges faced by all 740+ defendants, these aggregations and observations paint the general picture: most participants in the Capitol insurrection who have been charged face relatively minor charges that could have been applied in instances of unauthorized peaceful protest on government property. Additionally, as estimates for the total participation in the insurrection reach about 2,000, even the size of the current pool of defendants reflects a general under-prosecution of the insurrection by the Department of Justice.[74]

Thus, a general survey of the data published by the Department of Justice reveals that many of those who participated in the insurrection, inspired by a defeated President desperate to

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[70] For example, defendant Tim Lavon Boughner faces charges both for "Engaging in Physical Violence in a Restricted Building or Grounds" and for "Act of Physical Violence in the Capitol Grounds or Buildings."

[71] "Capitol Breach Cases," https://www.justice.gov/usao-dc/capitol-breach-cases.

[72] For example, defendant Bruno Joseph Cua faces one "assault"-related charge ("Assaulting, Resisting, or Impeding Certain Officers"), two "violence"-related charges ("Engaging in Physical Violence in a Restricted Building or Grounds with a Deadly or Dangerous Weapon" and "Act of Physical Violence in the Capitol Grounds or Buildings"), and three "weapons"-related charges ("Entering and Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon," "Disorderly and Disruptive Conduct in a Restricted Building or Grounds with a Deadly or Dangerous Weapon," and "Engaging in Physical Violence in a Restricted Building or Grounds with a Deadly or Dangerous Weapon"). Note the overlap in this final charge that includes both a reference to "violence" and to the use of a weapon. This further illustrates the overlap of these more serious charges, underscoring the relatively small minority of perpetrators who face these more serious charges when compared to the majority who face less punitive charges such as ""Entering and Remaining in a Restricted Building."

[73] This charge will be discussed at greater length in subsequent sections of the chapter as well as future chapters of the paper.

[74] Lucas, "Where the Jan. 6 Insurrection Investigation Stands, One Year Later."

hold onto power by blocking the ascension of the legitimate President, face criminal charges that do not correspond to this aim.

B. Obstruction of an Official Proceeding and Sarbanes-Oxley

To the Justice Department's credit, it has acknowledged that these minor charges, which do not fully capture the nature of the offenses committed, are insufficient for many defendants. Prosecutors have several options to tailor their response to January 6 to the unique behavior of the insurrectionists, including charging the attackers with seditious conspiracy. Wary of levying this charge too liberally, prosecutors have opted instead to apply the charge of Obstruction of an Official Proceeding against many of the most violent insurrectionists who ardently fought to block the transfer of presidential power. At first glance, the obstruction charge is vague. What qualifies as an "official proceeding"? Is this the appropriate charge for the Justice Department to apply, and does it adequately capture the severity of the mob's attack? Because it has been levied so frequently by prosecutors, understanding the overall strategy of the Justice Department warrants a deeper analysis of the obstruction charge's meaning, use, and interpretation.

(i) Obstruction of an Official Proceeding

The Obstruction of an Official Proceeding charge can be found in 18 U.S.C. §1512(c)(2) - tampering with a witness or informant. The provision flows directly from its neighbor §1512(c)(1). Together, these two clauses provide:

Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.[75]

These provisions were enacted by Congress as part of the Sarbanes-Oxley Act of 2002, legislation passed in response to the scandal-ridden collapse of energy giant Enron and the auditing failures of Arthur Andersen LLP.[76] Both the law as a whole and these provisions in particular sought to target and punish corporations and executives for concealing fraudulent accounting practices. Other provisions of the law, such as 18 U.S.C. §1519, further demonstrate this aim:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.[77]

The provisions of the Sarbanes-Oxley Act of 2002 confirm that this legislation aimed to regulate the record-keeping, accounting, and administrative activities of companies and the individuals in their employ. Considering this background, the widespread use of this law in the

[75] 18 U.S.C. §1512, accessed at https://www.law.cornell.edu/uscode/text/18/1512.
[76] Spencer Hsu, "Lead felony charge against Jan. 6 defendants could be unconstitutionally vague, U.S. judge warns," *The Washington Post*, August 10, 2021, https://www.washingtonpost.com/local/legal-issues/capitol-riot-charge-vague/2021/08/06/018b4cf8-f483-11eb-9068-bf463c8c74de_story.html.
[77] 18 U.S.C. §1519, Accessed at https://www.law.cornell.edu/uscode/text/18/1519

prosecution of the Capitol insurrection raises questions. Is it appropriate to rely on Sarbanes-Oxley as the primary instrument of justice for many of the most troubling acts committed on January 6?

(ii) Judicial History of Sarbanes-Oxley

The Department of Justice boasts a history of applying Sarbanes-Oxley in matters unrelated to those targeted by Congress in the wake of the Enron scandal. The broad application of this law caught the attention of the Supreme Court in its 2015 decision *Yates v. United States*. In this case, Captain John Yates of the fishing vessel *Miss Katie* was convicted of violating 18 U.S.C. §1519, one of the aforementioned provisions of Sarbanes-Oxley. Officer John Jones of the Florida Fish and Wildlife Conservation Commission boarded *Miss Katie* while she was at sea in the Gulf of Mexico for an impromptu inspection. Though a state officer, Jones had been deputized by the National Marine Fisheries Service and could thus enforce both state and federal regulations. Jones noticed that several red groupers aboard the ship were smaller than federal regulations permitted. Jones ordered Yates to keep these fish aside and report for further inspection at port. Rather than comply with this order, Yates ordered his crew to toss the unauthorized catch overboard. He was charged and convicted of "destroying, concealing, and covering up undersized fish to impede a federal investigation" in federal district court under 18 U.S.C. §1519 and lost on appeal at the Court of Appeals for the Eleventh Circuit.[78]

Yates appealed to the Supreme Court, challenging the constitutionality of his conviction. In his appeal, Yates argued that the charge provided by §1519 was a "documents offense" and

[78] *Yates v. United States*, 574 U.S. 528 (2015)

that the "tangible object" provision of §1519 referred only to "computer hard drives, logbooks, [and] things of that nature" which pertain to an investigation of financial crimes, not fish from an unauthorized catch.[79] Broadly speaking, Yates pressed that Sarbanes-Oxley was enacted by Congress with a particular category of crime in mind, and that though the language of the legislation could be construed to apply to other situations, this application of the law deviated from the intent of Congress. Yates won the day with his argument, as the Court reversed the Eleventh Circuit's ruling in a tight five-to-four decision.

In a plurality opinion, Justice Ruth Bader Ginsburg determined that a "tangible object" as understood by Congress when enacting the Sarbanes-Oxley Act had to be "used to record or preserve information."[80] In this sense, Ginsburg acknowledged Yates' argument about the true aim of Sarbanes-Oxley. Ginsburg argued that the context of the law's passage confirmed that the section's meaning extended only to the tampering of objects related to the collection of information. Furthermore, Ginsburg noted the placement of §1519 near other provisions of Chapter 73, Title 18 of the U.S. Code that concern the handling of a company's information. This suggested to Ginsburg that §1519 was "not intended to serve as a cross-the-board ban on the destruction of physical evidence of every kind."[81] Thus, with its overall decision in *Yates*, the Supreme Court asserted that Sarbanes-Oxley ought to be construed narrowly.

Despite advancing this higher-level argument, Ginsburg's analysis does leave open the possibility that §1512 could be read slightly differently than §1519. In arguing that the "tangible object" discussed in §1519 referred only to documents and related objects, Ginsburg cited the reference to "other object[s]" in §1512(c)(1) as evidence that §1519 referred only to this

[79] Ibid., 4.
[80] Ibid., 14.
[81] Ibid., 2.

narrower class of objects, as the inclusion of §1512(c)(1) in the law would have otherwise been redundant.[82] In highlighting the placement of §1519 as evidence of its narrow scope, she also noted that "Congress did not direct codification of the Sarbanes-Oxley Act's other additions to Chapter 73 [such as §1512(c)] adjacent to these specialized provisions."[83] Thus, while the Supreme Court has ruled on the general application of Sarbanes-Oxley, questions remain about whether §1512 enjoys a wider scope of application.

The judiciary has thus painted a confusing picture of Sarbanes-Oxley. On one hand, it has yet to pass judgment on §1512 and its applicability in circumstances unrelated to the preservation of information and documents; in fact, in narrowing §1519, it has suggested that §1512 may be broader in scope than its counterpart. Nevertheless, the Court sent a clear signal with its decision in *Yates* that Sarbanes was passed as a response to a particular kind of misconduct and that overly broad applications of the law are inappropriate.

The signals sent by the Supreme Court in its interpretation of Sarbanes-Oxley do not look favorably upon the use of the law over the past year to punish the Capitol insurrectionists. The decision in *Yates* clearly indicates judicial skepticism of applying Sarbanes-Oxley far beyond its intended purpose. While some may point to Ginsburg's discussion of §1512 as an affirmation of the path that the Justice Department is currently pursuing, this potentially raises more questions than it answers. The ambiguity that overshadows the law, including §1512, underscores the observation that the obstruction charges levied are tenuous and fail to clearly and emphatically confront the insurrectionists for the particular conduct in which they engaged on January 6. Thus, this analysis of the judicial history of Sarbanes-Oxley confirms preliminary suspicions that Obstruction of an Official Proceeding is not a wholly appropriate response to the crimes of the

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[82] Ibid., 12.
[83] Ibid., 11.

insurrection. We must next examine whether the judiciary today shares that perspective amidst the ongoing prosecution.

(iii) Judicial Skepticism of Obstruction of an Official Proceeding in the Capitol Insurrection Prosecution

The questions raised by *Yates* rooted many early arguments by the defense attorneys of those insurrectionists charged with Obstruction of an Official Proceeding. The first murmurs of judicial skepticism emerged last summer, when two judges of the U.S. District Court for the District of Columbia (Randolph D. Moss and Amit Mehta) questioned the constitutionality of the charges given the legislative history of Sarbanes-Oxley and the Supreme Court's position in *Yates*.[84] While they were both ultimately persuaded by prosecutors and allowed their respective trials to proceed,[85] another judge has been friendlier to these challenges. On March 7, 2022, Judge Carl J. Nichols dismissed an Obstruction of an Official Proceeding charge against defendant Garret Miller,[86] ruling that "the text, structure, and development of the statute," along with its legislative history, suggest that a narrow reading of §1512(c)(2) is most appropriate.[87] Nichols concluded that any violation of the statute must involve "action with respect to a document, record, or other object" for the charge to be applied appropriately.[88] Nichols'

[84] Spencer Hsu, "Lead felony charge against Jan. 6 defendants could be unconstitutionally vague, U.S. judge warns,"; Spencer Hsu, "Second U.S. judge questions constitutionality of lead felony charge against Oath Keepers in Capitol riot," *The Washington Post*, September 9, 2021, https://www.washingtonpost.com/local/legal-issues/oathkeepers-obstruction-charge-vague/2021/09/08/9a833eaa-10c3-11ec-bc8a-8d9a5b534194_story.html.
[85] Roger Parloff, "The Justice Department Faces a Setback in the Capitol Riot Cases," *Lawfare* (blog) (The Lawfare Institute, Brookings Institution, March 11, 2022), https://www.lawfareblog.com/justice-department-faces-setback-capitol-riot-cases.
[86] *United States v. Miller*, Memorandum of Opinion, Criminal Action No. 1:21-cr-00119 (CJN), accessed at https://s3.documentcloud.org/documents/21408592/miller-nichols-memo-opn-1512c2-govuscourtsdcd227582720_1.pdf.
[87] Ibid., 28.
[88] Ibid.

dismissal of the charge against Miller not only confirms that questions regarding Sarbanes-Oxley, §1512(c)(2), and Obstruction of an Official Proceeding remain; it also directly threatens one of the most punitive tools at prosecutors' disposal in bringing to justice the most dangerous of insurrectionists.

The questions raised by this analysis of the Obstruction of an Official Proceeding charge (along with those of Judges Moss, Mehta, and Nichols) highlight the critical role that the judiciary will and must play in shaping the outcome of the Capitol insurrection investigation and prosecution. As seen with the Colfax massacre and the Supreme Court's decision in *United States v. Cruikshank*, the courts enjoy substantial power in shaping the response of the federal government to white anti-democratic violence. The Colfax incident reminds us that even if prosecutors pursue insurrectionists and terrorists with all possible tenacity and zeal, judges who fail to commit to the federal government's power to protect our democratic institutions can both neutralize the efforts of prosecutors and give further license to this sort of dangerous violence. Just as legislators must enact the necessary laws and prosecutors must enforce them, judges bear the responsibility of protecting democracy and the rule of law by upholding the government's power to prosecute and punish enemies of democracy. Even if Obstruction of an Official Proceeding is not the ideal charge, Judge Nichols' dismissal foreshadows an even gloomier future in which hundreds of insurrectionists who attempted to install Donald Trump as an unelected dictator face only minor and inconsequential charges. While this paper has also questioned the appropriateness of Obstruction of an Official Proceeding as used against the insurrectionists, it has advocated for a more forceful approach to the prosecution, not a more lenient one. History reminds us of the power the judiciary wields and the role it must play, and

Judge Nichols' skepticism of federal efforts to punish anti-democratic violence suggests that he, and perhaps other judges, have not learned the lessons of the past.

C. Seditious Conspiracy: A Limited Application

Much of the previous discussion of the Capitol insurrection has focused on the relative leniency with which most Capitol rioters have been charged. This claim has been supported by the heavy reliance on low-level illegal entry charges and the overreliance on obstruction charges to avoid widespread application of the more serious charge of seditious conspiracy. Nevertheless, the Department of Justice did finally hand down its first seditious conspiracy charges against participants in the Capitol insurrection. These were filed against Elmer Stewart Rhodes and ten of his co-conspirators in the Oath Keepers just over a year after the insurrection.[89] The willingness of the Department of Justice to apply such a serious charge suggests that it recognizes the grave jeopardy the insurrection posed to American democracy. The decision to levy this consequential charge against even a handful of the insurrectionists warrants closer examination of its use.

(i) Initial Discussion of Sedition

The prospect of charging participants in the Capitol insurrection with seditious conspiracy was first raised as the insurrectionists scaled the walls of the Capitol, shattered its windows, and forcibly entered the building. Television commentators covering the insurrection

[89] Alan Feuer and Adam Goldman, "Oath Keepers Leader Charged With Seditious Conspiracy in Jan. 6 Investigation," *The New York Times*, January 13, 2022, https://www.nytimes.com/2022/01/13/us/politics/oath-keepers-stewart-rhodes.html

in real time expressed pure astonishment, with many labeling the actions of the mob (and of President Trump) as "treason."[90] As members of Congress took refuge in their offices, barricading their doors with desks and bookshelves, then President-elect Biden took to the airwaves to demand that the President call off the insurrection, forcefully denouncing the attack as "border[ing] on sedition."[91] Just days after the insurrection, Acting U.S. Attorney for the District of Columbia Michael Sherwin announced that the Department of Justice was "looking at significant felony cases tied to sedition and conspiracy" and that he had ordered a "strike team" to investigate seditious conspiracy charges.[92] In the following weeks, with shocking images of the insurrection seared into the national consciousness, it seemed that momentum had begun to build to forcefully punish those responsible and politically ostracize these enemies of democracy.[93] In March of 2021, Sherwin made waves when he indicated in an interview with *60 Minutes* anchor Scott Pelley that "the evidence is trending towards" the use of seditious conspiracy charges, that "the facts support" seditious conspiracy, and that "as we go forward, more facts will support" these charges.[94] Sherwin's interview marked the clearest indication to

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[90] Van Jones, Jake Tapper, CNN live coverage of Capitol insurrection, January 6, 2021, accessed at https://www.youtube.com/watch?v=JLBLgH3PAeI

[91] Joseph R. Biden Jr., "Remarks on U.S. Capitol protesters" (speech, Wilmington, DE, January 6, 2021), C-SPAN, https://www.c-span.org/video/?507742-1/president-elect-biden-at-hour-democracy-unprecedented-assault

[92] Michael R. Sherwin, "Remarks on Capitol insurrection investigation" (speech, Washington, D.C., January 12, 2021), Reuters, https://www.youtube.com/watch?v=zAq7sR32qh0

[93] In his final days in office, President Trump was impeached for a second time by the House of Representatives, with ten House Republicans supporting the impeachment resolution. During the Senate trial the following month, fifty-seven Senators voted to convict the former President and prevent him from ever again seeking the presidency, including seven Republican Senators. Both of these figures are the greatest support ever seen for the impeachment and conviction of a President by members of his own party. See Aaron Blake, "Trump's second impeachment is the most bipartisan one in history," *The Washington Post*, January 13, 2021, https://www.washingtonpost.com/politics/2021/01/13/trumps-second-impeachment-is-most-bipartisan-one-history/; Li Zhou, "7 Senate Republicans vote to convict Trump — the most bipartisan impeachment trial verdict ever," *Vox*, February 13, 2021, https://www.vox.com/policy-and-politics/2021/2/13/22279879/7-senate-republicans-convict-trump-romney-collins-murkowski-sasse-cassidy-burr-toomey

[94] Michael Sherwin, "Detailing the charges facing the Capitol rioters," interview by Scott Pelley, *60 Minutes*, CBS, March 21, 2021, https://www.youtube.com/watch?v=FoAqWnD7NTI

date that the Justice Department intended to bring seditious conspiracy charges against (at least some) insurrectionists.

After raucous noise by pundits, politicians, and prosecutors about sedition, silence echoed for months on end. A steady stream of trespassing, disorderly conduct, and obstruction charges flowed from the U.S. Attorney's office, but no news emerged on the seditious conspiracy front until January 2022, when the Department of Justice handed down the aforementioned charges against Rhodes and his co-conspirators.[95]

(ii) Charges of Seditious Conspiracy Against the Oath Keepers

To even the most offended of witnesses to the Capitol insurrection, the plot detailed in the indictment against Rhodes and his co-conspirators is shocking. The indictment describes a highly coordinated, sophisticated, and militarized effort by Rhodes and ten others to overturn the 2020 presidential election and forcibly install Donald Trump as President for a second term despite his electoral loss. Prosecutors relied heavily on messages between Rhodes and his co-conspirators sent via Signal, an encrypted messaging service, to bring to light the coordinated nature of the conspiracy. As early as November 5, 2020 (two days before the election was projected for Biden by most media outlets), Rhodes rallied his close followers to resist if the election were to be called for Biden, urging, "[w]e aren't' getting through this without a civil war. Too late for that. Prepare your mind, body, spirit."[96] He later told another Oath Keepers leader that if Biden were to take office, "we will have to do a bloody, massively bloody

[95] Feuer and Goldman, "Oath Keepers Leader Charged With Seditious Conspiracy in Jan. 6 Investigation."
[96] United States v. Rhodes, et al., Indictment, Case 1:22-cr-00015-APM, January 12, 2022, 10, accessed at: https://www.justice.gov/usao-dc/case-multi-defendant/file/1471016/download

revolution against them."[97] He sent further messages through several channels urging this violent resistance and coordinating training programs for Oath Keepers to prepare for the struggle against the government.[98]

As the date of the certification neared, it became clear that Rhodes and his followers intended to intimidate Congress with the use of force. Rhodes messaged another Signal channel that "the only chance we/he [Trump] has is if we scare the shit out of them [Congress] and convince them it will be torches and pitchforks time i[f] they don't do the right thing."[99] Rhodes also began building up arms, purchasing thousands of dollars in guns, ammunition, and other weapons-related material.[100] After traveling to the D.C. area, the Oath Keepers organized "quick-response force" (QRF) teams around Washington, heavily arming them in case the need for backup arose. On the morning of January 6, Rhodes and his followers arrived at the Capitol in tactical and battle gear and divided themselves into two "stacks" that aimed to penetrate different parts of the building.[101] The stacks, as well as the reinforcements at the QRF outposts, communicated and coordinated throughout the day and were emboldened by the enthusiasm with which the mob attacked the Capitol. "Stack One," which consisted of about half of the defendants named in the indictment, began searching for Speaker of the House Nancy Pelosi.[102] "Stack Two" also forced its way into the building, assaulting law enforcement personnel once inside.[103] After the building had been cleared, Rhodes again met with his co-conspirators at a

[97] Ibid., 13.
[98] Ibid., 12.
[99] Ibid., 14.
[100] Ibid., 15, 19.
[101] Ibid., 21.
[102] Ibid., 26.
[103] Ibid., 28-29.

restaurant in Virginia and, in subsequent weeks, continued to amass arms and encouraged resistance to the Biden administration.[104]

If any case were to warrant a seditious conspiracy charge, it is undoubtedly that of Rhodes and his followers. Rhodes and the Oath Keepers demonstrated remarkable and deliberate planning and coordination from the election to the insurrection. The group had extensively prepared to attack the Capitol and demonstrated their previous training with choreographed tactics. Furthermore, the aim of the conspiracy could not have been made clearer through Rhodes' repeated messages and correspondences with his followers. He repeatedly alluded to an impending "civil war" and a willingness to use violence to impede Biden from taking office. He explicitly urged his followers to violently intimidate Congress into abandoning their responsibility to certify the election, and the group allegedly targeted one of the country's most senior elected officials in their attack.[105]

Perhaps no other criminal charge could even scratch the surface of justice for these insurrectionists. The willingness of the Department of Justice to pursue seditious conspiracy charges against Rhodes and his co-conspirators suggests that prosecutors at least seek to severely punish those insurrectionists who most gravely threatened democracy and the lives of congressional leaders. Furthermore, though the indictment came over a year after the insurrection itself and after thousands of other charges were announced, prosecutors had to piece together a lengthy and complicated conspiracy through messages and video evidence before charging the defendants. Investigating such a complex conspiracy in the midst of such chaos certainly required time and had to be approached methodically and deliberately.

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[104] Ibid., 30-32.

[105] The indictment does not specify what the defendants intended to do once finding Speaker Pelosi.

(iii) Lack of Seditious Conspiracy Charges in Cases of Egregious Conduct

Nevertheless, this close reading of the Rhodes indictment demonstrates the extremely narrow scope of cases that the Department of Justice has deemed appropriate for seditious conspiracy prosecution. Thousands of insurrectionists stormed the Capitol on January 6, 2021 hoping to prevent the certification of the 2020 presidential election; surely, most did not plan as extensively or as deliberately as Rhodes and the Oath Keepers. Yet, they too engaged in acts of shocking violence at the Capitol, and their political aim underscores the seriousness of their actions. Those insurrectionists who do *not* face seditious conspiracy charges can perhaps reveal as much as those who do. Many of the defendants facing obstruction or other charges indeed engaged in troubling violence and expressed a sincere wish to stop the certification of the election (and hence the legitimate transfer of presidential power). For example, defendant Tim Boughner faces charges for Obstruction of an Official Proceeding and Assaulting, Resisting or Impeding Certain Officers Using a Dangerous Weapon or Inflicting Bodily Injury among others. The Statement of Facts cites photo and video evidence to demonstrate that Boughner discharged chemical spray against law enforcement while attempting to overpower law enforcement and breach the Capitol building. This certainly implicates Boughner in assaulting an officer using a dangerous weapon. Yet, the Statement of Facts also included evidence from Boughner's Facebook account demonstrating his aim in traveling from Michigan to Washington: to stop the transfer of presidential power. Boughner confirmed this with several remarks on Facebook, commenting on one post that "I can't believe I'm saying this but we are going to be at war."[106] In a correspondence with another user, Boughner expressed excitement at the prospect of using violence to stop the certification, writing, "Never will there be anything like this again bro.

[106] *United States v. Boughner*, Statement of Facts, Case 1:21-mj-00649-ZMF, 18, accessed at https://www.justice.gov/usao-dc/case-multi-defendant/file/1459236/download

Might even get lucky and stomp some ass."[107] The day before the insurrection, Boughner posted, "I'm on my way to Washington DC. To make sure Biden's doesn't become president."[108]

Boughner is not alone in escaping seditious conspiracy charges despite engaging in serious violence at the Capitol after expressing designs to overturn the election. Bruno Joseph Cua faces a suite of charges that includes obstruction but excludes seditious conspiracy. Cua was also among the violent rioters, wielding a baton in a fight with Capitol Police. Video evidence demonstrates that Cua was able to gain entry into the Senate chamber, which had at that point been evacuated. Additional footage shows Cua trying to open locked or barricaded doors, likely in search of members of Congress to intimidate. As with Boughner, Cua also documented his purpose for traveling from Georgia to Washington on social media. Cua repeatedly posted his intent to stop the transfer of power in a series of posts on Parler. In one post, Cua wrote that "President Trump is calling us to FIGHT!...It's time to take our freedom back the old fashioned way."[109] In a response to a post from President Trump calling on his supporters to gather in Washington on January 6, Cua posted "This isn't a joke, this is where and when we make our stand. #January6th, Washington DC."[110] Despite expressing such explicit intent to "fight" on January 6 to stop the transfer of power to Biden, Cua has not faced any sedition-related charges. Instead, the Department of Justice has opted to throw the book of less consequential charges at Cua, leaving him off the list of history's most infamous anti-American terrorists.

Thus, after talking the talk of sedition in early 2021, the Department of Justice has not fully walked the walk, but perhaps *limped* it. To its credit, it has thoroughly investigated and has

[107] Ibid.
[108] Ibid.
[109] United States v. Bruno Joseph Cua, Statement of Facts, Case 1:21-cr-00107-RDM, 10, accessed at https://www.justice.gov/usao-dc/case-multi-defendant/file/1365571/download.
[110] Ibid.

now indicted those most organized insurrectionists who coordinated an elaborate plot to forcibly install Donald Trump as President for a second term. Yet, many insurrectionists, including Boughner and Cua, traveled to Washington with similar aims as the Oath Keepers despite their lack of membership in a formal organization. The Justice Department's hesitancy to levy similar charges against these insurrectionists leaves only less serious and less relevant charges to use as instruments of justice. In this sense, though the department has made strides in strengthening its criminal justice response to the attack on the Capitol, the charges issued thus far still reflect a general leniency towards the insurrectionists as a whole, affirming the observations detailed in the previous two sections.

D. Pleas, Convictions, and Sentencing

As demonstrated in the three preceding sections, the charges faced by Capitol insurrectionists run the gamut from picketing and parading in the Capitol to seditious conspiracy. The punishments for the hundreds of charged perpetrators will likely vary significantly. Yet, if punishment for unlawful conduct is seen as a deterrent against future criminal behavior, then the nature of the punishment handed down must be examined.[111] The following section seeks to briefly analyze the criminal consequences that the perpetrators of the Capitol insurrection now face.

Despite the best efforts of the Justice Department and the commitment of Attorney General Garland that the prosecution of the Capitol insurrection would be his "first priority"[112]

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[111] Indeed, the very argument of this paper rests on the assumption that more serious charges and more severe punishments serve as effective protection against criminal behavior that targets our democracy and electoral institutions.

[112] Matt Zapotosky, Ann E. Marinow, and Devlin Barrett, "Merrick Garland Tells Senators Capitol Riot Investigation Will Be His First Priority as Attorney General," *The Washington Post*, February 22, 2021,

upon assuming the role, the sheer quantity of cases to manage has proved a challenge for investigators and prosecutors. As previously mentioned, it is estimated that over two thousand insurrectionists (illegally) entered the Capitol on January 6, 2021 in this mob attack on democracy.[113] Many hundreds (if not thousands) more attacked the building and the law enforcement personnel protecting it but never gained entry. In the fourteen months since the attack, the U.S. Attorney for the District of Columbia, whose office is overseeing all Capitol insurrection cases, has charged at least 740 individuals with various crimes for their participation.[114] Despite charging between a quarter to a third of the total number of individuals who entered the building, prosecutors still face a gargantuan caseload. As a result, the government has had to settle plea agreements with hundreds of defendants as a means of managing the greater investigation and prosecution.[115] Approximately 220 defendants have already entered guilty pleas after facing indictments for their participation in the insurrection,[116] nearly a third of all those charged thus far.[117] Many defendants who initially pleaded not guilty later reached plea agreements with the Department of Justice. Because of the preponderance of guilty pleas, many hundreds of defendants will face more lenient sentences.

Among those who have pleaded not guilty, very few cases have gone to trial. Indeed, only one Capitol breach trial has been completed. Guy Wesley Reffitt was found guilty by a federal jury in Washington on all five charges he faced in court, including Obstruction of an

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https://www.washingtonpost.com/national-security/merrick-garland-confirmation-hearing/2021/02/21/b4725878-7474-11eb-9537-496158cc5fd9_story.html.

[113] Lucas, "Where the Jan. 6 Insurrection Investigation Stands, One Year Later."

[114] "Capitol Breach Cases," https://www.justice.gov/usao-dc/capitol-breach-cases

[115] Tom Jackman and Spencer Hsu, "Hundreds of People Stormed the Capitol. Most Won't Face Hefty Prison Terms, Legal Experts Say," *The Washington Post*, May 15, 2021, https://www.washingtonpost.com/nation/2021/05/13/capitol-rioters-sentencing/.

[116] "Capitol Breach Cases," https://www.justice.gov/usao-dc/capitol-breach-cases

[117] Note that this does not mean that two-thirds of the currently charged defendants will go to trial. Since the investigation into the insurrection remains ongoing, many defendants have yet to enter pleas.

Official Proceeding.[118] Reffitt's sentencing is scheduled for June.[119] No sentences have yet been handed down for convictions, as Reffitt was the first defendant to go to trial.

Because so few cases have gone to trial, we must resort to the sentences that offenders are facing (in addition to our analysis of the charges earlier in the chapter) to evaluate the punitive consequences faced by the insurrectionists. An examination of the published information reveals that approximately 125 offenders have been sentenced; of this total, only about fifty (or forty percent)[120] face incarceration.[121] Among these fifty, offenders face a median sentence of forty-five days.[122] Thus, many offenders who attempted to violently install Donald Trump as President for a second term will spend just forty-five days or fewer in custody.[123]

A handful of those sentenced thus far do face significant prison time. Of the 125 offenders sentenced and the fifty who have been or will be incarcerated, eight face prison sentences longer than a year.[124] Most of these offenders pleaded guilty for the more serious charges levied by prosecutors, including Assaulting, Resisting or Impeding Certain Officers Using a Dangerous Weapon and Obstruction of an Official Proceeding. Prosecutors have relied on this latter offense as one of the most serious charges to use against the insurrectionists, as it carries a maximum prison sentence of twenty years,[125] though most sentences issued thus far

[118] Alan Feuer, "Texas Man Convicted in First Jan. 6 Trial," *The New York Times*, March 8, 2022, https://www.nytimes.com/2022/03/08/us/politics/guy-reffitt-jan-6-trial.html.
[119] "Capitol Breach Cases," https://www.justice.gov/usao-dc/capitol-breach-cases
[120] Ibid.
[121] This figure includes imprisonment, time in jail, and intermittent incarceration. Offenders sentenced to time served are not included in these figures.
[122] The mean sentence is just over 8 months. The extreme gap between the mean and median sentence can be attributed to a handful of offenders who face much lengthier prison terms. Robert Scott Palmer faces the longest term of 63 months.
[123] To clarify, this only considers the small minority of offenders who have pled guilty, face incarceration, and have been sentenced. Because 60% of those sentenced thus far do not face incarceration, this figure is actually a gross overestimate of the consequences faced by the insurrectionists as a whole. This merely measures the median time of incarceration faced by a participant who *already* faces incarceration.
[124] "Capitol Breach Cases," https://www.justice.gov/usao-dc/capitol-breach-cases
[125] 18 U.S.C. §1512, accessed at https://www.law.cornell.edu/uscode/text/18/1512.

range from three to four years. As can be measured thus far, a small handful of rioters will face substantial prison time for their actions. However, because prosecutors have arranged plea agreements, many of these sentences have erred on the side of leniency. Most importantly, the miniscule number of offenders facing lengthy prison terms highlights the macro reality that the vast majority of Capitol insurrectionists will not spend significant time in prison for their attempt at reversing the transfer of power.

E. Federal Response: Concluding Remarks

This multi-level analysis of the prosecution of the Capitol insurrectionists helps paint a more detailed and complete picture of the intensity with which the Department of Justice has sought to protect our democracy and the integrity of our government from violent attack. Faced with the herculean challenge of identifying and investigating every participant in the insurrection, the Department has thus far managed to locate and charge only a minority of perpetrators. Among those who do face charges, most are confronted with only minor allegations akin to those used for other unlawful entry into a government building. These charges are not tailored to the political aim of overturning the presidential election that the insurrectionists pursued. Many of these charges are mere misdemeanor offenses; thus, many of those who attempted to block the transfer of power will not be stamped with the lasting and damning label of "felon." The Justice Department has attempted to push more severe consequences for insurrectionists whose behavior was deemed especially egregious or dangerous, relying on the charge of Obstruction of an Official Proceeding from the Sarbanes-Oxley Act. However, skepticism clouds the hundreds of charges that rely upon this statute, as the context of the legislation's passage indicates it was intended to combat corporate financial crimes rather than

attempts to subvert or overthrow the government. The department has wielded the sharpest weapon in its arsenal, the seditious conspiracy charge, against a mere handful of insurrectionists. However, the extraordinary circumstances of these charges along with their relative scarcity among the greater prosecutorial effort underscore the leniency with which other insurrectionists, who also intended to forcibly halt the transfer of presidential power, have been treated. Finally, the unmanageable caseload that prosecutors in the District of Columbia must handle has prompted the government to negotiate hundreds of plea deals. Among these agreements, only a minority of offenders face any jail time, and an even more modest fraction will serve significant terms of incarceration.

With the general leniency of the prosecutorial effort established, we must also consider a few complicating factors. First, any evaluation of the severity of the consequences for the Capitol insurrection is frozen in time. Though less than half of the participants in the insurrection have been charged, we have yet to reach the sixteen-month mark since the insurrection. Such a massive and chaotic crime will understandably require time to thoroughly investigate. More charges and indictments can be expected, which may modify the picture illustrated in this paper. Given the nearly insurmountable caseload prosecutors must handle, it is further understandable for the government to settle for low-level plea agreements with less dangerous offenders while concentrating its energies on the most threatening insurrectionists (including the Oath Keepers) and those who incited the violence. Indeed, in response to criticism by federal judges that the Department of Justice has not pursued the insurrectionists with sufficient intensity and severity, Attorney General Garland retorted that the government has deliberately elected to pursue less serious offenders before investigating and charging more serious ones, conjuring an inaccurate

appearance of leniency.[126] Garland suggested that, as more charges, convictions, and sentences are handed down, the overall treatment of the insurrectionists will appear far less generous.

There is a certain irony in the courts chastising prosecutors for their failure to effectively seek justice with respect to the Capitol insurrection. In the past year, the judiciary has once again proved an obstacle to an activist executive branch intervention to protect the democratic process. After Michael Sherwin's *60 Minutes* interview with Scott Pelley, District Judge Amit Mehta condemned the government for making statements to the press about the growing body of evidence for seditious conspiracy charges. Sherwin was later referred for review by the Department of Justice Office of Professional Responsibility for commenting on active investigations and subsequently left the department for private practice.[127] The hostility of Judge Mehta to the comments on sedition and the controversy surrounding Sherwin's interview may explain a reluctance to pursue serious charges that once seemed an apparent inevitability to the U.S. Attorney for the District of Columbia in March 2021. More significantly, the judiciary has proved a formidable obstacle for the government's pursuit of justice under the Sarbanes-Oxley Act. Judge Mehta and Judge Randolph Moss both expressed skepticism of the appropriateness of the Obstruction of an Official Proceeding charge.[128] Judge Carl Nichols took his skepticism a step further, throwing out the government's case for Obstruction of an Official Proceeding and drawing support from the Supreme Court's narrow interpretation of the Sarbanes statute in *Yates v. United States*.[129] While this paper has also questioned the appropriateness of the obstruction charge to prosecute the crimes related to the Capitol insurrection, the skepticism of these judges

[126] Lucas, "Where the Jan. 6 Insurrection Investigation Stands, One Year Later."
[127] Jordan Fischer, "Judge Takes Justice Department to Task over Former US Attorney's 60 Minutes Interview," WUSA9, March 23, 2021, https://www.wusa9.com/article/news/national/capitol-riots/judge-takes-justice-department-to-task-over-former-us-attorneys-60-minutes-interview-michael-sherwin-capitol-riot-oath-keepers-jessica-watkins/65-85a223ad-08d2-4c98-bd42-146d3f84541d.
[128] Hsu, "Second U.S. judge questions constitutionality of lead felony charge against Oath Keepers in Capitol riot."
[129] Parloff, "The Justice Department Faces a Setback in the Capitol Riot Cases."

does not seem to direct the government to pursue *more* serious alternatives; rather, questioning and blocking the government's efforts may weaken its arsenal of prosecutorial tools while eroding at the government's confidence and resolve to pursue harsh punishment for the insurrectionists.

The Department of Justice's timid approach to the prosecution of the insurrectionists coupled with the judicial skepticism of the relatively forgiving path already charted by the government paint a concerning picture. The history of anti-democratic white supremacist violence and failed government responses to it demand a robust, activist, and whole-of-government approach to confronting this threat to democracy. Not only does an analysis of the current suite of charges demonstrate that only a miniscule fraction of insurrectionists faces serious charges and significant prison time; discordance between the executive and judicial branches reveal glaring cracks in the government and its approach to dealing with this danger. Failure to fill these gaps threatens to embolden the enemies of democracy, signaling to a growing political coalition that countering violent subversion is not a priority of the federal government. History teaches us the dangers of such a message. Both the Department of Justice and the judiciary must reckon with the threat that the "Stop the Steal" movement poses to our democracy. The very stability and survival of free, fair, and pluralistic democracy in America depend on the entire government confronting these existential threats with the utmost seriousness and resolve.

Chapter III: Alternative Paths to Justice

Thus far, this paper has examined the ugly history of white supremacist, anti-democratic violence in the United States and the failed government responses that permitted this violence to dismantle democracy. It has further asserted that the response of the criminal justice system to the 2021 Capitol insurrection has been reminiscent of this era of leniency and tolerance. Yet, it is imperative that we not assume the role of armchair faultfinder. It is far too easy to lament the state of affairs without examining possible alternatives. As previously mentioned, the Department of Justice, Congress, and the judiciary are bound by constraints in their efforts to protect the electoral process. Prosecutors may only apply and enforce those statutes that have been passed by the legislature, Congress may only enact those laws that fall within its power, and the judiciary must block those laws and dismiss those charges that violate the Constitution. Though the preservation of democracy depends on aggressively targeting its most threatening and violent enemies, the government must operate within the strict boundaries set by the Constitution. The following section of this paper will examine what more the government could be doing to punish those who tried to overthrow our elected government on January 6, 2021, and whether any viable alternatives preferable to the status quo exist.

A. Seditious Conspiracy: A Wider Application?

Deeply rooted in the ethos of our country's founding is the principle of government by popular consent. The only leaders who enjoy legitimate power are those who are chosen by the people themselves. The centrality of this principle to our Republic highlights the irony of the images that blanketed the airwaves and Internet amid the Capitol insurrection: a sea of crazed rioters waving American flags and espousing loyalty to the Constitution while forcing

themselves into the seat of democracy to upend the long American tradition of elected government. If American citizenship demands loyalty to the principles of democracy, the images of January 6 displayed a wholesale rejection of this loyalty by the attackers. Widespread calls for sedition charges for the rioters were finally met a year after the insurrection, but, as detailed in the previous chapter, these have been limited to a minute fraction of the insurrectionists; furthermore, evidence has mounted that many of those insurrectionists who have not faced seditious conspiracy charges traveled to Washington with the genuine aim of forcibly halting the transfer of power. A possible remedy to the Department of Justice's leniency could entail more aggressive use of seditious conspiracy against the insurrectionists. Should the Department of Justice pursue this path? Understanding the true implications of using seditious conspiracy on a greater scale requires a deeper analysis of the history of the charge.

(i) History of Sedition and Seditious Conspiracy in the U.S.

Sedition as a criminal charge has a lengthy, complex, and ugly history in the United States. This history may explain the Justice Department's reluctance to pursue these charges against the insurrectionists who stormed the Capitol on January 6, 2021. Current sedition law specifically targets seditious *conspiracy*, which necessarily involves two or more individuals. Most recently updated in 1994, the law reads,

> If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States

> contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.[130]

As a conspiracy charge, this provision aims to criminalize an agreement to undertake seditious activity. This requires multiple participants deciding to undermine the authority of the United States government. However, for much of U.S. history, implementation of sedition law has primarily targeted seditious *speech*. The relationship between seditious speech and conspiracy is obvious; in the eyes of the First Amendment, the freedom to assemble with others and collectively protest the government is critical to maintaining the "uninhibited, robust, and wide-open" public discourse foundational to our democracy.[131] Nevertheless, sedition law has primarily been an instrument of curtailing speech critical of the government, rather than violent action aimed at actually overthrowing the government. This history traces back to the passage of the Alien and Sedition Acts under the Adams administration in 1798, which criminalized criticism of Adams and of the federal government at a time when tensions with France were worsening and the Federalists' grip on power seemed tenuous.[132] The second prominent sedition episode arose during the First World War, as the Espionage Act of 1917 and the Sedition Act of 1918 aimed to criminalize expression that opposed the war effort, the draft, and the purchase of war bonds.[133] A number of Supreme Court cases during this era, including *Schenck v. United*

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[130] 18 U.S.C. §2384, accessed at https://www.law.cornell.edu/uscode/text/18/2384

[131] *United States v. Sullivan,* 376 U.S. 254 (1964), 270.

[132] "Alien and Sedition Acts (1798)," National Archives and Records Administration (National Archives and Records Administration), accessed April 11, 2022, https://www.archives.gov/milestone-documents/alien-and-sedition-acts#:~:text=As%20a%20result%2C%20a%20Federalist,imprisonment%2C%20and%20deportation%20during%20wartime.

[133] Christina L. Boyd, "Sedition Act of 1918," The First Amendment Encyclopedia (Middle Tennessee State University), accessed April 11, 2022, https://www.mtsu.edu/first-amendment/article/1239/sedition-act-of-1918.

States,[134] *Frohwerk v. United States*,[135] and *Debs v. United States*,[136] upheld criminal convictions under these statutes. The tide turned with *Brandenburg v. Ohio* in 1969, which held that the government could prohibit advocacy of illegal conduct only when the speech expressly advocates "imminent lawless action" that is likely to occur.[137] *Brandenburg* ushered in an era of sweeping protections for free speech, especially speech on public issues that criticized the government. Since then, the government has been wary of bringing sedition charges against political dissidents, keenly aware of the ugly history of sedition prosecutions in curtailing freedom of expression. Judges are also generally skeptical of seditious conspiracy charges given this history. Often, prosecutors feel that they must clear a very high bar to attain a conviction on seditious conspiracy charges and instead opt for alternative charges with less troublesome histories.

Federal prosecutors have thus brought seditious conspiracy charges only a handful of times in the past few decades. The most recent instance occurred in 2010, when members of Christian militant group in Michigan known as the Hutaree militia allegedly plotted violent attacks on police officers to spark an uprising against the United States government. Judge Victoria Roberts of the Eastern District of Michigan dismissed all seditious conspiracy charges against the defendants.[138] Citing late-19th and early-20th century court cases, Roberts asserted that seditious conspiracy is a valid charge only for actions that use force to oppose the government of the United States "while it is exerting its authority."[139] Simple failure to obey the law does not constitute sedition, and the appropriate charges for these *actions* are detailed by

[134] *Schenck v. United States*, 249 U.S. 47 (1919)
[135] *Frohwerk v. United States*, 249 U.S. 204 (1919)
[136] *Debs v. United States*, 249 U.S. 211 (1919)
[137] *Brandenburg v. Ohio*, 395 U.S. 444 (1969)
[138] *United States v. Stone*, Case No: 10-20123 (E.D. Mich. Mar. 27, 2012).
[139] Ibid., 7.

those laws that are broken. Roberts held that the forceful action must be directed at those who have been given the task of executing the laws of the United States while executing them. Seditious conspiracy must "be an offense against the Nation, not local units of government."[140] Since sedition represents a forceful effort to overthrow the constitutional government of the United States, sedition charges cannot be levied against those who oppose smaller subunits of government; it must instead be a crime against the Nation. Roberts further questioned whether the plot against law enforcement could be considered a conspiracy, finding insufficient evidence to demonstrate that the defendants "came to a concrete agreement to forcibly oppose the Government of the United States."[141] Judge Roberts dismissed the seditious conspiracy charges on these grounds, and the defendants were later convicted on lesser weapons charges.

The most recent successful seditious conspiracy prosecution came in 1995, when a Manhattan federal jury convicted ten defendants in connection with a series of planned and partially executed bombings, including the 1993 World Trade Center bombing. The defendants were part of a radical Islamist militant terror cell led by the blind Egyptian Sheikh Omar Abdel-Rahman. All ten defendants, including Rahman, were convicted of seditious conspiracy (among other charges) at trial in the Southern District of New York. The charges against Rahman and his co-conspirators centered around several crimes, including the attempted assassination of then-Egyptian President Hosni Mubarak, the "provision of assistance" to the 1993 World Trade Center bombings, attempted bombings of bridges and tunnels in New York City, and the murder of Zionist Rabbi Meir Kahane.[142] While the perpetrators successfully carried out only two of these four crimes (the World Trade Center bombing and the murder of Kahane), the seditious

[140] Ibid., 9.
[141] Ibid.
[142] *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999), 104.

conspiracy charges applied to all four crimes. Though Rahman himself was not known to be involved in the execution of these crimes, the sedition charge allowed the government to charge, try, and convict those "who did little more than talk about the plot with others"[143] for involvement in serious crimes.[144] In appealing their conviction, the defendants argued that their charges violated the First Amendment and the Treason Clause of the Constitution. The U.S. Court of Appeals for the Second Circuit upheld the convictions, holding that seditious conspiracy does not target speech activity because it requires that the guilty party conspire to take *action* against the government, not merely express a desire to topple it; to the second challenge, the Court ruled that sedition is a fundamentally different crime than treason and thus is not bound by treason's evidentiary requirements stipulated in Article III, §3 of the Constitution.[145] Rahman and his co-conspirators remain the most recent seditionists in American history.

In the 2010 Hutaree case, Judge Roberts laid out clear criteria to meet the requirements of the seditious conspiracy charge–that the action must oppose the government of the United States while it is exercising its authority, be directed at those exercising its authority, and be, in its essence, a crime against the Nation. Yet, the facts of the case against Rahman and his co-conspirators raise serious questions whether their actions met these standards. Though their plots jeopardized public safety and could possibly, in the very long-term, have brought about the eventual collapse of the U.S. government, the bombings of the World Trade Center and New York bridges and tunnels, along with assassinations of domestic religious and foreign political

[143] Richard Perez-Pena, "THE TERROR CONSPIRACY: THE CHARGES; A Gamble Pays Off as the Prosecution Uses an Obscure 19th-Century Law," *The New York Times*, October 2, 1995, sec. B, pp. 5-5, https://www.nytimes.com/1995/10/02/nyregion/terror-conspiracy-charges-gamble-pays-off-prosecution-uses-obscure-19th-century.html.
[144] Malcolm Gladwell, "SHEIK, 9 OTHERS CONVICTED IN N.Y. BOMB," *The Washington Post*, October 2, 1995, https://www.washingtonpost.com/archive/politics/1995/10/02/sheik-9-others-convicted-in-ny-bomb/5bd7099a-f960-4d32-b02d-8165302dd594/.
[145] U.S. v. Rahman, 189 F.3d 88 (2d Cir. 1999)

leaders, do not together constitute a direct attack on the U.S. government and its efforts to execute its authority. Though heinous, these crimes do not appear to be crimes against the Nation. Thus, the Rahman case does not comport with the requirements for seditious conspiracy outlined by Roberts fifteen years later.

One of the most controversial seditious conspiracy cases arose in the late 1980s in response to the rising threat of violent, anti-government, white supremacist paramilitary and terrorist groups. Rather than coalesce into one larger organization, proponents of this movement split into smaller terror cells across the country, practicing "leaderless resistance" in an effort to inflict large-scale damage without attracting close scrutiny or opposition by the government.[146] In trying to dismantle this movement, the Department of Justice charged fourteen prominent cell leaders with seditious conspiracy in Fort Smith, Arkansas. Defendants included Louis Beam of the Covenant, the Sword, and the Arm of the Lord (CS&A) and other prominent members of white supremacist groups such as the Order and Aryan Nations. These leaders had plotted several attacks, including the 1983 bombing of a Jewish Community Center, the bombing of a natural gas pipeline in Arkansas, and bank robberies, among other crimes. Wiretaps, surveillance, and informants confirmed suspicions that these groups aimed to revolt against and overthrow the government. The trial marked an important turning point in the history of white domestic terrorism; after years of largely ignoring white supremacist violence on a state and federal level, "the Fort Smith trial marked the first serious attempt by the federal government to recognize the unification of seemingly disparate Klan, neo-Nazi, and white separatist groups in a cohesive white power movement, and to prosecute the movement's leaders in light of this

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[146] Kathleen Belew, *Bring the War Home: The White Power Movement and Paramilitary America* (Cambridge: Harvard University Press, 2019), 4-5.

understanding."[147] Despite the sincere efforts of federal prosecutors, these alleged seditionists would not be brought to justice. The trial judge took a number of steps in the trial to tip the balance towards the defendants despite the overwhelming evidence against them. The judge found reasons to dismiss all possible Black jurors and ensured an all-white jury. During the trial, he excluded half of the prosecution's evidence and witness testimony. All fourteen defendants were acquitted despite the evidence and the fact that many defendants, including Beam, had no legal counsel and represented themselves at trial. The fairness of the trial further came under fire when two jurors became romantically involved with two defendants after their acquittal, suggesting a severely compromised jury.[148]

The Fort Smith trial is a particularly revealing example of the use of the seditious conspiracy charge for multiple reasons. First, the charge was handed down by the Department of Justice amidst a wave of white supremacist violence that aimed to take down the government itself and after a history of inaction in response to this violence. In this instance, the federal government genuinely tried to leverage its power and resources to address this threat to public safety and governmental stability. However, these efforts were once again neutralized by a hostile judge who refused to ensure a fair trial. Furthermore, in a community where these white supremacists and their ideology enjoyed at least a fair degree of support, even the federal criminal justice system failed to effectively administer justice when encumbered by a hopelessly biased jury. The defendants never failed to hide their aims or the threat they posed to civilians, minorities, and the government itself. Indeed, Louis Beam began publishing a journal known as

[147] Ibid., 173.
[148] Ibid., 170-184.

The Seditionist after his acquittal.[149] Despite this grave threat, the government's criminal intervention failed to hold accountable the leadership of these white terror cells.

Two other notable seditious conspiracy cases targeted Puerto Rican nationalists who aimed to overthrow U.S. authority over its island territory. In another post-*Brandenburg* 1980s case, ten Puerto Rican nationalists were convicted of seditious conspiracy for connections to bombing plots and armed robberies that took place in the 1970s. Most prominent among the accused was Oscar López Rivera, the alleged leader of the nationalist group FALN. In alleging this seditious, terrorist activity, the government accused the group of plotting several bombings in New York and Chicago during the previous decade and linked members of the group to a bomb-making facility in Chicago. Though the government found no direct connection between López Rivera and the bombings in question, he was convicted with other FALN members simply for being a member (and the suspected leader) of the organization that carried out the attacks. Convicted in 1981, López Rivera remained in federal custody until January 2017, when President Obama commuted his sentence. Given the lack of evidence surrounding López Rivera's involvement in the bombings, his imprisonment has generated controversy for decades, with many labelling him a political prisoner. To many, the conviction of López Rivera for seditious conspiracy represents the daunting power of the government to imprison political dissidents simply for opposing the government in power.[150]

Though now historically distant, a pre-*Brandenburg* case involving Puerto Rican nationalism is particularly illuminating for our purposes of exploring seditious conspiracy within the context of the Capitol insurrection. In 1954, four members of the Puerto Rico Nationalist

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[149] Ibid., 183.

[150] Sam Levin, "Obama Commutes Sentence for Political Prisoner Oscar López Rivera," *The Guardian*, January 17, 2017, https://www.theguardian.com/us-news/2017/jan/17/barack-obama-commutes-sentence-oscar-lopez-rivera-puerto-rico-activist.

Party entered the U.S. Capitol and fired upon members of Congress, injuring five in another attempt to advance the cause of Puerto Rican independence. The four shooters were arrested, but prosecutors linked their actions to the activities of thirteen other members of the Party in New York, Chicago, and Puerto Rico who were allegedly involved in recruiting and training terrorists and coordinating with other cells to plan violent acts of resistance against the U.S. government. These plots included attempts to incite an armed uprising in Puerto Rico and an assassination attempt on then-President Harry Truman. The defendants were all convicted of seditious conspiracy, and their convictions were upheld by the U.S. Court of Appeals for the Second Circuit in 1955. The Court found that all the defendants were involved in a broader conspiracy to "overthrow American authority in that commonwealth by force of arms and violence," despite the additional charges in D.C. federal court faced by the four Capitol gunmen and a lack of direct involvement in the shooting by the other defendants.[151] This case is particularly interesting given the direct parallels that can be drawn to the 2021 Capitol insurrection, as it also involved the invasion of the Capitol building and attempted violence against members of Congress. Importantly, however, the shooters could not have possibly thought they could successfully overthrow the U.S. government with a force of only four. Nevertheless, the shooters were convicted of this "crime against the Nation" along with other members of the Puerto Rican Nationalist Party who did not have direct involvement in the shooting.

[151] *United States v. Lebron*, 222 F.2d 531 (2d Cir. 1955).

(ii) Takeaways from Historical Analysis

These five historical applications of seditious conspiracy yield some key takeaways in understanding how the criminal justice system has combated anti-government violence since the mid-twentieth century. Most immediately obvious is the racial disparity in successfully charging and convicting terrorists of seditious conspiracy. Ahead of the Fort Smith sedition trial, white power violence was rarely prosecuted at any level.[152] In 1988 and again in 2010 the federal government did try to use its power to confront these groups for their attempts to incite revolution, only to meet resistance by judges and biased juries. Yet, the government has achieved far greater success in prosecuting religious and racial minorities for seditious conspiracy, winning convictions in the Rahman case as well as the two Puerto Rican nationalist cases. The recent history of the seditious conspiracy charge suggests that sedition itself is associated with racial and religious outsiders and does not apply to those on the inside. This historical reluctance to see white anti-government forces as seditionists must remain in focus as we seek to understand the significance of the Capitol insurrection. Do prosecutors, the judiciary, and the public hesitate to stamp the label of sedition on the insurrectionists because they present themselves as white, Christian, flag-waving patriots? While confirming this would require further study, the government must be wary of underestimating the threat posed by those who seek to overthrow the legitimate government simply because of their racial identity or religious ideology.

In using history to understand the appropriate response to the Capitol insurrection, the 1954 Capitol shooting is particularly helpful. Direct parallels can be drawn between the two episodes as attacks on Congress at the Capitol building with the specific aim of challenging the

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[152] Belew, 173.

authority of the federal government. In both cases, the attackers threatened the lives of members of Congress. Though the Capitol insurrectionists ultimately failed and were never likely to actually halt the transfer of power, they indeed came much closer to their goal than the Puerto Rican shooters. Not only were these terrorists convicted of seditious conspiracy, but other members of the Puerto Rican Nationalist Party not present at the shooting were also convicted. Thus, history provides strong precedent for the application of seditious conspiracy in confronting violence meant to subvert the authority of Congress.

Despite the evidence supporting more aggressive use of seditious conspiracy against the Capitol insurrectionists, a few reasons for caution must be addressed. In addition to presenting the historical applications of seditious conspiracy, these historical incidents also confirm the legitimate danger that the aggressive use of sedition charges can pose to democracy. Sedition charges have targeted political expression, even in recent history. The conviction of Oscar López Rivera for seditious conspiracy despite a lack of evidence linking him to FALN bombings demonstrates that the charge has proved a useful tool for the government to silence political dissidents. The judiciary's concern for restrictions on free speech and political association has been articulated in various decisions since the mid-twentieth century, including *Brandenburg* and *New York Times v. Sullivan*. The risk of trampling upon critical democratic freedoms and civil liberties is a legitimate cause for concern, and prosecutors must carefully balance aggressive prosecution against those who violently oppose democracy with deference to an open and robust speech environment for those who wish to peacefully express opposition.

Another concern for prosecutors regards the evidentiary requirements that must be met in order to successfully charge perpetrators with seditious conspiracy and the specific type of crime that this criminal charge targets. In levying this conspiracy charge, prosecutors must demonstrate

that defendants acted in coordination with other attackers. Proving the conspiracy element seems an easy task in the case of Rhodes and his co-conspirators, who left a lengthy paper trail confirming their plans through their messages, travel, and purchases. For other perpetrators, this task may prove far more challenging. Though the mob was able to scale the Capitol facade, break into the building, and scare Congress into hiding only by acting together, there is less evidence of premeditated planning and coordination for the majority of the attackers. Without a sedition charge oriented towards the individual actor, evidence of this coordination is critical for prosecutors to win convictions of seditious conspiracy. There is indeed evidence that many of the most determined insurrectionists traveled to Washington intending to use violence to halt the transfer of power.[153] Nevertheless, the high bar the government must meet to successfully prosecute conspiracy charges may explain a general hesitancy to rely on them except in the most obvious cases.

(iii) Seditious Conspiracy: Concluding Thoughts

Should the government charge more insurrectionists with seditious conspiracy? This examination of the history of the charge and its implications helps bring an answer to this question closer. Over the course of history, the government has often abused sedition law to quash dissent. Prosecutors and judges are thus rightfully skeptical of applying the charge against protesters engaging in political expression, especially in the post-*Brandenburg* era. Furthermore, conspiracy's requirements to demonstrate coordination pose another obstacle to the prosecution of seditious conspiracy. Nevertheless, the history of seditious conspiracy suggests that it can

[153] Note the evidence demonstrating that defendants Cua and Boughner intended to travel to Washington to forcibly stop the certification of the Electoral College vote and the transfer of power as discussed in Chapter II.

successfully and appropriately be used against at least some of the Capitol attackers. Any decision to refrain from charging the insurrectionists with seditious conspiracy must be juxtaposed against a history of leniency for majority white and Christian groups who engage in violent anti-government and revolutionary activity. The fact that the charge has only been successfully used against racial and religious minorities in recent decades further underscores this point. For the structural foundations of our democracy to truly be race neutral and provide a voice to even the most marginalized, the enemies of democracy must not enjoy special protection for their violent opposition simply because of their race. Furthermore, successful use of the seditious conspiracy charge against violent terrorists at the Capitol itself in the 1950s supports the case for seditious conspiracy for these pro-Trump insurrectionists.

Though the questions and concerns surrounding the application of this charge are legitimate, the history of seditious conspiracy as well as the government's historical response to anti-democratic violence cautions against leniency. As one of the sharpest tools in the government's arsenal, its application against more of the Capitol insurrectionists would not only more adequately punish the perpetrators and deter future political violence; it would also better capture the true danger that this violent mob posed to the continuation of democracy itself in America. A reluctance to label the acts of January 6, 2021 as sedition would whitewash one the darkest days in the history of American democracy.

B. Resurrecting the Insurrection Charge

Though a broader use of seditious conspiracy charges seems justified in effectively punishing the most dangerous attackers of January 6, alternative avenues seen as more appropriate by the executive and judicial branches may provide a smoother path to justice. One

such avenue has remained largely dormant for the past century and a half but may prove less problematic than the seditious conspiracy charge. Found under 18 U.S.C. §2383, this charge specifically targets activities that are defined as "insurrection" or "rebellion." The statue reads,

> Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.[154]

Passed as part of the Second Confiscation Act of 1862 during the Civil War, the statue was enacted ahead of the Emancipation Proclamation to punish those who actively participated in the rebellion by emancipating these rebels' slaves.[155] Given that the charge has remained unused for nearly all of its existence, a deep dive into its history and meaning to interpret its meaning may reveal whether it would be a useful and appropriate instrument of justice in prosecuting the insurrectionists of January 6.

(i) United States v. Greathouse

An early application of the insurrection charge came in the 1863 case *United States v. Greathouse*, in which defendants were indicted under §2383 after they "procured, prepared, fitted out and armed a schooner" in San Francisco with the intent to employ the vessel in the service of the Confederacy.[156] Justice Stephen Johnson Field, sitting as a Circuit Judge, noted that the Framers were deeply concerned about the aggressive overuse of treason as a means to

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[154] 18 U.S.C. §2383, accessed at https://www.law.cornell.edu/uscode/text/18/2383
[155] "The Confiscation Acts of 1861 and 1862," United States Senate (United States Senate, June 10, 2020), https://www.senate.gov/artandhistory/history/common/generic/ConfiscationActs.htm.
[156] *United States v. Greathouse*, 26 Fed. Cas. 18 (C.C.N.D. Cal. 1863), accessed at https://law.resource.org/pub/us/case/reporter/F.Cas/0026.f.cas/0026.f.cas.0018.2.pdf

silence political dissidents. A strenuous standard was thus enshrined in the Constitution for the successful prosecution of treason cases: Treason consists only of levying war against the United States or giving aid and comfort to its enemies and requires two witnesses to the same overt act or open confession in Court for a conviction. In analyzing the statute within this historical and constitutional context, Field argued,

> Looking at the act alone, we conclude that congress in- tended: 1. To preserve the act of 1790, which prescribes the penalty of death, in force for the prosecution and punishment of offenses committed previous to July 17, 1862, unless the parties accused are convicted under the act of the latter date for subsequent offenses; 2. To punish treason thereafter committed with death, or fine and imprisonment, in the discretion of the court, unless the treason consist in engaging in or assisting a rebellion or insurrection against the authority of the United States, or the laws thereof, in which event the death penalty is to be abandoned, and a less penalty inflicted. By this construction, the apparent inconsistency in the provisions of the different sections is avoided, and effect given to each clause of the act. The defendants are therefore in fact on trial for treason, and they have had all the protection and privileges allowed to parties accused of treason, without being liable, in case of conviction, to the penalty which all other civilized nations have awarded to this, the highest of crimes known to the law.[157]

Justice Field saw the law as an attempt to circumvent the constitutional safeguards on treason prosecutions, concluded that the defendants were on trial for the equivalent of treason, and were entitled to all of the privileges and protections of treason defendants. The government's heavy use of language evoking treason supported Field's claim. The statute's full title read, "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."[158] Field construed the indictment to allege "[t]hat the defendants traitorously engaged in and gave aid and comfort to" the rebellion,[159] drawing upon the government's contention that the defendants' actions to participate in the rebellion were

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[157] Ibid.

[158] Second Confiscation Act of 1862, U.S., Statutes at Large, Treaties, and Proclamations of the United States of America, vol. 12 (Boston, 1863), 589–92, accessed via http://www.freedmen.umd.edu/conact2.htm.

[159] *United States v. Greathouse*, 26 Fed. Cas. 18 (C.C.N.D. Cal. 1863)

undertaken "maliciously and traitorously."[160] Despite this evidence and analysis pointing towards treason, Field also concluded that the prosecution had provided the requisite treason protections to Greathouse and the other defendants and allowed the case to go forward.

The potential revival of this forgotten statute hinges upon whether it will again encounter constitutional problems posed by the Treason Clause of Article III. Given the high standard for treason prosecutions, few today advocate charging the Capitol insurrectionists with treason. Thus, in order to constitutionally apply the insurrection charge found in §2383 and avoid the constraints on treason provided by Article III, prosecutors must adequately distinguish insurrection from treason.

(ii) Albizu v. United States

Albizu v. United States is one of the few cases that invoked the §2383 insurrection charge after Greathouse.[161] In this instance, the government targeted members and leaders of the Nationalist Party of Puerto Rico who advocated for independence from the United States. In the second count of the indictment against Pedro Albizu Campos and other Nationalist leaders, the government alleged that the defendants conspired "to incite rebellion and insurrection against the authority and laws of the United States."[162] The defendants were convicted in the District Court of Puerto Rico and challenged the ruling on several grounds. One such contention argued that the District Court erred in "instruct[ing] the jury that if a person, by speech or otherwise, uses

[160] Ibid.
[161] *Albizu v. United States*, 88 F.2d 138 (1st Cir. 1937)
[162] Ibid., 143.

language or his conduct is reasonably calculated to incite others to crimes of violence, then he is guilty" of incitement of insurrection under §2383.[163]

In handing down its opinion on the side of the government, the Court of Appeals of the First Circuit cited several instances over several years that demonstrated that Albizu and his fellow Nationalists were attempting to bring about a rebellion to overthrow U.S. rule over Puerto Rico. Many of these instances included speech activity that explicitly advocated violence. Albizu warned in August 1932 that if a Nationalist were killed by the Puerto Rican insular police, they would retaliate by assassinating the Governor. In 1934, he declared in a central public square of San Juan "that every Puerto Rican home should be converted into an armed arsenal, in order to overthrow by means of force the Yankee imperialism in Puerto Rico."[164] In the same year, he encouraged the people of Mayaguez to assassinate President Roosevelt. Around 1935, he boasted that he could kill the head of the insular police with a gun or bomb. The Court also cited the attendance of many of the defendants at a Nationalist Party convention in December 1935 at which Albizu encouraged taking up arms. The party resolution from this convention was used as evidence against the defendants, as it advocated the use of force to expel the United States from Puerto Rico should it not leave voluntarily.[165]

The response of the public and the audience to each of these speech instances was key to the Court's acceptance of these examples as evidence in the government's insurrection prosecution. The Court tied many of these instances to violent skirmishes and clashes that occurred at the time, although not in the immediate aftermath and/or in the vicinity of these speeches and publications. Furthermore, the Court strongly weighed the validity of the party

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[163] Ibid., 140.
[164] Ibid., 142.
[165] Ibid.

convention and its resolution because the speeches and resolution were received with "great applause" by 1,500 to 2,000 attendees.[166] In considering all the evidence, the Court deemed this sufficient to achieve a conviction for "incit[ing] rebellion and insurrection against the authority and laws of the United States."[167]

From the arguments laid out by the Court, two key observations emerge. First, though the court in *Albizu* makes no reference to the treason question raised in *Greathouse*, the differing circumstances of the case negated the need for any such discussion. Unlike in *Greathouse*, in which §2383 was applied to prosecute insurrectionists attempting to help the Confederacy's war effort against the Union, the United States was not engaged in a war effort against Puerto Rico when Albizu was charged. Because he could not have been levying war against the United States or giving comfort and aid to its enemies, the insurrection charge in this case could not be construed as a treason charge. Importantly, this provides precedent for the application of §2383 in wholly different circumstances than those of the passage of the Second Confiscation Act without encountering the obstacle of the Treason Clause. Moreover, the use of this law seventy-five years after its passage demonstrates that §2383 is not frozen in the era of the Civil War. It has been successfully applied to combat other attempts to subvert the authority and legitimacy of the U.S. government.

Second, there are clear First Amendment implications to this case. Much of the conduct outlined by the Court as evidence of a conspiracy to incite an insurrection would today be challenged on First Amendment grounds, including Albizu's speeches in San Juan, Mayaguez, and the Nationalist Party convention as well as the convention resolution. Historical context helps explain why these concerns failed to be considered by the Court in 1937. *Albizu* firmly

[166] Ibid.
[167] Ibid., 143.

belongs to a pre-*Brandenburg* era during which the judiciary tolerated and affirmed government efforts to suppress speech that questioned the policies and legitimacy of the government. This line of thinking traces its roots to the aforementioned World War I era cases of *Schenck, Frohwerk*, and *Debs*, which all affirmed the power of the government to punish speech that presented a "clear and present danger" of evils that Congress could constitutionally prevent.[168] Today, attaining an insurrection conviction in *Albizu* for the speech activities of Albizu and the other defendants would require satisfying the test set forth in *Brandenburg v. Ohio*. Under this test, proscribable speech must expressly advocate "imminent lawless action" that is likely to occur.[169] Although the speech activities of Albizu and the other defendants occurred amidst violence in Puerto Rico in support of the Nationalists, it would be difficult to demonstrate from the facts described that the speech was the immediate cause of such violence.

(iii) Applying §2383 in the Capitol Insurrection

Despite its long dormancy over the past 150 years, the insurrection charge has been the subject of chatter by legal scholars since January 6, 2021. Joshua Braver, Assistant Professor of Law at the University of Wisconsin-Madison Law School, has advocated for the use of insurrection in lieu of seditious conspiracy to adequately prosecute the Capitol insurrectionists. Braver asserts that "§2383 takes aim at a much narrower range of conduct, specifically a 'rebellion or insurrection,'" making it a more appropriate charge in these circumstances.[170] To circumvent the limitations of *Greathouse* on §2383, Braver cites the cases *Ex Parte Quirin* and

[168] *Schenck v. United States*, 249 U.S. 47 (1919)
[169] *Brandenburg v. Ohio*, 395 U.S. 444 (1969)
[170] Joshua Braver, "The Justice Department Shouldn't Open the Pandora's Box of Seditious Conspiracy," *Lawfare* (blog) (The Lawfare Institute, Brookings Institution, May 6, 2021), https://www.lawfareblog.com/justice-department-shouldnt-open-pandoras-box-seditious-conspiracy.

Hamdi v. Rumsfeld, arguing that the courts have grown increasingly friendly to laws that target activity resembling treason without the same constitutional safeguards. In *Quirin*, the Supreme Court permitted a U.S. citizen who aided Nazi Germany in World War II to be tried as an unlawful combatant in a military commission rather than as a civilian for treason. In *Hamdi*, the Court reaffirmed *Quirin* by allowing a U.S. citizen to be tried as an enemy combatant instead of as a civilian.

Though Braver focuses on *Hamdi* and *Quirin* to assert that a revival of the insurrection charge today would not suffer the same fate as *Greathouse*, the Capitol prosecution may be sufficiently distinguishable from *Greathouse* even without referring to these cases. Justice Field construed the insurrection charge applied in *Greathouse* as treason given the circumstances of the time: the United States was actively engaged in a war with the Confederacy, and therefore the conduct engaged in by Greathouse and his co-conspirators could be seen as levying war against the United States or giving aid and comfort to its enemies. The Capitol insurrection shares none of these critical details. While they did attack the government of the United States, the insurrectionists certainly did not levy war against the United States or give aid and comfort to any external enemies. Because of the differing circumstances, an application of the insurrection charge against the Capitol insurrectionists should not suffer the same Treason Clause scrutiny seen in *Greathouse*.

By advocating for the use of the insurrection charge, Braver hopes to evade the negative civil liberties implications of reviving the practice of charging dissidents with sedition. Nevertheless, the argument he advances raises similar, troubling questions. Both *Quirin* and *Hamdi* ceded significant power to the executive branch to detain and punish U.S. citizens who opposed the government without the traditional limitations on executive power provided by the

Treason Clause. Justice Antonin Scalia declined to join the Court's majority in *Hamdi*, noting that *Quirin* was "not this Court's finest hour"[171] and thus did not provide adequate support to the argument advanced by the government.[172] The prospect of using the insurrection charge would significantly empower the Justice Department, perhaps jeopardizing the strong constitutional safeguards for political dissidents essential to a democratic order that respects civil liberties. However, in grappling with these concerns, we can once again turn to Justice Scalia's dissent in *Hamdi*.[173] Taking issue with Hamdi's trial as an enemy combatant, Scalia cites §2383 as a potential charge the government could use against citizens in a civilian trial.[174] Thus, even for those concerned about the protection of civil liberties, the insurrection charge may provide the optimal, balanced path; it captures the true nature of the crime committed by the insurrectionists and should not require the evidentiary standards of the Treason Clause while still avoiding the dubious history of the sedition charge.

Our examination of how the insurrection statute was passed and the circumstances of its application further support its application as the appropriate charge to levy against the Capitol insurrectionists. Though we are not currently staring down open rebellion, the passage of the statute during the Civil War as a means of punishing those who revolted against the authority of the federal government is significant. As demonstrated in Chapter I, the insurrectionists at the Capitol did not act in a vacuum; they are the descendants of anti-government terrorists who sought to overthrow the multiracial democracies imposed upon them by the federal government in the aftermath of the Civil War. Many of those terrorists were themselves veterans of the rebellion against the Union. In this sense, the revival of this charge to punish a new wave of

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[171] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), (Scalia, J. dissenting), 17.
[172] Braver, "The Justice Department Shouldn't Open the Pandora's Box of Seditious Conspiracy"
[173] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), (Scalia, J. dissenting), 8.
[174] Braver, "The Justice Department Shouldn't Open the Pandora's Box of Seditious Conspiracy"

violent insurrectionists who deny the legitimacy of the elected government seems fitting, especially if (as argued) the treason-related problems brought up by Field in 1863 can be resolved. Furthermore, as seen in *Albizu*, a determinant of whether an act actually constitutes insurrection is its contextual setting. In the case of the Capitol attack, the fact that the crowd was actually incited to violence by President Trump and mob leaders and that Congress had to flee its chambers to protect itself from this threat demonstrates that the actions of the crowd can accurately be considered insurrection as defined by §2383. While the application of the insurrection charge in *Albizu* does raise some First Amendment questions (as mentioned above), an application of the law in the context of the Capitol insurrection would likely not be impeded by *Brandenburg*. If applied against the actual insurrectionists, the charge would target their conduct in attacking the Capitol, not speech activity encouraging others to do so as in *Albizu*.[175]

Thus, Braver's idea raises a promising path forward. There currently exists a way to charge the Capitol insurrectionists with a crime that captures the severity of their misdeeds while avoiding the risks of total reliance on seditious conspiracy. Though the statute came under fire in *Greathouse*, its dormancy over most of U.S. history means it also carries less baggage than its sedition counterpart. Developments in *Quirin* and *Hamdi* indicate that the treason problems raised by *Greathouse* can be circumvented, and even those troubled by these decisions might look to §2383 as an instrument of justice sufficiently protective of civil liberties. Furthermore, *Albizu* indicates that the insurrection charge is not wholly dead. Prosecutors can thus revive this statute and charge defendants with insurrection under §2383 in order to hold them accountable for their attempt to violently overturn a legitimate government.

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[175] Of course, these questions may be raised if those who incited the insurrection but were not at the Capitol, such as President Trump, were prosecuted for incitement of insurrection under §2383.

C. Prosecution of President Trump and His Inner Circle

Aggressive prosecution of the participants in the violence at the Capitol should certainly demand much of the Justice Department's attention and energy. Yet, many attribute the reliance on minor charges (such as disorderly conduct) to the fact that many in the mob did not plan to violently attack the Capitol, but instead were "swept up" in the chaos of the attack. Away from the Capitol complex, many others played active roles in provoking the insurrection. Prosecuting the leaders and organizers of the insurrection, rather than any common insurrectionist, is perhaps far more critical to protecting democracy to prevent these plotters from again trying to steal presidential power. While the House of Representatives has convened a Select Committee to investigate the Capitol attack, the Department of Justice has thus far declined to charge those who provoked the insurrection to keep Donald Trump in power, including Mark Meadows, John Eastman, and the President himself. A lack of culpability does not seem to explain the lenity they have enjoyed. Evidence indicates that Trump and several of his closest allies meant to reverse the result of the election and that viable paths to prosecution exist.

Concerns that Trump did not plan to accept the result of the 2020 election in the event of his defeat mounted well before Election Day. Beginning in the spring of 2020, Trump flooded Twitter with allegations–at least seventy of them by November 3–that heavy reliance on mail-in ballots would corrupt the election results.[176] He suggested in a July 2020 interview that he might not accept the results of the election should he lose.[177] In the days shortly following the election, it became clear that Trump had assembled a team to litigate his fight to overturn the result of the

[176] Marianna Spring, "'Stop the Steal': The Deep Roots of Trump's 'Voter Fraud' Strategy," BBC News (BBC, November 23, 2020), http://www.bbc.com/news/blogs-trending-55009950.
[177] Donald John Trump "'Fox News Sunday' interview with President Trump," interview by Chris Wallace, *Fox News Sunday*, Fox News, July 19, 2020, https://www.foxnews.com/politics/transcript-fox-news-sunday-interview-with-president-trump.

election both in court and in the eyes of the public. Texts between Donald Trump Jr. and then White House Chief of Staff Mark Meadows on November 5, 2020 reveal that Trump's inner circle had begun to see the certification of the election on January 6 as a pivotal point at which Congress or the Vice President could intervene to overturn the result of the election.[178]

While the President enjoys the right to explore all possible legal avenues to resolve his questions about the election, his repeated attempts to undermine the election's validity in a question to retain power seems to have implicated him in crimes. These allegations have not only been voiced by political opponents of the former President, but by a federal judge. In *Eastman v. Thompson*, Chapman University law professor and Trump adviser John Eastman sued the House Select Committee opposing a subpoena he had been issued to hand over documents and communications related to his involvement in the plot to overturn the election. Eastman claimed that, because he served as a legal adviser for the President, the documents in question were protected under attorney client privilege. The January 6th Committee asserted that the documents were not privileged under the crime-fraud exception, which allows the government to subpoena an attorney when "a client consults an attorney for advice" to help him commit a crime and when that consultation is made "in furtherance of" the crime.[179]

The House Select Committee argued that Trump committed three crimes in his bid to overturn the election, and that he consulted Eastman in furtherance of these crimes. Specifically, the Committee alleged that:

(1) President Trump attempted to obstruct "Congress's proceeding to count the

[178] Ryan Nobles, Zachary Cohen, and Annie Grayer, "CNN Exclusive: 'We Control Them All': Donald Trump Jr. Texted Meadows Ideas for Overturning 2020 Election before It Was Called," CNN (Cable News Network, April 9, 2022), https://www.cnn.com/2022/04/08/politics/donald-trump-jr-meadows-text/index.html.
[179] *Eastman v. Thompson*, Case No. 8:22-cv-00099-DOC-DFM, Order Re Privilege of Documents Dated January 4-7, 2021, 30.

> electoral votes on January 6," in violation of 18 U.S.C. § 1512(c)(2);
> (2) "President Trump, Plaintiff [Dr. Eastman], and several others entered into an agreement to defraud the United States by interfering with the election certification process," in violation of 18 U.S.C. § 371 and
> (3) "President [Trump] and members of his Campaign engaged in common law fraud in connection with their efforts to overturn the 2020 election results.[180]

Judge David O. Carter of the Central District of California analyzed the evidence of Trump's activity in the days and weeks leading up to the insurrection to determine whether it was more likely than not that Trump committed these crimes. On the first allegation, an Obstruction of an Official Proceeding charge, Judge Carter found it "more likely than not that President Trump corruptly attempted to obstruct the Joint Sessions of Congress on January 6, 2021."[181] Carter recognized the "pressure campaign" pursued by the President against Vice President Mike Pence to stop the certification of Biden's win as evidence of this attempt to obstruct.[182] Carter cited meetings between the President, the Vice President, and Eastman, along with the President's tweets encouraging the Vice President to follow Eastman's plan and his rhetoric during his speech at the Ellipse as evidence of this "pressure campaign."[183] Carter further cited the meetings between the two as evidence of "an agreement between the President and Dr. Eastman"[184] to interfere with the certification of the election, making it more likely than not that President Trump and Dr. Eastman dishonestly conspired to obstruct the Joint Session of Congress on January 6, 2021."[185] To Carter, "[t]he illegality of the plan was obvious," noting

[180] Ibid., 31.
[181] Ibid., 36.
[182] Ibid., 32.
[183] Ibid., 32-33.
[184] Ibid., 37.
[185] Ibid., 40.

that "Every American–and certainly the President of the United States–knows that in a democracy, leaders are elected, not installed."[186]

Judge Carter's opinion in *Eastman* is striking. It shows that a federal judge believes that President Trump himself likely committed at least two crimes in his attempt to overturn the election: Obstruction of an Official Proceeding and Conspiracy. Furthermore, Carter's belief that Eastman participated in a conspiracy with the President raises questions regarding the conduct of other senior Trump officials. Given the central role played by Chief of Staff Mark Meadows in orchestrating the effort to overturn the election, could he be implicated in this conspiracy as well? Could Rudy Giuliani or Donald Trump Jr.? Investigation into each of these senior Trump officials could confirm that all of these senior White House and campaign officials committed crimes when they conspired to install President Trump for a second term despite his electoral defeat.

Despite the evidence cited by Carter, no charges have been levied against Trump or his inner circle. Attorney General Garland has sought to allay the concerns of leniency by suggesting the Department of Justice is pursuing a strategy of investigating smaller, simpler crimes before larger, more complex ones.[187] Even as reports emerge that the House Select Committee has amassed enough evidence to issue a referral of Trump to the Department of Justice,[188] only the attackers who entered the Capitol have been criminally charged for their attempt to overturn the election. If the Department of Justice is truly intent on protecting democracy and holding accountable those responsible for the insurrection, the prosecution of the ringleaders of this

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[186] Ibid., 36.
[187] Ryan Lucas, "Where the Jan. 6 Insurrection Investigation Stands, One Year Later," *National Public Radio*, January 6, 2022, https://www.npr.org/2022/01/06/1070736018/jan-6-anniversary-investigation-cases-defendants-justice.
[188] Michael S. Schmidt and Luke Broadwater, "Jan. 6 Panel Has Evidence for Criminal Referral of Trump, but Splits on Sending," *The New York Times*, April 10, 2022, https://www.nytimes.com/2022/04/10/us/politics/jan-6-trump-criminal-referral.html.

attempted power-grab is of paramount importance. Inaction could set the precedent that the President and his team are above the law and may use their power and political clout to subvert the will of the people. As many in the Republican Party continue to perpetuate the "Big Lie," the risk of future unsupported allegations of voter fraud remains very high, threatening the integrity and stability of American democracy. Judge Carter has provided a compelling case for prosecution, and his belief that Trump is likely guilty of crimes signals that there is a viable path for the Justice Department to follow.

D. Concluding Thoughts on Alternative Paths

The examination of the charges of seditious conspiracy and insurrection, along with the plausible prosecution of Trump and his inner circle, does not produce one singular solution to the question of how to proceed. But, perhaps the fact that no one answer dominates further supports the assertion that the government should be doing more. At the minimum, there lie ahead two potential paths that the Department of Justice could pursue to bring justice to those who stormed the Capitol on January 6, 2021 to overturn the election result. With two alternatives in hand, it is all the more damning for the Justice Department to rely on obstruction, disorderly conduct, and a handful of other, lesser charges in the prosecution of the Capitol attackers. Furthermore, Judge Carter's opinion in *Eastman* and the preliminary conclusions of the House Select Committee suggest that there is evidence of crimes committed by Trump and his senior advisers as well as a viable path to prosecution for the Justice Department. By all accounts, the attack on the Capitol was indeed an insurrection; encouraged by the President at the Ellipse rally, the rioters banded together to overcome the Capitol police, forcibly enter the building, and attempt to violently halt the transfer of power, thereby installing an illegitimate government and an unelected man as

President. The existence of viable criminal alternatives underscores the shortcomings of the Justice Department's efforts thus far as well as a potential remedy to their errors. Prosecutors are anything but handicapped in the tools at their disposal to punish the attackers of January 6. In deciding whether to use these tools, it is critical to keep in mind the history of unsuccessful government responses to previous instances of violence that subverted democracy. A failure to exhaust all possible avenues would constitute an abdication of prosecutors' responsibility akin to the failures of the McKinley administration in the late 1890s, as well as a betrayal of the legacy of James Beckwith and other guardians of our democracy.

Conclusion

Around 7:00 P.M. on January 6, 2021, Trump adviser and lawyer Rudy Giuliani placed a call to a number he mistakenly believed belonged to newly-selected Senator Tommy Tuberville of Alabama. In actuality, it was fellow Republican Senator Mike Lee of Utah who received a voicemail from Giuliani. The pro-Trump mob had finally been ousted from the building after suffering extensive damage. Emerging from their barricaded offices, Congress prepared to reconvene and continue the work of certifying the election. In the voicemail, Giuliani implored Tuberville to continue objecting to the results from "numerous states" in order to delay the certification "ideally until the end of tomorrow."[189] He requested Tuberville to return his call so they could further discuss the plot to overturn the presidential election, which continued unabated despite the violence at the Capitol.[190]

Though Tuberville only later learned of Giuliani's attempted correspondence through the news media,[191] Republicans in Congress continued to press forward with their attempt to stop the presidential transition as they reconvened. Undaunted by an attack that left the Capitol in tatters and threatened their own lives, six Republican Senators and 121 Representatives continued to endorse the movement to overturn the election by voting to reject the electoral votes submitted by Arizona.[192] After midnight, Republican Congressman Scott Perry and Senator Josh Hawley objected to the votes submitted by Pennsylvania. An increased share of congressional Republicans voted to reject Pennsylvania's results, with seven Senators and 138 Representatives

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[189] Sunlen Serfaty, Devan Cole, and Alex Rogers, "As Riot Raged at Capitol, Trump Tried to Call Senators to Overturn Election," CNN (Cable News Network, January 9, 2021), https://www.cnn.com/2021/01/08/politics/mike-lee-tommy-tuberville-trump-misdialed-capitol-riot/index.html.
[190] Ibid.
[191] Ibid.
[192] Li Zhou, "147 Republican Lawmakers Still Objected to the Election Results after the Capitol Attack," Vox (Vox, January 7, 2021), https://www.vox.com/2021/1/6/22218058/republicans-objections-election-results.

supporting the objection.[193] The violent insurrection provoked by Trump did not deter their efforts to keep the President in office against the wishes of the American people.

Since Trump left office in January 2021, he and his supporters have continued to perpetuate the "Big Lie." Banned from his favorite platforms, Trump has spread his message that the 2020 election was stolen in rallies with supporters and through surrogates. His messaging has proved effective; recent polls indicate that a significant majority of Republicans continue to believe that President Biden's victory in the 2020 election was illegitimate.[194] Unchecked by criminal charges, Trump has been given free rein to perpetuate this lie.

The continued efforts to question the results of the 2020 election and the potential for future challenges to legitimate election results highlight the importance of the subject of this paper: the criminal justice response to the Capitol insurrection. To begin, this paper examined the history of similar instances of white anti-democratic violence to illustrate the historical precedent for attacks like the Capitol insurrection. This history is filled with failed responses by the government, enabling racist and authoritarian governments to assume power and trample on the civil rights of Black Americans. This unfortunate past emphasizes the importance of activist intervention supported by all three branches of the federal government to counter this violence today. By examining the actions of the federal government since January 6, 2021, I concluded that the government's response has been insufficient. The charges pursued by the Department of Justice fail to capture the severity of the acts perpetrated by the insurrectionists, and only a minute fraction of the insurrectionists sentenced face significant incarceration. Reminiscent of their role in *Cruikshank*, judges have also questioned the actions of the federal government in

[193] Ibid.
[194] Lane Cuthbert and Alexander Theodoridis, "Do Republicans really believe Trump won the 2020 election? Our research suggests that they do," *The Washington Post*, January 7, 2022, https://www.washingtonpost.com/politics/2022/01/07/republicans-big-lie-trump/

response to the insurrection. In the final chapter, I illustrated the viable alternatives that the Department of Justice may pursue in order to hold accountable all those who endangered American democracy on January 6. This includes more aggressive use of seditious conspiracy charges, the resurrection of the insurrection charge, and the pursuit of criminal charges against the senior organizers of the plot to overturn the election, including against President Trump himself.

Perhaps officials at the Justice Department simply do not understand the stakes of the task before them. Democracy in America is on the line. While articulating several complex sub-arguments, a larger aim of this paper has been to draw attention to the democratic emergency we must now confront. Developments since the 2020 presidential election have brought us a new political reality in which a former President and much of his party's political apparatus seem intent on grabbing and holding onto power by any means necessary. While these trends warrant serious concern from all in the civic arena, the threat of criminal prosecution remains one of the most powerful tools to deter and punish behavior that violates the bedrock rules of our democratic order. If prosecutors do not use this power now to fight back against this assault on democracy, it could fall into the hands of authoritarians who have little intention of ceding it.

For too much of our history, Americans have celebrated our founding principles without living out their meaning. Since the 1960s, we have begun to slowly and gradually reverse this trend. We cannot cede our government to those who try to take it by force. If we fail to confront these violent and subversive forces, we risk suffering a similar fate as the multiracial coalitions of Louisiana and North Carolina in the late 1800s. The flame of hope continues to burn for democracy in America, even as it wavers in 2022. The federal government and the criminal justice system cannot allow Donald Trump and his followers to extinguish it once more.

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